

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 Cameron Mitchell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his Sixth Amendment right to confrontation.

2. Appellant was denied a fair trial when the prosecutor engaged in misconduct.

Issues Pertaining to Assignments of Error

1. At appellant's pre-Blakely¹ sentencing hearing, two witnesses testified for the defense regarding a limited factual issue. Appellant was given an exceptional sentence by the judge. After the Supreme Court's decision in Blakely was issued, the exceptional sentence was overturned and the case remanded for a sentencing hearing before a jury. At that time, the State sought to enter into evidence the prior testimony of the witnesses previously called by the defense to support its case in chief. Appellant objected on the ground that he did not have an opportunity and similar motive to cross-examine the witnesses. The trial court disagreed and admitted the prior testimony. Was appellant denied his constitutional right to confrontation?

¹ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

2. In closing argument, the prosecutor appealed to the jury's sympathies and asked jurors to speculate about facts outside the record. There was no legitimate purpose for such argument. Was appellant denied a fair trial due to prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. The Incident and Procedural History

On March 2, 2002, appellant Delonde Pleasant had a considerable amount to drink while out with his cousin, Jamar Sims. Ex. 41 at 4-6. Near midnight Pleasant and Sims returned to Pleasant's house. Ex. 41 at 6. When Pleasant returned home, San Juanita Montelongo let him into the house because he had misplaced his key. Ex. 41 at 7-8. Montelongo and Pleasant had been living together for three years and had a 2-year-old child together, Cincere. RP 435-36. Randy Pleasant, Pleasant's 12-year-old brother, was also staying at the house. The children were asleep in the other rooms at this time. RP 602-03.

Shortly after his arrival, Pleasant and Montelongo began bickering, with her accusing him of seeing another woman. Ex. 41 at 2-4; RP 604. Sims left. RP 604.

The argument became more heated and Pleasant grew angry, because Montelongo was accusing him of something he did

not do. Ex. 41 at 2-4. Pleasant and Montelongo continued to argue and, at some point, Pleasant "lost it" and hit Montelongo. Ex 41 at 4. Pleasant, who suffered from alcohol dependency, major depressive disorder, and post-traumatic stress disorder, experienced an alcoholic black out that impacted his ability to remember the events.² RP 619, 621, 622, 626.

The next morning, Pleasant discovered Montelongo badly beaten and unconscious. Ex. 41 at 10-11. Because the phone was not charged, however, he was unable to call 911 for help. Ex 41 at 9. Pleasant attempted to revive Montelongo by splashing her with water and administering CPR, for which he had been trained. Ex. 41 at 10-12. He also woke his brother Randy and asked him to get assistance. Ex. 41 at 9. Before Randy could do so, however, Pleasant drove to pick up his mother and aunt so they could help. Ex. 41 at 9. Upon returning to the house and seeing Montelongo's condition, Pleasant's aunt called 911. RP 442.

Officers and medical personnel responded quickly, finding Montelongo unconscious on the floor and the furniture in disarray. RP 443, 504-05. Montelongo was transported to hospital, but she

² When interviewed by police, Pleasant could not remember most of what happened after he "lost it." Ex. 41 at 6-8.

was pronounced dead shortly thereafter arrival. RP 531. An autopsy revealed she had sustained approximately 100 blows, including stomps to the head and chest, a bite to the leg, and a face punch that knocked out a tooth and ripped her lip – all of which combined to cause her death. RP 452-483.

Pleasant was arrested after officers arrived on scene and was eventually charged with first degree murder. RP 541; CP 106-07. On January 16, 2003, he entered an Alford plea to an amended count of first degree manslaughter. CP 23. As part of the agreement, the State was permitted to seek an exceptional sentence up to 306 months (three-times the top of the standard range).³ RP 20.

³ Appellant's criminal history included only one prior juvenile offense (possession with intent to delivery), which amounted to an offender score of .5 that was rounded down to 0. CP 91-105.

On April 22, 2003, after hearing evidence pertaining to aggravating factors, the trial court concluded the State had proven by a preponderance of the evidence that the offense occurred within the sight or sound of Montelongo's child and that Pleasant's conduct manifested deliberate cruelty. CP 86. It imposed an exceptional sentence of 306 months. CP 91-105. After the United States Supreme Court issued its opinion in Blakely, however, the exceptional sentence was reversed on appeal and the case was remanded to the trial court so a jury could determine the existence of aggravating factors. CP 77-83.

