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34901-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

PRUDENCIO JUAN FRAGOS-RAMIREZ, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUE

Did the trial judge manifestly abuse her discretion in granting the State's motion to exclude evidence against a third party that was inadmissible as hearsay, as prior bad act evidence, and as "other suspect" evidence where there was no evidence of a similar character connecting this third party to the crime?

IV. STATEMENT OF THE CASE

The Defendant Prudencio Juan Fragos-Ramirez has been convicted by a jury of two counts of aggravated murder in the first degree with firearm enhancements. CP 3-4, 126-27 (special allegations under RCW 10.95.020(7) and (10)). The victims were 18 year old Maria Guadalupe (Karla) Cruz and her three year old son

Luis. CP 3-4; RP 673, 747-48.

Ms. Cruz met the Defendant when she was dating his roommate Alex. CP 41, 49; RP 1747, 2459. The Defendant was working and living at an Othello orchard while dealing drugs. RP 2459. After Alex was arrested and deported, the Defendant pursued Ms. Cruz romantically – in vain. CP 41; RP 2459. However, the Defendant allowed Ms. Cruz sell large quantities of methamphetamine and cocaine for him. CP 41, 44-45, 115, 171; RP 1210, 1609-12, 2459, 2461, 2509. She would let him drive her car when they traveled together. RP 742. In the few months that she was selling drugs for the Defendant, she had become very nervous and scared, careful to immediately answer all his text messages. RP 737-41, 749, 756-57. She was frantic about having lost drugs. CP 44; RP 2324-25.

On July 2, 2015 beginning at 3 AM, the Defendant texted Ms. Cruz 160 times after she said she was going to sleep. CP 117-18; RP 1615-17. The next afternoon, the Defendant texted Ms. Cruz to meet him at his house, telling her that they would go down a dirt road and that she was not tell anyone about the location for security reasons. CP 118, 171; RP 1618-19, 2162, 2180-81. As in previous visits, Ms.

Cruz did not go to the Defendant's house alone; this time she was accompanied by her son Luis. RP 1119, 1203-04, 1208-09, 1868-69. They entered the Defendant's home where at 4:57 PM she tried to call Fernando Lopez Aguirre, who was Luis' father. RP 617-18, 1260-61, 1694-95, 2018-19. Mr. Lopez was home drinking beer with his housemate and his boss and did not take her calls or respond to her texts. CP 52-53; RP 617-19.

The Defendant, Ms. Cruz, and Luis left the Defendant's home at about 5:15 PM. CP 110, 112-13; RP 2019. At 5:50 PM, a fire was discovered just a half mile down a dirt road from the Defendant's home – Ms. Cruz's car was on fire in the brush. CP 172; RP 818, 860-64, 1950-53. Ms. Cruz's body was found kneeling on the floor of the front passenger seat with her head and chest resting on the seat. RP 864. Luis's body was tucked into a corner behind the driver's seat. RP 864. Luis had been shot in the chest and spleen. RP 2055-59, 2063. Ms. Cruz had multiple gunshot wounds causing injuries to the scalp and chest, fracturing her C-5 vertebra, and piercing her lung. RP 2066-75. A bullet was found in her hand. RP 2071.

The Defendant was not seen to return to his home until approximately 7 PM. CP 113. When police contacted the Defendant

at 1 AM that night, he claimed that Ms. Cruz was his girlfriend. RP 682, 894. Ms. Cruz was known to be in a relationship with Isai Amado Santos. CP 36, 40, 44, 45, 48; RP 1268, 2464. Before the police could arrive to talk to him at 2:30 AM, the Defendant had deleted his July 2 text messages with Ms. Cruz from 3:59 AM to 4:48 PM. RP 682-84, 895, 905, 911-12, 1302. When the detective arrived, the Defendant would deny that he had seen Ms. Cruz at all that day. CP 171-72; RP 911, 2141-49.

