No. 31845-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

CLAY DUANE STARBUCK
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Gregory Sypolt, Judge

APPELLANT'S REPLY BRIEF

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A. THE SUPREME COURT'S DECISION IN *STATE V. FRANKLIN*[1] MANDATES REVERSAL BECAUSE THE TRIAL COURT ERRED IN LIMITING CLAY'S[2] RIGHT TO PRESENT EVIDENCE OF OTHER SUSPECTS

In his opening brief, Clay argued that the controlling cases in Washington demonstrated that the "other suspect evidence" offered in this case meets any standard of admissibility. The trial judge erred in concluding that the evidence could not demonstrate a clear connection or train of facts or circumstances between any alternative suspects and the homicide. Conversely, given Chanin's risky behavior (inviting men she met on the internet into her home for sex) and multiple, unidentified male DNA (not linked to Clay), other men had an equal if not greater opportunity to murder her. There was no compelling reason to exclude the evidence.

Both Walker and Kenlein had the opportunity to have intentionally or even accidentally killed Chanin on December 1, 2011. Both had been invited over that day for a sexual encounter. And neither one had a

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[1] *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159, 163 (2014).

[2] To avoid confusion, Clay Starbuck and Chanin Starbuck will be referred to by their first names throughout this brief. No disrespect is intended.

complete alibi. The State concedes this is an accurate statement of the facts. *See* Brief of Respondent (BOR) at 3.

On December 1, Walker asked Chanin for a picture of her with a dildo in her vagina. The State concedes this is an accurate statement of the facts. *See* BOR at 3. That is precisely how Chanin's body was found on December 3. No reasonable jurist could conclude this fact was not relevant to the question of who killed Chanin.

Kenlein was, by his own admission, at Chanin's residence three times on that date. He did not come forward when her body was discovered. He lied about his identity and he bought cleaning products at midnight. According to the investigators, the master bathroom had been cleaned up after the murders. No one testified to his whereabouts between the time he left home after 9:00 p.m. and midnight when he went to Walmart. And, no one testified about where he was between midnight and the time his wife woke up the next morning. RP 1751-56. Walker lacked an obvious motive to kill Chanin, but her death could have happened accidentally during a sexual encounter or she could have angered him in some way. The same was true as to Kenlein. Chanin could have threatened to tell his wife or jeopardize his career as a teacher.

Clay should have been able to show that Chanin was engaging in risking on-line dating practices and inviting men to her home. That could

have explained the unidentified male DNA found at the scene and on Chanin's phone. Arguably, even if Walker and Kenlein did not murder her, one of her other partners could have been present, had sex with Chanin and murdered her on that morning. That would also explain why she turned off her phone for a while and did not answer the door.

After Clay's opening brief was filed, the Washington State Supreme Court decided *State v. Franklin*. Clay submitted that decision as supplemental authority. In its response, the State engages in a cursory and incorrect analysis of *Franklin*. A thorough and correct analysis reveals that *Franklin* now mandates reversal of Clay's conviction.

In his oral ruling, the trial judge impermissibly relied on his view of the strength of the State's case.

> It is true also that the alibis [of Walker and Kenlein] are not completely airtight to one degree or another. ***Nonetheless, the state and law enforcement specifically went to [the] effort to seek out evidence to establish whether or not there were alibis in the case of each of these gentlemen and not only them but others including [] Austin Starbuck and Drew Starbuck*** . . . it appears to me that there is no direct evidence or even circumstantial evidence that provide the clear connection and the clear train of facts or circumstances between any of the alternative named suspects and the homicide of Ms. Starbuck.

RP 119-20 (emphasis added). In its response, the State argues that the trial court did not deprive Clay of a fair trial in "its ruling on other suspect evidence" because the trial court "only granted its motion after examining

the relevance, materiality and weighing the probative versus prejudicial value vis-à-vis the entire body of evidence." BOR at 12-13. The State argues:

> The record reflects the depth of the investigation conducted by the Sheriff's Office in this case. The Sheriff's Office investigation checked out and ran down every alibi that was offered by the other suspects as well as the defendant.

BOR at 13. And, again when discussing the exclusion of Chanin's emails with the other suspects, the State argues:

> As noted, the defense simply did not proffer evidence sufficient to make the salacious content of some of those texts relevant. Such evidence neither established a motive for those named other suspects to kill Ms. Starbuck nor negated the fact that defendant's DNA was found on her body at the points which corresponded to the means of death identified by the Medical Examiner.

BOR at 15; *see also* BOR at 18-20.

This argument reveals the State's flawed reading of *Franklin*. In *Franklin*, the Supreme Court held that the trial court may not rely on the strength of the State's case against the defendant as a reason for excluding other suspect evidence.

> The trial court's reasoning in this case suffers from the same flaw as did the South Carolina rule rejected by *Holmes*. The trial court stated that in considering whether the defense had laid the foundation for other suspect evidence, "I not only look at the foundation for other suspect evidence, but I also look at the evidence against the defendant." Under *Holmes*, this is unconstitutional. It impermissibly inquires into the strength of the

> prosecution's case, rather than focusing on the relevance and probative value of the other suspect evidence itself.

