No. 12-108795-A

IN THE
COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MICHAEL ANDREW PAULSON
Defendant-Appellant

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Saline County, Kansas
The Honorable Rene S. Young, Judge
District Court Case No. 2010 CR 804

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The Defendant-Appellant, Michael Andrew Paulson, submits this reply in response to Appellee's Brief received by the Court on October 16, 2014.

I. The evidence in this case, viewed in the light most favorable to the Defendant, warranted an instruction on heat of passion voluntary manslaughter because there was sufficient provocation when the Defendant learned that his wife was having an extramarital affair and the expert psychological testimony established that Defendant experienced an intense emotional excitement causing him to act upon impulse without reflection.

The State, relying upon State v. McClanahan, 254 Kan. 104, 114, 865 P.2d 1021 (1993), and State v. Follin, 263 Kan. 28, 947 P.2d 8 (1997), argues that the Defendant learning his wife was having an affair was insufficient provocation to warrant a voluntary manslaughter instruction. The State further argues that if heat of passion voluntary manslaughter instruction had been given, it would have constituted reversible error under State v. Gooding, No. 110,352, 2014 WL 4933051, (Kan. App. Oct. 3, 2014). (Appellee's Brief, p. 34-35).

The State's reliance upon State v. McClanahan, 254 Kan. 104, 114, 865 P.2d 1021 (1993), is misplaced because it is factually distinguishable. In McClanahan, there was no evidence the defendant had just learned his estranged wife was actually having an affair with another man. 254 Kan. at 115. And unlike State v. Gooding, No. 110,352, 2014 WL 4933051, (Kan. App. Oct. 3, 2014), in which a "sudden quarrel" instruction was at issue, the heat of passion instruction was requested repeatedly by the defense here, so the Defendant could now hardly object had the jury found the Defendant guilty of manslaughter based on that theory. And clearly, unlike Gooding, a factual basis for such an instruction exists here.

In State v. Follin, 263 Kan. 28, 947 P.2d 8 (1997), the defendant learned his wife was having an affair after listening to a tape-recorded telephone call between his wife and another person. Afraid he was going to lose his entire family, the defendant took his daughters to a lake, where, several hours after learning of his wife's infidelity, he stabbed to death both of his daughters. The Kansas Supreme Court held that a voluntary manslaughter instruction was not warranted. In reaching that conclusion the Court held:

> If believed, his testimony might have supported a finding that his murderous actions occurred while he suffered some unusual mental state. It also might have supported a finding that his hearing the taped telephone conversation of his wife ultimately produced that mental state. Between his listening to the tape and his murdering the girls, however, many hours passed in which Follin methodically adhered to routine and interacted with his girls in a manner that they did not seem to find unusual. Thus, immediacy and spontaneity, which would seem to be essential elements of the form of voluntary manslaughter defined in K.S.A. 21-3403(a), is wholly missing in the present case.

263 Kan. at 37.

Follin supports the Defendant's contention that learning about a spouse's unfaithfulness may be sufficient provocation to produce the requisite mental state to support a voluntary manslaughter

instruction. In Follin, however, the passage of several hours between the defendant learning about his wife's affair and killing his children negated the requirement of voluntary manslaughter that the defendant must upon impulse without reflection. In the present case, however, unlike Follin, there was evidence that Defendant stabbed his wife within seconds of learning that her relationship with Daniel Fouard was sexual. (R. XXXIX, 2523; XXXIX, 2637).

The State suggests there was a sufficient cooling off period because the conversation that took place in the Assaria residence between Jessie and Valerie (wherein they discussed Valerie's affair) was minimal, and eight minutes had passed between Valerie's last telephone conversation with Fouard and the stabbing. (Appellee's Brief, p. 36).

First, the State is arguing the evidence in the light most favorable to the State. That is not the proper standard this Court applies when reviewing the denial of a requested jury instruction. The evidence must be viewed in the light most favorable to Defendant.

