

NO. 30005-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

DELONDE PLEASANT,

Appellant.

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

The Honorable Gregory P. Canova, Judge

REPLY OF APPELLANT

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A. ARGUMENT IN REPLY

I. APPELLANT WAS DENIED HIS RIGHT TO CONFRONTATION.

In his opening brief, appellant Delonde Pleasant asserts he was denied his constitutional right to confrontation when the trial court permitted the jury to hear the prior testimony of unavailable witnesses. Brief of Appellant (BOA) at 8-14. In response, the State claims the issue is controlled by State v. King, 113 Wn.2d 243, 292, n. 20, 54 P.3d 1218 (2002). Brief of Respondent (BOR) at 12-13. This is not so.

King's holding is limited by the fact it did not apply the now required inquiry for determining whether prior testimony is admissible under ER 804(b)(1). In King, Division One stated that the purpose for which the prior testimony is admitted does not control the inquiry of whether there were similar motives to cross-examine a witness where the defendant previously was able to challenge the truthfulness of the witness by cross examination. However, King's analysis was superficial at best, failing to undertake what has since been confirmed as the appropriate analysis for determining whether a party has a similar motive to examine a witness at a prior proceeding.

As shown in a Washington Supreme Court case published after King, reviewing courts must consider the following factors when determining whether similar motives exist: (1) whether the party opposing the testimony in fact undertook to cross-examine of the witness; (2) the nature of the two proceedings, including the applicable burden of proof; and (3) whether the party opposing the testimony previously had an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. State v. Benn, 161 Wn.2d 256, 266, 165 P.3d 1232 (2007). King did not apply the legal factors set forth in Benn and, thus, is not controlling. As shown in appellant's opening brief, when the Benn factors are properly applied, this record establishes Pleasant did not have a similar motive in cross-examining the unavailable witnesses. BOA 8-13.

The State also suggests that because the defense's evidence in the first hearing in essence included a concession that a child was present at the scene, the defense was stuck with this concession at the second hearing. BOR at 13. The State fails, however, to fully appreciate the different burdens of proof between the two proceedings and how that changed the defense's motivation.

In the first sentencing, the State's burden was only to prove the child's presence by preponderance of the evidence. In the second sentencing, it had to do so beyond a reasonable doubt. This had a notable impact on the defense's strategy. Because the defense strategically chose in the first sentencing to concede the fact that the State would be able to prove by a preponderance of the evidence that the child was present, it had no motive to cross-examine the witness to expose reasonable doubt. In the second trial, however, given the new, stricter standard of proof placed on the State, the defense did not to concede the State could prove beyond a reasonable doubt that the child was present and, thus, the defense had a significantly dissimilar motive in cross-examining the absent witnesses in an effort to expose reasonable doubt. See, BOA at 11-13.

Finally, the State devotes large portions of its argument to distinguishing United States v. Feldman, 761 F.2d 380, 385 (7th Cir.1985), and United States v. DiNapoli, 8 F.3d 909, 914-15 (2nd Cir.1993), based on the specific facts of those cases. BOR at 13-15. It claims the appellant's reliance on these cases is misplaced. The State's assertion is peculiar, given the fact appellant cites these cases solely for legal principles that apply regardless of

factual differences. See, BOA at 10 (citing Feldman for the principle that mere “naked opportunity” to cross-examine in a prior proceeding is not enough to show similar motive) and BOA at 11 (citing DiNapoli as an original source for the legal inquiry that is now applied in Washington State).

For the reasons stated above, and those set forth in greater detail in appellant’s opening brief, this Court should reverse and remand for a new sentencing.

II. THE PROSECTOR FLAGRANTLY APPEALED TO THE JURY’S PASSIONS, THEREBY DENYING APPELLANT OF HIS RIGHT TO A FAIR SENTENCING HEARING.

As explained in appellant’s opening brief, the prosecutor violated his duty to insure a fair trial when he appealed to the jurors’ sympathies by inviting them to speculate about facts of which there was no support in the record. BOA at 14-18.

The central question in determining whether a prosecutor has committed misconduct by appealing to juror passions is whether the prosecutor’s comments had the effect of stirring up heightened emotions in jurors, prompting them to make a decision regarding guilt out of a sense of passion, rather than making a reasoned decision based on the evidence before them. Viereck v.

