FILED
January 11, 2013
Court of Appeals
Division III
State of Washington

NO. 30219-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER FOLEY,

Appellant.

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

The Honorable Scott R. Sparks, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF FACTS IN REPLY

For purposes of its response, the state accepts Foley's statement of facts but makes one "correction" and adds some detail, "in order to more fully present the case to the court." Brief of Respondent (BOR) at 2-3. Foley will respond to each in turn.

First, the state asserts the following correction should be made to appellant's brief:

> The correction pertains to the Statement of the Case portion of the Appellant's brief pertaining to the playing of the video of Appellant's first recorded interview with law enforcement officers at trial. Appellant's Brief, Pages 16-17. It is inaccurate to state that the State "failed" to skip the part where Appellant was advised of his constitutional right[s] when at that point said portion had not been prohibited. RP 179-81. Likewise, it is inaccurate to state that the [sic] "the court agreed the warnings were ... partially privileged" when it is clear from the record that the court was referring to latter parts of the interview as being privileged. RP 1638. It is also inaccurate to state that the State's response to Appellant's concern was to "essentially complain" about limited options when the State actually proceeded to describe to the court how it would redact the parts of the interview where the officers asked why the Appellant needed an [sic] lawyer and whether he would take a polygraph. RP 1639-42.

BOR at 2-3.

In light of pretrial discussions, it is logical to conclude the state agreed not to play that portion of the tape wherein Foley was

read his constitutional rights. As detailed in his opening brief, Foley moved in limine to exclude comments concerning Foley's exercise of his constitutional rights, including "any evidence that the defendant was read his rights, exercised his right to remain silent or any evidence that he retained an attorney." RP 80. The only opposition the prosecution voiced to this motion was in regard to Foley's exercise of the right to an attorney, as his attorney was present at the interview, which would be difficult to omit. RP 181. It is therefore reasonable to conclude – as did defense counsel at trial – that the prosecutor agreed not to play the advisement of rights for the jury.

Regardless, Foley does not challenge the playing of this portion of the recording on appeal. The facts pertaining thereto are recounted to show the full extent of the parties' and court's discussions about the potential problems with playing the recording, which pertains to the prosecutorial misconduct issue. Brief of Appellant (BOA) at 43, 45.

Similarly, whether the court believed that particular portion contained privileged discussions or whether it was referring to some other portion, the point is the discussion demonstrates the level of awareness the prosecutor must have had about the risk of

creating trial error by playing the video in its entirety. Again, this is relevant to the prosecutorial misconduct claim. Id.

Finally, in regard to the asserted "correction," the state takes issue with the characterization that in response to defense counsel's concern about the video, the prosecutor was "essentially complain[ing]" about the limited options regarding the recording. BOA at 16; BOR at 3. According to the state, the prosecutor was describing how it would redact portions of the interview "where officers asked why the Appellant needed an [sic] lawyer and whether he would take a polygraph." BOR at 3 (citing 1639-42).

Yet, the prosecutor also explained in this same discussion about redacting the video, "I tried alternatives didn't work," when the court pointed out the video contained irrelevant material, such as the advisement of rights. RP 1638. And although the prosecutor proposed to "make a record" regarding "when I am going to hit the pause slash select in terms of the recorded portion," he did not in fact do so. RP 1639.

Furthermore, when the defense interjected there were many references in the recording that were inadmissible, the prosecutor admitted to struggling with "this specific piece of evidence" and that it was "unmanageable:"

> MR. McCLAIN [defense counsel]: We have lots of things not coming in. My understanding this whole right to remain silent would not be –
>
> THE COURT: It's not helpful to the jury. I don't know why you have to play that.
>
> MR. SANDER: Struggled with this specific piece of evidence as the court knows there is a portion not just the reference to having an attorney later on and there is some suggestions about having an attorney. We specific talked about and reference to polygraphs talked about excised there is other portions where a question is answered in such a round about way is not relevant evidence and the reality is the functionality being able to go through and make it so every aspect is – this is unmanageable and kind of effects the interview.

RP 1640. Whether this constitutes a complaint about the nature of the recording, the record will speak for itself.

