NO. 44633-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH LESTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Cuthbertson

No. 11-1-04427-2

BRIEF OF RESPONDENT

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2. If the trial court committed error in admitting the victim's statements, was it harmless?

3. Was defense counsel ineffective for not advocating the court instruct the jury that the State bore the burden of disproving diminished capacity?

B. STATEMENT OF THE CASE.

1. Procedure

On November 2, 2011, appellant was arraigned on two counts, both murder in the first and second degree. Each count included a deadly weapon enhancement and notification of aggravating circumstances that appellant knew the victim was pregnant and that the crime was one of domestic violence. CP 1-2. (*Information*). The appellant eventually endorsed the defenses of self defense and diminished capacity. CP 560-62. (*Order on Omnibus Hearing*). Several amended charging documents were filed, the last being the Fourth Amended Information. CP 183-84. It alleged the same two underlying counts of murder, but clarified the

domestic violence aggravating factor was predicated upon the crime occurring within the sight or sound of the parties' minor children. *Id.*

Both parties filed briefing with assorted motions, including those that are the subject of this appeal. CP 28-37, 38-69, 87-97, 98-125, 126-173, 174-180, 185-191, and 196-217. The trial court ultimately ruled that some statements of the victim made to two nongovernmental witnesses may be admitted. CP 394-98. (*Order on Motions in Limine*).

On January 28, 2013 the case was called for trial by the Honorable Frank Cuthbertson. Twenty-four witnesses testified and approximately 150 exhibits were admitted at trial. CP 382-93, 563-64. (*Exhibit & Witness Records*).

On February 14, 2013 the jury returned a verdict of guilty of murder in the second degree while armed with a deadly weapon. The jury returned special verdicts affirmatively stating appellant knew the victim was pregnant at the time of the offense and that the offense was one of domestic violence. CP 376, 378, 380-81. (*Verdict Forms*).

The appellant was sentenced on March 15, 2013 to a total of 263 months, including the deadly weapon enhancement. CP 529-41. (*Judgment &* Sentence). He filed his notice of appeal the same day. This timely appeal follows.

2. Facts

On October 31, 2011 the defendant stabbed the victim, Kiesha Lewis to death. CP 376, 378, XIII 1237-38. The murder ended a tumultuous relationship between the two. Just weeks earlier, on October 9th, there was a physical altercation between the parties that resulted in defendant sustaining a serious stab wound to his leg. 5 RP 221. The parties tell differing stories as to how defendant was injured. Through a family member and friend, the victim told them that the defendant had been choking her and she stabbed him in self defense. 5 RP 221. The defendant claims that the victim became angry with him, they wrestled and she stabbed him in the leg. 7 RP 624, 631. Not long before the murder, the victim told her mother, Ms. Barnes, that she was frightened defendant would retaliate against her for the injury and she asked to move back home. 5 RP 185. Ultimately the two witnesses were allowed to testify to the general circumstances surrounding the victim's statements as well as the statements themselves. 5 RP 185, 220-21.

Earlier in the day of the murder on October 31, 2011 the victim asked Ms. Barnes to drive her to a certain location, apparently for the purpose of buying prescription pills. 5 RP 186-87. Her best friend, Ms. Taylor accompanied them. 5 RP 234. Ms. Taylor testified to a heated telephone conversation between the victim and defendant during the drive.

5 RP 238-40. Ms. Taylor said that the defendant was angry that the victim was taking the pills despite being pregnant. 5 RP 239. He was also apparently angry that the victim had not purchased a Halloween costume for their 10 month old daughter. 5 RP 239. Ms. Taylor thought the defendant was the more angry of the two because the victim laughed at him and terminated the call by hanging up on him. 5 RP 240.

Not long after the women returned to Ms. Barnes' home, the defendant called and later arrived at the residence. 5 RP 241, 245-46. Upon arriving, defendant went to the victim's bedroom. 5 RP 196. Ms. Barnes testified that the defendant exited the victim's bedroom and quickly picked up his daughter. 5 RP 196. Both Ms. Barnes and Ms. Taylor testified they did not hear any yelling or arguing between the victim and defendant in the house. 5 RP 197-98, 250-51. defendant did not appear agitated. 5 RP 250. Ms. Barnes watched as the defendant left the home with the victim walking behind him. 5 RP 203. Ms. Barnes described the victim's demeanor at the time as "fine." 5 RP 203. Ms. Barnes testified that the victim did not have anything in her hands as she walked outside with the appellant. 5 RP 197. Ms. Taylor also testified that she did not see the victim with a knife. 5 RP 253.

