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NO. 994391

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

GUSTAVO TAPIA RODRIGUEZ,

PETITIONER.

RESPONDENT'S ANSWER TO
PETITION FOR DISCRETIONARY REVIEW

GARTH DANO
PROSECUTING ATTORNEY

Kevin J. McCrae – WSBA #43087
Chief Deputy Prosecuting Attorney
Attorneys for Respondent

PO BOX 37
EPHRATA WA 98823
(509)754-2011

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A. IDENTITY OF RESPONDENT

The State of Washington is the respondent in this petition and in the Court of Appeals, and is the plaintiff in the trial court.

B. COURT OF APPEALS' DECISION

The unpublished Court of Appeals' decision, dated December 17, 2020, is reproduced in petitioner's appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly conclude there was no significant double jeopardy violation where Mr. Tapia was only sentenced once to aggravated first-degree murder for the killing of Jill Sundberg?
2. Did the Court of Appeals correctly hold the trial court was correct not to interfere with defense counsel's conduct of the defense?

D. STATEMENT OF THE CASE

Facts are summarized in the State's opening brief and the Court of Appeals' opinion. They are repeated here in a more limited fashion for the convenience of the Court.

1. The Execution

On the night of December 21, 2016 Josh Bechtel arranged on Facebook to meet Jill Sundberg at the Shady Tree RV Park to buy heroin from her. RP 716, 735, 736. After he bought the heroin, he left but continued to communicate with her. Jill Sundberg's last communication

to Mr. Bechtel was at 12:07 AM on the 22nd. RP 731. Ms. Sundberg was often picked up at the Shady Tree. RP 741. Gonzalo Reyes Sr. tried to pick her up on the night of the 21st, but did not connect with her. RP 741-42. She later texted him, at about 9:00 PM, that she was going to stay at the Shady Tree. RP 742.

Liliana Alejandres was Jill Sundberg's friend. RP 754. They hung around at the Shady Tree. *Id.* During trial Ms. Alejandres claimed a lack of memory. RP 755-762. However, she gave an interview to Det. Cook on January 5, 2017. RP 777, 785, 800. Excerpts of the interview were admitted as recorded recollections. RP 772-775, 800. Mr. Tapia believed he ran the Shady Tree RV Park. RP 800. Ms. Alejandres also stated that Mr. Tapia pretended to be part of a cartel. She was scared that she was going to end up like Jill. RP 813. She knew Mr. Tapia as a businessman with a bigger boss involved in drugs. RP 816.

On the night of December 21, 2016 Leslie Silva Diaz visited the Shady Tree RV Park with her friends Carlos Lopez and Destiny Rivera. RP 822, 863. They were smoking meth with Chato (Salvador Espinoza Gomez) in his trailer. RP 823, 1188. Later Jill joined them. RP 824. Jill would stay with Chato from time to time. RP 1186. They were also joined by a person named Tom or Don. RP 837, 1053.

Mr. Tapia and his crew, Julio Albarron Varona, Fernando Marcos Gutierrez (Zapatos) and Ambrosio Mendez Villanueva (Chivo or Chivito), started the evening drinking in Gustavo Tapia's trailer, where they all lived. RP 1049-50. Later they went over to another trailer Mr. Gutierrez owned but was being rented by Chato. RP 1051, 1189.

After the group in Chato's trailer was joined by Albarran Verona, Gutierrez and Mendez Villanueva, they had a bottle of tequila, beer and drugs. RP 826. After a while Silva Diaz, Lopez and Rivera left the small trailer to return to Quincy, leaving Jill behind with the men. RP 827, 1052. Jill Sundberg and Mr. Tapia started arguing. Tom/Don left during this argument, leaving Jill with the four men from Mr. Tapia's trailer and Chato. RP 1054. Mr. Albarran Verona could not understand them, so did not know what they were talking about. RP 1055. During this time, Mr. Tapia ordered Albarran Verona, Mendez Villanueva and Gutierrez to go ensure someone was not stealing things at the park laundry mat. RP 1054. About 10 minutes after Mr. Albarran Verona returned to the trailer Mr. Tapia left with Mr. Gutierrez and Mr. Mendez Villanueva. RP 1054. Mr. Gutierrez then called Mr. Espinoza Gomez and told him Mr. Tapia wanted him and to go over to Mr. Tapia's trailer. RP 1192 Mr. Albarran Verona was left behind to make sure Ms. Sundberg did not leave. RP 1055, 1192.

