NO. 43632-9-II

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

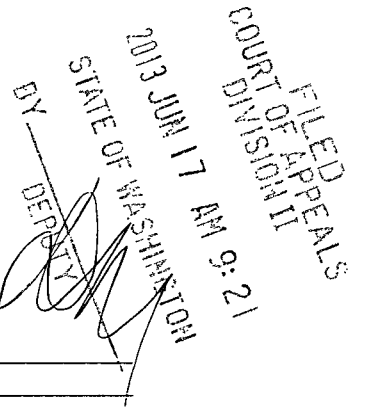
STATE OF WASHINGTON,

Respondent,

v.

DARLENE GREEN,

Appellant.



FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jay B. Roof, Judge

REPLY BRIEF OF APPELLANT

LENELL NUSSBAUM
Attorney for Petitioner

Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

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A. STATEMENT OF CASE IN REPLY

1. THE STATE CONCEDED MR. GREEN'S THUMB COULD HAVE BEEN ON THE TRIGGER.

The State makes much of Detective Doremus's testimony that Mr. Green's left thumb was not inside the trigger guard. Resp. Br. at 7-8, 23-24. The other experts' conclusions that his thumb was there were based on more than the blood pattern on Mr. Green's thumb. App. Br. at 9-11.

Det. Doremus did not offer any explanation for the shape of fingerprints outlined by blood on the gun's grip -- consistent with Mr. Green's thumb being on the trigger and inconsistent with anyone holding the gun in a normal fashion to shoot away from themselves. RP 561-63; CP 265-66.

Even the State conceded in closing argument:

> Is it conceivable that the left hand and the left thumb could have been in the trigger guard, could have been pressing up against the trigger? That's possible.

RP 755.

2. THE EVIDENCE WAS UNDISPUTED THAT THERE WAS NO BLOOD ON MRS. GREEN'S SLEEVES OR TORSO.

The State argues Mrs. Green was "covered in blood." Resp. Br. at 24. It neglects to mention that there was no blood spatter on the sleeves or

torso of Mrs. Green's clothing. Even microscopic examination of her robe showed no blood on her cuffs or upper torso. Thus her cuffs were not close to the gun when it fired the contact shot. RP 287-88, 584-89; CP 155-62. The State had no evidence to the contrary.

Det. Doremus seized Mrs. Green's clothing. He never sent it to the crime lab for examination. RP 403-04. The State's crime lab analyst agreed fine mist of blood backspatter does not travel far, dries easily and is affected by gravity. She did not examine Mrs. Green's clothing. RP 524, 537.

3. DEFENDANT'S OFFER OF PROOF OF DR. MAIURO'S TESTIMONY WAS BROADER AND MORE SPECIFIC THAN THE STATE PORTRAYS.

> ... Dr. Maiuro is a licensed Psychologist who did a full evaluation of Mrs. Darlene Green. In that report he indicated that she was a battered woman, based on his testing as well as medical records from the time of her arrest and other information. ...
>
> ...
>
> It is expected that he will testify as to the nature of "battered women's syndrome" its similarity to PTSD, Post Traumatic Stress Disorder. And how those effects may effect the perceptions of an individual. This is something that is beyond the knowledge of a lay person and will assist the jury in making the determination as to believe Mrs. Green or not. **He will not be asked if she is now telling the truth.** As noted by Dr. Maiuro in his report which is attached to

> the State's Motion, at page 8, **In the study of serious trauma events, it is commonly observed that individuals sometimes "step outside themselves" or partially dissociate when they are in a state of recoil and shock" Consequently, they may attempt to piece together what has happened much as an outsider would.**
>
> ...
>
> **Dr. Maiuro also states that the tendency to subjectively self blame, even in the absence of objective data to suggest otherwise, is a classically documented symptom of intimate partner abuse and domestic violence victimization.**

CP 385-86 (emphases added). See also CP 77-85 (Dr. Maiuro's nine-page report of his full evaluation, which included formal psychological testing and a series of diagnostic interviews and assessments over a period of days).

Thus Dr. Maiuro would have testified that PTSD, battering and its effects contribute to (1) a person experiencing a dissociative state, and (2) self-blame that becomes a mindset within the context of the battering relationship. He concluded Mrs. Green's history of abuse led her to develop a mindset of inappropriately accepting blame and guilt when she was not in fact blameworthy or guilty; and her evaluation was consistent with experiencing a dissociative state when her husband shot himself and fell dead onto

her lap. She could observe the situation as if from outside of her own body, contributing to her tendency to blame herself for anything bad that her husband did to her.

