

NO. 93818-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SCOTTIE LEON MILLER,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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I. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

II. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Miller, No. 71559-3-I, filed October 3, 2016 (unpublished).

III. ISSUE PRESENTED FOR REVIEW

The State asks this Court to deny the petition for review.

However, if this Court accepts review of Petitioner's assertion that the Court of Appeals erred by finding certain evidentiary errors harmless, the State seeks cross-review of the Court of Appeals' conclusion that the trial court erroneously admitted hearsay statements in the first instance. The State renews its argument that the trial court did not abuse its discretion in admitting any of the out-of-court statements of the victim.

IV. STATEMENT OF THE CASE

Just two weeks after his release from prison after serving time for threatening to kill his girlfriend Patricia Patricelli, Petitioner Miller made good on his threats and murdered Patricelli. After hiding on her apartment balcony the night before, Miller let himself into Patricelli's apartment when she left to drop her children off for school. When she

returned home, Miller stabbed her to death. At trial, Miller admitted that he intentionally killed Patricelli, but denied that he had premeditated the crime, claiming instead that he killed her in a fit of rage after she had provoked him.

However, two days before he murdered her, Miller had texted his mother that he was “sorry,” but he was about to kill Patricelli. Ex. 349, pg. 1. Miller also texted a friend that something kept telling him to “kill the bitch,” and that his family was telling him to “chill,” because “they know me and they know that I will do what I say I will do.” Ex. 349, pg. 1; 12/12/13 RP 35-36.

In the twelve hours preceding the murder, Miller secreted himself in the storage closet on the balcony of Patricelli’s apartment, eavesdropped on her, and repeatedly threatened her via text message. Miller told Patricelli “to keep thinking that you can’t be touched,” and that she would “hate when she saw him.” Ex. 349, pg. 2. Miller texted Patricelli, “Watch how you’re going to ask me not to hurt you, just watch.” Ex. 349, pg. 3. He told her that her new boyfriend could not help her. Id. He told her that he “had her scared” because she thought (accurately) that he was hiding outside her apartment, but that he “wasn’t going to get her there,” he was going to “get her” at work. Ex. 349, pg. 4. Miller informed Patricelli that he would “have the last laugh.” 12/12/13 RP 60.

While Miller lurked outside in the hours before Patricelli's murder, he also texted Patricelli's friend Raymond Varnado, who was inside the apartment with Patricelli. Miller asked Varnado if he was going to help Patricelli when Miller went "inside to kill the bitch." Ex. 349, pg. 2. Miller told Varnado that if Varnado left, Miller could claim to be with him, so the police "can't put me there at the scene." Id. Miller texted Varnado, "She still talking shit, she don't know she about to die." Id.

The next morning, Miller texted Patricelli, lying about his whereabouts, and claiming to be nowhere near her apartment. Ex. 349, pg. 10; Ex. 351. He waited until she left to drop off her children, entered her apartment, took three large knives from her kitchen, hid under her bed until she returned, and then stabbed her 30 times.

The jury convicted Miller of premeditated, first-degree murder, committed with a deadly weapon. CP 154, 156. A penalty phase was conducted regarding the State's allegations that the murder was an aggravated domestic violence offense that was committed shortly after Miller's release from incarceration. The State presented evidence that Miller had been convicted of 15 domestic violence offenses over the preceding 10 years. Ex. 344A, 397A, 397B, 398-401, 402B, 403-05. 10 of those 15 convictions were not included in Miller's offender score,

and were not considered when establishing his standard range.

See CP 188-90, 206, 211; Ex. 397A, 397B, 398-99, 401, 403-05.

Additionally, the State presented testimony from Patricelli's young daughter about the abuse she had witnessed her mother suffer at Miller's hands. The daughter told the jury how she watched Miller push Patricelli down a flight of stairs, 12/16/13 RP 148-50, punch her in the face, 12/16/13 RP 152-54, and violate a no-contact order. 12/16/13 RP 155.

The State also presented evidence from the mother and sister of Miller's ex-wife, Angel Williams, detailing how Miller terrorized Williams throughout their four or five-year relationship. On one occasion, Miller hid in a storage closet outside of their apartment, leaping out and chasing Williams back up the stairs into her apartment. 12/16/13 RP 183, 198. When she managed to run back inside, he threw a rock through the glass door. Id. Williams and her mother fled the apartment, only to return later to find it destroyed, with their wedding cake smeared all over the walls and "you're next" written over a picture of Williams' mother's face. 12/16/13 RP 184-85. Miller had also cut the vacuum cleaner cord from the vacuum and hidden it under the mattress. Id. Miller violated no-contact orders against Williams, poured gasoline all over their bedroom, and hid in the dryer, waiting for her to return. 12/16/13 RP 188.

Williams' sister testified that Miller made multiple threats to kill Williams and the rest of her family, and that Williams was terrified of Miller. 12/16/13 RP 193, 197. The State also presented testimony from a woman who lived in the apartment above Miller and Williams. The neighbor testified that she heard Williams screaming and asking Miller to "stop," 12/16/13 RP 162, saw Miller choke Williams while she was pregnant, 12/16/13 RP 165, and saw Miller drag Williams by the hair while holding their newborn child, 12/16/13 RP 166. The neighbor told the jury about an incident where she heard Williams tell Miller to leave and then heard screaming and a loud "thud" against the wall. 12/16/13 RP 167. The neighbor went downstairs and informed Miller that she was calling the police. When she went back upstairs and called 911, Miller followed the neighbor and punched her in the face. 12/16/13 RP 167-70, 177. The 911 call was played for the jury. 12/16/13 RP 170-75.

