State v. Engman

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Concurring: Anne L. Ellington, Ronald E. Cox

Unpublished Opinion

Pavel Lenskiy was charged with first degree robbery with a deadly weapon enhancement for his alleged involvement in an incident in which the victim was beaten and kicked until he bled. The shoes Lenskiy was wearing when arrested had a substance on them that appeared to be blood, although the State did not test for the presence of blood. The trial court granted the defense motion in limine to prohibit the State's witnesses from referring to the substance as 'blood,' but allowed the witnesses to testify that the substance 'appeared to be blood.' In closing, the prosecutor repeatedly referred to the substance as what appeared to be blood, but did refer to it as blood once, did argue that the evidence showed that the substance was blood, and apparently presented a slide on a computer using the word 'blood.' Because the evidence supported the prosecutor's arguments, and because Lenskiy cannot demonstrate prejudice from the prosecutor's inadvertent use of the word 'blood,' he has failed to meet his burden of establishing prosecutorial misconduct requiring reversal.

FACTS

On March 24, 2000, Mark Engman was at the Flying J truck stop in Federal Way with another man and two women when James Thompson approached him and asked for a ride to a nearby bar. Engman agreed on the condition that Thompson buy him a can of beer. While in the car, Thompson and the other four passengers shared a bottle of whiskey. When they passed the exit to the bar, Thompson became nervous and asked where they were going. Engman explained that they had to stop and pick someone up. Instead they drove to the Sandpiper apartments, where one of the women in the car lived.

While at the apartment, Engman made at least two telephone calls. At some point, outside of Thompson's earshot, Engman told one of the women who had been in the car that they were going to rob Thompson. Also while at the apartment, Engman showed Thompson a gun with the clip removed, which Thompson handled. Although Thompson became increasingly nervous, he did not attempt to leave.

After about fifteen minutes, Thompson, Engman, Kevin Light-Roth and Marie Lynch all left the apartment in Lynch's car. While in the car, Engman handed a gun to Light-Roth. Thompson asked Lynch to take him back to the Flying J truck stop. Instead, they drove to another apartment complex

where they picked up Pavel Lenskiy and Kevin Zimmerman. As the two men entered the car, Engman said, '{Y}ou guys know what to do{.}' Lenskiy and Zimmerman responded in the affirmative.

Engman asked Lynch to drive to Crystal Springs Park so that they could urinate. After they accomplished this task, Engman, Light-Roth, Zimmerman, and Lenskiy attacked Thompson, beating and kicking him for about five minutes. During the assault, Thompson saw Engman with the gun in his hand.

At trial, Thompson specifically identified Lenskiy as one of the four men who beat and kicked him. As he searched Thompson's pockets, Engman told him, '{Q}uit fuckin' around or I'm going to cap you where you are.' Thompson took this as a threat to kill him. After Thompson told him where he kept his money, Engman took approximately $71, a buck knife, and a wallet from Thompson's pocket.

Greg Gamble, who was exercising in the park, heard Thompson yell for help. He saw Thompson was bleeding and had been severely beaten, so he called 911. Police arrived and interviewed Thompson as he was being cared for in an aid car. Thompson told the police that he had been at the Sandpiper apartments earlier with his attackers. The aid car transported Thompson to the apartments, where he identified Engman, Light-Roth, Zimmerman, and Lenskiy.

Police found Thompson's knife in Zimmerman's pocket. Zimmerman confessed, and directed the police to the gun used in the assault. Thompson identified the now loaded gun as the one held by Engman during the attack. While investigating the crime scene, police found what appeared to be blood in the freshly mowed grass. In examining the suspects' clothing, the police saw what appeared to be blood on Zimmerman's pants, grass clippings on Light-Roth's shoes, what appeared to be blood and grass clippings on Engman's shoes, and what appeared to be blood on Lenskiy's shoes. The items were not tested for the presence of blood.[1]

Engman and Lenskiy were both charged with first degree robbery with an allegation that the principal, Engman, had been armed with a firearm. At trial, the State sought to have its witnesses testify that blood had been found on the defendants' shoes. Both defendants objected due to the lack of testing. Lenskiy's counsel specifically deferred to Engman's counsel to make the arguments with regards to the apparent blood. The court allowed the State's witnesses to testify that the substance on the defendants' shoes 'appeared to be' blood. The State's witnesses abided by this ruling and referred to the substance as 'what appeared to be blood.'

In closing argument, the prosecutor stated, 'There is what appears to be blood on both pairs of shoes. Mr. Lenskiy's as well as on Mr. Engman's.' Engman's counsel objected, and that objection was overruled. The prosecutor went on to argue that in a photograph of the grass at the park, there was what 'clearly appears to be fresh blood.' She argued that the pattern of blood was consistent with Lenskiy kicking the victim and went on to state: '{T}here is no evidence in front of you that the blood that is on Mr. Lenskiy's shoes came because his shoes . . .' Engman's counsel interrupted with an

objection, and the trial court sustained the objection.