Mr. Tapia told Espinoza Gomez that Ms. Sundberg had said something he didn't like, and that Mr. Espinoza Gomez should get her out of his trailer. RP 1195. Espinoza Gomez refused. *Id.*

Mr. Mendez Villanueva and Mr. Gutierrez returned to Mr. Espinoza Gomez's trailer and said they were to take Ms. Sundberg to Mr. Tapia's truck. RP 1055, 1196. Ms. Sundberg pulled a knife to resist, but Mr. Gutierrez pulled out a gun, and Mr. Albarran Verona disarmed Ms. Sundberg. RP 1056-57. The three of them forced Ms. Sundberg into the middle of the back seat of Mr. Tapia's SUV. Mr. Espinoza Gomez was ordered to accompany them. RP 1059, 1197. Mr. Tapia drove west on I-90, got off and took the road that goes down to the river. RP 1060. They arrived at a parking area with a restroom a bit after midnight. RP 1060. Mr. Gutierrez used a cell phone charging cord to tie up Ms. Sundberg's hands. RP 1061. Mr. Albarran Verona took Ms. Sundberg about five meters from the vehicle. RP 1062. Ms. Sundberg asked "why?" RP 1062. Mr. Tapia ordered Ms. Sundberg to kneel. RP 1062. Mr. Albarran Verona lowered Ms. Sundberg's head down. RP 1063. Gustavo Tapia then emptied an entire magazine from his pistol into Ms. Sundberg's head and back. RP 1063, 1200.

The group of men then got back into the Tahoe. RP 1064. They started to drive away and then stopped. RP 1064. Mr. Mendez Villanueva

got out with a piece of cardboard and a knife, ran over and stuck the cardboard to Ms. Sundberg's back with the knife. RP 1064. The group then drove to a store in Quincy to buy beer. RP 1067. They then returned to the trailer park, collected all of Ms. Sundberg's belongings, drove to the Vantage Bridge and dumped her belongings into the river. RP 1068, 1202. They then returned to the trailer park. RP 1068. That evening Ms. Silva-Diaz's group returned to the park to drop off Mr. Lopez and saw Mr. Tapia show up in his Yukon with Zapatos, Julio, Chato and another Hispanic male. RP 836.

The next day Tapia, Espinoza Gomez, Mendez Villanueva and Albarran Verona went to a store in Ephrata to buy ammunition and then to an orchard on the road to Kennewick by the river, near Desert Aire. RP 1070, 1203. They went shooting in a clearing in the orchard. RP 1070. Gutierrez stayed behind at the trailers. RP 1238. Mr. Tapia later told Mr. Albarran Verona that Ms. Sundberg had insulted his daughter. RP 1074.

Late in the morning of December 22, 2016 Lynnly Kunz was taking her dog for a run off of the Old Vantage Highway. RP 902. She found a dead body in the parking area of the trail. RP 902. She left to call the police. RP 904. She then drove back, showed the officer the body, provided information and then left the area. RP 905.

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2. The Investigation

Detective Cook responded to the scene on the Old Vantage Highway, a dead-end road leading to the Columbia River. RP 876. There he found a body with a sign on it and a knife. In the area of the body were numerous bullets and shell casings that were collected. RP 884, 983-91. Bullet fragments and clothing with bullet holes were collected during the autopsy. RP 992-94. Through tattoos and law enforcement records, the body was identified as Jill Sundberg. RP 994-95.

During the investigation officers interviewed several people, and collected buccal swabs for DNA analysis from many of them, including the five people involved in the Sundberg killing. RP 995, 1323. Fernando Gutierrez's DNA was found on the gun from Julio Albarran Verona's backpack, along with a DNA mixture from several other people. RP 1337-38. There was also a Bud Light can found at the scene with Mr. Espinoza Gomez's DNA on it. RP 1342-43.

Officers obtained a video from the Short Stop convenience store in Quincy. On the video time stamp of 12/22/16 at about 12:50 AM, officers recognized Mr. Albarran Verona and Mr. Gutierrez purchasing items at the store. RP 1307.

Officers obtained call data and NELOS records from AT&T. RP 1274. These are records maintained by AT&T for their business. RP 909-

918. NELOS records are historical location records used by engineers in determining coverage areas. RP 917. Det. Cox uploaded the files to a company called ZETX. RP 1275. ZETX prepares a .KML file that will show the data in the files in relation to Google maps. RP 1275. Using the processed phone records officers were able to find a clearing in an orchard in the Mattawa area that was approximately 200-300 yards long by 200-300 yards wide. RP 1292-93. No person had been able to adequately direct the detectives to the orchard. *Id*, RP 1320. In the clearing the officers were able to use the phone records to focus on a specific area and used metal detectors to find shell casings. RP 1294, 1298. They also found a Modelo beer can at the orchard. RP 1310.

