

NO. 73332-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

LESLEY VILLATORO,

Appellant.

FILED
Oct 20, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

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

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A. ARGUMENTS IN REPLY

1. SPECULATION AND CONJECTURE WERE REQUIRED TO FIND VILLATORO HAD THE REQUISITE KNOWLEDGE AND INTENT TO BE CONVICTED AS AN ACCOMPLICE.

In response to Villatoro's claim the evidence was insufficient to convict her as an accomplice to Horne's crimes, the State employs unreasonable inferences and speculation to argue how a jury might conclude Villatoro may have known about the crimes Horne intended to commit and might have been prepared to assist if necessary. This Court should reject the State's argument and reverse and dismiss with prejudice.

"Reasonable inferences" are inferences that are both reasonable and not based on speculation. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318, 325 (2013).

The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncrasies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts. As the Supreme Court has stated, "the essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." Galloway v. United States, 319 U.S. 372, 395, 63 S.Ct. 1077, 1089, 87 L.Ed. 1458 (1943).

Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 895 (3d Cir. 1981) abrogated on other grounds by Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982).

An Oregon case, State v. Bivins, 191 Or. App. 460, 83 P.3d 379, (2004), is instructive. In Bivins, the issue was whether a jury could reasonably infer the defendant's children witnessed him slap his girlfriend, their mother, which if they had would make the assault a felony instead of a misdemeanor. 83 P.3d at 380-81. The evidence demonstrated the children were in a different room of the house when the defendant and his girlfriend argued and he eventually slapped her. Id. at 380, 383-84. Trial testimony suggested that the sound of the assault could easily have been heard in different parts of the house. Id. at 383-84. The court reasoned, however, that the jury was left to infer (1) that the slap produced a distinctive sound, (2) that the sound rose above the noise of the argument, (3) that the children actually paid attention to the sound made by the slap, and (4) that they recognized it as the sound of the defendant striking his girlfriend. Id. at 384. The court concluded “the minimal circumstantial evidence presented by the state requires too much stacking of inferences and, ultimately, too great an inferential leap.” Id. at 385.

As in Bevin, and as discussed in her opening brief, Villatoro's jury was forced to stack inference upon inference in order to conclude

Villatoro had actual knowledge of and the intent to assist in Horne in his crimes, and therefore was guilty as an accomplice. Brief of Appellant (BOA) at 24-37. One example is the State's claim in its response that it is reasonable to infer Villatoro was aware of what was in the bag Horne removed from the trunk when she dropped him off at "John's" cul-de-sac, and therefore must have known of and been ready to assist Horne. The State makes this assertion based not on any evidence Villatoro ever saw the contents of the bag, or that Horne told her, but instead because she replied, "Um, I don't think so" when asked by Detective Campos the day of the incident if Horne had any other duffle bags besides the one Villatoro said was in their living space (the Cumbia's garage). RP 372. Brief of Respondent (BOR) at 27-29. The State claims this response, when considered in light of evidence showing Horne and Villatoro had each purchased black bags in the weeks preceding the incident, and her admission Horne removed something from the trunk when she dropped him off, is sufficient to infer Villatoro knew what was in the duffle bag and therefore knew of and was ready to assist Horne in the crimes he committed. This claim should be rejected.

To go from Villatoro's response to Campos, to concluding she knew what was in the bag Horne removed from the trunk, requires unreasonable inferences. One such unreasonable inference is that

Villatoro understood Detective Campos was asking her whether she and Horne, as a family, had any other duffle bags, rather than just asking if Horne personally had more. Detective Campos' questioning was inadequate to logically allow an inference one way or the other, so it is impossible to infer which question Villatoro thought she was answering. If the duffle bags they purchased were for her, their twins or the Cumbia's instead of for Horne, then Villatoro did not lie when she said she did not think Horne had any other duffle bags. RP 370, 372; Ex. 59.

Similarly, with regard to evidence that Villatoro heard sirens shortly before leaving the church parking lot and looked up local news stories throughout the day after she got home does not provide for a logical inference that Villatoro knew beforehand the crimes Horne intended to commit. It may be sufficient to infer Villatoro knew after the fact that Horne had gotten himself into some trouble, but not that she knew beforehand how that might have occurred.

