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FILED IN THE
CLERK OF DISTRICT COURT
OF THE STATE OF COLORADO

David W. Bezina

Appeal from the District .
Court of Mesa County
and State of Colorado

vs.

Honorable
WILLIAM M. ELA
Judge

REPLY BRIEF OF DEFENDANT-APPELLANT

ATTORNEYS FOR DEFENDANT-APPELLANT
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No. 27525

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE	]	Appeal from the District
STATE OF COLORADO,	]	Court of Mesa County
	]	and State of Colorado
Plaintiff-Appellee,	]	
	]	
	]	
vs.	]	
	]	
KENNETH H. BOTHAM, Jr.,	]	Honorable
	]	WILLIAM M. ELA
Defendant-Appellant.	]	Judge

REPLY BRIEF OF DEFENDANT-APPELLANT

The Reply Brief will be limited to a response to four arguments contained in the Answer Brief. The contentions raised in the balance of the Answer Brief are adequately rebutted by reference to the Opening Brief.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AS TO ALL FOUR COUNTS OF MURDER IN THAT THE EVIDENCE WAS INSUFFICIENT FOR A REASONABLE JURY TO CONCLUDE THAT KENNETH BOTHAM HAD COMMITTED THESE CRIMES.(Argument XV, Opening Brief; Argument IV, Answer Brief).

II. THE TESTIMONY OF DR. DOELL AND OFFICER MONTGOMERY CONSTITUTED INADMISSIBLE HEARSAY AND ITS ADMISSION WAS REVERSIBLE ERROR.(Opening Brief, Argument XVI; Answer Brief, Argument V).

III. PERMITTING EVIDENCE CONCERNING THE "STRANGULATION" OF LINDA MIRACLE AS PROOF OF MALICE AND ILL-WILL BETWEEN

MIRACLE AND THE DEFENDANT WAS REVERSIBLE ERROR IN THAT THERE WAS NO SUBSTANTIAL EVIDENCE THAT THE DEFENDANT WAS INVOLVED IN THE APPARENT ASSAULT.(Argument XVII, Opening Brief; Argument VI, Answer Brief).

IV. IT WAS REVERSIBLE ERROR TO EXCLUDE THE TESTIMONY OF PATSY MURPHY THAT LINDA MIRACLE INTENDED TO MEET TRUMAN HALEY ON THE NIGHT THAT MIRACLE DISAPPEARED.(Argument XVIII, Opening Brief, Argument VII, Answer Brief).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AS TO ALL FOUR COUNTS OF MURDER IN THAT THE EVIDENCE WAS INSUFFICIENT FOR A REASONABLE JURY TO CONCLUDE THAT KENNETH BOTHAM HAD COMMITTED THESE CRIMES.(Argument XV, Opening Brief; Argument IV, Answer Brief).

In their Answer Brief, the prosecution makes certain misstatements of fact, which misstatements they then use to support their argument that the evidence presented was sufficient to support the verdicts. While the Defendant's marshalling of the evidence has already been fully set out in his Opening Brief, the misstatements of fact by the prosecution must be raised and corrected in order for this Court to be able to fairly review this evidence in reaching its decision.

A. Time of Death and the Defendant's Presence

In support of their attempt to show that Mr. Botham could have been present at the time of the crimes, the State, as does the Defendant, reviews the testimony of three neighbors of the Bothams and Miracles who told of the events of the night of August 22, 1975. Incredibly, however, they refer to these people as "eye- and ear-witnesses to the murders".(Answer Brief, p. 44). While Mrs. Heiner, Mr. Larson and Ms.

McConnell may have been eye- and ear-witnesses to certain screams, barking, and automobile movements over a period of approximately four hours, they certainly did not witness any crimes. Their testimony must be evaluated on its face and cannot be bolstered by characterizing it as that of eye- and ear-witnesses to the crimes. There were no such witnesses presented and the evidence against Mr. Botham was wholly circumstantial.

