

65443-8

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NO. 65443-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE BLANCO,

Appellant.

REC'D
SEP 29 2010
King County Prosecutor
Appellate Unit

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

The Honorable Douglass North, Judge

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EDWARD GUY #1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Flagrant, prejudicial prosecutorial misconduct denied the appellant a fair trial.

2. Did the prosecutor's argument undermine the presumption of innocence and relieve the State of its burden to prove each element beyond a reasonable doubt?

Issue Pertaining to Assignments of Error

The State suggested in closing that in order for a juror's doubt as to an element of the crime to be "reasonable," all 12 jurors must agree. Did the prosecutor's argument undermine the presumption of innocence and violate the appellant's right to proof of each element beyond a reasonable doubt?

B. STATEMENT OF THE CASE¹

1. Charge and introduction to facts

The King County prosecutor charged appellant José Angel Blanco with first degree murder with a deadly weapon enhancement for the stabbing of his ex-wife, Noemi Lopez. CP 1-4.

Blanco did not deny killing Lopez but presented expert testimony that he suffered from borderline personality disorder to the extent that it

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 4/1/10 and 5/14/10; 2RP – 4/5/10; 3RP – 4/6/10; 4RP – 4/7/10; 5RP – 4/8/10; 6RP – 4/12/10; 7RP – 4/13/10; 8RP – 4/14/10; and 9RP – 4/15/10.

interfered with his ability to premeditate the murder, an element of the charge. The court therefore instructed the jury on the inferior degree offense of second degree murder. CP 36-39. The State presented rebuttal testimony from its own expert opining that Blanco's capacity to premeditate was intact at the time of Lopez's death.

The jury convicted Blanco as charged. CP 22.

2. Trial testimony: fact witnesses

Blanco and Lopez divorced in 2007, but Blanco occasionally stayed at the south Seattle home where Lopez and the couple's three children lived. 4RP 7-8.

According the couple's oldest child, K.L., Blanco had threatened to kill Lopez if he saw her with another man. 4RP 9. On Thanksgiving Day 2008, K.L.'s brother told Blanco that Lopez was planning to go out dancing with her family, and Blanco became angry. 4RP 10-12. Blanco asked Lopez's sister not to take Lopez dancing. 6RP 38. Blanco also confronted Lopez when she returned from her outing early the next morning. 4RP 12; 6RP 16-17, 42-43.

According to Lopez's mother, Blanco was waiting outside Lopez's house after the family returned from a shopping trip the following day. He threatened to kill himself and three others if Lopez did not speak with him. 6RP 20. When Lopez told Blanco she would get a restraining order,

Blanco stated, “[D]o it.” 6RP 20. Later that night, Blanco confronted Lopez and her sister in the parking lot of a nightclub and attempted to dissuade the women from going in. 6RP 45-48.²

The Sunday after Thanksgiving, K.L. woke to the sound of her parents arguing. 4RP 16. K.L. and her siblings went to church with Blanco’s sister, Rosalia, while Lopez and Blanco remained at home. 4RP 17. When K.L. and the others returned, Lopez was dead and Blanco was gone. 4RP 23-24, 29-34. According to the medical examiner, Lopez died from multiple stab wounds to the torso. 5RP 115-19. Lopez also suffered a number of defensive wounds to her hands, arms, and legs. 5RP 93-94, 105, 108-09.

Blanco left K.L. a tearful voicemail apologizing and telling K.L. not to return home, but K.L. did not check her messages until after church. 4RP 20; Ex. 4. Blanco’s cousin testified Blanco called looking for Rosalia’s phone number and said he had just killed Lopez. 6RP 7-8.

Sunday night into Monday morning, Blanco and his girlfriend, Artchariya Tanapukdee, drove up and down the freeway. 5RP 23-27. Blanco was restless and repeatedly changed his mind about what he wanted to do to occupy himself. 5RP 30, 32. At one point, Blanco began

² The State played recordings of angry, disjointed voicemails Blanco left Lopez in the days before her death. 6RP 55-89; Exs. 33-46.

to cry and said he killed his wife. 5RP 31. He then laughed and told Tanapukdee it wasn't true. 5RP 31.³

The next morning, Blanco asked if he could take Tanapukdee's car to work, explaining his vehicle registration had expired. 5RP 36. After he received permission, Blanco drove to Southern California, left Tanapukdee's car, and fled to Mexico. 5RP 141-42.

