

No. 42427-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

OLUJIMI AWBAH BLAKENEY,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-03138-5
The Honorable Brian Tollefson, Judge

OPENING BRIEF OF APPELLANT (CORRECTED)

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

1. The prosecutor improperly vouched for a State witness' credibility when he elicited testimony regarding a polygraph provision in the witness' plea agreement.
2. The trial court violated Olujimi Blakeney's constitutional right to a public trial when it sealed the juror questionnaires without first conducting the required Bone-Club¹ analysis.
3. The trial court violated the constitutional requirement of public access to court records when it sealed the juror questionnaires without first conducting the required Bone-Club analysis.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the prosecutor improperly vouch for a State witness' credibility when he elicited testimony that a polygraph provision in the witness' plea agreement was intended as motivation for the witness to tell the truth and to ensure the witness understood that the State would not accept untruths, and that a polygraph would only be requested if the State suspected he was not being truthful. (Assignment of

¹ State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

Error 1)

2. Did the trial court violate the constitutional requirements of a public trial and public access to court records, when it sealed the juror questionnaires without first conducting the required Bone-Club analysis? (Assignments of Error 2 & 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Olujimi Awbah Blakeney by Amended Information with one count of first degree murder (RCW 9A.32.030), one count of drive-by shooting (RCW 9A.36.045) one count of unlawful possession of a firearm (RCW 9.41.040), and one count of second degree assault (RCW 9A.36.021). (CP15-17)

A jury convicted Blakeney as charged, and also found that he was armed with a firearm when he committed the murder and assault. (CP 120-26; TRP 730-31) Based on an offender score of nine, the trial court sentenced Blakeney to a standard range sentence totaling 740 months of confinement. (CP 255, 258; TRP 762) This appeal timely follows. (CP 264)

B. SUBSTANTIVE FACTS

On the night of July 22, 2010, friends Olujimi Blakeney, Manuel Castillo, and Herman Jackson spent the evening drinking

and socializing with each other and with Castillo's girlfriend, Chrissy Roushey. (TRP 176, 177, 178, 540-41, 542)² At some point during the evening, Roushey received a threatening text message from a man named Jordan Kudla. (TRP 179-80, 236, 405) This made Castillo angry, and he wanted to fight Jordan.³ (TRP 180, 543) Several text messages were exchanged in an attempt to arrange a meeting between Castillo and Jordan. (TRP 181, 183, 405, 445) Eventually, Jordan told Castillo to come to his house if he wanted to fight. (TRP 185, 445)

Jackson drove Castillo and Blakeney to Jordan's house on 72nd Street in South Tacoma. (TRP 185, 543, 546) When they arrived, Jackson parked his car across the street from Jordan's house. (TRP 187, 481, 549) Castillo got out of the car and stood on the lawn next to Jackson's car. (TRP 369, 408, 485) Jackson also got out of the car but stayed next to the driver's door, while Blakeney remained in the car. (TRP 369, 374-75, 408, 448, 549)

Jordan and his friends, Amie Hieronymus and Austin

² The transcripts of the pretrial hearings will be referred to by the date of the proceeding. The transcripts of trial and sentencing proceedings, labeled Volumes 1 thru 8 (proceeding dates of July 11 thru August 3, 2011) will be referred to as "TRP."

³ Several witnesses at this trial share a last name. In the interest of clarity, these witnesses will be referred to by their first names.

Frederick, came out of the house to meet them. (TRP 406, 446, 548) Jordan was holding what appeared to be a rifle.⁴ (TRP 192, 193, 450, 551) Then Castillo saw Jordan hand the rifle to Austin, who handed Jordan a baseball bat. (TRP 194, 410, 411, 453, 480, 483) The men then agreed that no weapons would be used in the fight. (TRP 192-93, 452, 484)

Castillo returned to Jackson's car and placed some personal items in the back seat. (RP 194, 195, 452, 484-85) Meanwhile, Jordan's mother, April Kudla, was alerted to the impending fight, and came outside to stop it. (TRP 369, 375, 412) She grabbed the bat away from Jordan and told everyone to go away. (TRP 195, 375, 412, 453, 553)

Jordan refused to go inside, and he and Castillo began fighting in the street. (TRP 196-97, 375-76, 453, 487, 550, 554) Castillo and Jordan wrestled and threw punches at each other as the fight moved from the street onto a neighbor's lawn. (TRP 196-97, 376, 454, 555)

The exact description of what occurred next varies from witness to witness. But there is agreement that at some point April

⁴ This item turned out to be just the barrel portion of the rifle, which was not capable of being fired. (TRP 598, 599, 600)

approached and hit Jordan and Castillo with the baseball bat. (TRP 376, 378-79, 380, 381-82, 410, 414, 415, 454, 488, 555, 556) Blakeney responded by exiting the car and confronting April. (TRP 376, 378-79, 380, 381-82, 410, 414, 415, 454, 488, 555, 556) April testified that Blakeney pointed a gun at her chest, which caused her to fear for the safety of herself and her son. (TRP 380, 381, 456) Then Blakeney lifted up his arm and fired two shots into the air. (TRP 380, 415, 457, 489, 490557)

The testimony also establishes that the Kudlas' next-door neighbors, Joe and Lisa Malencon, were summoned to help during the fight. (TRP 417, 505-06) Joe and Lisa both came outside, and Lisa dialed 911. (TRP 379, 419, 491, 506, 508)

Just after Blakeney fired the shots into the air, the fight ended and Jackson, Blakeney and Castillo got back into Jackson's car. (TRP 199, 382, 384-85, 459, 491, 558) Jackson was driving, with Blakeney in the front passenger seat, and Castillo in the back seat. (TRP 200, 382, 384-85, 460, 492, 558)

As they pulled away, witnesses saw someone reach out of the passenger side of the car and fire several shots in quick succession. (TRP 385, 386, 387, 420, 421-22, 461, 493, 508, 559-60) The witnesses said the shooter's arm was pointed toward the

back of the car, in the direction of the Kudla and Malencon homes. (TRP 386, 422, 461, 493, 494, 508) One of those bullets hit the curb, but another struck Lisa in the head as she stood on her front porch. (TRP 149-50, 388, 510, 619) She died almost instantly. (TRP 614, 620)

April thought the shots were fired from the front passenger window by the same person who had earlier fired the gun into the air. (TRP 386) Castillo also testified that Blakeney fired the shots from the car. (TRP 201) The remaining witnesses could not identify the shooter, except to say that he was wearing black. (TRP 420, 424, 490, 508, 559) Blakeney was wearing black clothing that night. (TRP 449, 458, 490)

Blakeney, Castillo and Jackson learned the next day that Lisa had been killed. Jackson immediately tried to abandon his car, and then fled to Texas. (TRP 207-08, 570-71) He was arrested there several weeks later. (TRP 153, 571) Jackson entered a plea agreement with the State whereby he would testify against Blakeney, in exchange for a reduction in his charge from murder to felony rioting, and a recommendation from the prosecutor that he be sentenced to time served. (TRP 573-74)

Castillo also agreed to testify against Blakeney in exchange

for a reduction from a murder charge to a rioting charge and a recommendation for time served. (TRP 231) According to Castillo, he and Blakeney hid the shell casings from the gun in ivy next to a nearby school. (TRP 211-12) Castillo also testified that he and Blakeney drove to a wooded area somewhere outside of Covington, and hid the gun under a log next to a pond. (TRP 217, 218, 219-20) Castillo testified that he believed Blakeney's gun was a .38 caliber revolver. (TRP 214)

Castillo told police about the locations of the casings and the gun. (TRP 259, 264-65) Investigators found four .38 caliber shell casings in the area where Castillo indicated they would be. (TRP 260, 282, 276-77, 281) The casings could have been fired from the same gun as the bullet that struck Lisa Melancon. (TRP 525, 621)

Castillo could not describe exactly where the gun was located, but investigators used Castillo's description and maps to pinpoint a spot they believed the gun was hidden. (TRP 264-65, 293-94) Trackers located an area next to a pond where the vegetation appeared to have been walked on, and an explosive-sniffing dog alerted to a spot below a log next to the pond. (TRP 298-99, 300, 303, 311, 312, 321, 223-24, 341) But investigators did not locate a gun. (TRP 273, 315, 340)

Ron Nocera and his son Alijah Nocera, live in the Sacramento suburb of Carmichael, California. (TRP 52, 64) In December of 2010, Alijah's mother came to visit from Washington. (TRP 52) She brought Blakeney with her. (TRP 52-53, 65) Alijah became suspicious of Blakeney and conducted an internet search to find information about him. (TRP 68-70) Alijah discovered that Blakeney was wanted in Washington in connection with Lisa Melancon's death. (TRP 69-70) Alijah and Ron confronted Blakeney, and he told them that he had fired a gun into the air and killed someone. (TRP 58, 59, 71)

Alijah notified the authorities, and Blakeney was taken into custody and extradited to Washington. (TRP 57, 71, 86, 95-96) During the journey home, Blakeney told two Pierce County Deputies that he knew he was going to "do big time," and wished he had been killed by the police rather than arrested. (TRP 91, 97-98)

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IV. ARGUMENT & AUTHORITIES

A. THE PROSECUTOR IMPROPERLY VOUCHERED FOR A STATE WITNESS' CREDIBILITY WHEN HE ELICITED TESTIMONY REGARDING A POLYGRAPH PROVISION IN THE WITNESS' PLEA AGREEMENT

During Castillo's direct examination, he testified about the basic facts of his plea agreement. (TRP 231-32) During cross examination, Blakeney's defense attorney asked about some of the details of the agreement, including the provision that Castillo "submit to a polygraph examination if requested by the prosecutor[.]" (TRP 233) Counsel asked Castillo if the State had made such a request, and he responded that it had not. (TRP 233)

The following day, the prosecutor informed the court that, after further reflection, he believed defense counsel's polygraph question was inappropriate. (TRP 347-48) The prosecutor requested permission to call Castillo's defense attorney to testify about the purpose of polygraph provisions in plea agreements, and to testify that polygraph examinations are not admissible evidence at trial. (TRP 348-49) Defense counsel objected, and explained that he asked the polygraph question only as it related to the quality and thoroughness of the State's investigation. (TRP 350-51)

Defense counsel agreed that an instruction informing the jury

that polygraph results are inadmissible would be appropriate, but that further testimony or explanation was unnecessary. (TRP 350-51, 353-54) The trial court disagreed, and allowed the State to call Castillo's defense counsel. (TRP 352-53) In response to direct questions from the prosecutor, Castillo's attorney testified that the purpose of the polygraph provision of the plea agreement is: (1) "as a potential investigative tool by law enforcement if they feel they need to do so[;]" and (2) as "sort of an inducement or motivator for the defendant to make him understand that the prosecutor's office is not going to accept any untruthfulness, and there will be a way to test that, if in fact it's suspected by them." (TRP 440)

This testimony was unnecessary and prejudicial, and it allowed the prosecutor to improperly vouch for Castillo's credibility. "Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." State v. Brett, 126 Wn.2d 136, 174–75, 892 P.2d 29 (1995) (citing State v. Hughes, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)); see also State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Generally, to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's actions were improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940

(2008) (citing State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)).

Although a prosecutor has reasonable latitude to draw inferences from the evidence, including inferences about witness credibility, it is nevertheless improper for the State to vouch for the credibility of a government witness. State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Vouching may occur when the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony. United States v. Roberts, 618 F.2d 530, 533 (9th Cir.1980). Whether or not a witness has testified truthfully is entirely for the jury to determine. United States v. Brooks, 508 F.3d 1205, 1210 (9th Cir.2007) (citing United States v. Ortiz, 362 F.3d 1274, 1279 (9th Cir.2004)).

Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. Roberts, 618 F.2d at 536 (citing United States v. Arroyo-Angulo, 580 F.2d 1137, 1150 (2d Cir.1978) (Friendly, J., concurring)).

While the State may ask the witness about the terms of the

agreement on redirect once the defendant has opened the door, prosecutors must not be allowed to comment on the evidence, or reference facts outside of the record, that implies they are able to independently verify that the witness is in fact complying with the agreement. State v. Ish, 170 Wn.2d 189, 199, 241 P.3d 389 (2010).

In this case, Blakeney's attorney may have opened the door to additional information about the plea agreement or about the polygraph provision specifically. But by eliciting testimony that the polygraph provision would be invoked by the State if it suspected that Castillo was not being truthful, coupled with the fact that the State had not requested that Castillo take a polygraph, the prosecutor was able to imply that the State had some independent reason to believe that Castillo was being truthful. This constitutes improper vouching. See Ish, 170 Wn.2d at 197, 199, 206-07 (four justices, plus the dissenting justice agreed that this type of questioning constituted "vouching").

Blakeney was prejudiced by the prosecutor's bolstering of Castillo's testimony because Castillo was the only witness who testified with certainty that Blakeney fired the shots from the car. (TRP 201) The remaining witnesses were either unsure as to the

identity of the shooter, or only saw the shooter's arm. (TRP 386, 420, 424, 460, 493, 508, 560) By eliciting testimony that the prosecutor would only request the polygraph if he suspected that Castillo was not being truthful, the prosecutor suggested that the jury should reject any doubts they might have as to Castillo's credibility or motive to tell the truth.

B. SUMMARILY SEALING THE JUROR QUESTIONNAIRES VIOLATED BLAKENEY'S RIGHT TO A PUBLIC TRIAL AND OPEN COURT RECORDS

The court and parties used juror questionnaires to assist them in jury selection. (TRP 23-26, 29-34; Sup CP 271-76, 277-518) Jury voir dire and selection were then conducted on July 11 and July 12, 2011. (TRP 23-26, 29-34) On September 23, 2011, the completed questionnaires were filed under seal. (Sup CP 722-518)

1. *The Trial Court Erred When it Sealed the Juror Questionnaires Without First Holding a Hearing to Consider Whether Sealing Was Necessary and Appropriate*

An accused's right to a public trial is protected by both the state and federal constitutions. Specifically, the Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. AMEND. VI.

Similarly, the Washington Constitution provides “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury.” WASH. CONST. ART. 1, § 22.

The Washington Constitution also provides that “[j]ustice in all cases shall be administered openly.” WASH. CONST. ART. 1, § 10. This provision has been interpreted as protecting the right of the public and the press to open and accessible court proceedings, similar to the public's right under the First Amendment. State v. Easterling, 157 Wn.2d 167, 174, 179, 137 P.3d 825 (2006) (citing Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

The right to a public trial encompasses voir dire. Press–Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). However, the right to a public trial is not absolute. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). But a trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 258. Before a court can close any part of a trial from the public, it must first apply on the record the five “Bone-Club” factors:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right. 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure. 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests. 4. The court must weigh the competing interests of the proponent of closure and the public. 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210–11, 848 P.2d 1258 (1993)).

In State v. Waldon, the court held this same analysis applies to the sealing of court documents. 148 Wn. App. 952, 957, 202 P.3d 325 (2009). And in State v. Coleman, the court relied on Waldon and held that a trial court must conduct the Bone-Club analysis before sealing jury questionnaires. 151 Wn. App. 614, 623, 214 P.3d 158 (2009).

The trial court in this case did not hold a hearing to consider the Bone-Club factors before sealing the jury questionnaires. This was clear error under Waldon and Coleman.

2. *The Remedy Is a New Trial*

Where courts have found improper closure of voir dire, the remedy has been reversal and a new trial. See State v. Strode, 167 Wn.2d 222, 231 P.3d 310 (2009) (“denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed”). In Coleman, however, Division 1 rejected appellant’s structural error claim, finding that because questionnaires were not sealed until several days after the jury was seated and sworn, “there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process,” which was conducted in open court. Coleman, 151 Wn. App. at 623-24. Under those circumstances, the court found the proper remedy was remand for reconsideration of the order sealing the questionnaires using the Bone-Club analysis. Coleman, 151 Wn. App. at 624.

In this case, the questionnaires were distributed and jury voir dire was conducted on July 11 and July 12, 2011, and the questionnaires were filed under seal on September 23, 2011. (TRP 23-26, 29-34; Sup CP 271-76, 277-518) But the questionnaire cover sheet explicitly states:

The information you provide is confidential and

for use by the Judge and the lawyers during questions associated with jury selection. At the end of the jury selection process, the copies supplied to the lawyers will be collected and destroyed. The original will be filed in the court file.

(Sup CP 271) This indicates that the questionnaires were not made available to the public because they were “confidential” and initially “for use by the Judge and lawyers” only. Then they were subsequently filed under seal. Thus, it appears that the questionnaires were never available for public inspection during the jury selection process. This violates Article I, section 10’s requirement that justice be administered openly. Therefore, unlike in Coleman, the remedy in this case should be a new trial.⁵

V. CONCLUSION

The prosecutor’s improper vouching for Castillo’s credibility prejudiced Blakeney’s right to a fair trial. Furthermore, the trial court improperly sealed the juror questionnaires without first

⁵ In State v. Tarhan, 159 Wn. App. 819, 246 P.3d 580 (2011), Division 1 again rejected the appellant’s claim, under facts similar to Coleman, that the error was structural and required reversal. However, the Supreme Court has accepted review on that issue. See State v. Tarhan, Supreme Court No. 85737-7. And recently, in State v. Smith, this court rejected Coleman altogether, and held that “the trial court’s sealing of the confidential juror questionnaires did not constitute a courtroom closure and, therefore, no Bone-Club analysis was required.” 162 Wn. App. 833, 846-48, 262 P.3d 72 (2011). Consideration of co-appellant Jackson’s petition for review on this issue has been stayed by the Supreme Court pending its decision in Tarhan. See State v. Jackson, Supreme Court No. 86386-5.

conducting the required Bone-Club analysis. On either or both of these grounds, Blakeney's convictions should be reversed and his case remanded for a new trial.

DATED: March 26, 2012



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Olujimi Awbah Blakeney

CERTIFICATE OF MAILING

I certify that on 03/26/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Olujimi A. Blakeney, DOC# 854286, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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