71162-8

FILED
April 13, 2015
Court of Appeals
Division I
State of Washington

COA NO. 71162-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARTIN DAVID PIETZ JR.,

Appellant.

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

The Honorable Michael Hayden, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE CONVICTION MUST BE REVERSED BECAUSE THE "TO CONVICT" INSTRUCTION MISDESCRIBED THE PROPER BURDEN OF PROOF.

The State concedes language in the final paragraph of the "to convict" instruction is "unclear." Brief of Respondent (BOR) at 16, 20. The State nonetheless claims the instruction's "particular flaw" is mitigated by the "halo effect" of other instructional language. BOR at 19. According to the State, the "faulty wording" was harmless because the jury was properly instructed on the definition of "reasonable doubt" and the State's burden of proof with regard to every element of the crime. BOR at 16-17.

First, Pietz questions the State's reliance on any purported "halo effect" deriving from another instruction. "The 'to convict' instruction carries with it a special weight because the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence." State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). The jury is therefore entitled "to regard the 'to convict' instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

But even looking to other instructional language, the law on the State's burden and when the jury must acquit was not made manifestly clear. Jury instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). This Court must be sure that the jury was not led astray. See State v. Smith, 174 Wn. App. 359, 368, 298 P.3d 785 ("We suspect that in this case the jury more likely than not understood the court's use of 'should' in the elements instruction as mandatory. But we cannot be sure that it did."), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

While acknowledging language in the "to convict" instruction is unclear, the State points to Instruction 3, which provides the State "has the burden of proving each element of the crime beyond a reasonable doubt." CP 305. The State also emphasizes introductory language in the "to convict" instruction, which states "each of the following elements of the crime must be proved beyond a reasonable doubt" in order to convict the defendant. CP 312 (Instruction 10).

The problem, though, is that the "to convict" instruction goes on to clearly tell the jury that the State need not in fact prove every element listed in the "to convict" instruction. The instruction tells the jury that the elements

under (1)(a)-(c) and (2)(a)-(b) are "alternatives" and "only one need be proved." CP 312. The general instructional language requiring the State prove every element of the crime is inconsistent with specific language in the "to convict" instruction that the State need not prove every element of the crime. That is confusing and signals to average jurors that the requirement that the State prove every element of the crime is not absolute. The inconsistency could have been entirely avoided if there were separate "to convict" instructions for second degree intentional murder and second degree felony murder. See WPIC 27.02, WPIC 27.04.[1] The State, however, proposed an instruction that mushed the two together, resulting in an unclear directive to jurors.

The crux of the problem is that the jury received only one instruction on its duty to return a verdict of not guilty and the language in that instruction is flawed: "On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to elements (1)(a), (b) and (c) and (2)(a) and (b), and element (3), then it will be your duty to return a verdict of

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[1] When alternative theories of liability for an alleged criminal act are presented, there is no double jeopardy concern in allowing the jury to reach separate verdicts based on each theory, so long as the defendant is sentenced on only one of the convictions. State v. Johnson, 113 Wn. App. 482, 488-89, 54 P.3d 155 (2002), review denied, 149 Wn.2d 1010, 69 P.3d 874 (2003); State v. Trujillo, 112 Wn. App. 390, 409-10, 49 P.3d 935 (2002), review denied, 149 Wn.2d 1002, 70 P.3d 964 (2003).

not guilty." CP 313. Use of the conjunctive "and" tells the jury that it has a duty to return a "not guilty" verdict only if it has a reasonable doubt as to each of the three elements of the first alternative means (1(a), (b) and (c)) and each of the two elements of the second alternative means (2(a) and (b)).

There is a difference in meaning between the disjunctive "or" and the conjunctive "and" in jury instructions. See State v. Owens, 180 Wn.2d 90, 101 n.6, 323 P.3d 1030 (2014) (conjunctive "and" rather than a disjunctive "or" in the "to convict" instruction became the law of the case in the absence of objection); State v. Stephens, 93 Wn.2d 186, 189-90, 607 P.2d 304 (1980) (where defendant was charged with one count of assault against two victims conjunctively, the jury instruction referencing the names of the victims in the disjunctive rather than conjunctive violated right to jury unanimity).

"The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev. in part on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts rely on rules of grammar in reaching a conclusion. See, e.g., LeFaber, 128 Wn.2d at 902-03 (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, resulting in court's determination that jury could have applied the erroneous

standard); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying upon grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act).

The disjunctive "or" should have been used to make it manifestly clear that the jury, in order to acquit Pietz, need only find a reasonable doubt as to any one element in each of the alternative means. A properly worded instruction would read: "if, after weighing all of the evidence, you have a reasonable doubt as to any one element in (1)(a), (b) and (c) *or* any one element in (2)(a) and (b), *or* element (3), then it will be your duty to return a verdict of not guilty."[2] Such language would have made it clear that, in order to return a verdict of not guilty on the murder count, the jury need only have a reasonable doubt as to any single element within the alternatives (or element 3).

General language about the State's burden of proving each element of the crime does not reform the specific, infirm language directed at when the jury must return a verdict of not guilty. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to

[2] This proposal makes the best of a bad "to convict" instruction encompassing both alternatives. To avoid this clunky language, separate "to convict" instructions for second degree intentional murder and second degree felony murder could have been given.

absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." Francis v. Franklin, 471 U.S. 307, 322, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). Further, internally inconsistent instructions do not meet the requirement of manifest clarity. State v. Irons, 101 Wn. App. 544, 552-53, 4 P.3d 174 (2000).

The State asserts the faulty language in the "to convict" instruction does not amount to structural error and instead should be reviewed under the constitutional harmless error test. The State is mistaken.

Instructional error that consists of a misdescription of the burden of proof is structural error because it vitiates *all* the jury's findings. Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). When faced with such an error, "[a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" Sullivan, 508 U.S. at 281 (quoting Rose v. Clark, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). Denial of the right to a jury verdict of guilt beyond a reasonable doubt is structural error because it is a defect in the trial mechanism, the jury guarantee being a basic protection whose precise effects are unmeasurable, but without

which a criminal trial cannot reliably serve its function. Sullivan, 508 U.S. at 281.

Miller v. State, 298 Kan. 921, 923, 318 P.3d 155 (Kan. 2014) is instructive. In Miller, the jury received the following instruction: "The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of *each* of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of any of the claims required to be proved by the State, you should find the defendant guilty." Miller, 298 Kan. at 923, 925 (emphasis added). Substitution of the word "each" for the word "any" in the first instance "effectively told the jury it could acquit Miller only if it had a reasonable doubt as to all of the elements the State was required to prove — rather than acquitting him if it had a reasonable doubt as to any single element." Id. at 923. "A literal reading of the erroneous instruction tells the jury it must acquit Miller only if it has a reasonable doubt as to each element of the charged offense." Id. at 937. This instruction constituted structural error because, as in Sullivan, it was "unclear whether the verdict was procured despite the jury not being convinced of his guilt to the constitutionally required degree of certainty." Id. at 938.

The same type of instructional error is present in Pietz's case. In both cases, the faulty instruction told jurors that it could acquit the defendant if it had a reasonable doubt as to all of the elements the State was required to prove — rather than acquitting him if it had a reasonable doubt as to any single element. That is a structural error requiring reversal of the conviction because it misdescribes the burden of proof.

2. PIETZ'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN AN EMPANELLED JUROR WAS RELEASED OUTSIDE OF OPEN COURT.

The debate here is one of form versus substance. The State contends there is no public trial violation because the judge announced the juror's excusal in open court and only the judge has the authority to excuse a sitting juror. BOR at 24-25. The judge's statement that "*I* did not complete excusing her until after I brought it up in open court" (emphasis added) indicates the bailiff did not act unilaterally in releasing the juror; rather, the judge was involved in that decision before he addressed the issue in open court. 14RP 5. The irreducible fact is that the juror was released before the parties addressed the issue in open court. The email makes this quite clear. CP 522. The substance of the violation is the release of the juror from further service outside of open court. The judge's formal excusal of the juror in open court, after the juror had already been released, is a matter of form, not substance.

Contrary to the State's suggestion, there is no accusation that the trial judge lied to the parties. BOR at 27. Rather, the judge was well aware that this issue would likely be raised on appeal and made a concerted effort to create a record that would make the issue appeal-proof. Thus, the judge told defense counsel "Take it up on appeal if you don't like it" after saying the excusal of the juror was not completed until the issue was addressed in open court. 14RP 6. Undersigned counsel is unaware of any authority recognizing the excusal of a juror can begin in one place and end in another. The excusal of a juror is a unitary action. It either happens or it doesn't. The public trial error persists. Pietz stands by the public trial argument made in the opening brief.

3. IMPROPER ADMISSION OF PRIOR BAD ACT EVIDENCE, NICOLE'S OUT OF COURT STATEMENT ABOUT AN AFFAIR, AND VOICEMAIL MESSAGES LEFT FOR NICOLE PREJUDICED THE OUTCOME OF THE TRIAL.

a. Evidence Of Pietz's Womanizing And Sexual Behavior Was Inadmissible To Prove Motive Under ER 403 And ER 404(b).

