NO. 92693-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAY KEODARA,

Petitioner.

ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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Washington State:

A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Keodara, No. 70518-1-I, 2015 WL 8122464 (filed Nov. 2, 2015; publication in part ordered Dec. 7, 2015).

C. STATEMENT OF THE CASE[1]

At 2:30 a.m. on a September night in 2011, Say Keodara shot four persons at a bus stop in Seattle. The victims had been drinking, and were quite inebriated. One of the victims had apparently indicated a desire to buy drugs. When Keodara discovered that they lacked the money, he shot them all without further provocation. When the shooting ended, one of the four was dead and the other three were seriously wounded.

A jury convicted Keodara of Murder in the First Degree and three counts of Assault in the First Degree, each with a firearm allegation, and Unlawful Possession of a Firearm in the First

[1] The facts of the crime are taken from the Brief of Respondent, filed in the Court of Appeals on December 12, 2014, at 1-12.

Degree. The trial court imposed a low end standard range sentence of 831 months.

In the published portion of its opinion, the Court of Appeals held that the affidavit in support of the search warrant for Keodara's cell phone lacked sufficient particularity, and failed to establish a nexus between the crimes alleged and the phone. The court nevertheless affirmed the convictions, concluding that failure to suppress the evidence obtained from the phone was harmless beyond a reasonable doubt in light of the untainted evidence of guilt.

In the unpublished portion of the opinion, the court vacated Keodara's sentence and remanded for a new sentencing hearing at which the trial court could take into account Keodara's youth (17 years old) at the time of these crimes. The court also rejected several claims raised by Keodara in a Statement of Additional Grounds for Review.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

The State submits this Answer solely to clarify factual statements made by Keodara in his Petition for Review. As to the legal issues raised, the State relies on arguments made in the Brief

of Respondent filed in the Court of Appeals, and on the Court of Appeals opinion filed in this case.

The first misleading statements relate to the testimony of Nathan Smallbeck, a friend of Keodara's to whom Keodara had confessed the shooting. Smallbeck, who was living in Wenatchee at the time of the shooting, testified that he got a phone call from Keodara on September 12, 2011. 8RP 33, 34. Smallbeck remembered looking at the time – he recalled that the screen on his phone said 3:18 a.m. 8RP 36. Keodara told Smallbeck that he had just shot at a bus station, and he wanted to come and stay with Smallbeck. 8RP 34-35. Smallbeck, not wanting to get into trouble, turned his friend down. 8RP 35.

Smallbeck further testified that Keodara called him again around 11:00 that morning. 8RP 36. This time, Keodara told Smallbeck that he had a "9mm," and that he knew he had hit someone. 8RP 36. Keodara also said that he had shot multiple people, and that the shooting was over a crack deal. 8RP 37.

Keodara asserts that "telephone records showed that this testimony was false." Petition at 7. He goes further, accusing the prosecutor of unethical behavior ("the prosecution knew or should have known it was eliciting false testimony"). Petition at 7.

In making this accusation, Keodara gives an incomplete account of the relevant testimony and evidence. While it is true that phone records did not show a *phone call* from Keodara to Smallbeck at 3:18 a.m. on September 12, the records showed that Smallbeck received a *text message* from Keodara on that date at 3:17:41 a.m. 8RP 47, 54; 9RP 7-8, 27-28, 97, 105. Given the time that had passed between the events testified to and the trial, it is reasonable to attribute the error to simple mistake. This is likely what the jury did, since they convicted Keodara of these crimes. *See* State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (credibility determinations are for the trier of fact, and are not subject to review).

As to Smallbeck's testimony that he received a call from Keodara at 11:00 on that same morning, again Keodara is correct that phone records do not show a call at this time on this date. What Keodara leaves out, however, is the fact that phone records show a call from Keodara to Smallbeck on the next day (September 13, 2011) at 11:08 a.m. lasting 188 seconds. 9RP 33, 160. Again, the difference is more likely due to a failure of memory than to deliberate deception.

