

NO. 77767-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS HACHENEY,

Petitioner.

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KITSAAP COUNTY

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 29965-8-II
Kitsap County Superior Court No. 01-1-01311-2

SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED August 4, 2006, Port Orchard, WA

Original: Supreme Court

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[Handwritten signatures]

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly instructed the jury on the arson aggravating circumstance where the arson and the murder were intimately related?

2. Whether the trial court properly found that State made a good-faith effort to secure the presence of three overseas witnesses before admitting their videotaped deposition testimony?

II. STATEMENT OF THE CASE

Nicholas Hacheney was convicted of the aggravated premeditated murder of his wife. Because he burned the marital home down around her after killing her, her death was initially deemed accidental and the murder was not discovered for several years, when Hacheney's spurned lover contacted the police. The evidence is summarized in the opinion of the Court of Appeals, at 1-6:

On December 26, 1997, Nicholas and Dawn Hacheney's house burned. A firefighter discovered Dawn, deceased, on a bed in the debris. Several propane canisters and an electric space heater were found near the bed. For the next couple of years, the fire marshal, medical examiner, and other investigators thought both the fire and Dawn's death were accidental. In 2001, however, they came to suspect foul play.

On December 29, 1997, Dr. Emmanuel Lacsina performed an autopsy. He found that although Dawn did not have soot in her trachea or lungs, she did have pulmonary edema, which can result from congestive heart failure,

drowning, a drug overdose, head injury, or suffocation. He initially thought that she had been asphyxiated when, during a flash fire, her larynx had spasmed reflexively.

During the autopsy, Dr. Lacsina collected blood and lung samples that were later tested by Egle Weiss, an employee of the state toxicology laboratory. Weiss performed the tests about ten days after the fire, at a time when she and the investigators were thinking that the fire had been accidental. She found little carbon monoxide and no propane in the lungs, no carbon monoxide in the blood, and an elevated level of Benadryl. Weiss died unexpectedly before trial.

Like the others, John Rappleye, a fire investigator for the Bremerton Fire Department, initially thought the fire was accidental. He also noted that some of the propane canisters had 'vented' during the fire, [RP 1260] and that the area around the canisters had burned more heavily than other areas in the room.

On January 26, 1998, Hachenev was interviewed by Rappleye and Detective Daniel Trudeau. Hachenev said that he and Dawn had opened Christmas presents in the bedroom, that they had strewn wrapping paper around the room, and that the bedroom space heater was the only source of heat in the house. He had been duck hunting when the fire occurred.

During the summer and fall of 1997, Hachenev was having an affair with a woman named Sandra Glass. During the spring of 2001, Glass mentioned to her then-boyfriend that while she and Hachenev had been alone in the basement of their church, Hachenev had admitted giving Dawn some Benadryl and lying awake until God told him, "[G]o take something that you want." [RP 2335] He held a plastic bag over Dawn's head until she was no longer breathing, set the fire, and left.

* * *

In February and March 2002, the trial court held pretrial hearings to determine whether certain evidence was admissible under ER 404(b). The State offered Hachenev's alleged statements, made before the fire, that he could not wait to go to heaven because then he could have sex with

whomever he wanted. The State also offered that shortly after the fire, Hacheny had begun sexual relationships with women named Latsbaugh, Anderson, and Matheson; and that at Dawn's funeral, he had given Anderson a hug of questionable propriety.

* * *

On June 28, 2002, over Hacheny's objection, the trial court granted the State's request to take depositions from three witnesses who were planning to be in other countries at the time of trial. Two of those witnesses, Michael and Julia DeLashmutt, were moving to Scotland for three years so Michael could obtain an advanced degree. The third, David Olson, was moving for at least six months to a rural area in Bolivia. Hacheny's father asked to attend the depositions, but the trial court denied his request.

* * *

[T]he jury found Hacheny guilty of first degree premeditated murder and answered 'yes' to a special interrogatory asking whether Hacheny had killed in the course of first degree arson. The trial court imposed a sentence of life without parole.

The State will include specific references to the record as necessary in the argument portion of the brief.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ARSON AGGRAVATING CIRCUMSTANCE WHERE THE ARSON AND THE MURDER WERE INTIMATELY RELATED.

