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Nov 27, 2012  
Court of Appeals  
Division III  
State of Washington

29048-4-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TANSY FAY MATHIS,

Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT  
Honorable Ted W. Small

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

**1. The decision in Nunez is dispositive of Appellant Mathis’ first issue.**

In her opening brief, Ms. Mathis argued that the aggravating circumstances and deadly weapon special verdicts should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts. Brief of Appellant 6–15. In a recent decision, State v. Nunez, the Washington Supreme Court overruled several prior decisions and concluded that juries are properly instructed when told they must be unanimous in order to reject aggravating circumstances alleged on special verdict forms. 174 Wn. 2d 707, 285 P.3d 21 June 7, 2012). Ms. Mathis concedes that Nunez controls resolution of this issue.

**2. The aggravating factor special verdict regarding commission of murder pursuant to an agreement to be compensated must be vacated because the “accomplice” language of the instruction allowed application of the aggravating factor without a finding that it specifically applied to Ms. Mathis.**

An aggravating factor for premeditated murder includes whether “[t]he person committed the murder pursuant to an agreement that he or

she would receive money or any other thing of value for committing the murder.” RCW 10.95.020(4). The aggravating factors instruction at issue in this case reads in pertinent part:

Instruction No. 10: If you find the defendant, Tansy Mathis, guilty or premeditated murder in the first degree [], you must then determine whether any of the following aggravating circumstance[s] exist[s]:

1. The *defendant, Tansy Mathis or one with whom she was an accomplice* committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder; ...

...

For any of the aggravating circumstance[s] to apply, the defendant, Tansy Mathis, must have been a major participant in acts causing the death of Michelle Kitterman and the aggravating factors must specifically apply to the defendant’s actions. ...

CP 29 (emphasis added).

The argument on appeal is that the accomplice language highlighted above allowed the jury to attribute the aggravating factor to Ms. Mathis without a finding that she possessed the requisite mens rea, i.e. “pursuant to an agreement that she would receive money or any other thing of value for committing the murder.” Brief of Appellant 16–20; *see In re Howerton*, 109 Wn. App 494, 501–02, 36 P.3d 565, 569 (2001) (language that aggravating factor applied if “the *defendant or an accomplice* committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime” erroneously

allowed possible application of the aggravating factor based on accomplice's motivation to conceal murder without evidence that Howerton shared the same motivation).

Here there is no evidence that Ms. Mathis did anything "pursuant to an agreement that she would receive money or any other thing of value". In fact, the record supports the opposite conclusion. According to Phillips, Ms. Mathis made phone calls to the "person paying the other half to get the [job] done" and later gave Phillips an envelope with \$500 cash in it. RP 806, 840. Without evidence that Ms. Mathis was motivated by an expectation of compensation, the jury could have improperly relied on Phillips' or Richards' motivation in finding that the aggravating factor applied. *See* Brief of Appellant 18–19.

The State does not address and therefore appears to concede that Instruction 10's requirement that Ms. Mathis be a "major participant" does not save the instructional error because the language is directed to her "participa[tion] in acts causing the death" of the victim rather than to her motivation for the participation as required in order to apply the aggravating factor. *See* Instruction 10 at CP 29.

Without citation to authority, the State overall responds that Ms. Mathis' argument is "completely without merit" in light of Instruction 10's language directing that "... the aggravating factors must specifically apply to the defendant's actions." Brief of Respondent 28. This language does not save the instructional error because it is essentially meaningless and inconsistent, where the jury was erroneously instructed it could apply the aggravating factor if it found that the "defendant or an accomplice" committed murder based on an agreement that "he or she" would receive compensation. *Compare* this language *with* RCW 10.95.020(4) (A person is guilty of aggravated first degree murder ...if he or she commits first degree murder ... and ...the following aggravating circumstance[] exist[s]: ... (4) [*t*]he person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder ... ).

Because the "accomplice" language of the instruction allowed application of the aggravating factor without a finding that it specifically applied to Ms. Mathis, the finding was in error and should be vacated. *See Howerton*, 109 Wn. App. at 501–02.

B. CONCLUSION

For the reasons stated here and in the initial brief of appellant, the aggravating factor special verdict regarding commission of murder pursuant to an agreement to be compensated should be vacated and the case remanded for resentencing.

Respectfully submitted on November 26, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 26, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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