Smallbeck's testimony was important, and it is apparent that the jury found him credible. The Court of Appeals correctly set out the test for constitutional harmless error. Keodara, Slip Op. at 12. The court looked at the evidence the State had presented:

> [T]he untainted evidence of Keodara's guilt was strong. Cellular phone tower records placed him near the location of the shooting, two eyewitnesses [Sharon McMillon and Lacana Long] identified him, and another witness [Nathan Smallbeck] testified that Keodara contacted him and told him about the shooting.

Keodara, Slip Op. at 13. At the same time,

> The text messages and photos [from the search of Keodara's phone], while relevant, demonstrated only that Keodara knew [Lacana] Long, to which she testified, and that he commonly wore Hornets' jerseys. The fact that the shooter wore a Hornets' jersey was only one of many pieces of evidence that supported the State's case.

Id. The Court of Appeals correctly concluded that the trial court's denial of the motion to suppress the evidence gained from a search of Keodara's cell phone does not warrant reversal in this case.

For the same reasons set out above, the record does not support Keodara's claim that the State deliberately elicited false testimony. The jury had all of the relevant evidence before it, including the cell phone records, and undoubtedly concluded that

any inconsistencies were due to mistake rather than deliberate falsehood.

The untainted evidence against Keodara, including his admissions to Smallbeck, was overwhelming. The Court of Appeals correctly concluded that the improper admission of evidence from the cell phone search was harmless beyond a reasonable doubt.

Finally, Keodara's discussion of the gun evidence admitted at trial is potentially misleading. His reliance on State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001) to argue that evidence of his possession of a gun unrelated to the crime should not have been admitted at trial could lead this Court to conclude that evidence of his possession of a gun (not used in the shootings at the bus stop) upon his arrest weeks after the shootings was before the jury. This is not the case.

Just prior to Smallbeck's testimony, the trial court ruled that Smallbeck could testify that Keodara, in the immediate aftermath of the shootings, told Smallbeck that he had a 9mm gun. 7RP 88-90. Smallbeck testified to this statement. 8RP 36-37. A firearms

specialist testified that the six fired cartridge cases submitted by the Seattle Police Department were all fired from the same gun, most likely a 9mm Luger semiautomatic. 8RP 168-71. In testimony describing Keodara's arrest in an unrelated incident weeks after the shootings, no mention was made of the 9mm firearm found in the car in which Keodara was apprehended. *See* 10RP 4-25 (testimony of Renton Police Detective Scott Barfield).

Testimony about Keodara's possession of a 9mm firearm *around the time of the shooting* was relevant, and properly admitted as more probative than prejudicial. Any testimony that Keodara possessed an unrelated firearm when he was arrested *weeks after the shootings* was properly excluded. The Court of Appeals recognized this distinction: "Finally, the trial court balanced the probative value and the prejudicial effect when it stated on record that it would only admit evidence of Keodara having the 9mm prior to the shooting, not evidence of other guns or being convicted for possession of the 9mm at the time of his arrest." Keodara, Slip Op. at 18-19. There was no error here.

E. CONCLUSION

This petition should be denied for the reasons set out above, as well as for the reasons provided in the State's briefing in the Court of Appeals, and in the decision of the Court of Appeals.

DATED this 4th day of February, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Jan M. Dwyer for
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, **Nancy P. Collins at nancy@washapp.org,** containing a copy of the **Answer to Petition for Review**, in **STATE V. SAY KEODARA,** Cause No. **92693-0**, in the Supreme Court of the State of Washington.

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

Name

02-04-16

Date

Done in Seattle, Washington

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Subject: Say Sulin Keodara/92693-0

Good afternoon,

Attached is the Answer to Petition for Review, to be filed in the subject case.

Thank you,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecuting Attorney's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-477-9499
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Debbie Dwyer
Senior Deputy Prosecuting Attorney
Attorney for Respondent
King County Prosecuting Attorney's Office