

FILED
Oct 21, 2016
Court of Appeals
Division III
State of Washington

No. 32228-9-III

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent

v.

DANIEL CHRISTOPHER LAZCANO, Defendant/Appellant

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

ISSUES.....1

BRIEF ANSWERS2

SUPPLEMENTAL STATEMENT OF THE CASE.....4

ARGUMENT.....10

CONCLUSION15

TABLE OF AUTHORITIES

<u>US Supreme Court</u>	<u>Page</u>
<u>Arizona v. Youngblood</u> , 488 US 51 (1988)	1, 10
<u>Washington Cases</u>	<u>Page</u>
<u>State v. Alvarez</u> , 45 Wn.App. 407 (1986)	14
<u>State v. Theders</u> , 130 Wn.App. 422 (2005)	13-15

ISSUES RAISED BY STATEMENT OF ADDITIONAL GROUNDS

1. Were the opinions of the forensic pathologist unreliable or speculative, with regard to the likely location of a 'remainder' portion of bullet?
2. Was the trial court correct to allow the forensic pathologist to testify as to the likely size of bullets to have caused the damage that was done to the body, and the likely location of the remainder portion of bullet?
3. Did the State satisfy its obligations under Arizona v. Youngblood, 488 US 51 (1988), when the pathologist did not locate and preserve every large fragment of bullet in the body?
4. Did the trial court properly limit cross exam of witness James Holdren, to exclude evidence that Mr. Holdren had driven recklessly at a point in time far removed from the murder case, and that Mr. Holdren, at a similar point in time, suffered from unspecified mental problems?
5. Did the trial court properly allow the admission of a non-testifying co-defendant statement (Frank Lazcano), as being in furtherance of a conspiracy?

BRIEF ANSWERS

1. No. The opinions were based on the many years of training and experience of the forensic pathologist who performed the autopsy. He was well versed in the effects of bullets on the human body and testified to what happens, according to his training and experience, when bullets strike the body: namely, how bones and tissue and bullets react to each other. Based on that knowledge, he testified to the fact that a relatively large caliber bullet, traveling at high speed, would have had to have been used to cause the damage (multiple broken bones, etc) that was done to the victim; that the bullet came apart in the course of doing that damage, as evidenced by the many bullet fragments shown on x-rays and the sample fragments recovered from the body; the path of damage as evidenced by the autopsy and x-rays; that there would likely be a substantial chunk of fragment or 'remainder' of bullet left after causing the damage to the body; that such a remainder likely ended up lodged in an area of the body outside of the area shown by x-ray of the body. None of this was just 'speculation', but was instead based on the forensic pathologist's training and experience.
2. Yes. For the reasons stated above, the forensic pathologist's testimony was properly allowed. The doctor did not testify to

things outside his area of expertise: how different types of bones and tissue react to different bullets.

3. The State satisfied due process since it acted in good faith in conducting the autopsy and took into evidence samples of the bullet fragments that were in the body. The State actors did not know, or have reason to believe, that it could lead to exculpatory evidence to recover all bullet fragments from the body.
4. Yes. The trial court properly excluded evidence that the person who the defendant accused of committing the murder, Mr. Holdren, had driven recklessly and was babbling intoxicated gibberish three months after the murder had been committed, as well as excluding evidence that Mr. Holdren had mental health problems at that same period some months after the murder in the case at bar.
5. Yes. The statements were given by a co-participant in the murder, who had refused to testify in this defendant's case, and which statements had been made to the police in furtherance of the conspiracy. As such, they were properly admitted.

SUPPLEMENTAL STATEMENT OF THE CASE

In addition to the facts noted in the State's earlier briefing, the State will also highlight the following:

Regarding the Forensic Pathologist, Dr. Reynolds

One important witness for the State was a forensic pathologist, Dr. Jeffrey Reynolds, who testified that the manner of death was homicide and the cause of death was gunshot wound. He testified in detail regarding his findings and conclusions, described below, including his ultimate opinion that the injuries to the victim were consistent with bullets that could be fired from an AK-47 rifle.

But, it is important to remember, that he did not testify in a vacuum. Virtually all the other evidence in the case pointed to the defendant having shot the victim with an AK-47 rifle. As already noted in the State's primary brief: an AK-47 was in defendant's possession from the time of a burglary some weeks prior to the murder (which burglary had been committed by the murder victim and was the motive for defendant to kill the victim); the AK-47 was with the defendant when he and his brother were hunting for the victim and the brother told a witness that the brother wanted to kill victim because of the burglary; the AK-47 was with the defendant when he and his brother went to confront the victim on the night of the murder, and was the only firearm with them; the defendant

told multiple people after the killing that he'd shot the victim with a rifle, and told at least one person explicitly that he'd used the AK-47; immediately after the killing, the defendant's brother gave the AK-47 to an uncle for the purpose of hiding or destroying evidence of the murder; that uncle and a step-father did throw that AK-47 in a river for that purpose. See State's Primary Brief.

