

COURT OF APPEALS NO. 48991-1-II

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

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STATE OF WASHINGTON,

Respondent,

V.

BRANDON FARMER,

Appellant.

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

The Honorable Michael E. Schwartz, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THERE WAS A FACTUAL BASIS SUPPORTING THE LEGAL LESSER OFFENSES OF FIRST AND SECOND DEGREE MANSLAUGHTER.

In his opening brief, appellant Brandon Farmer argued the court erred in failing to instruct the jury on first and second degree manslaughter as lesser included offenses of first degree murder. Brief of Appellant (BOA) at 1, 16-25. In finding no factual basis to support the instructions, the court focused exclusively on Farmer's testimony that he was not the shooter. RP 855. As argued in his opening brief, however, the court took a limited view of the evidence and failed to consider all the evidence presented at trial in deciding whether the instructions should be given. BOA at 23-25 (citing State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000)).

- (i) Evidence the Gun Went Off During a Struggle Supplied a Factual Basis for Manslaughter Instructions.

As defense counsel argued below, there was evidence the gun went off during a struggle, as evidenced by the injury to Velma Tirado's right hand. RP 855. Forensic pathologist Dr. Clifford Nelson testified there was a small laceration and stippling on Tirado's right hand, which could be consistent with "cylinder gap."

RP 745. Nelson explained that powder, soot and small fragments of metal sometimes expand out from the side of the cylinder when the trigger is pulled and the bullet jumps from the cylinder into the barrel. RP 745. In Nelson's opinion, the laceration on Tirado's right hand could be indicative of being caught on something sharp in the mechanism when the cylinder was rotating, or indicative of "cylinder gap." RP 745. He opined Tirado's hand was either touching the gun or within millimeters of it to have sustained the injury. RP 759.

A reasonable inference from this is that Tirado and the shooter were struggling over the gun when it went off. RP 855. If the jury believed the gun went off during a struggle, it likewise could believe that the shooting was not intentional but rather, the result of negligence or recklessness. Farmer was therefore entitled to have the jury instructed on manslaughter.

In response, the state agrees the legal part of the test for lesser included offenses was met. Brief of Respondent (BOR) at 8. However, the state argues that because there were two shots, it would be impossible to construe the shooter's actions as reckless or negligent. BOR at 10. The problem with the state's argument is there was not definitive proof of two shots.

The state claims: “all of the witnesses (and the defendant) agreed that the gunman fired not one but two shots in quick succession.” BOR at 10. This is not true. As an aside, it should be pointed out that no one but Farmer and Titus actually saw the shooting.

Regardless, the witnesses who heard the shooting did not all agree there were two shots. When asked if he remembered anything about “the pace of the shots,” Gregory Thompson testified: “They were pretty closely set. I think it might have been an echo, or maybe just been one shot.” RP 128.

That there was only one shot is also consistent with the physical evidence. As the state notes, Tirado’s death was caused by a single gunshot wound. BOR at 10. Only one bullet was recovered. RP 452. And both experts testified it was possible there was only one shot. RP 457, 754. In other words, Tirado’s injuries were consistent with there being only one shot. RP 457, 754, 759. Thus, there was evidence Tirado was shot one time during a struggle.<sup>1</sup>

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<sup>1</sup> Contrary to the state’s suggestion, that Farmer testified there were two shots does diminish the factual basis supporting the instructions. There is no requirement in Washington case law that a defendant’s testimony be consistent with the rest of the evidence presented at trial. Fernandez-Medina, 141 Wn.2d at 458-59.

That there was a sufficient factual basis for the manslaughter instructions is supported by the Supreme Court's decision in State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). In that case, Robert Kuehny's girlfriend heard what sounded like a shot in her trailer home and ran out into the kitchen/living room area and found Leslie Berlin holding a shotgun over his dead friend Robert Kuehny. The two men had been drinking that night. Berlin, 133 Wn.2d at 549.

Berlin was charged with inter alia second degree intentional murder. In finding a sufficient factual basis to support instructions on manslaughter, the court stated:

Here, ample evidence was offered of Berlin's drinking to the point of potentially impairing his ability to form the requisite intent to kill. Berlin himself testified the gun discharged accidentally while he and Kuehny struggled. The State requested the manslaughter instruction, which supported the Defendant's theory of the case. We find the factual prong of Workman<sup>[2]</sup> satisfied.

Berlin, 133 Wn.2d at 551.

There was similar evidence of major drinking here. RP 526. Farmer testified he and Titus met up around 8:00 p.m. and were drinking at a couple different bars until 1:30 a.m., and that they also

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<sup>2</sup> State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).

ingested cocaine. RP 765. There was also evidence the gun went off during a struggle. Under Berlin, Farmer was entitled to manslaughter instructions.

(ii) Evidence the Gun Went Off When Farmer Pushed Titus Supplied a Factual Basis for Manslaughter Instructions.

During an interview with Detective Miller, Farmer reportedly said Tirado was shot by accident. RP 841. According to Miller, Farmer said that when Titus pulled the gun, Farmer was afraid Titus was going to shoot Tirado, so Farmer pushed him and “the gun just went off.” RP 841-42. As Farmer argued in his opening brief, evidence that Tirado was shot by accident also supported the defense proposed manslaughter instructions. BOA at 16, 24.

In response, the state posits Farmer is precluded from making this argument because neither party requested an accomplice instruction. BOR at 13. However, accomplice liability is not an element of the crime charged or an alternative means of committing a crime. State v. Haack, 88 Wash.App. at 428, 958 P.2d 1001. The elements of the crime are the same for both a principal and an accomplice. State v. Carothers, 84 Wash.2d 256, 264, 525 P.2d 731 (1974), overruled on other grounds in State v. Harris, 102 Wash.2d 148, 685 P.2d 584 (1984). An information

need not allege accomplice liability in order to state the nature of the charge; charging the accused as a principal is adequate notice of the potential for accomplice liability. State v. Rodriguez, 78 Wash.App. 769, 774, 898 P.2d 871 (1995), review denied, 128 Wash.2d 1015 (1996). Thus, the fact the jury was not instructed on accomplice liability would not necessarily preclude it from convicting based on proof of complicity, rather than principal liability.

The state also argues this Court should reject Farmer's argument that his statement to Miller supplied a factual basis for manslaughter instructions on grounds there was no evidence Farmer knew that Titus was going to commit a negligent or reckless killing. According to the state:

In this case the defendant has not raised, discussed, argued or cited any authority for his implicit argument that he could have been convicted of manslaughter as an accomplice for a killing committed by Mr. Titus.<sup>[3]</sup> Had the defendant included such an argument, however, it would have been of no consequence. In order for the defendant to have been convicted as an accomplice of either degree of manslaughter the state would have been required to prove that [the defendant] *actually* knew that he was promoting or facilitating ... the commission" of those particular crimes. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (emphasis in the original), citing State v. Shipp, 93

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<sup>3</sup> But see authorities cited supra.

Wn.2d 510, 517, 610 P.2d 1322 (1980) (An accomplice must have actual knowledge that the principal was engaging in the crime eventually charged.). Thus in this case the defendant would have needed to have actual knowledge that Dusty Titus was going to commit a reckless or negligent killing.

BOR at 14.

But there is case law that also says the state is required to prove only the accomplice's general knowledge of his coparticipant's substantive crime. Specific knowledge of the elements of the coparticipant's crime need not be proved to convict one as an accomplice. State v. Roberts, 142 Wash. 2d 471, 512, 14 P.3d 713, 736 (2000), as amended on denial of reconsideration (Mar. 2, 2001).

One could infer Farmer had knowledge that Titus intended to pull a gun on Tirado. Farmer testified he gave the gun to Titus beforehand because Titus wanted to buy it. RP 781. So Farmer knew Titus had a gun. Farmer also acknowledged he and Titus sometimes drove around and shot guns. RP 782. Therefore, one could infer Farmer facilitated Titus' crime in pulling a gun on Tirado by driving them into the alley where, as Farmer testified, Titus did in fact pull the gun. Therefore, there is evidence Farmer acted with

knowledge he was promoting or facilitating a reckless act that could result in death.

Finally, the state focuses on Farmer's testimony as a basis for upholding the trial court's refusal to instruct the jury on the legal lesser offenses of manslaughter. BOR at 14. However, that is the precise error the trial court made. This Court must look at the record as a whole and not limit its view to Farmer's testimony. See note one.

As argued in the opening brief and this reply, the court erred in finding no factual basis for the manslaughter instructions.

## 2. PROSECUTORIAL MISCONDUCT DEPRIVED FARMER OF HIS RIGHT TO A FAIR TRIAL.

In his opening brief, Farmer alleged five instances in which the prosecutor unfairly bolstered Titus' credulity by: making misleading statements about Titus' motivation in coming forward; minimizing the benefits Titus was receiving in exchange for his testimony; and intimating Titus remained in jeopardy of prosecution for his role in the shooting. BOA at 25-37. In response, the state argues Farmer has not established the un-objected-to misconduct was sufficiently egregious to merit review. The state is incorrect.

(i) The Prosecutor's Misstatement of Facts in Opening Was Egregious.

Regarding opening statement, the state alleges the prosecutor was merely including both of Titus' alleged motivations in coming forward – to get a deal and to unburden himself. BOR at 23. In so arguing, however, the state refers only to the part where the prosecutor stated that Titus “came clean because it was time to tell people what happened.” BOR at 28. The state does not address the second paragraph of the prosecutor's comments in opening misrepresenting the facts preceding Titus' disclosure:

He grows up. He decides it is time to tell people what happened.

They tell him, “You are not getting any benefit from this, no promises.” And he goes, “I know. I get it. But I need to tell somebody, and he does.”

RP 23-24.

