

74663-4-I

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Court of Appeals

Division I

State of Washington

COURT OF APPEALS OF THE STATE OF WASHINGTON

NO. 74663-4-I

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CORTNEY STAHL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Whether the defendant's right to a unanimous jury as to the crime of assault in the fourth degree was protected when the State presented evidence of a continuing course of assaultive conduct against the same victim, in the same place during a short span of time, rather than evidence of separate and distinct acts that could have constituted the assault.

2. Whether the prosecutor's rebuttal argument urging the jury to give the homeless victims the same protection of the law as other citizens was a fair response to the defense closing argument that repeatedly characterized the victims as "homeless addicts" and drew unwarranted generalizations based on their homelessness.

B. STATEMENT OF CASE.

1. PROCEDURAL FACTS.

Cortney Stahl was charged by second amended information with five crimes: rape in the second degree (count 1), two counts of indecent liberties (counts 2 and 5), assault in the third degree (count 3) and assault in the fourth degree (count 4). CP 38-39. A jury found him guilty of all five crimes. CP 74. The State moved to

vacate count 2 based on double jeopardy principles. CP 105. The court sentenced Stahl to an indeterminate sentence of 129 months to life on Count 1, with the other sentences to run concurrently to count 1. CP 90-102.

2. FACTS OF THE CRIMES.

Stahl was living in a homeless encampment at 117th and Aurora Avenue in Seattle in July of 2015 when he victimized other homeless people staying in the same encampment. 7RP¹ 121; 8RP 10-11, 61, 105, 179.

Counts 1 and 2: Rape in the second degree and indecent liberties against J.S. J.S. was living in the homeless encampment due to her addiction to heroin and methamphetamine. 9RP 174. She testified that the people in the encampment took care of one another and were like a family. 9RP 179. She considered Stahl a friend, but was never romantically involved with him. 9RP 179. On July 8, 2015, Stahl gave J.S. \$20 worth of heroin, and then later told her he had taken the heroin from N.W. 9RP 180-81. The next day, J.S. was asleep in a shelter made of tarps when she awoke to

¹ The State will reference the verbatim report of proceedings in the same manner as the Brief of Appellant.

find Stahl in the shelter with her, forcing his penis into her mouth. 9RP 187. She felt angry and scared and tried to stand up. 9RP 187-88. Stahl pulled her back down and held her from behind, fondling her breasts as he masturbated. 9RP 190-92. Eventually he ejaculated onto the side of her head, and then allowed her to leave. 9RP 192-94. However, as she was leaving, he grabbed her by the neck and shoved her down, causing her to hit her leg on a large rock. 9RP 193-94. Stahl threatened to kill J.S. if she told anyone about the assault. 9RP 195. She did not try to call the police. 9RP 197.

Later that day, Officer Ryan Kennard responded to the encampment with other officers in response to a report of a disturbance. 7RP 121, 124. At the encampment, J.S. approached him. 7RP 125. He observed a bruise on her knee and redness around her neck. 7RP 125. He took photos of her injuries and collected a dry, flaky substance from her hair, which was submitted for DNA testing. 7RP 127, 7-8. Stahl was placed under arrest when the police found him sleeping in the nearby cemetery. 7RP 10-12. The substance collected from J.S.'s hair was

determined to be semen matching Stahl's DNA profile.²

9RP 152-55, 240-41.

Counts 3 and 4: Assault in the third degree of Jose Leon and assault in the fourth degree of Alicia Nickerson. Jose Leon became homeless because he experienced health problems and rent in Seattle became too expensive. 8RP 99-101. Leon is not a drug user. 8RP 106. Leon considered Stahl to be his friend. 8RP 106.

On July 9, 2015, Leon went to the store to get food and returned 30 minutes later to the shelter he was using to find his friend, Alicia Nickerson, crying and yelling at Stahl. 8RP 109-10. Nickerson was crying and shaking and stated that Stahl had been choking her. 8RP 114. Leon tried to calm Stahl, telling him they were friends, but Stahl began striking Leon. 8RP 115. Leon grabbed a rock to protect himself, and Stahl grabbed a two by four inch board. 8RP 116, 119-20. Stahl began hitting both Leon and Nickerson with the board. 8RP 119-21. Nickerson ran up an embankment, near the yard of homeowner Albert Coffin, who was out working on his fence. 8RP 122. Coffin heard a woman yelling, "leave me alone," "get off me" and "don't hit me," and saw a scuffle

² The probability of randomly selecting an unrelated individual with a matching DNA profile was 1 in 11 quintillion. 9RP 155.

involving two men and a woman before Nickerson ran up toward his yard, upset and crying. 8RP 42-44. Coffin called the police, who arrived shortly. 8RP 43, 47.

