STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS (1-7)

Defendant Steven A. Avery has proffered seven (7) special jury instructions. None of them should be given to the jury.

Avery's Proposed Jury Instructions Nos. 1, 2, 4 And 7 Improperly Comment On The Trial Evidence And Improperly Highlight Certain Evidentiary Factors.

A criminal defendant is entitled to one closing argument, delivered by counsel. He is not entitled to a second closing argument, delivered by the trial court in the guise of presenting special jury instructions. That is what Avery hopes to accomplish through several of his proposed jury instructions.

The controlling principles of law are well-established. This court "has broad discretion in deciding whether to give a particular jury instruction." State v. Fonte, 2005 WI 77, ¶ 9, 281 Wis. 2d 654, 698 N.W.2d 594. It must exercise its discretion to "fully

and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." Id. (citation and quotation marks omitted). While a criminal defendant is entitled to a jury instruction on a theory of defense, the record must contain sufficient evidence to support it. See State v. Coleman, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996).

With particular application to this case, a defendant is not entitled to jury instructions that merely highlight certain evidentiary factors, or place the trial court in the position of commenting on the evidence. See, e.g., State v. Davidson, 44 Wis. 2d 177, 191-92, 170 N.W.2d 755 (1969) (footnotes omitted):

> Defendant next claims as error the failure of the trial court to give a proposed instruction, the so-called 'theory of the defense' instruction. On this point it is important to distinguish between the legal theory on which prosecution or defense relies and the factual evidence adduced in support of such theory. In the case before us, the proposed 'theory of defense' instruction submitted by the defense appears to be a summarization of the evidence as the defense sees it. In fact, the defendant's counsel in their brief define a 'theory of defense' instruction as '. . .the defendant's theory of the case is a recitation of the facts upon which he relies and the inferences which can reasonably be drawn from these facts.' This commingles an explanation as to legal theory with comments on the evidence by the trial judge. The majority of cases cited by defendant on this point are from the federal system, where comments on the evidence may be made by the trial judge. In Wisconsin, trial judges are not to thus comment on the evidence. Such comment even in the form of a statement that these are the assertions of the defense, is not allowed in Wisconsin.

Accord State v. Pruitt, 95 Wis. 2d 69, 81, 289 N.W.2d 343 (1980) (citations omitted) ("A defendant does have the right to an instruction on the theory of defense if there is one. However, the legal theory upon which the defense relies and the evidentiary facts offered in support of the same must be distinguished. A recital of the latter by the trial court

must be avoided as it constitutes an impermissible comment on the evidence by the court"). See also State v. Amos, 153 Wis. 2d 257, 278, 450 N.W.2d 503 (Ct. App. 1989) (footnotes omitted) ("A trial court has wide discretion in presenting instructions to the jury. If its instructions adequately cover the law applied to the facts, a reviewing court will not find error in refusing special instructions even though the refused instructions would not be erroneous. A defendant is entitled to an instruction on a valid theory of defense, but not to an instruction that merely highlights evidentiary factors. Such instructions are improper, and trial courts are correct if they reject them").

The State asks this court to examine Avery's proposed jury instructions nos. 1 ("Bloodstains In Toyota"), 2 ("Bone Fragments"), 4 ("Investigative Bias and Tunnel Vision") and 7 ("Spoliation"). All four instructions run afoul of Davidson, Pruitt, and Amos. They do not describe a legal theory of defense but rather "factual evidence adduced in support of such theory." Davidson, 44 Wis. 2d at 191. The court in Davidson distinguished between a legal theory and a factual summary and indicated that an instruction on the latter is error in Wisconsin: "In Wisconsin, trial judges are not to thus comment on the evidence. Such comment even in the form of a statement that these are the assertions of the defense, is not allowed in Wisconsin." 44 Wis. 2d at 192.

All four instructions are possible templates for counsel's closing argument. But when presented by the trial court in the form of jury instructions, they constitute improper commentary on the evidence.

Avery's Proposed Jury Instructions Nos. 1 and 2 Are Improper Under State v. Coleman, 206 Wis. 2d 199, 556 N.W.2d 701 (1996).