He also repeatedly denied owning a gun. CP 108, 171; RP 1014, 1990-91, 2019 (“we are working people. We came to this country to work”), 2141-50. A few days after the murders, police found the Defendant’s BB gun and a machete in a field, a few hundred feet from the Defendant’s residence. RP 1022-26, 1163. On his phone he had a picture of himself holding a 9 mm handgun at his residence, which looked exactly like the 9 mm Hi-Point handgun that would later be recovered in a remote part of the orchard. CP 65-66, 116, 172; RP 2021, 2142. Police also discovered a clean box of ammunition hidden inside a dusty shed beside the Defendant’s home. CP 75, 106, 171; RP 928-35. The ammunition that was (1) used to kill the victims, (2) found in the Defendant’s shed, and (3) found in the

discarded gun in the orchard was all Perfecta 9 mm Luger caliber, an Italian brand. CP 54, 57; RP 687-88, 935, 1067-77, 1479-80, 1661, 2115.

Confronted with the evidence against him, the Defendant then claimed that he had owned a gun, but he had sold it to Ms. Cruz in his brother's presence. CP 108; RP 2021. But his brother told a different story – that the Defendant woke him up on the night of the murder to tell him that the detective was coming to talk to him, that Ms. Cruz's car had been blown up, and that he had sold his handgun to Ms. Cruz a few days earlier. CP 108; RP 1758-60, 1771, 2158-60. The Defendant told police that he sold Ms. Cruz the gun for \$300 and borrowed another \$100 from his brother to purchase \$400 of carne asada for a June 30th barbecue. RP 2154-55. A review of the shop's receipts and the receipt located in the Defendant's home showed that he had only purchased \$89.89 in groceries that day. RP 2155-57.

The Defendant eventually told police to “go ahead and convict me. ... you have enough evidence to convict me, anyway.” RP 2153. “When you find the gun that killed her, you're going to find my fingerprints.” CP 42.

Motion in limine to exclude "other suspect" evidence

In pretrial motions in limine filed September 7, 2016, the prosecutor asked the court to exclude "other suspect" evidence as irrelevant where there was no link connecting any third party to the killings. CP 162-64.

Three weeks later, the Defendant filed his own motions in limine. CP 5-59. The Defendant asked that he be permitted to argue that Fernando Lopez Aguirre was the real killer. CP 9.

Although he lived in the same small town, Mr. Lopez rarely came around and had not visited his son in four or five months. CP 35, 48. Police had interviewed Mr. Lopez early in the investigation, but he was in Mexico during the trial. CP 50; RP 612, 652, 1000, 2000, 2028-29. The Defendant wanted to offer the information in Mr. Lopez's recorded interview. CP 9-11, 71. The defense wanted Berenice Hernandez to testify about what Ms. Cruz had said about her ex. CP 9. And the defense wanted to admit the speculation of Ms. Cruz's brother about possible perpetrators. CP 10.

The defense repeatedly claimed that the rule on third party perpetrator evidence is "relaxed" when the state's case is circumstantial. CP 8, 9; RP 615. The prosecutor pointed that this

was a misrepresentation of the law. CP 68; *see also State v. Downs*, 168 Wn.2d 664, 666, 13 P.2d 1 (1932) (third party perpetrator evidence only comes into play in a circumstantial case).

The prosecutor noted that hearsay and prior bad acts would be inadmissible under the rules of evidence, as would speculation based on knowledge of those acts. RP 613-14. Speculation was of course irrelevant. RP 324.

The court found the evidence proffered by the defense was not of a similar character to the State's evidence. RP 627, 629. The Defendant was actually with the victims shortly before their death; Mr. Lopez was not. *Id.* The court found that the evidence the Defendant was seeking to admit (prior bad act evidence) was not admissible under the rules of evidence. RP 628. The court found that there was not "a sufficient train of facts or circumstances that connect [Mr. Lopez] to the crimes." *Id.* The court granted the State's motion to exclude and denied the defense motion to admit. RP 629.

The prosecutor did not object to the defense arguing generally that someone else did it, so long as no specific other person was named. RP 630. That more general theory was already queued in the defense's PowerPoint.

The evidence is going to show you that someone planned this. That someone with precision executed these murders. And the evidence is also going to show you that someone is getting away with these murders.