Ms. Taylor was in one of the other bedrooms of the duplex when she saw the victim and appellant outside. The couple was sitting on

defendant 's car talking. 5 RP 251. Ms. Taylor saw no knife. 5 RP 253. Neither witness ever saw or heard anything from the couple that indicated they were arguing or involved in any kind of scuffle. 5 RP 210, 253.

The first and only screaming Ms. Barnes heard was that of the victim after she had been stabbed. Ms. Barnes heard the victim scream, "My God, My God, He's killing me!" 5 RP 199. Ms. Barnes testified the victim kept repeating it. *Id.* The victim ran into the home into Ms. Barnes's arms and died. 5 RP 199. Ms. Taylor estimated the couple had been outside "a little more than five" minutes before she heard the victim scream. 5 RP 253.

The landlord, George Ganyon, was in the process of getting his mail at the time of the stabbing. 5 RP 274. He testified he looked over in the direction of the couple and saw the victim holding her neck. 5 RP 274. Like the ladies, he also testified the victim hollered, "He's Killing Me." *Id.* After the victim ran into the house, he saw the defendant putting his daughter in the back of his car and close the door. 5 RP 275. Mr. Ganyon testified the appellant said, "I'm just doing to her what she was doing to me." *Id.* He testified appellant was calm and did not appear panicked. 5 RP 277. Mr. Ganyon also testified that he did not hear any yelling or arguing before hearing the victim scream. 5 RP 280-81, 301.

Ms. Barnes testified that she left the house and ran outside only to see defendant speeding off down the street. 5 RP 254. Despite the witnesses' observations to the contrary, defendant testified he was panicked and sweating. 8 RP 680.

Defendant contacted an attorney who arranged for him to surrender himself to law enforcement. 8 RP 680-81.

At trial, the appellant testified to the events leading immediately up to and immediately after the stabbing. 8 RP 675-81. However, when it came to describing the stabbing itself, he claimed to be in a 'black out' and recall nothing. 8 RP 678. When asked, appellant admitted there was no one else present at the time the victim was stabbed. 8 RP 685.

Due to his endorsement of self defense, appellant was allowed to testify to multiple alleged acts of violence perpetrated on him by the victim. However, on cross-examination, the State elicited from appellant that during a mental health evaluation in late 2010, the defendant never mentioned any such activity when asked what life stressors he was experiencing. 8 RP 718-22. Defendant testified he and victim began dating around January, 2010 and living together by February or March. During that time period they had a child. 7 RP 607. Despite having lived together for nearly a year, and having a child, defendant did not mention a single episode of alleged physical abuse by the victim. 8 RP 718-722.

C. ARGUMENT.

1. THE COURT DID NOT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES BY ADMITTING VICTIM'S NON-TESTIMONIAL STATEMENTS TO NON-GOVERNMENTAL PERSONS.

The victim's statements in question to both Ms. Barnes and Ms. Taylor were non-testimonial. The Confrontation Clause only applies to testimonial statements or materials. ***State v. Hurtado***, 173 Wn. App. 592, 598, 294 P.3d 838 (2013). In the absence of a comprehensive definition of "testimonial," the Washington Supreme Court has developed two tests to determine whether an out-of-court statement is testimonial. ***Hurtado*** 173 Wn. App at 599. When a declarant makes a statement to a nongovernmental witness, a court uses the "declarant-centric standard" announced in ***State v. Shafer***, 156 Wn.2d 381, 390 n.8, 128 P.3d 87 (2006).

> The proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. This inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made.

State v. Hurtado, 173 Wn. App. at 294 *citing* ***State v. Beadle***, 173 Wn.2d 97, 107-08, 265 P.3d 863 (2011). Trial counsel on behalf of appellant concurred.

> Obviously we don't have a *Crawford* issue here, I don't think, because it's nontestimonial, even from my understanding of *Crawford*, *Bryant*, and that line of cases.