From March 23-29, 2011, a sentencing hearing was conducted in front of the jury. RP 1- 734. The jury concluded the State had proven the following aggravating factors: manifestation of deliberate cruelty during an act of domestic violence and aggravated domestic violence committed within the sight or sound of the victim's child. CP 32. The trial court entered findings and sentenced Pleasant to 282 months.⁴ CP 4-28.

⁴ When deciding to sentence Pleasant to something less than 306 months, the trial court took into consideration Pleasant's considerable efforts to overcome his psychological problems and better himself through the services offered during his prior ten years of incarceration, concluding Pleasant "is likely not the same person that was sentenced by the previous court." RP 792.

2. Use of Former Testimony

During the sentencing hearing conducted in 2003, the defense called Sims and Randy as witnesses to establish a single fact – Cincere was sleeping during the incident. RP 563; CP 602-05. Randy testified Cincere was asleep in the bedroom on the night of incident and that he never awoke during the incident. RP 602. The State did not cross-examine him. RP 602.

Sims testified that he came into the house with Pleasant and the baby was not awake at any time while he was there. RP 603. On cross-examination, the State established that Sims witnessed some bickering between Montelongo and told them to tone it down so the kids were not awakened, but he left before there was any physical violence. RP 603-05.

During the second sentencing hearing, the State sought to have the transcript of Sims' and Randy's former testimony read to the jury because they were unavailable. RP 548-57. The state argued that the testimony was relevant to proving Cincere was present that night. RP 556.

The defense objected. RP 558. Defense counsel argued Pleasant did not have a full opportunity and similar motive to cross-examine these witnesses because during the previous hearing they

were only presented for the limited purpose of proving Cincere was asleep throughout the incident. RP 558, 563. She explained that the motivation for cross-examination was different in this hearing because the State was seeking to introduce the testimony for something other than what the defense sought to introduce the testimony for in the previous hearing. RP 563-64. The trial court disagreed and the jury was permitted to hear the former testimony. RP 568, 601-05.

3. Prosecutorial Misconduct

The jury was instructed that to conclude deliberate cruelty had been sufficiently proven, it had to find that the State proved beyond a reasonable doubt: (1) That the victim and defendant were family or household members; and (2) That the defendant's conduct during the commission of the offense manifested deliberate cruelty to the victim. CP 44. Deliberate cruelty was defined as "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself...." CP 43.

When arguing to the jury that it should find Pleasant acted with deliberated cruelty, the prosecutor argued that Pleasant had the ability to, and did, inflict pain. RP 695. He then added:

And the victim felt every one of those stomps, every one of those kicks, every one of those bites, every one of those punches. She was not going to surrender to death with her two-year-old child there in the next room. That was not going to happen. She felt every one of those assaults, every one of those bites, kicks, punches, over a hundred of them according to the testimony that you've heard from Dr. Selove. She felt every one of them and the defendant knew he was inflicting every one of them, and the whole purpose of doing it was to inflict pain as an end in itself.

RP 696. The jury did not have before it an expert opinion as to the point at which Montelongo became unconscious or an expert opinion as to whether one can feel pain when in an unconscious state. RP 1-734.

C. ARGUMENT

I. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN THE TRIAL COURT PERMITTED THE PRIOR TESTIMONY OF UNAVAILABLE WITNESSES TO BE READ TO THE JURY.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Cross-examination is a fundamental aspect of a defendant's confrontation right and the integrity of the judicial system. Id. The United States Supreme Court has described

cross-examination as the “greatest legal engine ever invented for the discovery of truth.” California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (quoting 5 John Henry Wigmore, Evidence in Trials at Common Law § 1367 (3d ed.1940)).

The confrontation clause bars out-of-court testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 50-51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Similarly, under ER 804(b)(1), former testimony of an unavailable witness is admissible only if the party against whom it is offered previously had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. ER 804(b)(1); State v. DeSantiago, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003). This rule contains “strong expressions of a preference for confrontation and cross-examination.” In re Detention of Stout, 159 Wn.2d 357, 386, 150 P.3d 86 (2007) (Madsen, J. dissenting). Accordingly, the former testimony of Sims and Randy should have been excluded because it failed to satisfy either the confrontation clause or ER 804. See, DeSantiago, 149 Wn.2d at 411.

