IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DERRICK WREN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10718 Trial Court No. 3AN-03-10649 CR MEMORANDUM OPINION AND JUDGMENT No. 5979 — November 6, 2013

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael Spaan, Judge.

Appearances: Andrew Steiner, Bend, Oregon, for the Appellant. W.H. Hawley, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Smith, Superior Court Judge.[*]

Judge SMITH.

Derrick Wren was convicted of second-degree murder and tampering with evidence. He was sentenced to 70 years with 10 years suspended on the murder charge

[*] Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution and Administrative Rule 24(d).

and 5 years to serve, consecutive, on the tampering charge, for a composite sentence of 75 years with 10 years suspended.

Wren challenges his conviction on the grounds that the prosecutor did not present exculpatory evidence to the grand jury; that the trial court impeded his ability to present his case by refusing to rule as a matter of law that two of the State's witnesses had immunity from prosecution for the murder; and that the trial court improperly allowed certain evidence to be presented. He also argues that his murder sentence is excessive. For the reasons explained below, we conclude that these claims have no merit. We therefore affirm Wren's convictions.

Factual and procedural background

At about a quarter past midnight on September 10, 2003, Kristmas Seal called 911 to report a shooting in her apartment at 101 Bunnell Street in Anchorage. Paramedics arrived at Seal's apartment and found Adam Calderon on his knees in the middle of the living room, bleeding from multiple gunshot wounds. Calderon later died from his wounds.

Seal told the 911 dispatcher that someone must have come through the window and fired the shots. When the police arrived, Seal's friend, Mele Fonua, told them that someone on the fire escape had shot Calderon.

Seal and Fonua changed their story over the course of the investigation. They eventually said that Calderon and his friend of 20 years, Derrick Wren, had come over to Seal's apartment to drink and watch movies. Wren got extremely drunk and spilled food all over himself. Calderon told Wren that he was going to take him home because he was making a fool of himself and embarrassing Calderon. In response, Wren pulled out a gun and shot Calderon. Immediately after the shooting, Seal told Wren to leave the apartment and called 911.

After Wren left, he apparently approached Desiree Vasquez. She testified at trial that a black man, whom she identified as Wren, asked her to give him a ride. After she refused, he walked away, and as he was walking away, she heard him drop a metal object that she assumed was a gun. Three days later, a Glock 27 was found near the place where Desiree Vasquez said Wren had asked her for a ride. The casings from the gun were a perfect match for three .40-caliber shell casings that were found inside Seal's apartment.

Wren was charged with first-degree murder, second-degree murder, manslaughter, and tampering with evidence. The jury convicted him of second-degree murder and tampering with evidence.[1] He appeals.

The prosecutor did not fail to present exculpatory evidence at grand jury

Wren contends that the prosecutor failed to present the grand jury with two pieces of exculpatory evidence: (1) the evidence that Seal and Fonua originally reported that an unknown assailant had come up the fire escape and shot Calderon; and (2) the evidence that, when an officer asked the dying Calderon if he knew who shot him, Calderon shook his head from side to side.

The prosecution has a duty to present exculpatory evidence to the grand jury.[2] But that duty only extends to evidence "that tends, in and of itself, to negate the defendant's guilt."[3] The mere fact that a witness at grand jury testifies inconsistently

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[1] AS 11.41.110(a)(1) and AS 11.56.610(a)(1), respectively.

[2] *Frink v. State*, 597 P.2d 154, 165-66 (Alaska 1979).

[3] *Tegoseak v. State*, 221 P.3d 345, 350 (Alaska App. 2009).

with statements the witness made previously does not make those previous statements exculpatory evidence.[4]

The initial statements by Seal and Fonua had some relevance to their credibility. But these statements, as well as Calderon's head-shake, were also susceptible of non-exculpatory interpretations. For example, as the trial court found, the grand jury could have viewed Seal's and Fonua's statements as "a desperate, quickly abandoned attempt to protect an acquaintance." And Calderon's head-shake "could have reflected the distracted mental state of one engaged in the process of dying," or "could have been a last gesture of loyalty to a friend." The grand jury also heard substantial additional evidence against Wren, including testimony that: Wren left his shoes in the apartment; he was photographed holding the murder weapon in the apartment shortly before the shooting; and someone else in the apartment building heard Seal tell Wren to leave immediately after the shooting, and then saw Wren go down the stairs. The evidence on which Wren relies therefore was not "exculpatory" as that term is defined in our cases.