After the murder, the defendant and his brother (along with relatives, friends, and lovers) covered it up. Those efforts are noted in the State's primary brief. They include the fact that the defendant, immediately after the murder, took the body to a remote location and dumped it in a creek and covered it with rocks. The defendant and his brother and relatives, friends and lover got a story together that they all told to the police, in an effort to cover up the murder and hide and destroy evidence. After the body was discovered about three months later, they continued to conspire together to mislead the police to avoid getting caught or protect one another.

Dr. Reynolds, a forensic pathologist, performed an autopsy of the victim's body after it was recovered. He testified that the manner of death was homicide and the cause of death was gunshot wound. He testified in detail regarding his findings and conclusions, described below,

including his ultimate opinion that the injuries to the victim were consistent with bullets that could be fired from an AK-47 rifle. RP 1380.

The doctor's testimony was based on his many years of training and experience as well as his exam of the body. RP 1348-1352. He was well versed in the effects of bullets on the human body and testified to what happens, according to his training and experience, when bullets strike the body: namely, how bones and tissue and bullets react to each other. For example, based on skin elasticity and the size of the entry wound, he gave an opinion about the size of bullet. RP 1366-1367. Based on that knowledge, he testified to the fact that a relatively large caliber bullet, traveling at high speed, would have had to have been used to cause the damage (entry wound, multiple broken bones, etc) that was done to the victim; that the bullet came apart in the course of doing that damage, as evidenced by the many bullet fragments shown on x-rays and the sample fragments recovered from the body; the path of damage as evidenced by the autopsy and x-rays; that there would likely be a substantial chunk of fragment or 'remainder' of bullet left after causing the damage to the body; that such a remainder likely ended up lodged in an area of the body outside of the area shown by x-ray of the body. RP 1348-1458, and 1822-1834.

At one point, Dr. Reynolds did testify as to his belief that when pieces of a metal jacketing of lead bullets have come apart from the lead, that rifling marks caused from firing from a rifle barrel, are difficult or impossible to trace to specific firearms. That seems to be an issue for an expert in ballistics. However, that answer was given in response to a direct question from the defense, during cross-examination. See Rebuttal Testimony at RP 1822-1834, especially RP 827.

The State did call an expert in ballistics, Mr. Glen Davis from the State crime lab. Mr. Davis testified about how ammunition is put together, including a cartridge case and a bullet, how firearms work, how rifling marks are created when a bullet is fired and how caliber may be able to be determined from examining a fired bullet. RP 632, 641-642. Mr. Davis examined some of the bullet fragments that Dr. Reynolds recovered from the body during the autopsy, and determined that they were consistent with the size rounds fired by the AK-47 in question. The fragments were also consistent with other high-velocity rifle rounds. RP 642-645.

Regarding James Holdren

The defendant has an uncle, James Holdren, who lives in the town of Malden, where the murder was committed. As noted in the State's primary brief, defendant claimed at trial that defendant had gotten out of a

car shortly before the murder, that Uncle Jimmy had taken defendant's place, that Uncle Jimmy and defendant's brother Frank had committed the murder, and that defendant had then just helped dispose of the body. There was no other witness or evidence to support that theory.

Three months after the murder, Mr. Holdren had driven a car recklessly in a nearby town in Whitman County, aiming it at pedestrians. He was intoxicated at the time. He was arrested and charged with Assault Second Degree. That charge was later reduced to Reckless Driving and defendant entered a deferred prosecution, based on a need for mental health treatment. See CP 285-299 for detailed description of these events. Near the same time (three months after the murder), defendant made a phone call to a jailer in Whitman County, while intoxicated, making some comments about being Jimmy C, or Jimmy Z, and being back in town, and it was going to get real, and other odd comments including having some ammunition that had been planted in his car. RP 1839-1867.

At the trial, Mr. Holdren was called as a rebuttal witness by the State, after defendant testified to the effect that Mr. Holdren must have been the one, along with Frank Lazcano, to have murdered the victim. Mr. Holdren denied knowing anything about it or having had anything to do with it, or having seen his nephews on the night of the murder.

The trial court, in response to the State's motion, limited the cross-examination of Mr. Holdren. The court considered the issues and made a detailed ruling. See detailed offers of proof RP 1738-1747, Court's Ruling RP 1751-1759. The court ruled that evidence of Mr. Holdren's having driven recklessly, and entering a deferred prosecution for mental health issues on that case, would be irrelevant and so not admissible.

