

FILED

SEP 15 2016
COURT OF APPEALS
STEVENS COUNTY

30800-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CRAIG COSBY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF STEVENS COUNTY
THE HONORABLE ALLEN C. NIELSEN, JUDGE

BRIEF OF RESPONDENT

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for Stevens County

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I. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Craig Cosby's Fifth Amendment rights by permitting the State to use compelled statements made by Cosby during a diminished capacity examination as impeachment evidence.
2. Cosby was deprived of effective assistance of counsel when his attorney failed to request a limiting instruction for testimony admissible only for impeachment purposes.
3. The sentencing court erred by imposing lifetime no-contact orders prohibiting Cosby from contacting his adult children when those orders were not crime related.

II. ISSUES PRESENTED

1. Were the defendant's statements compelled or coerced by the court, where they were made during a mental health evaluation requested by his attorney, and where the defendant was informed of his right not to answer questions, and had the assistance of defense counsel from the outset of the evaluation?
2. Was the defendant denied his right to effective assistance of counsel when his attorney decided not to request a limiting instruction regarding the answers to four questions that were introduced for impeachment purposes only?

3. Did the trial court abuse its discretion by ordering a lifetime no-contact order against the defendant and in favor of his children, after he was convicted of murdering their mother?

III. STATEMENT OF THE CASE

On the morning of October 3, 2009, the defendant practiced drawing a .40 caliber handgun from his waistband, removing the safety as he drew so that the gun was ready to fire.¹ That afternoon, he practiced again, noting he became quicker and more fluid in the motion of drawing the weapon and disabling the safety. RP 400-402. He had practiced getting better at drawing and preparing his gun to fire. That evening, just as he had practiced all day, he drew that gun, and shot his wife 10 times, at close range. RP 268-270, 282-289.

On Oct 3, 2009, at about 5 PM, Stevens County Dispatch received a 911 call from Mr. Cosby. He identified himself and stated, “I just shot and killed my wife.” (Supplemental Transcript of 911 call, page 4, line 5.) In response to the 911 operator’s question as to why he had done that, he replied, “she just pushed me over the edge finally,” and, “she just kept pushing and pushing and pushing.” *Id.*, at lines 8-14. Ms. Cosby and the defendant were contemplating a divorce. She was about to move out of the

home. RP 23-25, 78. Her car was in the driveway. It contained a piece of luggage that appeared to be new and unused. RP 134-136.

Susan Cosby was found in the small front bedroom lying face down across her bed with her feet on the floor. RP 112. Her death was caused by multiple gunshot wounds to her chest, abdomen, and extremities. RP 268-269. The bullets were fired from Mr. Cosby's .40 caliber weapon that was found in his back bedroom. RP 240-246. There were 10 gunshot wounds. RP 269. The corresponding 10 shell casings were found in her bedroom. RP 152-153. The bullets were full metal jacketed bullets; all but one passed completely through and exited her 105 pound body. RP 269-270. The medical examiner testified the wounds were consistent with Susan being seated and shot by someone standing. RP 282-289. Susan Cosby's dusty and unused gun was found by her closet inside a holster that was zipped up inside of a pouch. RP 120-122.

After he was arrested, Defendant's attorney requested a stay of proceedings so that a mental health evaluation could be conducted. (Supplemental Transcript of Defendant's Request for Evaluation and Stay, held 10/13/2009, Judge Baker, page 2; Supp Trans Eval hereinafter). The court acquiesced to the defendant's request. Supp Trans Eval at 4. The

¹ Report of Proceeding, March 26, 2012, 335, 399 – 401 (RP 335

trial court ordered that Defendant's counsel be present at the evaluation, and informed the defendant that he could consult with his attorney before he answered any particular question. Supp Trans Eval, at 4, lines 19-22.

At the evaluation, the defendant was again informed that he had a right to consult with counsel at any point during that process, and that he had a right to refuse to answer any question during that process. (Supplemental Clerk's Papers, Sub 16, Dr. Randall Sandquist and Dr. William Grant Sanity Commission Report, page 2. Sanity Report hereinafter). He had defense counsel present for his evaluations. *Id.* During his evaluations, the doctors determined he understood the basic workings of the legal proceedings he was subject to, he understood the roles of the parties involved, and he understood the charges he was facing. *Id.* page 7-9.

