FILED
May 2, 2016
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33769-3-III

STATE OF WASHINGTON, Respondent,

v.

ANTHONY J. TUDOR, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....10

VI. CONCLUSION.....16

DECLARATION OF SERVICE 17

AUTHORITIES CITED

Federal Cases

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973).....10

Holmes v. South Carolina, 47 U.S. 319, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006).....10, 11

State Cases

In re Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994).....11

State v. Downs, 168 Wash. 664, 13 P.2d 1 (1932).....11

State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014).....10, 12, 13, 14, 15

State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996).....13, 15

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994).....11

State v. Starbuck, 189 Wn. App. 740, 355 P.3d 1167 (2015).....12

State v. Strizheus, 163 Wn. App. 820, 262 P.3d 100 (2011).....10, 11

State v. Wade, 186 Wn. App. 749, 346 P.3d 838 (2015).....12

I. INTRODUCTION

Anthony Tudor was convicted of felony murder in the shooting of Ed Giesbrecht, even though no physical evidence connected him to the crime, he did not match the eyewitnesses' physical descriptions of the shooters, and his mother's testimony placed him in her kitchen at the time of the killing. At trial, Tudor sought to introduce a photograph of a third party, A.J. Lankford, that had been recognized by the victim's girlfriend as having been present at the victim's home the morning of the shooting with a friend who also looked like one of the shooters. The eyewitness to the murder also identified Lankford as appearing very similar to the shooter. Although Tudor had no known relationship with the victim, Lankford did; he admitted buying drugs from the victim on several occasions. On the night of the murder, while tracking potential suspects, police also located footprints in the fresh snow leading toward Lankford's parent's house.

The trial court refused to admit the photograph of Lankford and prohibited Tudor from arguing that Lankford was the shooter. Because Tudor presented sufficient circumstances establishing a non-speculative link between Lankford and the killing, the trial court's rulings deprived him of his right to present a defense under the U.S. and Washington State constitutions. The error was not harmless because the State's case against Tudor was not overwhelming, and the proffered evidence gave rise to a

reasonable doubt as to Tudor's involvement. Accordingly, Tudor's conviction should be reversed and a new trial should be granted.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in refusing to allow Tudor to present evidence and argument that another person committed the crime.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When a third party has an existing relationship with a murder victim and the suspected shooter, had visited the murder victim the morning of the shooting, matched the description of one of the suspects, and whose photograph was identified as similar to the suspect by the only eye-witness to the shooting, did the trial court abuse its discretion and deprive the defendant of his constitutional right to present a defense by refusing to allow Tudor to argue that the third party was the perpetrator? YES.

IV. STATEMENT OF THE CASE

On the evening of January 4, 2014, two men kicked down Ed Giesbrecht's door and shot him in the head, killing him. CP 33; II RP 212, 229-30. Giesbrecht's girlfriend, Terri Smilari, had just gone to bed when

she heard a loud noise and Giesbrecht's friend, Gary Wright, yelling that Giesbrecht had been shot. II RP 217-19. Wright heard somebody pounding on the door before it was violently kicked in and a man entered with a firearm and shot Giesbrecht in the head. II RP 229-30. The shooter looked straight at Wright with wide eyes, but Wright could not tell police who he was. II RP 233-34. He described the man as medium height with a dark complexion and dark brown eyes, wearing a dark hoodie, a ball cap turned backward, and a medium blue bandana pulled up over the lower part of his face. II RP 232, 235-36.

Neighbors who heard noise at the apartment saw two people leaving. II RP 248-49, 252. One neighbor said that one of them looked like a kid named Steven who used to go to Giesbrecht's house. II RP 250. Smilari recalled that Steven had come to Giesbrecht's house that morning with somebody else and was trying to sell Giesbrecht gas for a boat, but Giesbrecht told them no and to stop bringing stuff to his house. II RP 221.

Police responded and contacted a male suspect at a middle school near Giesbrecht's home. II RP 272, 274. A gun holster was found in the bushes a few feet away, which drew the attention of the responding officers because although it was a very cold night, there was no frost or snow on the holster. II RP 278, 280, 284. The male suspect was older

than the description given of the two males seen leaving Giesbrecht's apartment and did not have his face covered, but there was a blue bandana around his neck and he was intoxicated. II RP 281-82, IV RP 712, 771. The man, identified as Richard Klepacki, was questioned and arrested. II RP 349.