Hacheny's first contention is that the evidence was insufficient for the jury to find the aggravating circumstance that the murder was committed in the course of a first-degree arson under RCW 10.95.020(11)(e). He

contends that because the arson was committed *after* he killed his wife, the murder was not committed in the course of the arson. This Court, however, has refused to read this provision literally, and has held that the evidence is sufficient if the murder and the aggravating crime are part of the same *res gestae*. Here there is no doubt that the arson was committed to conceal the murder and such was intimately connected with it. The evidence was therefore sufficient to send the issue to the jury.

In challenges to the sufficiency of the evidence to prove an aggravating factor, this Court must view the evidence most favorably toward the prosecution to determine whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt. *State v. Finch*, 137 Wn.2d 792, 835, 975 P.2d 967 (1999). All reasonable inferences from the evidence are drawn in favor of the State and interpreted against the defendant. *Finch*, 137 Wn.2d at 831.

This Court has long held that to establish that a killing occurred in the course of, in furtherance of, or in immediate flight from a felony, there must be an “intimate connection” between the killing and the felony. *State v. Brown*, 132 Wn.2d 529, 608, 940 P.2d 546 (1997) (citing *State v. Golladay*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970)). An intimate connection is established if the killing is part of the *res gestae* of the felony, *i.e.*, in “close proximity in terms of time and distance.” *Brown*, 132 Wn.2d at 608 (quoting

State v. Leech, 114 Wn.2d 700, 706, 790 P.2d 160 (1990), and citing *State v. Dudrey*, 30 Wn. App. 447, 450, 635 P.2d 750 (1981), review denied, 96 Wn.2d 1026 (1982)). To be part of the *res gestae*, “more than a mere coincidence of time and place is necessary.” *Brown*, 132 Wn.2d at 608. A “causal connection” must clearly be established between the two crimes. *Brown*, 132 Wn.2d at 608 (citing *Golladay*, 78 Wn.2d at 130).

In *Brown*, this Court noted that in *Leech* it had declined to apply a literal reading of the phrase “in furtherance of.” In that case, a fire fighter died while fighting a fire set by the defendant. The defendant, charged with felony murder, argued his act of arson ended once he set the fire and that any death caused by the fire was not within the *res gestae* or “in furtherance of” that crime. *Leech* nevertheless held that because the fire fighter died while the arson fire was still engaged, his death was sufficiently close in time and place to the arson to be within the *res gestae* of that felony.

Brown, however, found that none of the Court’s earlier cases addressed the specific issue of whether a killing that occurred “hours” after the rape or robbery was committed or completed could be within the *res gestae* of those crimes, or committed to “further” those crimes. *Brown*, 132 Wn.2d at 609. In *Leech*, *Dudrey* and *Golladay*, the killings and related felonies occurred within close proximity of time and place, while in *Brown*, the felonies occurred sometime within a two-day period, presumably “hours”

before the actual killing. *Brown*, 132 Wn.2d at 609.

This Court nevertheless rejected the contention that the defendant's killing of his victim did not "further" the rape, robbery or kidnapping. *Brown*, 132 Wn.2d at 609. Instead, the Court followed the rule of *Leech* that the Court would not apply too literal an interpretation of "in furtherance of," but would look instead to whether the killing was part of the *res gestae* of the felony. *Brown*, 132 Wn.2d at 610. The Court concluded that where the defendant's crimes were linked by his motive to obtain money to pay for a trip, his robbing the victim, holding her captive, torturing and raping her and ultimately killed her to eliminate her as a witness, the killing and the other felonies were intimately connected. *Brown*, 132 Wn.2d at 610.

Hachenev argues that all of these cases rely on "temporal logic", *i.e.*, that the felony must precede the killing. *Petition*, at 6. But none of these holdings was based on a simplistic timeline analysis. For example, the problem in *Golladay* was that the theft was essentially accidental and occurred when the defendant "disposed of the victim's property *mistakenly* in his possession" after the fact. *Golladay*, 78 Wn.2d at 132 (emphasis supplied). The fatal flaw in *Golladay* thus was the State's failure to establish the requisite "intimate connection" because the evidence showed that "the larceny established by the evidence was entirely separate, distinct, and independent from the homicide." *Golladay*, 78 Wn.2d at 132. Here, on the

other hand, there is no evidence whatsoever that that the arson had any purpose distinct or separate from the killing, but instead was an essential component of Hachenev's plan to kill his wife.

