

MAY 24 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 349012
District Court No. 15-1-50301-3

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff-Appellee,

vs.

PRUDENCIO JUAN FRAGOS-RAMIREZ,

Defendant-Appellant.

On Appeal From the Court of Appeals
of the State of Washington, Division III

DEFENDANT-APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR & ISSUE PERTAINING THERETO

The court erred in denying appellant's motion to present evidence which would have suggested that another suspect or group of suspects could have committed the murders Mr. Fragos¹ was accused of committing. Mr. Fragos had sufficient evidence which would have logically connected Fernando Lopez and others to the crime. The denial by the Trial Judge of Mr. Fragos' request to present that evidence denied Mr. Fragos the ability to present his specific defense evidence and to argue inferences which could have reasonably drawn therefrom. Instead, Mr. Fragos' defense was limited to a general denial and that the State failed to prove he was the killer without any ability to identify the other possible killer or killers.

II. STATEMENT OF THE CASE

On June 2, 2015 a report came in of a fire in Franklin County near Othello. 5RP 857². Deputies on scene requested a detective and Jacinto Nunez arrived on scene at 8:00 p.m. 5RP 858. Detective Nunez found other law enforcement and fire department personnel present near a burned vehicle which contained two corpses and he initiated an investigation. 5RP 862-3. Detective Nunez contacted the registered owner of the vehicle and learned it was likely driven by Maria Cruz. 5RP 881-3. Detective Nunez thereafter spoke with Mr. Cruz's family and friends

¹ Appellant's name is actually Prudencio Juan Fragoso-Ramirez and he goes by Juan Fragoso. The State listed this as an A.K.A. and charged him under the name Prudencio Juan Fragos-Ramirez. CP1. For purposes of this appeal and in honor of brevity, he is referred to as Mr. Fragos.

² There are 13 volumes of Verbatim Report of Proceedings referenced with the number of the volume followed by RP for Report of Proceedings and the page upon which the reference is found.

and learned that she had been in a relationship with Mr. Fragos. 5RP 889-90. Mr. Fragos was located and contacted. 5RP 895. A significant investigation ensued.

Based on the investigation of Detective Nunez and others, Mr. Fragos was charged and tried for the murder of Maria Cruz and her son. At trial, Mr. Fragos' counsel argued that he should be permitted to admit evidence that a third party was responsible for the murder. 4RP 610-627. The Court denied the request as follows:

“Based on what I’ve heard and the differences in the evidence that the State has against the defendant versus apparent projected evidence against Fernando, I do not find that they are similar types of evidence.

So I would grant, I suppose, the State’s motion to deny third-party perpetrator evidence and deny defense motion for admissibility of third-party perpetrator evidence.” 4RP 629:13-20

The record as to what that evidence would be, due on the Court’s ruling excluding it, is largely limited to the offer of proof from defense counsel in his motions in limine #2 (CP 7-9) and in his oral argument (4RP 615-623). Bullet pointed out, those facts can be laid out as follows:

- The State’s case was entirely circumstantial. 4RP 615.
- The victim and the other suspect³ had a longer-term relationship than the victim and Mr. Fragos. 4RP 615.
- The other suspect and victim had a child in common who was the victim of Count Two. 4RP 615-6.

³ A third-party perpetrator is also referred to as an “other suspect” in the case law. See *State v. Ortuno-Perez*, 196 Wash.App. 771 (Div. I, 2016).

- The other suspect and victim had a tumultuous relationship involving domestic violence and harassment and there was no evidence of such tumult between the victim and Mr. Fragos. 4RP 615. This evidence included constant harassment by the other suspect and a busted lip at his hand. CP 9.
- On multiple different occasions the victim tried to get others to assault the other suspect. No such instances existed as to Mr. Fragos. 4RP 615-6 & CP 9.
- There would have been specific evidence from multiple witnesses that in the days and weeks prior to the homicides the victim was actively trying to get people to help her get the other suspect to a location where they could assault him. 4RP 626. A possible defense theory was that the homicides could have been that assault gone wrong.
- The other suspect was the first suspect of the victim's brother which, although possibly not admissible as conceded by counsel, still may form a basis to admit the evidence which was admissible as to the other suspect. See 4RP 616 & CP 10.
- There was evidence that the other suspect had recently come to believe that the victim's new relationship mere days before her killing. 4RP 616 & CP 10. No such fact existed as to Mr. Fragos.

