

68511-2

68511-2

No. 68511-2-I

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

Snohomish County No. 11-1-00589-0

STATE OF WASHINGTON,

Respondent,

v.

GARRETT TURSKI,

Appellant.

FILED
COURT OF APPEALS
DIVISION ONE
DEC 12 2012

APPELLANT'S REPLY BRIEF

ALLEN, HANSEN, & MAYBROWN, P.S.
Attorneys for Appellant

Richard Hansen
600 University St.
Suite 3020
Seattle, WA 98101
(206) 447-9681

TABLE OF CONTENTS

Table of Cases ii

I. INTRODUCTION 1

II. FACTS RELEVANT TO REPLY 1

 A. Materiality of Leanne Floyd’s Testimony 10

 B. This Conviction Must Be Reversed if not Dismissed
 Outright..... 14

III. CONCLUSION..... 16

Proof of Service

TABLE OF AUTHORITIES

Federal Cases

United States v. Davis, 960 F.2d 820 (9th Cir. 1992)..... 15

State Cases

In Re Spencer, 152 Wn.App. 698, 218 P.3d 924 (2009) 15

In Re Stroh, 97 Wn.2d 289, 644 P.2d 1161 (1982) 15

State v. Rolax, 84 Wn.2d 836, 529 P.2d 1078 (1974), *overruled on other grounds by Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 14

State v. Savaria, 82 Wn.App. 832, 919 P.2d 1263 (1996), *overruled in part on other grounds by State v. C.G.*, 150 Wn.2d 605, 80 P.3d 594 (2003)..... 15

Yurtis v. Phipps, 143 Wn.App. 680, 181 P.3d 849 (2008) 15

I. INTRODUCTION

Now that the defense has newly discovered evidence that Leanne Floyd, the State's key witness at trial, committed perjury, the State has reversed the theory it used to convict the Defendant at trial and the State is now arguing on appeal that the testimony of Leanne Floyd was not critical to the Defendant's conviction. The State also asserts the untenable argument that Leanne Floyd did not deliberately lie on the stand about her financial motive to fabricate, but rather she just didn't know the attorneys she hired within two weeks of her daughter's death were poised to file a civil suit for hundreds of thousands of dollars in damages once Garret Turski was convicted, even before he was sentenced.

Both of these propositions are flatly contradicted, not only by the evidence, but by the arguments and theories relied upon by the State at trial to obtain this conviction.

II. FACTS RELEVANT TO REPLY

The only issue at trial was whether the defendant or the decedent was driving the Mustang involved in the collision that occurred on April 10, 2010 at approximately 4:00 a.m. After aid car personnel arrived on the scene they could not find any occupants in the smoldering ruins of the car or surrounding area. After fifteen or twenty minutes, they heard groaning

and the defendant was located in the trunk where he was regaining consciousness. When questioned, he repeatedly insisted he had not been driving, though his memory was clearly affected by his brain injury. The body of the decedent, Ellen Floyd, was found two hours later amongst some trees and bushes twenty feet from the car.

Dr. Steven Mitchell, head of the Harborview Trauma Center, testified that Garrett Turski had clearly experienced a concussion (“traumatic brain injury”), as evidenced by his unconscious state, and that his limited memory of the accident was typical of such an injury. RP 514.

Dr. Mitchell also testified to an 80-90% certainty that the abrasions on the defendant’s right shoulder and waist, along with his fractured sternum, proved he was wearing the *passenger side seatbelt* when the accident occurred:

- Q. How probable is it, when you consider all the evidence we have been talking about there, the shoulder injury and the sternal fracture, how probable is it, when you put that together, that this was caused by a seat belt?
- A. With the shoulder and the sternum, there’s not an exact scientific way to quantify that; but in my thinking about it, I would say between a 75 and 80 percent chance. With the injury to the waist, I think it makes it actually much more likely than that.
- Q. Higher than 75 or 80 percent?
- A. Yes. I’d put it close to between 80 and 90 percent.
- Q. Is there any other cause that you are aware of, from what you know about this accident, that could have caused that combination of injuries, all three?

