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STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent

-vs-

GEORGE A. TRINKA,

Defendant-Appellant

Case number:

2013AP000539 CR

L.C. 2010CF000232

REPLY BRIEF 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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ARGUMENT

I. The family photograph should have been excluded.

Mr. Trinka maintains that the family photo should have been excluded. The government neither concedes error nor vigorously defends the trial court's decision to admit the family photograph for "general background information." (Response, pp. 3-4). As a result, the government does not present an in-depth analysis as to why four children shown with their mother and now deceased father provides "general background information," nor of the prosecutor's purpose at trial, to "help the jury get a sense as to who was present" and to "show a photo of Nick." (72: 14-16). (Response, p. 3).

The reasons for showing the photo are not strong. In order to get a sense of who was all there, the government should have shown the entire extended family, as many members were present. Connie Puerling had twenty people at her house that day, including her

children and grandchildren. (72: 194, 222). Of all the persons present, Steve Szerbowski's children, except for Nick, have little significance to the story. (72: 222). Nick's role was that of an unintended catalyst to events he never dreamed he might put into motion by asking to cut the grass. (72: 228). None of the children were in the basement at the time of the shooting. (72: 228-243).

The government did not show a photo of the entire family to show who was present, just the young children who lost their father as a result of attending the party.

Furthermore, since Nick testified at trial, the jury did not need a photograph of Nick in order to prevent confusion. (73: 15). An eighth grader, Nick was able to identify his father as Steve Szerbowski, his maternal grandmother as Connie Puerling, and that he was the oldest of his parents' four children. (73: 16). Nick related how he had gone to his grandmother's house with his parents and siblings and how he had requested to cut the lawn for his grandmother. (73: 18). Nick later heard

his mother's screams, as she told Nick that his father had been shot. (73: 23). There was no need to present a family photo in order to assist the jury in identifying Nick in relation to the family. Nick was able to do so himself.

The Wisconsin Supreme Court allows other crimes evidence into trial to complete the story of the crime "by proving its immediate context of happenings near in time and place." State v. Pharr, 115 Wis. 2d 334, 348, 340 N.W. 2d 498 (1983). While not exactly on point, the Court emphasized that background information should actually be *proving* something. In this case, the family photo does not *prove* anything.

The photo's admission remains more prejudicial than probative. Wis. Stat. §904.03. The jury had to decide which man was the aggressor. (75: 145). The man in the photo standing with his wife and four young children would not seem to be a candidate. (Exhibit 14).

II. The error was not harmless.

The government asserts that the error is harmless.

(Response, p. 14). The test for harmless error is as follows:

[I]n order for an error to be deemed harmless, the party who benefitted from the error must show that ‘it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error’ ...As the party benefitted by the error, the State bears the burden of showing the error was harmless ... [that] the jury would have arrived at the same verdict had the error not occurred.

Several factors assist [the] analysis of whether an error is harmless: the frequency of the error; the importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense; the nature of the State’s case; and the overall strength of the State’s case ... [The factors are] non-exhaustive.

State v. Martin, 2012 WI 96, ¶¶45-46, 343 Wis. 2d 278, 816 N.W. 2d 270. The factors will be now be applied to

Mr. Trinkka's case:

The frequency of the error. The photograph was shown once, but its use was cultivated throughout the trial. In opening argument, the prosecutor stated:

Now, the name of this case is State versus Trinkka but its really a case about many people. It involves many people. It involves Steve Szerbowski. It involves his wife Amy *and their four children*, the oldest of whom was Nick, the young man who wanted to cut the grass that day and did.

(70: 285). Actually other than Nick's innocent request to cut the grass, and his brother's minor role in accompanying Nick to the fire department for help, the case was not about the children. (73: 25). During opening argument the prosecutor continued his portrayal of the good family man Steve:

Steve was 39 years old on July 24th, 2010, just over a year ago. He was married to a wonderful woman, you'll get a chance to meet during this trial, Amy Szerbowski, who was right beside

him, 31 then. *Young family, four kids. Nick, age 13 now, eighth grader, 12 then. Nathan, Natalie, and Nolan, a little younger than Nick.*

Steve was a nice Wisconsin man. He liked fishing, hunting. He liked basketball. He liked movies. He was a hard worker. He was a roofer. Worked hard. But you know what? He was always one to lend a hand to those in the neighborhood. When the snow came, Steve as out often times assisting others and blowing snow, blowing his neighbors' snow. *But mostly he loved his family. He loved his family, spending time with them.*

(70: 286). Here the prosecutor presents the image in words, as later shown in the family photo, of the “nice Wisconsin man,” with his wife, a “wonderful woman,” and their four children, the message being that George Trinka deprived the wonderful wife and beautiful children of the good family man, Steve.

The prosecutor made a few more, less dramatic, references to the children in opening argument, telling how the four children were present at the party and how they went to the fire department with their parents to get something to eat, later returning to the house. (70: 286).

Would it have mattered to the story if some children had stayed home with a babysitter or stayed with a family member at Grandma's rather than go to the fire department to eat? While these references, taken alone, appear insignificant, the prosecutor mentioned the children at any opportunity, regardless of their lack of importance to the story.

As mentioned in Mr. Trinkka's brief-in-chief, the family photo was the highlight of the "Steve as good husband and father" presentation the government was making versus its depiction of "George Trinkka as bum, loafing off a woman." (See Mr. Trinkka's brief at pages 8-10).

In closing, the prosecutor had toned down the argument somewhat, briefly referencing that Steve was a "hard-working man ... a nice, Wisconsin guy [who had] dreams for himself and his family ... He loved his family." (77: 123-124). Nevertheless the theme was repeated: nice family men are not aggressors.

The importance of the erroneously admitted evidence.

