APPEAL NO. 25899

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA
V.
JOHN GRAHAM

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

HONORABLE JOHN J. DELANEY, SR.
Circuit Court Judge of the Seventh Judicial Circuit

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL FILED ON FEBRUARY 7, 2011

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Graham replies to arguments made in the State's brief, cited herein as SB. Graham's initial brief is cited as DB.

I. DOCTRINE OF SPECIALITY / EXTRADITION ISSUE (ISSUE 1)

Graham alleges that South Dakota did not have authority to prosecute him for felony murder. He argues the prosecution was defective in two regards. First, he was extradited to face charges in the United States' federal courts. Second, he was extradited to face the charge of premeditated first degree murder, not felony murder (kidnaping). Graham also argues that he should have been returned to Canada after his federal charges were dismissed to allow him to contest this state court prosecution.

The State argues that South Dakota was permitted to prosecute Graham for felony murder because the state court charges were "based upon the same facts in the federal court charges for which he was extradited." SB 11. The sole authority cited by the State for this proposition is Gordon v. Warden, New Hampshire State Prison, 2003 WL 22037316 (D.N.H.).

Gordon is expressly listed as being a decision that is "not for publication." Id. Gordon is procedurally and factually different from Graham's case. Therefore, it has little precedential value to the issue raised by Graham.

Gordon was convicted in New Hampshire in 2003 of a felony. He was put on probation. In 2008, he allegedly raped two women. He fled to Belgium. He was returned to the United States to be prosecuted for the rapes in the state courts of New Hampshire. Once Gordon was returned to New Hampshire, he was also prosecuted for violating his probation. The probation violation was based on the rapes as well as him leaving the jurisdiction without permission. The extradition treaty between Belgium and the United States specifically allowed for the prosecution of "the offense for which extradition has been granted or a differently denominated offense based on the same facts on which extradition was granted, provided such offense is extraditable or is a lesser included offense." Id. p. 4. Gordon appealed the issue in state court, lost, then sought federal habeas review of the matter. The decision cited by the State is the denial of his federal habeas review application.

The differences between the two cases are substantial. First, Gordon was extradited to face state court charges. Graham was extradited to face federal charges. When those charges were dismissed, the State then prosecuted Graham without giving Graham an opportunity to return to Canada to contest the extradition. Second, the extradition treaty at issue in

Gordon contained a provision that allowed for expanded prosecution based on factually similar allegations. The treaty between Canada and the United States does not contain this provision. Third, Gordon's case was reviewed in the federal court to determine whether the New Hampshire state court's had unreasonably applied federal law. As noted in the decision, even if the state court was wrong in its application of federal law, that would not have entitled Gordon to relief unless he could show the error was unreasonable. Id. p. 3-4. This is a far more deferential standard than that applied to Graham, who is raising the matter on direct appeal.

Gordon is not as expansive as the State suggests it to be. It does not cover cases where a prosecution is shifted from federal to state court, and where the offense prosecuted is different from that authorized in the extradition agreement or by the extradition treaty. Graham should have been returned to Canada to contest South Dakota's authority to try him.

II. LOOKING CLOUD'S 2002 STATEMENT TO MALONEY (ISSUE 2)

Graham objects to the admission of Looking Cloud's 2002 statement to Maloney. The statement admitted was that Looking Cloud told Maloney in 2002 that Graham and Clarke took Aquash to a bluff in the Badlands and shot her while he stayed in the car. The statement was admitted through

both Looking Cloud and Maloney.

A. ADMISSION THROUGH LOOKING CLOUD

The State claims that the statement was admissible through Looking Cloud because it was not hearsay and because it was a prior consistent statement offered to refute an allegation of recent fabrication. Neither claim is accurate.

The State argues that because hearsay is defined as a statement "other than one made by the declarant while testifying," any statement Looking Cloud made while on the stand was not hearsay. SB 13. This interpretation of SDCL 19-16-1(3) is contrary to the plain application of the rules against hearsay. Under the State's construction of the statute, a witness is allowed to testify about anything he said on any previous occasion as long as he is subject to cross-examination. If this was the case, then the rules relating to the admissibility of prior consistent and inconsistent statements would have no meaning. A witness could take the stand and recount all of their prior statements regardless of whether impeachment on a particular matter had occurred. That is not how the rules of evidence are constructed. In Graham's first brief he set forth in detail why these statements were not admissible under the rules of evidence. The State has not shown the

statements to meet any of the exceptions to the rule against hearsay.

The State also argues that Looking Cloud's statement to Maloney was admissible as a prior consistent statement offered to rebut an allegation of recent fabrication. The State argues that because Looking Cloud's credibility was challenged during counsel's opening statement, it was permitted to pro-actively introduce Looking Cloud's statement to Maloney to rebut the allegation of recent fabrication.