The primary question before this Court is whether in the first sentencing hearing Pleasant had a full opportunity and similar

motive to cross examine Sims and Randy as to their basis of knowledge as to whether Cincere was present and within the sight or sound of the incident. As shown below, Pleasant did not.

In determining whether a party had a similar motive to cross examine a witness, "a court must evaluate not only the similarity of the issues, but also the purpose for which the testimony is given." United States v. Feldman, 761 F.2d 380, 385 (7th Cir.1985) (citations omitted).⁵ "Mere 'naked opportunity' to cross-examine is not enough; there must also be a perceived 'real need or incentive to thoroughly cross-examine' at the time [the former testimony was given]." Id. As such, testimony is admissible under ER 804(b)(1) only when the purpose for which the testimony was offered in the first proceeding was such that the present opponent had an adequate motive for testing on cross-examination the credibility of the testimony as to the purpose for which it is currently offered. 5C Karl B. Tegland, Washington Practice: Evidence sec. 804.18, at 100 (4th ed.1999).

⁵ The language of ER 801(b)(1) is substantially the same as that of the federal rule. Where the language of Washington's evidence rules is substantially the same as the language of the federal rules, Washington courts may look for guidance from courts applying the federal rule. Beal v. City of Seattle, 134 Wn.2d 769, 777, 954 P.2d 237 (1998).

The following is a non-exhaustive list of factors a trial court should consider in determining whether a party had a similar motive to examine a witness at the prior proceeding: (1) whether the party opposing the testimony in fact undertook to cross-examine 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. See, United States v. DiNapoli, 8 F.3d 909, 914-15 (2nd Cir.1993); State v. Benn, 161 Wn.2d 256, 266, 165 P.3d 1232 (2007) (affirming the Court of Appeals' reliance of the factors set forth in DiNapoli).

Under the first prong, Pleasant did not cross-examine Sims or Randy as to their basis of knowledge regarding Cincere's presence or his ability to hear the incident. Instead, Pleasant presented them for the very limited purpose of establishing Cincere was asleep. Accordingly, the defense narrowed the scope of direct-examination to establishing that fact. RP 602-05.

Turning to the second prong, the two proceedings were notably dissimilar due to the different burdens of proof. Pleasant was originally sentenced under pre-Blakely SRA provisions, which

permitted aggravating factors supporting an exceptional sentence to be proved to a judge by a preponderance. Former RCW 9.94A.535(2). In Blakely, however, the Supreme Court held a defendant's constitutional due process and jury trial rights are violated unless such factors are proven beyond a reasonable doubt to a jury. 542 U.S. at 296. Consequently, the State's burden was considerably lower in the first hearing than it was in the second hearing. As shown below, the difference in burdens had a substantial impact on Pleasant's interest and incentive in cross-examining Randy and Sims.

Turning to the third prong, Pleasant did not have the same intensity of interest in the previous hearing of disproving the fact that the child was present during the offense. There, the defense strategy was to establish Cincere was asleep and argue that he, therefore, could not have been within the sight or sound of the offense. Sims and Randy were called to establish only the fact that Cincere was asleep. In doing so, the defense strategically chose to concede that the State would be able to show – by a preponderance of the evidence – the fact that Cincere was present in a nearby room. Thus, the defense had no need or incentive to cross-examine Randy or Sims regarding his basis of knowledge for

believing Cincere was in the bedroom during the incident or the extent to which the offense might have been heard in the bedroom.

By contrast, when the State's burden of proof changed in the second proceeding, the defense's strategy also changed. Instead of using the former testimony to establish the child was asleep, the defense chose to place the entire burden on the State to establish - beyond a reasonable doubt - the child's presence and ability to hear the incident. Thus, when the State sought to introduce the former testimony, the defense had a different need or incentive in cross-examining Sims and Randy in an effort to uncover factors that might raise a reasonable doubt in the juror's minds that the child was within the sound of the offense. Because there was not a similar motive for cross-examination from the defendant's perspective, the former testimony should never have been admitted in the second sentencing hearing.

