

A05-118

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Robert Vincent Larson,

Appellant.

RESPONDENT'S BRIEF

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LEGAL ISSUES

- I. Evidence that would otherwise be inadmissible may be introduced if the party opens the door to admission by introduction of other evidence. Appellant raised a third party perpetrator defense and attempted to show that the police were dilatory in seeking to obtain DNA samples from certain witnesses. Was it an abuse of discretion to allow the state to show that the witnesses gave samples voluntarily but appellant's sample was obtained by search warrant?

After appellant brought up how and when the police sought DNA samples from witnesses the prosecutor showed that other witnesses gave samples voluntarily but search warrants were used to obtain samples from appellant and his sister.

Authority: *State v. Chomnarith*, 654 N.W.2d 660 (Minn. 2003)

State v. Jones, 753 N.W.2d 677 (Minn. 2008)

State v. Valtierra, 718 N.W.2d 425 (Minn. 2006)

- II. Evidentiary rulings are in the broad discretion of the trial court and will not be reversed for an abuse of discretion unless the party complaining shows both error and prejudice from the ruling, and has given an offer of proof in cases where the ruling was one excluding evidence. Appellant was not allowed to use unauthenticated transcripts of interviews for impeachment, and has not shown error or prejudice. Were the rulings an abuse of discretion?

Judge Wilson ruled that appellant could not rely on unauthenticated transcripts or introduce evidence of bad acts of another that did not connect the other to the commission of the crime.

Authority: Rule 801 (d)(2)(E), Minn. R. Evid.

Rule 901(a), Minn. R. Evid.

State v. Hall, 764 N.W.2d 837 (Minn. 2009)

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STATEMENT OF THE CASE AND FACTS

This is a direct appeal from conviction after a jury trial in the District Court in the Second Judicial District, Ramsey County, with the Honorable Edward S. Wilson presiding. The jury found Appellant Robert Vincent Larson guilty of first-degree murder and Judge Wilson imposed the mandatory sentence of life in prison. Although he filed a direct appeal, appellant moved for a stay to pursue postconviction relief. The district court did not grant postconviction relief, and the appeal was reinstated. Appellant does not raise any issue from the postconviction proceedings.

T [REDACTED] J [REDACTED] (“T. J.”) C [REDACTED], Jr., died on November 28, 2003, due to asphyxia caused by ligature strangulation. Trial transcript page 1546. [Hereafter “T <x>.”] His body was found in a ditch in Ramsey County. T 1229. The ligature used to strangle him was a plastic zip tie that has a locking mechanism that allows tightening but not release. T 1517, 1521, 1528, 1530. Assistant Ramsey County Medical Examiner Dr. Paul Nora determined that the tie had been tightened to at least 66 pounds of pressure to cause the effects he observed on C [REDACTED]. T 1533-34, 1543.

The pressure from the zip tie caused marks on C [REDACTED]’s neck. T 1525-26. There were also pattern marks on appellant’s hands that Dr. Nora believed were caused by being used to tighten the zip tie. T 1528-29, 1544-46. No such marks were observed on any suspect or witness other than appellant. T 1433-34.

Appellant did not testify, but called his former work supervisor Ryan Seibeo¹ to explain that appellant's work installing carpet tack strips might result in injuries to one's hands. T 1421, 1424. When Deputy [REDACTED] [REDACTED] saw appellant after the murder, there was skin missing on appellant's left thumb and index finger and on his right middle and ring fingers. T 1433. When appellant saw the deputies looking at his hands, he put them under the table. *Id.*

But appellant told [REDACTED] that he put a zip strip around T. J. C [REDACTED], Jr.'s, neck, and showed [REDACTED] how he choked C [REDACTED]. T 1080. C [REDACTED] woke up and jumped out of the truck and appellant went after him and choked him. *Id.*

Appellant was upset with C [REDACTED] because C [REDACTED] had hit appellant's sister, [REDACTED] [REDACTED] T 1066. [REDACTED] was asking people to help her "pay back" C [REDACTED] for hitting her. T 1046-47, 1077. [REDACTED] saw C [REDACTED] hit [REDACTED] and knock her to the floor after C [REDACTED] found her with [REDACTED] T 1064.

