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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT II

Case No. 2013AP539-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE A. TRINKA,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
CONVICTION ENTERED IN THE WASHINGTON
COUNTY CIRCUIT COURT, THE HONORABLE
JAMES K. MUEHLBAUER PRESIDING.

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

The State of Wisconsin does not request oral argument or publication. The case can be resolved by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

Whether photographs are to be admitted at trial is within the circuit court's discretion. *State v. Lindvig*, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996) (citing *Hayzes v. State*, 64 Wis. 2d 189, 198, 218 N.W.2d 717 (1974)). "The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *State v. Wollman*, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). "This court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination." *State v. Alsteen*, 108 Wis. 2d 723, 727-28, 324 N.W.2d 426 (1982) (citing *Boodry v. Byrne*, 22 Wis. 2d 585, 589, 126 N.W.2d 503 (1964)).

Here the circuit court allowed two photographs depicting the victim of a homicide alive to be admitted at trial. The first photograph depicted the victim and his wife, and was not objected to at trial on grounds that it was used for identification (72:14, 83-84). The second photograph, the one at issue, depicted the victim with his wife and four children (72:13). Trinkka objected to the photograph on the following grounds:

the purpose is it doesn't seem related to an issue in the case. The Court had a pretrial discussion with us about gratuitous photos intended to invoke sympathy or passion in favor of the victim's family and it appears that that is the only purpose that it serves.

Identification is not an issue here. We told the State we wouldn't object to pictures showing Mr. Szerbowski with his wife to identify him and that's been done in opening, but to show the happy family

picture really didn't serve any purpose in this case other than to have accumulative effect of trying to invoke sympathy, so we object.

(72:14).

The State's theory of admissibility was:

There are many individual that were present during the day at Ms. Puerling's house and I think it would be helpful for the jury to get a sense as to who was all present and also it shows a photo of Nick, who is the son who was present during the incident.

There's a lot of players that were there. So the purpose is to show the family certainly and for people to get an idea of some of the players that were present during - - during the event.

(72:14-15).

The court ruled:

I'm going to allow the photograph but whether it goes to the jury room, of course, is an entirely different matter. But I'll allow you to use it but, you know - - and my only rationale for that is it's general basic background information, but obviously, you'll need to be efficient on it and if you want it identified, it can be identified.

So assuming we've got the proper foundation from the witness, you can use it, but if you start to stray into sympathy matters rather than simply background information as to the nature of the family, I'll sustain an objection.

(72:15-16).

The circuit court is in the best position "in light of the evidence, [to] make the determination that the photographs will assist the jury in a rational and dispassionate determination of the facts." *Hayzes*, 64 Wis. 2d at 200. The decision to admit a photograph will be upheld if discretion was appropriately exercised

“unless it appears that, in light of the record as a whole, his conclusion was wholly unreasonable or if the circumstances indicate that the only purpose of the photographs was to inflame or prejudice the jury.” *Id.* Here, the court expressly stated that it found the photograph relevant for “general basic background information” (72:15). While the State does not concede error, this Court should deny Trinka’s request for a new trial as any error in admitting the photograph was harmless.

EVEN IF ADMITTED IN ERROR,
THERE WAS NO HARM IN
ADMITTING THE FAMILY
PHOTOGRAPH AT TRIAL.

A. A brief background on the use
of the photograph at trial.

In considering the evidence against Trinka, the introduction of a family photograph containing the victim did not contribute to the verdict. The photograph was introduced during the direct examination of Amy Szerbowski, the victim’s wife (72:84). The following exchange took place:

Q. I’m also showing you what’s been marked State’s Exhibit 14. Do you recognize that photograph?

A. Yes.

Q. And how do you recognize that photograph?

A. ‘Cause that is me with my husband Steve and our four children.

Q. And that looks like that was taken in October of 2009?

A. Yes.

Q. And does that look like an accurate photograph of your family?

A. Yes.

MS. HANSON: Would move for the admission of State's Exhibit 14.

