72068-6

FILED
December 30, 2015
Court of Appeals
Division I
State of Washington

NO. 72068-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRUCE HUMMEL,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Statutes

Court Rules

A. ARGUMENT.

1. The purely speculative claim of premeditation premised on an incident about which nothing is known or inferable does not meet the State's burden of proof.

Premeditated intent is a specific and heightened *mens rea* that substantially increases the punishment imposed for homicide. The method in which the killing occurs typically demonstrates whether the perpetrator deliberately formed and reflected upon the intent to take a human life, having engaged in "'the mental process of thinking beforehand" for longer than a moment in time. *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995)); RCW 9A.32.020(1). A mere opportunity to deliberate is not sufficient to support a finding of premeditation.

The prosecution says that there are four "particularly relevant" characteristics from which premeditated intent has been drawn in case law, motive, procurement of a weapon, stealth, and the method of killing. Resp. Brief at 24. But motive is the only characteristic it finds any basis to assert in this case. And it cites no precedent upholding a conviction for premeditated intentional murder premised solely on the

motive to kill. Motive is not even enough of a logical connection tending to connect a person to a crime as to be the basis of "other suspect" testimony. *See State v. Strizheus*, 163 Wn.App. 820, 829, 262 P.3d 100 (2011), *rev. denied*, 173 Wn.2d 1030 (2012).

The State speculates that Mr. Hummel's manner of concealing his acts demonstrates his premeditation. By "manner of concealing," the prosecution means Mr. Hummel left no evidence showing how, when, or even if he was the perpetrator. Under the prosecution's logic, the complete absence of evidence about the killing is turned on its head to constitute substantial evidence of premeditation. If the lack of evidence implicating Mr. Hummel is not outright exculpatory, it is at most patently equivocal and may not be the core evidence against him. *See State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013) (intent "may not be inferred from conduct that is 'patently equivocal'").

The State also insists that this case is similar to *State v. Neslund*, 50 Wn.App. 531, 749 P.2d 725 (1988), where the deceased's body was never recovered. But the prosecution does not mention that in *Neslund*, the accused admitted her guilty many times to many people, she obtained a weapon that was in her bedroom and had blood evidence on it and there was other blood evidence in her home. *Id*. at 534. Neslund's

admissions and the explanations of what happened by people present established the premeditation without sheer speculation as in the case at bar.

Without evidence of what happened, or even proof of a plan such as obtaining a weapon or increasing the family life insurance policy, there is simply insufficient evidence to satisfy the State's heavy burden of proving all elements beyond a reasonable doubt.

The State opted not to ask for a lesser included offense instruction of second degree intentional murder even though it had no evidence of when or how a killing occurred. The speculation, sympathy, or bias on which the verdict rests does not meet the requirements of due process.

2. By taking on the burden of proving all acts occurred within this state, but having no evidence that any acts occurred in any particular place, the State did not meet its burden of proof.

The prosecution proposed and the court gave a to-convict instruction setting forth the essential elements of first degree murder that departed from the pattern instruction. It said that the prosecution must prove beyond a reasonable doubt that "the acts occurred in the State of Washington." CP 242 (Instruction 12). This instruction required the prosecution to prove that all acts constituting premeditated

murder occurred in Washington, while the standard WPIC would only have required the State to prove "any" acts occurred in the state.

The Response Brief implicitly concedes, as it must, that it was required to prove the acts occurred within the state based on this jury instruction. Resp. Brief at 30. It claims that the Hummel home was likely the place where some of the acts occurred, while "remote areas" were likely where other acts occurred given the absence of trace evidence in the home. *Id*. at 30-31. Yet this home sits less than one hour's drive from the Canadian border, a boat ride away from international waters, and a few hours from other states.

Evidence about where "the acts" constituting premeditated murder occurred was at best patently equivocal: there is no reason to find it occurred within Washington absent evidence indicating it did so, particularly when the police spent years trying to turn up incriminating evidence. It is just as likely it occurred outside of the state or country in readily accessible locations, which would explain why the police could not find any corroborating evidence. Patently equivocal inferences are insufficient to prove the essential elements of the State's case. *Vasquez*, 178 Wn.2d at 7. The prosecution did not prove all essential elements as set forth in the to-convict instruction.

3. The court should have instructed the jury on the lesser offenses of manslaughter as requested by the defense.

The prosecution complains that Mr. Hummel needed to affirmatively introduce evidence that Ms. Hummel was killed in a reckless or negligent manner for the court to instruct the jury for the lesser offenses of first or second degree manslaughter. Response Brief at 33. But this misstates the test for a lesser included offense instruction. The court must view the evidence in the light most favorable to the party requesting the instruction, and must give the requested jury instruction if the evidence, so viewed, "would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)). As the Supreme Court explained in *Keeble v. United States*, 412 U.S. 205, 208, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973), it raises "difficult constitutional questions" for a court to too narrowly parse the requirements for providing an accused person his right to a lesser included offense instruction.

Here, the State could not muster any explanation about how Ms. Hummel died. In the prosecution's authority to decide what offense to charge, it selected the most serious charge and claimed Mr. Hummel must have acted with premeditated intent. But there was no more evidence of premediated intent than there was recklessness or negligence. The State had no evidence whatsoever about the murder weapon or its circumstances, even when or where it occurred.