But it is important to note for purposes of the misconduct claim that the prosecutor conceded he was "trying to limit the portions that have to be redacted." RP 1640. In the prosecutor's opinion, the irrelevant portions would not prejudice Foley. RP 1640. The prosecutor therefore proposed to "play the whole video except for those portions the state agreed and counsel made a motion on are prejudicial to his client." RP 1640; see also RP 179-181 (defense motion to exclude reference in recording to Foley's exercise of constitutional rights).

In the end, the court agreed to allow the prosecutor to "fast forward it past advisement of rights and we'll start there and you can play other than the circumstance." RP 1644.

As was later indicated by defense counsel, the recording of the interview ultimately played for the jury contained questions by the detectives describing statements attributed to other people opining on Foley's guilt. CP 206-207; BRP 42. As argued in Foley's opening brief, this constituted prosecutorial misconduct, as opinion evidence on guilt had been excluded pursuant to a separate defense motion. CP 82 (MIL 6), 207; RP 184 (MIL 6 granted).

Turning now to the additional factual details provided by the state. BOR at 3-5. Under RAP 10.3(a)(5), the "Statement of the Case" should contain "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument." The brief of appellant should not exceed 50 pages. RAP 10.4(b). In summarizing a case with a jury trial transcript of more than 1,600 pages, it logically follows that not every single fact adduced at trial can be repeated in appellant's brief. In the interest of brevity and with an eye toward the issues presented, Foley therefore presented a "fair statement of the facts and procedure," painted with broad

strokes, not bogged down in minutia. Nonetheless, where appropriate, Foley will similarly supplement the facts *in order to more fully present the case to the court.*

First, the state finds it important to note the fact that deputy Whitsett never advised Foley the police considered him to be a suspect. BOR at 3. Yet, in the letter to police, Foley's attorney recounted Foley's statement that the police considered him a suspect. BOR at 3. Considering the history between Ray and Foley[1] – and the fact police wanted to interview Foley following Ray's disappearance,[2] it is hardly surprising Foley would think police viewed him as a suspect. Indeed, Foley's niece Meghan Lucas testified Foley felt like a "suspect" based on the police phone calls. RP 1456.

The state also details a conversation Foley had with Lucas and her husband, Michael, while driving back from dinner. RP 1458-1459. Michael's truck was acting up at the time, and the men discussed the possibility it had something to do with the tires. RP 1459. "In a joking manner," Foley made a comment about switching tires with Michael so when police checked, "the tread wouldn't match." RP 1459. At the time, police had already

[1] See e.g. RP 581, 584, 588, 1278-81, 1310-1311, 1324, 1452.

contacted Foley to set up an interview, of which Lucas was aware. RP 1454, 1456. Moreover, Lucas testified Foley has a dark sense of humor. RP 1463.

B. ARGUMENT IN REPLY

1. THE COURT ERRED IN ADMITTING PREJUDICIAL PROPENSITY EVIDENCE.

In his opening appellate brief, Foley argues the court erred in admitting evidence of the alleged 4 x 4 incident because: the state failed to prove its existence by a preponderance of the evidence; and (2) the potential for prejudice far outweighed any probative value of the evidence. BOA at 35-39.

With regard to the first point, Foley argued the testimony of Ray's brother (Mark Ray) – to whom Ray supposedly disclosed going into Foley's shed – was insufficient to prove the existence of the incident because it was hearsay without sufficient corroboration. BOA at 37-38 (citing ER 804(b)(4)). In response, the state explains there were three hearings on the matter and concludes, without citation to authority or reference to the particular challenge made:

[2] See e.g. RP 948.

> At both of those hearings and even again at a third argument on the first day of trial, the trial court consistently applied the correct legal standard, relied upon supported facts and adopted a position that a reasonable person would take: the trial court found by a preponderance of the evidence that this incident occurred and entered an order accordingly. RP 282, 496.

BOR at 9. The state's brief does not address the corroboration requirement of ER 804(b)(4).

With regard to the second point, Foley argued that because the state had ample evidence establishing the tool-centered feud between Ray and Foley, the court should have excluded the 4 x 4 evidence as its potential for prejudice far outweighed any probative value, in light of the similarity between it and the charged crime. BOA at 38-39.

In response, the state does not address whether the court struck the proper balance in light of the potential for prejudice and availability of less prejudicial dispute evidence. BOR at 10-11. Rather, the state suggests the court's decision is insulated from review except insofar as it was required to conduct a balancing test, which it did. BOR at 10.