Engman's counsel also objected to a slide that was shown by the prosecutor. That slide apparently contained the word 'blood.' (Although the prosecutor printed out the allegedly objectionable slides and had them admitted as exhibits in order to preserve the record for appeal, Lenskiy has not designated the exhibits on appeal.) The court responded by stating, 'Then that would be considered as appeared to be blood.' Engman's counsel again objected to a slide containing the word 'blood' later in the prosecutor's argument. That objection was overruled. Again on the subject of the alleged blood, the following exchange took place:

Ms. Austell {Prosecutor}: And the defense wants DNA. Wants to be able to conclusively have proved to you by the State that what appears to be blood on the shoes of the defendants, and what appeared to be blood on Mr. Zimmerman's pants, that it conclusively is blood. It seemed fairly obvious from the testimony of the officers that indeed this was blood.

Ms. Wiegand {Counsel for Engman}: Objection, Your Honor I don't believe that was in evidence. I ask that the court -

The Court: It appeared to be blood.

Ms. Austell: That is what I said, is it not?

The Court: Proceed.

Ms. Austell: That it appeared to be blood. . . .

The prosecutor then continued to argue that based on the fact that Thompson was bleeding profusely, what appeared to be blood was found at the crime scene, and what appeared to be blood was found on the defendants' shoes, the evidence showed that both defendants participated in the attack on Thompson.

After the prosecutor concluded her closing argument, counsel for Engman moved for a mistrial based on prosecutorial misconduct. After a lengthy discussion as to whether the slides shown during closing said 'blood' or 'appeared to be blood,' the court denied the motion.

In rebuttal argument, the prosecutor again referred to the substance found on Mr. Lenskiy's shoes, stating:

When you look at the shoe that has what the State believes to be blood, I'm now holding Mr. Lenskiy's left shoe, and the area where the State believes there's blood, if you look, you can see considerable blades {of} grass that are caught in the crevasses of the shoe.

The prosecutor also noted that the defense argued that Zimmerman was the sole attacker because he had blood on his pants, notwithstanding the fact that that substance had not been tested for blood either. She argued:

Not once in closing argument did {Engman's counsel} say, much less suggest to you that what was on Mr. Zimmerman's sweat pants was apparent blood. So it's intriguing that it was blood when it was on Mr. Zimmerman's stuff, but not maybe {sic} blood when it's on her client's shoes. . . .

The defense did not object to these arguments.

The jury found Lenskiy guilty of first degree robbery with a deadly weapon finding. After the verdict, the court heard further arguments outside the presence of the jury about what was contained in the prosecutor's slides and allowed the defense to complete its record as to the earlier motion for a mistrial. Engman's counsel claimed that the State had altered the slides after they were shown to the jury, but the court agreed that they appeared the same as when shown to the jury. The court then turned to Lenskiy's counsel and asked if he wished to be heard. He responded:

My only objection that I join in at the time that {Engman's counsel} made the objection was that my understanding was that we were not to refer to any blood specifically, but what appeared to be blood, and I do think that that was inappropriate to do. And I join in to that extent to {Engman's counsel's} motion.

Lenskiy now appeals, arguing prosecutorial misconduct.DISCUSSION A defendant alleging prosecutorial misconduct bears the burden of showing both improper conduct and prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury's verdict. Brown, 132 Wn.2d at 561. Failure to object to an improper remark constitutes a waiver of error unless the remark 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. Brown, 132 Wn.2d at 561 (citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

We assume for purposes of discussion that Lenskiy preserved his objections by joining in the motions in limine argued by counsel for co-defendant Engman. Even under this more lenient standard, Lenskiy fails to meet his burden of demonstrating prosecutorial misconduct. First, the prosecutor was entitled to argue that the circumstantial evidence demonstrated that the substance found on Lenskiy's shoes was blood. The victim was bleeding heavily. He testified that Lenskiy was one of the people who had kicked him. The police found what appeared to be blood on the ground where the assault took place and what appeared to be blood on Lenskiy's shoes. The prosecutor did not commit misconduct by arguing that these facts demonstrated that Lenskiy did kick the victim and that the substance on his shoes was blood.

Even assuming that the prosecutor should only have been allowed to refer to the substance as what 'appeared to be blood,' Lenskiy is unable to demonstrate prejudice. With regard to the State's initial closing arguments, the prosecutor repeatedly emphasized that the substance had not been tested and that it only appeared to be blood. On one occasion, the prosecutor did refer to 'blood' rather than what 'appeared to be blood.'

But the trial court sustained the objection to this argument and reiterated that the substance only appeared to be blood. Under the circumstances, Lenskiy has failed to show a likelihood that the jury's verdict was affected by these remarks.

With regard to the slides shown by the State during closing, Lenskiy has failed to designate these exhibits. We are therefore unable to properly review Lenskiy's arguments about the prejudicial nature of the slides.[2]

But even if the slides did contain the word 'blood,' Lenskiy would be unable to show prejudice because both defense attorneys, as well as the prosecutor and the court, repeatedly informed the jury that the substance had not been tested and only appeared to be blood.