A lesser included offense instruction is a "procedural safeguard" to the defendant. *Beck*, 447 U.S. at 637. It is "especially important" in a serious case involving a violent offense, where the evidence leaves some doubt about an element of the most serious offense, that the jury receive an option of convicting of a lesser included offense. *Id*. Denying such an offense 'inevitably" will "enhance the risk of conviction." *Id*. Although *Beck* was a death penalty case, Mr. Hummel faced one of the most serious offenses possible and would spend the rest of his life in prison if convicted. It well-established that "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *State v. Grier*, 171 Wn.2d 17, 36, 246 P.3d 1260 (2011) (internal citation omitted).

The jury could have concluded that in the absence of other suspects, Mr. Hummel was responsible for Ms. Hummel's death. But it was arbitrary and unfair to preclude the jury from considering the lesser offenses sought by the defense, and leave it with only the choice of finding Mr. Hummel guilty of first degree murder or not guilty of any offense at all. The paucity of any affirmative evidence in the case at bar could only allow the jury to reach a just result if permitted to consider various levels of culpability. Failing to give these lesser offense instructions unacceptably enhanced the risk of conviction where there was no evidence about the circumstances of the killing.

4. The alternative theory of second degree murder should have been available to the jury but for counsel's deficient knowledge of the pertinent sentencing laws.

Mr. Hummel's attorney withdrew their request for the court to instruct the jury to consider the lesser offense of second degree murder based on the mistaken belief that Mr. Hummel faced similar sentences for first and second degree murder. 4RP 561-62. Defense counsel explained that the sentences would be effectively identical for first and second degree murder. 4RP 562. But as set forth in the Opening Brief, this offense occurred in 1990, when the standard ranges were different

than they are today. Assuming a high-end standard range sentence for second degree murder, Mr. Hummel would serve five more years in prison, while a high-end first degree murder would mean another 17.6 years in prison, including the same good time percentage given for both offenses. *See* Opening Brief at 35.

Counsel's strategic advice to reject a proposed lesser offense instruction for second degree murder constitutes competent performance of counsel only if based on an accurate understanding of the law. *See State v. Kyllo*, 166 Wn.2d 856, 866-68, 215 P.3d 177 (2009). In *Kyllo*, the court found counsel's performance deficient when "relevant case law" and "proper research" would have shown counsel he proposed an inaccurate statement of law in self-defense instruction. Even without an explanation from counsel about why he made this error, the court "could not conceive of any reason" why the lawyer would inaccurately explain the law. *Id*. at 869. Failing to conduct proper legal research and accurately explain the law is "not the result of strategy or legitimate tactics" when gives the prosecution an unnecessary advantage based on a legal error by the defense. *Id*. Mr. Hummel did not exercise his prerogative of an all or nothing approach

to the charge before the jury based on competent legal advice. *Grier*, 171 Wn.2d a 39.

Defense counsel asked the court to strike the lesser offense from the jury's consideration based on the incorrect claim that the sentences for first and second degree murder were too similar. The high end of the second degree murder standard range that was raised after the offense to be similar to the first degree murder sentencing range would not apply to Mr. Hummel. RCW 9.94A.345. Defense counsel's mistake made it far harder for Mr. Hummel to obtain any relief, because the jury was left in the difficult position of having to find Mr. Hummel not guilty of any crime even though there was no evidence suggesting how, when, or under what circumstances Ms. Hummel died. Counsel's incorrect legal advice prejudiced the outcome of the case and requires a new trial.

5. Mr. Hummel's documented indigence merits relief from LFOs.

Legal Financial Obligations are defined as restitution, costs, fines, and other assessments as required by law. RCW 9.94A.760. Trial courts must make an individualized finding of current and future ability to pay before the court it imposes LFOs. *State v. Blazina*, 182 Wn.2d

827, 838, 344 P.3d 680 (2015). GR 34 should cause courts to "seriously question that person's ability to pay LFOs." *Id.* at 839.

The legislature intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual's circumstances. *Id.* The trial court made no such inquiry into Mr. Hummel's ability to pay and this Court should not rely on this unsupported, boilerplate finding. Mr. Hummel has been incarcerated since 2008 and has qualified for court-appointed counsel throughout. He is in his mid-70s and suffers from health problems, including needing a hearing device in court. Based on the evidence of his continued indigence, and without a basis to conclude otherwise, this court should not strike the LFOs and not assess appellate court costs against him in the event he does not substantially prevail on appeal.

B. CONCLUSION.

Based on the foregoing and for the reasons explained in Appellant's Opening Brief, this Court should reverse Mr. Hummel's conviction and sentence.

DATED this 30th day of December 2015.

. Respectfully submitted,

s/ Nancy P. Collins

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant
(206) 587-2711
nancy@washapp.org

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 72068-6-I
	)	
BRUCE HUMMEL,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	KIMBERLY THULIN, DPA WHATCOM COUNTY PROSECUTOR'S OFFICE [Appellate_Division@co.whatcom.wa.us] 311 GRAND AVENUE BELLINGHAM, WA 98225	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	BRUCE HUMMEL 334240 MONROE CORRECTIONS CENTER PO BOX 777 MONROE, WA 98272-0777	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF DECEMBER, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711