While the abuse of discretion standard is deferential to the trial court, it does not insulate the trial court's ruling from

meaningful review. Moreover, the state's proposed "abuse of discretion" test necessitates clarification. The "no reasonable person" standard set forth in the state's brief is legal shorthand that has been regularly criticized. BOR at 7, 9 (asserting a trial court's decision is manifestly unreasonable only if the court adopted a position no reasonable person would take).

As one appellate court astutely observed,

> [i]nstead of examining the reasons for the decision, [the "no reasonable person"] standard focuses on the reasonableness of the decision-maker. But to say that an abuse of discretion exists when "no reasonable man, woman or judge" would have taken the view adopted by the trial court is not accurate. It cannot justly be said that every trial judge reversed by the appellate court or Supreme Court for an abuse of discretion is less reasonable than the reversing judges . . . Strict application of such a standard would mean that an appellate court would never reverse without a hearing to determine the general reasonableness of the judge.

Coggle v. Snow, 56 Wn. App. 499, 504-07, 784 P.2d 554 (1990).

Our Supreme Court has clarified the abuse of discretion analysis more usefully as follows:

> A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the

> record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); see also, State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (discussing the nature and purpose of appropriately exercised judicial discretion in an effort to temper the "no reasonable person" standard).

In this case, the court's decision to admit the 4 x 4 evidence was based on untenable grounds because the state did not prove the incident occurred by a preponderance of the evidence. Moreover, the court's decision was based on untenable reasons, as there were insufficient corroborating circumstances to guarantee the trustworthiness of the state's hearsay evidence offered as proof of the incident. The court's decision was also manifestly unreasonable as it was outside the range of acceptable choices considering the state had ample evidence establishing the feud between Ray and Foley, without admission of the highly prejudicial 4 x 4 evidence. Because the state has not offered any meaningful argument in response, this Court should find the court abused its discretion and reverse Foley's conviction.

2. THERE WAS NO FACTUAL BASIS FOR NEGLIGENT AND RECKLESS HOMICIDE INSTRUCTIONS.

As indicated in the opening appellate brief, Foley maintains his innocence. RP 1690-91. Regardless, the evidence did not support an inference that a reckless or negligent killing was committed to the exclusion of an intentional one. According to crime scene responders, the blood and hair evidence found all over Ray's property reflected a "bloodletting." RP 1097, 1167. Moreover, the forensic evidence showed Ray suffered not one – but at least three – blunt force injuries fracturing his skull. RP 1582. In light of these facts, and the lack of any evidence indicating Ray's injuries were anything other than intentional, the court erred in instructing the jury on first and second degree manslaughter, over Foley's objection. BOA at 39-43.

In response, the state first asserts the instructions were supported because:

> Throughout the entire trial, including the State's opening and closing, there was a repeated theme of anger and spontaneous violence between Appellant and the victim due to the dispute about tools. This is especially seen in the context of the "other acts" evidence which was presented to the jury to prove motive, opportunity, intent or absence of mistake of accident.

BOR at 12.

The state's theory of the case as expressed in opening and closing is no substitute for evidence, however. See e.g. Jones v. Hogan, 56 Wn.2d 23, 31, 351 P.2d 153 (1960) (a prosecutor's argument is not evidence). Nor can the "other acts" constitute a factual basis for giving a lesser included offense instruction on the offense actually charged. State v. Berlin, 133 Wash.2d 541, 548, 947 P.2d 700 (1997) (courts apply the lesser-included offense analysis to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in the statute.

Next, the state appears to suggest that because Foley was convicted of first degree manslaughter, and because the jury was instructed it must find all the elements of the offense beyond a reasonable doubt, that there was no error, i.e. there must have been a factual basis for the instruction. BOR at 13. But if this were the standard, there would never be any error in the *failure* to give a lesser included offense instruction when the jury returns a verdict on the greater. After all, the jury is required to consider the greater offense first and if it found those elements proven, it would never address the lesser. Our Supreme Court nevertheless has rejected

this rationale. State v. Parker, 102 Wn.2d 161, 165-66, 163 64, 683 P.2d 189 (1984).