- There was further evidence that the other suspect became upset upon believing that the victim was in a new relationship that he threatened that person to stay away from her. 4RP 616 & CP 10 No evidence of any threats by Mr. Fragos existed.
- There was evidence that 2-3 days before the murder, the victim had threatened to report the other suspect to the Division of Child Support. 4RP 616 & CP 10. No such threat existed as to Mr. Fragos.
- On the day of the homicides, there were numerous attempts by the victim to contact the other suspect and though he stated he refused to talk to her, he sent her two photographs. One was difficult to identify, but may have been a photo of the victim and the other was not difficult to identify, it was a photo of the three of them together; the other suspect and both victims. This photo was sent shortly before the two victims were killed. 4RP 617 & CP 10.
- The other suspect denied to law enforcement that he spoke with the victim that day, but another witness said she handed him a phone with the victim on the other line and that witness believed they spoke. CP 10-11. This was a 57 or 58 second phone call perhaps 20-40 minutes before the homicides. 4RP 617-8. We cannot know what was said, but this would have been near the time when the victim was with a new boyfriend, Mr. Fragos, and about enough time for the other suspect to get to the murder scene. The other

suspect told law enforcement that he was familiar with the scene and lived some 13 miles away. CP 12.

- The State relied heavily on the fact that Mr. Fragos was nearby to where the victims were found, but the other suspect was close enough to also be a suspect based on proximity given the timeline of contacts with both Mr. Fragos and the other suspect. 4RP 618-9.
- For the detailed reasons outlined by counsel below, the alibi of the other suspect was tenuous and did not line up with the other evidence in the case. 4RP 619 & CP 11.
- After the homicides, the other suspect began accusing others of committing them and went so far as to name multiple specific individuals thereby distancing himself from the killings. Mr. Fragos, on the other hand, simply denied his involvement and did not shift blame to others. 4RP 620-1.
- The other suspect went so far as to tell law enforcement that he dreamt of Maria Cruz's killing and that three men had shot her in the shoulder. According to the forensic pathologist, Maria was shot in the shoulder, but this was not publicly known at the time. 4RP 621.
- When asked by law enforcement to provide the phone he had on the day of the homicides, the other suspect said he had thrown the phone away. 4RP 621 & CP 12. Mr. Fragos freely handed over his phone. 4RP 621-2. The other suspect gave law enforcement a SIM card, but it is unclear from the

evidence why law enforcement or trial counsel knew it came from the discarded phone. CP 12. Detective Nunez testified that the other suspect was the one to suggest he give Nunez the SIM card; there was no testimony that it was specifically tied to any particular phone. 9RP 1688.

- At the time of trial for the murder of his son, the other suspect had disappeared; his whereabouts and those of his cohorts was unknown. 4RP 622 & CP 12. Mr. Fragos did not flee, even when he knew law enforcement was coming to question him.

Despite all of the above and at every turn, the Court denied the defense theory that this other suspect may have been responsible for the killings and not Mr. Fragos. As such, Mr. Fragos appeals his October 28, 2016 convictions after a jury trial on two counts of Aggravated First-Degree Murder. On November 30, 2016 Mr. Fragos was sentenced to life in prison without the possibility of parole as well as a 60-month enhancement for aggravating circumstances. Mr. Fragos specifically assigns error to the denial of his request to present evidence of a third-party perpetrator, also discussed as “other suspect evidence.”