Because this person has a horrible secret. The horrible secret is that they know that they are on the verge, based upon the evidence and lack of evidence in this case, of getting away with two murders. They know that because as we sit here in trial, they know that Juan is innocent. They know that Juan did not do this. They know that Juan didn't kill anyone. And they also know that they killed both Luis and Maria in July of 2015.

And they also know that as we sit here today, we have no idea who they are. And that will be the evidence in this case, as we sit here today and next week and the week after, we will not know who killed Maria and Luis.

RP 689-90 (defense opening statement).

Someone has a horrible secret. [...] Someone knows who killed Luis. Someone knows who killed Maria. And someone knows that it is not Juan. But because of the way this investigation was done, the fourteen of you are never gonna know that answer.

RP 2496 (defense closing argument). The defense suggested the cartel was behind the killings, and the DEA knew it.

... there was a DEA drug investigation going on with all the trappings of the Federal government in the Connell area. And that's why that still photograph you saw with all the markings around the still photograph isn't from a drone you buy at Best Buy, it is from an aircraft that is designated to work on the ridge and the surrounding area. You're gonna hear at the time these murders happened, investigation was ongoing in the area.

RP 711. In fact, the federal investigation was in another county. RP 995, 2361, 2393-96.

This part of Washington State experiences a lot of seasonal migration related to crops. RP 702, 855-56, 1115, 2542. But the defense argued that the absence of several persons interviewed early in the investigation was sinister.

... law enforcement talked to a lot of people in this case, a lot of people ... shortly after the murders ... after they talked to these people ... the people disappeared. ... And you're not gonna hear any explanation about who or where. The only thing you're going to know based on the evidence is that those people are gone.

RP 693.

In closing, the defense discussed several other suspects, with special attention given to Mr. Lopez.

We have Fernando Lopez, who is Maria's baby's father. Luis's dad. Where is Fernando, ladies and gentlemen?

....

... Fernando Lopez's son, Luis, is brutally murdered. Not only does [Fernando] take off for wherever he went, he's also not been here a single day of this trial for his son, who was murdered. And you have to ask yourself, why? You know that the Franklin County Sheriff's Office talked to Fernando Lopez time and time and time again. Taking reports every time they talked to him. And you've gotten zero of that information because they lost Fernando Lopez.

RP 2501.

... we have no idea where Fernando Lopez is. Or his roommate, Carlos Baeza. Or Isai Santos. Or El Guero. the Sheriff's Office let them get away.

RP 2502.

Who do the missing witnesses have in common? Maria. None of them have any connection directly to Juan. ... Maria is the common denominator.

RP 2502-03.

On appeal, the Defendant seeks review of the trial court's order granting the State's motion to exclude third party perpetrator evidence.

V. ARGUMENT

A. LEGAL STANDARDS.

The Defendant claims that the trial court abused its discretion in granting the State's motion to exclude third party perpetrator evidence. The parties agree on the standard of review. BOA at 8. The decision to admit evidence lies with the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P2d 1120 (1997). There is no constitutional right to present irrelevant or inadmissible evidence in one's defense. *Montana v. Egelhoff*, 518

U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996); *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996).

The limitation on collateral evidence of this sort is similar to a trial judge's ruling under ER 403. *State v. Franklin*, 180 Wn.2d 371, 380, 325 P.3d 159, 163 (2014).

The Supreme Court held that trial courts may exclude evidence on the ground that its probative value is outweighed by other considerations, but the probative value must be based on whether the evidence has a logical connection to the crime.

State v. Franklin, 180 Wn.2d at 381 (citing *Holmes v. South Carolina*, 547 U.S. 319, 330, 126 S. Ct. 1727, 1728, 164 L. Ed. 2d 503 (2006)).

The scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendants to produce evidence tending to show that hundreds of other persons had some motive or *animus* against the deceased....

State v. Franklin, 180 Wn.2d at 380 (quoting *People v. Mendez*, 193 Cal. 39, 52, 223 P. 65 (1924)). A defendant is not permitted "to indulge in conjectural inferences" or "fanciful analogy ... that some one other than he is more probably guilty." *State v. Louie Moon*, 117 P. 757, 758 (Idaho 1911).