4. THE STATE OFFERS NO EVIDENCE OR LITERATURE REFUTING THE VALIDITY OF DISSOCIATIVE STATES FOR PTSD AND BWS.

Although defense counsel twice offered to conduct a Frye hearing if the court deemed it necessary, RP(1/30/2012) at 13-15, the State argues as if the defense were responsible for making such a hearing occur. Resp. Br. at 28-29. Ultimately, the trial court's ruling to exclude the expert testimony was based on its conclusion the evidence would not be helpful to the jury, ER 702. CP 102. From that point, a Frye hearing was of no value.

The State argued at trial it was unaware of any authority that BWS can cause a person to inaccurately perceive an event. Resp. Br. at 9-10. The trial court concluded "the concept of dissociation" was not listed as a symptom of PTSD in the DSM-IV. Resp. Br. at 10-11. The State and court were both wrong.

The DSM-IV-TR explains that dissociative symptoms may occur in cases of PTSD, and are more

commonly seen in association with interperson stressors, e.g., domestic battering. DSM-IV-TR at 465. See App. Br. at 49-50 & n.17, and authorities cited there. See also State v. Bottrell, 103 Wn. App. 706, 714-18, 14 P.3d 164 (2000) (dissociative reaction from PTSD admissible to explain defendant's mental state at time she killed decedent); App. Br. at 32-33.

Mrs. Green has provided this Court sufficient evidence and literature to demonstrate that a Frye hearing is not necessary for Dr. Maiuro's testimony. App. Br. at 28-50. The State offers no evidence or literature to refute it.

5. THE STATE OBJECTED TO EVIDENCE OF MR. GREEN'S ASSAULTS AGAINST MRS. GREEN BASED ON ER 404(b), NOT MERELY ER 106.

The State is correct that it moved in limine to exclude Mrs. Green's statements to police. It is incorrect, however, that this was the only basis for excluding evidence. Resp. Br. at 36-42. See Supplemental Clerk's Papers (Subno. 128: State's Motion Regarding ER 404(b) Evidence As It Relates to Conduct of the Victim).

After a lengthy voir dire of Detective Rodrigue as an offer of proof regarding Mr. Green's

biting and other bad behavior, RP 457-68, defense counsel argued he wanted it all in. RP 468. The State argued to the court not merely from ER 106, but also from ER 404(b):

> The state objects based upon the motions I've made under 404(b) that apparently this is going to be evidence about an activity of the defendant -- excuse me, of the victim -- describes him as a bad person. It's a bad act, and it's being used to show, not the victim's state of mind, apparently, at this point, but it's being used to show the defendant's state of mind.

RP 468-69. The court limited the testimony to the fact of an unspecified argument the night before. It excluded mention of "sex with a sister" and comments about biting. It specifically noted it was "expanding" its earlier ruling. RP 472.

Based on this ruling, the court sustained the State's objection as Mrs. Green began to testify that "he proceeded to bite me all over my ..." RP 703.

B. ARGUMENT IN REPLY

1. THIS CASE IS CONTROLLED BY STATE v. ATEN, WHICH IS NOT OVERRULED BY THE STATE'S CITED AUTHORITIES.

In State v. Aten, 130 Wn.2d 640, 660, 927 P.2d 210 (1996), the Court held:

> [T]he corpus delicti is **not** established when independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause. We consider this the preferable rule under the facts of this case.

The State seems to argue this legal standard established in Aten somehow has been modified by State v. Rooks, 130 Wn. App. 787, 125 P.3d 192 (2005), review denied, 158 Wn. 2d 1007 (2006), and State v. Hummel, 165 Wn. App. 749, 266 P.3d 269 (2012), review denied, 176 Wn.2d 1023 (2013).

Of course, the Court of Appeals cannot modify holdings of the Supreme Court. The Supreme Court reaffirmed its holding from Aten in State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006), and State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010) -- both decided since Rooks. See App. Br. at 21-25.

These Court of Appeals opinions are factually very different from this case. Rooks and Hummel involved dramatically more independent evidence than exists here. Both involved the unexplained sudden disappearance of a mother of young children. Both involved the children's fathers with motives to get rid of the mothers: Hummel's daughter had just told her mother he was molesting her, and he continued molesting her for years afterward; Rooks

was fighting for custody of their infant son. Both victims vanished without taking their purses, keys or other personal effects. Both uncharacteristically failed to attend a special planned event with a child. Rooks's brother led police to the body, lying in a ditch in a remote location, partially clothed. Hummel's wife's body was never found, but over eight years his actions proved he repeatedly lied about what had occurred to her.