- A. The forces that are generating these types of crashes are hard to predict, and there's a lot going on; but I can't imagine too many situations where you would have the shoulder, the area of contusion on the waist, as well as the sternal fracture. To me, as a treating doctor, it tells me that this guy definitely had a seat belt on.
- Q. And that would be the passenger side seat belt?
- A. That's correct, sir.

RP 510:8-511:4.

If this were true, Garrett Turski could not have been the driver and Leanne Floyd would recover no monetary damages for her daughter's death.

Because of this, the testimony of the decedent's mother, Leanne Floyd, became the centerpiece of the State's case, and her credibility was critical to the outcome. In response to this, the defense argued in its trial brief and at a pretrial hearing for the admissibility of "evidence of financial motivation with regard to Leanne Floyd," arguing: "Within about ten days of her daughter's death, she retained the Giersch Law Firm, and they have been actively involved ever since." RP 35.

The defense counsel was handicapped in its ability to prove that Ellen Floyd knew how to drive a manual transmission vehicle due to the recent death of a witness who had been interviewed by the police:

[T]here was another witness, Suzanna Parker, I think her name is, who was interviewed by the police and testified that Ellen Floyd had tried several times to learn to drive a

manual transmission. But that witness died about a month and a half before trial, so she was unavailable.

RP 847:21-848:1.

Without the benefit of Ms. Parker's testimony, the defense sought to admit two letters from the Turskis' insurance company, Safeco, advising them that Leanne Floyd's attorneys had demanded to know their limits of \$250,000. *See* Ex. 110 and RP 159-163. Then a few months later, the Turskis received another letter advising them that a full limits demand had been rejected and stating to them that their coverage was limited to \$250,000. *See* Exhibit 111 and Appendix to Appellant's Opening Brief. That letter also advised the Turskis that Safeco "will continue to attempt to resolve this claim within your policy limits," but it also warned them: "If this matter goes to trial, any award in excess of these limits is your responsibility." *Id.* However, the trial judge refused the admission of this evidence to impeach Leanne Floyd. RP 165-166.

The trial then began and the State made clear in the prosecutor's opening statement that he was relying on Leanne Floyd's testimony that her daughter Ellen could not have been driving the car due to her supposed inability to operate a manual transmission:

One of the things that is important to keep in mind in this case is that Ellen was not an experienced driver. She did not have a driver's license. She had an instructional permit. *To the best of everyone's knowledge, she hadn't driven*

manual transmissions. Her mother, Leanne, has a family car with a manual transmission. She had taken Ellie out on one occasion to try to drive it; but the grinding of the gears was so bad that she was a little worried that it was going to break the car, and it was her only vehicle; so she discontinued those lessons. Ellie had taken Driver's Ed at Stanwood High School; but she had, again, as far as is known, no manual driving experience.

RP 71 (emphasis added).

Leanne Floyd was the State's first witness and she testified on direct examination that Ellen was living with her when the accident occurred. She testified that she owned a Kia Sophia, which "had a five speed manual transmission." RP 85. When asked by the prosecutor "how many times did you try to teach Ellie to drive it?" she answered "just the one." RP 86. When asked to explain, Leanne Floyd testified: "She couldn't drive it. She kangarooed it. She couldn't drive, because she couldn't get it in motion." *Id.* She explained: "We didn't get out of the driveway" and she never tried to teach Ellen again because it was Leanne's "only car to get to work, and she was going to wreck the clutch or something." *Id.* This occurred more than a year before the accident. RP 87.

The prosecutor also asked Leanne Floyd about a "Toyota MR2" stick shift vehicle that was given to Ellen, but Leanne claimed: "It was

mechanically unsound. Its clutch ended up going, and the motor didn't run," and she insisted that Ellen never drove it. RP 87-88.¹

During Leanne Floyd's cross-examination, the defense elicited testimony that she had several personal injury attorneys present in court and during the defense interview of her in the prosecutor's office. RP 98. However, she adamantly and unequivocally denied that she had hired these attorneys to seek financial compensation for her daughter's death:

Q: The reason you hired them is to get a large sum of money out of the tragic death of your daughter; is that correct?

A: Incorrect. That is not true whatsoever.

Q: Are you aware –

A: I hired them so that I could be heard, so that I could have somebody stand up and take accountability for the death of my daughter.