This second argument requires a critical review of the facts. The State discusses at length the various facts alleged by Graham to challenge Looking Cloud's credibility. Nowhere in that discussion is a reference to a time when Graham alleged that Looking Cloud had recently fabricated the story that Clarke and Graham were responsible for the murder.

When Looking Cloud spoke with Maloney in 2002, he claimed that Graham and Clarke took Aquash into the Badlands and killed her while he stayed at the car. Looking Cloud described himself as a unknowing bystander. Looking Cloud took the opposite approach during Graham's trial. He claimed that he and Graham took Aquash into the Badlands and killed her while Clarke stayed at the car.

These facts show that Looking Cloud's 2002 statement to Maloney

was not consistent with his testimony at Graham's trial. Therefore, it could not be admitted as a prior consistent statement.

The State has ignored these facts in its brief. Instead, it generically asserts that Graham attacked Looking Cloud's credibility. Then asserts that the Looking Cloud statement to Maloney rebuts that attack. However, the State has failed to show how Looking Cloud's statement to Maloney in 2002 is consistent with his trial testimony or rebuts any of the facts used by Graham to challenge his credibility.

B. ADMISSION OF THE STATEMENTS THROUGH MALONEY

Graham also challenges the admission of Looking Cloud's 2002 statement through witness Maloney. Maloney testified that Looking Cloud told her in 2002 that he stayed at the car while Clarke and Graham killed her mother. The primary thrust of the State's argument is that Graham did not preserve this matter for appellate review. SB 15.

Prior to trial Graham filed a motion in limine to exclude the testimony, R 522. The circuit court considered the motion at hearing. MT (11/15/10) p. 23.

The State correctly notes that at the precise moment the testimony

came in, Graham did not object. SB 16. The State cited to the jury trial transcript, volume 7, page 76.

However, if one looks one page earlier in the transcript, one will see that when Maloney started down the path of testifying as to what Looking Cloud told Maloney about Graham, Clarke, and Janis's involvement in this case, Graham made a timely objection on hearsay grounds. JT Vol. 7, p. 75, line 20. The State argued that it was admissible as a prior consistent statement. The circuit court sustained the objection and held that the testimony was double hearsay. JT Vol. 7, p. 76, line 1.

Notwithstanding the circuit court's ruling, the next question asked by the State elicited the hearsay that Graham now contests. In light of his pretrial motion, the court's discussion of the matter at hearing, and the fact that Graham's objection was initially sustained at trial, the matter should be considered to have been preserved for appellate review.

The State relies on Steele v. Bonner, 2010 S.D. 37, ¶ 20, 782 N.W.2d 379, 384, as authority for the proposition that "[w]hen an objection is not made, the evidence is admissible." SB 16. Taken in the context of its argument, the State appears to be saying that Bonner stands for the proposition that evidence not objected to at trial should be considered to be

admissible on appeal. SB 16. That is not the holding in Bonner.

In Bonner, the defendant did not object at all to the admission of documents at trial. On appeal, Bonner claimed that the trial court erred in relying on these documents. This Court held that it was appropriate for the trial court to consider those documents because Bonner had not objected thereto. This Court did not say that a trial court's decision to admit evidence will be upheld on appeal if no objection is made thereto. And, as set forth above, the facts in this case are distinguishable from those in Bonner. In this case, Graham did object, prior to and during trial, and received a ruling in his favor.

For the same reasons that this testimony was inadmissible through Looking Cloud, this testimony should be deemed inadmissible through Maloney.

III. PELTIER'S STATEMENTS TO AQUASH (ISSUES 3 & 4)

The circuit court admitted out of court statements (verbal and non-verbal) by Peltier. Peltier was not shown to be unavailable. A witness was allowed to testify that Aquash had told her that Peltier had accused her of being an informant in June of 1975. Another witness was allowed to testify that Peltier had admitted to killing an FBI agent in front of Aquash in

October of 1975. The circuit court held that these statements were not offered to prove the truth of the matter asserted, but instead were offered to provide a motive for members of the American Indian Movement (AIM) to kill Aquash.

Hearsay is an out of court statement offered at trial to prove the truth of the matter asserted. SDCL 19-16-1(3). The confrontation clause of the state and federal constitutions are implicated when the declarant of the statements is not the witness through whom the statement is presented to the jury.

In this case, it is not seriously subject to debate that the State offered these two statements to prove the truth of the matters asserted. At trial, the State expressly tried to establish as fact that Peltier accused Aquash of being an informant. And, the State tried to prove as fact that Peltier had confessed to killing an FBI agent in front of Aquash. The out of court statements went directly toward the proof of these two facts. They were the only proof offered of these two facts.

