

No. 37858-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN PINGLE,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR COWLITZ COUNTY

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Largely due to the lack of an alternative explanation, the State accused Benjamin Pingle of killing one of his twin infant daughters, Justice, and assaulting the other, Liberty. At the close of a trial that lasted more than three weeks, the deputy prosecutor summed up the State's evidence for the jury, "I can't tell you what exactly he did. But we know what it did to Justice. . . . He killed her." RP 3405. In fact, the State's evidence consisted of the testimony of experts who reached their conclusions that Justice died of diffuse axonal injury based not on what they saw but rather what they did not see.

These experts concluded the fact that no physical evidence of the injury was observed did not mean the injury they were looking for had not occurred. Instead, the experts opined the injury must have occurred too close in time to Justice's death for it to be visible. From the speculation that the injury was both present and recent, the State was able to point to Mr. Pingle as the person who caused Justice's death because he was the only adult with Justice in the hours immediately before her death. Thus, the State charged Mr. Pingle with the murder of his daughter. In addition, because Liberty had bruising on her body, despite the lack of evidence that

Mr. Pingle caused the bruising, the State charged Mr. Pingle with assaulting Liberty.

To topple the house of cards that was the State's case, the defense tried to present the testimony of a neurosurgeon, Dr. Ronald Uscinski, and a neuropathologist, Dr. Jan Leetsma, who each concluded Justice died of a chronic subdural hematoma: long-term and repeating bleeding below and within the outer lining of the brain. Dr. Leetsma would have testified that his opinion of a chronic process was bolstered by the presence of "iron-laden alveolars" in Justice's heart and lungs.

The State argued Dr. Leetsma's testimony must be limited to rebutting the testimony of the State's neuropathologist. The State conceded its objection had no grounding in the rules of evidence. The State further conceded defense counsel had disclosed Dr. Leetsma's proposed testimony at least two months prior to the start of trial. Nonetheless, the trial court excluded this evidence that Justice died of natural causes concluding it was "new evidence" and its admission would be unfair to the State.

Following the exclusion of this exculpatory evidence, the jury acquitted Mr. Pingle of second degree murder and second degree

assault of a child but convicted him of alternative charges of first degree manslaughter and third degree assault of a child.

B. ARGUMENT IN REPLY

1. THE TRIAL COURT DENIED MR. PINGLE HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN IT SUPPRESSED RELEVANT EVIDENCE

a. The State's response brief grossly misstates the basis of the trial court's suppression of excluding relevant evidence.

Despite the State's concession that it had long known of Dr. Leetsma's observations and conclusion, and that the State was not claiming surprise, and although the court had heard the same argument 19 days earlier, RP 246-85, on May 28, the court stated it was the first time the court had heard this "totally new" issue and concluded it was improper for defense to raise such a new issue at that juncture. RP 2938, 2949. The court found the introduction of such a new issue "at this point in trial is totally inappropriate." RP 2950. The court concluded "**I'm not going to allow the testimony as it relates to this particular item. It's a new item.**" Id.

(emphasis added)

The State claims in its response that the trial court excluded Dr. Leetsma's testimony because the court found it unhelpful and

that it was a violation of the court's early ruling granting a continuance. Brief of Respondent at 22. The State imaginatively contends "the trial court carefully considered the proffered testimony and ultimately found it so lacking in probative value that it should be excluded." Brief of Respondent at 23 (citing RP 2949-50). While the State is correct that the trial court actually uttered the phrase "probative value," the State misrepresents the court's actual ruling. What the court said was:

the introduction of a new issue which maybe has some probative value and maybe doesn't at this point in trial is totally inappropriate.

RP 2950.

From a review of the actual record, two things are clear. First, the court never found the evidence was irrelevant. Indeed the court allowed that it was or at least might be relevant. RP 2950. Tellingly, the State makes no effort to argue the evidence did not make a fact of consequence more or less likely. Indeed, the evidence plainly did, as it called into question whether Mr. Pingle (or anyone else) caused Justice's death.