The defendant argued to the court that he wanted to cross-examine Mr. Holdren about whether or not the State had granted him any consideration, or any 'deal', in exchange for Holdren's testimony. The court allowed the defense to do so. Although there was no evidence to support such a theory, the court was willing to allow the defense to inquire about it, although it was expected that Mr. Holdren would deny that there was any such deal. See RP 1738-1747, 1751-1759, and CP 285-299. But the defense never did ask Mr. Holdren whether there was any 'deal' between him and the State regarding his testimony. See defense cross-examination of Holdren RP 1837-1867.

Regarding Statements of Co-Conspirator Frank Lazcano

Part of the cover-up occurred when the defendant's brother Frank Lazcano made statements to an investigator named Deputy Tim Cox. The Deputy testified to those statements of Frank Lazcano during the State's case. See RP 1274-1278. The State had earlier briefed the trial court on

this issue, see CP 56-61, and the defense did not further challenge the testimony during the trial.

ARGUMENT

Regarding the Dr. Reynold's testimony:

The forensic pathologist's testimony was not just speculation. It was instead based on the forensic pathologist's training and experience.

For the reasons stated above, the forensic pathologist's testimony was properly allowed. The doctor testified to things in his area of expertise: how different types of bones and tissue react to different bullets. Dr. Reynolds ended up agreeing with the conclusion of the defense expert: that there would have been a chunk of remainder bullet, after the bullet fragmented as it traveled through the body, and that such remainder chunk of bullet was likely still in the body, since there was no sizeable exit wound. But such testimony was not beyond his expertise in how bullets interact with the human body.

Regarding Due Process under Youngblood:

Arizona v. Youngblood, 488 US 51 (1988), requires that the State preserve exculpatory evidence, if they know about it. If potentially exculpatory evidence is not preserved by the State, and if the defendant

can show bad faith on the part of the State, then the failure to preserve potentially useful evidence may constitute a denial of due process.

But in the case at bar, it was the defendant and his co-conspirators who hid the evidence (the body and the AK-47). The defendant could have performed all the tests he wanted to do during those three months following the murder and before the body was discovered. He chose not to. After the body was discovered, he made no request to have the body independently examined. On the other hand, the police and pathologist looked for cause and manner of death. They did not act in bad faith by not trying to find every piece of fractured bullet. Would it have been better, in hindsight, to have done so? Obviously. A violation of due process to not do it at the time of autopsy? No. And, in the cold light of day, is there any reason to believe that had they done so, there would have been any actually exculpatory evidence to be found? No. Not only has the defendant not met his burden to show some sort of bad faith, all the evidence is to the contrary.

Regarding Confrontation Clause:

Mr. James Holdren cross exam:

The defendant, in his Statement of Additional Grounds, argues that the trial court prevented him from asking Mr. Holdren (Uncle Jimmy), whether Mr. Holdren had gotten some special deal or plea bargain or any

consideration in exchange for his testimony. However, as noted above, the trial court did not prohibit such cross-examination. The defense chose not to ask the question. Obviously, since there was no proof whatsoever that there was any such deal (and there was no such deal), there was no actual reason to ask the question. But the initial proposition that the court prevented the question – is just wrong.

As to the things the trial court did limit, the court did prohibit inquiry about a reckless driving incident and a resulting mental health deferred prosecution, as being irrelevant to the case at bar. That analysis is detailed and clear. The trial court was well within its sound discretion to make such a small limitation on the cross of this witness.

Admission of Frank Lazcano statements:

In the early morning hours following the murder, after learning that Whitman County deputies were looking for him, the Defendant's brother Frank Lazcano turned himself in. He gave a partial account of the story, and stated that he dropped the Defendant off in Spokane the day before, and proceeded to find the victim on his own. He also stated that when he heard gunshots, he fled, but didn't know who fired the shots. Later that day, the Defendant talked to a deputy and gave a similar version of events. In addition, the Defendant's girlfriend McKendry Rogers also corroborated the cover-up story by saying the Defendant was in Spokane

with her all day.

The statements from defendant's brother and co-defendant Frank are not hearsay by definition. ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Emphasis added.* The statement by Frank Lazcano is not being sought to prove the truth of the matter asserted, but rather knowledge possessed by the Defendant Dan Lazcano relevant to the Felony Murder portion of the charge, and participation as an accomplice.