The State relies on State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) for the proposition that evidence of "marital unhappiness" and "ill-feeling" is admissible to prove motive in spousal murder trials. BOR at 34. The State exaggerates what Powell stands for. Powell does not go so far

as to hold evidence of mere "marital unhappiness" is admissible to prove motive. And Powell is easily distinguished from Pietz's case.

The Supreme Court in Powell recognized prior misconduct evidence consisting of prior assaults, fights, quarrels and threats between husband and wife can demonstrate motive and is of consequence to the action when only circumstantial evidence of guilt in a murder case exists. Powell, 126 Wn.2d at 260. Evidence that Powell had fought and assaulted his wife on earlier occasions leading up to his wife's death and that she left the home because she wanted a divorce were thus admissible to show motive in that case. Id. at 260-61.

Evidence of Pietz's extramarital activities and philandering are qualitatively different from evidence of the prior fights and assaults at issue in Powell.[3] Evidence that Pietz was interested in sexual relations with other women does not establish a hostile relationship between him and his wife. Without that nexus, such evidence lacks probative value on the issue of motive.

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[3] The evidence of "ill-feeling" referenced by Powell through its citation to State v. Hoyer, 105 Wn. 160, 163, 177 P. 683 (1919) encompasses the kinds of evidence specified above. See Hoyer, 105 Wn. at 163 (no error in admitting evidence of quarrels between defendant and deceased) (citing State v. Churchill, 52 Wn. 210, 100 P. 309 (1909) (no error in permitting the details of the fight between defendant and deceased, which took place on the afternoon of the killing)).

The State's citation to State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998) is also wide of the mark. In that case, a witness overheard the wife ask Stenson if she could borrow his truck. Stenson, 132 Wn.2d at 700. Stenson agreed, but told her that if anything happened to the truck, she would be in trouble. Id. This statement was made three days before her murder. Id. The trial court acted within its discretion in admitting this evidence under ER 403 because the comment had a "threatening tone," which bore on the relationship and Stenson's feelings toward his wife, and refuted other evidence that the Stensons had a good relationship. Id. at 702-03.

Unlike Stenson, the evidence at issue in Pietz's case does not show he directed a threat or even a hint of menace toward his wife. Again, evidence that Pietz had sexual relations with other women and expressed interested in pursuing such relationships does not show he harbored hostile feelings towards his wife. "Evidence of a troubled marriage alone does not establish a motive to kill. Spouses in a troubled marriage may be neither jealous nor emotional, and even if they are, that jealousy or emotion need not necessarily create a homicidal motive. It would be highly speculative to infer that marital infidelity, standing alone, created a

homicidal motive." Casterline v. State, 736 S.W.2d 207, 212 (Tex. Ct. App. 1987).

The State's citation to State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007) is inapposite. Athan did not address an ER 403 or ER 404(b) evidentiary issue, but rather a hearsay issue. Athan, 160 Wn.2d at 382.

The State claims "Pietz does not contest that the trial court's decision here comports with the established precedent set forth in Washington by the state supreme court in cases such as Powell, Stenson and Athan." BOR at 35. That is a curious claim. The opening brief expressly distinguishes Powell. Amended Brief of Appellant at 35. The opening brief does not cite Athan or Stenson in regard to the ER 404(b) issue. As discussed, Stenson is distinguishable and Athan does not address the issue at hand.

The State posits that Lesley v. State, 606 So.2d 1084 (Miss. 1992) and Camm v. State, 812 N.E.2d 1127, 1131 (Ind. Ct. App.), review denied, 822 N.E.2d 980 (2004) go "too far" in conditioning the admissibility of marital infidelity evidence. BOR at 36. Those cases provide a thoughtful analytical framework for dealing with an explosive issue. Evidence of marital infidelity, by nature, triggers emotional reaction and paints the perpetrator as a horrible human being especially where, as here, the

perpetrator's spouse is portrayed as a devoted and loving wife. Such evidence needs to be handled carefully. When its probative value is outweighed by its prejudicial effect, the evidence stays out. The State does not dispute that, under the framework set forth in Lesley and Camm, the evidence in this case should have stayed out. Pietz urges this Court to look to this persuasive authority in reaching a decision here.

b. Evidence That Pietz Spiked His Wife's Drink In 2003, And Evidence That She Subsequently Performed A Public Sex Act On Him, Was Inadmissible Under ER 403 And ER 404(b).