The group of acquaintances with knowledge of what happened before C [REDACTED] was killed gathered at the Travelodge Motel in Saint Paul on Thanksgiving 2003. T 921. [REDACTED], [REDACTED], and [REDACTED] were in room 206. T 921, 961, 963. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] and Robert Larson, and T. J. C [REDACTED] were in room 208. T 921. The rooms are separated by a stairwell. *Id.* Most, if not all, used methamphetamine or other drugs. T 960. [REDACTED] [REDACTED] is the cousin of [REDACTED] and Robert Larson. T 1098. [REDACTED] and [REDACTED] sometimes supplied drugs to the others.

¹ Seibeo was called out of order to accommodate him. T 1418.

T 1121. Sleep deprivation due to continued methamphetamine use can cause disorientation as to time and place and may affect the memory. T 1552.

Some time earlier, in an attempt to get money that ██████████ owed a friend, T.J. C█████—who had arrived with ██████████—demanded the money from ██████████ at gunpoint. T 968. ██████████ told C█████ that he didn't owe anybody money, and that C█████ could go ahead and shoot him. *Id.* C█████ and ██████████ left. *Id.*

T. J. C█████ brought his pistol into a room at the Travelodge on Thanksgiving, and was waving it around. T 1023, 1042. ██████████ pushed it out of his face. *Id.* C█████ later went to sleep in his truck, and ██████████ took the pistol and brought it back inside. T 965-66, 1104.

██████████ said that she wanted to put C█████ six feet under. T 966. She asked ██████████ to help her get back at C█████ because C█████ had pointed the gun at ██████████. T 966. ██████████ told ██████████ that he would not help her, and ██████████ then said that A█████ and ██████████ were “pusses” and that she and her brother would take care of it. T 969-70. Shortly after, ██████████ saw ██████████ and appellant walking down the steps. T 970. Appellant looked “hyper” to ██████████. *Id.* Appellant pulled out a zip strip from his sweater and held it in a loop. T 970-71. ██████████ told them not to do it, but to scare C█████. T 971.

██████████ heard appellant mentioning zip strips and duct tape, and saying that he was going to tie up C█████'s hands so he could not fight back. T 1023. The reason to do it was because C█████ had hit ██████████ T 1024. ██████████ and appellant talked about giving C█████ a sedative to put him asleep, and choking him. *Id.* ██████████ thought they seemed

serious. T 1025. Later, when appellant returned to the room, [REDACTED] saw appellant breathing heavily and washing blood off his knuckles. T 1027. Although [REDACTED] [REDACTED] said that appellant had been beat up by Ca [REDACTED], [REDACTED] saw no indications on appellant's face or body that he had been beaten up. *Id.*

When [REDACTED] saw [REDACTED] come into room 206, she looked angry and said that she wanted some action against C [REDACTED] because he had hit her a couple days earlier and that C [REDACTED] and one of his uncles had forced themselves on her. T 1046-47. She tried to enlist [REDACTED] but he wanted no part of it. T 1047. [REDACTED] saw [REDACTED] [REDACTED] get into the driver's side of C [REDACTED]'s truck. T 1049.

When [REDACTED] saw C [REDACTED] hit [REDACTED] she got up and told [REDACTED] to go after C [REDACTED]. T 1064. On Thanksgiving, [REDACTED] observed that appellant was upset because C [REDACTED] had hit [REDACTED]. T 1066. Appellant wanted to "kick his ass" and retaliate. *Id.*

[REDACTED] was [REDACTED] best friend. T 1094. She heard [REDACTED] and appellant talking about different ways to kill C [REDACTED]. T 1103. They talked about beating him up and shooting him, putting him in the back of the truck and burying him near Pine City. T 1104. They were upset because C [REDACTED] had hit [REDACTED]. T 1105. [REDACTED] said that she was tired of guys getting away with hitting girls. *Id.* [REDACTED] thought that [REDACTED] was acting serious, in a way that [REDACTED] had not seen before. T 1106. Although the others tried to talk them out of it, appellant got some zip strips and they left in C [REDACTED]'s truck. T 1106-08.