The ZETX animation and the AT&T records track the witness testimony. It shows the group in the vicinity of the Shady Tree RV Park on the evening of the 21st until about 10 minutes after midnight on the 22nd, at which time Mr. Tapia's and Mr. Espinoza Gomez's phones start moving. Ex. 1, 03:00-07:10. At 12:21:52 the records located Mr. Tapia's phone at the parking lot where Ms. Sundberg's body was found, with an accuracy likely better than 25 meters. Ex. 1, 08:40. Officers made the drive between the Shady Tree and the murder scene in about 11 minutes going the speed limit or slightly under. RP 1758-59. It then shows the group going to Quincy, where Mr. Gutierrez and Mr. Albarran Verona are

seen on the Short Stop security camera. Ex. 1, 13:50-15:20. At about 1:23 in the morning the cell phone data goes down to the area of the Vantage Bridge on the Columbia River. Ex. 1, 16:00-17:45. At about 1 PM on the 22nd the group is shown in Ephrata. Ex. 1, 19:00-20:00. The group returns to the Shady Tree and leaves Gutierrez behind. They then travel to the orchard. Ex.1, 20:00-25:00. There are then a large number of points in the orchard. Ex. 1, 25:00-26:15. The data then shows the group returning to the Shady Tree. Ex. 1, 26:15-29:30.

Modelo beer cans have the same lot numbers as the boxes that they are distributed in. RP 944. The lot number on the cans and the box stabbed into Jill Sundberg was distributed around Grant County. RP 953.

The detectives made an overhead image of the orchard clearing using a drone in July of 2017. RP 957.

During the search warrant of a house on Road 5 Det. Messer found a gun in the toilet tank. RP 960, 962. Ambrosia Mendez Villanueva was also arrested at that house. RP 1278. The gun in the toilet tank matched a shell casing found in Mr. Tapia's Tahoe. RP 1477-78. During the search the detectives also found a shell casing at a vehicle at the house. At that same time officers also arrested Albarran Verona at a different address. RP 1281. Officers found a gun in Albarran Verona's backpack. RP 1287.

That gun matched shell casings found both at the scene of the homicide off Old Vantage Highway and the orchard. RP 1472, 1519-20.

3. The Trial

Gustavo Tapia was charged, by a consolidated amended information, with murder in the first degree under the alternative means of premeditation and felony murder predicated on kidnapping. CP 55-56. He was also charged with aggravators under RCW 10.95.020(7) (premeditated murder during the course of a drive-by shooting) and (11)(d) (premeditated murder during the course of a kidnapping). He was also charged with a deliberate cruelty aggravator under RCW 9.94A.535(3)(1) and a firearm enhancement. CP 56. He faced an additional charge of unlawful possession of a firearm in the second degree. CP 56.

The jury returned verdicts finding Mr. Tapia guilty of all counts. In addition it answered special verdict forms unanimously finding that Mr. Tapia committed all alternative means and aggravators alleged. RP 2276-80.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

- 1. The kidnapping and drive-by shooting were done to facilitate the murder. That does not make them incidental to the murder or mean they were not intentional.**

- a. *Any potential double jeopardy violation was cured by the Court of Appeals.*

Mr. Tapia creates a confusing tableau of double jeopardy issues, confuses intent with objective and misunderstands the relationship between felony murder and aggravated first-degree murder.

Premeditated murder and felony murder based on kidnapping are alternative means of committing murder in the first degree. RCW 9A.32.030. They have different mens rea requirements. Premeditated murder requires a premeditated intent to kill. Felony murder requires an intent for the underlying felony, and that a death result in the course of or furtherance of a felony. Aggravated first-degree murder requires both a premeditated intent to kill and the intent for the other felony. Mr. Tapia was found guilty of aggravated murder. He was also found guilty of the alternative means of premeditated murder and felony murder.

