

NO. 39598-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

TERRY NOLAN,

Appellant.

2011 JUN 27 PM 4:33

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

The Honorable Brian Tollefson, Judge

AMENDED REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Did the trial court err in excluding evidence of the decedent's reputation for violence, where the court premised its ruling on erroneous legal grounds?

2. Did the exclusion of such evidence prejudice the appellant?

3. Did the prosecutor's repeated misconduct in closing argument and rebuttal, which improperly shifted the burden to the defense, combined with the court's repeated failures to correct the error, deny the appellant a fair trial?

4. May this Court consider the appellant's challenge to the jury instructions?

5. Is vacation of the deadly weapon special verdicts as to counts 1 and 2 required?¹

6. May the appellants raise this issue for the first time on appeal?

¹ Nolan assigns error to the special verdicts on both counts. Should this Court find Nolan's adoption of appellant Smith's assignment of error 13 (Smith opening brief at 2, 81-85) inadequate to assign error to the verdicts on both counts, Nolan reserves the right to move that this Court accept a supplemental assignment of error as to count 2. It is worth noting, however, that the State's argument in response is general and applies equally to counts 1 and 2. Brief of Respondent at 122.

B. ARGUMENTS IN REPLY

1. THE TRIAL COURT ERRED WHEN IT EXCLUDED EVIDENCE OF THE DECEDENT'S REPUTATION FOR VIOLENCE ON ERRONEOUS LEGAL GROUNDS AFTER THE DEFENSE LAID A SUFFICIENT FOUNDATION

- a. The trial court erred as a matter of law in excluding evidence regarding the decedent's reputation in the community for violence.

It appears the State does not dispute that (1) the trial court relied on erroneous legal grounds in excluding Beaudine's reputation in the community for violence, and (2) the court therefore never expressly ruled on whether the defense laid the foundation to admit such evidence. Brief of Respondent (BOR) at 53-59.

Instead, the State argues *this* Court should find the foundation was lacking because the community the defense relied was insufficiently general and neutral and the defense failed to show personal knowledge of reputation. BOR at 56. These arguments, however, are based on an incorrect reading of the record and a misunderstanding of the pertinent law.

The State first claims the "defense offer of proof was that within a 12 month period [the Bull's Eye bartender] Hutt had spoken to patrons and employees of the Bull's Eye as well as other establishments that [Beaudine] frequented." BOR at 57. The State then complains it is

unclear whether the 12-month period referred to in the defendants' offer of proof occurred before or *after* the night in question. BOR at 57 (citing 33RP 2514).

Based on the record, the State's claim is incorrect; defense counsel was referring to the period *before* the night in question. Counsel clearly stated that Hutt would testify

that within the last 12 months . . . up to the night of April 15, 2008 that she had seen . . . Beaudine on several occasions inside the pub in which she worked; that she has personal knowledge of his obnoxious and threatening behavior; that she also spoke to other persons who regularly came through the establishment who were not only patrons, but employees, as well as employees of other establishments that . . . Beaudine frequented; that the number of people who come into those establishments during that one year period [is at least] 1100 . . . ; that she has spoken to more than ten people who have offered the same opinion regarding his reputation that when intoxicated, which he was that night . . . that he was obnoxious, threatening and violent; that he has to be watched; that his reputation for that behavior is bad within that community.

33RP 2514 (italics added).

Because the State's argument that the community was insufficiently neutral rests on an inaccurate reading of the record regarding the 12-month period, this Court should reject that argument as well.

As Nolan's opening brief argues, the group of bar patrons and employees represents a community of similar size and breadth as the one

held sufficient in State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). In addition, unlike the group of police officers held too narrow in Callahan,² bar patrons and employees represent a community of sufficient breadth and neutrality to provide the proper foundation for reputation evidence.

The State next argues that Hutt testified she had never spoken with Beaudine and therefore could not have had personal knowledge of his reputation. BOR at 57 (citing 32RP 2395). In this respect, the State conflates the issue of having spoken with a person with knowledge of his reputation, which may be gained in other ways, such as observation. Moreover, reputation, by definition, reflects general knowledge in the community. United States v. Dennis, 625 F.2d 782, 780 (8th Cir. 1980); see also Webster's Third New International Dictionary Unabridged 1929 (1993) (defining reputation as "the estimation in which one is generally held"). Hutt's testimony and the offer of proof, which was consistent with Hutt's testimony, reflected her personal knowledge of Beaudine's reputation. ER 405 (a).

b. The error prejudiced Nolan

Contrary to the State's claim, denial of the admission of the evidence prejudiced Nolan. According to the defense theory, Smith acted

² State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997).

to defend himself from Beaudine's aggression, and Nolan eventually perceived he must defend Smith. 35RP 2883-84. The reputation evidence was crucial to the defense theory: that, especially when drunk, Beaudine was belligerent and sought out trouble; just the sort of person eager to singlehandedly confront a group of men, armed with a knife.

