

FILED
March 30, 2016
Court of Appeals
Division III
State of Washington
NO. 32872-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

MARK CAVAZOS, SR.,

Appellant.

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

The Honorable Kathleen m. O'Connor, Judge

REPLY BRIEF OF APPELLANT / RESPONSE BRIEF OF CROSS-
RESPONDENT

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. COUNTER-STATEMENT OF ISSUES ON CROSS-APPEAL

On cross-appeal, the State challenges the mitigated exceptional sentence, claiming the record fails to provide a legal basis for the sentence.

The State's claim raises the following issues:

1. Does the record support finding James was a willing participant, aggressor and/or provoker of the events that led to his death, thereby authorizing the court to impose a mitigated exceptional sentence, when there was evidence James had a reputation for physically attacking others, James' attack of Cavazos rendered Cavazos briefly unconscious in his own home, Cavazos only armed himself to prevent further attack by James, and the shot that killed James was fired accidentally while Cavazos was attempting unsuccessfully to convince James to leave his home? CP 379 (Finding of Fact 1).

2. Does the record support finding Cavazos did not have a substantial criminal history, had painful physical disabilities, had expressed remorse immediately following the shooting, was cooperative with law enforcement following the shooting by admitting he was the shooter, and was suitable for community-based supervision when the record shows Cavazos' only prior offense is a 1996 unclassified violation of a fish and wildlife code provision, Cavazos is so physically disabled he needs assistive devices to ambulate and requires medication for pain

management, Cavazos immediately contacted police following the incident and admitted he was the shooter, Cavazos expressed immediate remorse after the shooting, and Cavazos is well-established in the community and remained out of custody on bond throughout the trial proceedings without ever failing to appear as required? CP 379-80 (Findings of Fact 2 & 3¹).

3. Even if this Court concludes Finding of Fact 2, and the associated findings under Finding of Fact 3, did not authorize the trial court to impose a mitigated exceptional sentence, should the exceptional sentence stand because the trial court concluded Finding of Fact 1 was sufficient on its own to support a mitigated exceptional sentence and it is apparent the court would have imposed the same sentence based solely on Finding of Fact 1? CP 381 (Conclusion of Law 2²).

¹ Finding of Fact 3 provides: "The Court's oral ruling is incorporated herein by reference." CP 380. This finding is not challenged by the cross-appellant, and therefore constitutes a verity on appeal. In re Estate of Barnes, __ Wn.2d __, __ P.3d __, 2016 WL 348057, at *2 (Slip Op. filed January 28, 2016, No. 91488-5).

² Conclusion of Law 2 provides: "The Court has concluded that the statutory mitigating factor in RCW 9.94A.535(1)(a) has been established by a preponderance of the evidence and that it justifies an exceptional sentence downward." CP 381.

B. RESTATEMENT OF ISSUES RAISED BY CAVAZOS

The respondent/cross-appellant attempts to re-cast the issues raised by Cavazos on appeal as involving alleged violations of his rights by the admission of post-arrest statements he made to police. Brief of Respondent/Cross-Appellant (BORCA) at 3-4. This completely misses the mark and should be disregarded.

As set forth in his opening brief, Cavazos challenges not the admission of statements he made to police, but instead the admission of evidence of Cavazos's silence in the face of accusations, as a violation of his right to remain silent. Brief of Appellant (BOA) at 1-2.

C. ARGUMENTS IN REPLY

1. THE STATE FAILS TO RESPOND TO THE ISSUE RAISED BY CAVAZOS ON APPEAL.

The State's first substantive argument defends the admission through Deputy Vucinich of spontaneous statements by Cavazos admitting he shot and killed his son, made to police when they first arrived. BORCA at 19-21. Cavazos has not challenged the admission of these statements, and agrees the court found them admissible. CP 129-32. Thus, the basis for the State including this argument is unclear.

What Cavazos has challenges on appeal is the admission of Deputy Vucinich's "No" response when asked by the prosecutor whether Cavazos

made "any statement as to whether or not it had been an accident that occurred that night." RP 1305; BOA at 13, 17-31. It was this testimony Cavazos asserts penalized him for exercising his right to remain silence, and therefore constitutes a violation of that right that warrants reversal of his conviction. Unlike the statements the State inexplicably defends, there was no pretrial CrR 3.5 ruling holding admissible testimony about what Cavazos did not say.

