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Division III
State of Washington

33983-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD F. KLEPACKI, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. RESPONDENT’S BRIEF MISAPPREHENDS THE THRUST OF SINGLETON AND ITS PROGENY.

In *U.S. v. Singleton*, the federal court analyzed the application of the federal bribery statute, 18 USCA § 201, to a case in which the government entered into a plea agreement with a co-conspirator “by promising him leniency in exchange for his testimony” against the defendant. The court’s analysis begins with the presumption “in criminal cases that an Assistant United States Attorney, acting within the scope of authority conferred upon that office, is the alter ego of the United States exercising its sovereign power of prosecution.” *U.S. v. Singleton*, 165 F.3d 1297, 1300 (10 Cir., 1999).

The federal statute provides:

(b) Whoever--

...

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom

18 USCA § 201(c)(2).¹

In construing this statute, the court reasoned that the practice of granting leniency in exchange for testimony is rooted in the common law and is a privilege of sovereignty that can be exercised by the prosecutor. 165 F.3d at 1301-02. “From the common law, we have drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency.” 165 F.3d at 1301. The court concluded that Congress could not enact a statute that would restrict the exercise of this prerogative. *Id.*

The court carefully noted, however, that the privilege “in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign.” 165 F.3d. at 1302. “A prosecutor who offers something other than a concession normally granted by the government in exchange for testimony is no longer the alter ego of the sovereign and is divested of the protective mantle of the government.” *Id.*

¹ Washington's bribery statute is similar to the federal bribery statute:

(1) A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to:

(a) Influence the testimony of that person

RCW 9A.72.090.

The Singleton decision recognizes that the bribery statute applies to the prosecutor except with respect to the traditional privilege of offering leniency to witnesses in exchange for testimony against their confederates. The State has acknowledged this limitation. (Resp. Br. at 19)

The prosecutor's offer in the present case does not fall within the traditional privilege. convicted co-defendant, and concedes the prosecutor offered "some form of potential consideration for Mr. Tudor." Br. at 18, 20. The State contends that the only thing that "was 'offered' to Ms. Woods during the meeting with the deputy prosecutor [was] some form of potential consideration for Mr. Tudor if Ms. Woods testified truthfully." (Resp. Br. at 20)

In short, the State did not enter into a plea agreement with Ms. Woods; she was not Mr. Klepacki's confederate, co-conspirator or accomplice; and the State did not offer Ms. Woods leniency. Instead, the prosecutor offered to grant some unspecified benefit to Ms. Woods's brother in exchange for her testimony against Mr. Klepacki. The prosecutor's offer was "something other than a concession normally granted by the government in exchange for testimony" and was not "within the scope of authority conferred upon [her] office." 165 F.3d. at 1300, 1302.

This court should not condone the State's unprecedented misconduct.

2. RESPONDENT'S BRIEF MISAPPREHENDS THE PURPOSE FOR WHICH THE CHILD'S HEARSAY STATEMENTS WERE INTRODUCED INTO EVIDENCE.

Respondent claims Mrs. McGillivary's testimony relating statements made by the child who allegedly found the gun was not hearsay because the statements were offered solely "for its effect on Ms. McGillivary and the steps she took to secure it, remove it from the bus stop area, and to dispose of it by way of having law enforcement collect it." (Resp. Br. at 32)

Apart from bringing the existence of the gun to his mother's attention, none of the child's alleged statements, or statements attributed to a child named Logan, were relevant to Ms. McGillivary's securing and disposing of the gun. Certainly suggestions about the location where the gun was found were not relevant to her actions, but did provide a convenient foundation for her subsequent testimony that the place where the gun was found was close to the school where Mr. Klepacki was arrested.

In closing argument the deputy prosecutor relied on the hearsay to impugn Mr. Klepacki's character as well as to link him to the murder

weapon: “The neighbors who found the gun put it up here right along a path that kids take to get to the middle school (indicating).” (RP 928) Mr. Klepacki ran north on Margaret, and dumped the gun. (RP 929)

The hearsay statements were offered solely as evidence linking Mr. Klepacki to the murder

3. RESPONDENT’S BRIEF MISAPPREHENDS THE NATURE OF APPELLANT’S ISSUES RELATING TO DETECTIVE DRESBACK’S TESTIMONY.

- a. Defense Counsel’s Hearsay Objection Was Directed To The Detective’s Testimony About Mr. Davis’s Statements, Not Testimony About His Own Observations And Opinions.

Respondent misstates the hearsay issue relating to Detective Dresback’s conversation with Mr. Davis. “The defendant next argues that Detective Dresback’s testimony regarding information about the size and type of holster, and the weapon it would accommodate constituted hearsay. Appellant’s Br. 14-21.” (Resp. Br. at 21)

The State argues:

The detective was asked, without objection, about his own research regarding the weapon and answered that the holster was the size and type which would accommodate the weapon found in the alleyway. The defense did not present a hearsay objection previous to the detective’s first statement regarding the holster and no relief is available on appeal.

(Resp. Br. at 24)

Appellant's argument was clearly directed to the detective's testimony relating statements made to him by forensics expert Davis:

Detective Dresback effectively testified that in their prior conversation Mr. Davis had confirmed that the gun found by young Logan was the murder weapon and that it would fit in the holster, that a person with that kind of weapon would be able to use the holster and that it would fit. (RP 802) The substance of the detective's testimony constituted a statement made by (or at least attributed to) Mr. Davis prior to trial. It could only have been offered for its truth, namely that the murder weapon fit the holster found near Mr. Klepacki. *The detective's testimony related statements made by the declarant, Mr. Davis, the statements were made prior to trial and were offered for the truth of the matter assert. The evidence was inadmissible hearsay and the court erred in admitting it over defense counsel's objection.*

(App. Br. at 14-15) Appellant does not challenge the detective's testimony as to his own opinion.

Defense counsel's objection to hearsay relating Mr. Davis's opinion was clearly made on the record and quoted in Respondent's brief:

[DETECTIVE DRESBACK]: Yes. I was asking [Mr. Davis] if there was a comparison he could do to the gun that we had recovered in Deer Park and the holster to see if they were in any way a match.

[DEPUTY PROSECUTOR]: Okay. And what was the response or what was the result of that?

[DEFENSE ATTORNEY]: *That -- that objection is -- I'm going to make, Judge, that is hearsay. We heard from Mr. Davis.*

[DEPUTY PROSECUTOR]: Correct, we have heard from Mr. Davis.

[DEFENSE ATTORNEY]: I believe the state is asking Mr. Dresback to tell him what Mr. Davis told him.

(RP 801, emphasis added; Resp. Br. at 23)

b. Appellant's Confrontation Clause Argument Is Directed To The Court's Improper Reliance On An Inapplicable Analysis Of The Hearsay Objection.

Respondent further misapprehends the purpose of Appellant's Confrontation Clause analysis, arguing it cannot be considered on appeal because defense counsel did not argue this issue in the trial court. (Resp. Br. at 25)

On the contrary, Appellant simply seeks to bring to this court's attention the trial court's failure to rule on the hearsay objection, instead assuming, inaccurately, that the objection presented a confrontation issue, and then ruling, again incorrectly, that since the declarant had already testified there was no confrontation issue:

THE COURT: Well, to the extent Mr. Davis has testified to this, and he has been cross-examined, then the confrontation issue has been satisfied, so you can ask this question.

(App. Br. at 23; RP 801-02) The ensuing question and answer clearly constituted hearsay:

Q. (By Mr. Lindsey) As a result of your discussion with Mr. Davis about the holster, was it confirmed that the weapon that he tested and was the murder weapon would fit in that holster?

A. Yes. That part was. An exact match could not be made.

Q. But it would fit?

A. It would be a holster that a person with that kind of weapon would be able to use with that weapon, yes.

(RP 802)

The record plainly shows that the trial court ruled on the defendant's evidentiary objection based on its understanding of the confrontation clause. By applying the wrong reasoning, the court avoided deciding the relatively simple issue of whether telling the jury what Mr. Davis said constituted hearsay, which it plainly did.

“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is not admissible except as provided by these rules, by other court rules, or by statute. ER 802.

The detective told the jury that Mr. Davis confirmed to him that the weapon he tested would fit in the holster and would be the kind of holster that a person would be able to use with that weapon. Anything Mr. Davis (the declarant) told Detective Dresback before trial would have been a statement “other than one made . . . while testifying at trial.” ER 801(c). Even if Mr. Davis had testified to this opinion, the detective's testimony relating the substance of their prior conversation would be hearsay.

Unfortunately, the trial court chose to apply reasoning relevant to a confrontation clause analysis. Because the State suggests appellant cannot raise the issue, this court should consider the purpose of the rule requiring a contemporaneous objection in the trial court to preserve an issue for appeal.

An established rule of appellate review in Washington is that a party generally waives the right to appeal an error unless there is an objection at trial. RAP 2.5(a). Although this rule insulates some errors from review, it encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

The trial judge, having spontaneously decided the Confrontation Clause analysis relevant, had every opportunity to consider whether that decision was correct. Moreover, “a procedural rule should not prevent an appellate court from remedying errors that result in serious injustice to an accused.” *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015) (citing *State v. Scott*, 110 Wn.2d 682, 686–87, 757 P.2d 492 (1988)). At a minimum this court should hold that evidence to which a proper objection has been taken, and which is clearly inadmissible hearsay, should be excluded even if its admission would not violate the confrontation clause.

Alternatively, this court might wish to consider whether admission of this testimony did in fact violate the Confrontation Clause.

