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NO. 52275-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN JENNINGS,

Appellant.

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

The Honorable Jerry Costello, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT EXCLUDED TESTIMONY THAT WAS CENTRAL TO HIS DEFENSE.

In his opening brief, appellant Justin Jennings asserts he was erroneously prevented from submitting to the jury critical evidence supporting his self-defense claim – evidence establishing the victim was on methamphetamine at the time of the incident. Brief of Appellant (BOA) at 9-21. In response, the State claims the trial court correctly excluded the evidence because Jennings' "offer of proof did not establish the relevance of the proffered evidence" and the evidence was prejudicial under ER 403. Brief of Respondent (BOR) at 8-18. As explained below, the State is incorrect.

Jennings' offer of proof was sufficient. When the motion before the trial court is one to exclude evidence, an offer of proof by the proponent is required by rule. ER 103(a). An offer of proof informs the court of the legal theory under which offered evidence is admissible. It also informs the judge of the specific nature of the offered evidence so the court can assess its admissibility, and it

creates a record for adequate review. State v. Ray, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991).

A formal offer of proof is not necessary if the substance of the testimony or evidence sought to be admitted is apparent from the record. Id. Reviewing courts presume the trial court is making its admissibility evaluation in response to the grounds stated, matters discussed by counsel, all pertinent arguments made by counsel, and the circumstances of the case as it existed when the ruling was made. State v. Ortuno-Perez, 196 Wn. App. 771, n. 6, 789, 385 P.3d 218, 227 (2016).

Jennings clearly identified the substance of the evidence he sought – the toxicology report of the victim, Christopher Burton, which established Burton was high on methamphetamine at the time of the incident. RP 92, 95, 97-98, 422, 424. He identified the legal theory under which the evidence is admissible: (1) it was relevant to corroborate Jennings' testimony that the victim was high on drugs and not in his right mind, and (2) it was relevant to the jury's determination of whether Jennings' subjective fear of Burton was reasonable. RP 97-98, 427-28.

The State suggests the evidence of Burton's methamphetamine use was irrelevant unless Jennings could

provide an offer of proof that the methamphetamine did in fact cause Burton to exhibit behavior. BOR at 11. This State is wrong. Jennings established the relevance of the methamphetamine evidence upon making an offer of proof that (1) he believed Burton was on methamphetamine at the time of the incident, and (2) this contributed to his subjective fear that Burton was going to cause him great personal injury or death. RP 97-98, 427-28.

The fact Burton was on methamphetamine during the incident was relevant to Jennings self-defense. In Harris v. Cotton, 365 F.3d 552, 555-57 (7th Cir. 2004), the Seventh Circuit reversed a murder conviction due to ineffective assistance of counsel when counsel mistakenly failed to obtain a toxicology report that showed the victim was under the influence of cocaine and alcohol at the time of death. In so ruling, it explained: "Common sense tells us that an individual under the influence of cocaine and alcohol may look and act in a strange manner..." Id. 556 (7th Cir. 2004). Indeed, "an affirmative defense of self-defense against a drunk and cocaine-high victim stands a better chance than the same defense against a stone-cold-sober victim." Id.

When assessing prejudice, the Seventh Circuit Court explained evidence establishing the victim was under the influence

of drugs would have created a “reasonable probability that the jurors’ collective perception regarding Harris’ conduct would have changed.” Id. (internal quotations and alteration omitted). It also recognized the corroborative value of the toxicology results, explaining that had the jurors known of the victim’s use of cocaine, they may have credited the defendant’s claim of the victim’s “hostile and erratic behavior.” Id. Thus, the Seventh Circuit recognized not only that the toxicology report provided relevant evidence to Harris’ claim of self-defense, it also concluded the absence of this evidence prejudiced the outcome of the case. Id. Consequently, it reversed Harris’ murder conviction. Id. The result should be no different here.

The State’s argument to the contrary rests heavily on its biased view of the record, and its failure to recognize Jennings’ testimony as evidence. BOR at 14. The State claims:

Because there was no evidence that methamphetamines consumption affected Mr. Burton’s behavior in any way, there was no relevance in admitting evidence of Mr. Burton’s methamphetamines consumption. The simple fact of drug consumption [was not relevant under ER 401].