Having misconstrued the factual basis for Cavazos' challenge to Deputy Vucinich's testimony, the State's response to Cavazos's related ineffective assistance of counsel claim based on a failure to object, is consequently well of the mark as well. BORCA at 21. However, to the extent the State is correct that to prevail on a claim of ineffective assistance of counsel Cavazos must show an objection to the offending evidence would have been sustained, that requirement is met here.

As discussing in the opening brief, there is "copious case law holding that comments on silence violate the Fifth Amendment." BOA at 32; see, e.g., State v. Terry, 181 Wn. App. 880, 890-94, 328 P.3d 932, 937 (2014) (testimony defendant failed to inquire why he was being arrested constituted a improper comment on the right to remain silent). State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996) ("A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer

questions.”); State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, (statement that defendant “had nothing to say” was an improper comment on the right to silence), review denied, 133 Wn.2d 1019 (1997).

Deputy Vucinich's testimony that Cavazos remained silent at the scene about whether the shooting was an accident is analogous to the "had nothing to say" comment found improper in Perrett. As in Perrett, had Cavazos's counsel objected, it should, and most likely would, have been sustained. 86 Wn. App. at 322.

2. LIKE THE TRIAL COURT BELOW, THE STATE MISCONSTRUES THE RECORD IN DEFENDING THE TRIAL COURT'S ERRONEOUS CONCLUSION CAVAZOS OPENED THE DOOR TO TESTIMONY THAT HE FAILED TO TELL RESPONDING OFFICERS DETAILS ABOUT THE SHOOTING.

The trial court agreed with the prosecutor that defense counsel opened the door to testimony that Cavazos did not provide responding officers with details about the shooting. RP 1513-14. This was error because defense counsel's questioning of Detective Johnson did not imply Cavazos was prevented from explaining his side of the story, nor did it cast aspersions on the quality of the investigation conducted due to a lack of information. Instead it merely pointed out that investigations are information driven, such that the more information available, the more specific

investigators can be in deciding what physical evidence to preserve in order to support or dispel claims about what did occur. RP 1494-98, 1511.

The trial court's error was likely created by the trial deputy's own erroneous recall of what defense counsel asked Detective Johnson, which he claimed was, "Well, shouldn't you have investigated and found out where everybody was standing and when the shot was fired? And wouldn't that have been a benefit if you determined this before you did your investigation?" RP 1510. No such accusatory questions were asked of Detective Johnson by defense counsel. See RP 1494-98. More importantly, nothing about defense counsel's questioning of Detective Johnson opened the door to evidence pointing out Cavazos exercised his right to remain silent.

The State cites several cases to support of its claim the trial court correctly found Cavazos opened the door to evidence of his silence. These cases, however, actually undermine the State's position. These cases are: United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2 23 (1988) (by arguing State never gave defendant opportunity to explain his actions, defense counsel opened the door to prosecutor noting defendant could have testified at trial or provided a statement earlier in the investigation, but did not); State v. Stackhouse, 90 Wn. App. 344, 957 P.2d 218, (defense counsel opened the door to evidence defendant declined to speak to detective by asking how reliable the defendant's recanted confession was if he was never

give the opportunity to change it), review denied, 136 Wn.2d 1002 (1998); State v. Kendrick, 47 Wn. App. 620, 736 P.2d 1079, (by portrayed himself at trial as being cooperative with authorities, defendant opened the door to evidence he only gave a statement after seeing all the evidence), review denied, 108 Wn.2d 1024 (1987); State v. Vargas, 25 Wn. App. 809, 610 P.2d 1 (1980) (by testifying he was cooperative with police and gave a statement, defendant opened the door to evidence that he had refused to give a statement). BORCA at 29-31.

Unlike in Robinson, Stackhouse, Kendrick and Vargas, neither Cavazos nor his trial attorney ever claimed Cavazos was denied an opportunity to explain his side of the story, and certainly not during defense counsel's cross-examination of Detective Johnson. To the contrary, defense counsel's questioning of Detective Johnson focused on the general process of evidence collection at a crime scene, much as the prosecutor had done on direct, and the extent to which law enforcement was able to employ that process at the scene of James' death given the information available. RP 1492-98. This was not a situation where the prosecution was entitled to introduce evidence of Cavazos's silence as "a fair response to a claim made by defendant or his counsel" that Cavazos was prevented from telling his side of the story, as in Robinson. 485 U.S. at 32.

As this Court noted in Stackhouse,

Because the central purpose of a criminal trial is to decide the factual question of guilt or innocence, “it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.” Robinson, 485 U.S. at 33, 108 S.Ct. at 869.