The highly questionable usefulness of Mrs. Heiner's confused testimony is discussed in the Opening Brief. The prosecution, however, attempts to rehabilitate this testimony by a reformation of the record. They state twice, on page 46 of their brief, that Mrs. Heiner identified Captain Hicks of the sheriff's department as resembling the man she saw in the Miracle yard on the night of the disappearance, and then state that Captain Hicks resembled the Defendant, who also fit that description. But this was not Mrs. Heiner's testimony at all. After Mrs. Heiner had testified that she had lived next door to Mr. Botham for three years and had seen him off and on throughout those years, she was asked to identify Mr. Botham in the courtroom.(9765, 9767). She chose Captain Hicks and said that he was Mr. Botham,(9767), not that he looked like the man she had seen on August 22, 1975. The People, however, use this misstatement in an attempt to minimize the incredible nature of her testimony as to what she saw that night. But her actual testimony shows that she could not even identify Mr. Botham from eight feet away in a well-lit courtroom, let alone at night from some distance. Such a result is not surprising since Mrs. Heiner had undergone four eye operations, was legally blind and suffering from severe glaucoma and cataracts, and under the influence of myotic medication which decreased the amount of light let into her eyes.

The Defendant showed, in his brief at pages 221-24, that the death of Troy Miracle occurred at 11:00 p.m. or earlier. This was the conclusion to be drawn from the testimony of both pathologist John M. Woods, and Dr. Canfield's statements at the autopsy. The time of death could be estimated

for the Miracle boys because the evidence showed when they last ate, and the contents of their stomachs were available for analysis. The prosecution however, in their attempt to show that the deaths occurred at least two hours later so that they could place Mr. Botham at the scene, state that the Miracle boys continued to eat until 10:00 p.m.(Answer Brief at 48) Mr. Wilhelm's testimony however, does not support this conclusion. While he did state early in his testimony that the boys ate at 9:30 p.m. and went to bed around 10:00 p.m.,(8794-95) he later admitted that, in talking to Mr. Montgomery of the Grand Junction police on August 24, 1975, two days after the disappearance, he had stated that the children went to bed around 9:00 p.m.(8821) Mr. Wilhelm then testified that the 9:00 p.m. time was more likely to be the correct time and, if the children had eaten a second time it was well before 9:00 p.m. not at 9:30 or 10:00 p.m.(8822) While, for the purposes of this argument, the prosecution can and should characterize the testimony in the light most favorable to their case, this does not mean that they can ignore the fact that Mr. Wilhelm specifically corrected his earlier testimony and abandoned his earlier time estimate. But it is exactly this abandoned testimony which they then use, at 49, as the support for their conclusion that the deaths occurred between 1:30 and 2:00 a.m. And this is done in the face of evidence that Dr. Canfield, at the autopsies of the Miracle boys, stated that death occurred within one to one and one-half hours of eating,(11930-31), and Dr. John M. Wood's testimony that the contents of Troy Miracle's stomach at autopsy was consistent with death occurring one to two hours after eating, and inconsistent with death four to six hours after eating.(11996-97)

Then, in their attempt to show that Mr. Botham could have been in Grand Junction at the time of the murders, the prosecution makes two unsupported attacks on the credibility of Mr. Botham's testimony.

First, at 43, they question Mr. Botham's testimony that he stopped at a motel in Ouray because the weather was inclement and he did not want to camp out in the mountains in this weather, by juxtaposing it with Mr.

Love's (the weather observer) testimony that Ouray had no precipitation from 5:00 p.m. August 22, to 5:00 p.m. August 23. However, Mr. Botham did not testify that he stopped at Polly's because it was raining in Ouray, but because it had been raining between Montrose and Ridgeway.(11163) And Mr. Love testified that his observations were only for the city of Ouray proper which sits in a valley surrounded by very steep cliffs.(8777-78) His observations of precipitation in Ouray would not reflect whether or not there was precipitation at some higher attitude.(8782) Thus, Mr. Botham's and Mr. Love's testimony are easily reconcilable.