Lester Vol. 2, 3, & 4 RP 82. In the present case, the trial court heard significant argument on the issue of the admissibility of the statements and determined that they were sufficiently reliable under ER 804(b)(3), a statement against penal interest. CP 394-98, Lester Vol. 2, 3, &4 RP 85. The court further evaluated the testimony that referenced the earlier stabbing and determined it was admissible pursuant to ER 404(b). *Id.*

We review a trial court's evidentiary rulings for abuse of discretion. ***State v. Lormor***, 172 Wn.2d 85, 94, 257 P.3d 624 (2011); ***Tate v. Yarbrough***, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. ***State v. Lord***, 161 Wn.2d 276, 283 -84, 165 P.3d 1251 (2007). Such an abuse of discretion exists if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. ***Lord***, 161 Wn.2d at 284.

The trial court performed the proper balancing test necessary for admission of evidence pursuant to ER 404(b). CP, 394-98, Lester Vol. 2, 3, & 4 RP 85. The court also commented that the evidence had value to both sides in that both wanted to show the history of violence between the couple. *Id.*

The State argued, and the court concurred, that the victim's statement admitting to stabbing appellant in self defense was sufficiently contrary to her penal interest. *Id.* The State explained that the victim's statement acknowledged and admitted that she in fact committed the stabbing, though she articulated a situation that would raise self defense. This defense however, did not insulate her from possible criminal prosecution. Lester Vol. 2, 3, & 4 RP 78. The success, or lack of success, of a defense cannot be predicted, but what is clear is that she states she was the one who stabbed defendant several weeks before her murder. That statement, in conjunction with her statements regarding her admission she lied to the police investigating defendant 's stabbing, clearly amounts to an admission of both obstructing a police officer as well as admitting to the underlying assault itself. 5 RP 220-21. The court concluded there was sufficient possible criminal exposure to warrant admission.

It is undisputed that all of the statements at issue were made by the victim to a nongovernmental witness. The statements were made to a

family member and a friend. 5 RP 177-78, 212-13 respectively. It is clear that the "declarant-centric standard" is the appropriate test to apply. There is nothing to indicate that any such statement was in any way made in the anticipation of a prosecution or other litigation. In applying that test, to include evaluating the circumstances in which the statements were made, the trial court did not abuse its discretion in admitting the statements.

The victim's statement to Ms. Barnes that she wanted to come home because she was afraid of defendant is not testimonial either. The same declarant-centric standard applies, i.e. would a reasonable person in the same situation anticipate the statement would be used in investigating and prosecution of the alleged crime. There is nothing to support the conclusion that the victim had any intention her statement regarding her request to come home because she was frightened of appellant would be used in a subsequent investigation or prosecution. The statement also properly portrayed the victim's state of mind at the relevant time and was properly admitted for that purpose also. Lester Vol. 2, 3, & 4 RP 67-68. Again, the trial court did not err in admitting the statement.

Appellant also argues that the State's use of the statements in trial and closing "without limitation" essentially converted the statements to improper testimonial statements. *Brf. of App., p. 11.* He argues they were offered as evidence of "past acts." *Id.* As noted earlier, the State offered

the October 9th event pursuant to ER 404(b). The court heard argument and ruled them admissible. Lester Vol. 2, 3, & 4 RP 85. In doing so he properly performed the required 404(b) balancing test and concluded, among other things, that the evidence was useful to both parties. Lester Vol. 2, 3 & 4 RP 85.

Appellant never requested a limiting instruction. There was no objection to either the State's closing or rebuttal argument concerning the use of the statements. 11 RP 1125-61, 1199-1223. Furthermore, defense counsel also substantively referred to the statements in question in his closing. 11 RP 1169, 1171, 1176-77. There is great potential for abuse when a party does not object because "[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." ***State v. Sullivan***, 69 Wn. App. 167, 271-72, 847 P.2d 953 (1993). The issue was not properly preserved for appeal. Even if the issue were deemed subject to review, it is apparent that both sides used the statements in question to fit their respective theories of the case. Their use may not now serve as basis for appeal.

2. ALTERNATIVELY, ANY ERROR IN ADMITTING THE VICTIM'S STATEMENTS WAS HARMLESS.

For the reasons already stated above, the State asserts that there was no violation of defendant's Sixth Amendment right in the admission of victim's statements to a family member and friend. Alternatively, if there was any error in admitting the statements in question, it was harmless.

