NO. 30219-9-III

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

CHRISTOPHER FOLEY

Defendant/Appellant.

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant's allegations of error in this case are not supported by a reasonable view of the record and the jury's verdict should be affirmed.

The State has never shied away from the fact that proving that the Appellant killed his brother-in-law, Russell Ray, was based upon reasonable inferences drawn from the circumstances that came out of the direct evidence collected as a result of a complicated and imperfect investigation. RP 541.

Without the classic "smoking gun" at its disposal, the evidence as to who killed Russel Ray could be likened to another cliché: motive, opportunity and means. BRP 63.

RESPONSE TO ASSIGNMENTS OF ERROR

1. Admission of ER 404(b) evidence was reasonable and based upon the correct application of law.

2. Sufficient evidence existed to support instructing the jury on lesser-included charges.

3. The State did not commit prosecutorial misconduct by not redacting portions of the video of Appellant's interview where detectives say that Appellant's wife thought the victim was dead

and that some members of Appellant's family thought he was involved in victim's disappearance.

4. Appellant did not receive ineffective assistance of counsel for failing to request a limiting instruction regarding the playing of the video of Appellant's interview to the jury.

STATEMENT OF THE CASE

Making a complete Statement of the Case is especially challenging in this matter due to the case being focused on what the victim and Appellant did with neither of them testifying (the victim being deceased and the Appellant exercising his right to not testify). The State hereby adopts most of the statement of the case prepared by Appellant's counsel, including foot-noted references to the trial proceedings, with several additions and one correction.

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 when at that point said portion had not been prohibited. RP 179-81. Likewise, it is inaccurate to state that the "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 lawyer and whether he would take a polygraph. RP 1639-42

The following portions of the trial record need to be added to the Statement of the Case as presented in the Appellant's Brief in order to more fully present the case to the court:

Sheriff's Deputy Chris Whitsett testified at trial that in his phone conversation with Appellant, the deputy never advised the Appellant he was a suspect or used the term "suspect" in any manner. RP 945-46. In addition, during Deputy Whitsett's testimony at trial, a stipulation was presented to the jury in which plaintiff's exhibit 14 was admitted into evidence and published for the jury to read. RP 986-88. Plaintiff's exhibit 14 was a redacted copy of a letter sent to the sheriff's office by Appellant's first attorney in which the attorney relayed Appellant's statements that the sheriff's office considered the Appellant a "suspect" in the victim's disappearance and that the victim had "left two wives in the

past and has a history of simply leaving with the clothes on his back and no notice to anyone." RP 983 and Plaintiff's exhibit 14.

One of the victim's ex-wives, Beth Lotspeich, testified at trial that when her relationship ended with the victim that it did not come as a surprise and had been discussed in advance. RP 1014-16.

The victim's other ex-wife, Susan Tharp, testified at trial that she was the one who moved out and that was hurtful to the victim because she had a new boyfriend. RP 1019-22.

Sheriff's Corporal James Woody and Search and Rescue Volunteer Robert Armijo testified at trial regarding the discovery of the bloody 2x10 board inside a stall in the barn on the victim's property. RP 1054-59 and 1082-86.

Megan Lucas, niece by marriage to both Appellant and victim, testified at trial that Appellant stayed with her family in Shelton during the work week due to the long commute from Ellensburg to his job in Olympia. RP 1446-47. Ms. Lucas also testified that on the first evening Appellant spent at her home after returning from the trip to California that Appellant had complained to her that tools were missing from his truck and he suspected the victim was involved. RP 1450-52. Ms. Lucas also testified that a few days later, after it was known that the victim was missing, she

heard Appellant discuss a problem regarding her husband's truck and Appellant offered to switch tires with his truck because "that way the tread wouldn't match." RP 1458-60.

Sheriff's Detective Greg Bannister testified that he and Detective Darren Higashiyama were given the opportunity to interview Appellant with his first attorney on July 23, 2010, and that toward the beginning of the interview the attorney presented a two-page written statement from Appellant describing where he was and what he was doing during the time surrounding the victim's disappearance. RP 1384. In that written statement Appellant included his claim that on June 22, 2010, he arrived at the parking lot near his worksite in Olympia at 4:30 a.m. and that he paid for parking at 5:13 a.m. RP 1386-87.

