No. 95602-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EZEKIEL WATKINS,

Appellant-Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Watkins, No. 73352-4-I, filed December 11, 2017 (unpublished).

C. ISSUES PRESENTED FOR REVIEW

Watkins presents as fact the testimony and opinions of defense experts at trial regarding Watkins' mental capacity, but those opinions were rejected by the trial court. The Court of Appeals properly held that substantial evidence supported the trial court's conclusion that Watkins' waiver of his Miranda[1] rights was knowing, intelligent, and voluntary, based on the extensive expert testimony concerning Watkins' mental capacity to understand and waive his rights and the videotaped recordings of the interviews. Details of the opinions of the experts and the trial court's conclusion that the State's expert was "more persuasive"[2] are included in the Respondent's Brief in the Court of Appeals at pages 11-18, in the

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] CP 627.

trial court's written findings of fact and conclusions of law relating to the admissibility of Watkins' statements, CP 619-30, and in the opinion of the Court of Appeals. State v. Watkins, 1 Wn. App. 2d 1038, No. 73352-4-I, 2017 WL 6335992 (2017).

If review is accepted, the State seeks cross-review of corresponding issues it raised in the Court of Appeals but that the Court's decision rejected or did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the alternative arguments raised by the State in the Court of Appeals. RAP 1.2(a); RAP 13.7(b). Those issues are:

1. If the statements made by Watkins prior to advice of his Miranda rights are suppressed, was the error harmless where those statements were essentially exculpatory and Watkins confessed to the murder in post-Miranda statements?

2. As argued by the State on cross-appeal, did the trial court abuse its discretion in excluding evidence that Watkins gave boots that he had taken from Kathy Chou's body to his current girlfriend, when that action was relevant to Watkins' motive to kill Chou and

the elements of intent and premeditation, and there is no inflammatory effect inherent in a gift of footwear?

D. STATEMENT OF THE CASE

The defendant, Ezekiel James Watkins, was charged with murder in the first degree, contrary to RCW 9A.32.030(1)(a), for the April 18, 2010, killing of Kathy Chou. CP 1. On March 13, 2015, a jury found Watkins guilty as charged. CP 711, 715. Watkins appealed his conviction; the Court of Appeals affirmed. State v. Watkins, 1 Wn. App. 2d 1038 (2017) (unpublished).

Watkins and Kathy Chou had dated in 2009, but by June 2009, Watkins was dating Jaymie Marlow. 26RP 1988-90; 38RP 3404. In the fall of 2009, both Chou and Marlow attended Lindbergh High School and Chou and her friends were annoying Marlow with rude remarks and at least implied threats, because of Marlow's relationship with Watkins. 27RP 2259-61. Chou threatened to call the police on Watkins because of his relationship with the 15-year-old Marlow. PT Ex. 5-D, 18:35.[3] The jury heard that Chou threatened to call police but not why. 38RP 3445.

[3] This brief will refer to Watkins' recorded statements by reference to the recordings, with the time shown on the recording, because they were the evidence admitted at trial. There are inaccuracies in the transcripts used by the

Marlow was annoyed with the harassment and told Watkins. 27RP 2266. This made Watkins very angry. Ex. 59, 18:38-39; 27RP 2266-68; 30RP 45-46; 38RP 3445. One day as he drove around with friends, Watkins saw Chou and said, "One of these days, I'm going to kill her." 30RP 62.

On April 18, 2010, Watkins initiated contact with Chou with three text messages, inviting her to meet him that day. Ex. 58, 15:26; 29RP 2489-91, 38RP 3406. Chou agreed. 27RP 2142. Watkins said he arranged to meet Chou so he could stab her, to get rid of the problem she had become. Ex. 59, 18:11-14. He said he had planned this encounter for two days, that he was angry because for six months Chou had been threatening Marlow and would not leave her alone and because Chou was threatening to call the police on him. Ex. 59, 18:38-39; 38RP 3445.

On the way to the meeting, Watkins stopped by a friend's house and got a folding knife. 38RP 3453-54. Watkins then met Chou and they walked to an undeveloped area near Watkins' home. Ex. 44; 28RP 2378.

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attorneys at trial and those transcripts were not admitted. The transcript in Exhibit 60 may be used for general reference, as times from the recordings are included throughout that transcript.