Hachenev's comparison below of the incidental nature of the theft in *Golladay* with the arson here, Court of Appeals Brief of Appellant, at 21, was thus also flawed. While the defendant in *Golladay* was no doubt seeking to dispose of the evidence, it was at best an afterthought. As Hachenev phrases it, "[h]aving been in a one-car accident, confronted with several passers-by, and discovering the victim's property in his car, [Golladay] decided to get rid of the evidence." *Id.*, at 21. The arson in the instant case is in no way comparable. Hachenev did not toss his wife's shoes into a field. He set fire to his house, well before any onlookers arrived, not to avoid a connection with the murder, but to obliterate, nearly successfully, any evidence that a murder had occurred *at all*. The Court of Appeals properly concluded that burning of the house was "intimately connected with," and thus part of the *res gestae* of, the murder. Opinion, at 8.

Hachenev's reliance on *Dudrey* is likewise misplaced. He asserts that the Court of Appeals in that case relied on the fact that the felony "caused," *i.e.*, had to precede, the killing. Petition at 7. That case in no way addressed that issue. Instead, the dispositive fact was that the killing was part of the *res gestae* of the burglary in which the defendant participated. Indeed, the court

began its “analysis by noting a homicide is deemed committed during the perpetration of a felony, for the purpose of felony murder, if the homicide is within the ‘res gestae’ of the felony.” *Dudrey*, 30 Wn. App. at 450. Because the burglary in that case was already in progress at the time of the killing, *Dudrey*, 30 Wn. App. at 449, *Dudrey* cannot be read as requiring that the felony precede the murder.

Although Hacheney appears to have abandoned his reliance on *In re Address*, 147 Wn.2d 602, 56 P.3d 981 (2002), *but see* Court of Appeals Brief of Appellant, at 23, that case is noteworthy in that it reaffirmed the rule set forth in *Leech*:

In *State v. Leech*, ... we concluded that the “in furtherance of” language must be construed to mean that the death “was sufficiently close in time and place to the arson to be part of the *res gestae* of that felony.” ... Although *Address* contends that we should accept a different interpretation of the “in furtherance of” language in this case, we decline to do so. The reasons for the construction of that language in *Leech* are still as compelling today as when *Leech* was decided.

Address, 147 Wn.2d at 609-610 (citations omitted). The Court went on to conclude that assault could not be a predicate felony because it was “nonsensical to speak of a criminal act -- an assault -- that results in death as being part of the *res gestae* of that same criminal act since the conduct constituting the assault and the homicide are the same.” *Address*, 147 Wn.2d at 610.

The trial court and the Court of Appeals properly concluded that there was sufficient evidence to instruct the jury on the arson aggravating circumstance. The jury's finding of it should be affirmed.

B. THE TRIAL COURT PROPERLY FOUND THAT STATE MADE A GOOD-FAITH EFFORT TO SECURE THE PRESENCE OF THREE OVERSEAS WITNESSES BEFORE ADMITTING THEIR VIDEO DEPOSITION TESTIMONY.

Hacheny also claims that the trial court erred in finding three witnesses unavailable, and the Court of Appeals erred in affirming that factual finding. This claim is without merit because the witnesses were under subpoena, they informed the State they would nevertheless be out of the country at the time of trial, and the trial court upon balancing the relative hardship to the witnesses against the relative importance of their testimony properly concluded that the State had made an adequate good-faith effort to secure their presence. Finally, any error would be harmless.

Under *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), whether the admission of an out-of-court statement comports with the Sixth Amendment hinges on whether the absent witness is unavailable and whether the defendant had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 54-55. Hacheny clearly had an opportunity to cross-examine these witnesses, and does not claim otherwise. The only

question, then, is whether they were unavailable.

This is a question, however, that *Crawford* does not address. Presumably, then, *Crawford* has not changed the analysis for whether a witness is unavailable. See, e.g., *State v. Benn*, 130 Wn. App. 308, ¶ 34, 123 P.3d 484 (2005) (applying pre-*Crawford* precedent to resolve the issue of availability).

