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Court of Appeals
Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

LUIS JOHN HORAL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
CAUSE NO. 17-1-01719-3

The Honorable Judge David Gregerson

BRIEF OF APPELLANT JOHN LUIS HORAL

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A. ASSIGNMENTS OF ERROR

- I. DEFENDANT'S FIRST ASSIGNMENT OF ERROR - THE TRIAL COURT'S TIME LIMITATION OF VOIR DIRE TO TWENTY MINUTES PER SIDE VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL

- II. DEFENDANT'S SECOND ASSIGNMENT OF ERROR - THE PROSECUTOR'S USE OF PERSONAL OPINION ARGUMENTS DURING CLOSING CONSTITUTED PROSECUTORIAL MISCONDUCT AND VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL

- II. DEFENDANT'S THIRD ASSIGNMENT OF ERROR - DEFENDANT'S ATTORNEY WAS INEFFECTIVE WHEN HE FAILED TO TIMELY OBJECT TO THE TIME LIMITATION ON VOIR DIRE AND THE PROSECUTOR'S CLOSING

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Appellant / Defendant, Luis John Horal, was charged by Information on 8/17/2016, with one count of Assault in the Second Degree. He pled not guilty and the case proceeded to jury trial on January 23, 2017, through January 24, 2017. The jury found him guilty of Assault in the Second Degree. Defendant now appeals.

II. TRIAL AND DEFENDANT'S POST-VERDICT MOTION FOR NEW TRIAL

At trial, the Court imposed a 20-minute time limit per side for voir dire.

Additionally, the prosecutor made various statements in closing that the Defendant argued in its Motion for New Trial constituted a personal opinion of the prosecutor amounting to prosecutorial misconduct. Defendant moved for a new trial based on the above grounds.

The statements were as follows:

"... So it all makes sense to be angry it makes a whole lot sense when we've heard the other testimony about how angry he was and that he lost it for him to say he came in all cool, calm, and collected ... it's not consistent with what the other witnesses said it's not consistent with our common sense about how a person would react in that situation it's not consistent with what ended up happening. He comes in all cool, calm, and collected, but somehow some guy ends up on the ground with a broken arm. It's not consistent and it's not believable." 2 RP 296.

In regards to the Defendant's "story to [the jury]", the prosecutor says:

"... We know that's not true." 2 RP 296.

In regards to the Defendant's testimony, the prosecutor says:

"You've got to come up with something a little bit better than that." 2 RP 297.

"... He came up with a better story, but he didn't come up with a believable story." 2 RP 297.

The prosecutor begins talking about Defense witness, Sarah Baker, who is also the Defendant's girlfriend. After discussing her testimony, the prosecutor states:

"... She doesn't want to get her boyfriend in trouble so she came in here to give him a hand." 2 RP 299.

In regards the State's witnesses, the prosecutor said:

"Because Lloyd and Patrick are the credible people here, and because their story makes common sense, the State believes it has proved its case beyond a reasonable doubt ..." 2 RP 303.

In rebuttal argument, the prosecutor says as to one of the Defendant girlfriend's statement:

"... That one in particular is kinda laughable." 2 RP 328.

Lastly, the prosecutor said:

"That's the story of what happened, and you have an abiding belief that that's what happened and there was an assault in the second degree so convict Luis Horal of that crime. Thank you." 2 RP 330.

The court denied Defendant's motions.

Though Defendant's counsel at trial filed motions for new trial based on the above, counsel did not timely object to the time limitation on voir dire or the prosecutor's closing remarks.

C. ARGUMENT

I. THE TRIAL COURT'S TIME LIMITATION OF VOIR DIRE TO TWENTY MINUTES PER SIDE VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL

The right to a jury trial includes the right to an unbiased and unprejudiced jury. *Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 265, 401 P.2d 982 (1965). The test is whether the court permitted the parties to "ferret out bias and partiality." *Lopez-Stayer v. Pitts*, 122 Wn.App. 45, 51, 93 P.3d 904 (2004). The trial court's decision is reviewed for an abuse of discretion. A trial court's decision constitutes an abuse of discretion when the decision is based on untenable grounds or untenable reasons. *Id.* at

50. The primary purpose of voir dire is to allow the parties to explore prospective jurors' attitudes to determine whether the juror should be challenged. *Id.* at 51. A party can waive its right to conduct voir dire. *State v. Tharp*, 42 Wn.2d 494, 500, 256 P.2d 482 (1953). A party may also waive challenges by failing to challenge a juror for cause or by failing to exercise a preemptory challenge of a juror. *State v. Reid*, 40 Wn.App. 319, 321-22, 698 P.2d 588 (1985). In *State v. Brady*, 116 Wn.App. 143, 147-48, 64 P.3d 1258 (2003), the appellate court found an abuse of discretion where, in a complex case with overarching issues, the trial court, in the middle of voir dire, eliminated one session of the two planned voir dire sessions, thereby removing the chance for some attorneys to ask the questions they had reserved for the second session. In contrast, this is not a complex case. Absent a showing of an abuse of discretion and substantial prejudice, the trial court's ruling on the scope and content of voir dire should not be disturbed on appeal. *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000).

