

No. 21-124510-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

DARY JENE GREEN
Defendant-Appellant

SUPPLEMENTAL BRIEF OF APPELLANT



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DOUGLAS T. SHIMA
CLERK OF APPELLATE COURTS

Appeal from the District Court of Wyandotte County, Kansas.
Honorable Jennifer Myers, Judge
District Court No, 19-CR-161

Dary Jene Green #126193
WCF
Winfield, KS

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NATURE OF THE CASE

Dary Jene GREEN WAS CONVICTED OF premeditated first-degree murder. Green represented himself thru trial. Green brings this direct appeal to this court. Green moves this court to address the merits set forth herein.

STATEMENT OF ISSUES

ISSUE 1: ARREST WITHOUT A WARRANT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT.

ISSUE 2: PROSECUTORIAL MISCONDUCT

ISSUE 3: THE TRIAL COURT AND STATE PROSECUTOR FAILURE TO EXCLUDE WITNESS STATEMENT DENIED DEFENDANT A FAIR TRIAL.

ISSUE 4: THE STATE AND TRIAL COURT ERRED BY ALLOWING STATE WITNESS, MORRIS HOLLISHED TO TESTIFY AT TRIAL THAT DJ WAS DARY GREEN.

STATEMENT OF FACTS

At the outset, Green notes that appellate counsel erroneously referred to Dary Green as DJ throughout his brief. Appellant want this court to know appellate counsel misstated the facts by stating Green arrived in his car with the deceased as his passenger. In fact, the record show Hollinshed stated DJ was the person who drove down the street, not Mr. Green. Green ask this court to note appellate counsel erroneously refer to him as DJ throughout his whole brief.

Green states appellate counsel misstated the facts by stating Hollished saw Green shoot the deceased. However, Ho plished stated in the affidavit DJ shot the deceased.

Appellate counsel misstated the facts by stating Hollished saw the deceased pull up in a car with Green. The affidavit correctly stated the deceased pulled up in a car with a man name DJ.

Appellate counsel misstated the facts by stating as the deceased was GETTING OUT, Hollished watched as Green pulled out a gun. The record correctly states as the deceased was getting out, Hollished watched as DJ pulled out a gun.

Appellate counsel misstated the facts by stating Hollished asked Green not to shoot. The affidavit correctly states Hollished asked DJ not to shoot.

Appellate counsel misstated the facts in his brief by stating Green shot twice at the deceased, hitting her once. However, the record stated it was DJ who shot twice at the deceased, hitting her once.

Appellate counsel erroneously stated in his brief Green had and fired multiple different attorneys representing him. Green asserts there is no record that he fired multiple attorneys.

Appellate counsel erroneously stated in his brief William further testified that Green shot the deceased. However, the record show Williams stated at the preliminary hearing he did not know the race of the driver. Therefore Williams did not know the voice of the driver in the driver seat because he never had a conversation or communication with the defendant. Williams never seen Green at the crime scene. Green notes that William stated he saw a black male and a black woman in the

black cadí but never stated that the black man was Dary Green. Green states it was a fact there was no premeditation because the State's only witness stated the man who did the shooting was DJ, not Dary Green.

Green disagree with counsel,s statement the evidence at trial would support a conviction for the lesser#included offense of intentional second-degree murder because Morris Höllished stated his statement that the person he saw at the scene was a man named DJ, not Dary Green. Further facts will be stated in appellant's brief

ARGUMENT AND AUTHORITY

ISSUE 1: ARREST WITHOUT A WARRANT VIOLATED DEFENDANT CONSTITUTIONAL RIGHT.

In 2019, defendant was at his residence asleep when he was awoke by an officer. The officer informed defendant he had a warrant for his arrest; however, there was no warrant for defendant's arrest. The officer informed the defendant he was under arrest for first-degree murder. Defendant was detained at the Jackson County Detention Center in Missouri. Thereafter, defendant learned there was no warrant but a bond was set for one million dollars. The defendant was booked for first-degree murder despite the fact there was no warrant for his arrest. Defendant allege the officer lied to him about his arrest upon which he was detained for. The arresring officer subsequently arrested defendant without reading him

his miranda rights.

