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STATE OF WISCONSIN :: COURT OF APPEALS, DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent

-vs-

GEORGE A. TRINKA,

Defendant-Appellant

Case number:

2013AP000539 CR

L.C. 2010CF000232

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT,
GEORGE A. TRINKA

On appeal from a judgment of conviction in a criminal case,
the Honorable James K. Muehlbauer, Washington County Circuit
Court, presiding

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ISSUE PRESENTED FOR REVIEW AND HOW THE
TRIAL COURT DECIDED IT

Whether the trial court should have admitted into
evidence a family photograph depicting the victim, his
wife, and his children.

Trial court allowed the photograph into evidence over
the defense objection.

STATEMENT ON ORAL ARGUMENT

Oral argument is not necessary.

STATEMENT ON PUBLICATION

Publication is not necessary.

STATEMENT OF THE CASE

I. The nature of the case.

This is an appeal in a homicide case involving
events at the trial. The issue on appeal does not involve

the “no contest” plea on Count 3, Felon in Possession of Firearm, as this count was not part of the trial.

II. Procedural status leading up to the appeal.

The court conducted a trial in this case from September 19 to September 23, 2011. (70-77). On the last day of trial, the jury convicted Mr. Trinka of First Degree Reckless Homicide, While Armed, and of First Degree Recklessly Endangering Safety, While Armed, both as charged in the information. (77: 178-179).

On July 10, 2012, Mr. Trinka pleaded “no contest” to the third count in the complaint, Felon in Possession of Firearm. (204: 11). The trial court then found him guilty. (204: 15).

III. Disposition in the trial court.

On January 12, 2012, the trial court sentenced Mr. Trinka on the homicide count to forty years in prison, consisting of thirty years initial confinement and ten

years extended supervision. (179: 74). The judge imposed a ten year consecutive sentence on Count 2, Endangering Safety by Use of a Dangerous Weapon, dividing this sentence into five years initial confinement and five years extended supervision. (179: 74-75). Finally, on July 10, 2012, the court imposed a concurrent sentence of five years, consisting of two years initial confinement and three years extended supervision for the Felon in Possession of Firearm count. (204: 16, 23).

On February 26, 2013, the trial court wrote an order vacating the DNA surcharge. (233).

IV. Facts relevant to the issue presented on appeal.

Tensions rose at a July 24, 2010 family gathering at Connie Puerling's home in Newburg, Wisconsin, Washington County, resulting in Steve Szerbowski being shot to death. (72: 194-195, 235-239, 221; 73: 162-3). Ms. Puerling had seven children from two different husbands. (72: 196-197). Steve Szerbowski was

married to Mrs. Puerling's daughter, Amy. (72: 197). After divorcing Mr. Puerling, Connie Puerling allowed her boyfriend, George Trinka, to move into her home, where he then lived for fifteen years. (72: 196-198). Although he could access the entire house, during the last half of his stay, Mr. Trinka lived in Ms. Puerling's basement. (72: 206-207).

At the gathering, a grandson, Nick, asked whether he could cut the lawn. (72: 223-224). When Nick tried to get the lawn mower out of the garage, Mr. Trinka objected to his cutting the lawn; after Nick succeeded in cutting the grass, he and his father, Steve, went to put the lawn mower away, only to find the door blocked by a piece of wood. (72: 225; 73: 21). Ms. Puerling went down the basement to confront Mr. Trinka about his treatment of her family. (72: 228-229). According to Ms. Puerling, Amy Szerbowski then entered the basement, getting involved in the argument, and pushing Mr. Trinka. (72: 229-232). Ms. Szerbowski and Mr.

Trinka began to fight over which of them should call 9-1-1. (72: 233).

Steve Szerbowski came into the basement, and Amy saw her husband trying to wrestle a gun away from Mr. Trinka, who then shot Steve. (72: 118). She recalled her husband's giving her the gun, and she ran upstairs with it and threw it in the sink. (72: 121-123).

Lisa Beimborn, Amy's sister-in-law, came into the basement to try to help Steve, but according to her, Mr. Trinka pointed a second gun with a long barrel at her, causing her to escape to the upstairs and then out of the house. (73: 36-42, 46-51; 72: 238). Connie Puerling wrestled this gun away from Mr. Trinka and ran out of the house with it. (72: 240-243).

George Trinka claimed that he had armed himself to deal with Steve's aggressive conduct and that the gun discharged accidentally during the struggle. (75: 143-145). Mr. Trinka told police that Steve had threatened to "beat his ass." (75: 145). Mr. Trinka said the gun

discharged because Steve grabbed Mr. Trinkka's hand. (75: 156). Mr. Trinkka did not recall Lisa Beimborn being in the basement at all. (75: 162, 171).

At trial, over the defense objection, the government introduced a family photograph of the victim, Steve Szerbowski, his wife, and his four young children. (72: 83-84; 87: Exhibit 14). The judge had agreed to permit the government to use it sparingly for family background but not for invoking sympathy from the jury. (72: 15-16). While introducing the photo, the government brought out that Mr. Szerbowski was a good provider, helped neighbors, and participated in family activities, and the defense objected again. (72: 86-87). The court directed the government to move on but allowed Steve's wife, Amy, to answer the question. (72: 87).

ARGUMENT

The family photograph was not relevant.

The family photograph was not relevant to the issues, and was more prejudicial than probative because it unfairly displayed the victim in a sympathetic light and reminded the jury that Mr. Trinkka had robbed young children of their father. Mr. Trinkka was defending the case by portraying Mr. Szerbowski as the aggressor. The depiction of the victim as a good family man undercut the defense.

Wis. Stat. §904.01 provides that evidence is relevant if it tends “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Wis. Stat. §904.02 provides that all relevant evidence is admissible, unless some other law excludes it, and evidence that is not relevant is not admissible.

In this homicide trial, the victim’s family portrait did not prove nor disprove any facts necessary to determine whether George Trinkka was guilty of killing Steve Szerbowski and endangering Lisa Beimborn’s

safety with the gun. The government did not introduce a family photograph of Ms. Beimborn's husband and children.

The trial court allowed the photograph for "basic background information as to the nature of the family." (72: 16). The court was not clear as to why the jury needed a photo of young children with their parents for background information. Nick testified at the trial, but except for mention of a brother accompanying Nick to the fire department to get help for their father, the other children did not have a significant role in the story. (73: 15-35, 25).

Even if relevant, the 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Wis. Stat. §904.03. For whatever value the "background information" had, it was outweighed by the

danger of unfair prejudice. In this self-defense trial, the family picture depicting the father with young children most likely reminded the jurors that four young children lost a father. In contrast, Mr. Trinkka was portrayed as a free-loader, living in Connie Puerling's basement. (72: 196-198, 199-200, 206, 224: the house belonged to Ms. Puerling, who also worked, who may have owned the cars, and who usually cut the lawn herself. Mr. Trinkka rarely paid rent, and this may have been the reason for the tension between him and Ms. Puerling's descendants. (72: 257-8)).

While the judge had hoped the prosecutor would discreetly use the picture, and move on, this is not what actually happened. (72: 14-16). The jury learned to Steve Szerbowski was "a good provider." (72: 86). The jury learned that Steve spent time with family and friends, holding many cookouts. (72: 86- 87). The defense objected after the prosecutor solicited evidence that Mr. Szerbowski went camping with his wife and

oldest children, took the family to the zoo, played basketball in his yards, and watched movies. (72: 87). The judge overruled the objection, but wanted the prosecutor to move along. (72: 87). The jury then learned that Steve worked a lot of hours but tried to spend time with his family. (72: 87).

The judge's decision to admit the family picture for "background" became an introduction to a portrayal of the loss of a good family man with small children, which had to arouse the sympathies of the jury. It would be difficult for the jury not to feel horror at the deprivation of Steve, the good father, at the hands of the guy in Grandma's basement. Under Wis. Stat. §904.03, evidence should be excluded if it tends to "influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." State v. Jackson, 216 Wis. 2d

646, 667, 575 N.W. 2d 475, ___ (1998). Steve's value to his family was a more appropriate argument for sentencing.

The trial court may admit or exclude evidence within its discretion, which the court of appeals will not reverse if any proper legal analysis supports the trial court's conclusion. State v. Bauer, 2000 WI App 206, ¶¶15, 238 Wis. 2d 687, 617 N.W. 2d 902. Wis. Stat. §904.04(1)(b) permits evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor. Therefore, the court of appeals might look at this statute to determine whether the peaceful family picture, depicting the father, his wife, and his four young children demonstrates peacefulness of Steve Szerbowski, deceased at the hand of George Trinko, claiming self-defense. (75: 143-145; 77: 178-179). The court might find that the evidence supporting the pleasant family picture, plus testimony of Steve

Szerbowski camping, playing basketball, watching movies with the wife and children, and working long hours to provide for the family refutes the image of the man who threatened to “beat the ass” of Mr. Trink. (75: 145).

Wis. Stat. §904.05(2) provides that “[i]n cases in which character or a trait of character is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person’s conduct.” Admission of evidence of specific acts of responsibility and care for children do not prove Mr. Szerbowski’s character for peacefulness when confronted by another male and when, as in this case, Steve’s blood ethanol (alcohol) level was found to be .200 grams percent, more than twice the legal limit for operating a motor vehicle. (73: 265-266). One would expect such evidence to involve specific instances of conduct showing that Mr. Szerbowski walked away from a bar fight or took other actions to diffuse a tense situation.

Even if the family portrait was somehow relevant to prove Steve Szerbowski's peaceful character, it is more prejudicial than probative. Wis. Stat. §904.03. While Mr. Szerbowski may be a good father, it does not show how aggressive or peaceful he might be with members outside of the family. Therefore, the family portrait and supportive testimony about the well-functioning family unit does not appear to fit as evidence of Steve Szerbowski's character trait for peacefulness in this homicide trial.

The admission of the family photograph and other testimony showing Steve Szerbowski as a good father had no relevance to this case and would inspire the jury to convict whoever left four young children without a father. Its admission was improper.

CONCLUSION

Mr. Trinko seeks a new trial.

Dated at Milwaukee, Wisconsin, this 20th day of

May, 2013.

Respectfully submitted by

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CERTIFICATION

I certify that this brief and appendix conform to the rules contained in Wis. Stats. secs. 809.19(8)(b) and (c) for a brief and appendix with a proportional serif font. The brief has 2285 words.

/s/

Dianne M. Erickson

ELECTRONIC CERTIFICATION

I certify that the text of the electronic copy of this
brief is identical to the text of the paper copy.

/s/

Dianne M. Erickson