90 Wn. App. at 359. It is this need for fairness in responding to evidence and arguments of the opposing side that drove the outcomes in Robinson, Stackhouse, Kendrick and Vargas. The defense in those cases having made claims the accused was deprived of providing his side of the story, it was only fair for the State to respond with evidence and arguments that rebut that claim.

The decision in Lupfer v. State, 420 Md. 111, 21 A.3d 1080 (2011), is informative in defining the scope of when the State may introduce evidence of a criminal defendant's silence. To a charge of murder, Lupfer claimed that during a struggle with the victim the gun discharged three times accidentally, killing the victim, and that he had no intent to kill. 420 Md. at 115-16. Others testified Lupfer shot and killed the victim as the victim tried to flee. 420 Md. at 116. At trial, Lupfer testified on direct that immediately after the shooting he fled to a neighboring state, but then called his girlfriend to bring him back. Id. at 117. Lupfer testified that his intention was to first get some rest and then go talk to police about the incident. Id. Lupfer was

arrested, however, before he could follow through. Id. Lupfer subsequently exercised his right to remain silent until testifying at trial. Id. at 115.

Prior to cross examination by the prosecutor, the State argued Lupfer's claim that he intended to talk to police upon returning from the neighboring state opened the door to evidence that he refused to give a statement following his arrest. 420 Md. at 117. Over defense objection, the court allowed the prosecutor to introduce evidence that Lupfer exercised his right to remain silent and refused to give a statement. Id. at 117-19.

Maryland's highest court reversed Lupfer's conviction, concluding the trial court erred in finding he had opened the door to evidence he exercised his right to remain silent. 420 Md. at 115. In doing so, the court conducted a survey of case law from various jurisdictions. Id. at 122-37. From this survey, the most liberal rule of admissibility for evidence of post-arrest silence is that it is admissible if a defendant or defense counsel "created an impression of general cooperation with police after arrest. . . ." 420 Md. at 136 (quoting, United States v. Shue, 766 F.2d 1122, 1129 (7th Cir.1985).

More importantly here, however, is that the cases reviewed by Maryland's high court all focused on whether evidence of the defendant's exercise of his right to remain silent should be admitted to rebut a defense claim of cooperation. See e.g., United States v. Fairchild, 505 F.2d 1378,

1383 (5th Cir. 1975) (such evidence is “admissible for the purpose of rebutting the impression which [the defendant] attempted to create: that he cooperated fully with the law enforcement authorities.”); United States v. Shue, 766 F.2d 1122, 1129 (7th Cir. 1985) (such evidence admissible even without a direct claim of full cooperation by defendant when defense still creates an "impression of general cooperation."). In other words, the State is entitled to introduce evidence a defendant exercised his right to silence only when it is necessary to fairly rebut a defense claim of cooperation.

Here, the prosecution was allowed to introduce evidence that Cavazos remained silent, but not to rebut a defense claim of cooperation. Instead, the trial court allowed the prosecution to introduce evidence of Cavazos's exercise of his right to remain silent in response to defense counsel's question about what information the officers had available to them when processing the scene for evidence, which the prosecutor claimed was disparaging of law enforcement's investigation, and which the court agreed. RP 1512-14. This was error.

Assuming arguendo,³ that defense counsel's cross examination of Johnson was disparaging of the investigation, that does not open the door to

³ Cavazos does not concede his counsel's examination of Det. Johnson was disparaging of the investigation. Rather, it was merely a fair response to the prosecutor's direct examination, which concluded with a question about how it is decided what should be documented at a crime scene. RP

evidence that Cavazos exercised his right to remain silent. At most it opened the door to evidence that law enforcement routinely and thoroughly processes crime scenes without any statements from any of the alleged perpetrators or victims, a fact the trial court recognized. RP 1513. But because the defense questioning did not implicate whether Cavazos gave a statement or was otherwise cooperative, it did not open the door to evidence he remained silent.

For the reasons stated in the opening brief (BOA at 29-31), the trial court's error prejudiced Cavazos. This Court should therefore reverse and remand for further proceedings in the trial court.

1493. A review of the subsequent cross examination shows counsel's questions were intended to reveal that evidence collection is an information-driven process that can potentially miss critical items when the information available is not complete. See RP 1494-98.