Second, also at 43, the prosecution contends that Mr. Botham's testimony of a conversation on the streets of Ouray after 11:00 p.m. was contradicted by Mr. Norris' testimony. They state that Mr. Norris was "quite certain" that the conversation could not have occurred after 11:00 p.m.(Answer Brief at 44) Yet Mr. Norris actually testified that he could have left the bar as late as 11:00 or 11:30 p.m.,(10386) and that he had so informed defense counsel in earlier conversations.(10386-88, 10404-06)

B. Physical Evidence.

The prosecution discussed in this section the evidence presented to show that the bodies were thrown off the Bridgeport Bridge. While Mr. Botham never challenged that evidence, it is still necessary to point out one glaring error in the Answer Brief which, while it does not implicate Mr. Botham any more than anyone else, does tend to make the evidence presented look much more substantial than it actually is. At page 52 the prosecution states: "Hairs positively identified as those of Chad and Linda were found on the Bridgeport bridge.(ff. 8551-61)."(Emphasis added) In so doing they certainly do a great disservice to witness Nelson K. Jennet, who was qualified as an expert in hair and textile fiber analysis. As has been well-established, hair, unlike fingerprints, does not carry a signature which allows a particular hair to be absolutely identified as having come from the body of a particular person. And Mr. Jennet, as an expert, certainly would

not, and did not so testify. Mr. Jennet stated, instead, that the hairs taken from the bridge exhibited the same microscopic characteristics as hairs taken from or near the heads of Linda and Chad Miracle and, therefore, could have come from those persons.(8552-58)

C. The Defendant's Past Activities.

Finally, in their attempt to create some motive for Mr. Botham to kill his wife, the prosecution turns to the testimony of Tim Tyree. They state, at 55, that Mr. Tyree testified that Mr. Botham had discussed divorce with Tyree on several occasions, saying that he was unwilling to pay alimony. Such a characterization of the testimony makes it seem as if Mr. Botham was greatly troubled by the possibility of paying alimony, and that such a possibility weighed heavily on his mind. Yet the record shows that Mr. Tyree testified to one short discussion with Mr. Botham on the subject of divorce and alimony.(9329) This is not evidence of a man greatly troubled, and is certainly not a surprising conversation, given that Mr. Botham freely admitted that he and his wife were having marital difficulties. One short conversation is hardly strong evidence of a motive to kill.

The discussion of factual errors is not to be taken as the Defendant's only disagreement with Argument IV of the Answer Brief. A comparison of the Opening and Answer Briefs shows that the Defendant strongly disagrees with the inferences the prosecution draws from the record. But those have already been amply discussed. We attempt here only to correct the prosecution's clear errors in stating the facts. The actual evidence produced at trial shows that Mr. Botham could not have been in Grand Junction at the time of the murders, and any reasonable jury, considering only the evidence produced at trial and the inferences reasonably drawn therefrom could not have legally found Mr. Botham guilty beyond a reasonable doubt.

II. THE TESTIMONY OF DR. DOELL AND OFFICER MONTGOMERY CONSTITUTED INADMISSIBLE HEARSAY AND ITS ADMISSION WAS REVERSIBLE ERROR.(Opening Brief, Argument XVI; Answer Brief, Argument V).

The prosecution argues that the challenged testimony of witnesses Doell and Montgomery was admissible since the witnesses testified concerning their own observations and conduct. Since that testimony did not involve out-of-court statements, urges the prosecution, it is not hearsay. This is the sole argument in support of the reception of the challenged testimony as the State has declined to rely on Bustamonte v. People, 157 Colo. 146, 401 P.2d 597 (1965), the case relied on in part by the trial court in reaching its confused decision to admit the testimony. The prosecution's argument has no merit.

