FILED
DEC 09, 2015
Court of Appeals
Division III
State of Washington

NO. 33169-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

RAMON MORFIN, JR.,

Appellant.

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

The Honorable Alexander C. Ekstrom, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE RESPONDENT'S STATEMENT OF THE CASE IS MISLEADING, INACCURATE AND CONTAINS ARGUMENT.

Under RAP 10.3(a), the brief of appellant should contain:

> (5) *Statement of the Case.* A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. RAP 10.3(b). In several respects, the respondent's statement of the case does not conform to RAP 10.3(a).

The state's first paragraph contains argument:

> The Defendant Ramon Morfin was convicted at bench trial of two counts of assault in the first degree. CP 3, 17, 33. He challenges foundational testimony and testimony describing the detective's identification of the Defendant from a video as impermissible "opinion testimony" and questions his trial counsel's tactical use of hearsay.

Brief of Respondent (BOR) at 1-2 (emphasis added). The underlined words are argument not facts. There has been no determination the officer's testimony was foundational or that defense counsel acted tactically.

The state also focuses on evidence suggesting the robbery was gang-related that was offered through Pasco police analysist David Reardon. See Brief of Respondent at 2 (citing 116-19, 123, 119-20). But regarding Reardon's testimony, the court found it was "unduly conclusory" to sustain a finding the shooting was gang-related and that "there was no foundational testimony regarding how those conclusions are reached." RP 165-66. Accordingly, the state's assertions based on Reardon's unhelpful opinions is misleading and not a "fair statement," because the court did not find it credible.

On page 3, the state cites RP 77-79 for the proposition: "Before joining rival gangs, the Defendant and Debbie Villareal had been childhood friends." It's true Paula Villareal testified Morfin and her daughter were friends. RP 77. But when asked if Morfin was "involved in gangs," she testified: "If he – he hung out with them. I don't know if he – just from hearsay." RP 78.

In the same paragraph, the state writes:

> Expert crime analysist Dave Reardon opined that this cross-boundary friendship would have put pressure on the Defendant to demonstrate to his gang that his loyalty to them was superior to his loyalty to an old friend in a rival gang. RP 120-21. Any failure to stand up for his gang could result in loss of street

> reputation and discipline "usually being beat up." RP 122.

BOR at 3.

But again, however, the court did not find Reardon's testimony persuasive:

> Now with respect to the aggravator for gang motivation, that's a slightly different story. There's testimony regarding affiliation. There certainly is, and those are rival gangs in opposition. But here the Court finds that that testimony was by its nature unduly conclusory to sustain that particular finding. It's not that Mr. Reardon wouldn't have been able to provide that information, but he was simply asked questions that leap out to the Court's mind as to the differentiation between affiliation and friendship, how those criteria are assessed, and how an individual's placed into one category versus another. Well, there was a stipulation as to his expert credentials. In this instance there was no foundational testimony regarding how those conclusions are reached. There was testimony regarding a "XF3" tattoo on the defendant's stomach, which again one could surmise means F13, and there was some testimony as to it being a gang tattoo. But again the testimony there and foundationally, the tie goes to the runner. So the Court will not find that.

RP 166.

On page 4 of its brief, the state writes: "Detective Nebeker has had multiple contacts with the Defendant over eleven years, so as to be able to identify him *with confidence.*" BOR at 4 (emphasis added). The emphasized language is the state's characterization

of Nebeker's ability to identify Morfin, not the detective's testimony. RP 30-31, 57-58. In fact, while the detective testified Morfin was a person who ran away from him eleven years ago, he also stated: "we have not talked face to face a whole lot." RP 57-58. Moreover, Nebeker testified: "it could go a long stretch where there have been several years where I have not talked to him face to face." RP 58.

On page 5 of its brief, the state writes: "Because Manuel Ramirez was already in custody, the detective questioned him about the shooting." BOR at 5 (citing RP 37). However, detective Nebeker testified only that he interviewed Ramirez. RP 37.

The state also writes:

> Mr. Ramirez and everyone who had been gathered around the Mercedes immediately prior to the shooting could be considered an accomplice to the crime. RP 48. They would have reasons to cover their tracks, and indeed Mr. Ramirez moved the Mercedes away from the shell casings. RP 48, 128. RP 18, 23, 38, 56. In the video he appears to pick something up from the passenger side of the car before returning to the motel. CP 35. The pistol was never found. RP 53.

BOR at 5 (emphasis added). For the proposition "In the video he appears to pick something up from the passenger side of the car before returning to the motel" the state cites the department of

corrections' Presentence Investigation Report prepared for sentencing. CP 34-44. It was not evidence before the court.

