

NO. 307344-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
OCT 11, 2013
Court of Appeals
Division III
State of Washington

THE STATE OF WASHINGTON, Respondent

v.

GREGORIO LUNA LUNA, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR FRANKLIN COUNTY

NO. 10-1-50164-8

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The defendant had a documented history of assaulting Griselda Ocampo prior to her murder in May 2010.

On September 4, 2008, Officer Jose Becho saw a cut on Griselda's lip after responding to a domestic call. (RP¹ 761). The defendant told Officer Saul Mendoza that he had argued about the telephone. (RP 769).

On December 31, 2009, Officer Ismael Cano responded to a 911 call from Griselda Ocampo. He saw Griselda with a neighbor. Cano observed a bruise to Griselda. The neighbor, Marcelino Quiroz, testified that he saw Griselda come out of her home with a cell phone and also saw the defendant run away. Quiroz testified that Griselda said that the defendant had hit her in the face. (RP 842).

On January 13, 2010, Griselda went to the local domestic violence shelter and stayed until January 15, 2010. (RP 785).

On January 31, 2010, the defendant entered Griselda's home while she was sleeping. He slapped her, started to tie her up, and threatened to kill her and their son if she did not do exactly as he said. (RP 792). Griselda was able to escape and went to her neighbors, Marcelino and Elva Quiroz, who found her crying and naked. (RP 843, 863).

¹ "RP" refers to the jury trial Verbatim Report of Proceedings Volumes I through VIII reported by Court Reporter Lisa Lang. All other transcripts will be dated.

On March 1, 2010, Griselda obtained an Order for Protection against the defendant which remained in effect as of May 24, 2010. (RP 830). Also in effect was a no contact order issued by the Pasco Municipal Court. (RP 827).

On April 30, 2010, Griselda gave Pasco police threatening letters the defendant had mailed to her. (RP 561). The letters included threats such as, "I am totally crazy, furious, uncontrollable, full of rage. I will not be stopped by anyone nor anything. I'm going to carry out every threat I made to you. I will make you feel the greatest pain you have experienced in life. . . ." and ". . . I will kill everyone slowly. I will make them suffer and let them know that is all on your behalf. . . ." (RP 564, 566).

On May 5, 2006, Griselda Ocampo asked her apartment manager to rekey her apartment. On May 19, 2010, she requested extra chain locks on the front and back entrance. (RP 513).

In May 2010, the defendant moved in with Robin Cole and Oscar Cortez-Garcia in their home in Snohomish, Washington.

Later in May 2010, the day before Griselda was killed, the defendant called Cortez-Garcia and told him that he was sorry that he took his car. He also told Cortez-Garcia that he was in Pasco, that he had seen Griselda at a restaurant, the he was very angry and that he had decided to kill Griselda. (RP 548). Cortez-Garcia called Griselda to warn her.

The testimony of Cortez-Garcia was corroborated by Jairo Flores-Flores and Corporal Matt Newton of the Kennewick Police Department. Flores-Flores testified that he was with Griselda at Roberto's Tacos when the defendant showed up, threatened Flores-Flores and said that he was going to kill Griselda. (RP 378).

Griselda called Jairo Fores-Flores that night and asked him to come over because she was afraid. (RP 379). Also staying at her apartment were brothers Sergio and Santiago Perez-Ramos.

That morning, the brothers woke up and left the apartment to go to work. The defendant confronted them after they left the apartment and forcibly took the keys to Griselda's apartment after threatening to kill Santiago. (RP 457).

The defendant then entered Griselda's apartment. Jairo Flores-Flores saw the defendant beat Griselda while he had a knife in his hand. Jairo took Griselda's son A.O. from the apartment so that the defendant would not hurt him. He took him to the Quiroz apartment. The defendant also went to the apartment demanding A.O.. The defendant and Jairo hit each other causing each to bleed when Marcelino Quiroz came out of the apartment. The defendant ran away. (RP 378-383). During that time, A.O. told Elva Quiroz that "My father hit her, got her by the hair and hit her on the nose. (RP 865).