In sum, the record shows Pleasant did not have a similar motive or incentive in cross-examining Sims and Randy. As such the trial court erred in admitting the former testimony and in so doing violated Pleasant's constitutional right to confrontation. Reversal and remand for a new sentencing is, therefore, required.

II. THE PROSECUTOR COMMITTED MISCONDUCT,
DENYING PLEASANT HIS RIGHT TO A FAIR
HEARING.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011).

Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676 (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675, (citations omitted). Prejudice is

established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578. Even where there is no objection, reversal is still required where the improper statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

It is the prosecutor's duty to “seek a verdict free of prejudice and based on reason.” State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Appeals to the passion, prejudice, or sympathy of jurors are improper. Viereck v. United States, 318 U.S. 236, 247, 63 S.Ct. 561, 87 L.Ed. 734 (1943). A prosecutor has a duty to ensure a verdict is free from prejudice and based on reason, not passion. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

The prosecutor may not encourage the jury to speculate about facts not in evidence. State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008). ABA Standards for Criminal Justice 3–5.8 (3d ed.1993) provides: “The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the

evidence.”⁶ Hence, when discussing the evidence, the prosecutor “has no right to call to the attention of the jury to matters or considerations which the jurors have no right to consider.” Case, 49 Wn.2d at 71. To do so constitutes misconduct. Evans, 163 Wn. App. at 644-46.

Here, the prosecutor appealed to the jurors’ sympathies when he invited them to speculate about facts for which there was no support in the record. The prosecutor claimed Montelongo felt “every one of those stomps, every one of those kicks, every one of those bites, every one of those punches.” RP 696. Yet, the State failed to produce any evidence establishing Montelongo’s conscious awareness of pain. The record establishes Montelongo fell unconscious at some point. There was no expert testimony suggesting whether she was conscious during any, part of, or all the assaults. And there was no expert testimony establishing whether one can feel pain when in an unconscious state. Thus, there was no factual basis to support this highly charged argument.

⁶ ABA Standards for Criminal Justice serve as “useful guidelines” when considering claim of prosecutorial misconduct. United States v. Young, 470 U.S. 1, 8, 105 S.Ct. 1038, 84 L.Ed.2d 1(1985).

Moreover, this argument was without any legitimate purpose given the issues before the jury. The jury's job was to determine whether the defendant engaged in gratuitous violence or in conduct which inflicted pain. CP 43-44. The focus was on his conduct and the reasonable result of such conduct. There was no requirement that the jury find that the victim actually felt pain. Thus, the only purpose the prosecutor's statement served was to arouse the sympathies of the jury and take their attention away from rendering a verdict based in reason, not emotion.

Additionally, the prosecutor suggested that Montelongo refused to "surrender to death" because she was trying to protect her child. There was no factual basis for this argument and no legitimate purpose for making such an argument. Instead, it was mere speculation that served to arouse the passions of the jury and divert their attention away from its duty.

In sum, the prosecutor committed misconduct by appealing to the jurors' passions and asking them to speculate regarding facts not in evidence. This highly charged argument served no legitimate purpose and invited the jury to render a judgment based on emotion rather than reason, thus, prejudicing the outcome of the hearing. Consequently reversal is required.

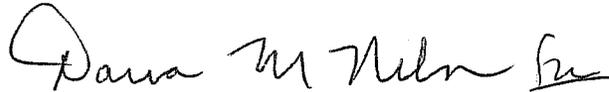
D. CONCLUSION

For the reasons stated above, this Court should reverse the exceptional sentence and remand for a new sentencing hearing.

Dated this 18th day of April, 2012.

Respectfully submitted

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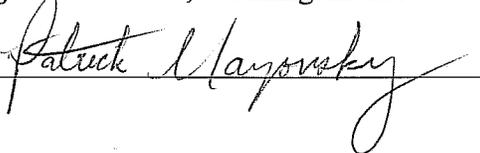
Certificate of Service by email

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 18th day of April, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Shawn Sant
Franklin County Prosecutor's Office
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Signed in Seattle, Washington this 18th day of April, 2012.

X 

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 30005-6-III
)	
DELONDE PLEASANT,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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 17TH DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DELONDE PLEASANT
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SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF APRIL 2012.

x 