While Hutt *was* permitted to testify as to certain behavior by Beaudine in the bar that night, the general reputation evidence was necessary to rebut Beaudine's fiancée's testimony that Beaudine was generally happy and social. Contrary to the State's argument that the fiancée's testimony went only to his observations of Beaudine that evening, her testimony, "He was happy and social, *that's how he is*"³ conveyed her opinion as to his general character, even while drinking.

Because the court's erroneous ruling undermined Nolan and prejudiced Nolan, reversal is required. State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136, review denied, 167 Wn.2d 1001 (2009).

2. PROSECUTORIAL MISCONDUCT DENIED NOLAN A FAIR TRIAL WHEN THE STATE SHIFTED THE BURDEN AND, DESPITE REPEATED REQUESTS, THE COURT FAILED TO CORRECT THE PROBLEM.

The State acknowledges the prosecutor misstated the law in closing argument but minimizes the nature of the errors ("inartful") and

³ 23RP 1000 (italics added).

claims that, in any event, the jury was set straight during rebuttal. BOR at 115-17. The State also argues that, in any case, that this Court should follow the trial court's ruling denying a mistrial. BOR at 138-39. This Court should reject the State's arguments.

It is true that, on rebuttal, the colleague of the prosecutor who made the first erroneous statement of the law acknowledged the State had the burden on self-defense and defense of others. 36RP 2934-35. But later comments snowed under this correct statement of the law, rendering the State's argument prejudicial as a whole. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005) (reviewing court must review claims of prosecutorial misconduct based on argument in its entirety).

After "acknowledging" the State had the burden of proof, the prosecutor went on to systematically undermine that premise. She continued, "What I want to say is this, for the State to disprove self-defense, first there must be proof of self-defense." 36RP 2935. Defense counsel immediately objected. The court stated, "my ruling is always the same. The jury has been instructed on the law of this case." 36RP 2935.

The prosecutor continued, "Ladies and gentlemen, there is nothing to disprove because there is no evidence of it." 36RP 2936. She then argued, "So if there's no evidence of self-defense, how is it that [the defendants] even get to argue it?" 36RP 2937. When counsel objected,

the court stated again that “the jury has been instructed on the law of the case, and the jury will decide the facts of this case. 36RP 2937.

The prosecutor continued, “The defense, so that they can argue that Smith was defending himself, that Nolan was defending another, and that McCreven was defending himself, they want you to make assumptions. Assumptions of fact that was not introduced, that no one testified about.” 36RP 2937. When counsel again objected, the prosecutor stated “Your honor, this is closing arguments. There is nothing inappropriate about my argument.” 36RP 2937. The court reiterated that the “jury has been instructed on the law of the case.” 36RP 2938.

Later, denying a defense motion for a mistrial, the court reasoned in part that any misconduct was not so flagrant that an instruction could not have cured it. 36RP 2960. The court appears to be referring to the standard to be applied only when there is no objection. See Boehning, 127 Wn. App. at 518 (where no objection, reversal is required only if misconduct was so prejudicial it could not have been cured by a timely objection and curative instruction). This was an erroneous basis to deny the defense claim; here, the defense provided the trial court with repeated opportunities to remedy the misconduct, and the court declined.

“Arguments concerning questions of law must be confined to the instructions given by the court.” State v. Papadopoulos, 34 Wn. App. 397,

400, 662 P.2d 59 (1983), abrogated on other grounds by State v. Brown, 36 Wn. App. 549, 555-56, 676 P.2d 525 (1984). Here, incorrectly asserting there was no evidence to support a self-defense claim, the prosecutor informed the jury it need not consider the court's instructions to that effect. 36RP 2936-37. By informing the jury it was not required to consider those instructions, and thus Nolan's claim he acted to defend another, the State shifted the burden to Nolan. A jury need only find the State failed to meet its assigned burden beyond a reasonable doubt in order to acquit. State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007).

As argued in the opening brief, the State cannot prove the improper argument was harmless. Witness accounts of the incident diverged, from Beaudine being jumped and brutally beaten by a number of men, to Beaudine and James versus the Hidalgos, to a fight between Smith and Beaudine that began with mutual yelling and ended with finger pointing. The only DNA found in the knife was Beaudine's. A possible, even likely, inference from this evidence was that Beaudine introduced the knife into the fight, making Nolan's defense of another claim both objectively and subjectively reasonable and necessary.

To make matters worse, while "concern[ed]" by the argument, the trial court repeatedly refused give an appropriate curative instruction. This was prejudicial error. United States v. Perlaza, 439 F.3d 1149, 1170-

73 (9th Cir. 2006) (after prosecutor engaged in improper burden-shifting argument, even delayed curative instruction was insufficient to ameliorate prejudice).

In summary, the State improperly shifted the burden in closing argument and cannot prove the misconduct was harmless. Reversal is, therefore, required. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); State v. Moreno, 132 Wn. App. 663, 671, 132 P.3d 1137 (2006).

