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No. 36062-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

ARNULFO BRAVO,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. Counsel was ineffective for allowing information relating to a past crime to be introduced into evidence.

2. The expert witness invaded the province of the jury by expressing a confidence level in his conclusion.

3. The Court improperly allowed introduction of evidence of conflict between the deceased and the defendant.

4. The Court improperly charged LFO's.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Was defense counsel ineffective for failing to object to evidence that boosted the defendant's credibility?

2. If defense counsel did not have a reasonable reason for failing to object, did that failure, within a reasonable probability, change the trial's outcome?

3. Does a witness expressing a confidence level in their observations and conclusions invade the province of the jury?

4. Did the trial court err in allowing evidence of a conflict between the murder victim and the defendant?

III. STATEMENT OF THE CASE

The last time Kristi Rambo saw her mother was in the summer of 1991. RP 209. Her mother, Barbara Kipp, brought her boyfriend, Arnulfo Bravo, to see Ms. Rambo and her children in Montana. RP 210. Mr. Bravo was very controlling of Ms. Kipp. RP 212-214. Back in Moses Lake Mr. Bravo worked for businessman Ritchie Norman. RP 222-224. Mr. Norman and Mr. Bravo were fairly close for an employer and employee. RP 224-228. Mr. Bravo called Mr. Norman when he needed help and a place to stay when his relationships went sour. *Id.* A few days after he supposedly found Ms. Kipp dead and fled to California Mr. Bravo acknowledged to Mr. Norman taking Ms. Kipp's money and jewelry. RP 230-231. Even after this Mr. Norman was still willing to give Mr. Bravo his job back. *Id.*

Charlie Flowers lived with Ms. Kipp for three or four years prior to her death. RP 336. Mr. Bravo lived with them for approximately a year. *Id.* However, Ms. Kipp was planning to return to Montana. RP 340. During the weekend of Ms. Kipp's death Mr. Flowers went on a hunting trip. *Id.* When he got home Mr. Flowers noticed things out of place. Beer was left out and the kitchen was not clean. RP 341. He found Ms. Kipp dead in the living room. *Id.* Mr. Flowers did not move Ms. Kipp, but went into the bedroom to call 911. RP 342.

Penny Sibley was the Grant County Coroner in 1991. RP 254. She responded to and took pictures of the scene where Barbara Kipp was found. RP 255. She took several pictures of the scene, which were admitted as exhibits 1-17. RP 255. These were done before the body was moved. RP 262. She saw no evidence of drug use at the scene. RP 256.

Dr. Gerald Rappe conducted the autopsy on Ms. Kipp. By the time of the trial he was in failing health, and needed some accommodations. RP 267. However, none of his failings affected his mental faculties. RP 267. Dr. Rappe explained his findings in detail to the jury. RP 272-276. Initially Dr. Rappe could not be certain about the cause of death. He knew Ms. Kipp had been strangled, but was not certain that was the cause of her death. RP 276. Dr. Rappe considered a drug overdose as an alternative cause of death. He consulted with the King County medical examiner. RP 277. He also received a toxicology report showing alcohol in Ms. Kipp's system but no other significant drugs. RP 278-80. He extensively detailed why he rejected drug overdose as a cause of death.

Det. Ron Varner, the detective on the scene, also testified. He reported seeing no signs of drug overdose or drug use. RP 324. Det. Varner interviewed Mr. Bravo twice. Transcripts of the interviews were admitted as exhibits. RP 330. When they were offered defense counsel initially objected, stating "object because—no, I'll waive the objection, no

objection.” RP 330. Defense counsel also did not object to Mr. Bravo’s judgment and sentence for the theft of Ms. Kipp’s property being introduced into evidence. RP 373.

During the interviews Det. Varner discussed his investigation with Mr. Bravo. Mr. Bravo discussed how Ms. Kipp ditched him at a bar. Ex. 23, p. 20. Mr. Bravo discussed how Ms. Kipp made her lunch the night she died, and how Mr. Bravo took her lunch after he found her dead. *Id.* at 20-32. They also talked about a fight and how Mr. Bravo got kicked out of the house. *Id.* at 44. Mr. Bravo came back after he fled to California because he had a bad foot and could not work down south. *Id.* at 67. Both Ms. Kipp and Mr. Bravo had been drinking that night. *Id.* at 78. They talked about moving to Montana. *Id.* at 88. In exhibit 21 he discusses how he placed a bullet in front of Ms. Kipp, and tried to pass it off. Ex. 21 at 10-11. He also talks about how she was not allowed to go to a bar if he did not go. *Id.* at 14. He described taking the ice chest with food in it that had been next to Ms. Kipp’s body. *Id.* at 22.

Dr. Carl Wigren testified for the defense. He hypothesized that Ms. Kipp was suicidal because she thought she was suffering a leukemia relapse. RP 391. Mr. Wigren looked at how Ms. Kipp was found on the floor. RP 398. He believed she died of a drug overdose. RP 406. Dr. Wigren also reviewed a transcript of an interview Ms. Rambo gave to Det.

