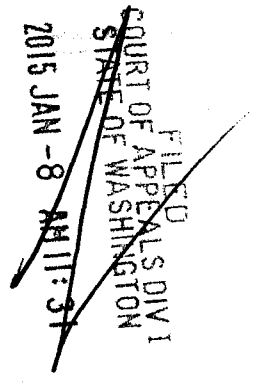
COA Case Number 71162-8-I

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

MARTIN DAVID PIETZ, Jr.,
Petitioner/ Appellant

v.

STATE OF WASHINGTON,
Respondant/ Appellee.



STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
PURSUANT TO RAP 10.10

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(Cover)

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ADDITIONAL GROUND FOR REVIEW #1

The Court erred in admitting Nicole's statement that she believed Peitz was having an affair, and this errer was further compounded when the court used speculation of an argument based on this hearsay evidence to support allowing the state to present inadmissable character evidence.

The court allowed the state to present evidence that Nicole told a co-worker she believed her husband was having an affair. The state argued that the evidence did not qualify as hearsay because: "[i]t would not be offered for the truth of the matter asserted, i.e., that Nicole actually knew the Defendant was having an affair." (CP389). In regard to a victim's extra-

judicial declarations, the State Supreme Court said in Parr, 93 Wn2d 95, 99-100, 606 P.2d 265 (1980)(citing United States v. Brown at 205-206 of 160 USAppDC., at 733-74 of 490 F2d) saying that they:

> "[a]re admissible under the state of mind exception to the hearsay rule with a limiting instruction only if there is a manifest need for such evidence, i.e., if it is relevant to a material issue in the case. Where there is a substantial likelihood of the prejudice to the Defendant's case in the admission of such testimony, it is inadmissable if it bears only a remote or artificial relationship to the legal or factual matters of the case. Even where there is a substantial relevance, the additional factual matters in the statment may be too explosive to be contained by the limiting instruction, in which case exclusion of the testimony is also necessitated."

As was argued by Defense Counsel at trial and in the Brief of Appellant, the victim's state of mind was never made an issue by the Defendant so as to open the door for the state to introduce such evidence. Further, the Court in Parr. supra at 99, [collecting federal cases], emphasized the need for a limiting instruction insuring the jury considers the testimony not for the truth of the matter, but only towards the victim's state of mind. No such instruction was given by the trial court.

The Court in Parr, supra at 104 also emphasized the importance of not introducing hearsay tesitmony regarding the conduct of the Defendant, stating:

> "We do not perceive the necessity of allowing hearsay testimony about conduct of the Defendant to go to the jury. In the interest of protecting both the State's right to disprove accident or self-defense and the Defendant's right

> to a fair trial free of unnecessary and prejudicial evidence which is not subject to cross-examination the trial court should allow the State to prove the victim's declarations about his or her own state of mind, where relevant, but should not permit it to introduce testimony which describes conduct or words of the Defendant."

The admittance of hearsay testimony regarding Mr Pietz's alleged conduct and the lack of a limiting instruction, in combination with the improper admittance of character evidence (as will be shown below) allowed the state to strongly infer to the jury that Pietz was not only unsatisfied with his marriage to Nicole at the time of her death, but that he was having an affair at that time as well, though no substantive evidence of current unsatisfaction or philandering was presented. Precisely the type of statement, not suject to cross-examination and explosive in nature the court in Parr, 93 Wn2d, sought to prevent from being introduced.

The trial court further compounded its error in admitting this hearsay testimony by using speculation based on this testimony to support its admission of prior acts under the guise of motive, which should have been barred by both ER 403 - ER 404(b). "They argued about it [Peitz's alleged infidelity] apparently."; [s]he thought he was having affairs leads to an argument. Argument about it." (1 RP 91, 92). Thorugh no other evidence of an argument regarding infidelity was offered, the trial court used this "arguemnt" a part of its rationale to admit character and propensity evidence.

