

65443-8

65443-8

NO. 65443-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE BLANCO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

BRIAN M. McDONALD  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

2010 NOV 22 PM 1:08

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	1
C. <u>ARGUMENT</u> .....	6
1. BLANCO HAS WAIVED HIS CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT.....	6
D. <u>CONCLUSION</u> .....	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Brown, 132 Wn.2d 529,  
940 P.2d 546 (1997)..... 9

State v. Cross, 156 Wn.2d 580,  
132 P.3d 80 (2006)..... 10

State v. Gamble, 168 Wn.2d 161,  
225 P.3d 973 (2010)..... 11

State v. Harsted, 66 Wash. 158,  
119 P. 24 (1911)..... 12

State v. McKenzie, 157 Wn.2d 44,  
134 P.3d 221 (2006)..... 9

State v. Stenson, 132 Wn.2d 668,  
940 P.2d 1239 (1997)..... 9

State v. Warren, 165 Wn.2d 17,  
195 P.3d 940 (2008)..... 8, 9, 13, 14

Other Jurisdictions:

State v. Reyes, 116 P.3d 305  
(Utah 2005) ..... 12

Other Authorities .

Steve Shepard, The Metamorphoses Of Reasonable Doubt:  
How Changes In The Burden Of Proof Have  
Weakened The Presumption of Innocence,  
78 Notre Dame L. Rev. 1165 (2003)..... 13

**A. ISSUE PRESENTED**

1. Whether defendant Jose Blanco's prosecutorial misconduct claim, raised for the first time on appeal, is waived because the argument at issue was not improper and any possible prejudice could have been avoided by a proper objection and a curative instruction.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Blanco with one count of first-degree murder and alleged a special deadly weapon allegation. CP 1. Trial began in late April of 2010. A jury convicted Blanco as charged. CP 22, 44. This appeal follows.

**2. SUBSTANTIVE FACTS**

In 2007, Noemi Lopez divorced Jose Blanco. 4RP 7-8.<sup>1</sup> Lopez had custody of their three children, Karina, Alondra, and Alexander, and they all lived in a house in Seattle. 4RP 6-8.

---

<sup>1</sup> The State adopts the abbreviations for the report of proceedings used by Blanco.

After the divorce, Blanco accused Lopez of seeing other men. 4RP 9. In front of their children, he frequently threatened to kill her if he saw her with another man. 4RP 9. Blanco also told his new girlfriend that he still loved Lopez and that he would kill Lopez if he ever saw her with another man. 5RP 17.

On Thanksgiving, November 27, 2008, Lopez and her children spent the holiday with Lopez's extended family. 4RP 11-12. That night, Lopez went to a concert with her sister and mother. 6RP 40-41. When they returned to Lopez's mother's house, Blanco was waiting there. 6RP 42. Blanco angrily confronted Lopez, complaining that Lopez had never dressed nicely for him. 4RP 12-13; 6RP 16-17, 42-43.

The next afternoon, Blanco went to Lopez's house and told her that he was going to kill three people and that he was going to kill himself. 6RP 19-20. In response, Lopez stated that she was going to get a "restriction" order. 6RP 20.

That night, Lopez went out with her sister to a club. 6RP 44-45. Blanco was already there and then moved his car, parking it right next to Lopez's vehicle. 6RP 44-45. He was angry and told Lopez to go back home. 6RP 45-46. He then drove off and, five minutes later, called Lopez on the phone and yelled at her.

6RP 46-47. Blanco then sent a text message to Lopez's brother-in-law, complaining that Lopez had left the children alone on two consecutive nights and stating, "I am going to take care of [Lopez]." 6RP 49-50.

During the extended Thanksgiving weekend, Blanco left numerous messages for Lopez on her cell phone, often at odd hours. 6RP 55; Ex. 34-46. In several messages, Blanco complained that Lopez was going out at night and seeing other men. Ex. 34-46.

On the Sunday morning, November 30th, Blanco was at Lopez's house, and their eldest daughter Karina could hear them arguing. 4RP 15-16. At around 1:00 p.m., the children went to church with their aunt Rosalba, leaving their mother alone with Blanco. 4RP 18-19.

At approximately 3:00 p.m., Blanco called his cousin who lived in Fresno, California. 6RP 4-7. Blanco stated that he was trying to reach Rosalba, explaining that he had "just made a big stupidity" and that he had just killed Lopez. 6RP 6-7. When the cousin expressed some doubt, Blanco insisted that he had killed her and explained that he did not want Rosalba taking the children back to their mother's house after church services. 6RP 8. The

cousin urged Blanco to turn himself in, and Blanco said he would do so. 6RP 9.

Meanwhile, after church services concluded, Karina checked her voicemail and discovered that she had a message from Blanco. 4RP 20-21. In the message, Blanco told Karina not to go to her mother's house, asked her to forgive him and asked her to care for her brother and sister. 4RP 20-22; Ex. 4. Despite this message, the children, their aunt Rosalba and grandmother went to the home and found Lopez dead on the living room floor. 4RP 23-24, 44.