Police next decided to investigate the residence where Klepacki was staying. II RP 249. Once there, they asked to speak with Anthony Tudor and informed him there had been a shooting. II RP 292-93. Tudor denied knowing Giesbrecht or anybody at his apartment, and said he had been home watching TV with Klepacki all night. II RP 295-96. Tudor initially denied leaving the house the previous evening, but when police confronted him with a video they had recovered showing him and Klepacki buying alcohol at Yoke's at about 8:00 p.m the night before, he admitted they had done so, stating that they drank a lot the night before. II RP 296-98, 375. Tudor said that Klepacki had gone outside and was pacing around while on his phone. II RP 298.

A few days after the initial response, police recovered a shell casing from Giebrecht's home that his brother found in the front yard. II RP 199, 303, 401. Nearly three weeks after the shooting, a child located a loaded gun in an alley at the base of a telephone pole in the neighborhood

near the Tudor home. II RP 383-84, IV RP 633-34, 636. Over the next several months, police analyzed a quantity of physical evidence including Tudor's clothing and shoes, fingerprints, shoe prints, blood evidence, the bullet and shell casing recovered from Giesbrecht's home, and DNA evidence from a variety of sources. Ultimately, Tudor and Klepacki were excluded as contributors to prints on the door of Giesbrecht's home as well as DNA on the found firearm, and test results did not show any of Giesbrecht's blood present on either of them. III RP 546, 571, IV RP 770. Police attempted to compare Tudor's shoes to the prints found on Giesbrecht's front door but were unable to determine that they matched. III RP 599-601; IV RP 774. However, they did determine that the bullet that killed Giesbrecht and the casing found at his home were fired from the gun that was located weeks later. IV RP 629.

Tudor was ultimately arrested on the basis of statements he allegedly made to others. IV RP 783. Mackenzie Griffin, a family friend who had a brief sexual relationship with Tudor, claimed that he called her the night of the shooting to say that he had gotten into some trouble. IV RP 692-94, 700. According to Griffin, Tudor told her that Klepacki went to get money from somebody who owed him and they beat him up. IV RP 697. Later, on speaking with Tudor's sister, she learned that someone had been killed. IV RP 698. Another witness, Jerrie Erickson, contacted

police to report that Tudor told her he and his mom's boyfriend went to the house of a guy who owed them money for drugs and he kicked the door down. V RP 824-25, 829. Erickson recalled Tudor saying that his mom's boyfriend shot the guy over his shoulder with a .45 caliber handgun, which would never be found. V RP 828, 830. He then ran home and kicked his shoes under his mom's bed to make it look like the boyfriend did it. V RP 830.

At trial, the defense sought to argue that another initial suspect, AJ Lankford, had committed the crime. II RP 388. Lankford was an old friend of Tudor's who was also acquainted with Klepacki. IV RP 672-73. Unlike Tudor, Lankford also had a relationship with Giesbrecht and claimed to have bought drugs from him. IV RP 674. Lankford admitted going to Giesbrecht's house the morning he was killed to drop off his friend Steve and picked him up again shortly afterward. IV RP 674-76, 682. This was consistent with Smilari's recollection that Steve had visited the apartment that morning to try to sell gas to Giesbrecht. II RP 221. In addition, Lankford matched the description given by Wright, the eyewitness, as a man with a dark complexion and brown eyes, while Tudor did not. CP 97. Wright acknowledged that he had previously seen a picture of Lankford and identified similarities in his appearance with the gunman. II RP 237-40, 337. The defense claimed that Wright had

identified Lankford as the shooter in a pretrial interview and offered an impeachment witness to establish it. II RP 355.

Furthermore, one of the neighbors who saw the suspected shooters leaving the apartment thought one of them looked like Steve. II RP 250. Lankford provided an alibi that was contradicted in part by the movement of his cell phone into Deer Park, when he claimed he had been north of town all night. CP 97-98. And finally, in the area of the middle school, which is where police detained Klepacki, police found shoeprints in the fresh snow that appeared to be running in the direction of Lankford's parents' house. II RP 276, IV RP 663-64, 761.

The trial court, holding that more than mere speculation was required to argue that another suspect committed the crime, refused to permit Tudor to present the defense. II RP 358-59, 363. Tudor then presented a number of witnesses to contradict portions of the State's case. Kari Wardlow, who picked Tudor up the day after the shooting and took him to the cabin where Erickson was staying, testified that contrary to Erickson's testimony, they were only at the cabin for a day and Erickson was drunk. V RP 862, 864, 866, 868-69. She took Tudor back to the cabin the following week, but Erickson was not there that night. V RP 870-71. Cheyeanne Woods, Tudor's sister, testified that they spoke on the

phone the night of the shooting about Tudor staying home to watch TV and drink. V RP 877-79. She also claimed that she had been friends with Griffin in high school but they drifted apart because Griffin was getting involved with drugs. V RP 881-82. Tracy Tudor, Tudor's mother, confirmed that she, Tudor and Klepacki were at home drinking beers the night of the shooting, and she went to bed around 8:00 or 8:30. V RP 885, 888, 890-91. She got up at about 5 or 10 minutes after 9:00 to use the restroom and saw Tudor at the table, using his phone. V RP 892.