When the state relies on circumstantial evidence to connect the accused with the crime, the defendant may, “by the same character of testimony,” offer evidence of another suspect. *State v. Downs*, 168 Wn.2d 664, 666, 13 P.2d 1 (1932). Before the court can admit such testimony, “there must be such proof of connection with it, such a train of facts or circumstances as tend to clearly point to some one besides the prisoner as the guilty party.” *State v. Downs*, 168 Wn.2d at 667 (quoting *Greenfield v. People*, 85 N.Y. 75, 89 (1881)). Without that evidence tending to connect the third party to the crime, bad character, means, and opportunity are irrelevant. *State v. Downs*, 168 Wn.2d at 667 (quoting 16 C.J. § 1085)).

Mere evidence of motive or motive coupled with threat to kill does not connect a third party to the crime and will not render the testimony admissible. *State v. Franklin*, 180 Wn.2d at 379; 5 Wash. Prac., Evidence Law and Practice § 402.19 (6th ed.). And remote acts disconnected and outside of the crime itself cannot be separately proven for such a purpose. *State v. Franklin*, 180 Wn.2d at 380. A defendant must be able to show a more tangible connection or adequate nexus between the other person and the crime charged. 5 Wash. Prac. § 402.19. “Some combination of facts or circumstances

must point to a nonspeculative link between the other suspect and the charged crime.” *State v. Franklin*, 180 Wn.2d at 381.

B. THE RECORD THAT WAS BEFORE THE JUDGE AT THE TIME OF HER RULING IS THE RELEVANT RECORD ON REVIEW.

In the Defendant’s Statement of the Case, he writes that the trial court “denied the defense theory” “at every turn.” BOA at 6. But he only shows that the argument was raised once, i.e. in pretrial motions in limine. BOA at 2-6 (citing to pretrial briefing and the transcript of the pretrial hearing).

He argues that the entire trial is the relevant record, because the judge indicated that she reserved judgment on the motion. BOA at 9 (citing CP 120). In fact, the court made a ruling. RP 629 (“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.”). The Defendant does not show that reconsideration was requested after any trial testimony. Accordingly, the relevant record was not the trial testimony, but only the briefing and arguments. This is the only record before the judge when she made her ruling. A judge does not abuse her discretion in failing to reconsider when no motion for reconsideration is put to her.

It is odd that the Defendant would make this argument. The only citation he makes outside of the pretrial record is to RP 1688. BOA at 6 (arguing that Mr. Lopez was not present at trial to give more details about his own SIM card). And the pretrial record on the whole is a better record for the defense. Defense counsel's representation of the evidence in pretrial motion did not hold up in the trial record.

C. THE TRIAL JUDGE DID NOT MANIFESTLY ABUSE HER DISCRETION IN EXCLUDING EVIDENCE THAT WAS INADMISSIBLE UNDER THE RULES OF EVIDENCE AND IN EXCLUDING THIRD PARTY PERPETRATOR EVIDENCE WHERE THERE WAS NO EVIDENCE OF A SIMILAR CHARACTER CONNECTING ANYONE ELSE TO THE CRIME.

The trial judge had multiple reasons for excluding the evidence. This Court may affirm the lower court on any theory supported by the record and the law. *State v. Glenn*, 140 Wn.App. 627, 636, 166 P.3d 1235 (2007).

Where the Defendant was seeking to introduce Mr. Lopez's statement to the police, that was hearsay. ER 801. Where the Defendant was seeking to admit Ms. Cruz's stories to Ms. Hernandez or anyone else about what gone on in her relationship with Mr. Lopez, that was also hearsay. Hearsay is not admissible. ER 802. There is

no exception to the hearsay rule that applies to these statements.

The Defendant wanted to admit information about Mr. Lopez's prior bad acts to demonstrate Mr. Lopez's character for the purpose of arguing that he acted in conformity with that character. Assuming arguendo that there was non-hearsay evidence of this, such evidence would be inadmissible under ER 404(b).