There was evidence that the Defendant learned of Valerie's affair either from hearing Valerie's telephone conversation with Fouard or hearing Valerie's conversation with Jessie. (R. XXXIX, 2523). The length of those conversations is irrelevant. The point is that the Defendant finally learned of Valerie's adulterous affair from one or both of those conversations.. In addition, according to the Defendant's evidence, the stabbing took place immediately after Defendant learned of the affair.

In addition to Follin, there are more recent Supreme Court cases supporting the Defendant's contention that learning about an adulterous affair may constitute sufficient provocation to support a voluntary manslaughter instruction. In State v. Story, __ Kan. __, 334 P.3d 297 (2014), the evidence showed that a defendant, after learning her former girlfriend had "company," came over

to the girlfriend's house and shot and killed the victim. The defendant argued that she was entitled to a heat of passion voluntary manslaughter instruction. The Supreme Court in Story defined "heat of passion" as "any intense or vehement emotional excitement of the kind prompting violent and aggressive action . . .The hallmark of heat of passion is taking action upon impulse without reflection. It includes an emotional state of mind characterized by anger, rage, hatred, furious resentment, or terror." 334 P.3d at 304. The Supreme Court in Story then rejected the defendant's argument, and held that there was insufficient evidence of provocation. The Court held:

> Any objective provocation Story was reacting to would have had to have occurred before she arrived at the apartment. Before Story arrived, all she knew was that Bartley had "company." *There was no evidence that Story knew that Bartley and her "company" were or had been intimately involved* or even that Story's relationship with Bartley was such that fidelity could be expected.

334 P.3d at 304-05 (Emphasis added).

The italicized language from Story suggests that, if there had been evidence that the victim and the defendant's girlfriend "were or had" been intimately involved, there may have been sufficient provocation to warrant a voluntary manslaughter instruction.

Further, in State v. Brown, __ Kan. __, 331 P.3d 797 (Kan. 2014), the defendant argued that a report of a sexual assault was sufficient provocation for the attack on the victim. The Supreme Court rejected that argument as follows:

> We find Quartez' argument to be unavailing for at least two reasons: The evidence did not establish that Quartez' emotional state reached the level to be described as a heat of passion; and, even if the alleged provocation initially generated a heat of passion, there was a sufficient cooling-off period to preclude the defense.

331 P.3d at 813.

Again, the language from Brown suggests that a report of a sexual encounter could be sufficient provocation if there had been evidence that the report generated the requisite emotional state for heat of passion.

In the present case, there was expert psychiatric evidence from both the defense and prosecution experts that the Defendant experienced an intense, emotional excitement, provoked from Valerie's admission of adultery, and his emotional state was such that it would cause an ordinary person to act on impulse without reflection. (R. XXXIX, 2523; XL, 2812, 2837-40).

The State's expert, Dr. William Logan testified that the Defendant experienced a "rage episode" when he learned of the infidelity and stated his expert opinion that the Defendant's attack was not disproportionate, considering his degree of emotion when hearing his wife had been sexually intimate with another man. (R. XL, 2837.)

Accordingly, when the evidence in this case is viewed in the light most favorable to the Defendant, there was sufficient evidence that would have supported a voluntary manslaughter instruction. There was evidence the revelation of infidelity constituted a sufficient provocation and that Defendant experienced an intense emotional excitement causing him to act upon impulse without reflection. The district court's refusal to instruct on voluntary manslaughter constitutes reversible error.

II. The prosecutor committed misconduct during closing argument when she made numerous comments that were not supported by the record.

The State argues the prosecutor's comment that Valerie denied her affair with Fouard "perhaps out of fear" was a reasonable inference from testimony that she got paled and quiet when earlier confronted about going out with Chuck Beemer. (Appellee's Brief, p. 37).

First, there was no testimony that Valerie showed fear of any kind in the earlier confrontation about going out with Beemer. Further, there was absolutely no evidence that the denial of her affair with Fouard was based on fear. The prosecutor's statement is complete conjecture and not based on any evidence or any reasonable inference from the evidence. The State fails to point out in its brief that the objection to this statement was sustained by the district court. (R. XLI, 3046). Apparently, the district court did not share the State's opinion that this statement was a "reasonable inference" from the evidence.