Meanwhile, police located Blanco's car at Tanapukdee's home. 4RP 90; 5RP 15, 123-25. Inside, they found two handwritten notes describing a conversation in which Blanco pleads with Lopez to take him back and she taunts and rejects him. 4RP 103-06, 110-12; Exs. 11, 13. The notes also purport to donate Blanco's body to the University of Washington and ask that his car be given to his children. 4RP 103-06, 110-12.

Seattle police were able to contact Blanco at a relative's home in Mexico and arrested him after persuading him to return to Seattle. 5RP 129; 6RP 24-33.

³ Previously, Blanco told Tanapukdee he loved Lopez and would kill her if he caught her with another man. 5RP 17-18.

3. Trial testimony: psychological experts

Psychologist Dr. Delton Young opined that Blanco likely intended to kill Lopez but lacked the capacity to premeditate the intent to kill. 7RP 73, 82; CP 34 (instruction 9).

In arriving at his conclusions, Young interviewed Blanco, reviewed discovery including witness interviews, considered jail mental health records, and administered the Millon Clinical Multiaxial Inventory - III to Blanco. 7RP 17-23, 27.

Young diagnosed Blanco with borderline personality disorder, a lifelong condition.⁴ 7RP 24-25, 28, 33, 45-46, 49-65, 72. Those suffering from the disorder experience intense and unstable emotions and, lacking the ability to manage anxiety and frustration, fall apart under stress. 7RP 40.

Young described the “heart” of the disorder as a dread of abandonment and separation. 7RP 40, 74-76. Young therefore opined that Blanco’s actions were driven by an intense fear of separation from Lopez. 7RP 75. Although the marriage ended the previous year, Lopez was finally enforcing the separation and threatened to seek a restraining order shortly before her death. 7RP 75. Facing the culmination of a

⁴ Young considered and rejected the State’s expert’s assertion that Blanco’s symptoms had begun too recently to diagnose a personality disorder. 7RP 28, 31-32, 130; 8RP 147.

lifelong fear, Young surmised, Blanco killed Lopez in a state of panic and desperation. 7RP 80-81.

Blanco's volitional behavior before and after Lopez's death, such as fleeing to Mexico, did not undermine Young's diagnosis. 7RP 84. Moreover, Young considered Blanco's threats to harm Lopez, himself, and others a form of "emotional extortion" to avoid abandonment by Lopez. 7RP 84-85, 133, 143-44.

Although Blanco described the events immediately before the stabbing, he claimed he could not recall the attack itself. 7RP 100. Even the State's expert, Dr. Brian Judd, did not dispute that it was possible the event was so traumatic that Blanco was unable to remember it. 8RP 121.

Judd opined Blanco suffered from "adjustment disorder" stemming from his separation from Lopez but did not suffer from borderline personality disorder or any other disorder impairing his ability to premeditate. 8RP 20, 70-73, 89-90.

4. Closing argument

The prosecutor argued it "is okay to believe things are exactly as they seem." In other words, when Lopez started socializing with other men, Blanco did as he had threatened to do and killed her. 9RP 3-4.

The prosecutor continued:

A reasonable doubt does not mean beyond all doubt or beyond all unreasonable doubt or beyond any doubt to an absolute certainty.

There are very few things in this world that occur with mathematical precision and that is built into our criminal justice system. It's beyond a reasonable doubt. *A reasonable doubt is one that you would feel comfortable and do feel comfortable talking about with your fellow jurors, putting out there for a discussion, and once a thorough discussion of 12 reasonable people is done in regard to it, it is still believed to be reasonable.*

9RP 11 (emphasis added). The prosecutor argued the evidence showed the murder was intentional as well as premeditated. 9RP 12-16, 25

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DENIED BLANCO A FAIR TRIAL.

The prosecutor improperly undermined the accused's fundamental constitutional right to the presumption of innocence and diminished the State's burden of proving each element of the offense beyond a reasonable doubt by suggesting that unless all 12 jurors agree, a doubt is not reasonable. This inaccurate statement of the law likely affected the outcome at trial and was so flagrant it could not have been cured by a limiting instruction.

1. Introduction to applicable law

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657,

664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). It is misconduct to misstate the State's burden of proof. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). When a prosecutor commits misconduct, he may deny the accused a fair trial. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; Boehning, 127 Wn. App. at 518.