It is too simplistic to focus upon a distinction between "statements" and "conduct" and argue as the prosecution does that no hearsay problems exist because Doell and Montgomery did not explicitly testify concerning statements of the victim. It has long been accepted that nonverbal conduct can constitute hearsay. McCormick, Evidence (2nd Ed.), §250, and Rule 801, Federal Rules of Evidence. The rather unique situation that exists in the instant case is that the challenged testimony of Doell and Montgomery is not only based on the statements of the victim but, as well, reveals the substance of the hearsay statements and was offered and received to prove the truth of the statements.

Brown v. People, 130 Colo. 77, 273 P.2d 128 (1954) is one of the few cases to deal directly with such an attempt to circumvent the prohibition against hearsay. The futile attempt of the prosecution to distinguish that case is both inaccurate and misleading. As noted in the Opening Brief (p. 236) a police officer was allowed to testify in Brown that he had seen the victim three days prior to her death. The officer described the bruised appearance of the victim and without detailing any of his conversation with her, testified simply that a complaint had been made against the defendant.

Contrary to the prosecution's claim, the officer did not summarize the statements of the victim during the testimony nor did this Court find reversible error because of this non-existent summary.

The situations in Brown and the instant case are identical. In Brown, the prosecution was permitted to introduce evidence through the police officer which implied that the defendant was responsible for a prior beating of the victim. The testimony of the police officer concerning his observations and conduct was based on the hearsay statements of the victim. The entire thrust of the officer's testimony was that the defendant beat the victim, although the officer did not testify to the actual statements of the victim to that effect. Here, the prosecution introduced the testimony of Montgomery to show by implication that the victim was fearful of the Defendant and the testimony of Doell to show by implication that the Defendant had beaten the victim on prior occasions. The testimony of both officers was based on hearsay statements of the victim. The whole thrust of both witnesses' testimony was to establish the truth of the hearsay statements of the victim upon which the witnesses' based their observation and conduct.

The prosecution also cites several cases in support of their argument that the challenged testimony of Montgomery and Doell was not hearsay. Those cases are cited only for very general propositions and none deal directly with the situation presented here. A few examples will suffice. State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977) and several other cases are cited for the proposition that testimony from a witness which only reflects the witness' own actions, thoughts, conduct and observations is not hearsay. Yet, in none of those cases is there any indication that the witness' thoughts, actions, or conduct is based on hearsay statements of a third party, as is the case here.

The discussion of State v. Downer, 192 Colo. 264, 557 P.2d 835 (1976) is not only misleading, but highly inaccurate. The defendant there was not convicted of murder but rather was acquitted and the prosecution

appealed. This Court's discussion of evidence concerning motive was not a discussion concerning the propriety of that evidence but was merely a portion of the summary of the evidence during its ruling disapproving the judgment of acquittal granted by the trial court. No discussion whatsoever took place regarding the manner in which the evidence was presented, the objections thereto, or the rulings of the court.

The prosecution also claims that the Defendant has waived his objection to Montgomery's testimony because the Defendant addressed that incident in his own testimony. It is, of course, absurd to argue that when a defendant attempts to answer evidence which was improperly received he waives any objection to that evidence. The error had occurred, the damage was done and a defendant on trial for his life cannot be expected or required to ignore prejudicial evidence.

III. PERMITTING EVIDENCE CONCERNING THE "STRANGULATION" OF LINDA MIRACLE AS PROOF OF MALICE AND ILL-WILL BETWEEN MIRACLE AND THE DEFENDANT WAS REVERSIBLE ERROR IN THAT THERE WAS NO SUBSTANTIAL EVIDENCE THAT THE DEFENDANT WAS INVOLVED IN THE APPARENT ASSAULT.(Argument XVII, Opening Brief, Argument VI, Answer Brief)