ARGUMENT

1. Admission of ER 404(b) evidence was reasonable and based upon the correct application of law.

Prior to trial, the State provided notice that it intended to present evidence pertaining to three specific acts which related to a physical altercation between the two men in May 2009, a verbal altercation between the two men in May 2009 and a physical

altercation between the two men involving a 4x4 board in May 2010. CP 279-281.

The State's notice filing was accompanied by an affidavit and a memorandum of support for the admission of these incidents under ER 404(b) for the specific purpose of helping to establish motive, opportunity, intent, identity and the absence of mistake or accident.

These incidents were a small but important part of the overall case presented to the jury that Appellant had killed the victim in that they connected the dispute over tools to violence between the two men. The trial judge recognized this in one of the several hearings on this matter when he observed "it's the tools that's driving this whole thing." RP 156.

Interpretation of an evidentiary rule is a question of law, which the appellate courts review de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The standard of review for a trial court's ruling on ER 404(b) evidence is for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). A decision is

manifestly unreasonable if the court adopted a position no reasonable person would take. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). A decision rests on untenable grounds when the trial court applies the wrong legal standard or relies on unsupported facts. Id.

ER 404(b) forbids admitting evidence of a person's other crimes, wrongs, or acts to prove a person's character to show that the person acted in conformity therewith. State v. Kipp __ Wn.App. ___, 286 P.3d 68, 72 (2012). However, ER 404(b) does not forbid such "other acts" evidence admitted for other purposes, such as to establish motive, opportunity, intent, identity and the absence of mistake or accident. These were the precise purposes for submitting evidence of the aforementioned incidents that occurred between Appellant and the victim prior to Appellant killing the victim on June 21 or 22, 2010.

In order for "other acts" evidence to be properly admitted under ER 404(b), it "must be '(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or rebut a defense, and (4) more probative than prejudicial.' "

DeVincentis, 150 Wn.2d at 17 (quoting State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)).

This analysis must be conducted on the record and if the evidence is admitted, a limiting instruction must be given to the jury. Foxhoven, 161 Wn.2d at 175. In this case, there were at least three distinct points where this evidence was considered by the court on the record. RP 144-167, 273-282, and 319-323. The following limiting instruction was given to the jury:

> Instruction Number Eight – Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of an allegation regarding an incident where Christopher Foley was alleged to have punched Russel Ray at a job site in north Ellensburg, an allegation regarding an incident where Christopher Foley was alleged to have a verbal altercation with Russel Ray at a gas station about tools, and an allegation regarding an incident where Christopher Foley was alleged to have confronted Russel Ray in Christopher Foley's shop and struck Russel Ray with a 4x4. You may only consider this testimony for the purpose of establishing motive, opportunity, intent or absence of mistake or accident. You must not consider the evidence for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation. BRP 53

Appellant only claims error by the trial court admitting evidence of the third incident, which involved Appellant striking the victim with a 4x4 piece of lumber. The particular error complained of is that the State did not prove by a preponderance of the

evidence that the incident happened and because its prejudicial effect far outweighed its probative value.

a. The State proved by a preponderance of the evidence that the 4x4 incident happened.

A trial court is not required to conduct an evidentiary hearing prior to admitting "other acts" evidence where an offer of proof is presented by the state. State v. Kilgore, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002).

The State met its burden initially at a hearing on June 10, 2011, in the form of a lengthy proffer accompanied by an involved discussion between the court and both parties. RP 144-168. This was followed by another hearing on the matter on July 29, 2011, wherein the Appellant presented a counter-proffer and again was accompanied by an involved discussion between the court and both parties. RP 273-283.

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 this incident occurred and entered an order accordingly. RP 282, 496.

b. The trial court appropriately found that the 4x4 incident was more probative than prejudicial.

In determining whether the proposed "other acts" evidence is more probative than prejudicial, the appellate court looks at the records as a whole to determine whether the trial court articulated the balancing of these two aspects. State v. Powell, 126 Wn.2d 244, 264-265, 893 P.2d 615 (1995).

To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves. State v. Wade, 98 Wn.App. 328, 335, 989 P.2d 576 (1999). It is the fact of the prior acts, not the propensity of the actor, that establish the permissive inference admissible under ER 404(b). Id.