Shortly after Jamie and appellant left the Travelodge in C [REDACTED] truck, [REDACTED] [REDACTED] and [REDACTED] [REDACTED] went after them. T 970, 972, 974. [REDACTED] was driving.

T 974. He wanted to stop [REDACTED] and appellant. T 1002. He briefly lost them when they made a sudden left-hand turn. T 980, 1006. When they went back to the area where they lost them, they picked up [REDACTED] T 981, 83. She then directed them to where they picked up appellant. T 983. Appellant complained that he had hurt his arm, hand, or ankle.
T 986.

ARGUMENT

Appellant Robert Vincent Larson was upset with T. J. C [REDACTED] because C [REDACTED] had hit appellant's sister [REDACTED] Jamie wanted help to retaliate against C [REDACTED], and got appellant to help her. Appellant told [REDACTED] that he put a zip tie around T. J. C [REDACTED]'s neck, and showed [REDACTED] how he strangled C [REDACTED]. There were marks on C [REDACTED]'s neck caused by the zip tie, and Assistant Medical Examiner Dr. Paul Nora stated that similar marks on appellant's hands were likely caused by tightening the zip tie to the more than 66 pounds of pressure that had been applied to kill C [REDACTED]. No similar injuries were seen on any other person. The jury concluded that appellant was guilty of premeditated murder and Judge Wilson imposed the mandatory life sentence. Appellant does not challenge the sufficiency of the evidence on appeal. Respondent State of Minnesota asks the court to affirm the conviction.

I. There Was No Due Process Violation.

Appellant's first claim is that the state improperly used as evidence of guilt appellant's refusal to voluntarily submit to allowing an oral swab to be taken for DNA testing. Appellant is factually incorrect about what happened during the trial and is not entitled to any relief on this claim.

It is a denial of due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search. *State v. Jones*, 753 N.W.2d 677, 687 (Minn. 2008). During a pre-trial interrogation, appellant refused to voluntarily submit to an oral swab. Transcript pages 868-871. [Hereafter "T <x>."] Judge Wilson ruled that the recorded

statement was voluntary and admissible at trial, after some redactions. T 869. But although the statement was ruled admissible, it was never offered and never admitted. The jury never heard that appellant refused to voluntarily give a DNA sample.

It is true, however, that the jury also heard that other witnesses had voluntarily given DNA samples and that a search warrant was obtained to get the DNA samples from appellant and from his sister [REDACTED] T 1260, 1441. But the jury also learned that people have an absolute right to refuse to talk to police and to require the police to seek a search warrant for evidence. T 1300-01.

Appellant gave notice before trial of an alternative perpetrator defense. Transcript of hearing on October 5, 2004, pages 11-12 (not the same volume or pagination as the trial transcript). He attempted to shift blame for the murder to [REDACTED] and [REDACTED] or [REDACTED] [REDACTED] who looked as if he had been beaten up at about the same time and had injuries on his hands. T 1452.

Appellant's argument is similar to that made in *State v. Jones*, 753 N.W.2d 677 (Minn. 2008). Jones argued that showing that a search warrant was necessary to obtain DNA samples from him operated to deny him due process when the prosecutor showed that other witnesses gave samples voluntarily. *Id.* at 687. This court held that a defendant that raises an alternative perpetrator defense opens to door for the prosecutor to present testimony exculpating the alleged alternative perpetrators. *Id.*

It was appellant, not the prosecutor, who first introduced the topic. Appellant's lawyer asked [REDACTED] on cross-examination if he gave a DNA sample. T 1010. This was the first mention of DNA testing during trial. Appellant was pointing out that

the police did not seek a DNA sample from [REDACTED] or others until very late in the process, around September, 2004. Appellant was introducing evidence to support his theory that the police investigation was faulty and that the witnesses who had been using drugs were not worthy of belief.