Second, the sole basis for the court's suppression of Dr. Leetsma's testimony was the court's mistaken belief that it was a "new issue." On the very page cited by the State the trial judge

said five times it was a new issue. RP 2950. And ultimately the court ruled, “I’m not going to allow the testimony as it relates to this particular item. **It’s a new issue.**” Id. (emphasis added)

Also missing from the court’s actual ruling is the State’s invented “violation of the court’s early ruling allowing a continuance.” See Brief of Respondent at 22. At trial the basis for the State’s objection was not relevance nor Dr. Leetsma’s qualification as an expert. Indeed the State conceded he was eminently qualified to render the opinion, RP 248, and allowed “[w]e’re not basing this necessarily on the rules of evidence or anything like that.” RP 246. Instead, the State claimed that because Mr. Pingle was forced to seek a continuance to retain Dr. Leetsma following the State’s discovery violation somehow required the Court to limit Dr. Leetsma’s testimony.¹ First, the trial court never imposed such a limitation, as indicated by the State’s inability in its response brief to provide a cite to such an order or limitation. Second, the State has never identified any rule that would have permitted such an unfair limitation, again conceding that nothing in

¹ The State withheld from the defense for more than three months the fact that it had obtained an opinion from a neuropathologist’s whom the State intended to call at trial; the State did not reveal either the identity or the opinion of the expert.. RP 153-54 Defense counsel learned of this evidence the week prior to the scheduled start of trial. RP 157.

the rules of evidence required it. Third, it would have been patently unfair and a violation of the Mr. Pingle's right to present a defense defense to allow the State's misconduct to somehow limit the scope of the evidence the defense could marshal to rebut the State's case.

Any claim by the State on appeal that the evidence was either irrelevant or not proper expert testimony is contradicted by its on concessions at trial. Specifically the State said, "We are not attacking his credentials or his ability to express the opinion. . . . We are not saying he does not have the ability under the rules to provide this opinion." RP 248. And again the State made clear its objection was not based "on the rules of evidence or anything like that." RP 246. These statements undercut any effort now to claim the evidence was properly excluded as irrelevant or unhelpful.

The court excluded the evidence because the court wrongly believed the evidence was new.

b. There was no basis to suppress the evidence.

The court's conclusion that Dr. Leetsma's testimony constituted a surprise is incorrect. As the State acknowledged Mr. Pingle disclosed Dr. Leetsma's proposed testimony more than three months earlier. The State had Dr. Leetsma's report long before the

start of trial. The report, dated February 21, 2008, was attached as Exhibit 2 of the State's motion to suppress its contents. CP 131-37. In fact the State admitted "the [February 21] dates wrong. We got it a little - - a couple of weeks before that . . . We are not claiming surprise, that's not the issue." RP 250.

Even ignoring the report provided to the State in February, and assuming instead that the court could have properly found Mr. Pingle had not complied with the discovery rules and had not timely disclosed the nature of Dr. Leetsma's testimony (although he had), suppression is not the proper remedy. State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991) (Suppression of evidence is not one of the sanctions available for failure to comply with CrR 4.7 governing discovery in criminal cases). Thus, even if the court's conclusion of surprise had support in the record, the court erred in excluding Dr. Leetsma's testimony.

There was no basis to suppress the proffered testimony.

c. The court's suppression of relevant evidence deprived Mr. Pingle of his Sixth Amendment right. The Sixth Amendment and the Washington State Constitution protect an accused person's rights to secure witnesses and to a meaningful

opportunity to present a defense. Holmes v. South Carolina, 447

U.S. 319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006).²

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.”

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). “[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.”

Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

² U.S. Const., amend. VI; Const., Art. I, § 22; Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); see also RCW 10.52.040; CrR 6.12.

The defense proffered Dr. Leetsma's observations that "iron-positive alveolar macrophages" were related to the cause of death and indicated a longer-term process than was opined by the State's experts. Specifically Dr. Leetsma believed that Justice "died of the complications and problems of an evolving and chronic subdural hematoma." RP 2938. This was wholly consistent with the doctor's remaining testimony that Justice suffered a long-term or chronic subdural hematoma which "rebled". RP 2937. His observations and opinion that they were indicative of "a long-term process" lent support to the correctness of his conclusion, and directly rebutted the State's evidence as to the cause of Justice's death.

Dr. Grafe testified there were no signs of a neomembrane in the dural slides provided to her by Dr. Nelson. RP 2062. However, she disagreed with Dr. Nelson and concluded that blood was present subdurally at least several days prior to death and perhaps weeks or months prior to death. RP 2101-03, compare RP 1826 (Dr. Nelson testifying there was no evidence of older bleeding).

Dr. Uscinski and Dr. Leetsma concluded Justice died of a chronic subdural hematoma which rebled. RP 2736, 2762, 3051. Dr. Leetsma testified that a negative result on the axonal stain test meant that diffuse axonal injury had not been demonstrated. RP

2995, 3112-13. Dr. Uscinski testified a diagnosis of diffuse axonal injury was impossible as the stain test was negative and there was no evidence of bleeding at the site of the believed injury. RP 2741.