The State next argues the prosecutor's comment that the document taken from Defendant's computer was not a "Bible Study" was a reasonable inference from the evidence because the title of the document was "Personal Victory." (Appellee's Brief, p. 37).

The Defendant is at a loss to understand how it is reasonable to infer from the title of the document that this was not a Bible study. The contents of the document taken from Defendant's computer demonstrated that it had been prepared as part of a Sunday school lesson. (R. XXV, 74). The prosecutor's statement that this document was not based upon a study of the Bible was a misstatement of the evidence.

Next, the State argues the prosecutor's comment that the presence of Valerie's DNA on the knife established that she was stabbed last was a reasonable inference from the evidence at trial. Further, the State asserts that Defendant mischaracterized the prosecutor's argument that it was "common sense" Valerie was stabbed last based upon the DNA evidence. (Appellee's Brief, p. 38).

The record does not support the State's position. The prosecutor's theory was that, after the Defendant attacked Jessie, he came back to the bathroom to make sure Valerie was dead; consequently, under the prosecutor's theory, Valerie was stabbed last. (R. XLI, 3113-14).

MS. TROCHECK: And why do we know she was the last person who was attacked? It is predominantly her DNA on that knife blade.

MR. NEY: Your Honor, I'm going to object. There has been testimony that that is – there is no science behind that argument.

MS. TROCHECK: There has not been testimony, Your Honor. Again, I'm trying to –

MR. NEY: Pretrial –

MS. TROCHECK: – do my rebuttal and that is absolutely consistent with the evidence.

MR. NEY: There has been pretrial testimony that that –

MS. TROCHECK: Your Honor –

MR. NEY: – there's no science behind that.

MS. TROCHECK: Your Honor, there is no evidence in the record at trial to support that.

THE COURT: Okay. Well, you have – again, you have – the jury has heard the evidence in this case and you will have all of the exhibits. And if statements are made by counsel that are not supported by the evidence, you should disregard those statements.

MS. TROCHECK: *Common sense, ladies and gentlemen, is a wonderful thing. Wonderful. What did the defense' evidence show*? That on the tip of the knife blade, which James Newman as a professional wanted to save for future testing if someone else wanted to test it, *it showed Jessie Putman is a minor contributor, but once again, Valerie was the major contributor of that DNA. Is that consistent with Jessie Putman being the last one stabbed with that knife. No; it's not. Common sense tells you it was Valerie Paulson who was the last person stabbed with that knife* because Valerie Paulson was the person the defendant was most angry with.

(R. XLI, 3114-15) (Emphasis added).

The above portion of the record clearly demonstrates that the prosecutor told the jury it was "common sense" that Valerie was stabbed last because she was the major contributor of DNA on the knife. The prosecutor knew this argument was completely devoid of any scientific basis because her own expert had testified at a pre-trial hearing that he could not determine, within a reasonable

scientific certainty, who was stabbed last based upon the DNA on the knife. (R. XVIII, 145, 150). He also testified that such a determination is not generally accepted in the scientific community. (R. XVIII, 151, 155). Nevertheless, the prosecutor persisted, over a defense objection, to make an argument she knew was completely false and unsupported by any scientific evidence.

Finally, the State argues that any misconduct by the prosecutor was harmless because there was "overwhelming" evidence that Defendant killed Valerie. (Appellee's Brief, p. 40).

This argument misses the point. At trial, it was not contested that the Defendant killed Valerie. The crucial element at issue at trial was the Defendant's intent. On that issue the evidence was not overwhelming, given the Defendant's emotional state at the time. The prosecutor was urging the jury to find this was an intentional killing because the Defendant went back to the bathroom to make sure Valerie was dead. To support that theory, the prosecutor argued evidence she knew was false. Any argument a prosecutor knows to be false is gross and flagrant misconduct.

III. Admission into evidence of the three-year old Sunday school lesson from the Defendant's computer constituted reversible error because it was not relevant to his intent; rather, the Defendant's religious views were used to prejudice him in the eyes of the jury.