BOR at 14 (emphasis added). However, the State is wrong when it claims there was “no evidence” Burton’s methamphetamine

consumption affected his behavior. Jennings offered this evidence through his own testimony.

Jennings testified that he had previously observed people who were high on methamphetamine. RP 1297. In his experience, people on methamphetamine get very aggressive and violent. RP 1345. Jennings believed Burton was high on methamphetamine at the time of the incident. RP 1297. Jennings testified he saw Burton act irrationally aggressive in response to Redman. RP 1298. As events unfolded, Jennings believed Burton was “not in the right mind.” RP 1324. Jennings testified that his belief Burton was on methamphetamine factored into his fear of Burton. RP 1323-24, 1332, 1423.

The State has chosen to disregard this testimony entirely – apparently because it believes it carries little weight. The State forgets, however, that it is the jury that must determine whether the evidence is weak or false – not the trial court and certainly not the State. State v. Duarte Vela, 200 Wn. App. 306, 321, 402 P.3d 281, 289 (2017).

Whether the State might have properly argued weight to the jury, on appeal the record cannot be viewed so one-sidedly. Here, the Court is not making a determination as to the weight of the

evidence; instead it is determining whether the jury should have been permitted to hear all the evidence and given the opportunity to assess the weight itself.

Next, the State appears to suggest that since the jury was tasked with evaluating the “reasonableness” of Jennings’ belief that Burton was on methamphetamine, it did not matter whether the proffered evidence establish the “fact” that Burton was on methamphetamine. BOR at 14. This makes no sense, however. The jury was tasked with considering the reasonableness of Jennings’ fear of Burton, and the fact Burton was on drugs was relevant to that task. See, Harris, 365 F.3d at 556-57 (explaining the relevance this type of evidence in the self-defense context). Certainly, if the toxicology report had shown there was no methamphetamine in Burton’s system, the State would have argued the results were relevant to show the unreasonableness of Jennings’ claimed belief Burton was on drugs. Just because the toxicology results actually favor the defense, that does not make them somehow less relevant.

Arguing to the contrary, the State makes a cute but ultimately useless hypothetical, suggesting that if this Court were to substitute the idea of methamphetamine consumption with cookie

consumption (i.e. the defendant believed the victim was high on cookies and agitated due to cookie intoxication) then Jennings' argument somehow logically fails. BOR at 17. However, the futility of the State's culinary foray is revealed in its analysis:

The mere presence of methamphetamines, or cookies, in the body of a person slain, does not make the reasonableness of the slayer's fear more probable. Those substances are just stuff, and unless that stuff causes something relevant, that stuff remains irrelevant stuff.

BOR at 17. The State again fails to recognize Jennings – through his proffer and testimony – established “the stuff” did cause something relevant. “The stuff” caused Jennings to subjectively fear Burton was out of his mind and would gravely injury or kill him. Thus, the fact Burton was high on “the stuff” was relevant.

Next, the State urges this Court to conclude the toxicology results were properly excluded because “the defendant's testimony was self-serving he was testifying about his own beliefs in a self-defense case.” It suggests that the methamphetamine evidence was too attenuated because there was no expert testimony to connect the dots between Jennings' belief that Burton was out of his mind on methamphetamine and some scientific evidence objectively establishing the methamphetamine did in fact have that

effect on Burton. BOR at 17-18. However, such scientific evidence was not necessary before the toxicology report became relevant. Jennings' subjective beliefs were at issue, and the jury was entitled to hear all evidence that had a tendency of making more likely the reasonableness of his fear of Burton. The toxicology report have such tendency. Just because there was no expert testimony telling the jury with scientific exactitude how the methamphetamine in fact affected Burton, this does not mean the toxicology report was inadmissible. The State's argument on appeal goes to the weight to be given the evidence – not to whether Jennings was entitled to submit it to the jury.

Finally, the State claims the evidence was properly excluded under ER 403 because it was misleading. The sum of the State's argument is as follows:

The trial court properly recognized that introduction of evidence might mislead the jury by falsely suggesting that there was a factual basis for believing that methamphetamines "amped up" and made Mr. Burton aggressive.

