

NO. 73703-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK KOLANOWSKI,

Appellant.

FILED
Aug 29, 2016
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Roger Rogoff, Judge

REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE RECORD IS SUFFICIENT TO ESTABLISH THAT DEFENSE COUNSEL'S DEFICIENCY IN FAILING TO AUTHENTICATE IMPEACHMENT EVIDENCE PREJUDICED THE OUTCOME OF KOLANOWSKI'S TRIAL.

In his opening brief, Kolanowski established his defense counsel was deficient in failing to authenticate a Facebook post that S.W.-H. made at 2:49 a.m. on February 8, a time when she claimed she did not have access to her phone because of the ongoing sexual assault. Br. of Appellant, 21-24. Relying on State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995), the State argues in response that the record on appeal is inadequate to show deficiency or prejudice. Br. of Resp't, 10.

The State reliance on McFarland is misplaced. In McFarland, the court of appeals held the record was insufficient to determine whether McFarland was prejudiced by his defense counsel's failure to move to suppress evidence based on an illegal arrest. 127 Wn.2d at 329-30. Specifically, the court of appeals could not discern from the record whether the trial court would have granted a motion to suppress. Id. at 330. The court of appeals reached the same result in the consolidated case, State v. Fisher, concluding it could not determine from the record on appeal whether a motion to suppress would have been granted if made. Id. at 332. The supreme court adopted the court of appeals' conclusion that the record was

inadequate to determine whether McFarland and Fisher were prejudiced by their attorneys' failure to move for suppression. Id. at 337-38.

McFarland is readily distinguishable from Kolanowski's case. The record demonstrates defense counsel possessed a screenshot of a Facebook post S.W.-H. made at a time she claimed she did not access Facebook, significantly undercutting her credibility. RP 107-13, RP 857. The State faults defense counsel for not making the Facebook post part of the record. Br. of Resp't, 11. The State essentially attempts to impugn the integrity of defense counsel by claiming, "[a] date and time of February 8 at 2:49 a.m. purportedly appeared somewhere on the page." Br. of Resp't, 11 (emphasis added). Given that defense counsel is an officer of the court, with a duty of candor, the State's insinuation is unfounded. RPC 3.3(a); State v. White, 94 Wn.2d 498, 503, 617 P.2d 998 (1980). Indeed, neither the trial court nor the prosecutor called into doubt defense counsel's description of it. This Court can rely on defense counsel's description of the Facebook page.

McFarland is further distinguishable because the record in Kolanowski's case demonstrates the trial court would have admitted the Facebook post had it been properly authenticated. The trial court made numerous efforts to help defense counsel get an authenticating witness: "Let's work on getting you the witness that you need from Facebook." RP 119. The court suggested defense counsel call one of the detectives or

contact the Facebook office in Seattle. RP 622-23. The court told defense counsel, “Really all that I am looking for in order to address the issue of authentication or relevance . . . is a witness who says, ‘This is how the posting date time works, generally.’” RP 298. This demonstrates, unlike McFarland, the trial court would have admitted the Facebook post had defense counsel authenticated it.

The State further claims “not even the State with its law-enforcement power could get answers from Facebook.” Br. of Resp’t, 11. In so arguing, the State misconstrues the record. Defense counsel explained that law enforcement must serve a judicial subpoena on Facebook before the company will turn over user account records. RP 109-10, 299-300. Defense counsel provided a sample subpoena to the original prosecutor on the case, who provided it to Detective Lorette. RP 109-10. Defense counsel informed the court he had been following up “approximately biweekly” to ask if Detective Lorette had submitted the subpoena.¹ RP 110. But Lorette never submitted the subpoena to Facebook, and admitted as much on cross-examination. RP 110, 1104-05. Contrary to the State’s assertions, then, it took no action to help defense counsel get the necessary information—

¹ After these repeated attempts, Defense counsel informed the court, “[a]t this point I think it goes to the bias of Detective Lorette.” RP 110. Defense counsel later reiterated, “I am looking at this as almost a Brady situation where the state is aware of something that is potentially exculpatory and inconsistent with their primary witnesses’ testimony,” but still made no “effort to submit a subpoena.” RP 299-300.

whether by simple inaction or purposeful stonewalling. This is likely one of the reasons why the trial court set the authentication bar so low.

2. THE STATE IS INCORRECT THAT ITS EXPERT WOULD HAVE BEEN ALLOWED TO TESTIFY ONLY THAT THERE WAS BLOOD ON KOLANOWSKI'S SWEATSHIRT, LEAVING THE JURY TO SPECULATE AS TO WHOSE BLOOD IT WAS.

One of the State's DNA experts, Megan Inslee, testified blood on Kolanowski's sweatshirt "matched" his DNA, without providing an estimated probability that the same genetic profile would appear in the population. RP 700. Defense counsel failed to object, despite clear Washington law that DNA match testimony is inadmissible without a probability estimate. Br. of Appellant, 33-37.

In response, the State argues defense counsel made a tactical decision in not objecting because, "[h]ad Kolanowski objected and succeeded in suppressing the evidence of a DNA 'match,' the jury would have been left with mysterious blood on Kolanowski's sweatshirt." Br. of Resp't, 14. The State claims "any rational defense attorney would be eager to point out that the blood on his sweatshirt matched only him, and not the victim or anyone else." Br. of Resp't, 14.

The State again misses the mark. For expert testimony to be admissible, it must meet the two-part test under ER 702: (1) the witness must be qualified as an expert and (2) the testimony is helpful to the trier of fact.

State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996). Expert testimony is “helpful” only if it does not mislead the jury. State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). Expert testimony is likewise subject to ER 403, which specifies relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”

If Inslee had testified only that she found blood on Kolanowski’s sweatshirt, without identifying the source of that blood, her testimony would have been misleading and unfairly prejudicial. The State is correct the jury would have likely speculated as to whose blood was on Kolanowski’s sweatshirt. But this is precisely the problem. Such testimony would allow impermissible speculation, and surely the prosecutor would have been prohibited from arguing the blood belonged to anyone other than Kolanowski. See State v. Guilliot, 106 Wn. App. 355, 363, 22 P.3d 1266 (2001) (expert testimony on diminished capacity inadmissible absent a link between hypoglycemia symptoms and the defendant’s mental capacity at the time of the crime); cf. State v. Stenson, 132 Wn.2d 668, 717-18, 940 P.2d 1239 (1997) (holding chemical test for the presence of blood was admissible when accompanied by expert’s conclusion that the blood was consistent with the victim’s blood). This is particularly true given the gap in time between the alleged assault and Kolanowski’s arrest.

Without a probability estimate, Inslee's "match" testimony was inadmissible, and without the "match" testimony, Inslee's testimony about blood on Kolanowski's sweatshirt would be misleading. Her entire conclusion regarding the blood on Kolanowski's sweatshirt would therefore be inadmissible under both ER 403 and ER 702. The State does not get the benefit of its own expert's deficiency.

Kolanowski's attorney ultimately failed to authenticate critical impeachment evidence and failed to object to prejudicial DNA testimony. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under [Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]." Hinton v. Alabama, 571 U.S. ___, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014); accord In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). Such is the case here. This Court should accordingly reverse and remand for a new trial.

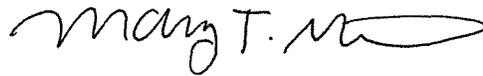
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse Kolanowski's convictions and remand for a new trial.

DATED this 29th day of August, 2016.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Mary T. Swift", written over a horizontal line.

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