The State argues, as it did below, that the "document" from the Defendant's computer was an expression of the Defendant's views on divorce and infidelity and were relevant to his motive, intent, and premeditation. (Appellee's Brief, p. 42).

The "document," of course, was a Sunday school lesson that had been prepared three years before this incident and long before the Defendant was aware of Valerie's infidelity. The teachings contained in the lesson were taken nearly word-for-word from religious material produced by the Southern Baptist church. (R. XXV, 69-73). This document reflected religious teachings from the Defendant's church written three years before Valerie's homicide. There was no logical connection

between the document and the Defendant's intent or premeditation to commit the act for which he was charged.

Further, if there was any probative value to this Sunday school lesson, it was far outweighed by the prejudicial effect its admission into evidence had on the jury. The district court even acknowledged that this evidence opened potential floodgates to "red herrings" that would serve to detract the jury from the underlying issues. (R. XV, 76-77). The district court's prediction was accurate. The district court allowed other irrelevant evidence of Defendant's religious beliefs to be introduced through the testimony of Krysten, the Defendant's daughter, (R. XXXIII, 1208), and a letter written by the Defendant to his son-in-law, Joshua Hoffman, containing the Defendant's religious views. (R. X, 44; XXXIII, 1302).

The record demonstrates that the State introduced Defendant's constitutionally protected religious beliefs, not as evidence of intent or premeditation, but as character evidence to attempt to show the Defendant was a religious fanatic. The Defendant's religious beliefs were referenced by the prosecutor during opening statement and closing argument. (R. XXXI, 659-60; XLI, 3047). The use of Defendant's in this way violated the First Amendment and requires that Defendant's convictions be set aside. State v. Leitner, 272 Kan. 398, 34 P.3d 42 (2001); Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992).

IV. Valerie Paulson's statements were not admissible under any hearsay exception or as "marital discord" evidence.

The State argues the district court did not commit error in allowing Valerie's statements to Jessie in June and July, 2010, to be admitted under K.S.A. 60-460(d)(2) and (d)(3), because Valerie

was "shaken and upset" when she made these statements, and she had no "ulterior agenda" when she made the statements. (Appellee's Brief, p. 44).

The State fails to address that the record contains conflicting evidence over when the events Valerie related to Jessie actually occurred. Valerie told her brother that these events had occurred two weeks before July 5. (R. XXXV, 1747-48). If that is true, the "excited utterance" exception to the hearsay rule clearly would not apply. State v. Giles, 27 Kan.App.2d 340, 346, 4 P.3d 630 (2000). The same is true about Valerie's statements to Jessie in June because the argument Valerie told Jessie about had occurred days before. (R. XXXII, 868).

Further, there was good reason to believe that the statements Valerie attributed to the Defendant (either on July 5 or two weeks before) were never made. The Defendant's two sons were present during the argument between the Defendant and Valerie when these statements were allegedly made. (R. XXXIV, 1442). Austin Paulson was adamant that the Defendant never said the things that Valerie related to Jessie or Keven. (R. XXXIV, 1391, 1443). The touchstone of allowing hearsay into evidence under any exception is reliability. The State fails to make any argument that Valerie's hearsay statements were true. Accordingly, they should have been excluded. State v. Boldridge, 274 Kan. 795, 804-05, 57 P.3d 8 (2002).

For many of the same reasons, Valerie's hearsay statements were not admissible under K.S.A. 60-460(d)(3). As related previously, there is evidence that Valerie falsified or distorted what actually occurred between herself and the Defendant on July 5. Such statements could not have been made in "good faith" if they were false. The district court should have excluded these statements as unreliable.

Next, the State argues that Valerie's hearsay statements were admissible as marital discord and/or to establish Valerie's state of mind. According to the State, the evidence of "marital discord" was a "central factor" in what led to the events of July 6. (Appellee's Brief, pp. 45-47).

First, K.S.A. 60-460(l)(1) allows state of mind hearsay statements to be admissible only "when such mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant." Neither the district court below nor the State in this appeal has articulated how Valerie's state of mind was at issue in this case. The fact of the matter is that Valerie's state of mind was not in issue and her statements were improperly admitted under this exception.