A trial court's decision to admit evidence in this context, as in most others, is reviewed for abuse of discretion. *State v. DeSantiago*, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003). The question of "unavailability to testify at trial" is a question of preliminary fact that the trial court decides under ER 104(a). *State v. Allen*, 94 Wn.2d 860, 866, 621 P.2d 143 (1980), *abrogated on other grounds*, *State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). The trial court is to consider all the facts and circumstances. *State v. Aaron*, 49 Wn. App. 735, 740, 745 P.2d 1316, 745 P.2d (1987). The facts must be established by a preponderance of the evidence. ER 104(a); *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987); *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 285-89, 966 P.2d 355 (1998); see also *State v. Pinnell*, 311 Or. 98, 114, 806 P.2d 110 (Or. 1991), and Advisory Committee's Note to Fed. R. Evid. 104(a), 56 F.R.D. 183, 197 (1973). The appellate court will reverse only if the record does not support the trial court's decision. *DeSantiago*, 149 Wn.2d at 41.

A declarant is “unavailable” if he or she is “absent from the hearing and the proponent of his statement has been unable to procure his attendance ... by process or other reasonable means.” ER 804(b). In order to satisfy the Confrontation Clause in a criminal case, the State must establish that it made a good-faith effort to obtain the witness’s presence at trial. *State v. Rivera*, 51 Wn. App. 556, 559, 754 P.2d 701 (1988). Whether the State has made a good-faith effort necessarily depends on the particular facts of each case. *Aaron*, 49 Wn. App. at 740. “The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness.” *State v. Goddard*, 38 Wn. App. 509, 512, 685 P.2d 674 (1984). Where the witness is beyond the legal reach of a subpoena, the State must show that it made an effort to secure the voluntary attendance of the witness at trial. *DeSantiago*, 149 Wn.2d at 412; *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987); *see also Mancusi v. Stubbs*, 408 U.S. 204, 211-12, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972).

Here Julia and Michael DeLashmutt were living in Scotland and Robert Olson was doing field work in Bolivia at the time of trial. All three witnesses left Washington in October 2001, a month before trial began. The State asserted, and Hacheny accepted the assertion as adequate for the purposes of the court’s ruling, 20RP 3825-26, that it had subpoenaed the witnesses, but that they intended to be out of the country at the time of trial

and to not honor their subpoenas. 20RP 3824-25, 3827. The State did not offer to pay for plane tickets for the witnesses to return to the United States to testify. 20RP 3825.

Under similar circumstances, witnesses have been deemed to be unavailable. Contrary to Hachenev's assertions below, Court of Appeals Brief of Appellant, at 43, the trial court properly considered the relative importance of the witnesses' testimony and the hardship to them. In this regard, Hachenev faults the trial court and the Court of Appeals for not following *State v. Aaron*. Yet *Aaron* was thoroughly argued by the defense at trial, and it cannot be concluded that the trial court did not consider it. Moreover, *Aaron* itself supports the trial court's weighing process:

To a certain extent, the State's efforts must also be measured by the importance of the witness' expected testimony.

Aaron, 49 Wn. App. at 743. In *Aaron* the State did not subpoena its "star witness." Nor can it be overlooked that there were other issues present in that case as well. The victim/witness left the country the day after the defendant was arraigned, and the deposition was taken the day of arraignment, just hours after defense counsel undertook the case over counsel's strenuous objections that he was not prepared. *Aaron*, 49 Wn. App. at 738-39.

Also, contrary to Hachenev's argument below, *Aaron* does not set an absolute standard for unavailability, as *Aaron* itself recognizes:

We emphasize that the foregoing discussion is intended neither to delineate precisely how much the State was required to do in the instant case nor to exhaust the possible considerations that might affect the unavailability requirement of ER 804 when the witness is in a foreign country. We hold only that because the State made *no* effort to obtain [the witness'] presence, she was not "unavailable" for purposes of ER 804 and admission of her deposition testimony was error.

Aaron, 49 Wn. App. at 744-745 (emphasis added). Thus, numerous cases have held that where the witness' testimony is relatively insignificant and/or there would be hardship to the witness, the State has met its burden of making a good-faith attempt to secure the witness' presence by properly subpoenaing the witness.