BOR at 20.

The State's argument should be rejected on two grounds. First, there was no risk the jury would be misled into falsely believing there was a basis that Burton's methamphetamine use

impacted his behavior. That is because the jury already had that evidentiary basis before them. Jennings testified to the fact that Burton was acting out of his mind, and he thought this was due to Burton being on methamphetamine. The proffered evidence corroborated Jennings' belief Burton had consumed methamphetamine. It was up to the jury to ultimately determine whether Jennings reasonably feared for his life after considering all relevant evidence – including the toxicology report.

Second, the State offers no explanation for why the trial court could not have used a limiting instruction to indicate to the jury the proper use of the methamphetamine evidence. Using a limiting instruction to clear up any potentially misleading effect would have been far more appropriate than denying Jennings the opportunity to introduce this evidence at all. Indeed, it was more misleading to the outcome to leave the jury in the dark regarding this relevant fact.

In sum, the State's response disregards that it was the job of the jury – not the prosecutor or the trial court – to resolve questions of facts after hearing all evidence relevant to Jennings' claim of self-defense. As explained in detail in appellant's opening brief, the trial court erred when it excluded the toxicology results. This

evidence had a tendency of making the reasonableness of Jennings' fear more probable, and it corroborated his version of events. As such, the trial court erred in excluding it, and reversal is required. Harris, 365 F.3d at 555-57.

II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A GUILTY VERDICT FOR FELONY MURDER.

In his opening brief, appellant asserts the State failed to prove Jennings caused the death of Burton in the course of and in furtherance of the bear-spraying assault, or in immediate flight from that assault. BOA 22-25. In response, the State first offers a novel theory, suggesting the bear-spray assault was a continuous event that was still occurring until Burton died because the noxious fumes were still in the air. BOR at 24-26. However, this is inconsistent with how the jury was instructed.

The to-convict instruction set forth the specific elements of assault in the second as follows.

The elements of assault in the second degree are:

- (1) That on or about the 6th day of May, 2017, the defendant administered to or caused to be taken by J. Christopher Burton, a destructive or noxious substance;
- (2) That the defendant acted with intent to inflict bodily harm; and

(3) That this act occurred in the State of Washington

CP 102 (emphasis added). Under this instruction, the actus reus occurred when Jennings deployed the bear spray, administering to Burton and causing Burton to be exposed to the noxious substance. It was at this moment Jennings arguably had the requisite intent to inflict harm. Suggesting otherwise, the State claims the assault occurred continuously until Burton died. However, that argument is only reasonable under the instruction if there was evidence that Jennings continued to spray Burton until his death. That did not happen.

Next, the State cites State v. Villanueva-Gonzalez, 180 Wn.2d 975, 985-86, 329 P.3d 78 (2014), for the proposition that assault in the second degree is a "course of conduct" crime. However, that case makes clear that whether the assault constitutes a "course of conduct" crime is dependent on the facts of the case. Id. Courts must consider the following factors: the length of time over which the assaultive acts took place; whether the assaultive acts took place in the same location; the defendant's intent or motivation for the different assaultive acts; whether the acts were uninterrupted or whether there were any intervening acts

or events; and whether there was an opportunity for the defendant to reconsider his or her actions. Id.

Here, the factors indicate the bear-spraying and shooting were not a continuous course of conduct. While the State is able to point to testimony establishing that the shooting occurred quickly after the spraying and in the same location (BOR at 24), other factors indicate the conduct was not one course of action. First, Jennings had different motivations. He deployed the bear spray to break up the fight between Burton and Lance Redman; afterward, he shot Burton because he feared Burton was going to kill him. RP 1328, 1332, 1337, 1423, 1430. There were also intervening events between the shooting and the spraying. Burton had turned his attention from Redman and began to act aggressively toward Jennings, moving at him. RP 807, 1329-31, 1334. Finally, there was an opportunity for Jennings to reconsider his actions as demonstrated by his ability to take in Burton's angry response, register fear for his life, and deploy a different means of defense. Id. Thus, on a whole, Villanueva-Gonzalez establishes there was not a continuous course of conduct from the bear-spraying to the shooting.