The trial court did not unduly constrain Wren's ability to establish Seal's and Fonua's bias by showing that the State had granted them immunity from prosecution for Calderon's murder

Wren argues that his due process right to confront the witnesses against him was violated because the superior court impeded his efforts to show that the State's two main witnesses, Seal and Fonua, had a motive to falsely accuse him of murdering Calderon. Specifically, Wren complains that the court prevented him from fully establishing that Seal and Fonua had received grants of immunity that barred the State from prosecuting them for Calderon's murder.

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[4] *Cathey v. State*, 60 P.3d 192, 195 (Alaska App. 2002) (quoting *Preston v. State*, 615 P.2d 594, 602 (Alaska 1980)).

The opportunity to cross-examine a witness to establish that they expect immunity from prosecution, and are therefore biased, "is one of the safe-guards essential to a fair trial."[5] As a general rule, trial judges should "freely allow counsel to demonstrate the grounds for a witness's potential bias."[6] But the right to establish a witness's bias is not unlimited; "the question of what specific questions will be allowed and what specific evidence will be admitted is entrusted to the trial judge's discretion."[7]

Both Fonua and Seal received letters from the Alaska Department of Law granting them immunity from prosecution. These letters had been signed by different assistant attorneys general, and they did not contain identical language. The letter to Fonua stated broadly that she had been granted "transactional immunity" with respect to the subjects of her testimony at Wren's trial. (Transactional immunity precludes the State from prosecuting a witness for any crime the witness is compelled to testify about.[8]) This letter did not list any specific crimes that were included in Fonua's grant of immunity.

Seal's letter, on the other hand, explained that her testimony at Wren's trial "could theoretically incriminate her" for the crimes of hindering prosecution, tampering with physical evidence, and misconduct involving controlled substances. The letter granted her transactional immunity "for these offenses." The letter also stated that Seal "[would] not be prosecuted for any matter about which she is required to testify by giving responsive answers to questions asked during court proceedings related to these cases."

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5 *RLR v. State*, 487 P.2d 27, 44 (Alaska 1971).

6 *Beltz v. State*, 895 P.2d 513, 518 (Alaska App. 1995).

7 *Id.*

8 *State v. Gonzalez*, 853 P.2d 526, 528 (Alaska 1993).

Wren's theory at trial was that Seal and/or Fonua shot Calderon and were trying to shift the blame onto him. As Wren describes it in his brief, the aim of the defense was to convince the jury that Seal and Fonua told lies that "not only convinced the State to prosecute Wren, but also guaranteed that they could not themselves be prosecuted for the murder."

To support this defense, Wren sought to show that the letter Seal received from the Department of Law gave her immunity not only from prosecution for the crimes enumerated in the letter, but also from the charge that she murdered Calderon.

When Wren's attorney cross-examined Seal, Seal admitted that, without the State's grant of immunity, she would potentially face charges of possessing and selling crack cocaine, hindering prosecution, and tampering with evidence. But when the attorney asked Seal if the agreement gave her immunity from a murder charge, Seal answered "No." She explained that, according to her understanding, she had received immunity only from drug and evidence-tampering charges.

When Seal gave this response, Wren's attorney showed her the text of the letter and attempted to lead her to the conclusion that the letter did, in fact, grant her immunity from a murder prosecution — but the trial judge interjected:

> *Court*: Wait, stop. The immunity [agreement] immunized her for the [enumerated] crimes ... and for any answers to responsive questions[, but] it did not immunize her for murder.

The judge then called for a bench conference.

In that bench conference, Wren's attorney argued that his questions were proper, but the defense agreed that, when he resumed questioning Seal, he would characterize the State's agreement with Seal as only "immuniz[ing] any statements [Seal made] in this trial from being used against [her]."

When the defense attorney resumed the cross-examination, the attorney suggested that Seal could "not be prosecuted for any matter about which you are required to testify related to these cases," and Seal replied: "Okay." But Seal repeated that she had understood the immunity agreement to only protect her from prosecution for drug crimes and tampering with evidence. She said that, to the extent the agreement covered other potential charges, "you're pointing this out to me [for the first time]."

On appeal, Wren complains that the trial judge misstated the facts when he asserted, in front of the jury, that Seal had not been granted immunity from a murder charge. The State concedes that the trial judge's statement mischaracterized the scope of the immunity agreement.

But for purposes of establishing Seal's potential bias, the pertinent issue was *Seal's* understanding of the grant of immunity. The defense attorney elicited Seal's understanding of the immunity agreement when he cross-examined her. He also elicited Seal's acknowledgment that her interpretation of the letter might be wrong, and that the letter might, in fact, grant her immunity from prosecution for Calderon's murder. Given this record, we conclude that the judge's error did not substantially affect Wren's opportunity to establish Seal's potential bias related to the grant of immunity.