Supposedly the family photo was simply background evidence of undisputed facts—that Steve Szerbowski was married and had four children—but that is not the real use of the evidence. (72: 15-16). Instead, the photo’s admission came in as part of a line of questioning proving Steve’s good character, reminding the jury that Mr. Trinko took a good father away from the children. (72: 85-86). Despite the government’s insistence that the jury know who was at the party, Amy Szerbowski did not even identify two of the children in the photo. (72: 14-15, 85-86).

Being a good provider and good family man do not prove Mr. Szerbowski’s character for peacefulness, so putting the photo in as part of character evidence is not appropriate. Wis. Stat. §904.04(1)(b) provides:

(1) ... Evidence of a person’s character or a trait of a person’s character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion,

except ...

(b) ... [E]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or 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 ...

This evidence tells nothing about Mr. Szerbowski's character for getting in fights or for avoiding them. Nor would this character evidence fit any other exception. The family photo was part of this package of facts and the most inflammatory for its ability to pull at the heartstrings of the jurors.

The presence or absence of evidence corroborating or contradicting the erroneously admitted evidence.

Witnesses testified that Steve Szerbowski was married and had four children. Amy Szerbowski testified that she was married to Steve, and they had four children, from ages 13 to 5. (72: 83). Nick testified

about the same family unit. (73: 16). Evidence of the family unit was not disputed. Contradicting the “happy family picture” was Amy’s testimony that the oldest children’s ages exceed the number of marriage years, suggesting a possible temporary break in the family unit. (72: [1], 108, 83, 86). The defense resisted any temptation to point this out, although this entire line of “background information,” dangerously presented for the perfect family picture, may invite a petty response and is why this should not go on at trials. (72: 150-178).

Also contradicting the happy family picture was Steve Szerbowski’s drinking in front of this children, reaching twice the legal limit for operating a motor vehicle. (73: 265-266). And the “wonderful woman,” Amy, actually pushed George Trinka in the basement, depriving him of the chance to call 9-1-1 by taking the phone away. (72: 229-233). Why not let him call 9-1-1? Who would care who got the police there, as long as police came?

But this contradicting evidence may have been lost on the jury, who would not want to vote against the children they saw in the photo. The trial should not have been about the marriage of Steve and Amy nor about their parenting skills. The prosecutor went too far presenting this theme, and the family picture was the highlight of this inappropriate evidence.

Whether the erroneously admitted evidence duplicates untainted evidence.

If the trial were held without the photo, untainted background evidence might come in briefly to establish the family unit. Missing would be the emotional impact of Exhibit 14, depicting the children and widow of the deceased.

The nature of the defense.

George Trinko asserted that he armed himself to deal with Steve Szerbowski's aggressions, but then the

gun discharged during the struggle. (75: 143-145). The defense blamed Steve for his own death. The defense further portrayed George Trinka as a long-time friend, sometimes lover of Connie Puerling, in a stable relationship her children tried to thwart. (72: 254-255, 257, 264). Mr. Trinka had increasing health problems, including a heart attack in 2008 and problems walking. (72: 255-256). Steve's wife, watching the argument between Mrs. Puerling and George Trinka, actually shoved Mr. Trinka into a small refrigerator. (72: 266). Amy prevented Mr. Trinka from calling 9-1-1. (72: 267). Steve then intervened and got shot. (72: 267).

The nature of the state's case.

The state argued that Mr. Trinka's conduct was not justified, and that it was unreasonable, creating a high risk of death and that Mr. Trinka faced no danger from family members who were simply there to investigate what was going on in the basement. (77:

124). Shooting Steve Szerbowski was no accident, the State maintained. (77: 124).

The overall strength of the state's case.

Amy Szerbowski had her back turned when her husband got shot. (72: 164). All she heard was the pop and Steve's cry, "[Y]ou fucking shot me." (72: 164). She saw her husband try to get the gun away from Mr. Trinka. (72: 164). Mrs. Puerling did not see Mr. Trinka obtain the gun nor how Steve was shot. (72: 235). She saw Mr. Trinka pointing the gun after the shot. (72: 235). Mr. Trinka claimed self-defense or accident. (75: 143-145).

Mr. Trinka's pointing the shotgun at Lisa Beimborn is a little more troubling, as Mrs. Puerling believed that Ms. Beimborn posed no threat, but rather was a rescuer, trying to help Mr. Szerbowski after he was shot. (72: 240). Without waiting to find out what Mr. Trinka feared from Lisa, Mrs. Puerling began to wrestle

for the shotgun he now had. (72: 240-243).

John Peterson, a corrections officer, claimed he heard Mr. Trinkka state that “the ding dong pissed me off, so I killed him.” (73: 285, 296-297). He heard nothing else of significance. (73: 298). Steve Szerbowski’s name was not mentioned, nor were any circumstances surrounding his death detailed. (73: 285-312).

Mark Simonson, the firearms expert, conceded that “in a struggle for a gun, it would only take a pound-and-a-half pressure for ... the trigger to cause the hammer to fall forward and discharge. (73: 217). He further agreed that in a struggle for the gun and pressure put on the trigger, if the hammer were “inadvertently pushed back and released, it would fall forward causing the gun to fire.” (73: 217). The amount of pressure was not great for the gun. (73: 218).

The case against George Trinkka was not a one-sided affair on the homicide charge. Endangering Lisa Beimborn’s safety was a somewhat more difficult charge

to defend, but Mr. Trinka may have felt the threat from the family continued. Error unfairly drawing in sympathy for Steve Szerbowski, in form of the family photo, was not harmless.

CONCLUSION:

George Trinka continues to seek a new trial.

Dated at Milwaukee, Wisconsin, this 1st day of July, 2013.

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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 2569 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