Regarding the prosecutor's rebuttal closing argument, Lenskiy is likewise unable to meet his burden. Lenskiy argues that the prosecutor committed misconduct by stating that 'the State believes' that the substance found on his shoes was blood. It is improper for a prosecutor to express his or her personal belief as to a defendant's guilt. State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000). Here, it is clear from the context that the prosecutor was not expressing her personal belief, but was merely stating that the State alleged the substance to be blood. And Lenskiy did not object to the prosecutor's comments. Had he done so, the court could have corrected any allegedly improper comment with a curative instruction.

Because Lenskiy has failed his burden of proving prosecutorial misconduct, we do not reach the State's argument that Lenskiy failed to preserve this issue because it was Engman's counsel, rather than Lenskiy's, who objected to the prosecutor's remarks.

Lenskiy filed a pro se brief in which he makes several arguments, none of which were presented below. Moreover, Lenskiy's arguments are virtually incomprehensible and not supported by the record. We therefore reject Lenskiy's pro se challenges.

Lenskiy first argues that Thompson lied about wanting Engman to take him to the Rainbow Bar, because the only bar by that name in Seattle is on Northeast 45th Street. This argument is based on Lenskiy's search on Netscape Yellow Pages (an on-line search service) and is thus based on matters outside the record. (As an aside, Lenskiy's information is flawed because he ran the search for Seattle only, and the crime took place outside of Seattle.) He also points to 'inconsistencies' in the various police reports. This argument is also based on matters outside the record.

Moreover, Lenskiy has not shown a conflict, but merely that not every officer put every detail into his report.

Lenskiy also insinuates that Thompson had some nefarious purpose in admitting to handling the gun while at the Sandpiper apartments and states that no federal investigation was done to determine if the gun had been used in other crimes. Lenskiy does not explain why either of these allegations would be relevant if proven.

Lenskiy makes much of the time frame testified to by the various witnesses. Again, his arguments are based on matters outside the record namely, a MapQuest search showing the estimated time to get from one location to another. He claims that a 'time calculation mistake occurred because the police computer calculated the travel time for police cruisers, not for civilian cars.' Because these arguments were not presented below and are not supported by the record, we will not consider them.

Lenskiy also argues that Thompson could have had a higher blood alcohol level than that testified to at trial. Again, this argument is based on articles on intoxication that are outside the record. Moreover, it was Lenskiy's own expert who testified as to Thompson's likely level of intoxication. And Lenskiy does not demonstrate that he was prejudiced. This argument is without merit.

Lenskiy argues that 'My bail was set at $75,000, which negates the meaning of the concepts of alibi and the presumption of innocence.' Pro Se Brief of Appellant, at 7. First, Lenskiy did not present an alibi defense, so it is unclear what he means by this. And given Lenskiy's prior history and the facts of this case, his bail was not excessive.

Lenskiy also argues, 'I also see the direct connection between the facts that Ms. Lynch was kicked out of her apartment and her children were taken away from her, and witness Gamble serving time in Walla Walla. All these facts indicate that they conspired to convict an innocent man.' Pro Se Brief of Appellant, at 7. Lenskiy does not explain what the 'direct connection' is, and we are unable to find it. Nor does the record support a claim that anyone conspired to convict an innocent man.

Lenskiy argues that Thompson was not really who he claimed to be a homeless man. He refers to Gamble's statement in which he states that when he called 911 for Thompson, he was yelling so loudly that he could not hear, so he gave Thompson the phone. Lenskiy argues that a homeless man would not yell to talk to the police, but an undercover Drug Enforcement Agency or Federal Bureau of Investigation agent would. Therefore, he surmises, '{I}in order to protect the reputation of the undercover agent Thompson, the police, the detective, and the prosecuting attorney all conspired to have me convicted for 62 months and sent to serve time in Walla Walla.' Pro Se Brief of Appellant, at 7. The record does not support this argument.

Finally, Lenskiy argues:

Nobody can state that that {sic} the spot that looks like blood is actually blood, before the lab test actually determines that it was indeed blood. Consequently, if the prosecutor claims that there was any blood on my shoes, she must know who put the blood there. I therefore claim that Officer Syler put blood on my shoes in the Tukwilla {sic} Police Department. Pro Se Brief of Appellant, at 7-8.

This argument is likewise not supported by the record.

Affirmed.

1. The State apparently sent the items to the lab for testing, but the lab was unable to complete the testing due to time constraints.

2. It appears that Lenskiy's counsel mistakenly believes that the printouts of these slides were not made a part of the record. After the jury returned with a verdict, the court heard further arguments about the slides. The prosecutor printed out copies of the slides, with counsel for Engman arguing that the slides had been altered. The trial court disagreed. The court then asked Lenskiy's counsel if he wished to be heard, and he stated: My only objection that I join in at the time that {Engman's counsel} made the objection was that my understanding was that we were not to refer to any blood specifically, but what appeared to be blood, and I do think that that was inappropriate to do. And I join in to that extent to {Engman's counsel's} motion. The court responded, 'I think the record will speak for itself.' Lenskiy's appellate counsel may have taken this to mean that the court did not admit the exhibits. (See appellant's brief at p. 10: But in the next sentence, the court stated, 'I think this is, as far as I can recall, what was shown to the jury and it will be admitted. Should we make them exhibits 32, 33 and 34, not to go to the jury but retained as exhibits.'