State Of Washington, Respondent V. Demar Nelson, Appellant

2016 | Cited 0 times | Court of Appeals of Washington | August 16, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, No. 46768-2-II

Respondent,

v. UNPUBLISHED OPINION

DEMAR MICHAEL NELSON,

Appellant.

MAXA, J. Demar Nelson appeals his conviction and sentence for first degree murder of James Guillory. We hold that (1) the State presented sufficient evidence of premeditation, (2) post-incident silence during

cross-examination and closing argument, and (3) the trial court erred by failing to inquire into legal financial obligations (LFOs).

Accordingly, w of first degree murder but remand for

reconsideration of discretionary LFOs.

FACTS

On the night of December 26, 2008, Nelson went to a bar in Lakewood with Grady Brown and Calvin Davis. Nelson encountered his friend Joseph Coleman at the bar. Guillory went to the same bar that night with Ryan Blosser, Robert Poeltl, and Jamar Robinson.

After both groups left the bar, Blosser and Coleman ended up in a fistfight in the parking Filed Washington State Court of Appeals Division Two

August 16, 2016 Coleman asked Nelson, Brown and Davis to come to the fight to ma

would not attack him. They agreed and arrived at the house shortly after Coleman. Blosser, Guillory, Poeltl and Robinson were already there on the front porch. Blosser and Coleman resumed their fight in the street, and Nel

Guillory left the porch and approached Nelson. Guillory was drunk and made comments to Nelson that implied he wanted to fight. Nelson told Guillory to calm down and that he did not want to fight. Guillory was pacing and took his shirt off. He then moved quickly toward Nelson. Nelson told Guillory to back up and drew a pistol.

According to Nelson, Guillory continued to move toward him. When Guillory was about four feet away, Nelson fired a couple of shots that intentionally missed him. Guillory continued to move forward and Nelson then aimed at him and fired repeatedly until his gun had emptied the remaining rounds in his ammunition clip. Nelson claimed that Guillory was still standing when Nelson got

Poeltl provided a different version of the shooting. He stated that Guillory took a step or two toward Nelson and then Poeltl heard shots. There was a pause and then Nelson approached Guillory and shot him several times. The pause was long enough for Nelson to get closer to Guillory. Poeltl testified that Guillory turned around and was trying to run as he was getting shot. Finally, Poeltl stated that after Guillory had been shot, Nelson stood over him and shot him a few more times as Guillory was wiggling on the ground.

Nelson left with Brown and Davis. In the car, Nelson asked Brown and Davis if they were okay. He also said that he told Guillory to back up a couple of times. Nelson did not say anything else to Brown and Davis about the shooting. He did not say that he shot Guillory in self-defense. Nelson also did not call the police.

indicated that 15 of the bullets that Nelson fired struck Guillory, with at least five of the shots

Almost two years later, the State charged Nelson with first degree murder. The trial started in September 2014, close to six years after the shooting. At trial, Nelson stipulated to killing Guillory. Nelson argued that he acted in self-defense, and he testified at trial.

The trial court ruled that the State could impeach Nelson with his failure to characterize the shooting as self-defense immediately after the shooting. During cross-examination, the prosecutor asked Nelson two questions about the fact that he did not call the police or tell the others in the car that he acted in self-defense. The prosecutor also elicited from Brown and Davis that Nelson did not say anything in the car about acting in self-defense.

the shooting and a reference to the fact that Nelson had not told the people in the car that he shot Guillory in self-defense. Nelson did not object to these comments.

The jury found Nelson guilty of first degree murder and also returned a special verdict supporting a firearm sentencing enhancement. The trial court sentenced Nelson to 481 months. The trial court also imposed $3,300 in LFOs, including $2,500 in discretionary LFOs for court-appointed LFOs.

Nelson appeals his conviction and sentence. ANALYSIS

A. SUFFICIENCY OF PREMEDITATION EVIDENCE

Nelson argues that the State presented insufficient evidence of premeditation, which is an element of first degree murder. We disagree.

1. Standard of Review

When evaluating the sufficiency of evidence for a conviction, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. State v. Homan, 181 Wn.2d inferences drawn from that evidence when evaluating whether sufficient evidence exists. Id. at of conflicting testimony and evaluation of the persuasiveness of the evidence. Id.

2. Legal Principles

To convict a defendant of first degree murder, the State must prove that the defendant

Premeditation is and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). The State may prove premeditation through circumstantial evidence if the inferences drawn from the evidence are reasonable and the evidence is substantial. Id. at 83. But proof of premeditation requires more than the fact that the defendant had an opportunity to deliberate. State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). Id. at 826. And RCW the premeditation required in order to support a conviction of the crime of murder in the first degree

Washington courts have recognized that a number of factors may provide evidence of

premeditation, including:

(1) The infliction of multiple wounds or multiple shots. State v. Gregory, 158 Wn.2d

759, 817, 147 P.3d 1201 (2006)

, overruled on other grounds by State v. W.R., 181 Wn.2d 757, 768-69, 336 P.3d

1134 (2014); State v. Cross Multiple blows are

strong evidence of premeditation. Hoffman, 116 Wn.2d at 84 (cons supported a finding of premeditation); State v. Ra, 144 Wn. App.