The State makes no separate argument to justify the admission of evidence that Pietz spiked his wife's drink with Ecstasy at a bar to loosen her up for sex. The evidence was that this took place in 2003, over two years before the murder took place. 6RP 141-52, 158-59, 162. The State cites no case holding that a husband's attempt to manipulate his wife into engaging in a sex act is admissible to show motive for a murder that took place years later. Doubtless there are many spouses dissatisfied with their marital sex lives and seek, through various means, to spice things up. Such dissatisfaction cannot fairly be equated with a motive to murder the spouse. Undersigned counsel is unaware of any case that holds otherwise. Meanwhile, spiking a spouse's drink represents a morally reprehensible

means of achieving that goal, which is why the evidence should have stayed out. Its prejudicial effect dwarfed its probative value.

c. The Court Erred In Admitting Nicole's Statement That She Believed Pietz Was Having An Affair Because The Relevance Of Nicole's State Of Mind Was Not Established.

The trial court admitted Nicole's statement to a co-worker that she thought Pietz was having an affair to show her state of mind. 1RP 74-75, 80. The general rule, however, is that the state of mind of the victim is generally irrelevant in criminal cases, thus precluding the use of statements by the victim as circumstantial evidence of the victim's state of mind. Karl B. Tegland, 5C Wash. Prac., Evidence Law and Practice § 803.16 at 61 (5th ed. 2007). "In a homicide case, if there is no defense which brings into issue the state of mind of the deceased, evidence of fears or other emotions is ordinarily not relevant." State v. Parr, 93 Wn.2d 95, 103, 606 P.2d 263 (1980). Further, ER 803(a)(3) "permits statements reporting the declarant's state of mind, but does not permit statements reporting the conduct of another which might have induced that state of mind." Parr, 93 Wn.2d at 104.

Yet the State argues Nicole's statement to a co-worker that she thought Pietz was having an affair was relevant because "the jury could reasonably infer that she may have been motivated to confront Pietz about it that night, causing an argument within the timeframe in which, the State

alleged, he strangled her. As such, Nicole's statement provided insight into possible future action she might take, and implicated Pietz's subsequent conduct." BOR at 38.

The State cites State v. Terrovona, 105 Wn.2d 632, 640-41, 716 P.2d 295 (1986) in support. BOR at 38. But Terrovona shows why the State's argument fails and the statement here should not have been admitted to show the victim's state of mind.

In Terrovona, the decedent's statements to his girlfriend of his intention to meet the defendant shortly before he was murdered were admissible to show the victim's state of mind. Terrovona, 105 Wn.2d at 637, 640-41. The victim's state of mind was at issue because the decedent's statements concerning his intention to meet the defendant shortly before he was killed necessarily implicated the defendant's future conduct. Id. at 640-41. Stated another way, "the decedent's intentions were admissible to infer that he acted according to those intentions, and that he acted with the person he mentioned." Id. at 642. Terrovona distinguished Parr on the ground that "the State is not relying on past incidents to prove the defendant's subsequent conduct." Id. at 641.

But that is precisely what the State succeeded in doing in Pietz's case. The State relied on Pietz's past conduct (alleged affair) as expressed in Nicole's statement to show Pietz murdered her later that day. The

victim's statement in Terrovona was admissible because it constituted an expressed intention to act in the future with the person mentioned. Id. at 640-42. But Nicole, in her statement, expressed no intention to do anything in the future with anyone. More specifically, she did not express an intention to confront Pietz with her belief that he was having an affair. 1RP 72-80; 5RP 72-76; CP 52. The statement is therefore not admissible under the Terrovona rationale.

All of which leads us back to the basic point that the trial court's reason for admitting Nicole's statement to show her state of mind rests on speculation. Without an expression of intent to confront Pietz about the affair later that night, there is no reasonable basis to infer that she in fact did so from the statement that was admitted into evidence. The victim's state of mind is relevant when the statement shows she acted with the person mentioned according to an expressed intention to do so. Id. at 642. In such a circumstance, the statement proves that the declarant acted in accordance with a statement of future intent. Powell, 126 Wn.2d at 266; see also State v. Bernson, 40 Wn. App. 729, 738, 700 P.2d 758 (1985) ("A victim's out-of-court statements which tend to prove a plan, design, or intention of the declarant are admissible under ER 803(a)(3)"), review denied, 104 Wn.2d 1016 (1985).

Nicole's statement contains no expression of future intent. The trial court abused its discretion in admitting it. See Powell, 126 Wn.2d at 266 (in prosecution in which the defendant was charged with murdering his wife, prosecution witnesses should not have been permitted to recount wife's out-of-court statements that her husband was a drinker, a drug user, and a violent person).

d. The Court Erred In Admitting All Of The Voice Messages Contained In Exhibit 85 And In Declining To Grant A Mistrial After Their Full Prejudicial Effect Became Manifest.

Pietz stands by the argument made in the opening brief.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Pietz requests reversal of the conviction.

DATED this 13th day of April 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71162-8-I
	)	
MARTIN PIETZ,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARTIN PIETZ 370510
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF APRIL 2015.

X Patrick Mayovsky