In the current case, the trial court limited voir dire to twenty minutes per side. 1 RP 5. Defense counsel was given a five minute warning and shortly thereafter wrapped up voir dire questions. 1 RP 60-64. This issue was first raised during Defendant's motion for new trial, which was ultimately denied. The court's basis for denying the motion was (i) fair allocation of time, and (ii) no objection was made at the time, nor was a request for additional time made. Counsel wrote in said motion:

"In the instant case, at trial, Voir Dire was limited to 20 minutes per side. I was unable to complete full questioning of the jurors about the qualifications to serve on this jury. In my experience, I have not been limited to a such a short Voir Dire except in misdemeanor cases, and in such cases, I believe the limitation was 30 minutes. Further, jurors commented after the trial that my looking at my watch was seen negatively by the jurors. I was looking at my watch to keep on eye on my time limit." See Clerk's Papers - Motion for New Trial page 2 of 8).

In a case involving a potential "most serious offense", twenty minutes per side cannot give either side sufficient time to "ferret out bias and partiality" and causes undue pressure on litigants to meet unreasonable time restraints.

Defendant submits the Court's 20-minute time limit on voir dire violated his right to a fair trial.

II. THE PROSECUTOR'S USE OF PERSONAL OPINION ARGUMENTS DURING CLOSING CONSTITUTED PROSECUTORIAL MISCONDUCT AND VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL

A prosecutor's statements about the credibility of a witness or defendant is governed by case law. The State may not assert its personal opinion as to the defendant's guilt or a witness's credibility. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). But a prosecutor enjoys wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *State v. Lewis*, 156 Wn.App. 230, 240, 233 P.3d 891 (2010). "[T]here is a distinction between the individual opinion of the prosecuting

attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case." *McKenzie*, 157 Wn.2d at 53 (quoting *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905)). To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a court should view the challenged comments in context and look for "clear and unmistakable" expressions of personal opinion. *McKenzie*, 157 Wn.2d at 53-54.

In *State v. Anderson*, Division Two held that the prosecutor did not express a personal opinion when, without objection, he characterized the defendant's testimony as "made up on the fly," "ridiculous," and "utterly and completely preposterous." *State v. Anderson*, 153 Wn.App. 417, 430, 220 P.3d 1273 (2009). In contrast, in *State v. Reed*, our Supreme Court held that the prosecutor clearly asserted his improper personal opinion when he called the defendant witness a liar at least four separate times, stated that Reed "did not have a case," asserted that Reed was clearly a "murder two," and implied that the jury should not believe defense counsel because they drove from out of town in fancy cars. *Reed*, 102 Wn.2d at 146.

In the current case, the prosecutor said "The State believes it has proved its case beyond a reasonable doubt", which is a personal opinion argument. Additionally, the amount of personal attacks on Defendant's credibility amount to a *State v. Reed* violation. "It's not consistent and it's not believable." 2 RP 296. "...We know that's not true." 2 RP 296.

"You've got to come up with something a little bit better than that." 2 RP 297. "... He came up with a better story, but he didn't come up with a believable story." 2 RP 297.

Additionally, the prosecution made extreme comment on the credibility of Defendant's other witness: "... *She doesn't want to get her boyfriend in trouble so she came in here to give him a hand.*" 2 RP 299. "... *That one in particular is kinda laughable.*" 2 RP 328.

Finally, as to the State's own witnesses, the prosecution overreached credibility arguments saying: "*Because Lloyd and Patrick are the credible people here, and because their story makes common sense, the State believes it has proved its case beyond a reasonable doubt ...*" 2 RP 303. "*That's the story of what happened, and you have an abiding belief that that's what happened and there was an assault in the second degree so convict Luis Horal of that crime. Thank you.*" 2 RP 330.

Based on the above, the prosecution's closing arguments were prejudicial and went beyond the bounds of *State v. Anderson*. Instead, the various commentary and accusations are more aligned with *State v. Reed*, and Defendant was denied a fair trial by the prosecution's closing remarks.

III. DEFENDANT'S ATTORNEY WAS INEFFECTIVE WHEN HE FAILED TO TIMELY OBJECT TO THE TIME LIMITATION ON VOIR DIRE AND THE PROSECUTOR'S CLOSING

Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is

guaranteed the right to effective assistance of counsel in criminal proceedings. *In re Davis*, 152 Wn.2d 647, 675 101 P.3d 1 (2004)(citing *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wash.2d 61, 77, 917 P.2d 563 (1996); see also *In re Pers. Restraint of Brett*, 142 Wash.2d 868, 873, 16 P.3d 601 (2001)). To successfully challenge the effective assistance of counsel, Petitioner must satisfy a two-part test. *Id.* Petitioner must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 672-673 (citing *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987)) (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))). The United States Supreme Court has defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)).

Though Defendant's counsel filed a motion for new trial on the above issues, neither were objected to at the time. As argued above, the limitation on voir dire and the prosecution's personal belief arguments at

closing denied Defendant a fair trial. Counsel failed to object at the time of trial, but did file a motion for new trial and said grounds.

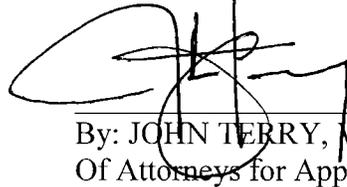
If the objections did not preserve the issues for appeal, and/or for all the reasons argued above, counsel was deficient by failing to object and Defendant's trial rights were prejudiced.

D. CONCLUSION

Defendant was denied a fair trial by the trial court's unreasonable limitation of voir dire to twenty minutes per side, by the prosecution's personal belief arguments, and by defense counsel's failure to object to said aforementioned errors. Defendant respectfully requests this Court remand for new trial.

Respectfully submitted this 30th day of October, 2017

MORSE BRATT ANDREWS & TERRY LLP



By: JOHN TERRY, WSBA # 41337
Of Attorneys for Appellant / Defendant Luis John Horal

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