A hearing was held where the arresting officer stated in court he lied when he informed defendant he had a warrant for defendant's arrest. The arresting officer stated in court he did not read defendant his miranda rights. The issue here is whether an arrest warrant must be issued when a defendant is detained following a warrantless felony arrest when no probable cause has been found by the court based on the arresting officer affidavit.

Defendant alleges the arrest was improper because an arrest warrant should have been obtained prior to entering the house. Based on this argument, defendant allege all proceedings occurring after the illegal arrest was improper and therefore, any evidence found at the time of his arrest should be suppressed. See State v. Platten, 225 Kan. 764, 594 P.2d 201 (1979). Defendant cite Kansas authority that an arrest without a warrant and the subsequent searches by officers violated his rights under the Fourth Amendment and Section 15 of the Kansas Constitution Bill of Rights.

Section 15 of the Kansas Bill of Rights provides "The right of the people to secure in their persons and property against unreasonable searches and seziures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the pearsons or property to be seized."

The Fourth Amendment to the United States Constitution, while not identical, is essentially the same. Platten, 225 Kan. 764.

Defendant argues that warrantless entry for purposes of arrest is illegal because searches conducted outside the judicial process, without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment to the United States Constitution. 225 Kan. 764. In Platten, as in the instant case, defendant was arrested without a warrant within the privacy of his home, that he did not consent to the entry by the police, and that no warrant was obtained prior thereto. Such an intrusion upon a person's right to privacy, absent exigent circumstances is a violation of the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Bill of Rights.

Defendant asserts that the arresting officer gained illegal entry of his home; that the officer was not authorized to search defendant without a search warrant because there was no probable cause to connect him to a felony and he was not considered dangerous. State v. Anderson, 1991 Kan. App. LEXIS 238. Defendant contends that the arresting officer act of intentionally given false statements to him incidental to the warrantless search of his home without consent constitutes unlawful detention under the Fourth Amendment and Kansas Constitution Bill of Rights because there was a close proximity between the constitutional violation and consent. State v. Murlock, 40 Kan. App. 2d 216, 190 P.3d 1002 (2008).

Defendant argues that the arresting officer had no probable cause to detain him without a warrant and without consent to search his residence in light of the officer's deception to obtain defendant's girlfriend consent to search his home, a ruse entry.

For all the above reasons, this court must reverse defendant's conviction on the grounds that the warrantless arrest was unlawful and grant defendant a new trial.

ISSUE 2: PROSECUTORIAL MISCONDUCT

Green asserts that prosecutorial misconduct denied him a fair trial because the prosecutor did not confine her remarks to the evidence during his trial. As a fundamental rule in closing argument, prosecutors must confine their argument and comments to matters in evidence. Commenting to facts not in evidence is clearly improper. *State v. Carter*, 278 Kan. 74, 91 P.3d 1162 (2005).

Green asserts that the prosecutor misstated the evidence throughout his jury trial. This instance occurred when the prosecutor adopted Morris Hollished testimony that the victim was standing and shot in the back. Green argues that the prosecutor's comment the victim was shot in the back is not supported by the evidence. Green notes that the autopsy report show the victim was shot once above her right elbow and the bullet traveled through her right torso and exited on her left side.

Green concedes a prosecutor is allowed considerable latitude in discussing the evidence and drawing reasonable inferences based on the evidence. 278 Kan. 74. Green argues because the prosecutor's statement is not supported by the evidence, it is beyond the wide latitude prosecutors are allowed in commenting on the evidence. State v. Baker, 281 Kan. 997, 135 P.3d 1098 (2006).

Green argues that the prosecutor's remarks constitutes reversible error. The misstatement of facts about the victim being shot in the back was a factual misrepresentation, was gross and flagrant, denying Green a fair trial because the jury was led to infer shooting the victim in the back constituted premeditated first-degree murder. The prosecutor's misstatements that the victim was shot in the back throughout Green's trial was a misstatement of fact constituting prejudice to Green's theory of defense as it was a significant part of the State's case.

Green notes that the factual misstatements was gross and flagrant constituting plain error denying defendant the right to a fair trial. For these reasons Green ask the court to remand his case to the district court for a new trial. Green challenges the prosecutor telling the jury the victim was shot in the back. A juror could easily construe the prosecutor's misstatements as suggesting Green did this, i.e., shoot the victim in the back, in preparation for murder, amplifying the impact of the State's motive evidence.