A jury instruction relating to evidence that Avery's blood was "planted" in the victim's vehicle or that bone fragments were "planted" behind Avery's garage would be improper for the following reasons under State v. Coleman, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996):

First, this "planting-evidence" or "frame-up" defense does NOT "relate to a legal theory of a defense, as opposed to an interpretation of evidence." Coleman, 206 Wis. 2d at 212. Avery's reliance on State v. Richardson, 210 Wis. 2d 694, 563 N.W.2d 899 (1997), is misplaced because Richardson only concerns the admissibility of proffered "frame-up" evidence, not whether there is a legal defense of "frame-up" warranting a jury instruction.

Moreover, if Avery is arguing that his "legal theory" of defense is that a "third party" committed the crime and then framed him, Avery has not met the "legitimate tendency test" of State v. Denny, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), which requires not only evidence that a third party had motive and opportunity to commit the crime but, most significantly, "some evidence to directly connect [the] third person to the crime charged which is not remote in time, place or circumstances." Denny, 120 Wis. 2d at 623-24.

Second, this "planting-evidence" or "frame-up" defense is adequately covered by other standard jury instructions, including instructions on reasonable doubt and the

jurors' responsibility to weigh the evidence and assess witness credibility. See Coleman, 206 Wis. 2d at 212-13; Davidson, 44 Wis. 2d at 192.

Avery's Proposed Jury Instruction No. 3 ("Chain of Custody of Tested Items") Is Improper, Misleading And Unnecessary.

Avery's proposed jury instruction no. 3 is also argument in camouflage. The first two sentences of the proposed instruction effectively defeat this court's determination that, with respect to the physical evidence described in the instruction, the State has already proven under Wis. Stat. § 909.01 that the "matter in question is what its proponent claims." This was a preliminary question for the trial judge. State v. McCoy, 2007 WI App 15, ¶¶ 8-9, ___Wis. 2d___, ___N.W.2d___. Daniel D. Blinka, Wisconsin Evidence, § 901.1, at 750-51 (2d ed. 2001). It is not the jury's function to second-guess this court's admissibility determination. This court has already held the evidence to be admissible: the State proved to this court's satisfaction that the items of evidence are what its witnesses claim them to be. Avery was permitted to challenge only the weight of this properly admitted evidence by introducing evidence of his own. See Wis. Stat. § 901.04(5). In closing argument, he will have the opportunity to comment on the weight of the State's evidence; an instruction questioning the admissibility of the evidence is improper.

This instruction is also unnecessary. The pattern instructions on presumption of innocence, burden of proof, reasonable doubt, weight and credibility, and expert witness

testimony are sufficient to cover this ground without confusing the jury, or worse, misleading the jury into believing they must decide whether this evidence should have been properly admitted in the first place. This proposed instruction is nothing more than glorified argument attacking the weight of the evidence. The defense has no right to give one argument to the jury, and then have the judge repeat that same argument in his instructions.

It is true State v. McCoy provides that gaps in the chain of custody go to weight of evidence rather than admissibility. 2007 WI App 15, ¶ 9. Again, counsel remains free to argue those "gaps" to the jury in closing. Id., ¶ 20. But if Avery is correct in his assumption that McCoy authorizes such an instruction, then the instruction should include everything McCoy holds. That would include the following presumption, culled from McCoy and curiously omitted from Avery's proposed instruction:

> "The State need only prove that it took reasonable precautions to preserve the original condition of the evidence; it does not have to exclude all possibilities of tampering with the evidence. A presumption of regularity exists with respect to official acts of public officers and, absent any evidence to the contrary, you are to presume that their official duties have been discharged properly."

McCoy, id. at ¶ 19, quoting United States v. Moore, 425 F.3d 1061, 1071 (7th Cir. 2005). See United States v. Boykins, 9 F.3d 1278, 1285 (7th Cir. 1993); Blinka, Wisconsin Evidence, § 9015.1 at 756. This would not be an improper burden-shifting presumption because it does not relate to an element of the offense; it only presumes regularity in the gathering of evidence that may or may not be probative of an element of the crime.

Avery's Proposed Jury Instruction No. 4 ("Investigative Bias and Tunnel Vision") Is Unnecessary And Improper.