Watkins shoved Chou to the ground and pulled out his knife. Ex. 59, 18:15. Chou pleaded for her life. Ex. 59, 18:15. Watkins pinned Chou down, sitting on her mid-section with his legs on either side of her. Ex. 59, 18:16-18. Watkins held his knife high above her as Chou struggled to defend herself. Ex. 59, 18:18. According to Watkins, he cut Chou a few times in the chest as she struggled. Ex. 59, 18:19. Watkins said that Chou got the knife from him and they rolled around on the ground and Chou cut him on the lip. Ex. 59, 18:19. Watkins said that he rolled Chou over and "jammed her in the throat with the knife." Ex. 59, 18:19. He demonstrated many parts of this attack. Ex. 59, 18:15-23.

Chou died as a result of sharp force injuries to her throat and deep into her chest. 34RP 3044-47, 3050; 37RP 14-16, 20. She had a sharp force wound to her left wrist, slicing the end of a bone, consistent with a defensive wound caused as she tried to block a blow. 37RP 25, 88-92. There was another cut to her lower neck, but further injuries were obscured by decomposition. 37RP 13-16.

After Watkins decided Chou was dead, he called his friend Jon Carpenter and asked him to bring a shovel to help bury her. 57RP 12:50-52. As he waited for Carpenter, Watkins went home and got a shovel to use to bury Chou. Ex. 57, 12:54; 38RP 3460.

As he waited, Watkins also took Chou's telephone and sent text messages to Chou's father and to a friend of Chou, stating that Chou was at Southcenter Mall. Ex. 57, 12:57-58; 26RP 2007; 27RP 2148-50. He took the battery out of the phone and threw it in the nearby swamp. 38RP 3471. Watkins also took the boots Chou was wearing off her feet and later took them home. 38RP 3461.

Once Carpenter arrived, the two dug a shallow grave and put Chou into it. Ex. 57, 12:52; 38RP 3417-18. Watkins threw the sweater that Chou had been wearing into the swamp because it was quite bloody. Ex. 59, 18:24-25. After they covered the grave, the two took the shovels and went back to Watkins' house, where Watkins showered and washed his bloody clothing. 38RP 3463. He packed some clothing and video games into a backpack and both then went to Carpenter's home, where Watkins played video games for a couple of hours. 38RP 3643, 3473. On the way, Carpenter threw Chou's phone down a street drain. 38RP 3471-72.

The next day, Watkins told Marlow that he had killed Chou and that Chou would not be harassing her any more. Ex. 59, 18:42-45; 28RP 2336.

Shortly after Chou disappeared, police searched an area near Watkins' home; when Watkins saw that, he was afraid that

Chou's body might be discovered, so he got Carpenter to help and they went back and dug up her body and reburied it deeper. 38RP 3478-81. Police contacted Watkins in April 2010 and Watkins said that he had not seen Chou that day and did not know where she was, mentioning that she had a new boyfriend. 28RP 2395, 2399.

Chou remained a missing person for over a year. On June 23, 2011, two friends of Watkins contacted the police and suggested that he was involved in Chou's disappearance and possible burial. 15RP 400-03; 28RP 2404-05.

In an interview with detectives on July 6, 2011, Watkins initially denied having any contact with Chou on the day she disappeared, but when confronted with phone data to the contrary, admitted they met, and said that he had accidentally stabbed her in the throat as the two struggled over his knife. Ex. 57, 11:30, 12:04, 12:19. His story evolved, and later that day, he admitted that he intended to stab Chou that night, had thrown her to the ground, pulled his knife and stabbed her as she struggled to escape. Ex. 59, 18:11-20. Watkins led the detectives to the burial site. 31RP 2642-43, 2682-85, 2702. When asked what other people might say, Watkins volunteered that his friends Jon Carpenter,

Giovanni Candelario, and Tyree (Milon) would probably say that Watkins wanted to kill Chou. Ex. 59, 18:49-50.

At trial, Watkins claimed that he accidentally stabbed Chou after she attacked him with his knife. 38RP 3414-16. He presented a diminished capacity defense.

E. ARGUMENT

1. THE COURT OF APPEALS PROPERLY CONCLUDED THAT WATKINS WAS NOT IN CUSTODY WHEN POLICE BEGAN QUESTIONING HIM, AND THAT WHEN MIRANDA WARNINGS WERE GIVEN, HE EFFECTIVELY WAIVED THOSE RIGHTS.