Moreover, the state's suggestion ignores the reality of compromise verdicts. See e.g. State v. Labanowski, 117 Wn.2d 405, 419, 816 P.2d 26 (1991) (recognizing that for this reason, some jurisdictions have opted to give an "acquittal first" concluding instruction to the jury, which requires the jury to acquit on the greater before it is allowed to consider the lesser). When the jury is given the option of a lesser offense and is not given an "acquittal first" instruction, there exists the danger the jury will engage in a compromise verdict. See e.g. People v. Boettcher, 69 N.Y.2d 174, 183, 505 N.E.2d 594, 598, 513 N.Y.S.2d 83, 87 (1987); see also State v. Van Dyken, 242 Mont. 415, 433, 791 P.2d 1350, 1361 (even if defendant requests an "unable to agree" instruction, the "acquittal first" instruction is proper), cert. denied, 498 U.S. 920, 111 S.Ct. 297, 112 L.Ed.2d 251 (1990). New York courts, for example, have held that "unable to agree" instructions ignore the jury's duty not to reach compromise verdicts based on sympathy for defendants or to appease holdout jurors. Id.

Here, the jury was instructed it could consider the lesser included offenses if it was unable to agree on the greater. CP 199.

Significantly, the jury did not reach a verdict on the second degree murder charge. CP __ (sub. no. 198, Verdict Form A). Accordingly, there is the possibility that a compromise verdict was reached. Had the jury been required to decide the crime charged – as Foley insisted – there is a very real possibility the jury would have acquitted or deadlocked. See State v. Hassan, 151 Wash.App. 209, 220, 211 P.3d 441 (2009) (recognizing that, "Where a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy.").

The court's instruction on lesser included offenses that were not supported by the evidence requires reversal of Foley's manslaughter conviction.

3. THE PROSECUTOR COMMITTED MISCONDUCT BY PLAYING THE INTERVIEW RECORDING IN ITS ENTIRETY KNOWING IT CONTAINED INADMISSIBLE EVIDENCE.

As indicated in the opening brief and this reply, the prosecutor was well aware of the attendant risks of playing the interview recording but chose to play it anyway. As a consequence he put into evidence inadmissible opinion evidence on Foley's guilt. This constituted prosecutorial misconduct requiring a new trial. As

will be set forth infra, the state incorrectly cites to the minority opinion in State v. Demery as support for its response the challenged hearsay statements were not improper opinions on guilt.

In response the state does not dispute that portions of the video were played in which Detective Higashiyama indicated Foley's family did not believe him and thought he was guilty. BOA at 11-13, 43;BOR at 14-15. Rather, the state contends "the complained of portions of the video are not impermissible opinion testimony." BOR at 15-16.

While the state concedes "it would be improper to submit testimony at trial that someone believed Appellant was guilty," the state seemingly argues there was no error because: (1) the officers during the interview (or the family members alluded to) were not under oath; and (2) the purpose of including that portion of the interview was to provide context and to impeach the defendant's credibility. BOR at 15-16 (relying on minority view expressed in State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001)).

Demery was arrested for robbery and kidnapping after he took money from Thomas Kelly at gunpoint and forced him to go to

a bank to withdraw more funds. Demery, 144 Wn.2d at 755-56. During the course of a subsequent interview with police, the detectives made statements suggesting that Demery was lying about his version of events. For example, during the interview, one of the detectives said the gun had, or would have, Demery's fingerprints on it and that he needed "to start tellin' the truth." Demery, at 757. These statements were not redacted when the tape and transcript were admitted during Demery's trial. Demery, 144 Wn.2d at 756-57.

As the state points out, the *lead* opinion concluded the detectives' statements during the interview did not constitute impermissible opinions, because they were not offered during live testimony at trial. Demery, 144 Wn.2d at 760. The lead opinion also found significant the fact the statements were offered to provide context for the defendant's responses. Demery, 144 Wn.2d at 761-62.

But the *lead* opinion in Demery was not the *majority*. Justice Sanders' dissent – to which three other justices signed on – held the officers' opinions that Demery was lying were improper opinions, as there is no justifiable difference between allowing recorded statements of what would otherwise be inadmissible as

live testimony. Demery, 144 Wn.2d 767 (Sanders, J., dissenting) ("It matters not whether the opinion was rendered in the context of an interrogation interview or in context of direct testimony in open court. The end result is the same: The jury hears the officer's opinion.").