Varner, concluding that Ms. Kipp was suicidal based on statements from Ms. Rambo. RP 409. Dr. Wigren explained he concluded that Ms. Kipp was originally face down on a chair, then later slumped into the position she was found in. RP 423-28. Dr. Wigren took information and made a conclusion that Ms. Kipp was suicidal. RP 431-32. Dr. Wigren insisted that the person making the determination should look at everything. RP 422. However, Dr. Wigren failed to take his own advice. He failed to review Mr. Bravo's statements about what happened. RP 447. He did not consider Ms. Kipp's plan to move back to Montana. RP 448. Dr. Wigren concluded that the initial prone position helped explain the hemorrhages in the neck. RP 454. However, Dr. Wigren failed to explain how Ms. Kipp, slumped face down on the chair, slipped down and then got her feet under the chair and beside, not in front of it. Ex. 6-8. He also failed to explain why a person who commits suicide would have their keys out next to them when they die. *Id.*

Ms. Rambo testified in rebuttal regarding the statements Dr. Wigren took to be indications of a suicidal tendency. She indicated the fear and anguish her mother was feeling was related to Mr. Bravo and her fear of him, not indications of suicide. RP 488. Ms. Rambo also described a plane ticket her mother received after her death, showing she planned to

travel back to Montana. RP 491. Ms. Rambo indicated that Ms. Kipp was happy to come back to Montana. RP 492.

IV. ARGUMENT

A. Ineffective assistance of counsel

1. Legal Standard

A court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Bravo includes a quotation from a Supreme Court case suggesting that Court has retreated from the standard adopted in *Strickland*, that there is a strong presumption that challenged actions were the result of reasonable trial strategy. The Court has not retreated from that

principle. The quotation: “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), cited at App. Br. at 10. The Court was not minimizing the presumption to be accorded strategic decisions; it was rejecting a per se rule establishing ineffectiveness as to a decision that was *not* strategic. *Flores-Ortega*, 528 U.S. at 479-81 (rejecting a per se rule that counsel has a duty to consult with the defendant about an appeal in every case). In subsequent cases the Court has reaffirmed its holding that reviewing courts must apply a strong presumption that challenged actions were the result of reasonable trial strategy. *E.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011); *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787, 178 L. Ed. 2d 624 (2011). In one case subsequent to *Flores-Ortega*, the Supreme Court noted that “[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Knowles v. Mirzayance*, 556 U.S. 111, 124, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009) (quoting *Strickland*, 466 U.S. at 690).

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2. Counsel's decision not to object was reasonable and strategic.

The defense strategy was to argue that Ms. Kipp committed suicide, and Mr. Bravo came home and found her dead, stole her valuables and fled, later returning to face the consequences. Defense counsel clearly considered objecting to the introduction of the statements, but then withdrew his objection. It was important that the jury believe Mr. Bravo. Mr. Bravo readily admitted to Detective Varner about the theft of Ms. Kipp's belongings, and was convicted and sentenced for it. In the face of extremely aggressive, hostile and intimidating questioning by Det. Varner Mr. Bravo steadfastly refused to admit that he killed Ms. Kipp. The fact that Mr. Bravo was honest about the theft, and refused to buckle under pressure about killing Ms. Kipp, only adds to his credibility and the credibility of the defense case. Once the Varner interview was in, there was no reason to redact the judgment and sentence and make it look like something was being hidden. Defense counsel made a strategic choice. It cannot now be assailed with 20/20 hindsight.

3. There is not a reasonable probability the outcome would have been different if defense counsel had objected.

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Knowles*, 556 U.S. at 127. Mr. Bravo cannot do so. Mr. Bravo choose to put forth an expert who tried to sell the jury on a theory that was deeply flawed. Dr. Wigren did not read Mr. Bravo's statement, the person who supposedly found the body first. Thus he was not aware that Ms. Kipp packed her lunch and was not acting suicidal. He was not aware of Ms. Kipp's plans. He ignored the pictures which refuted his theory of how Ms. Kipp died, including where her feet were and the car keys found next to her. To put it simply, Mr. Bravo's theory of the case did not match the evidence. The fact the jury knew his history from 15 years before the incident had no appreciable effect on the trial. In addition the jury clearly did not respond emotionally. The jury rationally weighed the evidence and rejected the highest charge in the case, murder 2, and convicted Mr. Bravo of manslaughter instead.¹ The issue in this case was "what was Ms. Kipp's cause of death?" The record of Mr. Bravo's past had no effect on

¹ It should be noted that felony murder 2 based on assault was not available to the jury in this case. *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 604, 56 P.3d 981, 982 (2002)

that issue, and there is not a reasonable probability the trial outcome would have been different.

B. Dr. Rappe did not invade the province of the jury.

The fact that Dr. Rappe expressed a confidence level in his conclusions did not invade the province of the jury. This issue is more accurately characterized as an unpreserved evidentiary objection. “Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.” *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). This issue is really an objection under ER 704, an issue that was not objected to, and would not have been sustained even if it had been. The Court should not review it under RAP 2.5.

