

NO. 47273-2-II

FILED
COURT OF APPEALS
DIVISION II
2016 MAY 18 AM 11:57
STATE OF WASHINGTON
BY *Cm*
DEPUTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

WILLIAM BARRY SELLEY

v.

STATE OF WASHINGTON

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy Pierce County Superior Court Cause No. 12-1-03671-5

REPLY TO BRIEF OF RESPONDENT

902 South 10th Street
Tacoma, WA 98402
(253) 779-0844

By
Barbara Corey
Attorney for Appellant
WSB #11778

TABLE OF CONTENTS

D. LAW AND ARGUMENT

 A. THIS COURT SHOULD STRIKE THOSE PORTIONS OF THE STATE’S STATEMENT OF THE CASE THAT ARE SIMPLY INCORRECT AND/OR SUPPORTED BY THE RECORD.3

 B. THE TERM “GROUND FALLS” WAS NOT APPLICABLE TO KATE’S INJURIES AND THE PROSECUTOR’S INTENTIONAL AND REPEATED MISUSE OF THE TERM EGREGIOUSLY MISSTATED THE EVIDENCE, DENIED SELLEY HIS PRESUMPTION OF INNOCENT, AND IMPEDED HIS ABILITY TO PRESENT HIS CASE.7

 C. THE DEPUTY PROSECUTOR PURPOSEFULLY MISSTATED THE MEDICAL TESTOMONY TO MISLEAD THE JURY RATHER THAT TO FULFILL HER DUTY AS A NEUTRAL ADVOCATE PURSUING JUSTICE FOR ALL, INCLUDING MR. SELLEY.8

E. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

State

State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)10

Sargent, 40 Wn. App. at 34410

State v. Finch, 137 Wn.2d 792, 838, 975 P.2d 967 (1999).....11

State v. CDW, 76 Wn.App. 761, 763 911 (1995).....12

State v. Burnette, 78 Wn.App. 952. 956-57, 94 P2d 776 (1995)12

76 Wn.App. 761, 763 911 (1995);12

D. ARGUMENT.

6. ARGUMENT¹:

The State has characterized this case as a lengthy period of domestic violence between and Southward. Sad and tragic as this relationship, there is no need to characterize as it as something that it was not. It was a “typical” domestic relationship where violence occurs. It ended in a death.

This reply brief addresses only a few of the issues addressed by respondent in its brief. The other brief are addressed sufficiently in Selley’s opening brief.

A. THIS COURT SHOULD STRIKE THOSE PORTIONS OF THE STATE’S STATEMENT OF THE CASE THAT ARE SIMPLY INCORRECT AND/OR SUPPORTED BY THE RECORD.

[1] *The State fails to apprehend the correct charges against Mr. Selley.*

The State averred that Selley proceeded to jury trial charged with “aggravated felony murder.” CP 9-10; 2RP 126. In fact, the State had charged Selley with second degree [felony] murder with the predicate felonies of assault in the first or second degrees. The State alleged three aggravating

¹ For ease of review, Mr. Selley has numbered the portions of his reply brief to conform with RAP 10.3[c].

circumstances in the case. These aggravating factors are not elements of the crime.

[2] The trial court erred when it refused to admit evidence of Kate's long term alcoholism where the record established that with regard to the current incident, the long term alcoholism would have affected her balance, the ability of her blood to clot, and her liver's ability to process alcohol.

It is abundantly clear from the record that trial court repeatedly denied Selley's motion to admit evidence of Kate's long term alcoholism. RP 365-366, 386. The fact of the trial court's denial of defendant's motions during trial provides a sufficient record for this court's review.

Contrary to the State's argument, there was ample evidence adduced at trial to support the admission of evidence of Kate's long-term alcoholism.

Consider:

[a] Medics who responded to the Selley residence testified that alcohol consumption affects blood clotting, the formation of bruises, vital signs. RP 7 878-879, 910. Every medical witness testified regarding Kate's vital signs.

The court erroneously denied defendant's motion for reconsideration holding "there had been no testimony that her vitals are in any way related to alcoholism." RP 880.

This court denied the defense motion for reconsideration for the admission of evidence of her alcoholism where Kate's body exhibited numerous bruises of various ages when she was admitted to the hospital as well as when the State alleged a pattern based on domestic violence based on bruises allegedly inflicted by Selley. RP 2456.

[b] *Selley agrees that there was no evidence of alcohol abuse at autopsy.*

Kate died on 10/5/12, weeks after she was hospitalized. RP 92712. She had been given so much intravenous fluid that she had gained 40 lbs. RP 92712.

Any alcohol in her system would have been flushed out.