ADDITIONAL GROUND# 2

The court allowed the state to present evidence that Mr Pietz commited numerous acts of infidelity in 2003 and prior. This evidence should have been excluded under ER 403 and ER 404(b), and its prejudical effect contributed to an unfair trial.

In their trial memorandum, the state argues that since Mr Pietz's propr act of infidelity were not criminal or particularly heinous in nature, (State's trial memorandum, P.20), and that "[t]he charge is murder versus sleeping with other women" (1 RP 60) they therfore did not fall under ER 404(b) as prohibited "Acts". However, in State v Everbodytalksaboutit, the State Supreme Court was very clear: "[a]cts inadmisable under ER 404(b) include any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion." (Everybodytalksaboutit, 145 Wn2d 456, 39 P.3d 300). Here, Pietz's prior "acts" were offered to show his qualities, or lack thereof, as a husband, and that he was acting in conformity with ther prior behavior at the time of Nicole's death, nearly three years after the acts offered into evidence. While not an argument towards criminal propensity, it is a propensity argument none the less; Pietz was dissatisfied (allegedly) with his marriage and sought out other women previously so he must be doing the same now; or, more bluntly: once an adulterer, always an adulterer. However, every instance of marital dissatisfaction

or philandering offered by the state occurred in 2003 or earlier - nearly three years prior to Nicole's death. No evidence of adultry at the time was offered. Nicole's statement to a coworker that she believed Pietz was having an affair was unsupported and was admitted erroneously, to show her state of mind and not for the truth of the matter.

When arguing for the admittance of Pietz's prior acts, the prosecution stated: "[o]therwise this murder happened in a vacuum. There is absolutely nothing to explain it..." (1 RP 54). With a wholly circumstantial case and no basis for a motive, the state sought to conjure one through speculation and a forbidden propensity argument. In this way, without the burden of presenting evidence to the fact, the state was able to imply to the jury that Pietz was having an affair at the time of Nicole's death.

As the state said itself, without the idea that Pietz wa currently having an affair, that he was: "The kind of man who would do something like this." (15 RP 30). There was no basis for a motive for Pietz to murder Nicole and the case exists "in a vacuum". The US 5th Circuit critizied this tactic of admitting prior acts by using motive and intent as "magic passwords who mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." (US v. Goodwin, 492 F2d 1141, 1151 (5th Cir. 1974)).

As the central theme to the state's case was that Pietz was dissatisfied with his marriage to Nicole, and caused that marriage to end through her death. There can be no doubt the use of this propensity argument to create a motive where no existed adversly affected the jury. "Such is the power of character evidence: he typically acts this way, therefore he must have acted this way on the night in question." (Everybodytalksaboutit, 145 Wn2d 456, 39 P.3d 352).

CONCLUSION

These errors contributed to a grossly prejudicial effect and an unfair trial. A new trial is required.

OATH

I, Martin David Pietz, do hearby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge. Dated this ____ day of January, 2015 at the Stafford Creek Corrections Center, Aberdeen, Washington.

Respectfully Submitted,

_____

Martin David Pietz DOC# 370510

DECLARATION OF SERVICE BY MAIL

GR 3.1

No. 71162-8-I

I, MARTIN D PIER JR, declare and say:

That on the 6TH day of JANUARY, 2015, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 71162-8-I:

- MOTION FOR EXTENSION OF TIME FOR STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW;
- STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW;

addressed to the following:

COURT OF APPEALS,
DIVISION I, COURT CLERK
ONE UNION SQUARE
600 UNIVERSITY ST
SEATTLE WA 98101

DAVID M SAUER
KING CO PROSECUTOR
516 3RD AVE STE W554
SEATTLE WA 98104

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 6TH day of JANUARY, 2015 in the City of Aberdeen, County of Grays Harbor, State of Washington.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JAN -8 AM 11:31

Signature

MARTIN D PIER JR
Print Name

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