Insofar as the proposed instruction is intended to reflect on the credibility of the Manitowoc County Sheriff's Department witnesses, no special instruction is justified. The pattern instruction, Wis JI-Criminal 300 (2000), "Credibility of Witnesses," tells the jury that in determining credibility and the weight to give a witness's testimony, they can consider "bias or prejudice, if any has been shown" as well as "possible motives for falsifying testimony." Id. at 1. The Comment to this instruction refutes the notion that a special instruction for law-enforcement witnesses is necessary:

> The question has been raised with the Committee whether a special instruction should be given for police officer witnesses. One theory is that the instruction should advise that the testimony of the police officer witness is to be weighed by the same standards applied to other witnesses. In the Committee's judgment, no separate instruction is necessary; WIS JI-Criminal 300 would apply to all witnesses, including the police officer.

Wis. JI-Criminal 300, at 2. The Comment also notes that in State v. Melvin, 49 Wis. 2d 246, 254, 181 N.W.2d 490 (1970), the supreme court rejected the argument that the jury should be instructed that greater care should be taken in weighing an officer's testimony because of the officer's greater interest in obtaining a conviction.

None of the three cases Avery cites to support submission of the proposed instruction is apposite. State v. Missouri, 291 Wis. 2d 466, 714 N.W.2d 595 (Ct. App. 2006), involved the admissibility of other-acts evidence bearing on a police officer's credibility, and not a claim of instructional error. Similarly, McDonald v. United States, 904 A.2d 377, 380-81 (D.C. 2006), dealt with the admissibility of evidence in a case tried

before a judge without a jury, so instructions were not an issue. Likewise, State v. Hughes, 748 S.W.2d 733, 738-39 (Mo. Ct. App. 1988), concerned the exclusion of evidence showing bias and did not involve a claim of instructional error.

In State v. Smith, 170 Wis. 2d 701, 715 (Ct. App. 1992), the court held it was not error to decline to give the accomplice instruction where the accomplice's testimony is sufficiently corroborated. It stands to reason that the refusal to give an instruction highlighting the possible bias of a witness who is not an accomplice cannot be error either.

Finally, there is also authority for the proposition that the proffered instruction is not only unnecessary but improper. "Generally, a defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." State v. Ortiz, 747 A.2d 487, 507 (Conn. 2000); State v. Slater, 908 A.2d 1097, 1109 (Conn. App. 2006). The two Connecticut exceptions are where the witness is the complaining witness or an accomplice, 747 A.2d at 507; here, the law enforcement officers are neither.

Avery's Proposed Jury Instruction No. 5 ("Experts and Common Sense") Is Unnecessary.

When the pattern jury instructions accurately state the law applicable to the case, the circuit court does not err by refusing to give additional instructions proposed by the defense. See Amos, 153 Wis. 2d at 278. Here, the pattern instructions pertaining to expert testimony in general (WIS JI—Criminal 200), juror's knowledge (WIS JI—

Criminal 195), and reasonable doubt (WIS JI-Criminal 140) accurately inform the jury of the law on the permissible use of, and limitations upon, expert testimony in general. The instructions also accurately and completely cover Avery's proposed jury instruction no. 5.

These pattern instructions accurately and completely state how the jury should evaluate expert testimony. WIS JI—Criminal 200 tells the jury that the expert testimony was received to help the jury reach a conclusion, but that the jury is not bound by any expert's opinion. The instruction informs the jurors of factors upon which to evaluate the expert's testimony: the expert's qualifications; the expert's credibility; the facts upon which the expert's opinion is based; and the reasons the expert gave for the opinion. WIS JI—Criminal 195 advises the jurors that they may use matters of common knowledge and their observations and experience in the affairs of life.

Taken together, the pattern instructions address the very issue of common sense raised in Avery's proposed instruction. It would be difficult to conceive of common sense that is rooted in something other than that which the pattern instructions advise the jury that they should consider in evaluating the expert testimony. If there was any question that the jurors should use their common sense in evaluating the testimony, it is dispelled by WIS JI—Criminal 140, which defines "reasonable doubt" as a doubt based upon "reason and common sense."

Taken together, the pattern instructions provide far better guidance about what the jury may and should consider in evaluating the expert testimony than does Avery's

proposed instruction. An instruction that the jury should "never surrender your common sense," and should set aside expert testimony if it "def[ies] common sense," does not provide the same amount of specific guidance on which to evaluate expert testimony, and may be confusing to the jury.

Additionally, Avery's citations of "authority" do not support his proposed instruction about experts and common sense.

