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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

No. 65809-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DZEVAD KULOGLIJA,

Mr. Kuloglija.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jim Rogers

MR. KULOGLIJA'S REPLY BRIEF

BLAIR RUSS, KEVIN TROMBOLD and TED VOSK
Attorneys for Mr. Kuloglija

Pacific Building
720 Third Avenue, Suite 2015
Seattle, WA 98104
(206) 467-3152

TABLE OF CONTENTS

- I. REPLY ARGUMENT1
 - A. “WHAT HAPPENED “WAS NOT A QUESTION STRICTLY LIMITED TO PROTECTING OFFICER AND PUBLIC SAFETY, RATHER IT WAS AN INQUIRY DESIGNED TO ELICIT AN INCRIMINATING RESPONSE.....1
 - B. THE MEANING OF BLOOD SPLATTER IS NOT LAY OPINION.....3

- II. CONCLUSION.....5

TABLE OF AUTHORITIES

United States Constitution

Washington State Constitution

United States Supreme Court Decisions

Melendez-Diaz v. Massachusetts, 557 US 305, 174 L. Ed. 2d314 (2009)
(Part III; C).....3, 5

New York v. Quarles, 467 US 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550
(1984).....1

Orozco v. Texas, 394 U.S. 324, 22 L.Ed.2d 311, 89 S.Ct. 1095 (1969).....2

Federal Court Decisions

Washington Supreme Court Decisions

State v. Grayson, 154 Wn.2d 333, 342-3 (2005).....4

State ex. Rel. Reilly v. Civil Service Com’n of City of Spokane, 8 Wn.2d
498, 501-2 (1941).....4

Washington State Court of Appeals Decisions

State v. Gronnert, 122 Wn.App. 214, 225 (2004).....4

State v. Perdang, 38 Wn.App. 141, 144-6 (1948).....4

State v. Lane, 77 Wn.2d 860, 467 P.2d 304 (1970).....1, 2

Washington State Court Rules & Evidence Rules

ER 403.....4

ER 702.....4, 5

ER 703.....4, 5

I. REPLY ARGUMENT

A. “WHAT HAPPENED “WAS NOT A QUESTION STRICTLY LIMITED TO PROTECTING OFFICER AND PUBLIC SAFETY, RATHER IT WAS AN INQUIRY DESIGNED TO ELICIT AN INCRIMINATING RESPONSE.

Respondent advances the position that Officer LeCompte’s question of “What happened” to Mr. Kuloglija was necessary to respond to a public safety threat. In support, Respondent relies on several appellate decisions derived from New York v. Quarles, 467 US 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). In Quarles, the Supreme Court recognized that an officer’s failure to provide *Miranda* warnings in a custodial setting was justified where there were overriding considerations of officer safety. In Quarles¹, the question “where is the gun” was directly related to that end, specifically, “ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket.” Id. at 657. Likewise, in State v. Lane, 77 Wn.2d 860, 467 P. 2d 304 (1970), cited in Respondent’s brief, the question was directly related to ascertaining the whereabouts of a gun in the context of an armed robbery investigation. Id. at 861. Again, the purpose and wording of the question was strictly limited to safety

¹ In Quarles the defendant was initially apprehended by one officer, as opposed to three. Moreover, unlike this case, the officer could not ascertain the whereabouts of the weapon.

concerns (i.e. the whereabouts of a weapon). In fact the Lane Court explicitly recognized that the questioning was “apparently for one reason only — the physical protection of the police.” Id. at 862. The Lane Court also observed that the police knew that the defendant had an extensive past history of robbery and burglary” and “was awake, dressed, and accompanied by another person.” Id. at 862.

In reaching its decision, the Lane Court distinguished Orozco v. Texas, 394 U.S. 324, 22 L.Ed.2d 311, 89 S.Ct. 1095 (1969)². Orozco, contained facts strikingly similar to Lane; however, key differences were noted: specifically, the fact that Orozco was alone, in bed, and lacked any criminal history. See Id. at 862. All factors which are present in Mr. Kuloglija’s case.