As discussed in detail in the Opening Brief, the prosecution was allowed to introduce over numerous vigorous objections of the Defendant evidence of an apparent assault on Linda Miracle which occurred in June of 1975. The State admits in its Answer Brief that this evidence was offered and received on the theory that the Defendant committed the assault. The stated purpose of this testimony, constituting evidence of another crime, was to show ill-will and hostility on the part of the Defendant toward Miracle. The State has also conceded that for evidence of another crime to be admissible there must be substantial or clear and convincing evidence that the Defendant committed the other crime. The sole issue in contention is whether the evidence here was substantial enough to connect the

Defendant to the assault in order to be admissible. The answer is clearly negative, for an objective perusal of the record reveals no evidence that the Defendant assaulted Miracle in June of 1975.

The argument presented in the Answer Brief that the evidence of the apparent assault on Linda Miracle is substantial enough or clear and convincing enough to connect the Defendant with the crime reaches far beyond the bounds of rationality. The testimony offered by the prosecution to "prove" the Defendant's involvement in this other crime differs in no material respect from the Defendant's own account of this incident. Ned and Jeanette Crawford were awakened from a sound sleep by a scream. After getting out of bed, looking out several windows in different rooms in an attempt to learn the source of the scream, the Crawfords saw the Defendant carrying Linda Miracle to his house, heard him calling to his wife and soon a rescue vehicle arrived.(9494-9576) That testimony is entirely consistent with the Defendant's account of the evening. The Defendant heard Miracle scream, went to her aid, carried her back to his house while calling to his wife and summoned the rescue squad.

The State's remarkable contention that this evidence is substantial and clear and convincing proof that the Defendant assaulted Miracle turns on one, and only one, factor—the amount of time involved. Apparently it is the prosecution's argument, based on the Crawford's estimation of time, that the Defendant's account of this incident cannot be true. Jeanette Crawford, in response to a highly leading question estimated the time between the scream and her view of Ken Botham carrying Miracle was a minute.

Q. This would have been perhaps less than a minute, a matter of seconds?

A. A minute possibly, because I looked out the window just a very short time?(9501)

Ned Crawford estimated this time frame as fifteen seconds.

Two people in a sound sleep hear a scream and are awakened. They arise and attempt to locate the source of the scream. Some eighteen months later they make an estimation of the time involved and contradict each other in that estimation (as is usually the case when estimations of

time are involved).

The absurdity of the State's position is highlighted when the uncontested facts about this incident are considered. If Ken Botham had just assaulted Linda Miracle, would he carry his victim, still very much alive, to his home, calling his wife's name? Would he have called the rescue squad? Would Linda Miracle not file a complaint against him or at least make an accusation?

The reversible error that occurred here becomes indisputable when the trial court's ruling is considered. The trial court was obviously confused concerning the law governing the admissibility of evidence of another crime. Clearly, there was no awareness of the quantum of proof required, since the trial court agreed with the prosecution that the evidence of this incident did not even rise to the level of probable cause.(9393) At least in this analysis, the court below was correct.

Finally, the answer brief is misleading regarding two related issues. First, the prosecution argues that Defendant cannot complain of the fact that the jury was never directly informed that Linda Miracle could not identify her assailant on that June evening since the defense rejected offered prosecution stipulations. However, the stipulations were rejected for the obvious reason that they were misleading. The district attorney initially offered to stipulate that Miracle refused to name her assailant (the obvious implication being that she knew her assailant but was too frightened to name him or her).(9404) In that the stipulation and obvious implication did not comport with the facts, the Defendant refused. The district attorney consistently refused to stipulate that Miracle could not name her assailant.(9414, 9425)

The Answer Brief also argues that the exclusion of Reverend Holler's testimony was correct. Reverend Holler spoke with Pat Botham the morning after the apparent assault on Miracle. Mrs. Botham told Reverend Holler that she saw the Defendant leave the house, run to Miracle, pick her up, bring her back to their house and call the rescue squad.(9401, 9436) After

the district attorney agreed to having this incident "fully explained," the court indicated the testimony would be permitted.(9387, 9402) Later, the court indicated the testimony would be allowed and the district attorney again agreed.(9416-17) Eventually, the court changed its mind and explicitly ruled that the testimony would be excluded.(9432) This proffered testimony had every indication of reliability and was admissible. Federal Rules of Evidence, Rule 803(24). The fact that the court, in an afterthought, offered to let defense counsel reargue the issue does not affect the prejudicial impact that resulted from the reception of this improper evidence in the first place.