Appellant elicited similar information from [REDACTED] establishing that [REDACTED] gave a DNA sample, but not until September 2004. T 1089. Only then, on redirect examination, did the prosecutor establish that [REDACTED] voluntarily gave a DNA sample without a search warrant. T 1092.

As in *State v. Jones*, 753 N.W.2d 677 (Minn. 2008)², the inference that appellant refused to voluntarily give a DNA sample that could be drawn from the fact that others voluntarily gave a sample while his (and his sister's) was obtained by a search warrant does not constitute a violation of due process. *Id.* at 687.

A defendant may open the door to the admission of otherwise inadmissible evidence. *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006). Appellant opened the door to questions about DNA sampling and testing, including the facts that some witnesses gave samples voluntarily while appellant and his sister's samples were obtained by search warrants.

The prosecutor did not argue that the failure to voluntarily give a sample was evidence of guilt. The evidence of the procedures used—voluntary or by search warrant—was introduced, but the prosecutor did not seek to argue that the failure to

² There are two cases involving the same Kent Richard Jones. The full citation will be given to help distinguish them. This is the second, after the case was remanded for a new trial. The conviction was affirmed.

voluntarily consent was evidence of guilt. There is no support in the record for appellant's claim that "Office ██████ testified (repeatedly) that he had been required to obtain [appellant's] DNA forcibly, by obtaining a warrant..." Appellant's brief page 20.

Appellant cites the prosecutor's statement that "You heard from ██████ that he took DNA from several people and he told you why." But how this constitutes an impermissible comment on appellant's right to refuse voluntary testing or how this is an argument that appellant refused due to consciousness of guilt is not clear. The inference is insufficient to support the claim of a denial of due process. Appellant also fails to point out that the statement was made in the rebuttal argument after appellant's lawyer criticized the police decisions to seek DNA samples when they did or what samples they submitted for testing.

Appellant has not shown that his failure to voluntarily submit to DNA testing was improperly used against him at trial. Any possible adverse effect of the introduction of the evidence that some witnesses voluntarily gave DNA samples but a search warrant was obtained to get appellant's sample was harmless beyond a doubt. The verdict was surely unattributable to any error. *State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003). Appellant is not entitled to relief.

II. Evidentiary Rulings Were Not An Abuse Of Discretion.

In the second section of his brief appellant claims that the cumulative effect of erroneous evidentiary rulings denied him a right to present a reasonable defense. Appellant's brief, page 21, heading. He has not shown that he was denied his right to present a defense or that the evidentiary rulings were an abuse of discretion.

A trial court has broad discretion over the admission of evidence, and it will be reversed as an abuse of discretion only when the defendant shows both error and prejudice from the error. *State v. Hall*, 764 N.W.2d 837, 841 (Minn. 2009). Evidentiary rulings will not be a basis for relief unless the ruling affected a substantial right of the party and, where the ruling is one excluding evidence, the substance of the evidence was made known to the trial court by offer of proof or was apparent from the context within which questions were asked. Rule 103 (a)(2), Minn. R. Evid.

A. Third-party Perpetrator Evidence.

Appellant claims that he was denied the right to produce evidence that a third party was the perpetrator who committed the murder. Appellant's brief page 22. But appellant has not identified any evidence concerning a third party perpetrator that he was not allowed to introduce. He is not entitled to relief.

Evidence that has an inherent tendency to connect another person to the commission of a crime is admissible. *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004). Appellant has not identified any trial court ruling that prevented him from introducing evidence that a third-party committed the offense. Appellant made no offer of proof of

any additional evidence that he sought to admit to show that a third party committed the murder.

It was shown that [REDACTED] and [REDACTED] were nearby when the murder was committed, having followed the truck belonging to T. J. C [REDACTED] from the motel. It was shown that C [REDACTED] had pulled a gun on [REDACTED] in an attempt to get money claimed by another, but [REDACTED] denied being pistol-whipped by C [REDACTED]. T. 1016. [REDACTED] attempted to get [REDACTED] to help her get even with C [REDACTED] due to the earlier confrontation, but he declined.