Both of these cases had far more independent evidence that the deaths were the result of criminal agency than exists here. See Hummel, 165 Wn. App. at 759-61, 770 (listing facts establishing corpus delicti); Rooks, 130 Wn. App. at 804-05 (State presented "overwhelming independent evidence establishing" death was result of criminal act).

Here Mr. Green did not "vanish." There is no question he died from a contact gunshot wound to his forehead. There was no dispute this elderly man suffered from dementia and had been drinking. There was no dispute that his right hand was on the gun when it fired.

Dr. Fino did not explore the cause of the blood gap on Mr. Green's left thumb. Dr. Reay

concluded it was consistent with the thumb being on the trigger. Both doctors concluded the gunshot could have been self-inflicted or inflicted by someone else. App. Br. at 9. Kay Sweeney did extensive investigation to conclude, based on all the evidence, that Mr. Green's thumb was on the trigger, relying on more than just the blood on the thumb, e.g., the bloody outline of fingers on the side of the gun consistent with the thumb being on the trigger. App. Br. at 10-11.

The State claims three matters of "independent evidence" prove the corpus of a criminal act: Detective Doremus testified the blood splatter [sic] on Mr. Green's left hand did not mean his thumb was on the trigger; Dr. Fino testified she found nothing in the autopsy "inconsistent with" someone else pulling the trigger -- although she also agreed it could have been a suicide, RP 362-63; and Mrs. Green was the only other person in the home, and was "covered in blood." Resp. Br. at 23-24.[1]

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[1] The State's reference to Mrs. Green's lack of an "overly emotional" response brings to mind Albert Camus's "The Stranger," in which the hero is convicted of murder because the prosecutor accused him of immorality because he did not cry at

As shown above, only the lower part of Mrs. Green's robe was bloody, where Mr. Green fell into her lap. Her cuffs, sleeves and torso -- where blood logically would have been if she had reached up and fired the gun -- were free of blood.

The prosecutor used many leading questions to get Detective Doremus to agree "there was **a question as to whether** the left thumb could have been inside the trigger guard."[2] He explained: "[I]n my opinion, had the thumb been inside the trigger guard, there would have been a complete void around the thumb itself." RP 409. He later testified, "I **surmised** that his thumb was not on the trigger." RP 412. He was unable to explain how Mr. Green's left hand was positioned that would permit someone else to pull the trigger. "I can only **surmise**." RP 413.

Surmise means:

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his mother's funeral. State v. Reed, 102 Wn.2d 140, 146 n.1, 684 P.2d 699 (1984). It should not be considered.

[2] Compare these leading questions with the State's "convoluted hypothetical question" to the pathologist in Aten, 130 Wn.2d at 647, which similarly led to the witness agreeing, "I think that it is a reasonable inference" that the child died from human intervention.

> --*vt.* to infer (something) without conclusive evidence. --*vi.* To make a conjecture. --*n.* An idea or opinion based on inconclusive evidence: CONJECTURE.

WEBSTER'S II NEW COLLEGE DICTIONARY (Houghton Mifflin Co. 2001) at 1109.

The detective gave no explanation for the bloody finger pattern on the side of the gun. RP 561-63; CP 265-66 (photographs). The detective also gave no explanation how, if Mrs. Green had reached up to pull the trigger, she avoided getting any blood spatter whatsoever on her robe cuffs or torso. RP 584-90; CP 155-62.

The State's expert and the prosecutor in closing argument agreed Mr. Green could have shot himself. These concessions alone preclude finding the corpus delicti in this case. Aten, supra.

The "totality of independent evidence in this case does not lead to the conclusion that there is a 'reasonable and logical' inference" that Mr. Green died from a criminal act, "and that that inference is not the result of 'mere conjecture and speculation.'" Aten, 130 Wn.2d at 661. The totality of independent evidence disproved Detective Doremus's single opinion, or "surmise,"

which was in fact "conjecture." It is not sufficient to establish the corpus delicti.

2. THE TRIAL COURT VIOLATED MRS. GREEN'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING THE PSYCHOLOGICAL EXPERT'S TESTIMONY, WHICH WOULD HAVE BEEN HELPFUL TO THE JURY.

a. The Standard of Review Is De Novo.