[c] *There was expert testimony that alcohol and/or alcoholism affects the body's ability to coagulate blood.*

Dr. Thomas Clark, the Pierce County Medical Examiner and State's expert witness testified that alcohol abuse can cause both temporary and permanent liver damage. Either one of these forms of damage can cause a transient coagulopathy. RP 2452.

[d] *Alcoholism also affects coordination and results in more bruising when blood does not clot normally.*

Dr. Clark also testified that alcoholics fall. RP 2452. He testified that that the combination of frequent falling and easy bruising often leads to an overall pattern of bruising. RP 2452.

Dr. Clark felt that it may well have been that there had been changes to her liver because of her alcoholism but that they simply weren't present at autopsy. RP 2454.

[c] *Kate's falls while she entered the residence after returning from the bar could have caused extensive bruising on her body.*

Dr. Clark testified that Kate could have sustained bruises when, after she could not stand up to get out of the car, Selley pulled her out and then they both fell. RP 2460. He acknowledged that after Selley managed to pull her up and then dropped her again, she could have obtained more bruises. RP 2460. And if this happened additional times, Kate would have sustained more bruises. RP 2460.

Falling over objects in the driveway such as ladders, paint cans, bins, and paint compressor multiple times also would cause additional bruises. RP 2461.

Dr. Clark averred that Kate would have sustained abrasions or scrapes when she was being dragged over pavement into the house because she could not walk. RP 2460.

Falling up a cement stair to get into the house also could have caused a bruise. RP 2461.

[d] Kate's fall down the stairs could have resulted in extensive injuries to her body.

Dr. Clark testified that people can get a multitude of injuries from falling down the stairs. RP 2447. When people fall down a couple of flights of stairs, they can get more injuries than merely falling down one flight of stairs. RP 2447.

People might obtain injuries in various points of the body depending on the position of the body during the fall. RP 2447.

Dr. Clark opined that it would be impossible to predict what would happen to any one person who was going to fall down the stairs in the future. RP 2448.

[e] The trial court erred when it refused to admit testimony that Kate was an alcoholic when it admitted testimony that her sisters took her to the

Crystal Judson Family Center but failed to permit testimony that her sisters contemporaneously wanted to take her to Alcoholics Anonymous.

Kate declined her sisters' efforts to take her to AA because she did not want her parents to know that she was drinking again. RP 2450.

B. THE TERM "GROUND FALLS" WAS NOT APPLICABLE TO KATE'S INJURIES AND THE PROSECUTOR'S INTENTIONAL AND REPEATED MISUSE OF THE TERM EGREGIOUSLY MISSTATED THE EVIDENCE, DENIED SELLEY HIS PRESUMPTION OF INNOCENT, AND IMPEDED HIS ABILITY TO PRESENT HIS CASE.

The State's witnesses without exception defined a "ground fall" in the same way, using a definition that was wholly inapplicable in this case. These are falls from a standing position, for example, when a standing elderly person simply falls down, perhaps from dizziness. E.g., RP6 797, 810.

The prosecutor apparent purpose in pursuing this wholly deceptive line of questioning appears to have been to persuade the jury that none of Kate's injuries could have been caused by a fall. This is obvious because after eliciting the definition of "ground fall," the State then elicited medical testimony that Kate's injuries were inconsistent with "a ground fall or a ground level fall." RP14 2061-2062, 2126.

The prosecutor's purposeful misuse of this term in an effort to mislead the jury affirmed that the prosecutor was devoted to a conviction at all costs

rather than to the protection of Selley's fundamental rights. Regrettably this was not the only serious misstatement of the evidence.

C. THE DEPUTY PROSECUTOR PURPOSEFULLY MISSTATED THE MEDICAL TESTIMONY TO MISLEAD THE JURY RATHER THAN TO FULFILL HER DUTY AS A NEUTRAL ADVOCATE PURSUING JUSTICE FOR ALL, INCLUDING MR. SELLEY.

The medical testimony in this regarding the nature of the injuries, their effect on Southward and the possible causes thereof, and the likely symptoms and timing thereof.

In section [c](iii), the State refuses to answer Selley's arguments. The State has entitled this argument section as, "The prosecutor did not misstate the testimony about ground falls."

Selley's argument throughout the appeal and in this section was that the prosecutor committed reversible misconduct when she repeatedly mischaracterized the testimony of Dr. Clark and Dr. Inouye as "ground falls."

Of course, this is not true. Dr. Clark never testified that Southward's injuries were caused by a fall from a standing position, such as when an elderly person simply drops to the floor because of low blood sugar. Rather, he testified that injuries on many planes of the body were consistent with various positions that an individual might sustain while falling down multiple

stairs, perhaps even hitting objects on the stairs. RP 16 2447-2448. Dr. Clark agreed that there many factors would cause the blood to clot. RP16 2448-2449. Dr. Inouye had never treated a patient who arrived in the ER three days after a fall down the stairs and so he had no comparison on which to make any determination as to the cause of injuries. RP 2287.