As discussed in the opening brief, guess, speculation and conjecture were required to convict Villatoro as an accomplice. This violated Villatoro's due process rights because it unfairly relieved the prosecution of its burden to prove every element of every charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Because the prosecution failed to

overcome the presumption of innocence, this Court should vacate her judgment and sentence and dismiss the charges with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. VILLATORO'S CLAIM HER JURY WAS NOT PROPERLY INSTRUCTED IMPLICATES A FUNDAMENTAL CONSTITUTIONAL RIGHT AND THEREFORE MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

On appeal Villatoro seeks reversal of her convictions based on the trial court's failure to properly instruct her jury on how to reach constitutionally valid unanimous verdicts. BOA at 37-49. In response, the State urges this Court to refuse to consider the issue because it does not involve manifest constitutional error. Brief of Respondent (BOR) at 35-43. The State is wrong, and the position it takes is in direct conflict with the Washington Supreme Court's decision in State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014). Lamar controls and this Court should therefore reject the State's argument.

The State correctly notes that Lamar involved the trial court's failure to instruct the jury to begin deliberations anew when an alternate juror replaced one of the sitting jurors during deliberations. BOR at 41-42. But the State then makes the error of limiting the legal rule expressed in Lamar to that specific factual scenario. BOR at 42. Nothing in Lamar warrants such a limitation. The decision provides insightful discussion

about the general concept of constitutional jury unanimity, and, like many other courts, recites the following as a proper rule of law:

"The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting People v. Collins, 17 Cal.3d 687, 693, 552 P.2d 742 (1976)) (emphasis added).

And although this particular issue has historically been raised in the context of reconstituted juries, as in Lamar, such juries are not the only ones that must be informed how to properly deliberate, instead all juries should be. The attempt to limit Lamar to its facts should be rejected.

In the same vein, the State claims Villatoro has failed to show she was prejudice by the failure to properly instruct the jury and therefore this Court should refuse to consider the issue. BOR at 42. But the burden is not on Villatoro to prove actual prejudice. Instead, she need only show "[t]he asserted error had practical and identifiable consequences" in order to satisfy RAP 2.5(a)(3). Lamar at 585. She has done so by noting her jury's numerous opportunities for deliberation that complied with the

instructions received from the court, but which do not comply with the constitutional requirement for the deliberations to be the "common experience" of all the deliberating jurors. Collins, 17 Cal.3d at 693. Thereafter, the burden shifts to the State to prove the constitutional error was harmless beyond a reasonable doubt. Id. at 588. The State has failed to meet its burden in this regard. Remand for a new trial is warranted.

3. THE INSTRUCTIONS THE TRIAL COURT DID PROVIDE WERE INSUFFICIENT TO INFORM THE JURY HOW TO DELIBERATE IN A CONSTITUTIONALLY ADEQUATE MANNER.

The State notes the trial court admonished Villatoro's jury throughout trial not to discuss the case with anyone, including fellow jurors, until deliberations began, and were polled after the verdict which showed they were all in agreement. BOR at 40. The State asserts there is no affirmative evidence the jury ever ignored any of the instructions provided by the trial court, whether during trial or during the deliberative process. BOR at 40-41. But Villatoro never claimed there was, nor is her challenged based on any instructions that were given.

Rather, Villatoro's challenge is to the trial court's failure to inform the jury that deliberations may only occur when all 12 jurors are present and only as a collective. The references in Villatoro's opening brief to WPIC 1.01 and WPIC 4.61 were included to both point out the WPIC

committee's attempts at ensuring a jury only deliberates when it is appropriate and to note that even those attempts fail to make clear it may only be done as a 12-person collective. That these instructions were not provided at every recess as suggested by the WPIC committee merely highlights the somewhat cavalier approach to instructions engaged in by the trial court here.

B. CONCLUSION

For the reason stated here and in the opening brief, Villatoro requests this Court to reverse and dismiss with prejudice, or in the alternative, reverse and remand for a new, fair trial.

Dated this 20th day of October, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant