

No. 49158-3-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

Pierce County Superior Court, No. 15-1-02250-6

STATE OF WASHINGTON
Respondent

vs.

LARRY J. LEE, JR.
Appellant

Reply Brief of Appellant

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A. REBUTTAL ARGUMENT

1. The charges at trial in fact required the State to establish the *corpus delicti* of the identity of the perpetrator of those crimes, and the State failed to satisfy this burden.

The State argues that, to establish the corpus delicti in this case, it was not required to admit prima facie evidence of the identity of the person who committed the crime. Brief of Respondent (“Resp.”) at 9. The State is correct that “the corpus delicti of most crimes does not involve the issue of identity[.]” *State v. Hamrick*, 19 Wn. App. 417, 419, 576 P.2d 912 (1978).

However, Washington courts have recognized that certain crimes “inherently require proof of identity;” in other words those where “the fact that a crime occurred cannot be established without the identification of a particular person” including, but not limited to, reckless driving, drunk driving, attempt, conspiracy, and perjury. *State v. Solomon*, 73 Wn. App. 724, 728, 870 P.2d 1019 (1994).

As the trial court correctly determined, due to the nature of the charges in this case, the corpus delicti

required proof that the defendant owed the decedent a duty of care. It is not inherently unlawful to fail to provide medical care to another person. It is only unlawful to do so if one is in a relationship with that person that creates a duty to provide certain care, for example “a *person* who has assumed the responsibility” to provide the basic necessities of life. RCW 9A.42.020; RCW 9A.42.030 (emphasis added); *State v. Morgan*, 86 Wn. App. 74, 80, 936 P.2d 20 (1997).

For these reasons, it was insufficient evidence of the corpus delicti of the crime for the State to merely establish through independent evidence the fact that the decedent needed, but did not receive, adequate medical care; rather, the fact that a crime occurred could not be established without the identification of a particular person made responsible for providing such care by virtue of his or her unique relationship with the decedent.

The State argues that it introduced adequate independent evidence of identity. Brief of Resp. at 11. The State points out that the decedent apparently received some remedial treatment. However, there was no evidence

independent of Mr. Lee's statements that he was the person who took those remedial measures. Moreover, even if the State had corroborated Mr. Lee's identity as the person providing some type of wound care, just because treatment was given does not create an inference that such treatment was given pursuant to a duty to do so. By way of analogy, the giving of one meal to another person does not create an inference that one has assumed the larger responsibility to provide all of his or her meals on an ongoing basis.

Outside of Mr. Lee's statements, the "record gives no rational basis for inferring one possibility over the other" among the multitude of ways that the decedent may have come to receive some wound treatment, nor the identity of anyone with a special relationship that required the provision of medical care. *State v. Bernal*, 109 Wn. App. 150, 154, 33 P.3d 1106 (2001).

Indeed, the conclusion of the State's contract for paid care with Mr. Lee, which coincided with notice to Mr. Carter that he must find a new caregiver (4RP 588-90), as well as Ms. Barbur's testimony that she did not wish to pay Mr. Lee for further caregiving services and was still

looking into options for other caregiving services (2RP 363) were more consistent with a conclusion that no one was serving in the capacity of caregiver to the decedent at the time of his death. These facts negate a conclusion that Mr. Lee had a unique relationship that gave rise to a duty to provide medical care for Mr. Carter at the time of his death.

2. **Even if the *corpus delicti* of the charged crimes did not require proof of identity, the State failed to admit prima facie evidence that a crime was committed by proving merely that the decedent required the assistance of a caregiver.**

The State argues that, if it was not required to introduce independent evidence of identity, it adequately established the *corpus delicti* by proving, through independent evidence, that Mr. Carter required a caregiver. Brief of Resp. at 9; 11. However, the fact that Mr. Carter could not adequately care for himself without assistance does not give rise to a logical inference that he had a caregiver. It does not follow from the mere fact of his need for assistance that someone filled that role and held that duty at the time of his death; it is equally possible that Mr. Carter died at a time when he was not adequately caring for himself, with no one presently under a duty to provide him

with that assistance. *State v. Aten*, 130 Wn.2d 640, 660, 927 P.2d 210 (1996) (corpus delicti is not established when independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause); *State v. Green*, 182 Wn. App. 133, 144, 328 P.3d 988 (2014) (evidence not inconsistent with innocence cannot satisfy the corpus delicti rule).

In short, outside of Mr. Lee's confession, the State could not corroborate that Mr. Carter's medical care was Mr. Lee's, or anyone else's, current responsibility at the time of his death. The trial court should, therefore, have excluded Mr. Lee's uncorroborated confession and dismissed this matter for insufficient evidence.

3. The continuance of the trial date to May 31, 2016, was not an agreed continuance, was beyond the time for trial deadline, and did constitute a manifest abuse of discretion.

The State argues that, although the prosecution was denied a continuance on March 9, 2016, a continuance of the March 24, 2016 trial date was reasonable based upon changed circumstances. Brief of Resp. at 15. The one circumstance that had changed was the sudden existence of

a trial conflict for one of the assigned prosecutors that must have arisen sometime between March 9, 2016 and March 24, 2016, as it was not discussed by the parties on March 9, 2016. IRP 11-14. The State neglects to make any argument regarding, and the presiding judge apparently did not address, the propriety of the prosecution managing its calendar in such a way that a trial conflict for one of the assigned deputies came into existence sometime between the State's first and second motions for a continuance.

The State should either have "promptly [notified]" the court of any conflict that predated its series of continuance requests, taken steps to prevent the conflict from arising, taken steps to manage its caseload so as to resolve the conflict, or attempted reassignment of the case to another deputy prosecutor. *State v. Heredia-Juarez*, 119 Wn. App. 150, 154-155, 79 P.3d 987 (2003). To simply avoid any analysis of the State's duties to balance its caseload against Mr. Lee's speedy trial right was to rule on untenable grounds and thus a manifest abuse of discretion. *Id.* at 153. Similarly, the State made no apparent effort whatsoever to resolve its expert witness dilemma after its

motion for a continuance on those grounds was denied on March 9, 2016.

Alternatively, although it acknowledges that the trial had previously been continued to March 24, 2016, the State appears to argue that the May 31, 2016 trial date was within the time for trial deadline that was in place at the time the court granted the continuance. Brief of Resp. at 17. However, by virtue of a previous continuance to March 24, 2016, the time for trial deadline pursuant to CrR 3.3(b)(5) was April 23, 2016 at the time the presiding judge decided to grant the State's second continuance request; thus, continuing the trial did burden Mr. Lee's speedy trial right, without any balancing of that right against steps that the State could have taken to manage its caseload and secure alternative witnesses. 1RP 16.

Finally, although the State argues that the defendant "did not object" to the continuance and agreed with the proposed trial date, insofar as defense counsel's comments in the State's Supplemental Report of Proceedings could be viewed as "agreement," which Mr. Lee would argue that they should not, it is clear that no written agreement to

continue the trial, signed by Mr. Lee, was entered. Thus, agreement was not a valid basis for the continuance under CrR3.3(f)(1).

4. Mr. Lee did preserve his objection to Ms. Burnam’s testimony, which was clearly inadmissible and extremely prejudicial.

The State argues that Mr. Lee did not preserve his objection to Ms. Burnam’s testimony. Brief of Resp. at 21. However, Mr. Lee’s objection to the testimony was not general, the objection was that the testimony was “speculation,” an objection that frames the issue with specificity. If the testimony did not satisfy the more probable than not standard, if it was not helpful to the trier of fact under ER 702, then it was speculation. *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007).

The State also argues that no particular degree of certainty was required for admission of Ms. Burnam’s opinion. Brief of Resp. at 18. The same degree of certainty, reasonable medical certainty, used in the authorities that the State cites does, however, apply to expert testimony in criminal cases. Testimony that an incident “caused a physical condition must be based on a more probable than

not, or more likely than not, causal relationship” and in a criminal case, “[t]here are legal consequences that attach to these scientific opinions. ... a level of medical certainty is required.” *State v. Shepherd*, 110 Wn. App. 544, 551, 41 P.3d 1235 (2002).

Ms. Burnam’s testimony constituted sheer speculation; rather than testifying that the cause of the marks was clear to any level remotely near medical certainty, she speculated that in her opinion the location of the marks made them “suspicious.” 3 RP 432.

In addition, like a determination by a doctor that the *conduct* of sexual abuse occurred, a determination that the physical marks here were the result of the *conduct* of restraining Mr. Carter raises concerns “as a result of the degree to which the diagnosis advances the jury's ability to evaluate the evidence is minimal and [the] risk that the jury will defer to the expert's assessment outweighs whatever probative value” the determination might have. *State v. Southard*, 347 Or. 127, 141–42, 218 P.3d 104 (2009). In *Carlson*, similar concerns were implicated even though a doctor’s physical findings were “compatible,” albeit not

conclusively, with her determination. *State v. Carlson*, 80 Wn. App. 116, 119, 906 P.2d 999 (1995).

5. Prosecutorial misconduct was established, as the prosecutor's misconduct was improper to such a degree it could be considered to have been flagrant and ill-intentioned.

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). In determining whether the misconduct warrants reversal, reviewing courts consider its prejudicial nature and its cumulative effect. *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994); *Boehning* at 518-19.

“Reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

“In-life photographs are not inherently prejudicial, especially when the jury also sees ‘after death’ pictures of the victim’s body.” *State v. Furman*, 122 Wn.2d 440, 452, 858 P.2d 1092 (1993). Where a photo is generic and simply shows what a victim looks like, the trial court does not abuse its discretion in admitting the photo. *State v. Brett*, 126 Wn.2d 136, 160, 892 P.2d 29 (1995). “Highly prejudicial images may sway a jury in ways that words cannot.” *In re Glassman*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012).

It may be difficult to overcome the prejudice imposed by a photograph with a curative instruction. *Id.* “Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented.” *Id.* at 707-708.

The in-life photo of Mr. Carter was irrelevant and prejudicial. Trial Exhibit 51. The photograph was not objected to at trial. RP 355. It was admitted during the testimony of Ms. Barber, the victim’s sisters. *Id.* Ms.

Barber testified that at the time Mr. Carter passed away, “he was maybe a little thinner, a little grayer and balder...” *Id.* Ms. Barber went on to testify that the photo was approximately 15 years old. *Id.* The misconduct assigned to the use of this photograph is not the prosecutor’s failure to mention it during their closing argument.

While the State did not explicitly comment on the photograph in their closing argument, the photograph was displayed. Not only did the photograph not accurately depict Mr. Carter at the time of his death, the use of the photograph in closing argument was clearly to evoke sympathy and sadness that a happy, smiling man was no longer alive. The photograph goes being showing a generic depiction of the victim.

A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. *United States v. Garza*, 608 F.2d 659, 663 (5th Cir. 1979). The Respondent’s Brief does not counter the argument set forth in Appellant’s Brief regarding the testimony of Ms. English. Brief of Resp. at 33-34. Mr. Lee was held out to be a mandatory reporter and this theme was

utilized throughout the trial and, particularly, in closing argument. RP 751. No such testimony or evidence was presented at trial to support this notion, and the jury instructions properly indicated a far different legal standard to convict. Respondent's Brief fails to point to any testimony to the contrary.

These repeated instances of prosecutorial misconduct, cumulatively and individually, were flagrant and ill-intentioned and denied Mr. Lee a fair trial.

6. Trial counsel's ineffective representation is well documented in the record, and falls well below the standard of informed and reasonably prudent advocacy.