The State argues the standard of review is an abuse of discretion, citing State v. Cheatham, 150 Wn.2d 626, 645, 81 P.3d 830 (2008). Resp. Br. at 30. The Cheatham Court, however, held the admissibility of expert testimony on the reliability of eyewitness identification is within the discretion of the trial court. It explicitly distinguished such evidence from "expert psychological testimony ... to assist juries in understanding phenomena not within the competence of the ordinary lay juror," citing State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984), State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988), and State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993) (all admitting experts on battering and its effects). Cheatham, 150 WN.2d at 645.

Mrs. Green's constitutional right to present a defense entitled her to present "competent,

reliable evidence bearing on the credibility of [her] confession" central to her claim of innocence. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22. It was the same psychological testimony regarding battering and its effects as admitted in Allery, Ciskie, and Janes, supra. The denial of the right to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). See Appellant's Brief at 25-28.

b. The Court Excluded the Expert Testimony by Finding it Would Not Be Helpful to the Jury.

The State focuses on its claim that "the Defendant clearly failed to show that the defense theory was generally accepted in the scientific community." Resp. Br. at 30-36. But the court's ultimate exclusion was based on its finding that the evidence would not be helpful to the jury. CP 102; App. Br. at 18. The State fails to address this issue in any way. See App. Br. at 25-50.

The State dismisses appellant's citations to analogous cases from other jurisdictions by arguing they were not based on battered women's syndrome.

Resp. Br. at 34 n.11. Those cases, however, were examples of courts holding expert psychological testimony is helpful to the jury under ER 702, and reversing convictions where the evidence was excluded in situations very similar to this case. See especially State v. Beagel, 813 P.2d 699 (Alaska, 1991), where a wife called 911 to say she shot her husband, but later did not remember that statement and testified he shot himself. App. Br. at 34-37.

The State's ongoing limited understanding of BWS and PTSD, and the trial court's own limited understanding, perhaps best demonstrate why the lay jury would find an expert's testimony helpful.

Judges are not immune from adhering to the same biases and erroneous beliefs the public holds regarding domestic violence. They come to the bench with a "lifetime of exposure to the same [mistaken] myths that shape [and bias] the public's attitudes," including the "ever-expanding scope of the mass media [resulting] in the wider and more pervasive presence of these contaminating myths." Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender*

Bias in Domestic Violence Cases, 32 Rutgers L. Rec. 31, ¶ 17 (2008).

Regrettably, research demonstrates that years of judicial education on domestic violence dynamics has yielded minimal results in terms of changes in rulings, and many judges still come to the bench with little or no training on the subject. *See* Leah Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 Yale J. of Law & Feminism 75, 124 (2008); Craig-Taylor, *supra*. A survey of 223 appellate cases involving battered defendants led the researcher to conclude

> the major obstacle to due process is that judges, vested with the power to make credibility determinations on the sufficiency of defense evidence, unjustly apply the law [through the exclusion of evidence, the denial of self-defense instructions, and/or the repudiation of instructions to the jury on the relevance of a battered woman's evidence], and essentially deny battered women fair trials.

Carol Jacobsen, Kammy Mizga and Lynn D'Orio, *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN'S L.J. 31, 40 (2007).

On this record, the jurors revealed during voir dire that they believed a person's confession was the best possible evidence of guilt. RP 207-

09. Yet extensive literature refutes that commonly held assumption. App. Br. at 33-47. If there was expert testimony to the contrary, it would have been helpful to the jury to learn about it.

For the same reasons as held in the cases cited in Appellant's Brief at 25-50, this Court should hold the expert testimony here would be helpful to the jury, and reverse this conviction.

c. Dr. Maiuro's Psychological Evaluation Meets the Frye Standard.

The State understands battered women's syndrome as it applies in cases of self-defense. Resp. Br. at 9-10, 33-34. That limited understanding, however, does not assist in analyzing this case, which was not self-defense.

Dr. Maiuro did a full psychological examination of Mrs. Green. The State argues Dr. Maiuro's report did not incorporate the term "Battered Women's Syndrome" (BWS), Resp. Br. at 26; yet he clearly referred to "intimate partner abuse and domestic violence victimization." CP 84-85.

Appellant has cited extensive literature and case authority for PTSD involving dissociative states, including the DSM-IV-TR -- contrary to the trial court's own finding. App. Br. at 28-50. The

State offers no authority to contradict any of this information.

The State cites State v. Ahlfinger, 50 Wn. App. 466, 749 P.2d 190, review denied, 110 Wn.2d 1035 (1988), that a single expert's assertion that a technique is reliable does not meet the Frye standard. But Ahlfinger involved an offer of expert testimony of a polygraph, which courts unanimously have rejected as unreliable. As shown in App. Br. at 25-20, psychological evidence of PTSD, BWS, and dissociative states is widely acknowledged and accepted in courts.

The State cites State v. Hanson, 58 Wn. App. 504, 793 P.2d 1001 (1990), as if to support its argument that BWS is admissible only in cases of self-defense. Resp. Br. at 31-32. In Hanson, the Court of Appeals affirmed the exclusion of expert testimony on self-defense because defense counsel conceded at trial the issue was waived for appeal. The trial court removed the State's theory of felony murder, and self-defense only applied to the underlying assault. Id. at 508. The Court of Appeals further held BWS was not relevant to a defendant's "general credibility."

Mrs. Green has never argued Dr. Maiuro was to testify to her "general credibility." The State admits as much. Resp. Br. at 27-28. It is clear from State v. Ciskie, supra, that evidence of battering and its effects is relevant to issues beyond self-defense. In that rape case, the State presented the evidence to explain the complaining witnesses' perceptions and behavior, delays in reporting the crimes, and failure to leave, and why that behavior was not inconsistent with her testimony. See App. Br. at 29-31, 39, 48.[3]

3. THE STATE MOVED TO EXCLUDE EVIDENCE OF PAST ABUSE AND BITING UNDER ER 404(b), WHICH MOTION THE COURT GRANTED.

The State argues it only sought to exclude Mrs. Green's statements to police officers about past abuse under ER 106. Resp. Br. at 36-42. As shown above, however, the State also challenged any evidence of Mr. Green's previous bad acts under ER 404(b).

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[3] But see State v. Frost, 242 N.J. Super. 601, 610-11, 577 A.2d 1282 (1990) (expert testimony on BWS admissible in state's case in chief, although it bolstered complaining witness's credibility; court observed how battered woman blames herself; rejected argument that only admissible for self-defense cases).

Certainly the recent history of Mr. Green abusing Mrs. Green, the biting and arguing in the previous day or two, should have been admitted as the res gestae of what was happening in the lives of this elderly couple. At the very least, Mrs. Green herself should have been permitted to testify to it. See App. Br. at 50-52.

Exclusion of this evidence was not harmless. This was at the very least an extremely close case of whether Mr. Green shot himself. Evidence of his dementia contributed to an understanding of why he might have done so. His irrational biting of Mrs. Green, his argumentative fixation on having sex with his sister 50+ years earlier, demonstrated both dementia and despair. In such a close case, this evidence might have made the difference for the jury.

If this Court remands for a trial with Dr. Maiuro's testimony, the trial court should be required to reconsider the issue of Mrs. Green's testimony of her full relationship with her husband, particularly the last few years of his decline when she was left to care for him alone.

C. CONCLUSION

The State failed to establish the corpus delicti of the crime independently of Mrs. Green's statements. For this reason, the conviction should be reversed and dismissed.

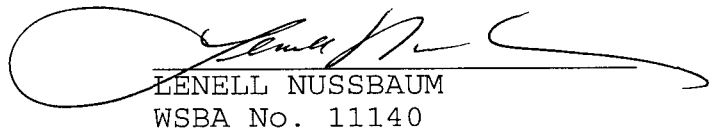
The court violated Mrs. Green's constitutional right to present a defense by excluding the expert psychological evidence to explain why she could have told people she shot her husband when in fact she did not shoot him.

The court committed additional reversible error by excluding evidence of Mr. Green's prior abuse of Mrs. Green, and evidence of how his dementia affected their relationship, potentially leading to his suicide.

For these reasons, Mrs. Green respectfully asks this Court to reverse her conviction.

DATED this 14th day of June, 2013.

Respectfully submitted,



LENELL NUSSBAUM
WSBA No. 11140
Attorney for Darlene Green

DECLARATION OF SERVICE

On this date, I served a copy of the Reply Brief of Appellant on the following parties:

VIA EMAIL
Jeremy A. Morris
Kitsap County Prosecutor's Office
EMAIL FOR SERVICE: kcpa@co.kitsap.wa.us

and by depositing in the United States Mail, postage prepaid, addressed as follows:

Ms. Darlene Green
358826
9601 Bujacich Rd. N.W.
Gig Harbor, WA 98332

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true.

6/14/2013-SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST