

No. 31857

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

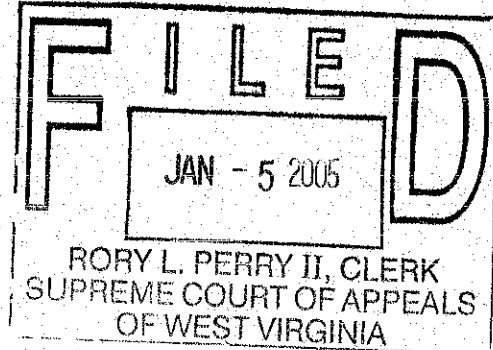
STATE OF WEST VIRGINIA

Appellee

v.

HARRY DAVID LEONARD,

Appellant



REPLY BRIEF OF APPELLANT HARRY DAVID LEONARD

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I. REPLY

A. APPELLANT'S REPLY TO APPELLEE'S ARGUMENT THAT THE STATE'S FAILURE TO PRESERVE THE 1:58 VOICE MAIL DOES NOT JUSTIFY ACQUITTAL

In an attempt to differentiate this case from *State v. Osakalumi*, 194 W.Va. 758 (1995), the Appellee argues that the State did not have sole possession of the voice mail evidence and the State played no role in the destruction of the voice mail evidence.

Although the State did not have sole possession of the voice mail evidence in this case, it failed to take the appropriate steps to preserve the evidence. Furthermore, the State constructively destroyed the evidence by failing to record it. This negligence was carried out despite the fact the State was aware of the recording for nearly two weeks. At the very least, the State could have recorded the voice mail via a hand held cassette recorder.

Additionally, the Appellee argues that it was incumbent upon the Appellant to proffer evidence at trial that a test existed to determine whose voice was on the voice mail recording. Although evidence of a test was admitted in *Osakalumi*, proffering such a test is not a requirement of the *Osakalumi* balancing test which has been set forth in both the Appellant's and Appellee's briefs. The Appellee also argues that the State would have had as much to gain from the voice mail recording as the Appellant. Perhaps so, but that cannot be determined based upon the negligence of the State.

As previously stated in Appellant's brief, the trial court erred by not dismissing the case despite gross negligence on the part of the Jackson County Sheriff's Department. At the very least, the trial court failed to properly apply the *Osakalumi* test in this case and did not even offer a jury instruction regarding the significance of the erased message. This was a tremendous blow to the defense of Mr. Leonard which violated his right of

due process under W.Va. Const. Art. III, §§ 10 and 14. The trial was so fundamentally unfair as a result of the admission of evidence regarding the destroyed message, that the Appellant is entitled to a new trial.

B. APPELLANT'S REPLY TO APPELLEE'S ARGUMENT THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT EVIDENCE OF PREVIOUS ACTS OF DOMESTIC VIOLENCE BY ANITA BUTCHER'S HUSBAND TO IMPEACH MS. BUTCHER'S CREDIBILITY.

Considering the importance of Anita Jo Butcher's "ear witness testimony," the Appellant should have been allowed to show through testimony and photographs that Anita Jo Butcher had been abused as a result of her relationship with Harry David Leonard. Had this testimony been allowed, the jury would have been able to weigh whether Mrs. Butcher's testimony had a propensity for truth or whether it was influenced by the relationship with her husband who was aware of her relationship with the defendant. Both the testimony and photographs were relevant and probative to the facts in this case. Therefore the trial court's denial of this evidence was an abuse of discretion.

The Appellee argues that Appellant's testimony regarding the abuse of Anita Joe Butcher was hearsay and defense counsel failed to argue any exceptions to the rule, thus waiving any objections. However, the trial court's rejection of photographic evidence and testimony regarding the same was within the purview of W. Va. Rule of Evidence 403 and did not necessitate a hearsay objection on behalf of trial counsel. The photographic evidence as well as testimony could have shown that Butcher was forced to testify against the Appellant because she was afraid the same abuse demonstrated by the photos and evidence would occur to her again if she testified otherwise.

C. APPELLANT'S REPLY TO APPELLEE'S ARGUMENT THAT THE TRIAL COURT'S DECISION NOT TO INSTRUCT THE JURY ON MANSLAUGHTER DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

The Appellee argues that the Geneva Leonard's eavesdropping could not been an act of gross provocation and a single incident of eavesdropping is not sufficient to provoke a reasonable person to kill (Appellee's Brief at 26, 27). However, the Appellant submits that this is a question for a jury. Unfortunately, the jury never had the opportunity to make that determination in this case because the jury was never afforded a voluntary manslaughter verdict option or jury instruction.

The Appellee points out that against the advice of counsel, the Appellant expressed to the trial judge that he did not wish to have a voluntary manslaughter charge read to the jury (Appellee's Brief at 27). However, he also expressed that he did not wish to have a second degree murder charge read to the jury (R. at 2630). Nonetheless the second degree murder charge was read to the jury because the trial judge decided that there was evidence in the case that could lead a jury to convict the Appellee of second degree murder. Similarly, evidence existed for a potential conviction of voluntary manslaughter but the charge was never given to the jury. Furthermore, it appears as though from the dialogue between the prosecutor, trial judge and defense counsel that regardless of the Appellant's wishes the instructions must be given for what the evidence supports (R. at 2630-2638).

Based upon the evidence at trial which is detailed in Appellant's brief, an instruction on voluntary manslaughter was warranted and necessary. However, despite objections from defense counsel, the trial Court refused to instruct the jury on a voluntary manslaughter finding:

“that there is no evidence that would support a jury verdict on voluntary manslaughter, therefore the Court will charge the jury on first degree murder and second degree murder and obviously the opportunity is there for the jury to find first degree murder without a recommendation of mercy, first degree murder with a recommendation of mercy, second degree murder and not guilty.

For the record, the Court will note Mr. Leonard’s objection to the Court’s determination in this matter.” [R. at 2638].

In post trial motions the trial judge in this case referred to his decision not to offer a voluntary manslaughter option by stating:

“I indicated that having reflected on the issue I did not feel that there was any evidence in the case and the events there was no evidence in the case that would permit the Court to properly instruct jury on manslaughter. Contrary to the argument of the defendant, the Court did feel that there was evidence that reasonable minds could conclude that a verdict of murder in the second degree was appropriate and the Court instructed the jury on, therefore, murder in the first degree, murder in the second degree and not guilty.(R. at 787)

The jury had an option to come back with a verdict not only of not guilty, but a lesser included offense to murder in the first degree and that being second degree murder. The jury elected not to come back with second degree murder and on the contrary found the defendant guilty of murder in the first degree. Therefore, the Court is convinced that the Court’s action in instructing the jury on the potential verdicts was appropriate.” (R. at 787,788)

Clearly, the trial judge had reasoned a manslaughter instruction was not necessary because a second degree murder option was available to the jury. In this case, the trial court was requested by defense counsel to give a manslaughter charge to the jury based upon evidence presented at trial. Therefore, the trial court was required to give the manslaughter instruction. By the trial court not giving the instruction, the Appellant was not afforded the opportunity for the jury to have an option in convicting him of a lesser offense which could have materially affected his time of incarceration. Therefore, the trial court committed reversible error.

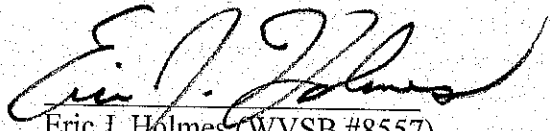
CONCLUSION

The trial court's failure to conduct the applicable test set forth by this Court to determine whether the destruction of evidence obtained by the State would have been prejudicial to the Appellant, its failure to allow evidence that a key state witness had motive to falsely testify against the Appellant, and its failure to give an option of voluntary manslaughter to the jury prejudiced the Appellant and denied the Appellant support for his defense. As previously stated, the record below requires reversal of the circuit court's judgment of conviction and its sentence, and remand to that court for a new trial.

Respectfully submitted January 4, 2005.

HARRY DAVID LEONARD

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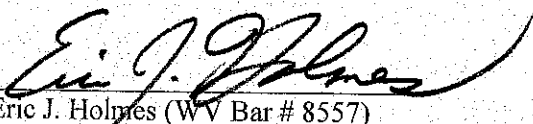
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CERTIFICATE OF SERVICE

I, Eric J. Holmes and Kevin C. Harris, and the Law Offices of Harris & Holmes, PLLC, counsel for Harry David Leonard, do hereby certify that service of the attached "*Reply Brief of Appellant Harry David Leonard*" has been served upon Robert D. Goldberg, Esquire, Assistant Attorney General, counsel for Appellee via first class mail on this 4th day of January, 2005.



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