On page 5 and 6 of its brief, the state describes Nebeker's testimony about the substance of the video before it was played for the court as follows:

> At the bench trial, <u>in laying a foundation</u> before offering the video exhibit for admission, the prosecutor asked the detective to describe the subject matter of the video. RP 17.

The state's assertion as fact the prosecutor was "laying a foundation" is argument. There was no such articulation or limitation. RP 17.

Moreover, immediately before asking about the *substance* of the video, the prosecutor elicited the following:

> Q. [prosecutor] Now you testified earlier that you spoke with the manager of the Motel 6 that night?
>
> A. [Nebeker] Yes.
>
> Q. And did you review the surveillance video at the Motel 6?
>
> A. I did.
>
> Q. And did you ask for a copy of that?
>
> A. I did.
>
> Q. And did you get a chance to review that video this morning in my office?

> A. I did.
>
> Q. Did it truly and accurately reflect what you saw that night on the videotape at the Motel 6?
>
> A. It did.
>
> MR. CHOW [prosecutor]: I'm going to ask the Court to mark this as state's identification.
>
> THE CLERK: The state's identification number 1 has been marked.
>
> Q. Now did watching that video this morning refresh your recollection as to what you saw?
>
> A. It did.
>
> Q. And what's in this video? Can you describe to the Court what's there?

RP 16-17.

Regarding Sergeant Gregory's familiarity with Morfin, the state claims: "Although less familiar with the Defendant than with the Martineces, the sergeant had known him prior to the shooting investigation." BOR at 7 (citing RP 108-09). In actuality, the sergeant did not know Morfin at all, as his testimony establishes:

> Q. [prosecutor]: Do you know if David Martinez is a gang member?
>
> A. [Sergeant Bradford Gregory]: Yes, he's admitted to me being an F13 Florence gang member.
>
> Q. What about his brother Jose?

A. He is also a Florence gang member that I knew at the time.

Q. And Ramon Morfin?

A. I didn't know him well enough to know what his affiliations were at the time.

Q. Had you ever dealt with Morfin, even in the past?

A. Not that I recall. I think I'd seen him before, but I don't know that I'd actually dealt with him."

RP 108-109 (emphasis added).

2. DETECTIVE NEBEKER'S AND SERGEANT GREGORY'S IDENTIFICATION OF MORFIN AS THE SHOOTER DEPICTED IN A BLURRY SURVEILLANCE VIDEO WAS IMPERMISSIBLE OPINION TESTIMONY.

In his opening appellate brief, Morfin argued he received ineffective assistance of counsel when his attorney failed to move pre-trial to exclude, or in any other way object to, what amounted to impermissible opinion testimony. Brief of Appellant (BOA) at 11-22 (citing inter alia State v. George, 150 Wn. App. 110, 206 P.3d 697 (2009); State v. Hardy, 76 Wn. App. 188, 884 P.2d 8 (1994)). Morfin argued his attorney should have objected to Nebeker's and Gregory's identification of him in the blurry video because neither one had sufficient contact with Morfin to be able to identify him any

better than the fact finder. BOA at 19-20. Morfin was prejudiced by his attorney's deficient performance in failing to object because the court relied on these identifications to convict him. BOA at 21 (citing RP 165).

In response, the state makes various claims as to why the officers' testimony was admissible and therefore counsel's failure to object reasonable. For the reasons stated below, each of these claims should be rejected.

First, the state accuses Morfin of attempting to "avoid this preservation requirement," by "reframing the admission of testimony as ineffective assistance of counsel." BOR at 9. But Morfin had the right to effective assistance of counsel at trial. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). And it is well settled that failure to object to inadmissible testimony constitutes deficient performance. See e.g. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987); State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1995), overruled on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Under these authorities, Morfin is asserting his right to effective assistance of counsel, not attempting to avoid anything.

Second, the state argues Nebeker's testimony was foundational and therefore admissible:

> First, the Defendant cannot challenge testimony offered for foundational purposes. Because the determination of admissibility is a preliminary question, the rules of evidence do not limit the evidence that can be offered for authentication. ER 104(a); Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 170, 758 P.2d 524 (1988). Second witness testimony identifying the perpetrator is not inadmissible opinion testimony.

BOR at 10-11.

As an initial matter, this argument does not even apply to Gregory's testimony; the video had already been admitted. But it doesn't apply to Nebeker's identification, either, because his testimony about the substance of the video, i.e. what was shown on it, was not foundational.

ER 901 provides:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
>
> (1) Testimony of Witness with Knowledge. Testimony that a matter is what it is claimed to be.

Under this rule, the foundation for admitting the video was established when Nebeker testified he viewed the video in the prosecutor's office that morning and it truly and accurately depicted what he saw that night on the videotape at the Motel 6. What the video showed, according to Nebeker, was extraneous and unnecessary for its admission.