Q: Do you deny that your attorneys are demanding hundreds of thousands of dollars from the Turski family?

A: Yes, I do.

Q: Do you deny that?

¹ On its face, this testimony is not credible. On cross-examination, she admitted that the Toyota was given to Ellen by "a friend of the family" a year before the accident, and she reluctantly admitted "I suppose so" when asked if Ellie "wanted to learn to drive that car even though it had a manual transmission." RP 94. When asked how the car got to Leanne Floyd's house, she admitted it had been driven to her house, claiming "it limped in," which contradicted her claim that the car was inoperable. RP 94. Although the Defendant had limited memory of the accident, he testified that Ellen Floyd had asked to drive his car prior to the accident. RP 718.

A: Yes, because we have not asked them for any money. The only finances I asked for was money to help bury my child.

Q: How are they being paid?

A: How is who being paid?

Q: Your attorneys, Adler Giersch?

A: I don't know.

Q: It's on a contingent fee basis isn't it; they get a percentage of the money collected?

A: From the car insurance?

Q: From the insurance, and from the Turskis personally.

A: Not that I know of, sir.

Q: You didn't sign a fee agreement?

A: I did.

Q: You don't remember what it says?

A: No.

RP 98:13-99:13.

After Leanne Floyd testified, the defense again argued for the admissibility of a letter

written by the Adler Giersch Law Firm to my client's insurance adjuster, with a copy to Garrett Turski, demanding to know insurance limits, dated October 26, 2010 -- that is 16 days after the accident -- talking about, if necessary, filing a lawsuit to get the insurance limits.

RP 157. This letter demanded to know if there was “enough insurance to cover our lawsuit. Clearly, this contradicts what Leanne Floyd said on the witness stand yesterday.” *Id.*² The defense argued for the admissibility of this exhibit because “it goes to prove that [Leanne Floyd] was not being candid and truthful because she clearly said, in a very emotional way, ‘this is not about money.’” *Id.* at 159. “It’s very clearly about a lot of money, and she got lawyers involved within two weeks of her daughter’s death. I think the jury needs to know that.” RP 160. The defense argued “that this demand letter flatly contradicts an affirmative statement that she made yesterday that is very material to this case” because Exhibit 110 “contradicts what she said very affirmatively under oath yesterday: ‘This is not about money.’” RP 161.

The prosecution made the improbable argument that Leanne Floyd did not “know what her attorney has been up to” so the letter was “not relevant,” but the defense responded: “Your Honor, an attorney cannot ethically make a demand without the consent of a client. I think that’s fairly basic.” RP 160-61. The defense pointed out language from the letter indicating that the attorneys “will file a lawsuit, if necessary, to get

² The Defendant’s father, Ken Turski, had “signed an authorization to release insurance limits, which are \$250,000, which has made him a witness now; because of this surprise testimony, I need to put this in evidence for when we get to the defense case.” RP 157-58.

disclosure of the insurance limits.” Yet Leanne Floyd testified that “her involvement of these attorneys was not about money. I think it’s very relevant to her credibility.” RP 163.

The court ruled: “I’m not going to permit 110 to be used for the purpose of contradicting or impeaching Ellie’s mother.” RP 165. The defense then offered to have his client and his client’s parents testify about another letter sent to them by their insurer Safeco in March of 2011, a year before trial, advising them that their insurance limits of “\$250,000 had been offered,” and that the insurance company was “trying to settle within that limit.” *Id.* The court denied this request as well when the prosecutor objected. RP 166.

Finally, in closing argument, the prosecutor urged the jury to reject the defense argument “that Ellie was the driver,” stating it must have been “an experienced driver behind the wheel of the vehicle. In this case, that could only be the defendant.” RP 801-802. Later, he again argued about “Ellie’s inability to drive a motor vehicle . . . Ellie didn’t suddenly get behind the wheel unexpectedly *for the first time in her life.*” RP 805 (emphasis added). Yet a third time he argued that the defense wanted the jury to “[i]gnore the fact that Ellie doesn’t have any driving experience . . . That’s a bunch of nonsense.” RP 828. Based on this argument, Garrett Turski was convicted.

