FILED
Mar 26, 2015
Court of Appeals
Division I
State of Washington

NO. 71823-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RODOLFO JEREZ-SOSA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce E. Heller, Judge

REPLY BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

TRIAL IRREGULARITY DEPRIVED JEREZ-SOSA OF HIS RIGHT TO A FAIR TRIAL.

In the state's prosecution of Jerez-Sosa for first degree robbery of a taxi cab driver, the state's key witness and Jerez-Sosa's alleged accomplice, Asuan Santos-Valdez, testified Jerez-Sosa also robbed a liquor store and was shot while committing other robberies. RP 127, 153. The court had reserved ruling on the admission of other prior bad acts evidence and expressly admonished Santos-Valdez to steer clear of any other alleged wrongdoing by Jerez-Sosa. RP 17, 119-20. Despite this, Santos-Valdez intentionally blurted out while testifying that Jerez-Sosa committed prior robberies. RP 127, 153. In his opening appellate brief, Jerez-Sosa argued the court erred in denying his subsequent motion for a mistrial based on Santos-Valdez's violation of the court's ruling. Brief of Appellant (BOA) at 123-30.

In response, the state attempts to downplay the seriousness of the irregularity, argues the evidence could have been properly admitted and was therefore cumulative, and that the court's instruction cured any error. For the reasons discussed below, however, each of these arguments should be rejected.

1. The Other Robbery Evidence Was a Serious Trial Irregularity.

First, the state argues Santos-Valdez's testimony was not a serious trial irregularity, because the court's ruling prohibiting testimony about prior bad acts was not an absolute prohibition on such testimony. Brief of Respondent (BOR) at 29. But the state is minimizing the strictness of the court's ruling. The court had ruled there would be no mention of any ER 404(b) evidence in the state's case-in-chief. RP 17. In advance of Santos-Valdez's testimony, the court admonished him not to mention other alleged crimes. RP 119-120.

This admonishment came well after opening statement. RP 119-120. Thus, the fact Jerez-Sosa advanced a duress defense in opening does not lessen the strictness of the court's ruling. Santos-Valdez's testimony violated the court's ruling to steer clear of other crimes and therefore constituted a serious trial irregularity.

Second, the state argues that the court's ultimate determination that the evidence could have been admitted during rebuttal renders the irregularity one of timing, rather than admissibility. BOR at 30. Regardless of the court's ultimate ruling, however, Jerez-Sosa maintains the evidence was not admissible

under ER 404(b), because the state never proved the statements were made, and because any probative value of the evidence was far outweighed by its prejudicial effect. BOA at 23-30.

Moreover, Jerez-Sosa disputes the state's attempt to characterize Santos-Valdez's testimony as unintentional. BOR at 30. He was specifically instructed not to talk about "other robberies" by the prosecutor. RP 119-120. Alleging Jerez-Sosa robbed a liquor store and was shot while committing other robberies is talking about "other robberies." The record shows Santos-Valdez intentionally interjected inadmissible evidence in violation of the court's ruling.

Third, the state attempts to distinguish the seriousness of the irregularity from that in Escalona, cited in Jerez-Sosa's brief. BOA at 24-25, 29-30; State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987). As argued in the opening brief, the circumstances here are analogous to those in Escalona, where the court held evidence of a prior stabbing was extremely prejudicial in the state's case against Escalona for stabbing someone.

But contrary to the state's argument (BOR at 31), the properly admitted evidence against Jerez-Sosa was similarly thin as that in Escalona. Significantly, Berhanu's testimony did not

rebut Jerez-Sosa's claim of duress. On the contrary, Berhanu testified Santos-Valdez was the one with the gun and the one who punched him in the eye. RP 78. Berhanu also testified Santos-Valdez directed Jerez-Sosa to "[t]ake everything." RP 81. Accordingly, this evidence supported Jerez-Sosa's duress defense.

And while Berhanu also testified he did not see or hear Santos-Valdez threaten Jerez-Sosa, Berhanu was scared and in shock. RP 100, 212, 218. Thus, it is possible his perception of the circumstances was skewed or that he missed subtle details.

The state also attempts to downplay the seriousness of the irregularity by pointing to the Facebook photos depicting Jerez-Sosa with "other robbery participants cavorting with a gun." BOR at 32. At the outset, it should be noted that the only evidence admitted to indicate Valle-Matos and Oreste Duanes-Gonzales participated in the robbery was the word of Santos-Valdez. Second, the picture did not include Santos-Valdez. RP 296. Thus, it did not rebut Jerez-Sosa's testimony that he was merely acquainted with Santos-Valdez and acting under duress the night of the robbery.

Fourth, the state attempts to distinguish the seriousness of the irregularity from that in Miles, cited in Jerez-Sosa's brief,[1] by arguing the offending testimony in that case would have been inadmissible under any circumstances; whereas, the state claims, the evidence in Jerez-Sosa's case was admissible to rebut his duress defense. BOR at 32. However, Jerez-Sosa disputes the "other robbery" evidence was admissible to rebut his duress defense. BOA at 26-30. Evidence of a defendant's prior bad acts is presumptively prejudicial unless the state proves the bad act actually occurred and that it's potential for prejudice is outweighed by its relevancy. State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012). The state failed on both counts here.