Marcelino and the Santiago brothers went to Griselda's apartment where they saw Griselda down on the floor. Police responded and collected the knives found near her body. An autopsy showed that she died of knife wounds.

The defendant was arrested. At his arraignment the State asked for a court order to take the defendant's DNA.

The motion was supported by an affidavit by Detective Scott Warren. That affidavit outlined the probable cause against the defendant including a summary of Marcelino Quiroz's statement that he saw the defendant and Jairo fighting on his doorstep shortly before Marcelino found Griselda's body. (CP 760-62).

Prosecutor Steve Lowe called Detective Warren to testify at the arraignment hearing to add to the written affidavit for the purpose of obtaining the defendant's DNA. Detective Warren testified that the police were able to obtain samples of what appeared to be blood from both the area of apartment C6 and C4. Warren also testified that there was information from the witnesses that the defendant bled from an injury he received from a fight with a witness. (RP 06/17/10, 768-70).

The court, over the objection of the defendant, ordered that DNA be taken from the defendant.

At the end of trial, the State and Defendant submitted proposed jury instructions to the court. Both proposed WPIC 26.02, the “to convict” instruction for Murder in the First Degree. (CP 837; RP 907).

The defendant was convicted of Murder in the First Degree. (CP 13).

The jury also found the aggravated circumstance that a court order existed at the time of the murder that prohibited the defendant from contacting the victim, and the aggravated circumstance that the defendant committed three or more crimes of harassment or assault against the victim. (CP 24). The defendant was sentenced to life without parole. (CP 17).

The defendant filed an appeal arguing that Judge Swisher abused his discretion when ordering that DNA be taken from the defendant, and that the jury instruction that he proposed to the court, WPIC 26.02, was in error.

II. ARGUMENT

1. THE DEFENDANT’S DNA WAS PROPERLY OBTAINED BY COURT ORDER ON SHOWING OF PROBABLE CAUSE.

The defendant concedes that the cheek swab of his DNA was taken pursuant to court order. He also concedes that all but one of the

requirements of *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010) were met. (App. Brief, 15).

The defendant only argues that one condition was not met, whether there was “clear indication that the desired evidence will be found.” He apparently argues that the State must determine that there are usable DNA profiles at a crime scene before obtaining a DNA sample from a defendant. He cites no authority for his novel argument.

In the present case, the probable cause affidavit relied on by the court stated that Santiago Perez-Ramos observed the defendant run out of apartment C6 (Ocampo’s apartment) and to apartment C4 where he started fighting with Jairo after Jairo had taken Ocampo’s son to that apartment. The affidavit also provided statements by Marcelino Quiroz, the resident of apartment C4, who stated that when he opened his door, he broke up a fight between Jairo and the defendant outside his door. (CP 760-61).

The written affidavit was supplemented by the sworn testimony of Detective Scott Warren. He testified that the Pasco Police Department obtained samples of blood from both apartment C4 and apartment C6. Warren also testified that the defendant bled from the injury he received during the fight. (CP 772; RP 06/17/10, 8-10). Finally, Warren testified that based on his experience, it would be helpful for the crime lab to have

the defendant's DNA when comparing it to blood samples taken from the scene.

The defendant did not dispute at the hearing or in his brief to the court Warren's testimony that the DNA sample from the defendant would be helpful to have when comparing it to the blood samples. This is consistent of the Washington State Crime Lab practice and policy of wanting to analyze and compare different DNA samples at the same time.

The defendant's argument that there was no DNA recovered at the scene is contradicted by the factual record that what appeared to be blood was found at the scene including an area where the defendant was injured and bled from his fight with Jairo.

