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No. 63142-0-I

**COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

EDO ASLANYAN,

Appellant,

APPELLANT'S REPLY BRIEF

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I. RESPONSES FOR REPLY BRIEF

- 1. Mr. Aslanyan concedes his due process argument is resolved by the Supreme Court decisions in State v. Kelley and State v. Aguirre.**
- 2. State's argument explaining relevance of anti-Semitic testimony during trial fails to justify prosecutor's inflammatory statements in closing argument.**
- 3. Prosecutor's inflammatory comments in closing were imputed to the defendant, and served purpose to create sympathy for victim and bolster his credibility.**
- 4. Prosecutor's argument that Armenian genocide may be referred to as a Holocaust is both textually, and factually, absurd.**
- 5. Court's failure to permit defense counsel to re-question Tigran was reversible error where testimony would have impacted primary aggressor jury instruction.**

II. REPLY ARGUMENT

- 1. Mr. Aslanyan concedes his due process argument is resolved by the Supreme Court decisions in State v. Kelley, --- P.3d ----, 2010 WL 185947 (Wash.) and State v. Aguirre, --- P.3d ----, 2010 WL 727592 (Wash.).**

Mr. Aslanyan's due process argument has been resolved by the Supreme Court decisions in the above cases.

- 2. State's argument explaining relevance of anti-Semitic testimony during trial fails to justify prosecutor's inflammatory statements in closing argument.**

The State responds the trial testimony regarding anti-Semitic remarks made to Simon, a Jewish man who attended Mr. Aslanyan's

December 2nd party, were relevant because it explained, “what all the fuss was about.” (BOR, pg. 29)

“The anti-Semitic remarks gave rise to the heated argument between Hamlet and Konstantin, which led to Eddie Jr.’s disagreement with Konstantin, which led to Tigran’s confrontation with Eddie Jr., which led to Aslanyan feeling disrespected and motivated him to take matters into his own hands two days later when he shot Tigran.” (BOR, pg. 23)

“The prosecutor argues the anti-Semitic remarks, and all that followed, explained why Tigran agreed to meet with Aslanyan two days later after the party and how Tigran’s confrontation with Aslanyan regarding the anti-Semite at his party triggered the fist fight, and ultimately, the shooting.” (BOR, pg. 25-26)

The State’s argument that anti-Semitic remarks made to Simon had its place in the trial concedes the point it was not essential evidence. Hamlet could have said any number of things to Simon that could have set in motion the events at the party, and ultimately, the shooting two days later. The fact the comments that were made were ethnically charged was relevant only because of the events that followed; the comments themselves were not relevant.

The parties appear to agree on the legal standard applicable to this appeal. To establish prosecutorial misconduct, a defendant must show the prosecutor's conduct was both improper and prejudicial in the context of

the entire record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). To establish prejudice, the petitioner must show a substantial likelihood that the misconduct affected the jury's verdict. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998). Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Mr. Aslanyan and his attorney did not object to the prosecutor's statements in closing. The question is whether the comments were so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not be removed from the trial. The State's argument on this point is that the trial prosecutor's comments were "inartful." (BOR, pg. 29; 31) Lawyers walk a fine line when they choose to make "reasonable inferences"¹ from a vague trial record. This is why we have a prosecutorial misconduct standard. The prosecutor does not have carte blanche to extrapolate his or her own assumptions of what might have been said between two persons without any standard regulating the

¹ BOR, pg. 29.

prosecutor. A prosecutor's duty is to ensure a verdict is free from prejudice; State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993); and not the product of it. The prosecutor's duty, therefore, is to refrain from making such statements; not use them.

If the State's theory is true; that the trial testimony about anti-Semitic comments at the party spawned a continuing course of conflict leading to the shooting, why did the prosecutor call what happened at the party "Jew bashing?" If Tigran's intent was to talk to Mr. Aslanyan about how Simon had been treated at the party, why did the prosecutor say that Tigran did not want Simon feeling like the "token Jew?" If there was no testimony at trial about what exactly was said to Simon, why would the prosecutor say Eddie Jr.'s dad was "laying into him" about whether or not there was actually a Holocaust?

It is absurd to suggest that these comments had no capacity to inflame the jurors' passions and prejudices. These comments were not accidental. They were meant to grab the jurors' attention at the beginning of closing argument. The prosecutor greatly exaggerated the trial testimony for its dramatic effect. Further, it justified his theory why Tigran should be believed by the jury.