Once these facts were established, the State asked the jury to infer a motive to kill. That inference is a separate matter from the purpose of the testimony. The purpose of the testimony was to prove as fact that the things

relayed in the statement were true. As such, these statements fall squarely within the rule against hearsay. SDCL 19-16-1(3). And, because the declarant was never made available to the jury, the confrontation clause was violated as a result of their admission.

IV. INSUFFICIENCY OF THE EVIDENCE (ISSUE 5)

Graham asserts that the evidence was insufficient to sustain his conviction. His argument is based on specific facts related to an uncontroverted timeline established by the State's witnesses at trial. The State's witnesses testified that Graham, Looking Cloud, and Clarke traveled with Aquash to Rapid City and Allen, South Dakota, in late November of 1975. DB 16. The State's prime witness, Looking Cloud, unequivocally set the date of this trip as beginning on November 27-28, 1975. JT Vol. 7, p. 24. Numerous other witnesses corroborated this timeline. DB p. 16.

Another key witness for the State, Hamilton, unequivocally established that Aquash was alive and in Rapid City between December 12th and 18th, 1975. DB p. 16. It was uncontroverted at trial that Graham, Looking Cloud, and Clarke were not with Aquash in Rapid City in December of 1975, and the State's witnesses agreed that Graham and Looking Cloud had returned to Denver shortly after they left with Aquash in

late November of 1975.

The State charged Graham with killing Aquash on or about December 10th through December 12th, 1975.

The State has not directly addressed the timeline issue raised by Graham. Instead, the State has avoided a frank discussion of the facts as they pertain to Graham's lack of contact with or proximity to Aquash during the two weeks (or more) prior to her death.

For instance, the State asserts that Hamilton testified that "[a]round Thanksgiving time in 1975" she saw Aquash in Rapid City. SB 30. At trial, Hamilton was asked, "At some point in 1975, I am talking about around Thanksgiving time, November, December, did you come to Rapid City?" JT Vol. 5, p. 5. She responded affirmatively to that broad question. Later, she narrowed the timeframe to having occurred sometime during the week of December 12th through December 18th, 1975. JT Vol. 5, pp. 39-45; Exhs. 116, 117.

The State appears to deliberately confuse the timing issue by mixing facts from different time periods in its brief. The State strings together facts from different times in a way to suggest one contemporaneous event. For instance, on page 30 and 31 of its brief, the State says, "Aquash went into a

room with AIM Members. Hamilton never saw Aquash again. Hamilton argued with Clarke, Lorelei Means, and Bruce Ellison about Aquash and told them she would never believe that Aquash was a snitch. Aquash was not free to leave." The State doesn't tell the Court that Hamilton clearly testified that the discussion with Clarke, Means, and Ellison happened 6 to 8 weeks before Aquash allegedly went into the room with AIM members. JT Vol. 5, p. 16. Different events have been joined together to confuse the timing issue.

Similarly, when summarizing Looking Cloud's testimony, the State ignores the timeline that Looking Cloud himself provided. The State's recitation of facts derived from Looking Cloud fails to reference any date for the acts described. SB 32-34. However, Looking Cloud was not vague when he testified. Looking Cloud stated with certainty that the trip he took with Graham, Clarke, and Aquash happened on November 27th or 28th, 1975. JT Vol. 7, p. 24.

Although the State has ignored the issue, the fact remains that there was a complete absence of evidence provided to the jury as to events between when Graham allegedly kidnaped Aquash in November of 1975, and when the State alleges she was killed on or around December 10th

through December 12th of 1975. It is this critical gap in the causal chain that renders the jury's verdict unsustainable.

Dated November 16, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, John R. Murphy, counsel for appellant John Graham, submits the following:

The forgoing brief is 13 pages in length. It is typed in proportionally spaced 14 point Times New Roman. The left hand margin is 1.5 inches, the right hand margin is 1.0 inches. It contains 2,558 words and 12,830 characters.

Dated November 16, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two (2) true and correct copies of the foregoing brief upon the persons herein next designated, on the date shown below, by depositing the same in the U.S. Mail at Rapid City, South Dakota, first-class postage prepaid, at their last known addresses, to wit:

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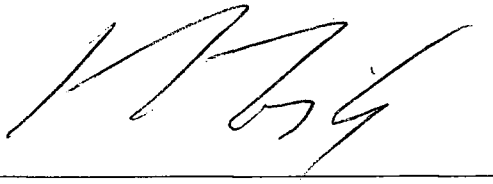

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