On Sunday, March 4, 2012, even before Garrett Turski had been sentenced, the Turskis were served with a Summons and Complaint for Damages naming Leanne Floyd as the sole plaintiff. It had been signed by all three of Leanne Floyd's personal injury attorneys who had sat through the criminal trial, and it was filed on February 28, 2012, less than two weeks after the trial. This Complaint, which runs 12 pages in length, contains four paragraphs that specifically allege Ms. Floyd was seeking money for herself. CP 125-162, Exhibit 4. Richard Adler, Arthur Leritz, and Melissa Carter were all present in court for Leanne Floyd's cross-examination when she adamantly denied she was seeking monetary compensation for her daughter's death.

A. Materiality of Leanne Floyd's Testimony

The State now argues on appeal that Leanne Floyd didn't really lie when she testified that she was not motivated to see Garrett Turski convicted in order to guarantee her attorneys would recover monetary damages for her, and a substantial percentage for themselves. However, at the hearing on the motion for a new trial following the verdict, the prosecutor essentially conceded that she lied by arguing that the jury must have assumed "that a lawsuit was coming after this," because "civil attorneys don't just sit around to spectate [sic] in court and see how the criminal process is working. It was obvious that this was forthcoming."

RP 848:16-848:25. However, this alleged “assumption” was flatly contradicted by Leanne Floyd’s sworn testimony, so this Court can hardly “assume” there was no prejudice.

That being the case, it was equally obvious that Leanne Floyd perjured herself to ensure a conviction and guarantee \$250,000 in insurance limits, with a large percentage of that going to the attorneys who sat back and witnessed, or perhaps encouraged her to lie under oath.

The State also now argues on appeal that Leanne Floyd’s testimony was just window dressing for the testimony of Detective Goffin and Detective Cummings, who provided opinion testimony about the mechanism of this disastrous accident at a speed of 100 miles per hour. However, both of those witnesses were seriously discredited on cross-examination to the point that their testimony actually supported the defense theory that Ellen Floyd was the driver, and Garrett Turski had been strapped into *the passenger seat* of the vehicle, as Dr. Mitchell opined to an 80-90% certainty.

For example, Det. Goffin conceded that his reconstruction of the accident was physically impossible, and that the location of Ellen Floyd’s body was consistent with her driving the car:

Q. But it doesn’t make any sense that her body could penetrate through the car to get over here, either does it? I mean, she can’t go through the car,

correct, to get from the right side to the left side;
that can't happen; right?

A. Well, it is possible, but not in this situation.

Q. Highly unlikely?

A. Highly unlikely.

RP 462:25-463:6.

* * *

Q. The car stops its movement very abruptly in this direction,
along this vector, when it hits the tree; right?

A. Right.

Q. And does a very sudden change in movement, like this?

A. Correct.

Q. During that process, if her body is right there, airborne,
next to the car, it's going to be like, you know, hitting a
home run out of the field; the car is going to strike her and
knock her body in a different direction, just like the car is
going in a different direction, out toward the roadway?

A. That's a possibility. I didn't find any other strikes on there;
but given your scenario, that's certainly a possibility.

Q. But it's not a possibility for her to have gotten from the
right side of the car to the left side of the car where you
found her body, is it?

A. No.

RP 464:24-465:15.

* * *

Q. Let's assume that Ellen is the driver, and she's not strapped
in. When the car hits this tree, what is the direction of the
force that's going to be applied to her body?

A. When it hits the first large tree?

Q. Yeah. It's going to be this direction; right?

A. Yeah. It's going to be, let's say about - - well, through the
driver's door.

Q. So if she went out the *driver's* door at that point, her body
would end up over here where you found it; correct?

A. I'd go with that, yes.

RP 465:18-466:2 (emphasis added).

Although a reluctant and evasive witness, Det. Cummins finally conceded that dirt located on the lap belt some 17.3 inches from the insert, proved that someone was wearing it *in the passenger seat* at the time of the accident as the defense claimed and Dr. Mitchell testified:

- Q. So you did observe dirt on both the lap belt and the shoulder belt of the passenger side?
- A. Correct.
- Q. And you normally associate that with an accident, don't you, because there was a lot of dirt involved in this case with the car hitting the embankment. You did find dirt throughout the passenger compartment didn't you?
- A. Yes.
- Q. And that would indicate that the seatbelt was in use when the collision occurred, the passenger side, since you found dirt on the part that had been retracted.
- A. I found dirt on the exposed section of the belt.
- Q. But on the retracted part, too, I thought.
- A. There was a little bit, but nothing compared to the driver's side, where it had been used by the tow company.