III. ARGUMENT

1. **Summary**

Mr. Fragos respectfully submits that the trial Court abused its discretion in prohibiting him from presenting evidence and then arguing to the jury that Fernando Lopez could have been responsible for these murders. The parties and

the Court engaged in a “who has better evidence” analysis which is not the applicable analysis as reiterated in the seminal case on this subject. Unfortunately, the seminal case was published as the jury was deliberating. The case did not change the law but restate it. Under that correct standard, whether the evidence has a logical connection to the crime, the evidence outlined above and by trial counsel should have been allowed to be put to the jury and the defense theory that Fernando Lopez could have committed these crimes, argued.

This brief refers heavily to the law as set forth in that seminal case, *State v. Ortuno-Perez*, 196 Wash.App. 771 (Div. 1, 2016). That case is factually somewhat similar, represents a comprehensive review of this rather small area of law and is the most recent published analysis. *Ortuno-Perez* covers this area of law from its broad common law inception through the original 1932 Washington State Supreme Court analysis in *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932) and the United States Supreme Court’s application in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 505 (2006) returning finally back to the Washington State Supreme Court’s analysis of those two cases in *State v. Franklin*, 180 Wash.2d 371, 325 P.3d 159 (2014). Under a proper analysis as was undertaken in *State v. Franklin* and *State v. Ortuno-Perez*, it is argued that the evidence “tending to connect” Fernando Lopez to these killings should have been admitted.

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2. Standard of Review & “Other Suspect” Evidence

Evidence rulings are reviewed for abuse of discretion which occurs when that discretion is exercised on untenable grounds or for untenable reasons. *State v. Ortuno-Perez*, 196 Wash.App. 771, 783 (Div. I 2016) (citing *State v. Perez-Valdez*, 172 Wash.2d 808, 814 (2011) and *State v. Clark*, 78 Wash.App. 471, 477 (Div. II 1995)). It is important, at the same time, to keep in mind that a defendant’s Sixth Amendment United States Constitutional Right and his article I, section 22 Washington State Constitutional guarantee to present a defense are implicated here. An abuse of discretion analysis considers “the purposes of the trial court’s discretion.” *State v. Clark*, 78 Wash.App. at 477 (citing *Coggle v. Snow*, 56 Wash.App. 499, 507, 784 P.2d 554 (Div. I 1990)).

A criminal defendant is not entitled to present inadmissible evidence, but *the purposes of the trial court’s discretion* is different in analyzing the admissibility of a defendant’s entire theory of the case versus whether a telephone number is hearsay. See 5RP 891-2.

An analysis of admissibility in the “other suspect” context rather focuses on relevance and probative value. *Ortuno-Perez* at 784. It has always been the law, since before *Downs*, that the requisite standard of relevance for “other suspect” evidence is “whether there is evidence ‘tending to connect’ someone other than the defendant with the crime.” *Ortuno-Perez* at 783 (quoting *Downs*, 168 Wash. at 667) (*in turn quoting* 16 C.J. Criminal Law §1085 at 560 (1918)). This inquiry is

not about proving that someone else committed the crime, but rather focuses on whether the proffered evidence tends to create reasonable doubt as to the defendant's guilt. *Ortuno-Perez* at 783 (quoting *State v. Franklin*, 180 Wash.2d at 380-81.).

The trial Court here, however, did not engage in this inquiry and thereby abused its discretion. The written record only reserves on the State's motion on this topic. CP 120. Thus, the Court's analysis in the Report of Proceedings is the entire record on appeal for what legal standard was applied. That standard was essentially the Court's weighing the evidence that the State had against the evidence that the defense had and finding that they were not similar types of evidence. 4RP 629. The whole thought process spans 4RP 627 to 630 with some clarification colloquy thereafter, but the clearest restatement of the analysis was as follows:

“Based on what I've heard and the differences in the evidence that the State has against the defendant versus the apparent projected evidence against Fernando, I do not find that they are similar types of evidence. So I would grant, I suppose, the State's motion to deny third-party perpetrator evidence and deny defense motion for admissibility of third-party perpetrator evidence.” 4RP 629 lines 13-20.