The Seattle Police responded to the scene. 4RP 24, 43-44. Lopez had suffered 58 stab wounds to her body. 5RP 55. There were numerous stab wounds that penetrated her heart and many defensive wounds to her hands and arms. 5RP 70-75, 93-115.

Later that day, at approximately 8:00 p.m., Blanco arrived at the home of his girlfriend, Artchariya ("Nay") Tanapukdee in Algona. 5RP 21-22. After the two drove around the Seattle area aimlessly, Blanco began crying and stated that he had killed his wife. 5RP 22-31. Nay was frightened, and Blanco then laughed and stated that he had not killed Lopez. 5RP 31. Eventually, they returned to Nay's house, and Blanco left the next morning. 5RP 34-35. Blanco stated that he was going to work, and asked to use

Nay's car, claiming that his car's license tabs were expired. 5RP 35-36.

During their investigation, the police located Blanco's car parked outside of Nay's home and seized it. 5RP 123-25. Inside the car were several bloody towels and two handwritten notes. 4RP 90-112. One note stated, "I donate my body to UW Medical Students, please." 4RP 104-05. It went on, "I got mad 'cause she say 'kill me I want to see if you are a man, pussy. I can call police on you any time.'" 4RP 105. The note further stated, "Take care of my kids. I love her so much. And she told me I don't have the balls to do what I said." 4RP 105.

On another note, Blanco wrote:

I told her when I marry you that means forever. She says: I don't care about that. I already handle you for so many years. I went on my knees and she said: Get up. I told you you are not a man. I am crying and she told me to get off my house. You have nothing, not even the balls to do what you said. Are you going to do -- kill me, kill me. Come kill me. You pussy. Go cry in the car. I got more power than you.

4RP 112.

Blanco fled to Mexico. 6RP 25. On December 5, 2008, Detective Gene Ramirez talked to Blanco over the telephone. 6RP 26. Blanco indicated that he was tired of running and wanted

to turn himself in for killing his wife. 6RP 27. When asked why he killed her, Blanco claimed he did not know and that he had blacked it out. 6RP 27-28. In a subsequent conversation, Blanco told the detective that he had thrown the knife used to kill Lopez out of his car window. 6RP 30-31. Blanco subsequently returned to Seattle on December 10, 2008. 6RP 33.

At trial, Blanco called psychologist Delton Young, who opined that Blanco suffered from borderline personality disorder and that his ability to form the intent to commit murder was impaired. 7RP 71-82. The State's expert Dr. Brian Judd evaluated Blanco, concluded that he suffered from pathological gambling and adjustment disorder with depressed mood, and opined that neither disorder impaired his ability to premeditate or intend to commit murder. 8RP 41-42, 89-122.

**C. ARGUMENT**

**1. BLANCO HAS WAIVED HIS CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT.**

Blanco claims that the prosecutor committed misconduct when discussing the concept of reasonable doubt during closing argument. There was no objection to this argument at trial, and

Blanco's argument on appeal is based upon a strained interpretation of the prosecutor's comments. In the argument at issue, the prosecutor encouraged the jurors to discuss any doubts that they had with their fellow jurors in order to determine whether such doubts were reasonable. This was entirely proper argument and consistent with the jury instructions. To the extent that the argument could have been misconstrued, Blanco's challenge on appeal is waived because any possible prejudice could have been avoided by a proper objection and a curative instruction.

During closing argument, the prosecutor discussed the reasonable doubt instruction. After quoting the instruction, he argued:

What I'd like to note to you about this paragraph is some of the things that it doesn't say. It doesn't say that a reasonable doubt means the following. A reasonable doubt does not mean beyond all doubt or beyond all unreasonable doubt or beyond any doubt or to an absolute certainty.

There are very few things in this world that occurred 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.

You don't leave your reason or your common sense at the door. And if at the end of your deliberations you have an abiding belief in the truth of the charge of murder in the first degree then the defendant is guilty. It's a pretty high burden. The State embraces it however. It's what our law requires.

9RP 11-12.

During closing argument, defense counsel also urged the jurors to discuss the evidence during deliberations. "One of my favorite instructions is the one that asks you to talk over what you've seen and heard, talk over your ideas and listen, reconsider what you've thought about as you've been sitting here and as you hear the ideas of the other people that are on your jury." 9RP 27.<sup>2</sup>

There was no objection to the prosecutor's argument about reasonable doubt at trial. Blanco now claims that the prosecutor's argument diminished the State's burden of proof and suggested that all 12 jurors had to agree for a doubt to be reasonable.