In *State v. Allen*, this Court concluded that given the damage that would have occurred to the witness' military career, the State met its burden by subpoenaing the witness, despite the witness' failure to honor the subpoena. *Allen*, 94 Wn.2d at 866-867. Likewise sailors at sea have been deemed unavailable. *State v. Hewett*, 86 Wn.2d 487, 494, 545 P.2d 1201 (1976); *State v. Firven*, 22 Wn. App. 703, 591 P.2d 869 (1979).

Similarly, a number of cases have acknowledged that the trial court properly balances the importance of the witnesses' testimony and the hardship to the witnesses. *State v. Hobson*, 61 Wn. App. 330, 338, 810 P.2d 70 (1991); *Rivera*, 51 Wn. App. at 561; *Aaron*, 49 Wn. App. at 744. Thus in *Hobson*, even though the witness' testimony was "essential" to the

conviction, subpoenaing the witness alone was deemed sufficient where the witness' testimony was not the sole evidence supporting the conviction. *Hobson*, 61 Wn. App. at 338.

On the other hand, the cases where the State's efforts were deemed inadequate all involved situations where the State failed to subpoena the witness and/or the State made no effort at all to secure the witness' attendance. *See State v. Sanchez*, 42 Wn. App. 225, 711 P.2d 1029 (1985), *review denied*, 105 Wn.2d 1008 (1986); *Goddard*, 38 Wn. App. at 511; *State v. Scott*, 48 Wn. App. 561, 566, 739 P.2d 742 (1987), *aff'd*, 110 Wn.2d 682 (1988).

Here, all three witnesses were subpoenaed. All three left the country and informed the State they did not intend to attend trial. The hardship to the witnesses would not have been insignificant. Mr. DeLashmutt was only a month into his doctoral studies in Scotland at the time of trial. Mr. Olson was in the Amazon jungle establishing a radio network.

Further, none of these witness' testimony could be described as critical. The DeLashmutts' testimony was largely innocuous and cumulative. *See CP 1194-1321 as redacted by CP 1008-13.*

Olson's testimony pertained to matters that the other experts relied upon in reaching their opinions. *See CP 1015-1124 as redacted by CP 1007-*

08. His conclusions and reports would have thus been admissible under ER 703, regardless of his deposition testimony. The trial court properly balanced these factors, properly concluded the State had made an adequate effort and properly allowed the videotaped depositions to be played for the jury. The Court of Appeals thus properly rejected this claim. Opinion, at 13-14.

Finally, even if both the trial court and the Court of Appeals erred in concluding that the witnesses were unavailable, “[i]t is well established that constitutional errors, including violations of a defendant’s rights under the confrontation clause, may be so insignificant as to be harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); accord *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005). The Court applies the “overwhelming untainted evidence” test:

Under the “overwhelming untainted evidence” test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt The “overwhelming untainted evidence” test allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.

Guloy, 104 Wn.2d at 426. As noted above, the deposition testimony added little to the State’s case. Subtracting it from the evidence the jury heard over the course of seven weeks of trial (less than 140 pages of deposition compared to nearly 5000 pages of other testimony) would not have changed

the verdict. *See State v. Scott*, 48 Wn. App. 561, 566-567, 739 P.2d 742 (1987).

Moreover, any error must be deemed harmless because the videotaped depositions in this case satisfied the purpose if not the letter of the Confrontation Clause:

The purpose of the guarantee is to provide a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S. Ct. 337, 39 L. Ed. 409 (1895). In the instant case, [the witness] testified under oath, [the defendant] was present, and his attorney cross-examined [the witness]. Moreover, the jury had the opportunity to view [the witness'] demeanor and manner in which he testified against [the defendant] in [the defendant's] presence. The only difference between admitting [the witness'] deposition and having him testify in person is that [the witness] did not give his testimony in the presence of the jury. Although it would have been preferable to have [the witness] testify in person, we hold that admitting the videotaped deposition satisfied the "central concern" of the Confrontation Clause, which "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666, 678 (1990).

Hobson, 61 Wn. App. at 334. Thus any error would be harmless and Hachenev's conviction should be affirmed.

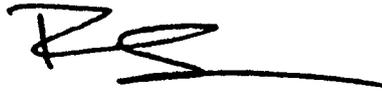
IV. CONCLUSION

For the foregoing reasons, Hachenev's conviction and sentence should be affirmed.

DATED August 7, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'R D Hauge', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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