The prosecutor admittedly told the jury Tigran “is a troubled man,” and not someone jurors would invite home for Thanksgiving based on his drinking and behavior at the party. (12/16/08 RP 12) The prosecutor had to rehabilitate his key witness. Therefore, it was simple, and necessary, to rehabilitate him with the argument that despite his blemishes, he wanted to “make it right for Simon” by confronting Mr. Aslanyan about the party. (12/16/08 RP 15) Simon was not simply someone who was picked on at a party. He is Jewish, and was picked on for being Jewish. He was the victim of hate-filled speech. This point was made by using the vilest descriptions possible for anti-Semitism.

The State attempts to distinguish this case from Belgarde² by stating the prosecutor in that case strayed from the record in presenting closing argument. (BOR, pg. 31) This is an erroneous distinction. In Belgarde, the defendant testified he was a member of AIM³ and witnesses testified Belgarde threatened to use AIM against them if they testified. Belgarde, at 506. From this record, the prosecutor described AIM as a terrorist organization, among other things. He described to the jury how reservation Indians fear AIM. Belgarde, at 509. Thus, through his own

² State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988).

³ American Indian Movement.

words he linked the state witnesses to this fear, which explained and justified their hesitance to come forward and testify. This testimony, in the guise of argument, bolstered witness credibility. *Id.*

The Court faulted the prosecutor for two things. First, his description of AIM was explicit and intentional and was a deliberate appeal to the jurors' passion and prejudice. *Id.* Second, he stepped far outside his proper role as a quasi-judicial officer and an advocate to give the jury highly inflammatory information for the purpose of supporting witness credibility. At 509. However, most fundamentally, the Court simply would not allow a conviction to rest upon the type of conduct displayed by the prosecutor. At 508

The similar situation occurred in Mr. Aslanyan's case. There was testimony in the record that Simon was the victim of hate speech at the Aslanyan party. The prosecutor tried, but failed, to develop a record of what was said. Closing argument was not the time to tell the jury his (or Tigran's) perception of how Simon may have felt, or to describe what may have been said. This comment, and others, was told to bolster Tigran's credibility before the jury. These comments were not inartful; they were flagrant and intentional, and served a purpose to improve the State's case.

Despite this, the State argues Mr. Aslanyan waived any chance to challenge the prosecutor's comments on appeal. (BOR, pg. 13) This argument ignores the both case law and the inflammatory nature of the prosecutor's comments. As stated in Belgarde,

An objection and an instruction to disregard could not have erased the fear and revulsion jurors would have felt had they believed the prosecutor's description of the Indians involved in AIM." Belgarde, at 508.

Terms like "Jew bashing," "token Jew," and denying the Holocaust are revolting terms. In the context of the trial, they bore no relation to the testimony, but expressed a clear definition of hate resulting from anti-Semitism. If the jurors are sickened by these terms, and associate Tigran as being the only person at the trial who feels the same way, the jury is more likely to associate with him and believe his testimony. Consistent with Belgarde, this type of prejudice requires no objection, and establishes a "substantial likelihood" the prosecutor's comments affected the verdict. Belgarde, at 508.

The prosecutor's comments concerning anti-Semitic comments far surpassed the State's justification for finding anti-Semitism relevant at trial. The prosecutor's argument closely mirrors the conduct rejected in

Belgarde. The State has not presented a legitimate argument defending the prosecutor's comments, and the conviction should be reversed.

3. Prosecutor's inflammatory comments in closing were imputed to the defendant, and served purpose to create sympathy for victim and bolster his credibility.

The State attempts to minimize the impact of the prosecutor's remarks by stating they were never imputed to Mr. Aslanyan. (BOR, pg. 13, 24) This is false. The prosecutor linked Mr. Aslanyan to the anti-Semitic remarks at the beginning of his argument. The prosecutor used inflammatory language to describe the anti-Semitic remarks, and held the defendant responsible for their use;

For goodness gracious, at a family barbeque, we have *Jew bashing*, we have people throwing up in the living room, we have people saying that other people are chasing people around with knives. This is not My Big Fat Greek Wedding, that is an out of control, out of hand party at the defendant's residence. **The defendant is responsible for that. But what is the defendant doing? He doesn't do anything. He doesn't kick anybody out." (12/16/08 RP 13-14) [Emphasis added]**

While in a grammatical sense the defendant's "responsibility" may be related to the out of control party, the reality is that when spoken aloud to a jury the prosecutor made no effort at all to distance the "Jew bashing" from the defendant's responsibility. Aslanyan was responsible for it all, and he did nothing.

The prosecutor did not stop there. Tigran did not confront Aslanyan simply because of the way Simon was treated, he confronted him because of the way Tigran believed Simon felt.