Mr. Kuloglija’s circumstances are equally distinguishable from Lane. He was lying face down on the bed and appeared to Officer LeCompte to be in agony. Two other officers assisted in handcuffing Mr. Kuloglija. The knife was immediately apparent to the Officers and Mr. Kuloglija promptly complied with Officer LeCompte’s demand to drop the knife. It was not until after Mr. Kulolija was handcuffed that he was asked “what happened.” The question was broadly worded; not specifically tailored to any identifiable safety concern. Accordingly, the question was a brief

² Orozco was also distinguished in Quarles based on the lack of exigent circumstances.

interrogation, designed to elicit an incriminating statement. The trial court erred in failing to suppress this statement and the other incriminating statements that followed.

B. THE MEANING OF BLOOD SPLATTER IS NOT LAY OPINION.

Understanding blood splatter is plainly not lay opinion; especially when employed in crime scene reconstruction. Mr. Kuloglija is not attacking testimony that detectives observed blood; but rather their competence to interpret blood patterns to reconstruct events. The trial court permitted Detectives Glover and Heckelsmiller to opine that the pattern of blood inside the apartment suggested that the attack came from within. This was error to permit such testimony.

Mr. Kuloglija cited a glut of authority in his Opening Brief confirming the recognition of blood spatter as scientific technique. Moreover, National Academy of Sciences Report, cited in Melendez-Diaz v. Massachusetts, 557 US 305, 174 L. Ed. 2d 314 (2009)(Part III; C), recognizes blood stain analysis as forensic science discipline. National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). The NAS Report cautions that “many sources of variability arise with the production of

blood stain patterns, and their interpretation *is not nearly straightforward as the process implies*. *Id.* at 177. Plainly, such interpretation falls outside of lay opinion and squarely within the ambit of ER 702.

Under ER 702, “the trial court is given broad discretion in determining whether an expert’s testimony is admissible.” 5B, K. TEGLAND, WASH. PRAC., EVIDENCE, §702.15 (5th Ed. 2007). Likewise, ER 703 grants the Court the necessary discretion needed to apply it. TEGLAND, §703.2.

When issues within the court’s discretion are raised by a defendant, the categorical refusal of a court to make a determination “is effectively a failure to exercise discretion.” Cf., State v. Grayson, 154 Wn.2d 333, 342-3 (2005); State v. Gronnert, 122 Wn.App. 214, 225 (2004). The failure to exercise discretion under such circumstances is an abuse of discretion. Cf., State v. Perdang, 38 Wn.App. 141, 144-6 (1984); State ex rel. Reilly v. Civil Service Com’n of City of Spokane, 8 Wn.2d 498, 501-2 (1941). Accordingly, not only does the Court have the power to apply and make a determination of admissibility under ER 702, ER 703 and ER 403, it is an abuse of discretion for the Court to refuse to apply and make a determination under those rules.

Interpreting blood spatter analysis as lay opinion supersedes the application of ER 702 and ER 703. These rules are designed to ensure

some degree of scientific integrity in the admission of forensic evidence. Dispensing with the analysis envisioned by ER 702 and ER 703 allows the admission of “scientific evidence” which may not conform to the standards of the very scientific discipline it purports to be from. Indeed, as Justice Scalia noted in Melendez-Diaz: “A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.”

The interpretation of blood splatter evidence went directly to the heart of the factual controversy in this case; whether the attack came from within or from without. The erroneous admission of this testimony was detrimental to the defense theory advanced at trial; and must result in reversal.

II. CONCLUSION

For the reasons stated above, Mr. Kuloglija’s convictions should be reversed and remanded for a new trial.

Respectfully submitted this 31st day of August 2012.



Blair Russ, WSBA #40374
Attorney for the Mr. Kuloglija