Third, the state appears to argue that opinion on guilt testimony should never be considered reversible error because:

> It is impossible to usurp the jury's function, because even if there is uncontradicted expert testimony on the victim's credibility, the jury is not bound by it. Id.; State v. Middleton, 657P.2d 1215, 1219 (Or. 1982). "Jurors always remain free to draw their own conclusions." City of Seattle v. Heatley, [70 Wn. App. 573, 585 n. 5, 854 P.2d 658 (1993)].

BOR at 11-12.

Contrary to the state's argument, however, the courts have found reversible error based on improper opinion on guilt testimony, regardless of the jury's freedom to draw its own conclusions. See e.g. State v. Quaale, 177 Wn. App. 603, 312 P.3d 726 (2013), affirmed, 182 Wn.2d 191 (2014). And while the state may disagree, it nonetheless recognizes case law holds that an officer's testimony "carries an aura of reliability." BOR at 12, n.

2 (citing State v. Montgomery, 163 Wn.2d 277, 291, 183 P.3d 267 (2008); State v. Rafay, 168 Wn. App. 734, 806, 285 P.3d 83 (2012)).

But regardless, in this particular case, the record clearly establishes that the fact-finder did not draw its own conclusions, but expressly relied on the officers' identifications. RP 165. Accordingly, the state's argument the fact finder was free to draw its own conclusions misses the mark entirely.

Finally, the state argues the circumstances are more like those in State v. Hardy, where prior contacts were considered sufficient, than in State v. George, where they were not. BOR at 13-15. According to the state, "Both witnesses had met the Defendant before the night of the shooting." BOR at 15. But this is not true, with respect to Gregory.

Contrary to the state's allegation, Morfin has not "unfairly characterize[d]" Sergeant Gregory's testimony. See BOR at 15 n. 3. Gregory testified he may have seen Morfin before that night, but had never dealt with him:

> Q. [prosecutor]: Do you know if David Martinez is a gang member?
>
> A. [Sergeant Bradford Gregory]: Yes, he's admitted to me being an F13 Florence gang member.

Q. What about his brother Jose?

A. He is also a Florence gang member that I knew at the time.

Q. And Ramon Morfin?

A. I didn't know him well enough to know what his affiliations were at the time.

Q. Had you ever dealt with Morfin, even in the past?

A. Not that I recall. I think I'd seen him before, but I don't know that I'd actually dealt with him."

RP 108-109.

Thus, while Gregory initially said he did not know Morfin "well enough" to know his affiliations, he clarified he in fact did not know him at all. The most he could say was that he thought he'd "seen him before." RP 109. He could not even say under what circumstances. This is not the kind of prior contact contemplated by State v. Hardy as providing a sufficient basis to admit the officer's identification.

And contrary to the state's assertion, Gregory's involvement with Morfin the night of the shooting was minimal. See BOR at 15. Gregory testified he "talked to a couple of people" that night. RP 108. The first was David Matinez, whom Gregory testified was one

of the three that had been detained in the motel room, which included "David, his brother Jose and Mr. Morfin." RP 108. When asked if he talked to "anybody else that evening," Gregory testified he talked to a person staying at the hotel, a hotel manager and the manager's boyfriend. RP 109. He then went to room 110 and spoke to Apolonia Alejandro and the other ladies in that room. RP 109-10.

When asked about the search warrant he later executed on room 120, he testified that's where the three men were located: "Actually Jose Martinez, David Martinez, and Mr. Morfin. At least those were the three that I talked to." RP 111-12.

Gregory never explained the extent to which he "talked" to Morfin. But regardless, a police interview of a suspect is an insufficient contact such as to render a police officer's identification admissible under George:

> Here, Rackley observed George as he exited the van and ran away and at the hospital that evening. Rackley observed Wahsise when Wahsise exited the van and was handcuffed and while Wahsise was at the police station in an interview room. Rackley based his surveillance video identifications on each defendant's build, the way they carried themselves, the way they moved, what they were wearing, how they compared to each other, how they compared to the rest of the people in the van, and from speaking with them on the day of the crime. These contacts fall far short of the extensive contacts in Hardy and do not support a finding that the officer knew enough about George and

> Wahsise to express an opinion that they were the robbers shown on the very poor quality video. We hold that the trial court erred in allowing Rackley to express his opinion that George and Wahsise were the robbers shown on the video.

George, 150 Wn. App. at 119.

And contrary to the state's assertion (BOR at 14), the error was prejudicial as to Wahsise and the court reversed his conviction. This was because the victim did not identify Wahsise as either of the men who took the television set and because there was no physical evidence linking him to the robbery. George, 150 Wn.2d at 120.