THE COURT: Subject to our prior discussion about Exhibit 14, any additional objection?

MS. PRIVAT: No.

THE COURT: Received.

(STATE'S EXHIBIT NO. 14 RECEIVED INTO EVIDENCE)

MS. HANSON: Your Honor, would request permission to publish briefly.

THE COURT: Go ahead.

....

Q. And then State's Exhibit 14 is your four children, as well as you and Steven?

A. Yes.

Q. And which of the children is Nick?

A. He would be, if I'm looking at it, he would on the right side by Steve.

Q. Okay. And then Nathan is the young boy, I guess it would be on your right side?

A. Yes.

(72:84-85).

It is not clear from the record how long the picture was actually shown to the jury, but based on the limited questions relating to the picture, it is reasonable to infer that it was only used briefly.

Trinka asserts that while introducing the photograph, the State also elicited information regarding

the victim's character (Trinka's Br. at 6, 9-10); however, there is nothing in the record to indicate that the photograph was used during that portion of the direct examination of Amy Szerbowski. Trinka's argument seems to be that the family background questions, lodged after the introduction of the family photograph, compounded the error in admitting the photograph. The questions complained of are:

Q. Did he provide for your family?

A. Yes.

Q. Was he a good provider?

A. Very good.

....

Q. How was he with the neighbors?

A. Got along with them, helped them.

Q. What kind of things did he do to help the neighbors?

A. Snow blew their driveway. I don't know.

Q. Did he have any hobbies?

A. He enjoyed fishing, hunting, spending time with the family, friends. Did a lot of cookouts.

Q. As a family did you have any special activities? Did you do - - did you go camping or anything like that?

A. When the children were younger we did a lot of camping when we first had the first two kids. He worked a lot but we did go to the zoo or play basketball in the back yard or front yard, watched movies.

Q. Did you do a lot of things as a family?

MS. PRIVAT: Objection, relevance.

THE COURT: Overruled, but let's move on, Ms. Hanson. Did you do a lot of things with the family?

THE WITNESS: We tried to. Like I said, he worked a lot.

(72:86-87). The record clearly establishes that the defense did not immediately object to this line of questioning. After the objection was lodged, the line of questioning stopped. Even if the photograph was displayed while the State asked family background questions, any error in use of the photograph was harmless.

B. The legal standards applicable to a harmless error analysis.

The State maintains that the photograph was properly admitted at trial; however, if this court finds error, the error was harmless. “Wisconsin’s harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by Wis. Stat. § 972.11(1).” *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *State v. Harvey*, 2002 WI 93, ¶ 39, 254 Wis. 2d 442, 647 N.W.2d 189) (footnote omitted).

“The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction.” *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999) (citing *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985)). The error is harmless, if in context of the entire trial, it does not undermine confidence in the verdict. *Thoms*, 228 Wis. 2d at 873 (citing *State v. Grant*, 139 Wis. 2d 45, 53, 406 N.W.2d 744 (1987)). The claimed error did not contribute to the verdict if this court concludes, beyond a reasonable doubt, that a rational jury would have found the defendant guilty absent the error. *Harvey*, 254 Wis. 2d 442, ¶ 49.

- C. A reasonable jury would have found Trinka guilty absent any error in admitting the family photograph.

There was no dispute that Trinka fatally shot the victim, rather the defense argued the affirmative defenses of accident and self defense (70:307-13). The court instructed the jury on self-defense and accident during the court's lengthy oral instruction (77:80-110). The complete jury instructions were also made available to the jury in the jury room (77:119-20).

At trial, testimony established that Trinka (referred to as Tony) and the victim had a brief verbal argument when the victim and his son entered the locked garage to retrieve the lawn mower (72:11, 115, 228; 73:35, 55-59). Ms. Puerling, the victim's mother in law, went to confront Trinka and a verbal argument occurred (72:228-29). Ms. Szerbowski, Ms. Puerling's daughter, went to the basement shortly thereafter and got in-between Trinka and Ms. Puerling (72:116-17). Ms. Szerbowski also began a heated verbal argument with Trinka and had a brief scuffle that involved some pushing (72:117, 162-63, 175).

After this occurred Trinka said he was going to call 911, but Ms. Szerbowski took the phone from Trinka and said she would be the one to call (72:118). While Ms. Szerbowski was trying to call 911 her back was to Trinka and she was not aware of what was occurring in the room (72:118-21). She heard a pop, turned and saw her husband (72:119, 123). Ms. Szerbowski testified that her husband said that Trinka shot him and eventually handed Ms. Szerbowski the pistol (72:123). At this point Ms. Szerbowski ran upstairs with the gun and the phone and continued to try to reach 911 (72:124-25). Ms. Szerbowski went back downstairs (72:125) and observed Trinka with another gun arguing with Ms. Puerling (72:130). Ms. Szerbowski observed Ms. Puerling attempting to get the gun away from Trinka, and ran out of the basement to the outside (72:130).

Ms. Puerling's testimony was similar to that of Ms. Szerbowski's. She testified to the verbal argument between Ms. Szerbowski and Trinkka and the pushing incident (72:231). Ms. Puerling testified that Trinkka wanted to call 911, but Ms. Szerbowski took the phone from him to call herself (72:232-33). Ms. Puerling testified that the victim was not in the basement during this altercation and appeared sometime after Ms. Szerbowski took the phone from Trinkka (72:233). Ms. Puerling heard the victim say that Trinkka shot him, but did not see it occur (72:234).

Shortly after Ms. Szerbowski ran upstairs, Lisa Beimborn, Ms. Puerling's daughter-in-law, came down with some towels (72:234-35, 238; 73:45). At this time, Ms. Puerling observed Trinkka pointing a shotgun at Ms. Beimborn and heard Trinkka verbally threaten Ms. Beimborn (72:238). Ms. Beimborn testified that Trinkka pointed a shotgun at her while she attempted to attend to the victim (73:46). Ms. Beimborn retreated upstairs and Ms. Puerling attempted to wrestle the gun from Trinkka (72:241; 73:46). Once Ms. Puerling finally gained control of the shotgun, Ms. Puerling ran outside with the gun (72:243).

There was continued animosity between Trinkka and Puerling's family, including the victim (72:153-54). The defense claimed that Trinkka was afraid of the victim (77:145). The claim of self-defense rested largely on Trinkka's statement to police, as Trinkka did not testify at trial (77:146). The defense pointed to minor inconsistencies in testimony from the State's witnesses and in prior statements, but as a whole, the version of events given by Ms. Puerling and Ms. Szerbowski were largely unchallenged (*see generally* 72:83-278). There was also the testimony from John Peterson, a correctional officer at the Washington County Jail, that he overheard Trinkka make a statement to the effect of "ding dong pissed me off, so I killed him" (73:286, 296).

The fact that Trinka fatally shot the victim is not in dispute. The question left for the jury on the homicide charges was whether Trinka acted in self-defense, and whether the gun discharge was accidental. The jury simply did not buy the defendant's story and the brief use of the photograph would not reasonably have any effect on that decision. Even if the photograph should not have been admitted, its introduction nonetheless would constitute harmless error. The photograph was used very briefly at the beginning of a multi day trial; and, in context of the entire trial, its very brief use does not undermine confidence in the verdict. *Thoms*, 228 Wis. 2d at 873.

CONCLUSION

Because a rational jury would have found Trinka guilty absent the error, the judgment of conviction should be affirmed and Trinka's request for a new trial should be denied.

Dated this 19th day of June, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,269 words.

Dated this 19th day of June, 2013.

Tiffany M. Winter
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of June, 2013.

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