Examples of circumstances supporting a finding of

premeditation include . . . multiple wounds inflicted or multiple shots.

(2) A time interval or pause between shots. Ra, 144 Wn. App. at 704 (finding that a

pause between shots supported an inference that the defendant had time to deliberate on and

weigh his decision to kill the victim); State v. Sargent, 40 Wn. App. 340, 353, 698 P.2d 598

(1985) (finding that evidence that the victim received two blows to the head with some interval

between them provided sufficient evidence of premeditation).

(3) Continued firing after missing with the first shots. Ra 144 Wn. App. at 704 (finding

that continued firing after missing twice supports a finding of premeditation). (4) Attacking the victim from behind. State v. Allen, 159 Wn.2d 1, 8, 147 P.3d 581

Sufficient evidence of premeditation may also be found . . . where the victim was struck

from behind. Hoffman, 116 Wn.2d at 84 (n attack on a victim from behind may indicate

premeditation. State v. Ollens, 107 Wn.2d 848, 853, 733 P.2d 984 (1987) (noting that the

defendant striking

3. Premeditation Analysis

The factors listed above support a finding of sufficient premeditation evidence. First, the evidence showed that Nelson shot Guillory 15 times. This evidence supports an inference that Nelson e firing was premeditated.

Second, there was evidence that Nelson fired his shots in two phases. Nelson testified that he first fired a couple of shots not aimed at Guillory. He then paused before firing the remaining shots, which emptied the ammunition clip. Poeltl testified that Nelson paused long after he missed Guillory shows that he had an opportunity to deliberate. And his moving toward Guillory supports an inference that he decided to kill Guillory after that deliberation.

Third, the evidence shows that Nelson continued firing after intentionally missing with the first few shots. During the second phase of shooting Nelson was aiming at Guillory directly. Continuing to fire and the change in aim supports an inference that Nelson made a conscious decision to kill Guillory. Also, Poeltl testified that after Guillory had been shot and was lying on the ground, Nelson stood over him and shot him again. Standing over a person who had been shot multiple times and shooting him again supports a finding of premeditation. Fourth, Poeltl testified that Guillory had turned around and was trying to run away when Nelson shot him. And the evidence indicated that at ed the jury to find that Nelson deliberated and decided to continue to fire lethal shots at Guillory even as Guillory retreated.

Taken together and viewing the evidence in the light most favorable to the State, these factors constitute sufficient evidence of premeditation. Accordingly, we hold that the State presented sufficient evidence to support the first degree murder conviction.

B. PROSECUTORIAL MISCONDUCT COMMENT ON PREARREST SILENCE

Nelson argues that the prosecutor committed misconduct by making comments regarding

-defense, which improperly

encouraged the jury to infer guilt from silence. We disagree.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that in the

improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. State v.

Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

2. Comment on Silence

The Fifth Amendment to the United State

evidence aga - incrimination, including the right to silence. State v. Pinson, 183 Wn. App. 411, 417, 333 P.3d

ence to its advantage

admission of guilt. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

However, the State is allowed to present evidence of the

before issuance of Miranda 1 warnings, and (3) the evidence is limited to impeachment of the

d not used to show guilt. Id. at 217-18. The fact that the

defendant testifies does not automatically transform a comment on prearrest silence into

impeachment. Id. at 215-16. Impeachment is evidence offered solely to show that the witness is

not being truthful. Id. at 219.

whether the prosecutor manifestly intended the remark to be a comment on the right to silence or

ce. Id. at 216. A comment on silence

violates the and to infer guilt from the invocation of the right of Id. at 217. reference to the mere reference if it is so subtle and brief that it does not naturally and necessarily emphasize the

Id. at 216. A mere reference to silence is not reversible error absent a

showing of prejudice. Id.

1 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). 3. Cross-Examination Questions

Nelson argues that the prosecutor violated his right to silence by asking him about his

failure to tell his friends or report to police that he acted in self-defense. We disagree because

this questioning involved proper impeachment evidence.

At trial, -defense claim. Nelson

the guy to back up a

Report of

Proceedings (RP) at 1142. During cross-examination the prosecutor questioned Nelson:

Q. You did absolutely nothing in regard to calling the police, telling these guys in the car that you shot in self-defense, none of that?

A. Correct.

Q. This is when you are saying that.

A. Correct.

RP at 1159.

