ARIZONA COURT OF APPEALS

DIVISION TWO

STATE OF ARIZONA, APPELLEE –vs– DIJON TREVAR YOUNG, Appellant,	2 CA-CR 2015-0091 DEPARTMENT B PINAL COUNTY SUPERIOR COURT S1100 CR2013-00632

APPELLANT'S REPLY

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¶ 1 As to Issue I: The Appellant asked the Court, DID THE TRIAL COURT ERR IN NOT GRANTING A WILLITS JURY INSTRUCTION? The State redefines the above issue and combines it with Appellant's issue statement II. As to the first issue, the State states that "the jury was told that the newly-manufactured gun was not the same as Appellant's gun." (State's Answer Brief, page 15, line 7) On the contrary, the State's expert stated otherwise that they were identical:

> Q. Okay. You said earlier, as I recall, that the two exhibits, the two handguns, should be identical?
> Do you recall saying that?
> A. Yes. With exception of the serial number and the tape and the writing that was on the suspect weapon.
>
> (Trial Day 6, page 47, line 16)

The whole purpose of the State's expert's testimony was to allege that the new gun (Exhibit 185) functions virtually the same as the weapon at issue (Exhibit 33). The introduction of the new gun (Exhibit 185) was not merely to demonstrate how a revolver functions in single-action and double-action modes. If this was the intent, then this could have been done with a host of different guns, Ruger, Smith and Wesson, etcetera. It also could have been done by a video or by the expert handling the weapon. Instead the exact same gun (Taurus Tracker, .357 Magnum Revolver) was proffered and utilized in an attempt to show that the destroyed gun (Exhibit 33) would have performed the same as the new gun (Exhibit 185). This

was even more evident when the jurors were allowed to handle the guns and dry fire them. At this point the line was crossed from demonstrative evidence into a somewhat pseudo-evidence making up for the lack of the actual gun (Exhibit 33) due to the State's expert's negligence. As for the defense's case, it was never able to fully develop an argument as to a hair-trigger as the State's expert destroyed the gun. The only test the expert could do after the sear was destroyed was a trigger pull in the double-action mode which is always substantially greater than that of a single-action mode.

¶ 2 The State argues further that even if the gun had a hair-trigger this would only add to the reckless nature of the defendant's act. This could not be further than the truth: If the gun had a hair-trigger (or defective trigger), it would not be functioning properly and normally. This would add substantially to the defense that it was not reckless but accidental in nature. The only way it could add to a reckless nature is if the Defendant knew it had a defective trigger and consciously acted in disregard of such knowledge. There are no facts to support this.

¶ 3 Just because the defense could not test the gun for a defective or hair-trigger condition does not make this issue speculation. The State uses one word, "speculation" from State v. Smith, 158 Ariz. 222 to argue that speculation nullifies the need for a *Willits* instruction. The whole argument of the State is that

the conduct of the defendant is reckless. A likely defense is if the gun was defective it could have been accidental. This is not speculation. The fact is that the State destroyed evidence to a viable defense. Had it not destroyed evidence, the evidence may have shown that the gun had a defective trigger. This defect could have led to an acquittal. The jury was never read a *Willits* instruction. They could not properly weigh the evidence in light of this substantial omission. Further, they being told that the two guns were "identical", combined with them being allowed to handle and dry-fire the guns removed any issue over a defective or hair-trigger in their minds.

¶ 4 Had the *Willits* instruction been given and the guns not been allowed to be dry-fired by the jury, the defendant would have not been substantially prejudiced. The jury may have easily concluded that the gun at issue malfunctioned resulting in a horrible accident.

¶ 5 As to issue II: DID THE TRIAL COURT ERR IN ALLOWING DEMOSTRATIVE EVIDENCE OF A NEW REVOLVER AND ALLOWING THE JURORS TO FIRE THE NEW GUN? The State argues that "a demonstration would assist the jury in understanding the operation of the mechanics of the gun and determining the facts in the case." (State's Answer Brief, page 12, ¶8) A demonstration is permissible to show how a revolver fires in double and single action modes. However this demonstration morphed into

something much more when (1) the exact substitute gun was used; (2) the substitute gun (Exhibit 185) was stated to be "identical" to that of the gun at issue (Exhibit 33); and (3) the jurors were allowed to handle Exhibit 185 and test fire (dry-fire) the "identical" gun. It this point the demonstrative evidence became pseudo-evidence. The jurors were led to believe that the gun at issue (Exhibit 33) is the same as Exhibit 185. Thus, the jury concluded that Exhibit 33 functioned on April 17, 2013 exactly the same as Exhibit 185 functioned in the court room. This is precisely what State v. Mincey, 130 Ariz. 389, 408 (1981) prohibits, a "purported replication." Such a demonstration then becomes a claimed "replication." Allowing the jury to handle and dry-fire Exhibit 185 after being told the guns are "identical" is highly prejudicial and goes far beyond demonstrative evidence.

¶ 6 Demonstrative evidence is admissible to "assist jurors in understanding basic principles" but cannot be offered for the "truth of the matter asserted." U.S. v. Martinez, 588 F.3d 301 (2009). The court abused its discretion by allowing the jurors to handle and dry-fire the guns, especially Exhibit 185.

¶ 7 As to issue III: DID THE TRIAL COURT ERR IN ALLOWING UNDISCLOSED AND INADMISSABLE "EXPERT" TESTIMONY OF BRIAN MARTINEZ? The state argues that it is harmless error because the jurors were not unanimous and did not find that the Defendant lied to police. The fact still

remains that Brian Martinez was not disclosed as an expert. The defense was ambushed at trial when his testimony was clearly that of an expert in an area that is dubious at best. His testimony was not harmless as it made substantial statements against the Defendant's character (the Defendant lies), which may have motivated them to find for "reckless" conduct. The State also states that the jurors saw the video taped interview and made their own opinions. Seeing this interview and drawing their own conclusions is much different to watching it, pausing it, having an "expert" tell you his opinion and conclusion of deception, and then continuing over again through to the end. It was highly prejudicial to the defense and likely caused one or more jurors to have disdain or disfavor in the Defendant. As the States comments, "the only disputed issue at trial was Appellant's relative degree of recklessness in handling the gun with which he shot and killed someone." (State's Answer Brief, page 20, ¶16) This very issue was likely compromised when Brian Martinez made his play-by-play recap of the video taped interview.

¶ 8 Officer Martinez's testimony was improper and was highly prejudicial to the Defendant. Moreover, the manner in which it was brought in was a surprise and amounted to a trial by ambush. The Defendant's conviction should be reversed and the Defendant should be given a new trial.

¶ 9 In conclusion, the State's trial prosecutor was emotionally motivated to

convict the Defendant. The State's expert destroyed evidence that could have exonerated the Defendant. Testimony and evidence was introduced that appealed to the emotions of the jury. Several errors were made that highly prejudiced the defendant: The lack of a *Willits* instruction; allowing the guns to be handled by the jurors; and testimony from Brian Martinez, the human lie detector. All of these factors played on the minds of the jurors to the issue… was this reckless criminal conduct or was it a horrible accident? The result of these defects was an unfair trial, As such, the Appellant and Defendant requests that his convictions be set aside and he be afforded a new trial.

RESPECTFULLY submitted this 5th day of December, 2016.

/S/ Richard Luff, Esq.

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