When the statements of a non-testifying co-defendant are offered to prove the defendant's state of mind and that the defendant had knowledge of a crime, those statements are not hearsay and are not contrary to *Crawford v. Washington*. *State v. Theders*, 130 Wn.App. 422, 425 (2005). In *Thedars*, the defendant housed Larry and Angela Graves. *Id.* at 426-27. Angela graves was not happy in the marriage and asked for a dissolution. *Id.* Angela Graves was being supported by her friend Valerie Anderson. *Id.* Larry Graves did not want the divorce and didn't like the fact that Ms. Anderson supported his wife in pursuing the dissolution. *Id.*

One evening, Larry Graves and the defendant Theders left in Theders' pick-up to go look for a dog bed for a new puppy. *Id.* Later, Larry Graves called his wife Angela to say that the store was closed, and they were much farther away looking at another store. *Id.* Angela Graves testified that she heard the defendant Theders in the background of the call. *Id.* Theders testified that he had a cold and did not pay attention to the call from Larry to Angela. *Id.* While they were supposed to be shopping, Ms. Anderson was attacked by a man in dark clothes and a ski mask who put a knife to her throat. *Id.* Ms. Anderson sustained several severe cuts to

her throat and face, and recognized Larry Graves' voice when he told her to be quiet. *Id.* The attacker fled to a slow moving pick-up truck when a neighbor responded to Ms. Anderson's screams. *Id.* Sometime after the attack, the defendant Theders and Larry Graves returned home together. *Id.* at 428. Later, after Graves was arrested, Graves told the police that he was out shopping with Theders. The defendant Theders was later questioned, and told the police an almost identical story, also stating that they were out shopping for the dog bed and had gone to several stores. *Id.* Shortly after the first statement, the police informed Theders that they had a witness who placed him at the scene too, and after a perjury advisement, he changed his story, admitting that he had driven Graves to Ms. Anderson's house. *Id.*

The court in that case ruled that Graves' cell phone statements made to his wife, as well as the custodial exculpatory statement at the police station, were admissible as they were not hearsay. *Id.* at 430-31. In a pre-trial hearing, the trial court found that the defendant (Theders) was present when his co-defendant (Graves) made the statement to his wife on his cell phone. *Id.* "The Statements were not offered to prove that (Graves) and Theders were actually where they said they were, but rather to show Theder's knowledge and agreement to Larry's false statement as to their location and for the development of the false alibi." *Id.* "[T]he *Crawford* Court expressly excluded certain types of statements from its holding, 'that by their nature [are] not testimonial-for example, business records or statements in furtherance of a conspiracy.'" *Id.* at 433. The *Theders* court found that the appropriate definition of non-hearsay was similar to the *Alvarez* case, where the testimony of a non-testifying co-defendant was admissible if it tended to establish the defendant's knowledge of criminal activity. *Id.* at 433, citing *State v. Alvarez*, 45 Wn.App. 407, 410 (1986). In

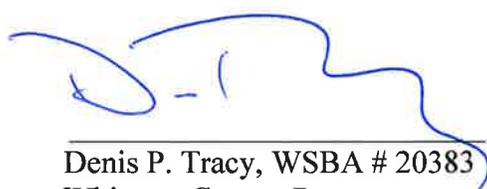
addition, the *Theaders*' court differentiated the facts in that case from *United States v. Bruton*, where the statements of the co-defendant directly implicated the defendant and were in fact hearsay. *Id.* at 431.

In order for the State to prove Felony Murder, the state had to prove that the Defendant was an accomplice of Frank Lazcano in a felony (the burglary at the Backman residence, the house where the victim was found and killed on December 27, 2011). Just as in *Theaders*, both defendants gave statements that actually exculpated Daniel entirely by attempting to remove the notion that he was present with Frank that evening. And, just as in *Theaders*, the State should be allowed to use this statement to demonstrate the Defendant's knowledge about the actual events and to demonstrate the conspiracy to develop a false alibi.

CONCLUSION

For the above reasons, the State respectfully requests that this court deny Mr. Lazcano's appeal issues in his Statement of Additional Grounds and affirm the decision below.

Dated this 21 day of October 2015.



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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,

Court of Appeals No. 32228-9-III
No. 12-1-00051-9

v.

AFFIDAVIT OF DELIVERY

DANIEL CHRISTOPHER LAZANO,
Defendant,

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

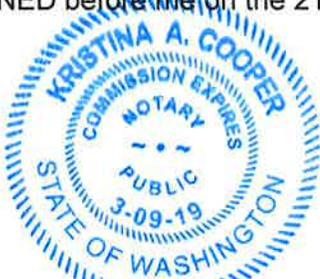
AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the 21ST DAY OF OCTOBER, 2016, I caused to be delivered a full, true and correct copy(ies) of the original **SUPPLEMENTAL BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

- EMAILED TO DENNIS MORGAN AT NOBDLSPK@RCABLETV.COM
- MAILED TO DENNIS MORGAN AT PO BOX 1019, REPUBLIC, WA 99166-1019

DATED this 21ST DAY OF OCTOBER, 2016.

Amanda Pelissier
AMANDA PELISSIER

SIGNED before me on the 21ST DAY OF OCTOBER, 2016.



Kristina A. Cooper
NOTARY PUBLIC in and for the State of
Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2019