RP 602:2-602:16.

* * *

- Q. And [the soiled area of the lap belt] would be retracted into the retractor if the belt were not in use; correct?
- A. If it had retracted fully. But, like I said, there was a bit extended that did not retract, because the retractor had wound itself with as much as webbing as it could hold; so there was a little bit of excess that was hanging out.
- Q. But not 44 centimeters.
- A. I didn't actually measure that part that was exposed; no, I did not. So I can't say for sure if it was 44 centimeters or not.

RP 603:15-603:24.

Thus, the State's position on appeal is directly at odds with the theory presented to the jury to convict Garrett Turski based on Leanne Floyd's testimony that her daughter Ellen was incapable of driving a manual transmission car. And, contrary to the State's assertion on appeal, her insistence that she had no financial incentive to see Garrett Turski convicted so she could collect hundreds of thousands of dollars was a deliberate lie under oath.

She emphatically and unequivocally denied, in her sworn testimony, that she had hired attorneys "to get a large sum of money out of the tragic death of [her] daughter," answering: "Incorrect. That is not true whatsoever"; then she denied that her "attorneys were demanding hundreds of thousands of dollars from the Turski family." RP 98. She then filed suit, less than two weeks after the verdict (and eight days before sentencing), personally seeking insurance limits of \$250,000, which have now been paid to her.

B. This Conviction Must Be Reversed if not Dismissed Outright

Our courts have specifically held that newly discovered evidence establishing that a key witness lied or misled the jury is a sufficiently material fact to require a new trial. *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974), *overruled on other grounds by Wright v. Morris*, 85

Wn.2d 899, 540 P.2d 893 (1975). Newly discovered evidence is not “merely impeaching” if it undercuts the credibility of a key witness. *In Re Spencer*, 152 Wn.App. 698, 218 P.3d 924 (2009). *Accord: United States v. Davis*, 960 F.2d 820 (9th Cir. 1992).

In *State v. Savaria*, 82 Wn.App. 832, 919 P.2d 1263 (1996), *overruled in part on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), the court upheld the granting of a new trial based upon newly discovered evidence of telephone records which would have impeached one of the state’s witnesses, reasoning “that impeaching evidence can warrant a new trial if it devastates a witness’s uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching but critical.” *Id.* at 838 (footnotes omitted).

The same result must be reached here, especially in light of the involvement of the personal injury attorneys who engineered, or at least condoned this serious misconduct for their own financial gain. *See* RPC 3.3, “Candor Toward the Tribunal,” and *Yurtis v. Phipps*, 143 Wn.App. 680, 691, 181 P.3d 849 (2008), *In re Stroh*, 97 Wn.2d 289, 644 P.2d 1161 (1982), where the Court concluded:

In sum, the legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness. Thus, “For an attorney at law to actively procure or

knowingly countenance the commission of perjury is utterly reprehensible.”

Id. at 296, citing *In re Allen*, 52 Cal.2d 762, 768, 344 P.2d 609 (1959).

III. CONCLUSION

This Court should be deeply troubled by the deliberate deception by Leanne Floyd and because of the ethical implications of her civil attorneys in perpetrating a fraud on the court. This discovery would even justify dismissal of the case in the furtherance of justice.

RESPECTFULLY SUBMITTED this 12th day of December, 2012.

A handwritten signature in black ink, appearing to read 'R. Hansen', written over a horizontal line.

RICHARD HANSEN, WSBA #5650
Attorney for Appellant

PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 12th day of December, 2012, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Reply Brief directed to attorney for Respondent:

Snohomish County Prosecuting Attorney
Attention: Appeals
3000 Rockefeller Avenue, MS 504
Everett, WA 98201

And mailed to Appellant:

Garrett Turski, #356728
Monroe Corrections Center
P.O. Box 777
Monroe, WA 98272

DATED at Seattle, Washington this 12th day of December, 2012.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

2012 DEC 12 PM 6:45
STATIONER