Mr. Tapia is correct that separate convictions for felony murder, premeditated murder and aggravated murder for the same killing would violate double jeopardy principles. Where his argument falls apart is that he seems to conclude this means the greater crimes of aggravated murder and premeditated murder should be dismissed, leaving the felony murder as the operative conviction. This is faulty reasoning. The proper remedy for a double jeopardy violation would be to dismiss the lesser crimes and

leave the greater crime of aggravated murder as the operative conviction. This is exactly what happened. The State charged the alternative means in one count. The jury found all alternative means were committed. Mr. Tapia was sentenced on one count of aggravated first-degree murder. The only mention of felony murder on the judgment and sentence was in a block that listed the crime of conviction as premediated/felony murder. The Court of Appeals has instructed the lower court to remove the felony murder reference. This resolves any potential double jeopardy issue.

b. While Mr. Tapia's goal in committing the kidnapping and drive-by shooting was to execute Jill Sundberg, he still had the intent to commit those crimes, and the murder was committed in the course of the kidnapping and drive-by shooting.

Aggravated first-degree murder is a premediated murder committed with an aggravating factor. As is relevant here, the aggravating factors were the murder was committed in the course of a drive-by shooting and/or a kidnapping. RCW 10.95.020(7), (11)(d). Mr. Tapia argues that the kidnapping and drive-by shooting were committed to accomplish the murder, and therefore these aggravators do not apply. But to prove drive-by shooting and kidnapping the State is not required to prove what the objective of the crimes was, only the intent. WPIC 39.02 (requiring intentional abduction and intent to cause bodily injury); WPIC 35.31 (requiring reckless or intentional discharge of a firearm). "A person

acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010. Thus the State had to prove that Mr. Tapia had the intent to abduct Ms. Sundberg, that is to restrain her by secreting her in a place where she is not likely to be found or by using or threatening to use deadly force. RCW 9A.40.010. To prove kidnapping the State does not have to establish what the larger goal of the kidnapping was. Likewise, with drive-by shooting the State had to prove that Mr. Tapia had the objective or purpose of discharging the firearm. It did not have to prove what he was trying to shoot to establish drive-by shooting, or whether he was trying to kill or simply scare someone. Of course the State did have to prove that Mr. Tapia intentionally killed Jill Sundberg to establish the crime of murder. But each individual crime has its own intent. The fact that they progressed towards the same larger goal does not mean there was not an intent for drive-by shooting and kidnapping.

In addition, the State Supreme Court has already rejected the incidental crime theory put forward by Mr. Tapia. In *State v. Berg*, 181 Wn.2d 857, 860, 337 P.3d 310, 311 (2014), the court held that the fact that a kidnapping was incidental to a robbery does not mean there is insufficient evidence for the separately charged kidnapping. The same would be true here. Where the evidence supports the intent to kidnap, as

well as the other elements of kidnapping, the argument that the kidnapping is incidental to the murder is irrelevant. The same would hold true for drive-by shooting. The lower courts properly concluded that the aggravated murder conviction was correct.

2. The trial court and appellate court correctly did not interfere with Mr. Tapia's right to control his own defense.

Mr. Tapia challenges jurors number 15 and 28 because they indicated they had a hardship and the Court did not remove them, therefore defense counsel should have. RCW 2.36.100 governs dismissal for hardship. Judges have broad discretion in deciding what is an "undue hardship." *State v. Ingels*, 4 Wn.2d 676, 683, 104 P.2d 944, 947 (1940). Here Mr. Tapia argues that his attorney should have done more to disqualify these jurors for their hardship. But he does not establish that counsel did not have a reason for leaving them on. Trial counsel was actually in the courtroom talking to the jurors, seeing their expressions and hearing their tones of voice. For Mr. Tapia to establish that counsel was ineffective he would have to establish that no reasonable trial counsel would have not picked these jurors over others. He has not even tried to identify which jurors would have been better. A juror who does not want to be there is just as likely to take it out on the State as he is the defendant, and there is no per se exclusion.

Mr. Tapia asserts that it was error not to question juror 44 about his wife's work with the prosecutor's office. The record does not support this contention. The experienced public defender on this case would have been more than familiar with the prosecutor's office. He would have been well aware that the employee works in a separate division and a separate building from the prosecutors handling Mr. Tapia's case. Juror 44 did not raise his paddle when asked if he knew anything about the case. RP 110-11. Because a record was not fully developed, including what the defense counsel did and did not already know, the record is simply insufficient to evaluate this claim. The presumption of effective assistance means that there is presumably a reason counsel did not need to ask more questions.

In addition, Mr. Tapia has to establish that with reasonable probability the outcome would have been different. He has not identified what juror defense counsel should have picked instead, or how that would have made the trial different. In an ineffective assistance of counsel claim it was his burden to do so.

RCW 4.44.180 does not dictate the removal of this juror. First, the statute is permissive, not mandatory. Second, it does not apply to the spouse of an employee of a party. Being the employee of a party fits the statute. Being the family member of a party fits the statute, but being the family member of an employee of the party is not covered by the statute.