Franklin, 180 Wn.2d at 378-79 (citations omitted). The State's argument that some of the DNA evidence here provided a basis for excluding other suspect evidence is incorrect.

Here, the trial court's written order denying Clay the opportunity to present other suspect evidence states:

> The defendant must establish a train of facts or circumstances as tend clearly to point out someone besides the defendant as the guilty party. That foundation requires a clear nexus between the person and the crime. Mere motive, ability, and opportunity to commit a crime alone are not sufficient. The offered evidence must demonstrate a "step taken by the third party that indicates an intention to act" on the motive or opportunity.
>
> There is no direct or circumstantial evidence that provides a clear connection or a train of facts or circumstances between any of the alternative named suspects and the alleged homicide of Ms. Starbuck. The defendant has the burden of showing that the other suspect evidence is admissible.

CP 553-554.

In *Franklin* the trial court entered an order based upon almost identical reasoning.

> The trial court also stated that other suspect evidence is inadmissible unless the proponent of the evidence shows that the alternate suspect had "more than mere opportunity" and "[m]ore than motive." RP (June 22, 2009) at 10. It ruled that "other suspect evidence ... requires specific facts to show that another person actually committed the crime." *Id.* at 11.

Franklin, 180 Wn.2d at 379.

But the Supreme Court found the trial court's reasoning in *Franklin* did not support the suppression of the other suspect evidence. The Court stated:

> The trial court was thus incorrect to suggest that direct evidence rather than circumstantial evidence is required under our cases. The standard for relevance of other suspect evidence is whether there is evidence "'tending to connect'" someone other than the defendant with the crime. Further, other jurisdictions have pointed out that this inquiry, properly conducted, "focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the defendant's guilt, not whether it establishes the guilt of the third party beyond a reasonable doubt." The standard set forth by the trial court establishes a bar to admission of other suspect evidence significantly higher than the standard we have previously set forth and higher than the standard used in other jurisdictions.

Id. at 381 (citations omitted).

Here, the trial court's ruling suffers from the same flaws as the trial court's ruling in *Franklin*. Judge Sypolt required Clay to prove beyond a reasonable doubt that someone else murdered Chanin. In its appellate brief, the State continues to argue that such a standard is correct.

> In the final analysis, the defense could not negate the fact that Mr. Starbuck's DNA was found on the deceased victim's body. The defendant's DNA was a "match" to the DNA found on Chanin Starbuck's neck where the Medical Examiner concluded that the manner of homicide had been perpetrated. The trial court's rulings and the record establish that the defendant was not deprived of the right to present a defense.

BOR at 20.

As the Court held in *Franklin*, this is an unconstitutionally higher standard than the Washington appellate courts have previously set forth, and higher than the standard used in other jurisdictions.

The state and federal constitutions protect Clay's right to test the State's case both on the crucible of cross-examination, but also by the production of compelling evidence that others had a greater opportunity and reason to kill Chanin than he did. The trial judge's opinion as to the strength of the State's case against him is not relevant to that inquiry.

B. THE TRIAL COURT'S FAILURES TO PERMIT CLAY TO PRESENT A DEFENSE WERE PRESUMPTIVELY PREJUDICIAL AND THE STATE HAS NOT CARRIED ITS BURDEN TO SHOW THE ERRORS WERE HARMLESS

The error in limiting Clay's right to present a defense is constitutional. *Franklin*, 180 Wn.2d at 382. Constitutional error is presumed to be prejudicial and the State must prove that the error was harmless. A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

No reasonable jury would have convicted Clay if they knew the following excluded facts:

> 1. Chanin solicited many sexual partners via the internet – not just Walker, Kenlein and Broadhurst.
>
> 2. Chanin left her minor children alone at night when she went on dates with these men.
>
> 3. Chanin had nude videos and pictures of herself and unidentified men on her computer that her children had seen.
>
> 4. Chanin engaged in sex with these other men – sometimes without knowing their true identity.
>
> 5. On December 1, Walker asked Chanin for a picture of her with a dildo in her vagina. That is precisely how Chanin was found on December 3.

The State concedes these are accurate statements of the fact. *See* BOR at 3. As argued in Clay's opening brief, when the trial court prohibited Clay from presenting evidence of the other suspects and Chanin's risky sexual relationships with multiple men she met online, Clay was prevented from demonstrating weaknesses in the State's case against him, including fully exposing the shoddy investigation pursued by the police. Clay argued that the police failed to properly investigate and test all of the potential biological evidence found at the scene. But, by failing to allow Clay to present evidence that the police knew Chanin was engaging in high risk on-line dating, the defense was incomplete. It was unfair for the State to argue that the DNA evidence excluded all other potential suspects while forbidding Clay to point out that many other potential suspects might have been identified if only the police had tested

all of the biological evidence available. Because of this unfair limitation on the defense, the jury could have concluded that the limitations on the investigation were reasonable because Chanin had no other sexual partners, so the biological material was irrelevant and there was no need to critically evaluate the police investigation.