Second, the State's characterization of much of this evidence as "marital discord" stretches the concept of marital discord far beyond what has been allowed by Kansas courts. It is undisputed that there was never any previous physical violence between the Defendant and Valerie. (R. XXXII, 987; XXXIII, 1215, 1221; R. XXXV, 1792). Most of the so-called "marital discord" evidence consisted in Valerie's description of her relationship with Defendant as "difficult." She described "tension" in the home. She said Defendant did not love her anymore, that he was "controlling," and did not treat her as an equal.

It is likely most spouses to a marriage have made statements that there has been "tension" and "difficulty" in their marriages from time to time. This sort of evidence went far beyond what Kansas courts have allowed in such cases in the past. This was not "marital discord" evidence but evidence to paint the Defendant as a bad husband. It was error for the district court to admit it.

Finally, the State argues that, if this evidence was erroneously admitted, it constituted harmless error because there was overwhelming evidence that Defendant killed Valerie and attempted to kill Jessie. (Appellee's Brief, p. 48).

Once more the State misses the point. It was not disputed that Defendant killed Valerie and stabbed Jessie. The disputed issue was the Defendant's state of mind. The erroneously admitted hearsay and "marital discord" evidence purportedly went to establish that element. The prosecutor emphasized this inadmissible evidence during opening statements and closing argument. (R. XXXI, 631; XLI, 3042-43). As a consequence, the State has not demonstrated that there is no reasonable probability the erroneous admission of Valerie's hearsay statements affected the outcome of the trial in light of the entire record. K.S.A. 60-261.

V. The Defendant's letters and phone calls from jail did not demonstrate a consciousness of guilt or establish his state of mind at the time the offenses were committed; consequently, their admission into evidence was prejudicial error.

The State argues, without citation to any authority, that a district court is not limited to admitting evidence of post-arrest statements and conduct only when it demonstrates consciousness of guilt. (Appellee's Brief, p. 49). The State goes on to argue that the Defendant's letters and phone calls from jail – well after the incident here – were relevant to his state of mind, motive, premeditation and intent. (Appellee's Brief, pp. 49-52).

Apparently, the State is conceding that the letters and calls from jail did not establish Defendant's consciousness of guilt. This is the primary basis upon which Kansas courts have found that post-offense letters or statements are relevant – because consciousness of guilt is relevant to establish material elements such as intent or premeditation. *See* State v. Huddleston, 298 Kan. 941, 960, 318 P.3d 140 (2014) (holding letters the defendant wrote to her sister from jail were relevant because they revealed the defendant acted in concert with her sister and indicate she was conscious of her guilt and the need to shift blame). Indeed, none of the communications here indicated that the Defendant was trying to conceal the crime, fabricate evidence or shift blame.

The problem with the State's argument that these communications were relevant to establish Defendant's state of mind is twofold. First, the statements were not relevant to the Defendant's state of mind at the time the homicide occurred. Indeed, some of the statements were made a year after the homicide. Nevertheless, their admission into evidence likely misled the jury into believing that the communications reflected the Defendant's state of mind at the time of the homicide. Their admission into evidence was erroneous under State v. Harkness, 252 Kan. 510, 847 P.2d 1191 (1993), a case neither cited nor discussed in the State's brief.

In addition, many of the Defendant's statements were vague, and susceptible of more than one interpretation. For instance, the Defendant told Kyrsten: "I'm okay in here. I can take this. That was a fear. I can take it as long as there's hope out there." (R. XVIII, 231). According to the State, the jury could infer from this statement that Defendant thought about killing Valerie and rationally weighed the consequences of going to jail. (Appellee's Brief, p. 50). It is a far more likely interpretation that the Defendant, *after his arrest*, feared what would happen to him and his children in jail. Indeed, the "that was a fear" statement came directly after Kyrsten responded to his concern about that would happen to his sons while he was in jail. She reassured him the boys were fine and he responded, "That was a fear." (R. XVIII, 231-32).

