

NO. 89180-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER FOLEY,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Court of Appeals considered four arguments brought by petitioner on his direct appeal for the conviction of Manslaughter in the 1st Degree, denying them all and affirming the conviction. A petition for review was subsequently filed which argues that the Court of Appeals decision is in conflict with another decision of the Court of Appeals, is in conflict with a decision of the Supreme Court, and that it gives rise to a significant question of law under the constitutions of the State of Washington or of the United States. Each of these arguments is without merit and as such the petition for review should be denied.

ARGUMENT

1. The Court of Appeal's decision that ER 404(b) evidence was appropriately admitted by the trial court is not in conflict with another decision of the Court of Appeals.

Petitioner seeks review of the Court of Appeals decision affirming the admission of "other acts" evidence pursuant to ER 404(b) by arguing that this holding is in conflict with a decision from Division One of the Court of Appeals. In particular, petitioner maintains that evidence of a prior incident where petitioner hit the victim, Russel Ray, with a 4 x 4 piece of wood was too similar to the charge at trial, which would have precipitated reversal had the

Court of Appeals ruled consistent with the holding in State v. Escalona, 49 Wn.App. 251, 742 P.2d 190 (1987).

However, this case is distinguished from Escalona. In Escalona the Court of Appeals reversed the trial court's decision to not grant a mistrial after testimony was presented about "other acts" by the defendant despite being previously forbidden by the court. The focus in the Escalona appeal was the irregularity of inadmissible testimony and the trial court's abuse of discretion for not granting a mistrial.

In this case, testimony about "other acts" by the petitioner was presented at trial only after being fully considered in advance by the court. The focus on the appeal here was whether the trial court conducted the correct analysis in exercising its discretion to allow evidence of the earlier act.

In both cases, the two different Courts of Appeals analyzed the issue of "other acts" evidence using the same standards of admissibility. There is no conflict between the two courts.

2. The Court of Appeals decision that sufficient evidence existed to support instructing the jury on lesser-included charges is not in conflict with another decision of the Supreme Court.

Petitioner seeks review of the Court of Appeals decision affirming the lesser included offense instructions by arguing that this holding is in conflict with a decision from the Supreme Court. In particular, petitioner maintains that the evidence at trial could only support the finding of an intentional act, which would have precipitated reversal had the Court of Appeals ruled consistent with the holding in State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000).

However, this case is distinguished from Perez-Cervantes, in which the Supreme Court affirmed the trial court's decision to deny the defendant's request for lesser included instructions in a murder case where there was eye witness testimony that the defendant stabbed the victim two times with a knife. The focus in the Perez-Cervantes appeal was whether lesser included instructions could be based upon an argument that the jury might not believe some of the evidence indicating intent.

The focus on the appeal here was whether there was sufficient evidence in the record to support an inference that the petitioner acted with intent, with recklessness or with criminal negligence. The Court of Appeals decision applied the same standard in regard to lesser included instructions as did the Supreme Court in the

Perez-Cervantes case but came to a different conclusion because the two cases had different facts.

In this case there were no surviving witnesses to the petitioner's actions and evidence that petitioner killed Mr. Ray was largely circumstantial. The state argued that inferences from the circumstantial evidence supported a finding that the petitioner acted with intent but also acknowledged that a reasonable view of the evidence could also support a finding that the petitioner acted with recklessness or with criminal negligence. The trial court agreed and gave the lesser included instructions. The jury agreed and found the petitioner guilty of a lesser crime. The Court of Appeals decision pointed to numerous aspects of the case which supported the inference that petitioner acted with recklessness when he killed Mr. Ray and affirmed the trial court's decision to give the lesser included instruction.

The Court of Appeals decision applied the same standard as in the Perez-Cervantes case in regard to lesser included instructions but came to a different conclusion because of different facts. There is no conflict between the two courts.

3. The Court of Appeal's decision that introduction of improper opinion testimony was not prosecutorial misconduct does not create a significant question of law under the

Constitution of the State of Washington or of the United States.

Petitioner seeks review of the Court of Appeals decision that the prosecutor did not commit misconduct and thereby did not deprive petitioner of a fair trial. While it is agreed that the issue of a prosecutor's conduct is significant, the Court of Appeals decision on the issue of prosecutorial misconduct in this case does not create a significant question of law.

It is well settled that a prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn.App. 511, 518, 111 P.3d 899 (2005).

Just as well settled is the standard of review and burden of proof involved in establishing the impropriety of a prosecutor's actions and their prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) and State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The Court of Appeals applied the correct standard and concluded that while improper evidence was introduced, that this was not misconduct because the prosecutor's actions were not flagrant and ill-intentioned, and it did not cause prejudice because it

was a minor part of the evidence in the trial and it could have been cured by instruction but petitioner declined the trial court's offer to give one.

There is no significant question of law under the constitutions of the State of Washington or of the United States that results from the Court of Appeals decision on this issue.

4. The Court of Appeals decision that petitioner's right to effective assistance of counsel was not violated by the failure to request a limiting instruction does not create a significant question of law under the Constitution of the State of Washington or of the United States.

Petitioner seeks review of the Court of Appeals decision that his counsel was not ineffective for failing to craft a curative instruction in response to the improper opinion testimony.

Both the federal and state constitution provide the right to have effective assistance of counsel in a criminal trial. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. It is well established that to prevail on a claim of ineffective assistance that the attorney's conduct must have been deficient in some respect and that the deficiency must have prejudiced the defense. Strickland v. Washington, 466 U.S.668, 687, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

The Court of Appeals applied the correct standard in reviewing petitioner's attorney's conduct, holding that the attorney's failure to seek a limiting instruction could have been a tactical decision and that the absence of a limiting instruction was not prejudicial to the defense.

There is no significant question of law under the constitutions of the State of Washington or of the United States that results from the Court of Appeals decision on this issue.

CONCLUSION

The arguments presented in the petition for review are without merit. The decision of the Court of Appeals is not in conflict with a decision from another Court of the Appeals nor is it in conflict with a decision from the Supreme Court. There are no significant questions of law under the constitutions of the State of Washington or of the United States. Accordingly, the petition for review should be denied.

Respectfully submitted on September 11, 2013.



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