But Chanin was having sexual relationships with several partners. This evidence was not "demeaning" – it was fact. It would explain why there was no sign of a struggle and no indication that someone forced their way into the home. Chanin apparently voluntarily opened her home to men she was dating. It would have countered the State's argument that Clay was the only person who had sufficient access to and knowledge of Chanin's habits to get her alone in the home. A sexual tryst with someone else on December 1, 2011, would explain why other unidentified male DNA was present at the scene. Had the jury been informed of this, the jurors could have readily agreed with Clay's argument that the police investigation was shoddy, incomplete and influenced by a biased view of the evidence.

C. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT

1. Misstating the Evidence

The State is plainly wrong when it argues that Dr. Heath testified that a piece of DNA at the scene "matched" Clay. She stated that she could not narrow the identification down to an individual, RP 2416, 2919, and that her protocols prevented her from stating that the DNA was a "match." RP 2474-75.

> Misstating the evidence from trial is a particularly prejudicial form of misconduct, because it distorts the information the jury is to rely on in reaching a verdict. Cf. *Darden v. Wainwright*, 477 U.S. 168, 181-82, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). By doing so, it also usurps the jury's prerogative of drawing, or not drawing, otherwise permissible inferences.

United States v. Mageno, 12-10474, 2014 WL 3893792 (9th Cir. Aug. 11, 2014).

The prosecutor repeatedly misstated the evidence by explicitly stating that the DNA was a "match." There was nothing in the record that remotely permitted the prosecutor to argue that this evidence conclusively proved that Clay was the murderer. This was flagrant and ill-intentioned misconduct. If the remarks are not a pertinent reply, or are so prejudicial that a curative instruction would be ineffective, they may still be reversible error. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

Although the trial judge gave the standard instructions that statements from lawyers are not evidence, and that the jury is to rely on its own recollection of the evidence, these instructions were never tied to the misstatements. The court's instruction that the prosecutor's arguments are not evidence and that the jury's recollection controls, is not a cure-all for factual errors. *United States v. Mageno*, *supra*; *Gaither v. United States*, 413 F.2d 1061, 1079 (D.C. Cir. 1969). This is especially true where, as here, repeated misstatements of fact went uncorrected. Because Clay's attorney did not object to the government's error, the jury likely accepted the government's characterization of the evidence as a "match." And if the jury's own recollection of Dr. Heath's testimony differed from the prosecutors' recitation, the jury likely would have speculated that the prosecutors' misstatements had at least some factual basis – that is, that the prosecutor knew the statement was so, even if there was no such testimony.

The erroneous comments regarding the DNA featured prominently in both government closing arguments, including the last plea the members of the jury heard in the rebuttal argument. Here, in his last statement to the jury, the prosecutor misstated the evidence on the key issue – the "bottom line" as the prosecutor termed it – the identity of Chanin's killer.

2. Arguing False Evidence

The State appears to agree that it is misconduct to argue evidence the prosecutor knows to be false. Rather, the State argues that the prosecutor never characterized Clay's comments about Chanin as lies. But that is not true. Although the prosecutor never said that Clay's statements about Chanin's risky behavior were lies, his argument presented that view. The prosecutor argued that Clay was trying to falsely portray Chanin as promiscuous, RP 2700, that he had a "perception" she was having fun with other men and "having sex with them." RP 2702. But Clay was not "portraying" Chanin as promiscuous. He was reciting the facts. Chanin was contacting several men over the internet and having sex with them.

But contrary to the State's argument, these were not misperceptions; they were true. And the prosecutor knew it because he well knew of the suppressed evidence corroborating Clay's statements.

D. THE ADMISSION OF THE 911 TAPE VIOLATED THE CONFRONTATION CLAUSE AND WAS PREJUDICIAL

The State complains that the defense did not object to the admission of the audio portion of the 911 clause on confrontation clause grounds. But the trial court cited to *Crawford v. Washington*, 541 U.S. 36,

124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in its ruling that the 911 phone call was not "testimonial." RP 2040-44.

But the prosecutor argued that the call was "testimony" from Chanin – that she needed help and was dying. Despite his representation to the judge, the prosecutor considered the evidence substantive testimony. While the call originated from Chanin's cell phone, there was nothing in the record to indicate who called or for what purpose. It is not reasonable to infer that the call was purposely made by Chanin or that she was dying. Chanin continued to use her phone and text others, including her children, until at least 2:19 p.m. on December 1, 2011. RP 1484; Ex 275B.

II.
CONCLUSION

This Court should find that because the police conducted a biased and incomplete investigation that targeted Clay from the beginning, the trial judge excluded relevant and probative evidence regarding other suspects and the victim's lifestyle, admitted prejudicial hearsay from the 911 call and the prosecutor falsely argued there was a DNA "match" to Clay on evidence found at the scene, Clay was denied a fair trial.

DATED this 2nd day of September, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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