NO. 31385-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DODD,

Appellant.

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

The Honorable Donald Schacht, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED DODD'S RIGHT TO PRESENT A DEFENSE BY PROHIBITING "OTHER SUSPECT" EVIDENCE.

Daniel Dodd sought to introduce the testimony of Sheyne Thrall, who had specific information that Clifford Fauver, not Dodd, shot and killed Kevin Myrick. Thrall's anticipated testimony included specific information about Fauver's identity, motive, movements before and after the shooting, and type of pistol used. RP 86-88, 690-95; Brief of Appellant (BOA) at 18-23. The court excluded Thrall's testimony, concluding there was not a sufficient nexus between the evidence and Fauver's alleged involvement in the case. RP 88-89, 699.

Dodd contends, for reasons set forth more fully in the opening brief, that the trial court erred when it excluded Thrall's testimony, thereby depriving Dodd of the opportunity to present his defense. BOA at 15-23. The State maintains the court properly exercised its discretion. Brief of Respondent (BOR) at 10-18. For the following reasons, Dodd asks this Court to reject the State's arguments.

Both the United States and Washington constitutions guarantee criminal defendants a meaningful opportunity to present a complete defense. U.S. Const. amend. VI, XIV; Wash. Const. art. I, § 21. When the defense proffers evidence that someone other than the defendant

committed the offense, a trial court may exclude that evidence only if it is repetitive or poses an undue risk of prejudice or confusion. Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citing Crane v. Kentucky, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). "Other suspect" evidence is therefore admissible when "there is a train of facts or circumstances as tend clearly to point to someone besides the accused as the guilty party." State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932).

Dodd maintains Thrall's information satisfied the standard for "other suspect" evidence under Downs and State v. Maupin.[1] BOA at 18-23. Thrall was prepared to provide information only the shooter would know, the information was consistent with other defense evidence, and it was critical to the defense case. BOA at 18-23.

The State cites State v. Strizheus[2] for the proposition that the constitutional right to a defense is not absolute and does not extend to irrelevant or inadmissible evidence. BOR at 10-11. Strizheus is factually distinguishable. On the day of the incident that gave rise to an attempted second degree murder charge, Strizheus' wife, Valentina, ran out of the

[1] 128 Wn.2d 918, 927, 913 P.2d 808 (1996).

[2] 163 Wn. App. 820, 262 P.3d 100 (2011), rev. denied, 173 Wn.2d 1030 (2012).

family home covered in blood and told her neighbor that her "husband had stabbed her with a knife." Valentina also told police her "husband" had hurt her. Strizheus, 163 Wn. App. at 823.

Seven months after the stabbing, Vladimir called 911 and reported he did "something that he felt bad about." When police arrived they found Vladimir was intoxicated and alternating his behavior between aggressive paranoia, crying and rambling. Vladimir told police that he should be in jail. Strizheus, 163 Wn. App. at 824-25. One officer reported Vladimir said he "stabbed his mother and father." Strizheus, 163 Wn. App. at 826.

At trial, Strizheus sought to introduce evidence that Vladimir stabbed Valentina. Strizheus argued Vladimir's statements to the police, a malicious mischief conviction, an assault incident against Valentina, and evidence that police were called to the residence several times in the months before the stabbing, met the requirements to admit evidence that Vladimir committed the crime. The defense further sought to introduce evidence that Vladimir was angry at Strizheus because Strizheus allegedly had sex with Vladimir's girlfriend. Strizheus, 163 Wn. App. at 826. The trial court excluded the evidence. Strizheus, 163 Wn. App. at 826-27.

On appeal, Strizheus argued the trial court violated his constitutional right to present a defense by excluding Vladimir's statement that he stabbed his parents. Strizheus, 163 Wn. App. at 829. Strizheus

claimed the statement alone established the nexus required to admit evidence showing Vladimir committed the crime. Strizheus, 163 Wn. App. at 829.

The Court found Vladimir's inculpatory statement alone failed to establish a nexus between Vladimir and the crime. For example, there was no physical evidence connecting Vladimir to the crime, no eyewitness placed Vladimir at the scene, and Valentina never identified Vladimir as her attacker. Additionally, no witness presented evidence contravening the State's version of events and there was no evidence of any step taken by Vladimir that indicated intent to act on his alleged motive. The Court concluded the evidence was properly excluded. Strizheus, 163 Wn. App. at 832-33.

Unlike Strizheus, the evidence provided by Thrall went beyond Fauver's inculpatory statement. As an offer of proof, the trial court heard evidence linking Fauver and Clayton Sibbett to Myrick's murder. Thrall was prepared to testify Sibbett had asked Fauver to shoot Myrick in order to clear a debt of $2,500 owed by Fauver to Sibbett. Thrall had information about the shooter's movements before the shooting and escape route after, as well as the type of pistol used to shoot Myrick. BOA at 18.