At trial, the defendant testified that he had no recollection of the first, or any of the ten shots that killed his wife. RP 403. He testified that he felt his wife hit him on his arm, that he thought the gunshot he heard was from her shooting him, and that he blacked out due to a self-diagnosed concussion-like fugue. RP 353-356. He testified he had had a concussion in elementary school after striking his helmetless head on the concrete

hereinafter).

during a fall from a bicycle, followed by a 1961 helmetless high speed motorcycle crash that left him unconscious for 16 hours. RP 309-11; 312-314. Further, these head injuries were exacerbated in 1970, when he was hospitalized for 22 days following being electrocuted by 1440 volts. RP 315-316. Because of these injuries, he could not remember what happened during the shooting - when he hit his arm on the door his mind snapped and flashbaked in an out-of-body type of fugue wherein he thought he saw plastic orange bullets in his gun:

I - I don't remember at that point. Everything was happening very fast and I was so shocked and surprised. And then of course, when the door hit my hand, it basically recreates getting electrocuted, because all those pathways are still there, and they're very sensitive, and it just comes right up the arm and goes right in the mind, and it just goes SNAP! And when it happens with that severity, my mind and body remembers when I was being electrocuted I could smell my flesh burning.

RP 353.

I was - it's like coming out of one of those types of sequences I've had over the years. It's kind of like waking up, that's the best I can describe it, and there was something orange-colored, diffused object and I was like I was looking at it, but it was kind of fading in and out, and gradually I became aware that I was looking at the .40, and this all took some time, and I was looking at what I thought was a plastic bullet in the magazine in the .40, but I slowly realized I - I didn't have a orange plastic bullet for the .40, and gradually I became aware that I was just looking at the top of the magazine, and I forget the name of the part, but there's an orange part there to tell you, visually, that you

have no more rounds in the magazine, and the - so the gun was empty and the slide was locked back, and I slowly realized that I was actually standing ... in my own bedroom with my back to the - to the filing cabinet, and I was looking at the bed, and by the time I got to that point of realization, I started going into another episode where I was gonna lose consciousness and so I just went forward and I just kind of tossed the .40 on the bed, and then I caught myself on the bed, and then I don't really remember until I was - my next realization was I was sitting on the bed and felt the episode coming again, so I wanted to get down on the floor, and so I got off the bed and got on the floor.

RP 355-356.

The jury returned a verdict of guilty of premeditated murder. In special verdicts, the jury found firearm and domestic violence enhancements. CP 102-104.

IV. ARGUMENT

A. THE DEFENDANT'S STATEMENTS, MADE DURING A MENTAL HEALTH EVALUATION REQUESTED BY HIS ATTORNEY, WERE NOT COMPELLED OR COERCED BY THE COURT BECAUSE THE DEFENDANT WAS INFORMED OF HIS RIGHT NOT TO ANSWER QUESTIONS, AND, FURTHERMORE, HAD HIS COUNSEL PRESENT FROM THE OUTSET OF THE EVALUATION.

The Defendant asserts that because he underwent an examination at Eastern State Hospital pursuant to a court order requested by his attorney, that all of his statements made during the course of the examination were compelled. Because this original premise is incorrect,

all of his argument and authority dealing with compelled testimony is inapt. In the instant case, the defendant's statements to doctors during his mental health evaluation were both voluntary and informed; they were not coerced or compelled.²

The order granting the defendant's motion for a mental health evaluation *required* that the defendant have counsel present during the evaluation. Supp Trans Eval p. 2. Indeed, Defendant actually had counsel present from the beginning of the evaluation. Sanity Report, p. 2. Most importantly, the defendant was informed as to his rights to refuse to answer any question, participate in any inquiry, right to consult counsel,

² The impeaching questions asked of Dr. Strandquist were brief and inconsequential:

Q. Did Mr. Cosby say to you that he blacked out after the first shot?

A. Yes.

Q. Did Mr. Cosby indicate that he turned sideways and shot at her one time?

A. Yes.

Q. Did Mr. Cosby say that he went over and called 911?

A. Yes.

Q. Did Mr. Cosby say that he went to block her from getting the gun?

A. Yes.

RP 439.

and the fact the evaluation was not subject to the same heightened confidentiality guaranteed by the typical mental health evaluation or attorney-client privilege. Sanity Report, p. 2. Mr. Cosby answered that he understood his rights. *Id.* There was no coercion because there was no threat of punishment if the defendant did not answer questions. Therefore, Defendant's reliance on *New Jersey v. Portash*, 440 US 450, 459, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979), is misplaced. There, "the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt." *Portash*, 440 at 459. (Brief of Appellant, page 12). Here, the trial court ordered that the defendant's counsel be present to enable the defendant to discuss questions and answers with his attorney, and he was able to refuse to answer questions without any threatened sanction. In this case, no court order was requested compelling the defendant to undergo an evaluation for capacity with an expert designated by the State, because no diminished capacity defense was plead or alleged that would require such an order under CrR 4.7. Compare *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998) (requiring such examination under CrR 4.7 when diminished capacity is raised).