Leon was treated by medics, who suspected Leon had a broken nose as well as an injury on his hand. 8RP 123, 125; 9RP 165-66. Leon refused to allow the medics to transport him to the hospital because he wanted to protect his belongings. 9RP 166. Nickerson had a red mark on her leg. 8RP 20. The police took photos of the injuries to Leon and Nickerson. 8RP 20-21. Nickerson did not testify at trial.

In regard to the timing of Stahl's assault on Nickerson and Leon, Leon testified that Stahl struck both Leon and Nickerson, left for "maybe 20 to 30 minutes" and then returned to start striking them again with the board. 8RP 115-20.

Count 5: Indecent liberties against N.W.

Two weeks later, on July 22, 2015, Officer Nathan Lemberg, who was one of the officers that responded to the disturbance call on July 9th, returned to the homeless encampment and was approached by N.W. 8RP 29. N.W. told the officer that she wanted to report an incident involving Stahl. 8RP 29-31. N.W. was homeless because she left an abusive marriage and was addicted

to heroin and methamphetamine. 8RP 54-55. She was acquainted with Stahl, but found him intimidating and was afraid of him. 8RP 62. On July 9, 2015, N.W. was sleeping in a makeshift shelter when Stahl entered the shelter and started throwing things at her. 8RP 66-68. She tried to crawl out of the shelter, but Stahl grabbed her and began groping her crotch area as she tried to get away. 8RP 70. She did not report this to the police on the day it happened due to past experiences with the police. 8RP 73. However, after talking to J.S. and realizing that Stahl had assaulted other women, she decided to report the incident to the police. 8RP 74-76.

C. ARGUMENT.

1. THE ASSAULT OF NICKERSON WAS A CONTINUING COURSE OF CONDUCT AND THUS NO UNANIMITY INSTRUCTION WAS REQUIRED.

Stahl contends that his constitutional right to a unanimous jury was violated because the assault of Nickerson involved separate and distinct acts and the jury was not instructed that they must unanimously agree on which act formed the basis of the charge. Stahl's right to unanimity was not violated. Viewing the facts in a commonsense manner, Stahl's assault of Nickerson was

a continuing course of conduct, not separate and distinct acts. As such, no unanimity instruction was required.

In Washington, there is a constitutional right to jury unanimity, meaning that a defendant may be convicted only when a unanimous jury concludes that a specific criminal act has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the prosecutor presents evidence of several distinct acts that could form the basis of the crime charged, the State must elect which act to rely on or the court must instruct the jury to agree on a specific criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Since a unanimity error is of constitutional magnitude, it may be raised for the first time on appeal. Id. at 411.

However, unanimity is not required when the State presents evidence of acts that constitute a "continuing course of conduct." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453, 456-57 (1989). To determine whether criminal conduct constitutes one continuing course of conduct, the facts must be evaluated in a commonsense manner. Id. Evidence involving conduct at different times and places tends to show several distinct acts. Id.

An assault that occurs at the same place, against the same victim, over a short span of time is generally considered a

continuing course of conduct. For example, in State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1992), overruled on other grounds in In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), an assault on the three-year-old victim occurring over a two-hour time span was deemed a continuing course of conduct not requiring a unanimity instruction. Similarly, in State v. Monaghan, 166 Wn.2d 521, 537-38, 270 P.3d 616 (2012), the defendant committed three potentially lethal acts against the victim over a 90-minute period and the court determined that was a continuing course of conduct. And in State v. Marko, 107 Wn. App. 215, 221, 27 P.3d 228 (2001), the defendant made multiple statements intimidating a witness during a 90-minute period and the court found that to be a continuing course of conduct.

In the present case, Stahl's assault of Nickerson was a continuing course of conduct. It occurred in the same place, against the same victim over a much shorter span of time than the acts in Crane, Monaghan, and Marko. The fact that Stahl briefly withdrew from the conflict, only to return approximately 20 minutes later to continue the assault against Nickerson, does not represent the kind of separate and distinct acts that require a unanimity instruction. Stahl was not denied his right to a unanimous verdict

because his assault of Nickerson was a continuing course of conduct.