Numerous times during the initial pretrial proceeding on June 10, 2011, where "other acts" evidence was first considered, the trial court demonstrated its balancing of the probative and prejudicial nature of this evidence. The conclusion of the court was that all three "other acts" incidents pertained to the ongoing dispute between Appellant and the victim over tools, that they were probative of motive, opportunity, intent or absence of mistake or accident, and that they were not unfairly prejudicial. RP 154, 160 and 166, CP 122-125.

This is particularly apparent in the record when the trial court was balancing the probative and prejudicial aspects of the 4x4 board incident, when it stated "This again just goes right back to the motive or intent or absence of mistake is (sic) sure this comes in ... Yeah, it's hard for Mr. Foley that this evidence would come in because it might help prove that he struck Mr. Ray. But that's not the standard. Standard is whether it's unfair ... But I don't think that it is unfair prejudice now. RP 166-167.

2. Sufficient evidence existed to support instructing the jury on lesser included charges.

First and second degree manslaughter are lesser included offenses of intentional murder, and instruction should be given to the jury when supported by the facts. State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997).

First degree manslaughter is committed when a person recklessly causes the death of another person. RCW 9A.32.060(1)(a). Second degree manslaughter is committed when a person, with criminal negligence, causes the death of another person. RCW 9A.32.070.

At the State's request, the trial court gave the lesser included jury instructions for first and second degree manslaughter,

complete with definitions of reckless and criminal negligence. RP 54-55.

"If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) citations omitted.

"When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000) citations omitted. A trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." Id.

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 or accident.

Ultimately, the question on appeal is whether the evidence presented in this case supported an inference that the lesser crime was committed, e.g. could the jury have rationally found that Appellant lacked the intent to kill and yet find that he acted recklessly or negligently in causing the victim's death. Warden, 133 Wn.2d at 564. Indeed, the jury in this case concluded that while the State had proven that Appellant had killed the victim, it was not proven that the killing was done intentionally but only recklessly and the jury returned a guilty verdict of first degree manslaughter. CP 203.

3. The State did not commit prosecutorial misconduct by not redacting portions of the video of Appellant's interview where detectives say that Appellant's wife thought the victim was dead and that some members of Appellant's family thought he was involved in victim's disappearance.

Appellant next complains of the State presenting impermissible opinion testimony by not redacting certain portions of the recorded interview that was played to the jury. Appellant's bases for this complaint are factually deficient.

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. State v. Charlton, 90 Wn.2d 657, 64, 585 P.2d 142 (1978). "[I]in order to prevail on an

allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect." State v. Bin Thach, 126 Wn.App. 297, 316, 106 P.3d 782 (2005), citing State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

A defendant establishes prejudice only if there is a substantial likelihood the instances of misconduct affected the jury's verdict, thereby depriving the defendant of his right to a fair trial. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

Appellant first refers the court back to trial counsel's CrR 7.4 and 7.5 post-conviction motions which included an allegation that the portion of the recorded interview that was played to the jury included assertions by the detectives that the Appellant's wife and the victim's wife did not believe Appellant's version of events. CP 204-258. However, the State refuted such an allegation by demonstrating that no such assertion was made. CP 322-323. The trial court agreed. RP 1686.

Next Appellant points to two sections of the recording as being impermissible opinion testimony where detectives discuss with Appellant why his wife believed the victim to be dead and that some of Appellant's family members are "pointing fingers" at

Appellant as being involved with the victim's disappearance. Appellant's Brief, pages 11-13.

Appellant's ensuing argument is that the State flagrantly and ill-intentionally violated the trial court's pretrial order excluding testimony as to opinions of guilt. To the contrary, the State did not violate the court's order due to the simple fact that the complained of portions of the video are not impermissible opinion testimony.

Appellant correctly states that it would be improper to submit testimony at trial that someone believed Appellant was guilty and listed two cases as examples that supported this proposition. State v. Dolan, 118 Wn.App. 323, 73 P.3d 1011 (2003), and State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). However, Dolan is easily distinguished from the case at hand, because there the issue involved direct testimony at trial of a police officer and a social worker that implied an opinion of Dolan's guilt.

Demery, on the other hand, is much more similar to what happened in this case and the conclusion of the court was that there had not been impermissible opinion testimony presented at trial. Demery at 765.