Even if this Court were to find there was a constitutional violation, reversal is not automatic. ***State v. Hieb III***, 107 Wn.2d 97, 727 P.2d 239 (1986). "It is well established that constitutional errors, including violations of a defendant's right under the confrontation clause, may be so insignificant as to be harmless." ***Hieb III*** 107 Wn.2d at 108-09, *citing* ***State v. Guloy***, 104 Wn.2d 412, 705 P.2d 1182 (1985) (citations omitted). Additionally, other cases have specifically allowed a harmless error test to be applied when the confrontation clause violation is due to admission of hearsay. ***Hieb III***, 107 Wn.2d at 109. In ***Guloy*** the Court adopted and applied the overwhelming untainted evidence test to analyze error. ***Guloy***, 104 Wn.2d at 110.

Defendant agrees that only he and the victim were present at the time the victim was stabbed. 8 RP 684-85. Ms. Barnes said that the

defendant walked out of her home quickly and was followed by the victim. 5 RP 196. She described the victim as walking or "shuffling behind" the defendant. 5 RP 197, 203. Ms. Barnes described the victim's demeanor as "fine." 5 RP 203. She also said the victim had nothing in her hands. *Id.* Prior to defendant leaving the victim's bedroom, Ms. Barnes did not hear any arguing or anything of that nature. 5 RP 197. Not long after the victim and defendant exited the house, Ms. Barnes heard the victim's scream, "My God, My God, He's killing me!" 5 RP 199. Other than what she just described, Ms. Barnes specifically testified she did not hear any yelling or arguing while the victim and appellant were outside. 5 RP 210.

This testimony was offered without objection.

Ms. Taylor, the victim's best friend testified that in the car ride not long before defendant came to see the victim, there had been a telephone call between the victim and defendant. 5 RP 239. Ms. Taylor could hear the appellant angrily commenting that he was displeased that the victim was apparently high despite being pregnant. *Id.* He was also apparently angry that she had not obtained a Halloween costume for their daughter. *Id.* When asked if it sounded like they were mad at each other, Ms. Taylor responded that "He was more mad at her. She was laughing, and that was

making him even more madder [sic]." 5 RP 240. Ms. Taylor also testified that the victim hung up on defendant. *Id.*

Similar to Ms. Barnes, Ms. Taylor did not hear or see any arguing between the victim and defendant after he arrived at the victim's house. 5 RP 251. Ms. Taylor testified that after the two left the house she observed them sitting on defendant 's car talking. 5 RP 251. Ms. Taylor never saw the victim with a knife. 5 RP 252. Shortly after her observation, Ms. Taylor heard the victim scream, "He's killing me!" 5 RP 254. She got up and ran outside only to see the defendant speeding down the street. 5 RP 254.

The landlord, George Ganyon also testified. He knew all of the parties. He told the jury that he was on the way to his mailbox when he saw the victim holding her neck and hollering, "He's killing me!" 5 RP 274. He said that he looked over and saw the defendant putting his daughter in the back of a car and closing the door. 5 RP 275. The defendant said to Mr. Ganyon, "I'm just doing to her what she was doing to me." 5 RP 276. Ganyon described the defendant as "calm as I was." 5 RP 277. He commented that the defendant did not seem panicked at any time. *Id.* Like Ms. Barnes and Ms. Taylor, Mr. Ganyon did not recall any screaming or arguing prior to hearing the victim scream after being stabbed. 5 RP 280-81.

Defendant agreed that despite his black out, there was no one else around except him that could have inflicted the victim's stab wounds. 5 RP 685. This testimony, as well as that listed above, was admitted without objection.

When evaluating the untainted evidence, there is little question as to whether there was sufficient evidence to sustain the charge. The issue of identity of the perpetrator was answered by a combination of the state's witnesses and the defendant himself. There is no evidence whatsoever to point to anyone other than the defendant as the assailant.

Despite the appellant's many stories of the victim's assaultive behavior, including October 9th, no one other than the defendant saw the victim with a knife on the day of the murder. Defendant doesn't actually say he saw where the knife came from, but testified "something was telling [him] to look back" and he saw the victim swinging a knife at him. 8 RP 678. It is at this point he claims to have blacked out, though he recalls wrestling on the ground with the victim for the knife. *Id.* The physical evidence did not support this any more than witness testimony did.

He also had a clear recollection of seeing the landlord, being afraid of him, of driving away, seeing his daughter out of her car seat, stopping to place her back in her seat, and of Ms. Barnes running after him telling

him to stop. 8 RP 678-79. He called the only person he could think of that could help him, an attorney. "I recall realizing that something was happening to my baby's mom. So I realized-- calling my lawyer .... I felt that was the only person I could call right now." 8 RP 679-80. He claimed to be afraid the police were going to kill him, though he offers no explanation for that belief. 8 RP 680. This testimony was in addition to his lengthy recitation of the various assaults he claimed were perpetrated against him by the victim, none of which he mentioned in his mental health evaluation in 2010. 8 RP 691-711. The evaluation was in the same general time frame when he and the victim were dating or had been dating. 8 RP 690. This testimony, in addition to the jury's ability to observe demeanor and determine credibility, supports the jury's verdict in this matter.