Dr. Jacoby testified to *a reasonable medical certainty* that Southward's injuries were inconsistent with a fall down the stairs. RP 2158.

The prosecutor foolishly and intentionally when she noted that defendant was the only witness who testified that Kate fell down the stairs before he discovered her sitting on a landing. 20RP 2931. No one else lived in the residence. No one else could have seen any fall.

The State argued that Selley did not provide all of details about what had happened to Kate to the medics who had arrived to treat her. RP 2987. Again, the medics had arrived to treat Kate rather than to take a complete statement from Selley.

It is improper for a prosecutor personally to vouch for the credibility of a witness. It is improper for a prosecutor personally to vouch for the credibility of a witness. *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). Prosecutors may, however, argue an inference from the evidence, and

prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. Sargent, 40 Wn. App. at 344.

The prosecutor injected her personal opinion when she vouched for the credibility of Dr. Clark.

Selley agrees that a litigant may argue his party's witnesses are credible and state the reasons why a factfinder should find so find them.

However, there is a world of difference between such neutral and proper testimony and what happened in this case. Instead of arguing, "Look at Dr. Clark's credentials . . .", the prosecutor informed the jury that in her opinion the witness was credible, "*I'm telling you that . . .*" [b](vii) The prosecutor misused and falsely attributed to Selley the statement "that's what getting the shit beat out of you looks like..."

Despite the State's zeal to attribute this statement to Selley, it was established at trial that this statement found its way into this trial through the 911 call taker. RP4 580-581. Over the course of the trial, the State sought to put these words into Selley's mouth to characterize him as Satan himself.

As noted in Selley's opening brief and referred to briefly herein, the prosecutor misstated the medical evidence throughout the trial.

///

///

Having done so, the deputy prosecutor then paraded photos in before the jury and yelled, "this is what getting the shit beat of you looks like." RP 3256. The trial court instructed the prosecutor to "dial it back just a little bit." 3256.

According to Dr. Clark, a bowel perforation that is three to four days out from time of perforation has a far, far lower chance of survivability with surgery and other medical care, RP 2464.

The corpus delicti rule applies to aggravating factors and the June 2011/October 2011 factor was not proven beyond a reasonable doubt.

An aggravating factor must be proven beyond a reasonable doubt. RCW 9.94A.537(3). The insufficiency of proof for the aggravating factors is addresses adequately in Selley's opening brief with the additional comments.

The State relied for one of the incidents on a conversation Selley had with Gary Robinson. Robinson initially insisted Selley told him that Kate had been injury about two months before his New Year's brunch on January 2011 [about a year before the charged incident]. RP 1213 However, in a conversation with Det. Salmon very close to trial, Robinson memory was "refreshed" after Salmon randomly mentioned the month of October 1212 and he changed the date. RP8 1100.

This incident may not be considered as proven beyond a reasonable doubt because the corpus delicti rule applies to aggravating factors. Where an act must be proven beyond a reasonable doubt, Washington law and the standard of review is the same for aggravating factors as for direct appeals, it defies credence to believe that lesser proof would apply. A statement attributed to a defendant made by another person would be admitted as proof absent corroborating evidence. That is not the law in Washington. *State v. Finch*, 137 Wn.2d 792, 838, 975 P.2d 967 (1999); made by another person would be admitted as proof absent corroborating evidence. *State v. CDW*, 76 Wn.App. 761, 763 911 (1995); *State v. Burnette*, 78 Wn.App. 952. 956-57, 94 P2d 776 (1995)., 76 Wn.App. 761, 763 911 (1995); *State v. Burnette*, 78 Wn.App. 952. 956-57, 94 P2d 776 (1995).

///

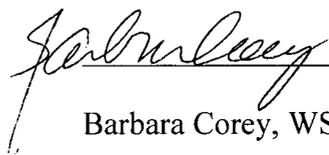
///

///

7. CONCLUSION:

For the foregoing reasons, Mr. Selley asks for the requested relief.

DATED this 16th day of May, 2016


Barbara Corey, WSB #11778

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger a copy of this Document to: Appellate Division Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946 Tacoma, Washington 98402 and via USPS to William Barry Selley, DOC#964495 Stafford Creek 191 Constantine Way Aberdeen, WA 98520

FILED
COURT OF APPEALS
DIVISION II
2016 MAY 18 AM 11:57
STATE OF WASHINGTON
BY  DEPUTY

5/16/16
Date


Signature