Separately, the statements were admissible for impeachment purposes under *State v. Lopez*, 74 Wn. App. 456, 874 P.2d 179 (1994).

Indeed, the trial court relied on this case in its ruling authorizing the limited cross examination of the defendant regarding prior inconsistent statements. RP 408-419 The trial Court “shepardized” *Lopez*, discussed its implications at length, and took note of the fact that Defendant’s attorney, Paul Wasson, was the appellate attorney in *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998). RP 417.

Lopez is indistinguishable from the instant case. There, in a first degree murder case the state was allowed to impeach the defendant with inconsistent statements made to a psychiatrist, even though the defendant had withdrawn his diminished capacity defense. *Id.*, at 459-60. Because the defendant’s statements were not compelled, those statements were admissible at trial for impeachment purposes without violating the defendant’s Fifth Amendment rights.³

Assuming, for argument, that the court did coerce the defendant’s statements during his evaluation, the defendant injected his own diminished capacity defense at trial when he testified that he blacked out from his self-diagnosed concussion, and introduced other evidence relating

³ See *Harris v. New York*, 401 U.S. 222 (1971) (“Statements inadmissible against a defendant in the prosecution’s case in chief because of lack of [Miranda safeguards] may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of the defendant’s trial testimony.”).

to his mental capacity - his mind “snapped” and flashbaked in an trance like fugue, smelling flesh burning, seeing plastic bullets, and becoming conscious of his surroundings only when he was back in his own bedroom remembering none of the ten shots he fired into his wife. RP 353-356. By raising this self-claimed diminished capacity defense, he opened the door for the State to use the inconsistent statements he made at his evaluation to refute his claimed lack of ability to form the premeditated intent. *Hutchinson*, 135 Wn.2d at 878-79. Without such a rule, a defendant would be free to commit perjury, or at least leave his in-court statements unreachable on cross examination. In his learned treatise on evidence, Karl B. Tegland summarizes the “open door” evidence as follows:

A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party. In this sort of situation, the introduction of inadmissible evidence is often said to “open the door” both to cross-examination that would normally be improper and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence. The rule is based upon the belief that an adversary system is essential to determining the truth.

5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW § 103.14, at 66-67 (5th ed.2007).

The most quoted case dealing with the “open door rule,” and the one cited by TEGLAND, *supra*, is *State v. Gefeller*, 76 Wn. 2d 449, 458 P.2d 17 (1969), where our state supreme court explained:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn. 2d at 455.

Because Defendant opened the door to the introduction of his inconsistent statements, they were admissible.

1) The defendant failed to object to the admission of the impeaching and inconsistent statements he made and thereby fails to preserve the issue for appeal.

Defendant failed to preserve the impeachment issue for appeal because the defendant failed to object to the admission of Dr. Randall Strandquist’s testimony. The Rules of Appellate Procedure allow the Court discretion to grant review of a manifest error affecting a

constitutional right as an exception to the defendant's failure to properly preserve the issue at trial. RAP 2.5(a)(3). The defendant has the burden to prove the error is manifest, is of consequence to the defendant's constitutional rights, and resulted in actual harm. The defendant has failed to prove, or address in any way, the exception that allows his assignment of error to survive on appeal.

Because the defendant failed to preserve the issue at trial, the defendant invokes the exception under RAP 2.5(a)(3), but makes no showing to satisfy any of the elements required to use the exception. The Court in *State v. Haq*, 166 Wn. App. 221, at 246-247 (2012), restates the four-part inquiry required to obtain review under Rule 2.5. First, the court must determine whether the issue on appeal implicates a constitutional issue. Second, the court must determine if the trial record has sufficient facts to make a showing of actual prejudice necessary for manifest error. Third, the court must determine whether manifest error was actually of consequence to the defendant's constitutional rights. Last, the court must undertake a harmless error analysis. *Id.*

The defendant makes no effort to satisfy any part of the four-part inquiry required to use Rule 2.5. The defendant only makes a conclusory

statement in a footnote in his brief stating the error is manifest and citing the rule. Brief of Appellant, page 7, fn. 5.