If there was any error in admitting the statements in question, the "untainted evidence" more than sufficiently supports the charge, and for that reason, appellant's claim must fail.

3. WAS DEFENSE COUNSEL INEFFECTIVE FOR NOT ADVOCATING THAT THE COURT INSTRUCT THE JURY THAT THE STATE BORE THE BURDEN OF DISPROVING DIMINISHED CAPACITY?

This Court has repeatedly rejected the argument that in a case where the appellant asserts diminished capacity, the jury should be instructed the State bears the burden of disproving the defense. ***State v. Marchi***, 158 Wn. App. 823, 833, 243 P.3d 556 (2010) *citing* ***State v. Sao***, 156 Wn. App. 67, 230 P.3d 277 (2010); ***State v. James***, 47 Wn. App. 605, 736 P.2d 700 (1987). [1]

The jury was instructed on both self defense and diminished capacity, specifically Jury Instructions 32 (*mental illness or disorder*), and 28-31 (*self defense*). CP 329-374. Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case. ***State v. Marchi***, 158 Wn. App. at 833, *citing* ***State v. Redmond***, 150 Wn.2d 489, 89 P.3d 1001 (2003).

The diminished capacity jury instruction allows a jury to take evidence of diminished capacity into account when determining whether the defendant could form the requisite mental state. ***State v. Marchi***, 158

[1] Division One has also rejected the argument the court must give an instruction expressly stating the State bears the burden of disproving intoxication. ***State v. Fuller***, 42 Wn. App. 53, 55, 708 P.2d 413 (1985).

Wn. App. at 834, *citing* ***State v. Stumpf***, 64 Wn. App. 522, 827 P.2d 294 (1992). In the present case the defendant was allowed to present his defense through his endorsed witnesses as well as supplementing with his own testimony. There can be no argument defendant was precluded from adequately presenting his defense. Furthermore, the jury was properly instructed. They were informed of both the possibility of a mental illness or disorder existing and to be considered as relates to the intent element that the State must prove beyond a reasonable doubt. They were also instructed on self-defense. Given the status of existing law, defense counsel could not reasonably have succeeded in having the trial court instruct the jury that the issue of diminished capacity is an element that must be affirmatively disproved by the State. Therefore trial counsel was not ineffective in not requesting the futile instruction.

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective representation. ***State v. Hendrickson***, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A defendant demonstrates ineffective representation by satisfying the two-part standard initially announced in ***Strickland v. Washington,*** 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and subsequently adopted in Washington. ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922, 107 S. Ct. 328, 93 L.

Ed. 2d 301 (1986). To demonstrate ineffective assistance of counsel, the defendant must show (1) counsel's performance was objectively unreasonable; and (2) the deficient performance prejudiced the defense. ***Jeffries***, 105 Wn.2d at 418, 717 P.2d 722 (*citing* ***Strickland***, 466 U.S. at 687, 104 S. Ct. 2052). The defendant bears the burden of proving both parts, and failure to establish either part defeats the ineffective assistance of counsel claim. ***Jeffries,*** 105 Wn.2d at 418, 717 P.2d 722 (*citing* ***Strickland***, 466 U.S. at 687, 104 S. Ct. 2052).

If there is no reasonable likelihood that trial counsel would have been successful in his request for the instruction, it cannot be said that his counsel was unreasonable. Appellant's claim must fail.

D. CONCLUSION.

The trial court did not err when it admitted statements of the victim made to her family and best friend. The statements were not made to governmental representatives and there is no evidence to support the contention the statements were made with the idea they could be used in the investigation or prosecution of the crime. The statements are therefore not testimonial.

Alternatively, if the trial court committed error in admitting the statements, the error was harmless in view of the significant untainted evidence.

Defense counsel was not ineffective for failing to request a jury instruction contrary to existing law. Appellant was not entitled to an instruction that the State has the affirmative duty to disprove diminished capacity beyond a reasonable doubt.

Appellant's claims fail and the State requests his conviction be affirmed.

DATED: April 4, 2014

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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