

FILED

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BENJAMIN, Justice, dissenting:

Because the constitutional error regarding the confrontation clause was harmless beyond a reasonable doubt, I would affirm the petitioner's conviction.

The majority opinion finds reversible error in permitting Dr. Kaplan to testify to the contents of the autopsy report prepared by Dr. Belding on the basis that Dr. Belding's clinical summary contradicts the contents of the autopsy report, and Dr. Belding was not available to be cross-examined on this matter. I disagree with the majority opinion because I believe that Dr. Kaplan's testimony and the autopsy report added nothing to the State's evidence against the petitioner, and that there is no contradiction between Dr. Belding's clinical summary and his autopsy report.

Dr. Belding's opinion in the autopsy report was as follows:

OPINION

CAUSE OF DEATH AND CONTRIBUTORY CONDITIONS/FACTORS: It is our opinion that Kathryn Gail Smith, a 53 year old woman, died as a result of reportedly being shot by her boyfriend, using a shotgun, at contact range. Multiple birdshot pellets were recovered and retained.

MANNER OF DEATH: Homicide

Significantly, Dr. Belding's opinion was undisputed and does not conflict with the recorded statement of the petitioner who admitted to Detective Sperry that he shot the victim.

More importantly, Dr. Belding's opinion in no way contradicts his informal clinical summary in which he stated:

Kathryn Gail Smith was a 53 year old white female who, after threatening to [throw] her boyfriend out of the trailer, walked into a bedroom and seized a single shot barrel shotgun. The boyfriend took the shotgun from her and shot her in the face. The boyfriend was subsequently arrested and [reportedly] has confessed. There was a witness.

First, this statement is perfectly consistent with Dr. Belding's opinion in the autopsy report that Ms. Smith's death was a homicide. Second, this information clearly was not based on Dr. Belding's interpretation of physical evidence but apparently was told to him by Detective Sperry, who in turn obtained the information from the petitioner in a recorded statement. Specifically, the petitioner admitted to Detective Sperry on the day of the murder that "[y]es. I shot her." He explained that "she pulled the gun on me. And I turned around and grabbed the gun and put it back in her face, and it went off." Significantly, Detective Sperry testified at trial and was cross examined by the defense. Also, the petitioner's recorded statement was heard by the jury. Therefore, the information was not previously undisclosed or exculpatory in that it simply is a restatement of what the petitioner told Detective Sperry. Finally, the remark in the

clinical summary that there was a witness simply refers to Joshua Jackson, who was the only person other than the petitioner and Ms. Smith in the house at the time of Ms. Smith's murder and who testified at trial. In sum, nothing in Dr. Belding's autopsy report or clinical summary made it more or less likely that the petitioner was guilty of an intentional killing.

Further, it is clear from reviewing the trial transcript that the verdict did not hinge on any physical evidence. Neither the State's nor the petitioner's blood splatter experts could rule out an accidental or an intentional killing, and their testimony agreed on material points. Specifically, the two experts agreed that when Ms. Smith was shot, she was looking away from the petitioner. The experts also agreed that based on the blood splatter evidence there is no way that the victim was facing the petitioner at the moment she was shot. However, the petitioner's expert testified that the gun could have hit the victim's face during a struggle and turned her head immediately before the gun fired. The experts also agreed that the victim's arms were up in front of her when she was shot. The State's expert characterized this as a defensive posture whereas the petitioner's expert characterized it as an aggressive posture.

It is apparent to me that the verdict was based on the fact that the jury believed Joshua Jackson's version of events over that of the petitioner. Mr. Jackson, who was in the house at the time of Ms. Smith's murder, testified,

[the petitioner and Ms. Smith] was [sic] arguing and then – I don't know what they was [sic] arguing about, but he said, "I will f--king show you, Bitch." And then he grabbed the gun and walked in there, and I heard the gunshot. And that was it.

Therefore, for the reasons stated above, I believe that the petitioner would have been convicted even if Dr. Belding, the doctor who performed the autopsy, had testified at the petitioner's trial. Accordingly, I respectfully dissent.