United States, 318 U.S. 236, 248, 63 S.Ct. 561, 87 L.Ed. 734 (1943). Appeals to passion based on facts not before properly before the jury are further problematic because they divert the jury's attention from the evidence that is properly before it. State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008).

As argued in detail in appellant's opening brief, the prosecutor appealed to the jurors' passions by encouraging them to feel a particular sympathy for the victim and the victim's child, and by creating heightened emotion regarding the victim's supposed feelings and thoughts during the incident (facts which were not in evidence). BOA at 16-17. In response, the State sidesteps appellant's argument regarding the emotional impact of the prosecutor's statements. BOR at 18-20. In all probability, the State recognizes that any argument that focuses the jury's attention on a mother's attempt to protect her sleeping child from violence by sacrificing herself is undeniably going to arouse emotions and passions.

Instead of discussing the emotional impact of the prosecutor's statements, the State focuses on whether these statements were supported by the evidence, claiming the prosecutor drew reasonable inferences permitted when he made

his argument. BOR at 18-20. However, the State's sidestepping approach fails no better.

According to the State, the prosecutor's argument that that victim felt every single assault and would not have surrendered to death because her child was in the next room merely "asked the jurors to draw a reasonable inference from the facts in evidence." BOR at 19. The State suggests the presence of the victim's child in the next room was "circumstantial evidence of the physical, physiological and emotional abuse she endured." BOR at 19. The State admits, however, this inference rests on the premise that any mother "would continue to fight death as long as possible knowing that her young child was in the next room." BOR 19-20. Unfortunately, one need only look at the body of case law in Washington regarding parental terminations to see the State's premise is false. In those cases, there are numerous examples of mothers who did not have the slightest protective instinct toward their children. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (establishing a child "suffered extreme abuse at the hands of her mother"); In re Dependency of D.C-M., 162 Wn. App. 149, 253 P.3d 112 (2011) (establishing mother hit

her child with belt causing a black eye and committed other acts of abuse).

Because the premise of the prosecutor's argument is false, the inference he drew from it was unsound. It is simply too far of a logical leap to surmise that because the victim's child was in the house, the victim would have felt "every one of those assaults." RP 696. If the prosecutor wanted to establish what the victim felt, it should have provided some expert testimony establishing the extent of the victim's conscious awareness of pain given the circumstances. In the end, it did not provide this evidence and instead encouraged the jury to speculate about facts not in evidence – facts of a highly emotional nature. This constituted flagrant misconduct.

Finally, contrary to the State's claim (BOR at 20), no jury instruction could have cured this kind of misconduct given the emotional impact of the prosecutor's statement. As the State's Counterstatement of the Case demonstrates, the circumstances of this case were already highly emotionally-charged. Given this context, an objection and an instruction to disregard the prosecutor's statements could not have erased the compassion and sympathy the jurors would have felt toward this mother who had

been portrayed as sacrificing her own well-being and consciously enduring tremendous physical pain to protect her young child who was sleeping in the next room. This error was not harmless and reversal is required. State v. Belgarde, 110 Wn.2d 504, 509, 755 P.2d 174 (1988); see, also, State v. Claflin, 38 Wn. App. 847, 851 690 P.2d 1186 (1984) (reversing rape conviction where prosecutor read a poem by a rape victim, explaining no curative instruction could erase such an appeal to passion and prejudice).

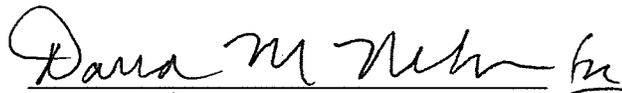
B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this court should reverse the exceptional sentence.

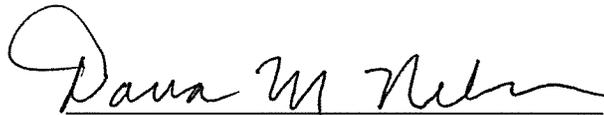
DATED this 15th day of October, 2012

Respectfully submitted,

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State v. Delonde Pleasant

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Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 15th day of October, 2012, I caused a true and correct copy of the **Reply Brief** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail

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Signed in Seattle, Washington this 15th day of October, 2012.

X Patrick Mayovsky