Following these witnesses, Tudor called Jamie Straub, who was present for a defense interview with Gary Wright. V RP 907, 909. Upon being shown a photograph marked as D-101, Wright got upset and his demeanor changed. V RP 910, 912. Wright said it could be him, it was pretty close. V RP 911. The defense also recalled Terri Smilari, who said that she thought the gentleman in the photograph, who she didn't recognize when she first testified, was at Giesbrecht's home with Steven the morning of the shooting. V RP 933-34. They seemed irritated when Giesbrecht said no, he was tired of them bringing stuff for him to buy, especially when it was stolen. V RP 935.

Tudor testified on his own behalf, stating that shortly after he went to the store with Klepacki to buy beer the night of the shooting, he

received a call that his girlfriend had been in an accident and was in the hospital. V RP 937, 943-45. He made several phone calls that evening including to Lankford and Griffin. V RP 947-50. Afterward, he went to sleep and was awoken when the police arrived the next morning. V RP 951-52. After the police left, he called Kari Wardlow and she took him to another person's house where a person was sitting on the couch by herself, drinking. V RP 959-60. Tudor did not speak with anybody and left the next morning. V RP 960-61.

The trial court refused to admit D-101, which was a photograph of Lankford. II RP 337, V RP 922. The trial court also refused to allow Tudor to argue in closing that the second person at Giesbrecht's house was Lankford, not Tudor. V RP 921.

The jury convicted Tudor of murder and answered "yes" to the firearm special verdict. VI RP 5. The trial court sentenced him to a total term of 300 months' incarceration followed by 36 months of community custody. V RP 1038, CP 174-75. Tudor now appeals. CP 190.

V. ARGUMENT

The sole issue on appeal is whether the trial court abused its discretion and violated Tudor's constitutional right to present a defense by refusing to allow him to argue that Lankford was the second person involved in the shooting of Giesbrecht rather than Tudor.

A defendant has a right of constitutional magnitude to present evidence supporting his defense. *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973)); *State v. Strizheus*, 163 Wn. App. 820, 829-30, 262 P.3d 100 (2011) (right to present a defense is protected by the Sixth Amendment to the U.S. Constitution and article 1, section 22 of the Washington Constitution). This right establishes limits on the authority of courts to exclude evidence in a criminal trial. *Holmes v. South Carolina*, 47 U.S. 319, 324, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006).

Nevertheless, evidence can be excluded if its probative value is substantially outweighed by its potential to prejudice the jury. *Holmes*, 47 U.S. at 326. In evaluating whether a defendant's proffered evidence that another suspect committed the crime is unduly prejudicial, the court must consider the effect of that evidence alone and refrain from allowing its

evaluation of the strength of the State's case to determine admissibility. *See id.* at 329, 331. Evidence that another person simply had the opportunity to commit the crime, without some proof of facts or circumstances that would tend to clearly point to another as the guilty party, does not satisfy the foundational requirements to argue that another person committed the charged offense. *Strizheus*, 163 Wn. App. at 830; *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932). As such, the determination whether such evidence is improperly excluded is necessarily fact-specific.

The evidentiary link with the third party must be more than speculative. *Downs*, 168 Wn.2d at 667-68. Thus, evidence that a known burglar was present in the city of Seattle the night a burglary was committed is insufficient to create an inference that he actually did so. *Id.* at 666-68. Evidence of separate assaults committed by others, without evidence tending to connect them with the charged assault, was too speculative to warrant admission. *State v. Russell*, 125 Wn.2d 24, 76-77, 882 P.2d 747 (1994). Evidence that other individuals refused to cooperate with an investigation by providing DNA samples or submitting to a polygraph examination did not tend to point to them as the perpetrators. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 315–16, 868 P.2d 835 (1994). Evidence that an ex-boyfriend had assaulted the victim in the past

and threatened her, without evidence tending to show he was present on the night of the crime, did not establish a sufficient connection with the crime. *State v. Wade*, 186 Wn. App. 749, 765-67, 346 P.3d 838 (2015). And evidence that the victim had enjoyed sexual relations with other men and received sexually explicit tests from another man did not tend to establish that any of those other men were involved with her murder. *State v. Starbuck*, 189 Wn. App. 740, 754-55, 355 P.3d 1167 (2015).