To determine whether a prosecutor's comments are misconduct, this Court must decide whether the remarks were improper and, if so, whether a substantial likelihood exists that they affected the jury. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where an accused does not object to the comments, the reviewing court will reverse if the misconduct is so flagrant that the resulting prejudice could not have been cured by a limiting instruction. Id. Misconduct is particularly egregious when the prosecutor seeks to mislead the jury as to the presumption of innocence, which is the foundation of the criminal justice system. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

2. The prosecutor's comments undermined the presumption of innocence and were so flagrant no curative instruction could have mitigated the resulting prejudice.

Due process requires the State to bear the burden of proving each element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). To protect this right, each juror must reach his or her own verdict uninfluenced by facts outside the evidence and proper instructions and argument. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). “[H]owever subtly the suggestion may be expressed,” an instruction that suggests that a juror who disagrees with the majority should abandon his opinion for the sake of reaching a verdict invades the right to jury unanimity. Id. Moreover, the presumption of innocence can be “diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.” Warren, 165 Wn.2d at 26 (quoting State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007)).

In Blanco's case, the prosecutor sought to diminish the presumption of innocence and the State's burden of proof by suggesting that all 12 jurors must agree for a doubt to be considered reasonable. For

several reasons, this inaccurate characterization of the law likely affected the verdict and was so flagrant it could not have been cured by a limiting instruction. Belgarde, 110 Wn.2d at 508.

First, for a juror's doubt to be "reasonable," it is not necessary that he or she can articulate the doubt or state a reason for it. "An unarticulated conviction that the State has failed to meet its burden of proof will serve as a legitimate basis to acquit." State v. Reyes, 116 P.3d 305, 312 (Utah 2005).

Second, the suggestion that jury unanimity is required is erroneous. The accused has the right to have each juror reach his own verdict. Boogaard, 90 Wn.2d at 736. Although counsel could find no Washington case involving identical misconduct, State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) illustrate the dangers of declaring that unanimity is required.

Bashaw argued the trial court erred in instructing jurors that in order to return a yes or no special verdict, all 12 jurors must agree on the answer. Bashaw, 169 Wn.2d at 145. The law clearly stated that although unanimity was required to answer yes, unanimity was not required to answer no. Id. (citing Goldberg, 149 Wn.2d 888).

Finding the instructional error harmless, the Court of Appeals held that, "Where all 12 [jurors] affirmed the written finding, there is no basis

for believing that telling the jurors that they had to be unanimous to return a negative finding could have harmed appellant.” State v. Bashaw, 144 Wn. App. 196, 203, 182 P.3d 451 (2008), rev'd, 169 Wn.2d 133, 234 P.3d 195 (2010).

Reversing, the Supreme Court observed that the Court of Appeals had “misse[d] the point” regarding the nature of the error:

The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court's instruction to a non-unanimous jury to reach unanimity. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.

Bashaw, 169 Wn.2d at 147. The Bashaw court found Goldberg illustrative as to the possible effects of such an error. The Goldberg jury initially answered “no” to a special verdict based on a lack of unanimity until told it must reach a unanimous verdict. Bashaw, 169 Wn.2d at 147 (citing Goldberg, 149 Wn.2d at 891-93). The Bashaw Court concluded that when a court improperly requires unanimity, jurors with doubts may not hold to their positions or may not raise additional questions that would lead to a different result. Bashaw, 169 Wn.2d at 147-48. The Court concluded, “[W]e cannot say with any confidence what might have occurred had the jury been properly instructed.” Id. at 148.

The situation in Blanco's case is analogous. The prosecutor told jurors any doubts as to an element of the crime were reasonable only if agreed upon by 12 jurors. This is wrong; unanimity is not a precondition to finding a doubt reasonable. Reyes, 116 P.3d at 312. To the extent that the prosecutor suggested otherwise, he committed misconduct.

The misconduct here prejudiced Blanco. Reasonable doubt was Blanco's defense. The sole issue at trial was whether Blanco had the capacity to premeditate his crime. Each side presented an expert who gave a plausible opinion regarding Blanco's ability to premeditate. Whether there was *reasonable* doubt as to this element was thus the central theme of the case. CP 39 (instruction 14).

Misconduct is particularly egregious when the prosecutor misleads the jury as to the presumption of innocence. Warren, 165 Wn.2d at 26. And while this case deals with argument, and not jury instructions, the comments likely prejudiced Blanco because they erroneously informed jurors they must reach consensus as to what constituted a reasonable doubt. Bashaw, 169 Wn.2d at 147-48.

D. CONCLUSION

This Court should reverse Blanco's conviction because flagrant, prejudicial prosecutorial misconduct denied him a fair trial.

DATED this 29TH day of September, 2010.

Respectfully submitted,

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