City of West Bend v. Wilkens, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W. 2d 324, involves the admissibility of evidence, not jury instructions. In City of West Bend, the court of appeals rejected the defendant's argument that field sobriety tests constitute scientific evidence. 2005 WI App at ¶ 21. Specific testimony may not be admissible as scientific evidence when common knowledge or experience in the affairs of life already informs the average juror on the matter. In City of West Bend, the court analogized the lack of need for expert testimony on how to discern drunkenness to the lack of need for an explanation of the theory of gravity. Id., at ¶ 21. But City of West Bend does not support the giving of an instruction on common sense where expert testimony has been admitted.

State v. Bednarz, 179 Wis. 2d 460, 507 N.W.2d 168, is also an admissibility of evidence case, not a jury instruction case. In Bednarz, the court of appeals concluded that expert opinion regarding a victim's recantation in a domestic abuse case was the proper subject of expert testimony because it assisted the trier of fact to understand the evidence or to determine a fact in issue. Id. at 466. The court expressly rejected the defendant's

claim that the reasons for the victim's recantation should be determined solely by the use of common sense inquiry. Id. at 467.

In State ex rel. Cholka v. Johnson, 96 Wis. 2d 704, 292 N.W.2d 835 (1980), the supreme court held that a trial court determining issues of probable cause at a preliminary hearing was permitted to "apply common knowledge and individual observations and experience to the evidence presented for the purpose of drawing factual inferences therefrom." Id. at 713. The court cited numerous cases in support of this principle but also cited to WIS JI-CRIMINAL 195. To the extent that a common sense instruction is necessary, WIS JI-CRIMINAL 195 is the best expression of what common sense means and how to apply it.

Finally, United States v. Barnard, 490 F.2d 907 (9th Cir. 1973) -- the case cited with approval in Hampton v. State, 92 Wis. 2d 450, 457, 285 N.W.2d 868 (1979), and the last case upon which Avery relies -- is also an admissibility of evidence case, not a jury instruction case. There the court rejected the argument that the circuit court had erred in excluding his defense-proffered expert testimony that a prosecution witness was not competent to testify and was not a reliable witness, because the witness had psychiatric problems and was a sociopath who would lie when it was to his advantage to do so. 490 F.2d at 912. The court first noted that competency was a matter for the judge, but credibility was for the jury. In the passage relied on by the defendant in this case, the court stated that receiving expert psychological testimony on a witness's credibility, "[. . .] may cause a jury to surrender their own common sense in weighing testimony [. . .]." Id..

While it is important for a jury not to surrender their collective common sense, it does not follow that Barnard supports use of the defendant's proposed jury instruction. In Barnard, the issue was whether the expert testimony should have been admitted. The court was concerned, in part, that the admission of the expert testimony might cause the jury to substitute the expert's judgment for its own in evaluating the identification testimony. In this regard, it was clear that the court felt that the jury was capable of deciding the issue of witness credibility for itself, based upon traditional tests of credibility, without undue reliance on expert opinions. Id. at 912-13.

Here, however, the evidence has already been admitted. All that remains is for the jury to decide how much of the expert's testimony should be believed and how much weight to give it. For that, the pattern jury instructions are better suited than the defendant's proposed instruction.

Avery's Proposed Jury Instruction No. 6 ("Lack of Motive") Is Legally Incorrect And Invites Jury Speculation.

The proposed instruction contradicts Wis JI- CRIMINAL 175, which correctly reflects the law on motive, by asserting that the failure to prove motive may be a proper basis for an acquittal, thereby suggesting that the State has an obligation to prove motive. The proposed instruction is based on the logical fallacy that the State's failure to present positive evidence of the defendant's motive to commit the crime(s) charged is the same as positive evidence that the defendant had no motive to commit the crime(s). The record

in this case reveals a total lack of evidence regarding motive, not evidence of the defendant's lack of motive.

The proposed instruction invites the jury to speculate about a fact that the defense says it agrees the State is not required to prove. As noted, there is no positive evidence in the record that the defendant had no motive to commit the crimes. If there has also been no evidence that he did have a particular motive then there is no evidence upon which a jury could "... find that he had a lack of motive" or that he had a motive.

The proposed instruction burdens the court with presenting the defense argument to the jury rather than providing the jury with a statement of the applicable law regarding the presence or absence of evidence of motive. But Wis JI-CRIMINAL 175 accurately and fully reflects the law and needs no modification or supplementation.