Dr. Leetsma disagreed with the autopsy conclusion that Justice died of an injury inflicted close to her death. Instead he concluded Justice died “of the effects of subdural hematoma the bulk of which appears to have been ‘recent’ but also involved an older subdural hemorrhage that could conceivabl[y] date to birth.” CP 135. Dr Leetsma concluded “a neomembrane was surely present and photographable.” CP 136. Dr. Leetsma found additional support for a chronic subdural hemorrhage in the presence of “iron-positive alveolar macrophages” which suggested a “prior on-going element of cardiac failure.” CP 137.

A jury acquitted Mr. Pingle of the charges of second degree murder for the death of Justice and second degree assault of a child for the injuries to Liberty. CP 41, 43. However the jury convicted Mr. Pingle of the alternative charges of first degree manslaughter and third degree assault of a child. CP 40-42. The excluded portion of Dr. Leetsma’s testimony provided further reason to doubt the assumptions at the heart of the opinions offered by Dr. Nelson and Dr. Grafe.

d. The constitutional error requires reversal. The court's refusal to permit the defense to present relevant testimony by a qualified expert deprived Mr. Pingle of his Sixth Amendment right to present a defense. That error requires reversal.

A constitutional error requires reversal unless the government can establish beyond a reasonable doubt that the error "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The State makes no effort in its brief to shoulder this burden, choosing instead to claim the error is harmless under the lesser standard governing erroneous evidentiary rulings.

Any discussion of harmless error in this case must start with the fact of the jury's acquittal on the greater charges. Plainly, the jury did not share the prosecutor's view in the certainty of the strength of the State's case. Importantly, Mr. Pingle was not required to show the cause of Justice's death; it would have sufficed to simply cast reasonable doubt upon the State's theory. Thus, it does not matter that Dr. Leetsma could not say with certainty that that potential cardiac failure was the cause of death. It was enough that this potential cast doubt on the State's theory.

The State cannot show beyond a reasonable doubt that the exclusion of this evidence was harmless. This Court must reverse Mr. Pingle's convictions.

2. MR. PINGLE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO RENEW THE MOTION TO SEVER CHARGES

Mr. Pingle was denied his Sixth Amendment guarantees the right to the effective assistance of counsel by his attorney's failure to renew his motion to sever the counts. Mr. Pingle believes the facts and authority supporting that argument are adequately set forth in his prior brief and that no reply to the State's brief is necessary.

3. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT EITHER OF MR. PINGLE'S CONVICTIONS

The State accuses counsel of purposefully failing to include any meaningful rendition of the facts in his brief. Brief of Respondent at 31. Despite its accusations, the State does not avail itself of the opportunity to identify a single relevant fact which Mr. Pingle has "purposefully" or otherwise omitted from his brief. In fact, Mr. Pingle's brief offers a full and fair statement of the case, and addresses all relevant evidence. But at the end of the day, the

sum of the evidence is what led the very same prosecutor, in his closing argument to the jury, to admit, "I can't tell you what exactly he did. But we know what it did to Justice. . . . He killed her." RP 3405.

At the end of more than three weeks of trial, the sum of the State's proof that Liberty was assaulted was the presence of bruises. See RP 3405-06. The sum of the State's proof that Mr. Pingle was the person who assaulted Liberty was Ms. Pingle's denial of responsibility and the supposed evidence suggesting he killed Justice. Id. The State's brief, despite its overheated rhetoric, points to nothing more.

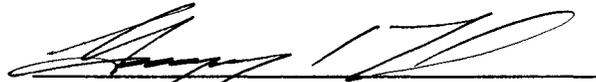
With respect to the murder/manslaughter charge, all the State's experts opined that she had died of diffuse axonal injury. But there was no physical evidence confirming that. Indeed it was the absence of physical evidence, the lack of a positive stain, that constituted the State's only "evidence" that Mr. Pingle was responsible for his daughter's death.

The State did not offer any evidence to establish Mr. Pingle assaulted Liberty. The State did not offer sufficient evidence to establish Mr. Pingle caused Justice's death.

C. CONCLUSION

The Court must reverse Mr. Pingle's convictions.

Respectfully submitted this 12th day of November, 2009.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

GREGORY C. LINK – 25228
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

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)	
RESPONDENT,)	
)	NO. 37858-2-II
v.)	
)	
BENJAMIN PINGLE,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES SMITH COWLITZ COUNTY PROSECUTING ATTORNEY 312 SW 1 ST AVE KELSO, WA 98626-1739	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] BENJAMIN PINGLE 319533 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF NOVEMBER, 2009.

X _____ 

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