The Confrontation Clause does not bar otherwise admissible hearsay testimony if the declarant testifies as a witness and is subject to full and effective cross-examination. *California v. Green*, 399 U.S. 149, 158, 164, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (emphasis added). “[T]he admission of hearsay statements will not violate the confrontation clause if the hearsay declarant is a witness at trial, is asked about the event *and the hearsay statement*, and the defendant is provided an opportunity for full cross-examination.” *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (emphasis added); see *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 15-16, 84 P.3d 859 (2004).

Here, the trial court stated: “Well, to the extent Mr. Davis has testified to this, and he has been cross-examined, then the confrontation issue has been satisfied, so you can ask this question.”

The State did not ask Mr. Davis to testify about whether the gun fit the holster, nor did the State ask him whether he had made any such statement to Detective Dresback. Accordingly, during cross-examination of Mr. Davis defense counsel had neither reason nor opportunity to question Mr. Davis about these matters. A search of Mr. Davis’s

testimony discloses that neither he nor the attorneys asked about, discussed, or even mentioned the holster. (RP 674-710)

When the trial court declines to grant defense counsel's timely and correct objection to hearsay testimony, and instead bases its ruling on grounds that have not been asserted and on an unjustified assumption regarding the testimony previously presented, and the substance of the hearsay relates to a central issue in the State's case, this court should find that the error resulted "in serious injustice to an accused." *Kalebaugh*, 183 Wn.2d at 583.

c. Appellant's Ineffective Assistance Argument Is Directed At Defense Counsel's Failure To Object To Hearsay Testimony Relating The Declarant's Non-Verbal Assertion, Not His Testimony Describing The Shooting.

Respondent contends Appellant failed to show ineffective assistance because Detective Dresback's testimony did not violate the Confrontation Clause. The State argues the detective's demonstration of an alleged gesture Mr. Wright made during a pre-trial interview did not violate the right to confront a witness because Mr. Wright, the declarant, had previously testified and was subject to cross-examination. (Resp. Br. at 34, 36) Once again, the State misapprehends the thrust of the Confrontation Clause.

Respondent relies on Mr. Wright's testimony that the shooter had reached in and shot the victim to show that the defendant was provided an opportunity for full cross-examination. (Resp. Br. at 34, citing RP 218) The State asserts that prior statements must be excluded *only if* a witness is unavailable at trial, citing *State v. Price*, 158 Wn.2d 630, 639, 146 P.3d 1183 (2006). This constitutes an overly narrow understanding of the full and effective cross-examination required by *California v. Green*, 399 U.S. at 158. Properly understood, the Confrontation Clause does not prohibit the use of otherwise admissible hearsay "if the hearsay declarant is a witness at trial, *is asked about the event and the hearsay statement, and the defendant is provided an opportunity for full cross-examination.*" *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (emphasis added); see *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 15-16, 84 P.3d 859 (2004).

But the deputy prosecutor never asked Mr. Wright to testify about the hearsay statement, namely the alleged demonstration of the shooting that he may have provided for the detective, and thus defense counsel had no opportunity to cross-examine him about that demonstration.

The State also claims any error was harmless because Mr. Wright had testified he observed only one person involved in the shooting, and even if only one person was involved that person could have been the

appellant. (Resp. Br. at 38-39) But the State's theory of the case was that Mr. Wright saw two people on the porch: Mr. Tudor, who kicked in the door, and Mr. Klepacki, who reached over Mr. Tudor's shoulder and fired the fatal shot. The prosecutor told the jury:

We know Mr. Tudor was convicted of his role. We know that friends and neighbors saw the door kicked in. That there was a young man standing in front who looked scared. A shooter had his arm over his shoulder

(RP 924)

Mr. Klepacki's arm was on Mr. Tudor. . . . That is a whole bunch of little facts. But what do they tell us? . . . That Mr. Tudor kicked in the door and was scared when the gun went off. That Mr. Klepacki stood behind with a gun over Mr. Tudor's shoulder.

(RP 925) Mr. Wright's statement, as related to the jury by Detective Dresback, is the only evidence in the record that supports this theory of the case.

The State relied on Detective Dresback to provide evidence that a forensic expert had confirmed the gun used in the shooting would fit in the holster found near Mr. Klepacki and that, according to the sole eye witness to the shooting, the shooter had held the gun over someone else's shoulder. (RP 845-46) Having failed to ask Mr. Davis whether the gun would fit the holster and having failed to ask Mr. Wright to demonstrate for the jury how the shooter held the gun, the State was not entitled to

introduce this evidence through the hearsay testimony of an investigating officer.

B. CONCLUSION

Mr. Klepacki's conviction is predicated on misconduct, hearsay and conjecture. It should be reversed.

Dated this 30th day of May, 2017.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33983-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
RICHARD F. KLEPACKI,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on May 30, 2017, I served a copy of the Appellant's Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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Signed at Spokane, Washington on May 30, 2017.


Janet G. Gemberling
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