3. IF THIS COURT AFFIRMS CAVAZOS'S CONVICTION,
THEN IT SHOULD ALSO AFFIRM THE MITIGATED
EXCEPTIONAL SENTENCE.

If this Court reverses Cavazos's conviction, then the State's cross appeal is moot. If, however, this Court does not reverse the conviction, then it should affirm the mitigated exceptional sentence imposed because there is a valid statutory reason for the sentence. And even if the non-statutory reasons the court cited as warranting a mitigated exceptional are wrong, it found the statutory basis sufficient on its own, so this Court should affirm.

"The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). On review this Court will reverse an exceptional sentence only if (a) the reasons for the exceptional sentence are not supported by the record or do not justify an exceptional sentence, or (b) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4).

The State does not argue Cavazos's sentence is too excessive or too lenient. Thus, this Court need only review Cavazos's sentence to see if there is a factual basis in the record for the reasons relied on by the trial court to impose the sentence, and determine whether those reasons legally justify an exceptional sentence. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

- (a) The trial court correctly relied on the statutory mitigating factor that James was an initiator, willing participant, aggressor and/or provoker of the incidents that led to his death.

A trial court may impose an exceptional sentence downward based on the mitigating factor that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). "The 'willing participant' factor is applicable where both the defendant and the victim engaged in the conduct that caused the offense to occur." State v. Hinds, 85 Wn. App. 474, 481, 936 P.2d 1135 (1997) (citing David Boerner, Sentencing in Washington, § 9.12, at 9-21 (1985)⁴). This is the statutory aggravating factor relied on by the trial court to impose a mitigated exceptional sentence for Cavazos. CP 379 (Finding of Fact 1).

The State claims the trial court's finding of fact 1 is really a conclusion of law that fails to reference any facts in either its oral ruling or written finding that support a legal conclusion that James "was, to a significant degree, a willing participant, an aggressor, or provoker of the

⁴ Professor Boerner wrote:

This factor recognizes that there is an obvious distinction in blameworthiness between a defendant whose actions were without provocation at all and a defendant who actually believed that his or her actions were justified, even though that belief later was determined to be unreasonable and thus not the basis for a defense of self-defense.

incident." BORCA at 41-42. The State essentially repeats the argument ten pages later when it argues:

This unsupported conclusion of law is not a substantial and compelling reason for imposing an exceptional sentence downward as a matter of law because there are no findings of fact supporting the trial court's legal conclusion that the victim, to a significant degree, was a willing participant, aggressor or provoker of the incident.

BORCA at 51. The State is wrong both times.

Curiously, the State purports to set forth the trial court's oral ruling "on the defendant's request for an exceptional sentence downward," a ruling that was incorporated by reference into its written findings and conclusions. BORCA at 36-39 (citing "RP 2213-19"); CP 380, Finding of Fact 3 (unchallenged)). The court's oral ruling, however, begins at RP 2206, not RP 2213 as the State's brief implies. BORCA at 36. This Court should not be fooled by the State's selective presentation of the record. All thirteen pages of the oral ruling were incorporated, not just the last seven pages. CP 380.

When the entire oral ruling is taken into account, it is apparent the trial court relied on the evidence presented at trial and made several factual findings based on that evidence regarding James. For example, early on in its oral ruling, the court states:

What I know about this case is that we have a family, we have a child in the family, James, who admittedly had his ups and downs, everybody admits that. He had a fairly significant criminal history. He had a drug and alcohol

problem which sometimes apparently was more apparent than at other times. He had difficulty maintaining a job in the community. . . .

RP 2206.

The court went on to note the evidence showing James has a "penchant for losing his temper, and often becoming violent in the course of losing his temper." RP 2207. Thereafter, the court concluded unequivocally that the evidence supported finding James was responsible in part for the events that led to his death, noting Beaumont's testimony indicating both Cavazos and James were yelling before the shooting, investigator Michelle Nesson's testimony, which confirmed that James could have been the aggressor, and the testimony of Cavazos's partner, Shelly Sumner, in which she described the early morning call from Cavazos during which he was distraught and expressing his fear of James because of his strange and threatening behavior. RP 2213-16.

The court noted that like most fact finders, it tends to find statements made immediately after an event more credible than statements made well after the fact. RP 2216. The court made this comment in the context of Cavazos's call to Sumner. Even if not an explicit finding that James was an instigator of the offense, it at least strongly implies the court believed Cavazos's claims to Sumner about James' aggressive behavior.