Even if a unanimity instruction was required under these facts, any error in failing to give a unanimity instruction was harmless. The failure to give a unanimity instruction will be deemed harmless if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 405-06. Harmless error can be found here. Evidence of the assault was presented through the testimony of Leon and Coffin. When Leon returned to the encampment, Nickerson was upset and crying and immediately reported that Stahl had assaulted her. 8RP 110-14. Leon saw Stahl hit Nickerson. 8RP 120.³ Coffin overheard the assault, and heard Nickerson yelling "leave me alone," "get off me," and "don't hit me." 8RP 43-44. When Leon tried to calm Stahl, Stahl began assaulting Leon as well, briefly left, and then returned and assaulted both Leon and Nickerson again. 8RP 115-21. Stahl did not testify and the defense presented no evidence. The defense theory understandably focused on the sex crimes. 10RP 305. As

³ Leon testified that when he first tried to calm Stahl, Stahl responded by hitting "both of us." 8RP 117.

to the assaults of Leon and Nickerson, defense counsel simply told the jury that he would “defer to your judgment.” 10RP 313-14.

There is no basis to conclude that the jury would have entertained a reasonable doubt as to any part of the assault incident described by Leon and Coffin. Even assuming a unanimity instruction was required, the failure to give such an instruction was harmless.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Stahl argues that the prosecutor committed misconduct in closing argument by mischaracterizing the defense argument and vouching for the credibility of the victims. Both of these claims should be rejected. The prosecutor fairly responded to the defense argument, in which defense counsel made broad generalizations about the victims, unsupported by the evidence. The prosecutor properly argued the credibility of the State’s witnesses, and did not express a personal opinion.

To prevail on a claim of prosecutorial misconduct, a defendant must show the prosecutor’s argument was improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). The court must review allegedly improper statements in the

context of the entire argument, the issues in the case, the evidence, and the jury instructions. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Where, as here, a defendant fails to object, he is deemed to have waived any error unless the reviewing court can determine that (1) no curative instruction could have cured the resulting prejudice and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). Even improper remarks from a prosecutor do not merit reversal “if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

In this case, defense counsel focused almost exclusively on the sexual assault victims’ heroin addictions in closing argument. 10RP 306-08. In regard to J.S., he argued that “she’s chosen this life of heroin.” 10RP 307. He then made the remarkable generalization that *all women* who are addicted to heroin are *prostitutes*: “Well, here’s how it works for a heroin addict that is a woman. You get heroin in return for a sexual act.” 10RP 310. The

State's objection was sustained. 10RP 310. In regard to N.W., defense counsel focused on her heroin use, referred to her as a "heroin addict," and stated "heroin is a big deal to [N.W.]" and that "she has chosen heroin over everything else in her life." 10RP 315.

In response to these attacks, the prosecutor urged the jury not to dismiss the victims as homeless addicts undeserving of the protection of the law, as was clearly suggested by tenor of the defense argument. In responding to defense counsel's statements that the victims had chosen heroin over all else, the prosecutor stated, "Designed to dehumanize them, so you think of them as just homeless addicts, people who don't deserve your consideration, people who don't deserve the protection of the law." 10RP 326. The prosecutor told the jury, "they are people just as deserving of the protection of the law as anyone else." 10RP 326. In reminding the jury that "homeless heroin addicts" can be raped and assaulted just like everyone else, the prosecutor was not appealing to the sympathies of the jury but responding to defense counsel's blatant appeal to the prejudices of the jury. This was a fair and necessary response to the defense argument, and was not misconduct. Even if improper, it was not so prejudicial that a curative instruction could not have alleviated the prejudice.

Likewise, the prosecutor did not improperly vouch for the credibility of the State's witnesses. A prosecutor may not express a personal opinion as to the defendant's guilt. State v. McKenzie, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006). As the state supreme court explained long ago:

While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.

....

In other words, there is a distinction between *the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.*

State v. Armstrong, 37 Wash. 51, 54-55, 79 P. 490 (1905)

(emphasis added). To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in context. McKenzie, 157 Wn.2d at 53-54.

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur

until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)

(emphasis added).

There was no improper vouching in this case. The defense theory in closing was that the sexual assault victims were falsely accusing Stahl. Defense counsel pointed out the delay in reporting the two sexual assaults. The prosecutor addressed the delay, and reminded the jury of the reasons why a person might not report a sexual assault immediately. 10RP 324. The prosecutor then stated, "But, you know, they were pretty honest too that they weren't here trying to get Mr. Stahl into trouble, you know. To some of them he's still a friend." 10RP 324. The prosecutor's statement that the witnesses were "pretty honest" was not a clear and unmistakable personal opinion, but an inference drawn from the content and the demeanor of the witnesses' testimony. There was no improper vouching in argument.

D. CONCLUSION.

Stahl's convictions should be affirmed. Because Stahl does not appear to be employable, the State will not seek appellate costs.

DATED this 1st day of November, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at Winklerj@nwattorney.net, containing a copy of the Brief of Respondent in State v. Cortney James Stahl, Cause No. 74663-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of November, 2016.


Name:
Done in Seattle, Washington