Watkins claims that the recorded statements that he made to police on July 6, 2011, were admitted in violation of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). That argument was rejected by the Court of Appeals, and the decision of that court is well grounded in the facts and the law.

Watkins was 22 years old when he drove himself to the police department for an interview with a detective, which had been scheduled based on Watkins' convenience. CP 621; 13RP 15-17; Ex. 57, 11:24. The interview was not custodial when it began; Watkins was not restrained in any way, his cell phone and keys

were not taken from him, and he was told he was free to leave. CP 622; Ex. 57, 11:24. Watkins had on two prior occasions gone to the police station to discuss the disappearance of Kathy Chou and had been allowed to leave afterward. CP 628; 15RP 375-80, 397-400.

One hour and thirteen minutes after the interview began, Watkins said that he possibly stabbed Chou in the neck (accidentally). Ex. 57, 12:36. At that point, Watkins was advised of his Miranda rights. Ex. 57, 12:38. Watkins understood that he was not being detained: when Detective Barfield said they would like him to take them to the burial site that day, Watkins mentioned that he needed to get to work at 4 p.m. Ex. 57, 13:03.

In his petition, Watkins includes claims regarding his mental capacity that were opinions offered by defense experts and rejected by the trial court.[4] The trial court found that the testimony and report of state expert Dr. Kenneth Muscatel were "more persuasive" on the issue of Watkins' mental capacity to waive his rights and to make voluntary statements. CP 627; PT Ex. 49 (Muscatel's report).

[4] E.g., Watkins assertion that he has the cognitive abilities of a 6 to 9-year-old are based on the testimony of Dr. Natalie Novick Brown, whom the court did not find persuasive. Pet. at 6 (citing 1/15/15 RP 258, 262). Brown relied on the Vineland test to reach this conclusion, but the Vineland result was based almost entirely on the report of Watkins' mother about his level of functioning, and that report was at a time that Watkins' mother was aware he was facing a murder charge. 18RP 804-06; 20RP 25-26.

Muscatel opined that, while Watkins has cognitive impairment, he was capable of understanding his Miranda rights and able to knowingly, intelligently, and voluntarily waive them. 18R 877. Muscatel had no question that Watkins was competent to understand, appreciate, and waive Miranda rights. 18RP 873.

Muscatel did not see any indication that Watkins was threatened or highly manipulated, noting that although there was some persuasive pressure applied, and use of guilt, it was not enough to prevent Watkins from making choices. 18RP 897. Muscatel looked for something that would indicate Watkins could not understand or voluntarily waive his rights, but did not find it, in the testing, the police interviews, or in his own interviews; it was not even a close call. 18RP 898-99.

Watkins relies heavily on a Third Circuit Court of Appeals decision, United States v. Jacobs, 431 F.3d 99 (3rd Cir. 2005), asserting that the Court of Appeals here erred in concluding that Watkins was not in custody at the start of the July 6 police interview. However, the Court of Appeals thoroughly analyzed all of the relevant case law and concluded that the situation in Jacobs was factually distinguishable. Watkins, slip op. at 4-9.

The Court of Appeals also correctly observed that the tactic condemned by Missouri v. Seibert, 542 U.S. 600, 602-03, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) was delay of Miranda advice *that was required.* Watkins, slip op. at 11. Because Watkins was not in custody, Miranda advice was not required at the start of this interview, so there was no improper delay.

The Court of Appeals held that substantial evidence supported the trial court's conclusion that Watkins' waiver of his Miranda rights was knowing, intelligent, and voluntary. Watkins, slip op. at 12. Watkins has not established any grounds for further review of that holding.

2. IF THE PRE-MIRANDA STATEMENTS WERE INADMISSIBLE BECAUSE WATKINS WAS IN CUSTODY, THE ERROR WAS HARMLESS.

If this Court accepts review, the State renews its argument below that even if the pre-Miranda statements were inadmissible, the post-Miranda statements were properly admitted, and any error in admitting the former statements was harmless.