The jury found that the State had proved that the crime was an aggravated domestic violence offense, and that Miller committed the crime shortly after being released from incarceration. CP 158-59. Miller's standard range was 362-474 months. CP 206. The Honorable Judge Barbara Linde imposed an exceptional sentence of 600 months, stating, "I've been around a long time, I've seen a lot of cases, I've sentenced a lot of offenders. I have not seen this kind of intentional,

systematic, repetitive devotion to terrorizing women. . . . Those [aggravating] factors, which the jury found for purposes of sentencing, really compel absolutely no other conclusion here in this case for the Court. And it's not the passion, or tears, or pictures, or anything else that's operating for the Court's decision here, but rather that the 600 months is clearly, in the Court's view, the appropriate sentence." 1/10/14RP 267-68; CP 212-13.

Miller appealed, alleging: 1) that the trial court abused its discretion by admitting several hearsay statements of Patricelli; 2) that the trial court improperly relied on the "ongoing pattern of abuse" aggravator because it is unconstitutionally vague and because it was based on crimes already considered in establishing Miller's offender score; 3) that the court improperly commented on the evidence by instructing the jury that a "prolonged period of time" meant more than a few weeks; and 4) that there was insufficient evidence of the rapid recidivism aggravating factor.

The Court of Appeals found most of the hearsay statements were properly admitted by the trial court, but to the extent that the hearsay statements reflecting Miller's behavior were improperly admitted, such error was harmless. The court rejected Miller's claim that there was insufficient evidence of the rapid recidivism aggravating factor. The court did not address Miller's claims as to the pattern of

abuse aggravator, concluding that the trial court would have imposed the same sentence based on the rapid recidivism factor alone.

V. ARGUMENT

The State's briefing in the Court of Appeals adequately responds to issues 2, 3, 4, 5, and 7 raised by Miller in his petition for review. Review should be denied on all five issues.

With respect to issue 1 – Miller's request that this Court review whether constitutional principles of vagueness apply to Washington's statutory aggravating sentencing factors – he attempts to raise new issues not properly argued or presented to the Court of Appeals, and this Court should deny review on that basis.

Although Miller argued in his opening brief that the statutory aggravating factor of "pattern of abuse" was unconstitutionally vague, he neglected to cite binding precedent from this Court holding that sentencing aggravators are not subject to due process vagueness challenges because they do not define conduct or allow for arbitrary arrest and criminal punishment by the State.¹ Similarly, despite the fact that the United States Supreme Court had issued its opinion in Johnson v. United States² three months prior to filing his opening brief,

¹ State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

² ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

Miller did not mention Johnson nor did he argue that Baldwin should be reexamined in light of it. Instead, Miller waited until the State summarily cited Baldwin in its response and then argued in reply that Baldwin's holding should be reexamined in light of Johnson. This effectively denied the State an opportunity to respond, and precluded the Court of Appeals from fully addressing the issue. For that reason, review should be denied of issue 1(a) of the petition.

With respect to issue 1(b), whether the rapid recidivism aggravating factor is unconstitutionally vague, Miller never raised such a claim in either the trial court or the Court of Appeals. "An issue not raised or briefed in the Court of Appeals will not be considered by this court." State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); see also Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review."). This Court should reject Miller's attempt to raise a new constitutional issue for the first time in his petition for review. Review should be denied on issue 1(b) of the petition.

Finally, in issue 6, Miller asks this Court to accept review of the Court of Appeals' determination that the erroneous admission of certain hearsay statements was harmless. Miller concedes the only contested issue was premeditation, but urges that the admission of

certain out-of-court statements by Patricelli expressing fear of Miller “likely influenced the jury’s verdict.” In support, Miller cites only to his own testimony describing how the crime occurred, dubbing it “plausible.” Pet. for Rev. at 19-20.

However, in the days leading up to Patricelli’s murder, Miller told his mother he was going to kill Patricelli, he told a friend he was going to kill Patricelli, and he told Patricelli herself that he was going to kill her. Ex. 349, pg. 1-4; 12/12/13 RP 35-36. In fact, while Miller lurked outside Patricelli’s home the night before the murder, he told the world on Facebook that he was about to go back to prison for hurting someone. Ex. 380; 12/12/13 RP 35. Then, the morning of the murder, Miller let himself into Patricelli’s apartment while she was gone, retrieved three knives from the kitchen, and stabbed her 30 times in the bathroom when she returned. 12/12/13 RP 48-53. Miller’s assertion that the evidentiary error was not harmless utterly ignores this overwhelming evidence of premeditation.

If review is accepted of issue 6 (whether the admission of certain hearsay statements was harmless), the State seeks cross-review of the Court of Appeals’ conclusion that the evidence was erroneously admitted in the first instance. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary.

However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the Court of Appeals' conclusion that certain hearsay statements were erroneously admitted. RAP 1.2(a); RAP 13.7(b). The State's briefing in the Court of Appeals adequately addresses that issue.


VI. CONCLUSION

For all of the above reasons, this Court should deny the petition for review. If this Court accepts review of Miller's claim that evidentiary error was harmless, the State seeks review of the Court of Appeals' conclusion that evidentiary error occurred.

DATED this 5th day of December, 2016.

Respectfully submitted,


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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Maureen Cyr, at maureen@washapp.org containing a copy of the Answer to Petition for Review and Cross-Petition, in STATE v. SCOTTYE LEON MILLER, Cause No. 93818-1, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name
Done in Seattle, Washington

12-05-16
Date

CERTIFICATE OF SERVICE BY
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