

WJ345-8

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No. 65345-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
BOBBY LITTLE III,
Appellant.

2010 OCT 25 PM 4:59
FILED IN COURT OF APPEALS
DIVISION ONE

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

The Honorable Vickie I. Churchill

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Mr. Little's trial on a charge of second degree assault, the prosecutor committed misconduct during examination of the State's prime law enforcement witness.

2. The defendant's sentencing enhancement for being armed with a deadly weapon must be reversed because the jury was improperly instructed.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the prosecutor committed misconduct during trial by remarking upon the evidence in a manner that expressed his personal belief in the victim's claims and the State's case.

3. Whether the sentence enhancement that was imposed based on a special verdict, in which the jury found that the defendant was armed with a deadly weapon at the time of the assault, must be reversed because the jury was erroneously informed that it had to be unanimous as to a "no" answer on the verdict form.

C. STATEMENT OF THE CASE

The appellant, Bobby Little III, was charged in Island County Superior Court with first degree robbery pursuant to RCW

9A.56.200(1) and RCW 9A.56.190, and second degree assault pursuant to RCW 9A.36.021(1)(a), (c). CP 43. Both charges were accompanied by deadly weapon enhancements pursuant to RCW 9.94A.825, based on the defendant's alleged use of a liquor bottle to strike the complainant. CP 43.

According to the State's evidence at trial, Mr. Little took a quantity of marijuana from complainant Timothy Kester while visiting at Kester's home. 4/7/10RP at 129; 4/8/10RP at 140-46. Mr. Little allegedly used force to commit the taking, and allegedly assaulted Mr. Kester, by striking him with a liquor bottle, which broke and caused injury and bleeding. 4/8/10RP at 140-41.

Bobby Little testified that Mr. Kester's account was false. Mr. Little was smoking marijuana as a guest in Mr. Kester's home when Mr. Kester strangely offered him a drink from an empty liquor bottle he retrieved, and then began pacing back and forth, holding the bottle by its neck menacingly. 4/8/10RP at 211-14. The two men had been in a dispute over a prior drug deal. 4/8/10RP at 200-07.

Mr. Kester then approached Mr. Little "like a predator" with his eyes staring wide open, and swung the bottle at his person,

causing Mr. Little to attempt to grab the bottle out of his attacker's hand as he was almost struck. 4/8/10RP at 221-23. During an ensuing struggle Mr. Little struck the complainant with the bottle, because he "had to defend myself." 4/8/10RP at 224-26. After the incident, Mr. Little told police immediately that he had been forced to defend himself. 4/7/10RP at 60-61.

The jury acquitted Mr. Little of the robbery charge, but found him guilty on the charge of second degree assault and on the deadly weapon allegation. CP 13-15. Mr. Little was subsequently sentenced to a standard range term of 24 months, which included a 12-month enhancement based on the special verdict. CP 3-6.

Mr. Little timely appealed. CP 1-2.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT DURING TRIAL.

a. The deputy prosecutor must not commit misconduct during presentation of the State's case in a jury trial. Mr. Little contends that the deputy prosecutor committed misconduct during direct examination of Officer William Wilkie, when the prosecutor, referring to photographs of the scene that the officer was reviewing,

commented that the photograph of the complainant showed “[q]uite a lot of blood.” 4/7/10RP at 37, 64-65. Both the trial court sua sponte, and defense counsel, noted this comment, the defense noted its objection, and the court admonished the prosecutor. 4/17/10RP at 64-65. State’s Exhibit 23 (photograph).

This comment by the prosecutor was misconduct. It is improper for the prosecutor to express a personal opinion as to the merits of the case before the jury or the credibility of one litigant over another. State v. Swan, 114 Wn.2d 613, 664, 790 P.2d 610 (1990). Here, the prosecutor’s comment effectively, and dramatically, expressed a personal opinion as to the nature and degree of injury suffered by the complainant. This was improper.

b. Reversal is required. Reversal is required based on the misconduct. As a general principle, when prosecutorial misconduct is alleged, the defendant bears the burden of establishing its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). To prevail on a claim of misconduct, a defendant must show that the improper conduct prejudiced the outcome of his trial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S.1137, 127 S.Ct. 2986, 168 L.Ed.2d 714

(2007). A defendant makes this showing of prejudice by demonstrating a “substantial likelihood” that the misconduct affected the jury’s verdict. Weber, 159 Wn.2d at 270.

Here, at issue in Mr. Little’s trial were the questions whether there was an illegal assault (in the absence of self-defense), whether the assault was with an object used in a manner that rendered it a deadly weapon, and whether Mr. Little was armed with a deadly weapon. CP 43, 4/8/10RP at 254-57. The prosecutor’s comment, which dramatized the nature and degree of the injury in a way that diminished the likelihood of its categorization by the jury as committed in defense of self, and as caused by an object wielded in such a way as to cause substantial bodily harm, went directly to all of these issues. The jury’s verdicts would likely have been different but for the misconduct, and reversal of the assault conviction and enhancement is required.

2. THE TRIAL COURT ERRED IN IMPOSING THE SENTENCE ENHANCEMENT.

a. The special verdict form was faulty and requires reversal of the deadly weapon enhancement. The special verdict form was faulty under State v. Bashaw, Supreme Court No.

81633-6, decided July 1, 2010, and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

The enhancement of 12 months that was imposed on Mr. Little based on a special verdict, in which the jury found that he was armed with a deadly weapon during the commission of the assault, must be reversed because the jury was precisely and erroneously informed that it had to be unanimous as to a “no” answer on the special verdict form. CP 15 (special verdict form), CP 38-39 (jury instruction regarding verdict forms). Specifically, the jury was instructed:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

(Emphasis added.) CP 38-39 (jury instruction no. 19).¹

This was error. In Bashaw and Goldberg the Supreme Court makes clear that a non-unanimous negative jury decision on a special finding is a final determination that the State has not proved

¹The defendant did not propose any jury instructions regarding the deadly weapon enhancement or verdict forms. CP 53 (Defense Proposed Instructions).

that finding beyond a reasonable doubt. In Goldberg, it was held that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's sentence. Goldberg, 149 Wn.2d at 891.

Here, jury instruction no. 19, stating that all 12 jurors must agree in order to answer in the negative on the special verdict as to whether the liquor bottle was a deadly weapon and whether the defendant was armed with it, was an incorrect statement of the law. Though jury unanimity is required to find the presence of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instructions in Mr. Little's assault trial erroneously stated that unanimity was required for either determination. CP 38-39.

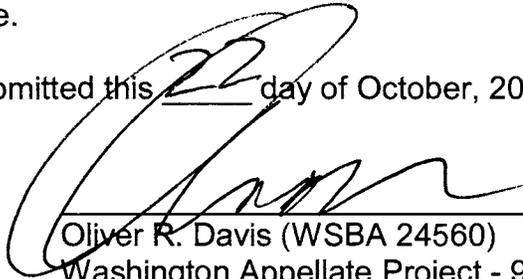
b. Reversal is required. This instructional error cannot be concluded to be harmless beyond a reasonable doubt under State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), and Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). As did the Bashaw Court, this Court should deem the error reversible under this constitutional error standard, because it is

impossible to speculate what a jury in an enhancement case did, or might have done or not done in terms of unanimity or mere disagreement among jurors caused by a sole juror (either of which circumstance would equally defeat the deadly weapon allegation) if that jury had been properly instructed. See State v. Bashaw, at pp. 15-17. Reversal is mandated.

E. CONCLUSION

Mr. Little respectfully requests this Court reverse his judgment and sentence.

Respectfully submitted this 22 day of October, 2010.



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