3. THIS COURT MAY CONSIDER NOLAN'S CHALLENGES TO THE JURY INSTRUCTIONS.

The State argues Nolan failed to preserve the errors asserted in sections 6 and 7 of the opening brief, the failure to instruct the jury under WPICs 17.02 and 15.01 rather than WPIC 16.02. Brief of Appellant (BOA) at 39-45; BOR at 125-27. But even if this Court finds Nolan failed to properly object in the court below, it may now consider the asserted errors.

Jury instructions that diminish the State's burden to prove each element of the crime implicate due process and may be reviewed for the first time on appeal. State v. Dow, __ Wn. App. __, __ P.3d ___, 2011 WL 2462020 at *2-3 (June 21, 2011) (citing State v. O'Hara, 61 Wn.2d 91, 100-01, 217 P.3d 756 (2009); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983)). The State bears the burden of proving the

absence of the defenses beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (self-defense); McCullum, 98 Wn.2d at 493-94 (self-defense); State v. Fondren, 41 Wn. App. 17, 701 P.2d 810 (1985) (excusable homicide). And, given the facts of this case, the trial court's instructions effectively lessened the State's burdens, in violation of Nolan's due process rights. BOA at 39-40, 45.

4. BASHAW AND RYAN⁴ REQUIRE VACATION OF NOLAN'S DEADLY WEAPON SENTENCE ENHANCEMENTS AS TO COUNTS 1 AND 2.

The State agrees the Supreme Court's decision in State v. Bashaw⁵ is the controlling law and appears to agree that Instruction 57, requiring jury unanimity to acquit on the enhancement, is erroneous under that case. CP 992; BOR at 122. The State's sole response, however, is that the appellant's claim cannot be raised for the first time on appeal.

Division One of this Court recently rejected that argument in State v. Ryan, 160 Wn. App. 944, ___ P.3d ___, 2011 WL 1239796 (April 4, 2011).⁶ Ryan was charged with second degree assault (deadly weapon prong) and harassment. As in Nolan's case, the State alleged aggravating

⁴ State v. Ryan, 160 Wn. App. 944, ___ P.3d ___, 2011 WL 1239796 (April 4, 2011).

⁵ State v. Bashaw, 169 Wn.2d 133, 234 P.2d 195 (2010).

⁶ Page numbers for the Washington Appellate cite are not available as of June 26, 2011.

circumstances in support of an exceptional sentence. And, as in Nolan's case, jurors were told they had to be unanimous in rejecting these circumstances. Ryan, 2011 WL 1239796 at *1. Citing Bashaw, the Court concluded that this instructional error was grounded in due process, could be raised for the first time on appeal, and was not harmless.⁷ Ryan, 2011 WL 1239796 at *2-3.

Instructional error is presumed prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). To find an instructional error harmless, the reviewing court must conclude beyond a reasonable doubt that the verdict would have been the same without the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). In Bashaw, however, "[t]he error . . . was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. Moreover, "[t]he result of the flawed deliberative process tells [a reviewing court] little about what result the jury would have reached had it been given a correct instruction." Id. "[W]hen unanimity is required, jurors with reservations

⁷ As the State correctly points out, the Court disagreed with Division Three's opinion in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011).

might not hold to their positions or may not raise additional questions that would lead to a different result." Id. at 147-48.

Here as in Bashaw⁸ and Ryan – which involved a similar general verdict, at least as to count 2 – but for the “flawed deliberative process,” jurors may not have reached unanimity on the deadly weapon special verdicts in Nolan’s case. Bashaw, 169 Wn.2d at 147; see also CP 993 (Instruction 58, deadly weapon definition); BOA at 9 (count 2 complainant James’s description of relatively minor nature of blow to head). The sentencing enhancements should, therefore, be vacated. Bashaw, 169 Wn.2d at 148.

⁸ The facts in Bashaw likewise demonstrate that, as in that case, the errors here cannot be considered harmless. The Bashaw Court addressed two distinct claims each relating to three school bus route enhancement special verdicts. 169 Wn.2d 133. As to the first claim, the Bashaw Court found the trial court abused its discretion in admitting testimony relating to a measuring wheel that was not shown to be reliable. Id. at 143. As to two of three counts, however, the Court considered the error harmless because there was sufficient evidence to show the drug sales well under the 1,000-foot range triggering the enhancement (100 to 150 feet). Id. at 138, 144. Despite finding the error harmless as to the first claim, the Court was compelled to reverse the enhancements as to the other two counts based on the erroneous instructions. Id. at 147-48.

C. CONCLUSION

For the reasons stated above and previously argued, this Court should reverse Mr. Nolan's convictions.

DATED this 21 day of June, 2011.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
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vs.)	COA NO. 39598-3-II
)	
TERRY NOLAN,)	
)	
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 27TH DAY OF JUNE, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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