In the same telephone conversation, the Defendant told Kyrsten that he had turned off the internet and telephone at the Assaria residence. The State argues that "perhaps" this shows Defendant wanted to ensure Valerie had no "avenues of communication," purportedly demonstrating premeditation and planning. (Appellee's Brief, p. 51). Commons sense says that the Defendant shut off the internet and telephone because he had agreed with Valerie to move out of the Assaria house and he did not want to pay for services he was not going to use.

The State's argument is pure conjecture and speculation as evidenced by the use of the word "perhaps." Under the State's theory, relevancy is no longer a question of whether the evidence is material and probative. Rather, relevancy is established simply by speculating that the jury could or might interpret a certain vague statement one way or another, with the help of the prosecutor.

Under Kansas law, evidence is probative "when it has a logical tendency to prove a material fact." State v. Huddleston, 298 Kan. 941, 959, 318 P.3d 140 (2014). Logical tendency does not equate to conjecture and speculation. But that is the basis upon which Defendant's communications from jail were admitted into evidence.

Finally, the State makes the argument that any erroneous admission of this evidence was harmless error because Defendant admitted he killed Valerie. (Appellee's Brief, p. 52-53).

As stated previously, the fact that Defendant killed Valerie was not in dispute at trial. The Defendant's communications from jail were not relevant to his state of mind. Their admission was prejudicial because either it confused the issues or it allowed the jury to draw speculative inferences from vague statements that were subject to differing interpretations including wholly innocent ones.

VI. The civil petition and release were made a part of the record at the restitution hearing.

The State argues that the Defendant has failed to provide an adequate record on appeal with respect to the restitution issue because there is not a copy of the civil petition and release in the record on appeal. (Appellee's Brief, p. 59).

The release was submitted as an exhibit to the district court at sentencing. (R. XLIII, 67.) It was made a part of the record at the restitution hearing held November 7, 2012:

> MR. NEY: Well, I want to make sure that this court has my exhibit which I submitted when we were here in September.

THE COURT: Which was?

MR. NEY: The agreement, the civil agreement.

THE COURT: And I did. I did previously review that.

MR. NEY: Well, is it part of the record?

THE COURT: Not here. I don't have it right here in front of me today for purposes of this hearing.

MR. NEY: Well, okay. I submitted it when we were discussing this in September. I marked it and provided it to the court. So do –

THE COURT: So that would be part of the record. I mean –

MR. NEY: Well –

THE COURT: I think that was at sentencing, correct?

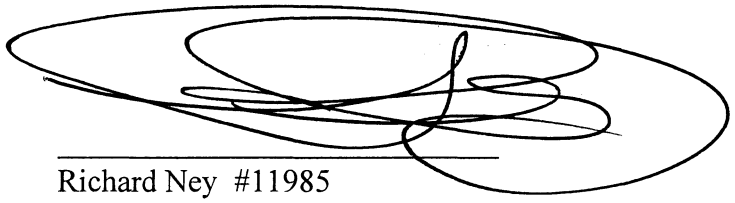
MR. NEY: Well, it was.

THE COURT: So that would be part of the record.

(R. XLIV, 48-49).

Appellate counsel will again request this exhibit to be made a part of the record on appeal.

Respectfully submitted,



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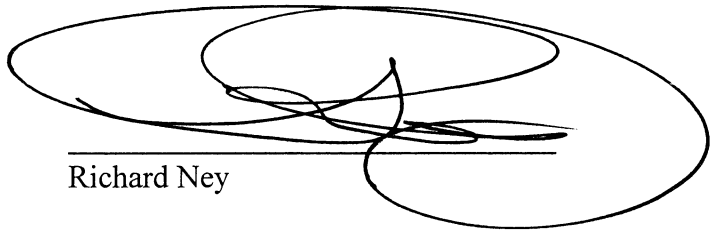
CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the above and foregoing reply brief was made by mailing two copies, postage prepaid to the Office of the Saline County Attorney, 300 W. Ash, #302, Salina, KS 67401, and mailing one copy, postage prepaid, to the Attorney General, Kansas Judicial Center, Topeka, Kansas, 66612, on this 27th day of October, 2014.



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