Wren also claims that the trial judge's misunderstanding of the scope of Seal's immunity from prosecution led the judge to improperly restrict his closing argument. He claims that the court should have allowed him to argue that, under Alaska law, Seal and Fonua both had immunity from prosecution for Calderon's murder.

But Wren's attorney made precisely this argument in summation to the jury. And, in the State's rebuttal argument, the prosecutor agreed with the defense attorney's position. The prosecutor told the jury that Seal and Fonua "couldn't be prosecuted for [the murder.] That's what the jury instruction tells you."

Wren also complains that the trial judge's instruction to the jury suggested that Seal had received immunity from prosecution only for the specific crimes listed in the state's letter. But Wren's attorney did not object to the language of the jury instruction, once the judge assured him that he would be allowed to argue that the jury could reasonably infer, from the text of the immunity letters, that Seal and Fonua could not be prosecuted for murder.

Moreover, any ambiguity in the challenged jury instruction was cured when both Wren's attorney and the prosecutor declared in closing argument that Seal and Fonua had been granted immunity from prosecution for Calderon's murder.

We conclude that Wren has not shown that the superior court impeded his ability to show that the State's witnesses might be biased against him because of the promises of immunity they received from the state.

Wren was not prejudiced by the admission of evidence that Fonua's brother had recently been shot and killed, and the trial court did not abuse its discretion in admitting evidence that Wren did not attend Calderon's funeral

Over Wren's objection, the prosecutor presented evidence that Fonua's brother had been shot and killed approximately four months before Calderon was shot. The prosecutor also presented evidence that Wren had not attended Calderon's funeral. Wren argues that this evidence should have been excluded as irrelevant and unduly prejudicial.

We agree that the fact that Fonua's brother was murdered was not particularly probative of any of the issues in this case. Wren's claim of prejudice appears to rest on the State's assertion at trial that, because Fonua had suffered a recent shooting death in her family, she was less likely to commit an act of violence with a gun. But this assertion was made outside the jury's presence. And as Wren acknowledges, the jurors

could have drawn a different inference from the testimony: he asserts in his brief that "common sense would indicate that a person who is surrounded by violence is actually more likely to commit violence themselves." We also note that the trial judge allowed Wren to present evidence that, several years after Fonua's brother and Calderon were killed, the police found a gun in the house where Fonua was living. We conclude that Wren has failed to show prejudice.

Nor did the trial judge abuse his discretion by admitting evidence that Wren did not attend Calderon's funeral. This evidence had some relevance, for the jury could have concluded that Wren's failure to attend the funeral indicated consciousness of guilt, since there was evidence that Wren and Calderon had been friends for many years.[9] And any prejudicial impact from the admission of this evidence was minimal at best.

Wren's sentence was not clearly mistaken

Wren challenges his murder sentence on two grounds. First, he asserts that the sentence is unlawfully severe because it exceeds the 20- to 30-year benchmark established in *Page v. State*.[10] He argues that he is not primarily a violent offender, and that he committed the murder while in a drunken haze. He also argues that the sentencing court improperly relied on its perception that he murdered Calderon execution-style, even though the jury acquitted him of first-degree murder.

The *Page* benchmark applies to *first* felony offenders convicted of second-degree murder.[11] Wren has three prior felony convictions, as well as many misdemeanor convictions. The misdemeanor convictions include an assault on a police officer and

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[9] *See Gafford v. State*, 440 P.2d 405, 408 (Alaska 1968), *overruled on other grounds by Fields v. State*, 487 P.2d 831, 836 (Alaska 1971).

[10] 657 P.2d 850, 855 (Alaska App. 1983).

[11] *Brown v. State*, 4 P.3d 961, 964 (Alaska App. 2000).

three assaults on other people. The trial judge noted this history when imposing Wren's sentence, concluding that Wren's prospects for rehabilitation were "poor to guarded at best" and that Wren was a "clear and present danger to the public."

The trial judge also looked at the circumstances of the crime, finding that the shooting was "senseless": "There [was] no provocation. ... [Y]ou felt disrespected in a drunken state, you were not seriously provoked, and you shot him in a way that was similar to an execution." The trial judge concluded that Wren was a worst offender and that his crime was "the most serious murder-two type of case." We conclude that the court was not clearly mistaken in exceeding the *Page* benchmark.

We do not read the sentencing judge's statement that Wren's shooting was "similar to an execution" as necessarily constituting a finding that Calderon acted with the intent to kill (the culpable mental state required to convict him of first-degree murder). In context, the judge was merely describing Wren's senseless and unprovoked crime.

Given the facts of this case and the trial court's findings, Wren's sentence of 60 years to serve for the murder, plus an additional 10 years of suspended time, was not clearly mistaken.[12]

Conclusion

The judgment of the superior court is AFFIRMED.

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[12] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).