It is respectfully submitted that this was actually an error in application of the law which cuts right to the heart of Mr. Fragos' ability to present a defense under the Sixth Amendment of the U.S. Constitution. In a somewhat similar situation, Division II just recently applied a hybrid review, making a threshold relevance determination under an abuse of discretion standard and then reviewing

Sixth Amendment claims *de novo*. See *State v. Horn*, Division II Case No. 48489-7, -- Wash.App. -- , 415 P.3d 1225 (Div. II, April 24, 2018). In that case, Horn sought to present evidence that he and the victim became engaged and had gone on a trip after the alleged assault. The trial court excluded that evidence and thus took from Horn his main defense. He raised a Sixth Amendment challenge. The Court held that under such a Sixth Amendment challenge is evidence is first reviewed for minimal relevance under abuse of discretion then, “if relevant, the burden shifts to the State to show that the relevant evidence ‘is so prejudicial as to disrupt the fairness of the fact-finding process at trial’”. *State v. Horn*, 415 P.3d at 1229 (quoting *State v. Jones*, 168 Wash.2d 713, 720 (quoting *State v. Darden*, 145 Wash.2d 612, 622 (2002))). Finally, if the otherwise relevant evidence is prejudicial it is balanced against the defendant’s need for the evidence and can be excluded only if outweighed by the States’s interests. *Horn*, 415 P.3d at 1229 (citing *Jones*, 168 Wash.3d at 720). The Constitutional issue is then reviewed *de novo*. *Id.* at 1229 (citations omitted).

This review process is not included in the analysis under *State v. Ortuno-Perez*, 196 Wash.App. 771 (Div. 1, 2016) but it is not clear why because *Ortuno-Perez* cites *Jones* at 784. There, as here, a Sixth Amendment challenge was raised. The “other suspect” evidence is just a theory of defense like in *Horn* and like Mr. Fragos intended to present. The minimal relevance of the evidence should be tested

for abuse of discretion but the Sixth Amendment application should thereafter be tested *de novo*. That is the standard Mr. Fragos urges.

3. Analysis of Other Suspect Evidence to These Facts

The significant and specific evidence that Fernando Lopez was an “other suspect” as outlined above, was far beyond minimally relevant. It created a significant case against Lopez and a clear logical connection between him and the murder such that it should have been admissible under *State v. Franklin*, 180 Wash.2d 371, 325 P.3d 159 (2014) and *State v. Ortuno-Perez*, 196 Wash.App. 771 (Div. 1, 2016). Where the Court got hung up, it seems, is in this comparison of the evidence standard. It may have come from *State v. Clark*, 78 Wash.App. 471, 479 (Div. II 1995) which held that if the government’s case is circumstantial then the defense is entitled to present neutralizing evidence if it is sufficiently similar to that character of the evidence the State has and tends to implicate some other perpetrator. But for that proposition, the *Clark* case cites a case from 1885! Clearly the language from *Franklin* and *Ortuno-Perez* are the controlling law.

Mr. Fragos is before this Court asserting the *exact* same argument as was asserted by Mr. Ortuno-Perez at 196 Wash.App. 785:

“by excluding his proffered “other suspect” evidence pointing at [Fernando Lopez] as the actual killer, the trial court abused its discretion in its pretrial evidentiary rulings because its rulings were based on an incorrect application of Washington’s “other suspect” case authority. [Mr. Fragos] further contends that the “other suspect” evidence he proffered tended to support a reasonable doubt as to his guilt.”

This Court should agree.

IV. CONCLUSION

Based upon the foregoing, Mr. Fragos respectfully submits that by exclusion of his “other suspect” defense, he was deprived of the right to present a defense and thus a fair trial under the Sixth Amendment of the U.S. Constitution and article 1 §22 of the Washington State Constitution. As such, he urges this Court to vacate his convictions on counts 1 and 2 and remand this matter for a new trial with the inclusion of his “other suspect” evidence.

DATED: May 24th, 2018.

PARTOVI LAW

A handwritten signature in black ink, appearing to read 'D. PARTOVI', written over a horizontal line.

DAVID PARTOVI, WSBA 30611
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2018, a true and correct copy of the foregoing was mailed by USPS and via email to the following:

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A handwritten signature in black ink, appearing to read 'D. Partovi', written over a horizontal line.

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