The issue in Demery surrounded a recorded interview of Demery by police officers which contained a portion wherein the

officers confronted Demery with their opinion that he was lying. The recorded interview was subsequently played without redaction at trial. Id. at 756-757

The Demery court considered two things: whether the statements by police in the recorded interview was "opinion testimony" and for what purpose was that portion of the interview presented to the jury. Id. at 759 and 761. The court concluded that "[b]ecause the officers' statements were not made under oath at trial, we conclude that they do not fall within the definition of opinion testimony for purposes of evidentiary prohibition." Id. at 760.

The court also observed that the purpose of including that portion of the recorded interview in the presentation of evidence was to provide context and were admissible to impeach the defendant's credibility. Id. at 761.

This is precisely the situation with the case at hand, as the trial court observed that the state's use of Appellant's interview was to "[c]reate a case against him to impeach. That's the whole purpose of what this trial is about." RP 1644. An important part of the State's case was taking Appellant's false claims and demonstrating to the jury how that was proof of his guilt. Playing the video was integral in that effort. It should also be noted that

specific portions of the video that were objected by Appellant's trial counsel (advisement of rights, reference to polygraph and questions regarding why an attorney was needed) were not presented to the jury. CP 322.

4. Appellant did not receive ineffective assistance of counsel for failing to request a limiting instruction regarding the playing of the video of Appellant's interview to the jury.

Appellant next claims that he was deprived effective assistance of counsel because his trial attorney did not accept the trial court's offer to issue a limiting instruction regarding the portions of the recorded interview that are claimed to be impermissible opinion testimony.

A defendant claiming ineffective assistance of counsel must show both deficient performance and resulting prejudice. State v. Pearsall, 156 Wn.App. 357, 361, 231 P.3d 849 (2010), citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts engage in a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995) citations omitted.

Appellant's trial counsel was not deficient in his performance for not getting a limiting instruction regarding these two portions of the recorded interview. It is true that "when the trial court admits

third party statements to provide context to a defendant's response, the trial court should give a limiting instruction to the theory, explaining that only the defendant's responses, and not the third party's statement should be considered as evidence." Demery at 761-762. However, in Demery and in the case at hand, "[s]uch a limiting instruction was not required in this case because the jury clearly understood from the officer's testimony that the statements were offered solely to provide context to the defendant's relevant statements." Id. at 762.

Should the court determine that not getting a limiting instruction was deficient performance there has been no showing by Appellant that he was prejudiced by it. Again, the Demery court made a distinction between opinion testimony given at trial by a police officer versus the jury hearing the officer's opinion as it is expressed to a defendant in a pretrial interview. Id. The former has an "aura of special reliability and trustworthiness" while the latter are "not the types of statements that carry any special aura of reliability." Id. at 763, citations omitted.

CONCLUSION

The trial court's exercise of discretion by allowing ER 404(b) evidence was reasonable and based upon the correct application of

law. Its analysis was conducted on the record and the appropriate limiting instruction was given to the jury.

In addition, there was sufficient evidence in the record to support the trial court giving the lesser included instruction allowing the jury to consider first and second degree manslaughter if they jury determined there was not sufficient evidence to prove second degree murder.

Further, playing portions of the recorded interview which included discussions with detectives about why Appellant's wife believed the victim to be dead and that some of Appellant's family members are "pointing fingers" at Appellant was not impermissible opinion testimony and Appellant's trial counsel was not ineffective for not asking for a limiting instruction.

For all of these reasons the State requests that Appellant's appeal be denied.

Respectfully submitted on October 30, 2012.

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APPELLATE COURT FOR THE STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,	)	
	)	No. 302199-3-III
Plaintiff/Respondent.	)	
	)	AFFIDAVIT OF MAILING
CHRISTOPER M. FOLEY,	)	
	)	
Defendant/Appellant.	)	
	)	

STATE OF WASHINGTON)
) ss.
County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 30th day of October, 2012, affiant deposited into the mail of the United States a properly stamped and addressed envelope directed to:

Renee Townsley	Dana Nelson
Court of Appeals	Nielsen Broman & Koch PLLC
Division III	1908 E. Madison Street
500 N. Cedar	Seattle, WA 98122
Spokane, WA 99210	

containing copies of the following documents:

(1) Affidavit of Mailing
(2) Respondent's Brief

SIGNED AND SWORN to (or affirmed) before me on this 30th day of October, 2012.

ROBIN S RAAP NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES JANUARY 15, 2013

NOTARY PUBLIC in and for the State of Washington.
My Appointment Expires: 1/15/13