If this Court concludes that Watkins was in custody before Miranda warnings were given, so the statements up to that point

would be inadmissible in the State's case-in-chief, the statements that he made after being advised of his rights are admissible unless the original statements were actually coerced. Oregon v. Elstad, 470 U.S. 298, 309-11, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); State v. Ustimenko, 137 Wn. App. 109, 116, 151 P.3d 256 (2007). There is no evidence that the detectives attempted to undermine Watkins' ability to exercise free will before Miranda warnings were given, so there is no basis to find coercion. Elstad, 470 U.S. at 309. The trial court found that all of his statements were voluntarily made. CP 629. Even if a person "lets the cat out of the bag" in his initial responses, that is irrelevant to the admissibility of his post-Miranda statements. Ustimenko, 137 Wn. App. at 116.

3. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT WATKINS BROUGHT A TROPHY OF THE KILLING TO HIS GIRLFRIEND, WHICH WAS HIGHLY PROBATIVE OF HIS STATE OF MIND.

If this Court accepts review, the State renews its argument on cross-appeal that the trial court erred in excluding evidence that Watkins brought a trophy of the killing to his girlfriend. The Court of Appeals did not reach the cross-appeal because it affirmed the conviction. Watkins, slip. op. at 4 n.3.

The State intended to offer evidence that shortly after Watkins killed Chou and removed her boots, Watkins presented those boots to Marlow, his current girlfriend. CP 93, 143; 16RP 537; 41RP 3962-63. The trial court excluded the evidence because the court did not find it persuasive evidence of premeditation but believed that the jury would find it compelling evidence of premeditation. 41RP 3966-67. The court improperly concluded that compelling evidence is unfairly prejudicial, and thus improperly excluded the evidence, which was not inherently inflammatory.

A person's actions after a crime may be relevant because they tend to prove the intent with which an act was committed, or are inconsistent with innocence. ER 401; State v. Messinger, 8 Wn. App. 829, 836-37, 509 P.2d 382 (1973). Watkins agrees that his intent when he killed Chou was the central issue in this case, including his capacity to form intent and premeditation. App. Br. at 50. Watkins' presentation of Chou's boots to Marlow was relevant to the issues of intent and premeditation and the defense theory that Watkins acted accidentally or in self defense.

One of the reasons Watkins had decided to stab Chou, he explained, was that Chou had been threatening Marlow for six months. Ex. 59, 18:38-39. Watkins was devoted to Marlow and

was angry that Chou was threatening and upsetting Marlow. Ex. 59, 18:38-39; 27RP 2266-68; 30RP 45-46; 38RP 3443-45. When Watkins told Marlow that Chou was dead, he told her that Chou would not be bothering Marlow any more. Ex. 59, 18:42-45; 28RP 2336. The presentation of the boots to Marlow was relevant to the issue of intent because it indicated that shortly after the killing, he was thinking clearly enough to take the boots so that he could give them to Marlow. It was relevant to the issue of lack of accident or self defense because that behavior is inconsistent with those theories of the event. It was relevant to the issue of premeditation because it indicated that he had killed Chou on Marlow's behalf and brought her a trophy to demonstrate his commitment to her.

Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The court's decision to exclude the evidence on that basis was an evidentiary ruling, which will be reversed only for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A danger of unfair prejudice exists when evidence is "likely to stimulate an emotional response rather than a rational decision." State v. Barry, 184 Wn. App. 790, 801, 339 P.3d 200 (2014)

(quoting State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011)). Examples of evidence that may be unfairly inflammatory include references to disfavored groups, such as the KKK, or terrorists, or references to behavior some would consider immoral. Barry, 184 Wn. App. at 802 (KKK); State v. Haq, 166 Wn. App. 221, 261-62, 268 P.3d 997 (2012) (terrorism, jihadis); Messinger, 8 Wn. App. at 837 (solicitation of a married woman).

There is nothing emotionally inflammatory about footwear, or giving footwear to a girlfriend. What is prejudicial about this evidence is not unfair prejudice, it is simply compelling evidence that when he killed Chou, Watkins had Marlow in mind. Because the trial court did not apply the correct legal definition of unfair prejudice and confused the unfair prejudice standard with the compelling probative force of evidence offered by the State, it erred in excluding the evidence.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issues identified in Section C and E(2) and (3), supra.

DATED this 21ST day of March, 2018.

Respectfully submitted,

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