Mr. Bravo mischaracterizes the evidence. Dr. Rappe did not offer an opinion on guilt. He offered an opinion on cause of death. This is well within his preview as the medical examiner in this case. There was no objection to Dr. Rappe’s qualifications to testify. Dr. Rappe said nothing about who strangled Ms. Kipp to death, only that she was strangled. ER 704 states that “testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

In *State v. Hayward*, 152 Wn. App. 632, 650, 217 P.3d 354, 363 (2009), the prosecutor, referring to the injury the victim sustained, asked

“is that one that would be a temporary but substantial loss or impairment o[f] the function of a body part?” This question mimicked the language of the legal definition of substantial bodily harm, an element of the charged offense. RCW 9A.04.110. The Court ruled “Though (the expert’s) testimony addressed an ultimate issue of substantial bodily harm that the jury was required to decide in determining Hayward's guilt, his testimony did not include an opinion as to Hayward's guilt. Indeed, it did not include any discussion of Hayward or his participation in the injury.” *Id* at 650-51. The Court affirmed the trial court’s ruling allowing the question.

Witnesses are often asked to express their confidence in a conclusion or observation. Doctors often testify to a reasonable degree of medical certainty. Indeed, medical expert testimony must be based upon “a reasonable degree of medical certainty.” *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171, 1175 (1989). Witnesses are often asked to express their confidence in their degree of identification, and a whole cottage industry of psychologists has sprung up to evaluate what weight should be given to witnesses’ level of confidence in their identification. *See, e.g.* 46 A.L.R.4th 1047; *State v. Johnson*, 49 Wn. App. 432, 434 n.3, 743 P.2d 290, 291 (1987). The State is unaware of any case, and Mr. Bravo does not cite to any, where a witness’s statement of the level of

confidence in their conclusions or observations is invading the prerogatives of the jury.

Dr. Rappe used the term beyond a reasonable doubt to express his confidence level in his observations and conclusions. He could have said he was 100% certain or absolutely certain and conveyed the same idea. However, simply because an idea is expressed using terminology that may also be used in the legal arena does not mean a witness is invading the province of the jury. *Hayward*, 152 Wn. App. at 650. There was no error in Dr. Rappe stating his level of confidence to the jury.

C. Evidence of hostility between the victim and the accused has long been held admissible under ER 404(b).

A court reviews “the trial court's interpretation of ER 404(b) de novo as a matter of law. If the trial court interprets ER 404(b) correctly, [the reviewing court reviews] the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. A trial court abuses its discretion where it fails to abide by the rule's requirements.” *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009).

ER 404(b) provides: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes,

such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Properly understood, ER 404(b) identifies one improper purpose for which evidence may be admitted “and an undefined number of proper purposes.” *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). “[T]he list of other purposes in the second sentence of ER 404(b) is merely illustrative.” *Id.* at 420.

Because ER 404(b) evidentiary errors are not of constitutional magnitude, a reviewing court may apply a harmless error analysis. *See, e.g., State v. Binh Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005).

The trial court held an ER 404(b) hearing prior to trial and concluded evidence of conflict between Mr. Bravo and Ms. Kipp was admissible. RP 41-48. This is completely consistent with prior case law regarding hostility between a murder or assault victim and the murder. On the logical, commonsense level murders are not committed out of the blue. Here the evidence shows that Mr. Bravo assaulted Ms. Kipp by choking her and wound up killing her. Given the jury’s verdict they likely found that he intended to assault her, but did not intend to kill her. This type of assault occurs when people are angry at one another. Conflict between the two shows intent and motive.

Case law supports this rationale. “[E]vidence of previous disputes or quarrels between the accused and the deceased is generally admissible in murder cases, and that such evidence tends to show the relationship of the parties and their feelings one toward the other and often bears directly upon the state of mind of the accused with consequent bearing upon the question of malice or premeditation.” *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239, 1257 (1997), citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Here the evidence of the quarrels and conflicts between Ms. Kipp and Mr. Bravo were recorded in the interviews Det. Varner conducted shortly after Ms. Kipp was killed. The Prosecutor used the evidence to show Mr. Bravo’s motive and intent. This is the proper purpose and is relevant and admissible under Washington case law. The trial court properly analyzed the 404(b) objection and came to the proper conclusion that such evidence was admissible. There was no error.

D. Legal Financial Obligations

The State waives argument regarding the Sherriff’s service fee and the filing fee. The DNA fee was properly imposed, as Mr. Bravo’s prior convictions were so old DNA was not collected at the time.

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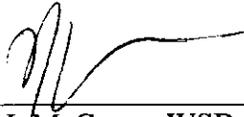
V. CONCLUSION

Defense counsel made a strategic choice to reinforce Mr. Bravo's credibility when he let in evidence of a harsh interrogation where Mr. Bravo steadfastly refused to admit to the killing, while admitting to other crimes. A witness expressing his confidence level in his observations and conclusions, even using legal terminology, does not invade the province of the jury. Evidence of prior conflicts between Mr. Bravo and Ms. Kipp was properly placed before the jury. The trial court should be affirmed.

Dated this 26th day of June, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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