“He wanted to make it right for Simon. He wanted Simon to feel like he was part of them. No, not that he was the token Jew hanging out with the Armenians, but that he was part of them as a person.” (12/16/08 RP 15-16)[Emphasis added]

This point was reiterated later in closing;

“Yes, Tigran was upset, he was mad at the defendant, he was mad at the way Simon was treated, he wanted to tell the defendant about that, but his motive was not to go down and seriously injure him and there is nothing to suggest that.” (12/16/08 RP 37) [Emphasis added]

The State’s argument Mr. Aslanyan was never the subject of the prosecutor’s comments does not make sense in the context of the argument. If Mr. Aslanyan was not at fault for what happened to Simon, why was he the target for Tigran? Why was it necessary to say there was “Jew bashing” at the party? Why was it necessary to explain that Tigran went to confront Mr. Aslanyan “to make it right for Simon” and to not

have Simon feel like a “Token Jew” around Armenians? (12/16/08 RP 15)

Why would Tigran be mad at the defendant? (12/16/08 RP 37)⁴

The State’s theory may be that reference to anti-Semitic comments at the party merely described the cause and effect of events transpiring over two days, but the use of the specific words and phrases by the prosecutor describe a different purpose. Mr. Aslanyan was linked to abhorrent behavior that occurred at the party. This placed him diametrically opposed to the good intentions of Tigran, who said he went to confront Mr. Aslanyan to defend a Jewish man from an anti-Semitic attack.

4. Prosecutor’s argument that Armenian genocide may be referred to as a Holocaust is both textually, and factually, absurd.

The State contends the prosecutor did not allege Eddie Jr.’s dad denied the existence of the Holocaust in closing argument. (BOR, pg. 30) Instead, the prosecutor referred to the Armenian genocide for which there was testimony, but described it as a Holocaust, and this description is historically accurate. It is not the intent of either party to turn this appeal into a history lesson. Reading the prosecutor’s argument as a whole, it is

⁴ At no time in Tigran’s testimony did he ever say he was mad at Mr. Aslanyan for what happened to Simon.(11/25/08 RP 346-353) In fact, he said he intended to personally apologize to Mr. Aslanyan’s wife. (11/25/08 RP 348)

simply impossible to conclude his remark did not sound like a reference to the “Jew bashing” Mr. Aslanyan was responsible for at his party. The prosecutor’s statement, in context, was an egregious example of what “Jew bashing” sounds like. Thus, it was prosecutorial misconduct to say it before the jury.

At trial, Tigran explained a part of the argument that transpired between Hamlet and Simon;

Q: But, at some time during the party, was there something happening regarding Simon? Were people saying things about him?

A: Yes.

Q: Could you tell us about that?

A: Hamlet was talking about it, because Armenia has a genocide. 1915, the Turkish brought genocide, and we were trying to prove that, Armenians and – you know, not every nationality could prove that, you know, like French did, Canada did, I believe United States not.

So, Jew people, they don’t even – like, they don’t understand that. So they they start – Hamlet, he start to, like, what, you guys don’t say that? Wouldn’t you guys prove that, you know? Jew people? And he goes, like – and he start to put the bad words in there. And he says, like, come on, I’m the only one who is a Jew here, in this house, and I’m sitting with Armenians, and I don’t have no problem with that, and that problem is not only – it’s not, like – I can’t do anything about it, you know? That’s the state, the country. That’s a country problem. It’s not my problem, you know?

//

Q: So Hamlet was upset with Simon because Simon wouldn't acknowledge that the Armenians also had a genocide?

A: I don't – no, no.

//

A: The point was, like – the point was, like he was trying to say, like, why not Jew people prove the genocide? (11/25/08 RP 335-337)

Clearly, this conversation addresses the 1915 genocide that occurred in Armenia. According to Tigran, Hamlet was questioning Simon why the Jewish people would not recognize the existence of the genocide? This explains Simon's response; that it is a state or country problem.

The State's explanation for the prosecutor's comment – "And all of a sudden Eddie Jr.'s dad is laying into [Simon] about whether or not there was actually a Holocaust" makes no sense. According to the testimony the only "genocide" discussed at the party was the Armenian genocide. Nothing in the record supports the conclusion Eddie Jr.'s dad would have questioned the existence of the Armenian genocide to Simon. Nothing in the record supports a conclusion Simon would have questioned the

existence of the Armenian genocide to Hamlet. The prosecutor's statement simply could not have been a reference to the Armenian genocide.

Considering the context of the overall argument, the prosecutor was telling the jury Mr. Aslanyan's party was out of control. Jew bashing occurred. Mr. Aslanyan was responsible for all that happened. In the course of the party, it is clear that Simon was the victim of the Jew bashing. As Tigran explained, Hamlet (Eddie Jr.'s dad) was the person arguing with Simon.