This underlined representation is patently false. Titus contacted his attorney David Lee in February 2014, when probation put in its violation report, to see if he (Titus) would receive better treatment on the violations, as well as the new felony charges, if he reported to law enforcement what he claimed happened to Tirado in 2006. CP 9, RP 37-38, 516-17, 597, 687. It was not until October and November 2014 that Titus actually spoke to Humbolt

County officer Wayne Cox and the Humbolt district attorney in turn contacted detective Gene Miller in Washington. RP 414, 547-548. And Titus' contact with the authorities happened *after* his attorney and the Humbolt district attorney had already been negotiating and putting off any court review of Titus' parole violations. RP 494-95, 549.

The new felony charges at some point were dropped (RP 583) and the probation violations were worked out so that Titus would receive no jail time. RP 485, 518.

(ii) The Prosecutor's Questioning of Titus and Miller About the Absence of any Formal Plea Agreement or Immunity Agreement Was Egregiously Misleading.

The state claims that in questioning its witnesses it accurately portrayed the cooperation agreement between Titus and the authorities. BOR at 24-25. The crux of Farmer's argument is that the state's questions were misleading and minimized the benefits Titus did in fact receive.

For instance, the prosecutor elicited from Titus that he did not enter into any "formal plea agreement" with California authorities or those in Washington. BOR at 24. However, the distinction between a "cooperation agreement" and "a formal plea

agreement” would be lost on a layperson such as a juror. See e.g. RP 715 (court notes “the distinction between an immunity agreement and a benefit really is not something that this jury is capable of understanding.”). It is clear the prosecutor was aware of the jurors’ lack of technical expertise and trying to exploit it by asking questions about “formal plea agreements” and “immunity agreements.” RP 518, 702.

Moreover, jurors would not know that police officers are not the ones who make deals or promises, prosecutors are. State v. Unqa, 165 Wn.2d 95, 104, 196 P.3d 645 (2008). Thus, whether Cox or Miller made no promises to Titus when they spoke to him is of no consequence. Yet, the prosecutor made sure to elicit this evidence. RP 586-87. The prosecutor’s questions were designed to mislead the jury into believing Titus’ motivations were more altruistic than in reality and that he was therefore more credible.

There is no curative instruction that could have been given. The court would have had to give a tutorial on criminal law, which clearly it could not do.

(iii) The Prosecutor's Statement "He's Not Guaranteed a Walk Here in Washington" Was an Egregious Misstatement.

The Pierce County prosecutor's office had no intention of prosecuting Titus for anything. RP 938 (in the prosecutor's own words: "he is not prosecutable because there are no facts to prosecute him.") Yet, as before with the questioning of witnesses, the prosecutor implied Titus still could face charges for his role in Tirado's shooting by arguing in closing: "He's not guaranteed a walk here in Washington." RP 865.

This was particularly egregious because before closing argument, the court expressed concern the state was giving the impression Titus was not receiving a benefit; and the court specifically referenced the state's questions about the absence of an immunity agreement, noting: "The distinction between an immunity agreement and a benefit really is not something that the jury is capable of understanding." RP 715. The court cautioned the state not to articulate in closing that, "somehow he hasn't received some kind of benefit." RP 715.

In its response, the state does not address the prosecutor's specific statement Farmer challenges as misconduct but seems to argue that the prosecutor did nothing wrong because there was in

fact no *immunity* agreement. See BOR at 25-26 (“the defense conflates a formal immunity agreement with the informal agreement at issue in this case”). The state misses the point. It is clear the prosecutor again was attempting to exploit the jurors’ lack of knowledge as to the meaning of precise legal terms. Despite the lack of any formal immunity agreement, it was clear to the legal professionals involved Titus was not in jeopardy. The prosecutor’s statement suggesting otherwise was egregiously misleading.

In its response, the state notes there was not a contemporaneous objection to the prosecutor’s argument and argues the higher standard for prosecutorial misconduct therefore applies. However, the state fails to address State v. Lindsay, which stands for the proposition that a mistrial motion following the prosecutor’s closing “is an acceptable mechanism by which to preserve challenges to prosecutorial misconduct.” BOA at 34 (citing State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014) (citing United States v. Prantil, 764 F.2d 548, 555 n.4 (9<sup>th</sup> Cir. 1985)). Because Farmer moved for a mistrial based on the prosecutor’s immunity argument, the issue is preserved and the less stringent standard for prosecutorial misconduct applies.

(iii) The Prosecutor's Statement Titus "Was Treated Just Like Everybody Else" Was an Egregious Misstatement.

The prosecutor argued in rebuttal closing Titus "was treated just like everybody else" vis-à-vis probation in California. For the reasons stated in the opening brief (BOA at 35-37), this is a gross mischaracterization of the facts. In its response brief, the state essentially argues that the gross misrepresentation was not prejudicial because the prosecutor – preceding the misstatement – stated, "we are not trying to argue that Dusty Titus received no benefit" and that "he was hoping he would get some consideration." RP 896. Again, however, this is a total minimization of what was actually occurring. The prosecutor engaged in unfair tactics in an attempt to bolster its otherwise tarnished star witness. The prosecutor's cumulative misconduct deprived Farmer of his right to a fair trial.

B. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Farmer's conviction.

Dated this 6<sup>th</sup> day of March, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", written over a horizontal line.

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