The juror would not have been removable under this statute. “A relationship with the government, without more, does not establish bias.” *State v. Cho*, 108 Wn. App. 315, 324, 30 P.3d 496, 501 (2001) (holding that status as a police officer does not create a per se bias). The Court had no reason to overrule defense counsel’s judgment and remove this juror.

Mr. Tapia also challenges Juror 35 for not appreciating the fact that the school he was working at was tagged. Mr. Tapia claimed that there was “obvious racial bias underlying the response to the prosecuting attorney’s question.” He also compared the statement to one where a juror said “I see a lot of black people dealing drugs.” To be upset by vandalism does not make someone automatically racist. There is no “obvious racial bias” underlying the response to the question. If there was trial counsel, who was there and could observe the juror, was in the best place to pick up on it. Mr. Tapia does not establish ineffective assistance of counsel.

Nor does Mr. Tapia establish the trial judge should have excused the juror for cause. “Implicit in the Sixth Amendment is the criminal defendant’s right to control his defense.” *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482, 485 (2013). For a trial judge to jump in and remove a juror without being asked by the defense attorney inserts the trial judge into defense strategy. The case did not involve tagging. The defense attorney may have liked this juror more than others.

Given the strategic importance of voir dire and the wide room for strategic decisions a defendant can make concerning which jurors to strike or accept, a court must not wade into the jury selection process *sua sponte* dismissing jurors absent an unmistakable demonstration of bias lest it interfere with a defendant's right to control his defense.

State v. Lawler, 194 Wn. App. 275, 284–85, 374 P.3d 278, 282 (2016).

The comment simply did not rise to the level of justification needed to remove a juror *sua sponte*. In *Lawler* the juror bias was much clearer than in this case, yet the Court still held there was no duty to dismiss *sua sponte*.

3. RAP 13.4(b)

RAP 13.4(b) lists the factors governing discretionary review. Mr. Tapia does not directly address these factors, and the case does not meet the factors for review.

RAP 13.4(b)(1) and (2) address conflicts with other appellate cases. Mr. Tapia identifies *State v. Hacheney*, 160 Wn.2d 503, 158 P.3d 1152 (2007), as the only conflicting case, but *Hacheney* is easily distinguishable on its facts. In *Hacheney* the evidence was that the victim was killed and then a fire was started, presumably to cover up the killing. In other words, the murder was complete before the arson was commenced; therefore, the killing was not in the course of the arson. Here the opposite is true, the kidnapping and drive-by shooting were

commenced prior to the murder, and were completed simultaneously to it.

Hachenev is simply not on point, and there is no conflict.

RAP 13.4(b)(3) requires a significant question of law under the Constitution of the State of Washington or the United States. There simply is not one here. Any possibly minor double jeopardy violation was cured by the Court of Appeals' opinion. The statements complained about by the jurors do not implicate the right to a jury trial or a fair trial. There simply is no significant issue here.

RAP 13.4(b)(4) requires an issue of significant public interest that should be determined by the Supreme Court. There simply is no such issue in this case, nor does Mr. Tapia identify one.

E. CONCLUSION

There is no double jeopardy issue in this case. Mr. Tapia was sentenced once for the murder of Jill Sundberg, and the kidnapping and drive-by shooting were properly added as aggravators. The trial court and Court of Appeals did not error in failing to interfere with Mr. Tapia's right to control his defense. The issues raised by Mr. Tapia regarding the jurors did not amount to bias sufficient to justify, much less mandate, the court's

interference. Mr. Tapia does not meet any of the RAP 13.4(b) factors.

The petition for review should be denied.

Dated this 11th day of February 2021.

Respectfully submitted,

GARTH DANO
Prosecuting Attorney

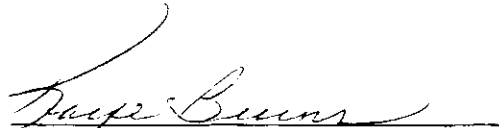
By: /s/
Kevin J. McCrae – WSBA #43087
Chief Deputy Prosecuting Attorney
Grant County Prosecutor's Office
PO Box 37
Ephrata WA 98823
(509)754-2011
(509)754-3449 (fax)
kmccrae@grantcountywa.gov

CERTIFICATE OF SERVICE

On this day I served a copy of the Respondent's Answer to Petition for Discretionary Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Dennis W. Morgan
nodblspk@rcabletv.com

Dated: February 11, 2021.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

February 11, 2021 - 3:39 PM

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