Finally, the State claims the jury could have found Jennings shot Burton in flight from the bear-spraying incident. RP 27. To support this, it cites only vaguely to its own summary of Lyndi Greinke's testimony. RP 27, n.21. However, nothing in that testimony remotely supports the notion Jennings shot Burton in immediate flight from the bear-spraying assault. BOR at 7-8.

In sum, the record simply does not support the State's claim this case involves a continuous assault. Moreover, as was discussed in detail in appellant's opening brief, the evidence was insufficient to show beyond a reasonable doubt Jennings killed Burton either (1) in the course of and in the furtherance of the bear-spray assault or (2) in immediate flight from the bear-spray assault. BOA at 23-25. As such, the felony murder conviction must be reversed.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO STRIKE A WITNESS' IMPROPER COMMENT ON GUILT.

In his opening brief, Jennings asserts the trial court erred in not striking witness Gary Tongedahl's comment that he watched Burton being "murdered." He explains this was an improper comment on guilt. BOA at 25-33. In response, the State first claims the issue was not preserved for appellate review because

the objection was not specific enough. BOR at 31-34. However, as discussed below, the basis of the objection was apparent from the context, and the trial court ruled on it in that context. Hence, appellate review is appropriate.

An objection to the admission of evidence must generally be timely and specific to preserve the issue for appeal. ER 103(a)(1); RAP 2.5(a); State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). This is so because a timely and specific objection gives a trial court the chance to prevent or cure error. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). However, “if the ground for objection is apparent from the context, the objection is sufficient to preserve the issue.” State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993) (citing State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987)).

In this case, the motion to strike came from both parties right after Tongedahl passionately told the jury that he had watched his close friend being “murdered.” RP 873-74. It was apparent from the context that both attorneys were objecting to the improper comment on guilt. See, BOA at 28-31 (discussing in detail how this was an improper comment on guilt). The trial court considered the motions to strike and decided (erroneously) that Tongedahl’s

opinion about Burton being murdered could be considered by the jury. RP 874. Given the context of the motions to strike from both counsel and the court's ruling, the objection was sufficient to permit appellate review.

Next, the State suggests there was no error because the trial court admitted the improper opinion evidence as part of the witness' explanation of prior testimony. However, the State fails to recognize that even in the context of clarifying prior testimony, a witness may not offer an impermissible opinion about the defendant's guilt. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213, 217 (2014). Even if an opinion is blurted out in the middle of otherwise admissible testimony, it is still improper because it impedes the jury in its job to make an independent evaluation of the facts. State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958, 963 (2009).

In its response, the State failed to address the factors that must be considered when determining whether testimony constitutes an impermissible opinion. See, State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009) (listing factors). Appellant thoroughly addressed each factor, demonstrating under relevant case law why Tongedahl's statement was an

impermissible comment on guilt. BOA at 28-31. The State has provided no substantive response. BOR 30-38. It appears this silence is a concession that Tongedahl did indeed render an opinion on Jennings' guilt.

Finally, the State suggests appellant's challenge to the trial court's failure to strike Tongedahl's opinion testimony "should be denied because defendant has failed to present an ER 403 analysis." BOR at 36. However, when a witness comments on a defendant's guilt in a criminal trial, ER 403 does not apply. The comment is inadmissible regardless of the probative value. As the Washington Supreme Court has said:

... this court has held that there are some areas that are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.

State v. Montgomery, 163 Wn. 2d 577, 591, 183 P.3d 267, 274 (2008). Comments on guilt are inadmissible, and no ER 403 ruling can change that.

In sum, as explained in Jennings' opening brief, Tongedahl's testimony constituted an inadmissible comment on guilt, and the trial court erred when it refused to strike it. BOA 26-32. Nothing in

the State's response establishes otherwise. Consequently, this Court should reverse.

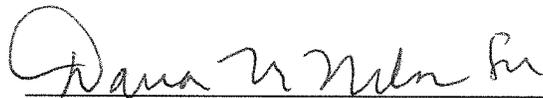
B. CONCLUSION

For reasons stated above and those stated in appellant's opening brief, this Court should reverse Jennings' conviction.

DATED this 3rd day of July, 2019.

Respectfully submitted,

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