The Defendant wanted to admit evidence that someone in the community speculated that Mr. Lopez might have been the responsible party. Speculation is not relevant and therefore plainly not admissible. *State v. Richmond*, 3 Wn.App.2d 423, 431, 415 P.3d 1208 (2018); *State v. Donahue*, 105 Wn. App. 67, 79, 105 P.3d 67 (2001). *See also State v. Farr-Lenzini*, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) (opinion testimony as to guilt or innocence is generally not admissible).

If the Defendant had any evidence that passed muster as to these foregoing evidentiary rules, and he did not, he could only have offered "other suspect" evidence with a showing of adequate nexus such that the probative nature of the evidence would not be substantially outweighed by the unfair prejudice. ER 403. It would have been highly prejudicial to offer evidence that Mr. Lopez had

assaulted Ms. Cruz in the past. It would have been highly prejudicial to offer evidence that Ms. Cruz had gotten so frustrated with him that she vented in revenge fantasies in which her new dangerous companions might assault her ex.

The evidence would be probative if it connected Mr. Lopez to the crime. Here, it was not at all probative. While the couple had a tumultuous relationship, they continued to date off and on. There was no evidence that Ms. Cruz or Mr. Lopez desired to kill each other. There was no evidence that Mr. Lopez would be driven to kill over child support. There was no evidence that Mr. Lopez had a gun, much less a 9mm with Perfecta cartridges.

There was no evidence he was in the vicinity of the crime scene or even knew where Ms. Cruz was going. Quite the opposite, he was avoiding her that day – assiduously. He did not pick up her call; he did not return her texts. CP 37. And when his neighbor handed him her phone with Ms. Cruz on the other end, he hung up. CP 37; RP 1694-95. That was minutes before her murder and several miles away. She was in the company of the Defendant and en route to a location that only the Defendant knew.

The defense wanted to admit information that Mr. Lopez

confronted Ms. Cruz's new boyfriend, Isai Amado Santos. The only witnesses to that confrontation were Mr. Lopez and Mr. Amado Santos. Neither were available for trial. RP 652. Their statements to police were inadmissible as hearsay.

There is no allegation of violence. Mr. Amado Santos told police that Mr. Lopez merely "asked him to stop dating her," and he obliged the request by breaking up with Ms. Cruz after dating her for less than two weeks. CP 43. Mr. Lopez initially suspected that Mr. Amado Santos may have had something to do with the killings, because he had been absent from work that day. CP 50, 52. But Mr. Amado Santos told Mr. Lopez (and later the police) that Ms. Cruz had been in trouble for losing a kilo of cocaine. CP 43-44, 50.

The Defendant argues that a 2016 court of appeals case is "seminal." BOA at 7. That case states:

[T]he threshold analysis for "other suspect" evidence involves a straightforward, but focused, relevance inquiry, reviewing the evidence's materiality and probative value for "whether the evidence has a logical connection to the crime." Franklin, 180 Wash.2d at 381-82, 325 P.3d 159 (citing Holmes, 547 U.S. at 330, 126 S.Ct. 1727).

State v. Ortuño-Perez, 196 Wn. App. 771, 783, 385 P.3d 218, 224 (2016). There is no evidence tending to connect Mr. Lopez logically

to the murders. There is no nexus between the evidence the defense wanted to admit and the crimes.

The Defendant claims his case presents “the *exact* same argument as was asserted by Mr. Ortuño-Perez.” BOA at 11. This is false. There the other suspect was armed and standing approximately a few feet away from the victim when he was shot at close range. *State v. Ortuño-Perez*, 196 Wn. App. at 777, 786. These are not similar facts of logical connection.

The Defendant then turns to *State v. Horn*, 3 Wn. App. 2d 302, 415 P.3d 1225 (2018). BOA at 10. The case is not relevant. It does not involve a request to admit other suspect evidence. The defendant attempted to frame the trial court’s evidentiary decision in constitutional terms. The court of appeals affirmed the conviction, finding the evidence that was excluded was not minimally relevant. *Id.* at 314.

The Defendant was not denied a defense. His trial counsel provided a very fine defense. He was simply held to the rules of evidence. The Defendant cannot show the trial judge manifestly abused her discretion in excluding evidence where there was

inadequate nexus connecting a third party to the murders and where the evidence was inadmissible under the rules of evidence.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: July 23, 2018.

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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