This questioning involves classic impeachment. Nelson testified at trial almost six

years after the shooting that he shot Guillory in self-defense. But he did not tell anybody at the

time that he acted in self-defense. The State elicited this testimony to support an argument that

Nelson had recently fabricated this defense and that his trial testimony was false. The State was

-defense was less credible because he had not mentioned it to

allowed witnesses to be impeached by their previous failure to state a fact in circumstances in

Jenkins v. Anderson, 447 U.S. 231, 239,

100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). -examinat

prearrest silence were proper because they were used for impeachment and not to imply guilt.

Nelson argues that two statements the prosecutor made during closing argument about his

conduct after the shooting impermissibly commented on silence.

Look at what he did afterward. Rationalize this case, use your common sense in deciding this case, and you will discover of course that he raised self-defense

RP at 1190 (emphasis added).

The defendant is guilty of Murder in the First Degree based on the number of shots, based on the location of the shots, both before and after this killing. The State is asking you to find the defendant guilty.

RP at 1193 (emphasis added).

Nelson argues that discussing in the first statement what Nelson did after the shooting

and in the second statement his demeanor after the shooting are comments on his silence.

However, the statements do not exp indirectly refer to silence. The statements could encompass a number of actions other than

Nelson failing to tell his friends that he shot in self-defense or failing to call the police. Even if

these statements did were so indirect, subtle and brief that they

would Burke, 163 Wn.2d at 216. Therefore, we

hold that the prosecutor did not engage in misconduct by making brief actions and demeanor after the shooting. -defense claim by

talking about the - yone can claim self-defense

after the fact. . . . Just because a defendant raises a claim of self- is

valid. . . . RP at 1189-90. A moment later, the prosecutor made a statement that expressly referenced

Any person if you act in self-defense, whether you are scared or not, you are worried, you are talking, you are especially talking to the two guys in the car. None of them. It is cold-blooded murder.

RP at 1190-91.

is not truthful, but not to argue that the defendant is guilty. Burke, 163 Wn.2d at 217.

Considered in context, the first two sentences of the quoted statement can reasonably be

Nelson failed to mention self-defense in the car, his trial testimony that he acted in self-defense

should be disregarded as untrue. Therefore, those statements standing alone are not improper.

is cold- adding that phrase, the prosecutor potentially transformed the focus of his argument from the

- uilt.

-defense

- silence that constitutes reversible

error only if Nelson can show prejudice. Id. at 216.

The question in distinguishing between a comment and a mere reference is whether the

silence. Id.

(quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Here, the prosecutor began

his short argument regarding self-

credibility whether his claim of self-defense was true. He concluded by arguing that a person

acting in self-defense would have said something about self-defense immediately after the shooting, which as discussed above could be interpreted as a credibility argument.

nt about cold-blooded murder which was somewhat disconnected from the previous argument is ambiguous. The prosecutor may have prosecutor also may have been attem - defense claim was not credible the jury should find him guilty of murder. Because of this on Nelso reversible error unless Nelson can show prejudice. Burke, 163 Wn.2d at 216. Nelson argues that this statement necessarily was not harmless because his credibility was at issue and the prosecutor told the jury that his silence was evidence of guilt. However, as stated above, the self-defense claim, and the prosecutor properly argued tha credibility. Finally, the jury heard testimony from Nelson himself as well as Brown and Davis that Nelson did not say anything about self-defense immediately after the shooting. The fact would not likely have affected the jury.

-blooded murder after mentioning ement did not constitute misconduct.

C. IMPOSITION OF LFOS

Nelson argues for the first time on appeal that the trial court erred by imposing discretionary LFOs without making an inquiry into his ability to pay. We exercise our discretion to consider this issue and agree.

1. Failure to Object at Trial

We generally do not consider issues raised for the first time on appeal. However, the

Supreme Court repeatedly has exercised its discretion under RAP 2.5(a) to consider unpreserved

arguments that the trial court erred in imposing discretionary LFOs without considering the

E.g., State v. Duncan, 185 Wn.2d 430,437, 374 P.3d 83 (2016); State

v. Marks, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016); State v. Leonard, 184 Wn.2d 505, 506-

08, 358 P.3d 1167 (2015); State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

LFO argument. Therefore, we exercise our discretion and consider the issue. 2. Failure to Inquire Into Ability to Pay

Before imposing discretionary LFOs, the trial court must make an individualized inquiry

Blazina, 182 Wn.2d

a future ability to pay. Accordingly, we remand the issue to the trial court in order to allow for

CONCLUSION

discretionary LFOs.

A majority of the panel having determined that this opinion will not be printed in the

Washington Appellate Reports, but will be filed for public record in accordance with RCW

2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, J.

BJORGEN, C.J.