However, the requirement to establish a link with the crime does not require the defendant to present direct evidence that another is guilty; circumstantial evidence is enough. *Franklin*, 180 Wn.2d at 381. Thus, when an eyewitness account placing a crime victim with another person undermines the State's version of events, a connection with the crime has been established. *State v. Maupin*, 128 Wn.2d 918, 927-28, 913 P.2d 808 (1996). When the defendant was in a relationship with the victim as well as another woman, and the other woman owned the laptop from which harassing e-mails were sent and Craigslist ads were posted, combined with circumstances that the other woman had sent harassing texts and e-mails to the victim in the past, had accessed the defendant's e-mail in the past, and was unhappy with the defendant's relationship with the victim, an adequate link was established with the crime such that exclusion of

evidence about the other woman's potential involvement was constitutionally deficient. *Franklin*, 180 Wn.2d at 373-77, 383.

Here, there was sufficient evidence to establish a non-speculative link between Lankford and the crime to permit Tudor to (1) introduce the photograph of Lankford that Wright had identified as being similar to one of the men at Giesbrecht's home that night, and (2) to argue that Lankford, not Tudor, was the second person involved with the shooting. Unlike Tudor, Lankford had both motive and opportunity. First, Lankford knew Giesbrecht and admitted buying drugs from him, while Tudor had no known relationship with Giesbrecht at all. IV RP 674. Lankford had gone to Giesbrecht's home with Steve the morning of the shooting and left, annoyed, when Giesbrecht did not want to buy the boat gas they were trying to sell him. II RP 221, IV RP 674-76, V RP 933-35. Lankford matched the eyewitness's description of the shooter, which Tudor did not, and a neighbor who saw the men leaving after the shooting thought one of them looked like Steve. CP 97, II RP 250. The eyewitness himself thought the photograph of Lankford was similar to the shooter, and during a pretrial interview indicated that Lankford was probably the shooter. II RP 237-40, 337, V RP 910-12. And footprints in the fresh snow near the middle school where Klepacki was arrested showed somebody had

recently run away in the direction of Lankford's parents' house. II RP 276, IV RP 663-64, 761.

Taken as a whole, these facts establish more than a speculative possibility that Lankford could have been involved. They provide a direct link with the crime by placing him at the victim's home the morning of the shooting with another individual who looked like one of the shooters. Additional circumstantial evidence tending to show Lankford's involvement consisted of the footprints in the snow and the physical similarities with the shooter identified by the eyewitness. These facts draw a far more credible link between Lankford and the shooting than the tenuous and remote connections shown in *Downs*, *Starbuck*, *Wade*, *Russell*, and *Lord*. While perhaps insufficient to prove Lankford guilty of the murder beyond a reasonable doubt, this was not Tudor's burden to present his defense – he needed only cast reasonable doubt on his own guilt. *Franklin*, 180 Wn.2d 381.

Because the evidence established a sufficient link between Lankford and the murder to permit Tudor to argue Lankford was the real perpetrator, the trial court erred in refusing to admit the photograph of Lankford shown to Wright and Smilari and in not permitting Tudor to argue Lankford was the shooter. Because the error was of constitutional

magnitude, it requires reversal unless the State proves that the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d 382. The error is harmless only if the reviewing court is satisfied beyond a reasonable doubt that any reasonable jury would have reached the same result even if the evidence had been admitted and the argument allowed. *Maupin*, 128 Wn.2d at 928-29. The error is presumed prejudicial, and the State bears the heavy burden of proving harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

Here, the evidence against Tudor was far from overwhelming. There was no physical evidence connecting him to the scene or to the firearm used in the shooting. He did not match the description of the individuals involved. His mother's testimony, if believed, placed him at the kitchen table of his house on his phone at the time of the shooting. Without the admission of D-101, the proffered photograph of Lankford, Tudor was unable to argue to the jury that Lankford was the person Wright had believed looked very similar to the shooter. This information likely would have been of enhanced significance to the jury in light of the neighbor's recollection that one of the shooters looked like Steve, and Lankford had gone to Giesbrecht's house that morning with Steve and left irritated after Giesbrecht refused to buy the gas they wanted to sell him. The information also likely would have influenced the weight the jury

gave to the footprints in the snow, as well as the fact that Lankford's original alibi was contradicted by his phone records.

Because the jury, having been given an opportunity to consider Tudor's proffered evidence and argument, may have reached a different result, the error is not harmless and the conviction should be reversed.

VI. CONCLUSION

For the foregoing reasons, Tudor respectfully requests that the court REVERSE his conviction and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 2nd day of May, 2016.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing a copy in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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And, pursuant to prior agreement of the parties, by e-mailing a copy to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 2nd day of May, 2016 in Walla Walla, Washington.

Breanna Eng