Sibbett was already connected with Myrick's death as the person who allegedly loaned the gun to Dodd. In contrast to Sibbett's testimony that all he did was loan Dodd a gun before the shooting, Thrall's information demonstrated Sibbett was directly involved in Myrick's death. BOA at 18-19.

Moreover, Thrall said the murder weapon was a .380 automatic pistol. His claim is consistent with the testimony of Michael Avery and forensic scientist Gaylan Warren. Contrary to what Sibbett and Cumming said, Avery did not believe the .357 pistol discarded in the river was the same gun displayed by Dodd the day before the shooting. Similarly, Warren opined the bullet that killed Myrick could have been fired from either a .357 or .380 semiautomatic pistol. In combination with the other evidence, Thrall's anticipated testimony would have provided further evidence that Dodd was not the shooter. Therefore, due process required its admission. BOA at 19.

The State also suggests Thrall's testimony that Fauver had confessed to him to shooting Myrick was inadmissible hearsay. BOR at 12, 15, 18. Dodd disagrees. An unavailable declarant's statement is not hearsay if it tends to subject the declarant to criminal liability and a reasonable person in the declarant's position would not have made the

statement unless he believed it to be true. ER 804(b)(3).[3] A declarant is unavailable when either he testifies to a lack of memory of the statement or is absent from the proceeding despite an attempt to secure his presence. ER 804(a)(3), (5). Fauver did not testify at trial.

"Statements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true." State v. Chenoweth, 160 Wn.2d 454, 483, 158 P.3d 595 (2007). A statement against the declarant's interest is "not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." ER 804(b)(3). Courts assess the adequacy of corroborating circumstances by evaluating nine factors. State v. Young, 160 Wn.2d 799, 811, 161 P.3d 967 (2007) (citing State v. McDonald, 138 Wn.2d 680, 694, 981 P.2d 443 (1999)). Five factors focus on the declarant (apparent motive to lie, character, personal knowledge of other crime participants,

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[3] The rule states in relevant part:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

likelihood of faulty recollection, and likelihood of misrepresentation). Three factors focus on the context of the statement (spontaneity, timing, and relationship between declarant and witness, and presence of more than one witness). One factor—whether the statement contains an express assertion of past facts—involves consideration of the statement's consistency with other independently ascertainable facts. There is no requirement that the past facts be material to the current criminal proceeding or that independent evidence corroborating the facts even be introduced. Young, 160 Wn.2d at 811.

The State argued below that Fauver's statements to Thrall did not satisfy the requirements of ER 804(b)(3). CP 197-98. However, the State did not argue, and the trial court did not find, that any of the Young factors were not satisfied. RP 88-89, 695-700. Rather, the State argued the statement was "inherently untrustworthy" because Thrall was in jail at the time he disclosed Fauver's statements to him. CP 197-98. But the focus is not on the timing of Thrall's disclosure, but rather on the trustworthiness of Fauver's disclosure. See State v. Hoskinson, 48 Wn. App. 66, 75, 737 P.2d 1041 (1987) (statements were suspicious because they were made after arrest of declarant, who had motive to shift blame to the defendant).

There can be no question Fauver's disclosure to Thrall tends to subject the declarant to criminal liability and a reasonable person in the declarant's position would not have made the statement unless he believed it to be true. For the aforesaid reasons, Thrall's testimony satisfied the standard for "other suspect" evidence. Dodd was therefore entitled to present evidence identifying Sibbett and Fauver as other suspects. The trial court erred in excluding the evidence.

2. THE TRIAL COURT'S COMMENT ON THE EVIDENCE DENIED DODD A FAIR TRIAL.

During trial, the court stated there was "testimony establishing that Charles Wilson was in custody," at the time Kevin Myrick was shot. Dodd argues the trial judge's remark constitutes a comment on the evidence. BOA at 23-29.

The state suggests the trial court's comment "was a simple fact" that the evidence showed Wilson was in jail at the time of the shooting. BOR at 21. This argument misses the point. It is the jury's job to decide what the evidence does or does not establish. The judge's comment conveyed to the jury his personal opinion concerning what the evidence showed and the credibility of a police officer's testimony about that evidence. The jury could draw but one conclusion from the trial court's comments: The court believed the testimony of the officers regarding

Wilson's whereabouts the night of the shooting and that evidence was so well established that it was futile to try to challenge the point. BOA at 24-25.

Similarly, the fact that the testimony regarding Wilson's whereabouts was not disputed has no bearing on the issue. It is the State's burden to prove Dodd's guilt beyond a reasonable doubt. Simply because evidence is not disputed does not require the jury to believe that evidence or find the State has met its burden.

The trial court's comment unfairly undermined Dodd's defense theory that someone else was responsible for Myrick's death while simultaneously bolstering the credibility of the police witnesses. The improper comment denied Dodd the right to a fair trial.

B. CONCLUSION

For the reasons discussed above and in the opening brief, this Court should reverse Dodd's convictions and remand for a new trial.

DATED this 24th day of February, 2014.

Respectfully submitted,

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State v. Daniel Dodd

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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 24th day of February, 2014, 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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