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Court of Appeals
Division III
State of Washington

NO. 32867-8-III

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON
Plaintiff/Respondent,
Vs.
JUAN A. RODRIGUEZ,
Defendant/Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT
BY YAKIMA COUNTY

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A. INTRODUCTION

This court requested supplemental briefing by the parties regarding a question posed by the court:

Is the improper admission of Rodriguez's booking statement harmless beyond a reasonable doubt, given the uncontroverted evidence that only Rodriguez's DNA was found on the gun? If not, what evidence in the record supports your position?

There is no dispute that State v. Deleon, 185 Wn.2d 478, 374 P.3d 95 (2016) applies to this case. It is equally clear, as argued in the State's opening brief which addressed Appellant's Brief and first Supplemental Brief, that the Washington State Supreme Court opined that harmless error was appropriate to this line of cases and in this case the overwhelming untainted evidence, to include the DNA, was such that the error in admission of the booking information was harmless beyond a reasonable doubt.

B. QUESTION PRESENTED BY PETITION

The question once again is:

Is the improper admission of Rodriguez's booking statement harmless beyond a reasonable doubt, given the uncontroverted evidence that only Rodriguez's DNA was found on the gun? If not, what evidence in the record supports your position?

ANSWER TO QUESTION PRESENTED BY PETITION

- 1) As argued in the State's opening brief the facts presented in this trial, including uncontroverted DNA evidence, was

sufficient to allow this court to determine that the error in admission of booking information was harmless error beyond a reasonable doubt.

C. STATEMENT OF THE CASE

The State will only reiterate the limited portion of the facts presented at trial which addresses the question asked by this court.

The first officer to arrive was Officer Derrick Perez, he arrived at the scene moments after the collision occurred. (RP 566, 571) He saw an individual later identified as Mr. Rodriguez trapped under the small car that had been smashed into Mrs. Kroes home. (RP 573, 575, 577) Officer Perez testified that the defendant appeared to be trying to crawl out from under the car. (RP 576.)

Officer Perez saw the barrel of a handgun that was sticking out from under Rodriguez's leg. (RP 576-77) Officer Perez positively identified the Appellant as the person in the car at the scene. (RP 577.) Officer Perez testified that neither the driver's side doors on the Nissan were able to be opened. RP 580-1. After Officer Perez saw the gun under the defendant he ordered the defendant not to move or he would be shot. (RP 583, 590.) Officer Perez testified that it appeared to him that Rodriguez was attempting to cover up the weapon, that he was actively positioning himself on top of the silver revolver. (RP 592-4.)

Detective Brownell testified he seized the firearm, a silver

revolver, that was found in the Nissan and the weapon was located in an open area by the passenger door between the Nissan and the house. (RP 635.) Detective Brownell testified that he located a holster for a revolver on the rear seat of the Nissan. (RP 649.) And that he observed there or four bullet holes in the car and later was made aware and observed additional bullet damage to the front of the Escalade. (RP 652-3.) Det. Brownell testified that the silver .357 revolver that was taken from under the defendant contained six spent rounds. (RP 657-62.)

Heather Pyles, an expert on DNA from the Washington State Patrol Crime laboratory, testified that she examined DNA found on the firearm recovered at the scene of the collision and DNA samples taken from Mr. Reynoso and Mr. Rodriguez. The DNA on the revolver matched that of Rodriguez, Reynoso was excluded as a contributor. She testified that “So for the match between the revolver and Mr. Rodriguez, the statistic was that the estimated probability of selecting an unrelated individual at random from the US population with a matching profile is 1 in 1.8 quintillion.” (RP 904.) Ms. Pyles testified that;

...if you have an item that you're handling all the time and it's yours and you're carrying with it (sic) and you're coming in contact with it a lot, I would expect to find enough of your DNA to, to produce a strong DNA profile.

Q: Okay. And was this profile in this case a strong DNA profile?

A: Yes, there was substantial DNA on the gun and that allowed me to produce a very good profile. RP 928.

D. ARGUMENT

1. As the State argued in its opening brief State v. Deleon makes ruled that the admission of booking information is not fatal to a conviction if the additional evidence presented at trial was sufficient to allow the reviewing court to determine that any error alleged was harmless beyond a reasonable doubt. Here, the independent evidence presented was clearly overwhelming and as such the error from the introduction of the booking information was harmless beyond a reasonable doubt.