More importantly, the testimony of Beaumont, Nesson and Sumner support these factual findings. See e.g., RP 1402-1410 (Beaumont on direct examination describes event immediately preceding the shooting, including that they were both yelling at each other); RP 1754-55, 1794 (Nesson confirming there was a struggle and that Cavazos's claim that James was the aggressor, was just as likely as the prosecution's theory that he was not); RP 1867-68 (Sumner describing her 4 a.m. phone call from Cavazos in which he was distraught and claiming James was acting "crazy"). In light of this record and the trial court's oral and written findings, the State's arguments that the trial court failed to make the factual findings necessary to support "the victim was an initiator, willing participant, aggressor, or provoker of the incident" aggravator are incorrect.

- (b) This Court should affirm Cavazos's mitigated exceptional sentence even if it concludes the trial court erred in relying on a combination of other mitigating factors as an independent basis for the sentence.

Assuming arguendo, that the trial court erred in relying on several of the "[f]urther mitigating circumstances" it cited to as justifying a mitigated exceptional sentence, this Court should still affirm the sentence. As the State correctly sets forth in its brief,

A reviewing court can affirm an exceptional sentence even though not every aggravating factor supporting the exceptional sentence is valid. "Where the reviewing court

overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing."

BORCA at 54-55 (quoting State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)).

This is just such a case. Here, the trial court concluded a mitigated exceptional sentence was independently justified and appropriate under the statutory mitigating factor set forth under RCW 9.94A.535(1)(a), supra. CP 381 (Conclusion of Law 2). Conclusion of law 2 unequivocally states "the statutory mitigating factor in RCW 9.94A.535(1)(a) has been established by a preponderance of the evidence and that it justifies an exceptional sentence downward." CP 381 (emphasis added). It was the primary basis for the sentence imposed. See RP 2218.⁵

There is no basis in the record suggesting the court would not have imposed the same sentence based on this conclusion alone. To the contrary,

⁵ The trial court states:

At the end of the day, the question from my standpoint in looking at just the legal analysis: Is there evidence to show that James had a role to play in this? And the answer is yes, there clearly is. Just as Mr. Cavazos had a role to play in this tragedy. So I believe, counsel, that there is evidence supporting a defense request for an exceptional sentence from the standard range.

RP 2218.

a review of the court's oral and written discussion of the "non-statutory mitigating factor" shows they were considered not so much as an independent basis to impose a mitigated exceptional sentence, but rather as additional factors in determining whether a mitigated sentence was appropriate. See CP 379-80 (court's written finding of fact 2 refers to the "[f]urther mitigating circumstances" as not sufficient independently to justify a mitigated exceptional sentence, but in combination with each other "establish that a sentence within the standard range would not further the purposes of the Sentencing Reform Act."); RP 2217-18 (court's brief oral discussion about the Cavazos's lack of criminal history and that he has been a responsible community member and would be a good candidate for probation, "are things that the court can consider in determining whether an exceptional sentence is appropriate.").

The trial court articulated, both in writing and during its oral ruling, that because James was responsible in part for the escalation of events leading to his death, it was appropriate to impose a mitigated exceptional sentence. In light of this record, this Court can be confident that even without consideration of the "[f]urther mitigating factors," the trial court would have imposed the same seven-year sentence. CP 379 (Finding of Fact 2). Therefore, this Court should affirm. Jackson, 150 Wn.2d at 276.

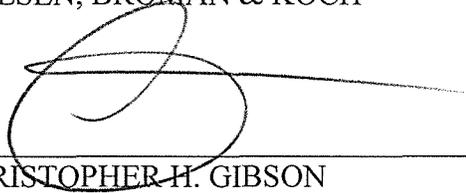
D. CONCLUSION

For the reason stated her and in the opening brief, this Court should reverse and remand for a new trial. In the alternative, if this Court affirms Cavazos's conviction, then it should also affirm the mitigated exceptional sentence.

DATED this 30th day of March 2016

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'CHRISTOPHER H. GIBSON', is written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke extending to the right.

CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. NELSON
JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT
OF COUNSEL
K. CAROLYN RAMAMURTI

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No. 32872-4-III

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 30th day of March, 2016, I caused a true and correct copy of the **Reply of Appellant/Response Brief of Cross-Respondent** 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.

Spokane County Prosecutor's Office
SCPAappeals@spokanecounty.org

Mark Cavazos
4020 N. Garfield Road
Spokane, WA 99224

Signed in Seattle, Washington this 30th day of March, 2016.

x 