Green argues it was error for the prosecutor to tell the jury throughout trial that the victim was standing and shot in the back. These misstatements conveyed serious adverse impressions to the jury. The statements improperly declared that Green had motive to commit premeditated first-degree murder.

Green points out the prosecutor had access to the autopsy report and the prosecutor knew the victim was shot in the arm instead of being shot in the back. Yet, the prosecutor chose to misstate the evidence despite Green's objection at trial. When prosecutor's argue facts not in evidence, the argument is outside the wide latitude given to them. State v. Hall, 292 Kan. 841, 848, 257 P.3d 272 (2011). This error prejudiced Green's due process right to a fair trial and thus requires reversal and remand for a new trial.

ISSUE 3: THE TRIAL COURT AND STATE PROSECUTOR FAILURE TO EXCLUDE WITNESS FALSE STATEMENT DENIED DEFENDANT A FAIR TRIAL.

Defendant Green ask this court to reverse his conviction because the State and trial court failed to exclude Morris Hollinshed prejudicial statements during trial. State v. Murrell, 224 Kan. 689, 585 P.2d 1017 (1978).

The first statement which prejudiced Green's case was when he stated to the jury the decendent was shot in the back. However, the autopsy report states the decendent was shot one time in her right arm, above her right elbow, the bullet passed thru her right torso, exiting out her left side.

The second misstatement of fact which prejudiced Green's case was when the State prosecutor allowed the jury to consider Hollished statement the person driving the black cadillac was DJ, who is known as Dary Green.

The third misstatement of fact which prejudiced Green's case was when the prosecutor told the jury Hollished would testify to the fact defendant possessed a 40 caliber hand gun, and that he believed that was the same gun used by the defendant. Green argues that the above misrepresentations were outside the scope of evidence, and such admissions prejudiced his right to a fair trial. This error constitutes remand of defendant's case for a new trial.

ISSUE 4: IT WAS PREJUDICIAL ERROR TO ALLOW THE STATE WITNESS, MORRIS HOLLISHED TO EXPLAIN TO THE JURY DJ WAS DARY GREEN.

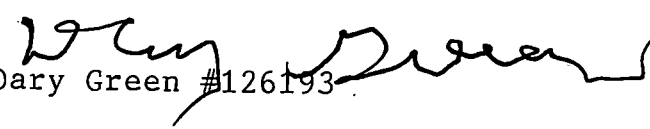
The trial court and the State prejudiced Green's case by allowing Morrish Hollished to tell the jury a man name DJ was Dary Green because the State had no factual support in evidence to support this fact in its case in chief. See LaPointe v. State, 42 Kan. App. 2d 522, 214 P.3d 684 (2009). Green alleges the State failed to present evidence that Green and DJ was the same person whom Hollished alleged was at the crime scene. The trial court failed to suppress Hollished statement which constitutes reversible error because the statement was false and misleading thus should not have been presented to the jury as it negatively affected Green's defense. Green asserts the State failed to place him at the scene as being

DJ because Hollished never factually stated Mr. Green was the alleged shooter. Hollished merely stated that DJ was the shooter. At one time Hollished did state Green was DJ but there is no evidence to support Hollished statement. This error in itself prejudiced Green's defense because Hollished's inconsistent statements about the alleged shooter was based on facts unsupported by the evidence. Due to this error Green's case should be remanded back to the district for a new trial.

CONCLUSION

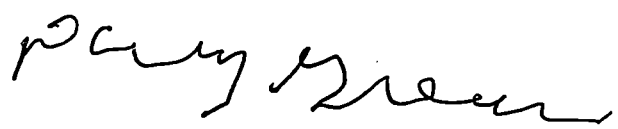
For the above reasons, Mr. Green ask that this court remand his case back to the district court for a new trial.

Respectfully submitted,


Dary Green #126193

CERTIFICATE OF SERVICE

The foregoing Supplemental Brief was mailed on this 31st day of May, 2023, upon the following:
Clerk of the Appellate Court, 301 SW 10th Ave., Topeka, KS 66612, Office of the Attorney General, 120 SW 10th Ave. Topeka, KS 66612-1594, Office of the District Attorney, and James M. Latta, Kansas Appellate Defender, 700 SW Jackson, Topeka, KS 66603-3733.


Dary Green #126193