The same result is required here. Morfin maintains Nebeker's prior contacts with Morfin were likewise too minimal to support admission of his identification. BOA at 19. Assuming arguendo this Court finds his contacts sufficient, however, reversal is still required based on Gregory's testimony. He had no prior contacts with Morfin that he could recall. His contact with Morfin was limited to the night in question, which is insufficient under George. And the court relied on both officers' identifications:

> The video itself would not allow an individual who hasn't observed these folks at the scene to make much of it. You can observe the difference in the color of the clothing. You can observe general size and carriage of the individuals, but not much more than that. So the Court has to rely upon the identification of

> the individuals who observed all the folks present and either give credence or not to their identification.
>
> In this instance, the Court does, and finds that there is sufficient proof beyond a reasonable doubt that the defendant was the shooter in this instance.

RP 165. The court made no finding Nebeker's testimony would be sufficient by itself to identify Morfin as the shooter in the blurry video.

As in Wahsise's case, there was no *admissible* eye-witness testimony identifying Morfin as the shooter. Nor was there any physical evidence tying him to the shooting. The officers' identification was integral to the court's finding of guilt. Morfin was prejudiced by his counsel's failure to object to the officers' testimony, even if this Court finds only Gregory's testimony was objectionable.

The state apparently concedes that if the testimony was inadmissible, Morfin was prejudiced by his attorney's failure to object, as the state makes no argument regarding the prejudice prong of the Strickland test. BOR at 9-16.

3. DEFENSE COUNSEL'S FAILURE TO OBJECT TO TESTIMONIAL HEARSAY IDENTIFYING MORFIN AS THE SHOOTER DOES NOT QUALIFY AS A LEGITIMATE TACTIC.

On direct, the prosecutor elicited from Detective Nebeker that he interviewed Manuel Ramirez – one of the individuals present at the shooting – and Ramirez confirmed Morfin was the shooter. RP

25. The prosecutor elicited the same on redirect. RP 62. In his opening brief, Morfin argued his attorney performed deficiently in failing to move pre-trial to exclude this testimonial hearsay or otherwise object to it at trial. BOA at 22-27. Morfin was prejudiced by his attorney's failure to object because the court relied on Ramirez's identification to convict Morfin. CP 32 (finding of fact 2.6).

In response, the state concedes Ramirez's identification was testimonial hearsay. BOR at 16. However, the state claims defense counsel's failure to object was tactical because he used it to undercut Nebeker's identification of Morfin in the video. According to the state, the defense was attempting to show Nebeker needed affirmation of his identification. BOR at 17.

But as argued in the preceding section, Nebeker's identification should not have come in, either. Had defense counsel properly moved to exclude his identification or object to it, counsel would have had no need to impeach it.

Regardless, defense counsel still could have impeached Nebeker's identification testimony with his prior statement to Ramirez he could not discern who was on the video. Defense counsel still could have asked whether Nebeker said to Ramirez: "I explained to him that in the video footage one can see the shooting

transpire. However, the video footage is not good enough to positively ID the individual other than by clothing." See RP 37 (where counsel did in fact ask that question). Nebeker's statement to Ramirez would have been admissible as a prior inconsistent statement – without Ramirez's prejudicial confirmation Morfin was in fact the shooter. See e.g. Webb v. Seattle, 22 Wash.2d 596, 610, 157 P.2d 312, 158 A.L.R. 810 (1945).

By allowing Ramirez's accusation to stand, defense counsel actually increased the credibility of Nebeker's identification, rather than impeach it. Assuming arguendo counsel's actions were "tactical" in failing to object, his tactics were not reasonable. Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Where there was nothing to be gained by allowing such prejudicial testimony to stand – an eye-witness identification by an out-of-court accuser – and everything to lose, counsel's strategy, assuming there was one, cannot be characterized as legitimate.

And while judges are presumed not to rely on inadmissible evidence, it is clear the court did so in this case, as its findings reflect the following:

> Detective Nebeker spoke to Manuel Ramirez Salazar, a witness to the shooting. Mr. Salazar was the person who moved the Mercedes Benz immediately after the shooting to a different location in the Motel 6 parking lot and was familiar with those present at the shooting. He confirmed the shooter as being Ramon Morfin.

CP 32.

C. CONCLUSION

Because Morfin's defense was prejudiced by defense counsel's repeatedly ineffective assistance, this Court should reverse his convictions.

Dated this 9th day of December, 2015.

Respectfully submitted,

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Certificate of Service

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 9th day of December, 2015, 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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Signed in Seattle, Washington this 9th day of December, 2015.

x