The law governing Blanco's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26,

---

<sup>2</sup> See also 9RP 25-26 ("I think that after you discuss the evidence in this case and the lack of evidence, that you will come to the conclusion that in fact he did not go to his wife's home with the intent to kill her.").

195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

"Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is 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.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense counsel's failure to object to the remarks at the time that they are made strongly suggests to a court that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. 157 Wn.2d at 53 n.2.

Blanco has not met his burden of showing that the prosecutor's argument was improper, let alone flagrant and ill-intentioned. Blanco's claim that the prosecutor suggested that all 12 jurors had to agree that a doubt was reasonable is an incorrect characterization of the prosecutor's argument. As reflected in the above quote, the prosecutor never made such an argument. Instead, he encouraged the jurors to discuss any doubts with their fellow jurors in order to decide whether the doubt was reasonable. There is nothing wrong with this argument; defense counsel made the same type of argument, and it is consistent with the law. The trial court instructed the jurors that "you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 28. As the Washington Supreme Court has noted, "We want juries to deliberate, not merely vote their initial impulses and move on." State v. Cross, 156 Wn.2d 580, 616, 132 P.3d 80 (2006).

Not only does Blanco's claim of misconduct rely upon a strained interpretation of the prosecutor's argument, but his argument concerning prejudice presumes that the jury would disregard the trial court's specific instruction that each juror had to

make his or her own decision on reasonable doubt. Prior to closing argument, the trial court instructed the jury as follows:

Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 28. The court further instructed the jury to disregard any argument by counsel that was inconsistent with the court's instructions. CP 25. The jury is presumed to have followed the court's instructions. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). Blanco cannot show that he suffered any prejudice.

Blanco briefly argues that the prosecutor's argument was improper because a reasonable doubt can be unarticulated, and he complains that the prosecutor's argument suggested otherwise. This assertion is inconsistent with Washington law. Nearly one hundred years ago, the Washington Supreme Court, addressing a challenge to a reasonable doubt instruction, observed:

As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and

one for which a good reason can be given. When a cause has been submitted to a jury, it retires to its room for the purpose of consultation, discussion, and deliberation. These precede the verdict. In practice it is known that verdicts are sometimes reached only after long and acrimonious debate in the jury room. While it is true that the jury is not required to report to the court a reason for its verdict, it is equally true that in the consideration of the evidence one juror has a right to call upon another for a reason for his faith. The very word 'deliberation' presupposes a painstaking and conscientious purpose upon the part of each juror to weigh the evidence in order that an intelligent verdict may be reached. If discussion and an interchange of views upon the evidence were not contemplated, the law would dissolve the jury after one unsuccessful ballot. Discussion tests the reasonableness of the conflicting views of the jurors, and weeds out fanciful and imaginary doubts.

State v. Harsted, 66 Wash. 158, 163, 119 P. 24 (1911). The prosecutor's argument was entirely consistent with Harsted.

Blanco cites to a single out-of-state case, State v. Reyes, 116 P.3d 305, 312 (Utah 2005), in which the Utah Supreme Court struggled with the proper formulation of the reasonable doubt instruction. In doing so, the Reyes court relied solely upon a law review article critical of the notion that a reasonable doubt must be articulable. Id. at 312. While the law review author advocated for a different standard for reasonable doubt, he acknowledged that "there is, at the close of the century, widespread federal and state acceptance of the idea that reasonableness includes a requirement

of articulability." Steve Shepard, The Metamorphoses Of Reasonable Doubt: How Changes In The Burden Of Proof Have Weakened The Presumption of Innocence, 78 Notre Dame L. Rev. 1165, 1212 (2003). These authorities do not establish that the prosecutor's argument was improper.

Moreover, in this case, because Blanco made no objection, he must show that the prosecutor's comments were so flagrant and ill-intentioned that an instruction could not have cured any prejudice. The Washington Supreme Court has recognized that a curative instruction can remedy the prejudice caused by an improper argument about the reasonable doubt standard. In State v. Warren, the prosecutor repeatedly argued that "reasonable doubt... doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt." 165 Wn.2d at 24-25. After Warren objected, the trial court gave a curative instruction, restating the reasonable doubt standard and explaining that the jury should give the benefit of the doubt to the defendant. Id. On appeal, the Washington Supreme Court held that the prosecutor's comments sought to undermine the State's burden of proof and were flagrantly improper. Id. at 27. However, the court affirmed Warren's convictions, concluding that the improper

argument was cured by the trial court's supplemental instruction.

Id. at 28.

The prosecutor's comments in Warren were more egregious than Blanco's characterization of the argument in this case. If a curative instruction was capable of curing the prejudice in Warren, such an instruction certainly would have cured any possible prejudice caused by the comments at issue in this case. Because Blanco failed to object, he has waived his claim of prosecutorial misconduct.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm Blanco's conviction and sentence.

DATED this 22<sup>nd</sup> day of November, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
BRIAN M. McDONALD, WSBA #19986  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002