The Court of Appeals affirmed the issuance of a warrant for a defendant's blood sample based on several items "which appeared to be blood stained." *State v. Osborne*, 18 Wn. App. 318, 569 P.2d 1176 (1977). There, the prosecutor provided a supporting affidavit stating the victim died of stab wounds, the execution of a search warrant produced several items which appeared to be blood stained, a sample of the victim's blood had been obtained and a sample of defendant's blood would be used for comparison with the blood in defendant's residence. *Id.* at 321.

The *Osborne* Court did not require that what appeared to be bloodstains be tested for blood before ordering a blood sample to be taken from the defendant.

Instead, *Osborne* held that an affidavit supplies probable cause when it supplies rational grounds to believe that evidence of criminal activity will be obtained in the search. It also held it was not necessary to prove the presence of probable cause beyond a reasonable doubt. In facts very similar to the present case, the *Osborne* Court found that the motion provided rational grounds to believe the defendant's blood sample would be evidence of criminal activity.

Even if it was error to take the DNA, it would be harmless error. A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, the State did not even use the DNA evidence in its statement of the case. Instead it listed the defendant's prior assaults against the victim, the defendant's written threats against the victim the month before she was killed, the defendant's statement to Cortez-Garcia the day before she was killed that the defendant had taken his car to Pasco and that he was going to kill Griselda, Sergio's and Santiago's testimony that the

defendant forcibly took the keys to Griselda's apartment from Sergio and then entered Griselda's apartment shortly before the murder, Jairo's testimony that the defendant came into Griselda's home and was beating her while holding a knife, that Jairo took her son A.O. away from the apartment, that A.O. told Elva Quiroz that he saw his "father hit her, got her by the hair and hit her on the nose," and that Griselda was found stabbed to death immediately after the defendant left her apartment.

2. THE "TO CONVICT" INSTRUCTION PROPOSED BY THE DEFENDANT AT TRIAL DID NOT MISLEAD THE JURY ABOUT ITS POWER TO ACQUIT.

The defendant's challenge to the final sentence of the "to convict" instruction has been rejected by all three divisions of the Court of Appeals. *State v. Wilson*, No 30378-1-III, ___ Wn. App. ___, 307 P.3d 823 (Aug 15, 2013); *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998) *Review Denied*, 137 Wn.2d 1024 (1999); *State v. Meggyesy*, 90 Wn. App 693, 958 P.2d 319 (1998) abrogated on other grounds by *State v. Rucuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005).

Even if all three divisions of this Court are wrong, the defendant would be precluded from raising this issue under the invited error doctrine. The general rule is that a party may not request an instruction and later complain on appeal that the requested instruction was given. *State v.*

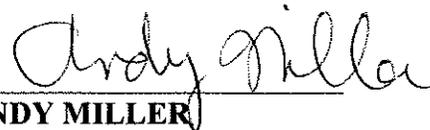
Henderson, 114 Wn. 2d 867, 872, 792 P.2d 514 (1990); *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

The invited error was limited in *State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009), which held that proposing a deficient instruction constituted deficient performance and prejudiced the defendant requiring reversal. However, the distinction made in the *Kyllo* decision, that there the instruction had been found deficient prior to the *Kyllo* trial, while in *State v. Studd*, the instruction was good law at the time of the *Studd* trial, weighs against the defendant in the present case. This is because at the time of the trial in the present case, the given instruction was good law. In fact, it continues to be good law in all three divisions of this Court.

III. CONCLUSION

The trial court properly ordered DNA to be taken from the defendant. Any error would be harmless. The “to convict” instruction proposed by the defendant is a correct statement of the law. The Judgment and Sentence should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of October 2013.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

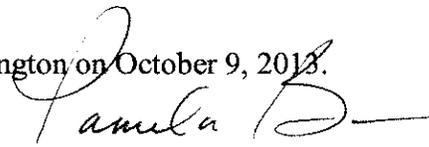
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U.S. Regular Mail, Postage
Prepaid

Signed at Kennewick, Washington on October 9, 2013.



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