The defendant failed to preserve the issue for appeal at trial and failed to substantiate, or even address, the analysis required for review under RAP 2.5. Therefore, this court should not undertake review of this issue.

Finally, any error is not manifest because the four questions asked were harmless in light of the overwhelming evidence of guilt.

2) Harmless Error Analysis.

Here, the “impeaching” evidence consists of only four questions asked of the Doctor, questions that were only allowed after the trial court carefully limited the scope of the questions and the manner of questioning, after reaching agreement with both trial counsel. (RP 407-29):

Q. Did Mr. Cosby say to you that he blacked out after the first shot?

A. Yes.

Q. Did Mr. Cosby indicate that he turned sideways and shot at her one time?

A. Yes.

Q. Did Mr. Cosby say that he went over and called 911?

A. Yes.

Q. Did Mr. Cosby say that he went to block her from getting the gun?

A. Yes.

RP 439.

As to the first question, the defendant on direct stated that he believed he did tell the doctor that he had blacked out after the first shot. RP 431, lines 10-12.

As to the second question, the defendant did not deny telling the doctor that he had turned sideways, he just could not remember whether he did or not. RP 431, lines 12-16. When asked whether he told the doctor that he attempted to block his wife from getting her gun, the defendant simply responded he did not remember telling him that. RP 431, line 22 – 432, line 5.

The third question, whether he stated he called 9-1-1, was meaningless, because the 9-1-1 call that he made had already been admitted into evidence, and the defendant had previously testified that he recognized himself as the person making the call. RP 392 lines 8-11. These questions do not prove or disprove the claim of self-defense. The defendant does not deny shooting the victim. Rather he asserted self-defense.

The questions were of miniscule import where the other evidence overwhelmingly established the defendant's guilt. Any error is harmless. Defendant called 911 and told them "I just shot and killed my wife." Supplemental Transcript of 911 call, page 4, line 5. In response to the 911

operator's question as to why he had done that, he said, "she just pushed me over the edge finally," and, "she just kept pushing and pushing and pushing." *Id.* lines 8, and 14. During the morning of the murder, the defendant practiced drawing his .40 caliber handgun from his waistband, removing the safety as he drew so that the gun was ready to fire. RP 335, 399-401. That afternoon, he practiced again, noting he became quicker and more fluid in the motion of drawing the weapon and disabling the safety. RP 400-401.

The physical evidence also was overwhelming. Susan Cosby was found in the small front bedroom lying face down across her bed with her feet on the floor. RP 112. Her death was caused by multiple gunshot wounds to her chest, abdomen, and extremities. RP 268-269. The bullets were fired from Mr. Cosby's .40 caliber weapon that was found in his back bedroom. RP 240-246. There were 10 gunshot wounds. RP 269. The corresponding 10 shell casings were found in her bedroom. RP 152-153. The bullets were full metal jacketed bullets; all but one passed completely through and exited her 105 pound body. RP 269-270. The medical examiner testified the wounds were consistent with Susan being seated and shot by someone standing. RP 282-289. Ms. Cosby's dusty gun was

found by her closet inside a holster that was zipped up inside of a pouch.

RP 120-122.

B. THE DEFENDANT WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY DECIDED NOT TO REQUEST A LIMITING INSTRUCTION REGARDING COURT-LIMITED ANSWERS TO FOUR QUESTIONS THAT WERE ASKED FOR IMPEACHMENT PURPOSES ONLY.

Defendant contends that the attorney's failure to request a limiting instruction as to the four narrow questions asked of Dr. Strandquist deprived him of effective assistance of counsel. This claim has no merit.

In order to prevail on an ineffective assistance of counsel claim, a defendant must establish both ineffective representation, and a resulting prejudicial effect. *State v. McNeal*, 145 Wn.2d 352, 362 (2002). To establish prejudice, the defendant must show "that but for counsel's performance, the result would have been different." *McNeal*, at 362 (citing *State v. Early*, 70 Wn. App 452, 460 (1993))

"There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions." *McNeal*, at 362. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of

counsel.” *McNeal*, at 362 (citing *State v. Adams*, 91 Wn.2d 86, 90 586 P.2d 1168 (1978)).