In this context, the use of the term "Holocaust" can mean only one thing; the Nazi atrocities of World War Two. A key component of anti-Semitism is to deny the existence of the Holocaust. The only plausible interpretation of the prosecutor's statement is that Hamlet, an alleged anti-Semite, engaged in Jew bashing to Simon's face by "laying into him" about whether or not there was actually a Holocaust. This is the only interpretation that takes into account the context of both the trial testimony and the prosecutor's argument.

Historically, the State is only partly correct. The State cites to Wikipedia as a source to determine the correct meaning of terminology. (BOR, pg. 30-31) Decades ago, the Armenian genocide was referred to as

a Holocaust.⁵ According to Wikipedia⁶, however, Holocaust “is the term generally used to describe the genocide of ... European Jews during World War II.” Since the 1960’s the term refers exclusively to genocide of the Jewish people.

It is more than reasonable to presume that average jurors would define Holocaust as the genocide that occurred in World War Two, and not some other incident.

Such a lengthy discourse about the Holocaust is necessary for two reasons: (1) the prosecutor brought it up, and (2) he used it to inflame the jury. This type of argument is similar to the arguments that were made in Belgarde and Claflin. In each case the prosecutor imputed graphic detail to evidence for prejudicial effect. In Belgarde the prosecutor did not just refer to trial testimony that the defendant was a member of AIM, he described AIM in a manner to prejudice the defendant. In Claflin, the prosecutor did not just describe the emotional trauma suffered by the victim in the case, he read a poem detailing the trauma of other women. In Mr. Aslanyan’s case, the prosecutor did not just tell the jury that anti-

⁵ Interestingly, the cite notes that Winston Churchill, prior to WWII, often referred to the Armenian genocide in WWI as a Holocaust. This, however, is no longer an accepted use of the term.

⁶ <http://en.wikipedia.org/wiki/Holocaust>

Semitic comments were made towards Simon and that is why Tigran went to meet Mr. Aslanyan, he made the defendant responsible for Jew bashing and described an example of it. As in all cases, the prosecutors' intent was to bolster witness credibility.

These examples are appeals to the jurors' passions. They constitute improper argument that prejudices the defendant. The State has failed to respond to this prosecutorial misconduct claim under the appropriate legal standards or with a detailed understanding of the evidence. The prosecutor's argument distorted whatever limited relevance evidence of anti-Semitism played in the trial. No curative instruction would have been any more helpful than the situations faced in Belgarde and Clafin. For these reasons, Mr. Aslanyan moves this Court to reverse the conviction.

5. Court's failure to permit defense counsel to re-question Tigran was reversible error where testimony would have impacted primary aggressor jury instruction.

The State argues the trial court's decision to read translated testimony to the jury in lieu of re-calling Tigran to the stand was not error. (BOR, pg. 35-42) Mr. Aslanyan has argued the inability to question Tigran about his un-interpreted insults directed towards defense counsel was relevant to determine the issue who was the primary aggressor leading to the fight and shooting. Mr. Aslanyan claimed self-defense at trial. The

primary aggressor instruction negates a defendant's ability to argue self defense. (CP 152 – Instruction 15)

The State claims any error was harmless because “Aslanyan brought a gun to a fist fight.” (BOR, pg. 42) This argument ignores the evidence in the case. A major issue at trial was whether the jury would believe Mr. Aslanyan and his version of what happened, or would the jury believe Tigran and his version. Mr. Aslanyan said he was assaulted first by Tigran, and shot when he thought he saw Tigran grab for something in his waist area. (12/1/08 RP 104; 104-105; 143; 144) Tigran said Mr. Aslanyan tried hitting him first, and was shot only after he saw Aslanyan's gun fall to the ground and began walking away. (11/25/08 RP 361; 362; 363-364; 369-370)

The issue who was responsible for assaulting the other first was essential for the jury to resolve whether Mr. Aslanyan was even entitled to his defense. It was necessary for Mr. Aslanyan to develop a record for the jury to decide if Tigran was dismissive to authority figures.

The State simply argues a self defense claim was unavailing because Mr. Aslanyan had a gun. However, the jury was instructed a defendant can act on a reasonable belief of danger, and not have to prove an actual danger existed. (CP 150 – Instruction 13). Therefore, the

determination of who was the primary aggressor was essential to then decide whether Mr. Aslanyan's perception Tigran was reaching for something around his waist constituted a reasonable belief of danger excusing his decision to shoot.

Therefore, Mr. Aslanyan's reliance in State v. Peterson, 2 Wn. App. 464, 469 P.2d 980 (1970) and State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980), is relevant, and the trial court's failure to permit Mr. Aslanyan to explore Tigran's credibility based upon his own words in court was reversible error.

RESPECTFULLY SUBMITTED this 6 day of March, 2010.

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