The concurrence agreed with the dissent that the officers' accusations were improper opinions that should have been redacted. Demery, 144 Wn.2d at 765 (Alexander, J., concurring) ("As Justice Sanders correctly observes, the officer's accusation was opinion evidence regarding Demery's veracity and would not have been admissible pursuant to ER 608(a) in live testimony and, consequently, should not have been admitted in recorded form). Accordingly, the majority held the officers' statements constituted impermissible opinion *evidence* that should not have been admitted.

Whereas the dissent would have reversed based on the error, the concurrence found the error harmless, and therefore, concurred in the result reached by the lead opinion. Demery, 144 Wn.2d at 765-767.

Accordingly, the state's distinction here between testimonial opinions on guilt and recorded ones should be rejected. See

Demery, 144 Wn.2d at 769-770 (Sanders, J., dissenting). Moreover, none of the justices in the majority who found the statements were wrongly admitted were persuaded by the argument that the opinions were offered merely to provide context to Demery's responses. Demery, 144 Wn.2d at 771 (Sanders, J., dissenting). Accordingly, the discussion thereof in the state's brief (BOR at 16-18) is completely irrelevant.

4. DEFENSE COUNSEL'S FAILURE TO REQUEST A LIMITING INSTRUCTION CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

As the state touches on in its brief, both the lead and dissenting opinions discussed the need for a limiting instruction when third party statements are admitted to provide "context" to a defendant's responses. Demery, 144 Wn.2d at 762-63; Demery, 144 Wn.2d at 771(Sanders, J., dissenting). As the lead opinion in Demery held, however, the court's failure to give one in Demery's case was excusable because "the jury clearly understood from the officer's testimony that the statements were offered solely to provide context to the defendant's relevant responses." Demery, 144 Wn.2d at 762. But as noted above, this portion of the majority opinion was backed by only four justices; the concurring opinion concurred in the result only.

And as the dissent criticized:

> Although the majority admits, "when the trial court admits third party statements to provide context to a defendant's responses, the trial court should give a limiting instruction to the jury, explaining that only the defendant's responses, and not the third party's statements, should be considered as evidence." Majority at 1283. But, in its next breath, the majority excuses the fact that there was no limiting instruction given here. Id. See also Resp't's Suppl. Br. at 8, Clerk's Papers at 38-60. Incredibly, the majority concludes a curative instruction was not necessary "because the jury clearly understood from the officers' testimony that the statements were offered solely to provide context to the defendant's relevant responses." Majority at 1283. Here I am at a disadvantage. Unlike the majority I cannot read minds, especially the minds of jurors. Rather I am limited to a review of the evidence that went to the jury and the instructions provided by the court.
>
> This lack of limiting instruction also distinguishes this case from Dubria v. Smith, 224 F.3d 995 (9th Cir.2000), cert. denied, 531 U.S. 1148, 121 S.Ct. 1089, 148 L.Ed.2d 963 (2001), upon which the majority mistakenly relies. Dubria was convicted of murder, rape, and other offenses after a jury was permitted to hear a taped interview in which a police investigator accused him of lying. Dubria, 224 F.3d at 997. The Ninth Circuit held, "[E]ven if it was error to admit the tapes and transcripts without redacting Detective Detar's statements, any error was cured by the judge's two cautionary instructions." Id. at 1002 (emphasis added).

Demery, 144 Wn.2d at 771-772 (Sanders, J., dissenting).

Here, the jury was permitted to hear evidence that those closest to Foley – his own family members – believed him to be

guilty. To the extent a limiting instruction could have obviated the error, defense counsel was ineffective in failing to request one. As the majority and dissent discuss in Demery, it would have been easy to fashion one instructing jurors any statements by third parties should not be considered as evidence, only the defendant's responses.

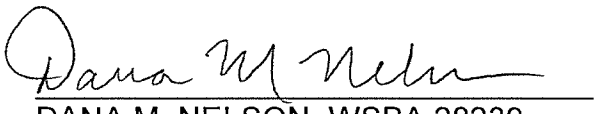
C. CONCLUSION

For the reasons stated in this reply and Foley's opening brief, this Court should reverse his conviction.

Dated this 11th day of January, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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State v. Christopher Foley

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Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 11th day of January, 2013, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 11th day of January, 2013.

X Patrick Mayovsky