The simple answer to this court's question is yes, the error in the admission of the booking information is harmless beyond a reasonable doubt based on the totality of the evidence, including the unrefuted DNA evidence, presented at trial.

The portion of DeLeon, supra, that is essential to this argument is: "We apply a harmless error standard to constitutional errors such as this. See, e.g., State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). "Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict." Id. More specifically, to find such a constitutional error harmless, we must find-beyond a reasonable doubt-that "*any reasonable jury* would have reached the same result, despite the error." State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995) (emphasis added). The State bears the burden of showing that the constitutional error was harmless. Monday,

171 Wn.2d at 680.”

Id at 487-8

As the State argued in its opening brief, the facts in this case were overwhelming. This is not a case where the defendant just happened to be riding in a car that was occupied by other gang members and just happened to be along for the ride when the shots were fired.

As set out above Rodriguez was literally lying on top of the gun when it was seen by officers who arrived on the scene of the crash almost instantly. Not only was the gun found under the defendant but a holster was also found in the same area.

Even trial counsel for Rodriguez stated that he believed the State had a strong case and it was his opinion that the State’s case was going to be difficult to defend against even if the gang information, including the booking information was not allowed;

MR. SILVERTHORN...It’s not, the gang evidence is not relevant for the State to prove their case. They don’t, you know, need it. They have eyewitnesses to say that someone in a Nissan Sentra shot into this Escalade and Mario Cervantes will be here to say he’s the one that got shot. He’ll say that he then got behind the car rammed it, crashed it into a yard, did a lap through the hospital parking lot, rammed it again totally both vehicles and ran away. Police officers and first responders get there. My client, Mr. Rodriguez has...

THE COURT: Kind of pinned at this...

MR. SILVERTHORN: Yeah.

THE COURT: ...car.

MR. SILVERTHORN: Pinned in the car. He's got head wounds. Okay. So he's there, right. His presence is there. He's tied to the car. His DNA is found on the gun.

...

They got pictures of the firearm .357 Magnum lying outside of the Nissan. They got a holster in the backseat of the Nissan and they got Mr. Rodriguez's DNA on the pistol. They got a police officer who's gonna come in and say as, as Mr. Rodriguez was trying to get from underneath this car and this wreck that he seemed to be reaching for this gun. So, you got nexus from the defendant to the car, nexus from the defendant to the gun. Scientific evidence connecting him to the gun and you got pictures of the aftermath all that information and they don't need their witness for any of that.
(RP 75-77)

The State called a Ms. Pyles, a DNA expert from the Washington State Patrol Crime Laboratory. During both direct and cross-examination Ms. Pyles was questioned about the quality of the result. Mrs. Pyles' testimony addressed the Appellant's theory that he merely touched the gun while crawling from the car;

Q: Okay. And to follow-up what Mr. Silverthorn followed up of me talking to you about, if I'm touching this piece of paper for the first time, pick it up and put it down, I may or may not leave DNA?

A: Yes.

Q: But if I'm -- We talked about it, if I have, for instance, a gun that I'm carrying around, possessing for a while, you would expect me to leave a strong profile?

A: Yes. If, if you have an item that you're handling all the time and it's yours and you're carrying with it (sic) and you're coming in contact with it a lot, I would expect to

find enough of your DNA to, to produce a strong DNA profile.

Q: Okay. And was this profile in this case a strong DNA profile?

A: Yes, there was substantial DNA on the gun and that allowed me to produce a very good profile.

Q: And if two people share a gun for a long period of time and have a lot of contact with it, would you expect to find two strong DNA profiles?

A: Yes, I would, I would expect to see two contributors and we didn't have a profile like that in this case, but a profile that would generate where there was more than one person, we would refer to that as a mixture, and there's, there's guidelines for when you can determine when a profile is a mixture and when it's not a mixture, and this profile in itself was not from more than one individual, based on those guidelines.

Q: Okay. So if I had such a, such an item with my strong DNA profile on it, threw it down on the ground and Mr. Silverthorn was to cut himself and drip blood all over it, would there be two strong DNA profiles on it?

A: Under that scenario, I would expect to find two people.