This right to effective representation is not a right to perfect counsel. In *State v. Adams*, the Washington Supreme Court stated:

Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate. Such a finding of ineffective representation should reverse a defendant's conviction if counsel's conduct created a reasonable possibility of contributing to that conviction.

Adams, 91 Wn.2d at 91.

Defendant does not show that his counsel's failure to propose a limiting instruction was anything but a tactical decision. In fact, as noted by this Court in *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993), we can presume counsel decided not to request a limiting instruction because to do so would reemphasize this damaging evidence. See, also, *State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000).

In our case, the defense's decision to not request limiting instructions, either before or after the attempted impeachment, was a tactical decision. Asking for a limiting instruction at either point has the same effect - that of emphasizing perceived inconsistencies regarding the defendant's memory of things he may have said. Asking for a limiting

instruction after the fact would reveal to the jury that those questions were potentially damaging, and add emphasis to the answers given. Asking for a limiting instruction before the questions would then cause the jury to pay closer attention to the questions, which would again add emphasis to the answers. Defense counsel's choice to not request an instruction was a tactical decision. As such it cannot uphold a claim for ineffective assistance of counsel.

Even if defense counsel's performance was deficient, it was not prejudicial. See "Harmless Error Analysis," *supra*. In order for defense counsel to determine that the effect was prejudicial, there must be a showing that "but for the deficient representation, the outcome of the trial would have differed." *State v. Pottorff*, 138 Wn. App. 343, 349 (2007) (citing *McNeal* at 362). The outcome of the trial would have been the same.

C. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED LIFETIME NO-CONTACT ORDERS PROTECTING THE CHILDREN OF THE VICTIM.

The defendant claims the sentencing court abused its discretion by imposing lifetime no-contact orders preventing him from contacting his two adult children. The trial court did not abuse its discretion in this regard.

Appellate courts review the imposition of crime-related prohibitions imposed at sentencing for an abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001); *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The appellate court will reverse sentencing court's imposition of a no-contact order only if the decision is manifestly unreasonable or based on untenable grounds. *State v. Williams*, 157 Wn. App. 689, 691, 239 P.3d 600 (2010), *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

A "crime-related prohibition" is "an order prohibiting conduct that directly relates to the circumstances for which the offender has been convicted." RCW 9.94A.030(10). The courts have stated that the existence of the relationship between crime and condition "will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." *State v. Parramore*, 53 Wn. App. 527, 530, 768 P.2d (1989)

The no-contact order that was imposed by the sentencing court was crime-related. Cosby was convicted of First Degree Murder with a firearm and domestic violence enhancement. He murdered the children's mother. The no-contact order is related to this charge. It is designed to protect the children because their mother was the victim.

In *State v. Williams*, the defendant was convicted of failing to register as a sex offender. *State v. Williams*, 157 Wn. App. 689, 690 (2010). The defendant was sentenced to 57 months and ordered that he not have unsupervised contact with children. *Id.* at 691. The Court of Appeals upheld this sentence as the court determined the defendant was a danger to children and as such it was appropriate to restrict the contact. *Id.* Similarly in *State v. Warren*, 165 Wn.2d 17, the defendant was given a no-contact order protecting his wife and children after being convicted. *Warren* at 33. His wife, Lisa, was not a victim. *Id.* The court however granted the no-contact order finding that the no-contact order was reasonably related to the crime. *Id.* The court said the restriction on the defendant's rights was justified because it served a compelling state interest in the protection of his wife and children. *Id.* at 34.

Protecting the victim's children from future emotional distress and violence arising from the murder of their mother supports the court's imposition of the lifetime no-contact order in the instant case. The existence of a relationship between the crime and the condition " 'will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge.' " *Parramore*, 53 Wn. App. at 530 (quoting David Boerner, *Sentencing in Washington*, § 4.5 (1985)). No

causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) (citing *Parramore*, 53 Wn. App. at 527). The trial court did not abuse its discretion in ordering the no-contact orders.

V. CONCLUSION

For the reasons stated herein, the respondent respectfully requests that this Court affirm the lower court's judgment and sentence.

Respectfully submitted this 15th day of February , 2012.



Tim Rasmussen
Prosecuting Attorney



Brian O'Brien # 14921
Special Deputy Prosecuting Attorney
Assisting Respondent