A similar "motive" for [REDACTED] was established by testimony that C [REDACTED] had been waving his gun around and [REDACTED] pushed it from his face. [REDACTED] was also the cousin of the Larsons' and might have had a motive to aid them. Aiding them would not excuse them, but gave appellant reason to argue that [REDACTED] was responsible rather than appellant.

Appellant has not shown that he was not able to introduce the above evidence or that he could not have argued more about their motives for killing C [REDACTED]. There was no offer of proof at trial and it is not clear on appeal what, if any, evidence appellant sought to offer to attempt to show that any other person was the perpetrator of the murder. He has not shown a right to relief.

B. Use of Un-authenticated Transcripts.

Appellant argues that it was improper for Judge Wilson to hold that appellant could not use transcripts of witness interviews recorded by the police during their investigation where the transcripts were prepared by a defense agent but had not been

reviewed or authenticated by the officers who conducted the interviews. Appellant sought to use the transcripts for impeachment purposes. He has not shown a right to relief.

Appellant does not cite any authority for the proposition that he should have been allowed to claim that the transcripts were accurate records of the interrogations without having the transcripts authenticated by a party to the conversation. Rule 901(a), Minn. R. Evid.

Nor did the ruling hinder appellant's ability to cross-examine any witness. Appellant was in the same posture as any defendant was before the advent of tape recordings. The police talked to the witness, wrote a report of what the witness said to the officer, and the report could be used to question the witness/declarant about whether the statements reflected in the report had been made and to question the officer if the statement was denied or overly clarified. Appellant has not shown that his ability to cross-examine the witnesses was adversely affected by the ruling that he could not use an unauthenticated transcript that he had prepared to cross-examine the witnesses.

The ruling prohibiting use of the unauthenticated transcripts was not an abuse of discretion.

C. Co-conspirator Statements.

Appellant claims that the trial court ruling on the use of "coconspirator nonhearsay statements of declarants who were available to testify at trial impermissibly circumvents the rule in *Crawford*, and deprived [appellant] of the right to confront witnesses against him." Appellant's brief page 27, heading. This argument makes no sense.

Crawford v. Washington, 541 U.S. 36 (2004), bars the use of testimonial statements against a defendant unless the defendant has an opportunity to cross-examine the declarant. Appellant has not identified with any specificity any testimonial statements that were introduced against him at trial. Some of the witnesses who testified at trial had been interrogated by police officers during the investigation, and their testimony at trial did not match the information that they first gave to the police. Both appellant and the prosecutor pointed out that the witnesses had initially not told the same story that they gave at trial, whether or not it was claimed that the statements were truthful. Some witnesses testified that they lied to the police in the investigations because they did not want to get involved in the investigation or feared what might happen.

But appellant has not shown how such use of statements to police was any different in this case than in any other, or that he was prejudiced. There are many situations where a witness gives a statement or story on the stand that differs from a previous out-of-court statement. That, after all, is classic impeachment with a prior inconsistent statement. And any party may impeach a witness. Rule 607, Minn. R. Evid.

Appellant has not shown that the prosecutor used any testimonial hearsay to show that appellant was guilty of the crime. Statements made by appellant and his sister [REDACTED] [REDACTED] before they committed the murder, explaining their motive for killing C [REDACTED] and the manner in which they intended to kill him, were properly admitted as statements of co-conspirator made in the course and furtherance of the conspiracy. Rule 801 (d)(2)(E), Minn. R. Evid. There was no error.

CONCLUSION

A jury heard that Appellant Robert Larson helped his sister [REDACTED] "get back" at T. J. C [REDACTED] because C [REDACTED] hit [REDACTED]. They heard that appellant told [REDACTED] that he put a zip tie around C [REDACTED]'s neck, and showed [REDACTED] how he strangled him. Marks from the zip tie appeared both on C [REDACTED]'s neck and on appellant's hands. The jury found him guilty. Appellant has not shown that he was denied a fair trial by any trial court rulings, and did not make an offer of proof of any additional evidence that would have tended to show that another person committed the murder. He had a fair trial and is not entitled to relief. Respondent State of Minnesota asks this court to affirm the conviction.

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Respectfully submitted;



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