Fifth, the state attempts to distinguish the seriousness of the irregularity from that in Wilburn, cited in Jerez-Sosa's brief,[2] on grounds the outcome turned largely on the credibility of Wilburn and the victim; whereas the state claims, the outcome here did not turn on the credibility of Jerez-Sosa and Santos-Valdez. BOR at 33.

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[1] BOA at 25; State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968).

[2] BOA at 25; State v. Wilburn, 51 Wn. App. 827, 755 P.2d 842 (1988).

Again, however, the state is mistaken. Berhanu's testimony could be viewed as supporting Jerez-Sosa's testimony he was merely acting as directed by Santos-Valdez. To convict, the jury therefore had to believe Santos-Valdez. Under the circumstances, his accusations Jerez-Sosa said he robbed a liquor store and was shot while committing other robberies had to have weighed into the jury's evaluation of the men's relative credibility. Thus, the severity of the irregularity was extreme.

2. The Evidence Was Not Cumulative of Otherwise Admissible Evidence.

In arguing to the contrary, the state relies – as it did below – on State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989). In affirming the lower court's denial of a motion to sever four counts of convenience store robbery (for which Watkins asserted duress) from a fifth car robbery (for which Watkins asserted mistaken identity), this Court held that proof Watkins committed the car robbery without duress tended to negate her duress defense to the convenience store robberies and therefore was cross-admissible. Watkins, at 270-71.

However, the state fails to address the fact that in Watkins, the court ruling on the severance motion had the benefit of a

previous court determining there was probable cause to file the charge in the non-duress case, thereby fulfilling the requirement that prior to its admission, a prior bad act must be proven by a preponderance of the evidence. BOA at 26-27. Here, there was no such finding and no such proof.

Next, the state argues "the statements were not even offered as substantive proof of prior robberies, only as impeachment evidence." BOR at 35. But the court's limiting instruction to the jury belies this claim, as the court instructed the jury it could consider the evidence in assessing Jerez-Sosa's state of mind. RP 202. State of mind is not the same as impeachment. Jerez-Sosa maintains the court was therefore required to conduct the three-part balancing test under ER 404(b).

Regardless, however, the state claims the liquor store statement was admissible to rebut Jerez-Sosa's portrayal of his state of mind at the time of the incident as one of despair, reluctance and fear. BOR at 37. Assuming arguendo the alleged boastful account of successfully robbing a liquor store in the past rebutted Jerez-Sosa's portrayal of his state of mind on the night in question, it is less clear how being shot committing prior robberies does.

And significantly, the statement about being shot while committing other robberies was not limited to impeaching Dr. Young's opinion or its basis. Rather, it was admitted to show Jerez-Sosa's state of mind. Therefore, it could have been interpreted by jurors as showing Jerez-Sosa has a violent streak or abnormal inclination toward violence.

In keeping with its claim that ER 404(b) does not apply, the state urges that the evidence is more properly analyzed under ER 403 to determine its probative value versus prejudicial effect. BOR at 39. The state notes Jerez-Sosa's argument that the probative value was low as there was no corroboration. BOR at 40. According to the state, however, Jerez-Sosa offered no authority "holding that a statement must be heard by more than one witness to be sufficiently probative." BOR at 40.

However, the Washington Pattern Instructions expressly caution against this type of testimony, noting that testimony by an accomplice "should be acted upon with great caution." CP 45; WPIC 6.05;[3] see also State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974). Thus, Jerez-Sosa has established that Santos-Valdez's testimony was of low probative value.

Finally, the state claims that even if ER 404(b) applies, the lack of an explicit preponderance finding was harmless since the court made a "conscious determination" to admit the evidence. BOR at 42. Jerez-Sosa disagrees the record shows the court made the required preponderance finding to support admission of the alleged statements. But regardless, the court improperly balanced the value of the evidence versus its prejudicial effect.

3. No Curative Instruction Could Have Unrung the Bell.

As indicated above, whether the limiting instruction alleviated the prejudice of the liquor store statement to some extent, the same cannot be said of the shot-while-committing-other-

[3] Testimony of an accomplice, given on behalf of the [State][City][County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

robberies statement. The court itself recognized this when it initially granted the motion for a mistrial:

> I'm going to grant the mistrial. And I'm doing that because I'm ultimately persuaded that when you have these types of extremely prejudicial statements, that it is not – it is unrealistic to expect a jury to make the distinction between the statement that's being admitted solely for the purpose of showing Mr. Sosa's state of mind, and the natural inclination of the jury is to say, if this person said he engaged in this kind of conduct, other armed robberies, then he must be guilty of this crime. I simply cannot eliminate that as a significant possibility.

RP 527-28. Considering the nature of the current accusation and the similar nature of the prior bad acts, the court's initial perception was correct.

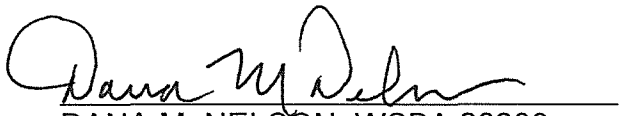
C. CONCLUSION

For the reasons stated in this reply and in the opening brief, this Court should reverse Jerez-Sosa's conviction.

Dated this 26th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF MARCH, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RODOLFO JEREZ-SOSA
DOC NO. 788450
COYOTE RIGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF MARCH, 2015.

X Patrick Mayovsky