The defense correctly points out that the first three sentences of its proposed instruction are taken verbatim from State v. Berby, 81 Wis. 2d 677, 686-87, 260 N.W.2d 798, 803 (1978). Berby dealt primarily with the question of the standard for probable cause at a preliminary hearing. In denying bindover, the trial court found insufficient evidence that the fire had an incendiary origin and commented that it was not satisfied that Berby had a motive to commit the crime charged (arson). On review, the supreme court stated the law regarding motive and concluded that the record did not reflect that the trial court gave evidence of motive (or lack of such evidence) any improper weight and certainly did not require the State to positively prove a motive to commit arson. Id. Berby is not a jury instruction case and does not fairly stand for the proposition that a jury should be instructed that it may rely on lack of evidence of motive to acquit. Such a

reading of the case would contradict the legal principle that no proof of motive is necessary.

Berby is cited by the Criminal Jury Instructions Committee in its Comment to Wis JI-Criminal 175, and one can presume that the Committee believed the pattern instruction accurately and fully describes the law related to motive and evidence of motive in light of Berby. Modification of the pattern instruction is simply not necessary in this case. The pattern instruction accurately reflects the law and does not prohibit the defense from arguing that the State has not positively proven a clear or identifiable motive on the part of the defendant and that the jury is free to consider this. The pattern instruction also makes clear that such proof is unnecessary in order for the jury to find the defendant guilty and protects the State from improper suggestions to the contrary.

The State also reminds the court that the defense went to great effort to successfully convince the court to exclude 13 instances of "other acts" evidence offered by the State that was designed to establish the motive and intent of the defendant to engage in the charged crimes. Avery now seeks to impose upon the State an extra-legal and positive duty to prove "motive" and further benefit from the exclusion of that evidence. This is the type of "perversion" of the judicial machinery and "fast and loose" play with the courts that is the basis for the equitable doctrine of "judicial estoppel". Olson v. Darlington Mutual Insurance Co., 2006 WI App. 204, ¶ 4, 723 N.W.2d 713, 716; State v. Johnson, 2001 WI App 105, ¶¶ 9-10, 244 Wis. 2d 164, 169-170, 628 N.W.2d 431, 433-44; State v. Petty, 201 Wis. 2d 337, 346-47, 548 N.W.2d 817, 820-21 (1996). Even if the court determined that the doctrine of judicial estoppel does not

directly apply to bar the requested instruction or the argument flowing from that proposed instruction, the court should be mindful of the fairness issues underlying the doctrine when the court exercises its discretion in instructing the jury and in ruling on objections during argument.

Avery's Proposed Jury Instruction No. 7 ("Spoliation") Is Improper And Contains Incorrect Statements Of Law.

Avery's proposed jury instruction no. 7 ("Spoliation") should be rejected for all of the following reasons.

The first sentence highlights specific evidence presented to the jury. As noted supra, this court should not give an instruction that highlights specific evidence.

The second sentence states: "There is a duty to preserve evidence, if possible." This is an incorrect statement of law. "The prosecution has a duty to preserve evidence only if the evidence possesses exculpatory value that was apparent before the evidence was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." State v. Kircher, 189 Wis. 2d 392, 402, 525 N.W. 2d 788 (Ct. App. 1994). See also State v. Greenwold, 189 Wis. 2d 59, 67, 525 N.W. 2d 294 (Ct. App. 1994) (defendant's due process rights are violated only if the police failed to preserve evidence that is apparently exculpatory or if the police acted in bad faith by failing to preserve evidence that is potentially exculpatory; negligent failure to preserve potentially exculpatory evidence is not bad faith).

Avery does not demonstrate that the civil spoliation instruction discussed in Estate of Neumann ex rel Rodli and Neumann, 2001 WI App 61, ¶ 82, 242 Wis. 2d 205, 626 N.W. 2d 821, applies in a criminal case. In any event, Neumann expressly states that a spoliation inference instruction should not be given in the absence of clear, satisfactory and convincing evidence that the party intentionally, deliberately destroyed evidence; mere negligence does not suffice.

CONCLUSION

For all of the foregoing reasons, this court should deny Avery's request to submit Proposed Instructions Nos. 1 through 7.

Dated this 11th day of March, 2007.

Respectfully submitted,

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