Q: Okay. Now, we're talking about touch when I'm just, you know, quickly grabbing up a piece of paper and Mr. Silverthorn talked about, you know, rubbing the hand up against something momentarily, what about brushing your leg up against something and skin to source but clothing to source?

A: So --

Q: And it's a momentary kind of (inaudible - away from mic)

A: A transfer between an item and an item of clothing is, is not a first rate transfer, so it's not a good way to transfer DNA. If DNA is transferred, it's very minute at that point, especially if, if the item of clothing is dry, so like you had a wet blood stain on a shirt and you brushed up against it, then, yes, you would transfer blood. But if you just take a general clothing item that's got no other sort of biological source on it and you brush against it, the DNA from that item, there's not going to be a lot of there to transfer and it's not going to want to transfer, based on that scenario.

That's why we wet the swab when we swab the gun, we need some sort of like a liquid medium to help the DNA transfer from the item to the swab. Same scenario with an item of clothing, if it's dry the DNA's not going to want to transfer just based on a general kind of brushing up against it.
RP 929-31

The Washington State Supreme Court ruled nearly twenty-five years ago that DNA testing was reliable. State v. Cauthron, 120 Wn.2d 879, 846 P.2d 502 (1993) The totality of the untainted evidence, anchored by the nearly irrefutable evidence from the DNA testing assure this court that any other reasonable jury would have found the defendant guilty beyond a reasonable doubt even without the improperly admitted booking information.

State v. Thompson, 151 Wn.2d 793, 92 P.3d 228 (Wash. 2004);

Thompson's conviction was based, at least in part, on evidence found within the trailer--evidence we here conclude is inadmissible. This constitutional error may be considered harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. State v. Brown, 140 Wn.2d 456, 468-69, 998 P.2d 321 (2000). To make this determination, we utilize the "overwhelming untainted evidence" test. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Under this test, we consider the untainted evidence *admitted at trial* to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.* (Emphasis in original.)

See also, State v. Flores, 164 Wn.2d 1, 186 P.3d 1038, 1046-7

(2008) "In evaluating whether the error is harmless, this court applies the

"`overwhelming untainted evidence'" test.

Rodriguez speculates that the facts regarding his location after the wreck and his position relative to the gun could support various scenarios. But those scenarios do not comport with the facts which were presented to the jury, a jury which found him guilty beyond a reasonable doubt.

Rodriguez also cites to State v. Mancilla, 197 Wn. App. 631, 2017 WL 354306 1 (slip. op. no. 31187-2, January 24, 2017) as supportive of his argument. That case does not support his theory. In Mancilla three of the four defendant's convictions were upheld, this court ruled that the untainted evidence proved beyond a reasonable doubt that a reasonable jury presented with only the untainted evidence would still have found the charges has been proven. The one defendant whose convictions were overturned had only a few tattoos' that were gang related, had no other known gang affiliations and there were only three weapons seized.

Here while there were other perpetrators, Rodriguez was found to be literally lying on top of a weapon containing six spent rounds of ammunition moments after the commission of the crime and at the time of his arrest while still physically inside the vehicle used in the commission of this crime. Clearly Rodriguez's case is not similar to the one defendant in Mancilla who's case was remanded for retrial.

E. CONCLUSION

This court asked the parties to address the very specific question as to whether the improper admission of booking information was or could be found to be harmless beyond a reasonable doubt based on the fact that the jury was presented with uncontroverted evidence that only Rodriguez's DNA was found on the revolver found underneath him at the scene.

As indicated above the answer is yes. The State argued in its opening brief this was the correct determination of the more general question of whether the totality of the untainted evidence presented at trial was such that any reasonable jury would have found the defendant guilty beyond a reasonable doubt absent the admission of the improper booking information.

To quote the DNA expert one last time "...there was substantial DNA on the gun and that allowed me to produce a very good profile ...this profile in itself was not from more than one individual, based on those guidelines."

Respectfully submitted this 12th day of May, 2017.

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DECLARATION OF SERVICE

I, David B. Trefry state that on May 12, 2017, I emailed a copy, by agreement of the parties, of the Respondent's Supplement Brief, to: Ms. Janet Gemberling as admin@gemberlaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of May, 2017 at Spokane, Washington.

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YAKIMA COUNTY PROSECUTOR
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