As an initial matter, the State argues that the record does not support Mr. Lee's contention that trial counsel provided ineffective assistance, including an absence of any reference to plea negotiations. However, counsel for the State at trial informed the court on the record that Mr. Lee had been extended an offer "without an aggravator and a low end offer" upon a plea to Murder in the Second Degree, which was rejected and a counteroffer was made of Criminal Mistreatment in the Second Degree. IRP 4-5.

The importance of the fact that the State extended a favorable offer to Mr. Lee and the fact that trial counsel filed the affidavits of his client that he did lies in the stark irreconcilability between trial counsel's gross misunderstanding of the elements of the crime and any inference that he competently advised Mr. Lee during "discussion of tentative plea negotiations and the strengths and weaknesses of [his] case" so that he might "know what to expect" and be able to make "an informed judgment." *State v. Estes*, 193 Wn. App. 479, 492–93, 372 P.3d 163 (2016). The State itself contends that the evidence at trial was so strongly in its favor as to be "insurmountable" and "beyond dispute." Brief of Resp. at 29. If that was the case, counsel should have advised acceptance of a low-end offer.

The significance of the affidavit in particular is that it contained damning admissions to the most evidentiary weak issues in the case for the State and yet it was attached in support of a *Knapstad* motion to dismiss for ***insufficient evidence***, a motion whose author was clearly oblivious to the legal standard at issue. CP 9-10; 21-30. Its filing and subsequent marking as an exhibit by the State at trial

irrevocably strengthened the State's arsenal of evidence as to Mr. Lee's duty of care and limited the arguments available to defense counsel.

More importantly, the affidavit sheds light on defense counsel's other deficiencies throughout the case. Trial counsel's misunderstanding of the law, rather than any conceivable trial tactic, demonstrably permeated his decisions in the case, from his negotiation posture, to his failure to so much as investigate the witnesses for either side (IRP 14), to his surprise thereafter at the court's rulings and the witness' answers, which contradicted his opening statement and forced a change of defense theory mid-trial. 2RP 318 (suggesting that Mr. Carter should have called for help and that his death arose from the choice of comfort care over surgical intervention); 2RP 371-73.

The State is correct that many trials are an uphill battle for the defense, but the record here demonstrates that, as a result of the absence of a meaningful factual or legal investigation of the case, defense counsel was sincerely unable to see the challenge that lie ahead of him, and thus to prepare for it in any meaningful way or evaluate whether

it should be avoided altogether, until it unfolded before him to his apparent disbelief. What should have been a foreseeable struggle at trial over whether Mr. Lee assumed the responsibility to care for Mr. Carter caught defense counsel completely off guard, and he was ill-equipped to find another viable course at that juncture.

Mr. Cross was unable even to fulfill his small but important factual promise to the jury that he would establish that Mr. Lee tried to get Mr. Carter in to see his doctor due to his misunderstanding of how he could secure the participation of the decedent's doctor, an important defense witness. 1RP 14; 2RP 317; 2RP 709. Failure to call a witness for the defense may be justifiable if counsel "investigated the case and made an informed and reasonable decision against" doing so, but that was not the case here. *State v. Jones*, 183 Wn.2d 327, 340, 352 P.3d 776 (2015).

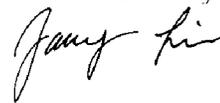
The conduct of Mr. Lee's trial counsel could not be further from "aggressively pursuing the only viable defense strategy." Brief of Resp. at 24. His omissions and oversights were not those of a "reasonably prudent" and

prepared attorney, but one who failed to make and act upon even a most rudimentary analysis of the law and the facts. *State v. Greiff*, 141 Wn.2d 910, 925, 10 P.3d 390 (2000). Mr. Lee respectfully requests this Court decline to accept the State's invitation to endorse this manner of defense of a client against the most serious of charges that an accused might face, and reverse his conviction on the grounds of ineffective assistance of counsel.

B. CONCLUSION

For the reasons explained above and in his opening brief, Mr. Lee respectfully requests this Court reverse his conviction and remand with instructions for dismissal, or, in the alternative, a new trial.

Respectfully submitted this 2nd day of June, 2017.



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