IV. IT WAS REVERSIBLE ERROR TO EXCLUDE THE TESTIMONY OF PATSY MURPHY THAT LINDA MIRACLE INTENDED TO MEET TRUMAN HALEY ON THE NIGHT THAT MIRACLE DISAPPEARED.(Argument XVIII, Opening Brief, Argument VII, Answer Brief).

The prosecution argues that the trial court properly excluded the crucial hearsay testimony of Patsy Murphy regarding Linda Miracle's statements of intention for the night Miracle disappeared and was apparently murdered. As discussed in the Opening Brief, Murphy would have testified that Miracle told her Truman Haley called and that after having dinner with Norman Wilhelm she expected to meet with Haley. Miracle also told Murphy of her intention to end her relationship with Wilhelm and to focus on her relationship with Haley. The argument in the Answer Brief appears to divide into three areas: 1) the offered testimony does not qualify under the Hillmon doctrine; 2) Miracle's intention was not relevant to a matter at issue; and 3) there was no corroboration of Miracle's statement. A brief examination of each claim reveals their lack of merit.

Initially the State claims that the Hillmon doctrine does not apply since the offered testimony was a statement of intention on the part of Haley rather than Miracle. While it represents an interesting semantical point, that argument reflects a fundamental misunderstanding of the

Hillmon doctrine. As explained in United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976) and discussed in the Opening Brief (p. 257), the Hillmon doctrine is applicable even in those situations, such as here, where the statement of intention requires the action of one or more others for fulfillment. The statement of intention was Miracle's statement and the jury thus was entitled to know that Linda Miracle expected to see Truman Haley on the night she disappeared.

The prosecution next advances the remarkable argument that Miracle's intention on the night of her disappearance was not relevant to a matter at issue. Under the facts of the instant case, where much of the evidence indicated that Miracle was the primary target of the murderer, (see 12255-12285) who Miracle planned to see and when were highly relevant issues.

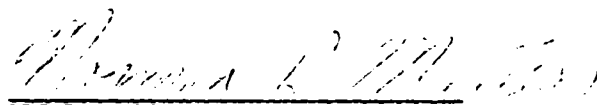
Finally, the prosecution claims that Miracle's statement was not definite nor was it corroborated. In so arguing, the prosecution inaccurately characterizes their own argument. The argument actually advanced is that Truman Haley refused to corroborate Miracle's statement of intention. In fact, Miracle's statement was corroborated. Norm Wilhelm testified that he had dinner with Miracle that evening, confirming that portion of Miracle's statement of intention to Murphy. The basis of the prosecution's argument is that Haley denied calling Miracle or seeing her that evening. On the basis of that denial, the prosecution claims "the record shows that it would not have been possible for Truman to murder Linda." In the interests of consistency and fairness the prosecution should concede that the Defendant, on the basis of his denial, could not have committed the murders.

The offered testimony of Patsy Murphy fell directly within the parameters of the Hillmon exception to the hearsay rule. The exclusion of that crucial testimony is but one of many examples of the denial of a fair trial for Kenneth Botham. A new trial must be ordered.

CONCLUSION

For the numerous and compelling reasons cited in the Opening Brief and the instant brief, the Defendant's judgment of conviction must be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Reply Brief of Defendant-Appellant was duly served on the Honorable J. D. MacFarlane, Attorney General of the State of Colorado and John R. Rodman, Assistant Attorney General, by interdepartmental mail this 14th day of February, 1979.

