State Of Washington, Respondent V. Sebastian Levy Aldrete, Appellant

2021 | Cited 0 times | Court of Appeals of Washington | March 30, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, No. 52733-2-II

Respondent,

v. UNPUBLSHED OPINION SEBASTIAN SAMUEL LEVY ALDRETE,

Appellant.

SUTTON, A.C.J Sebastian Levy-Aldrete appeals his second degree felony murder conviction. He argues that prosecutorial misconduct deprived him of a fair trial. We agree and hold that the prosecutor committed misconduct when he (1) presented an improper puzzle analogy, (2) argued that the jur must speak the truth, and (3) argued facts not in evidence. Accordingly, we reverse Levy- conviction and remand for a new trial. 1

FACTS

I. BACKGROUND

Levy-Aldrete and his mother lived in a secured apartment building with two levels of parking garage below. Both parking garage levels allowed people to exit but not to enter. The front lobby of the building required a key pad code to enter. Levy- apartment was on the top floor of the building, and they typically locked the front door.

1 Because we reverse Levy- , we do not address his other arguments. Filed Washington State Court of Appeals Division Two

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March 30, 2021 At approximately 5:30 am on October 16, 2017, Levy-Aldrete called the police and reported that an intruder had attacked and killed his mother in their apartment. The police responded and found Levy- all over the walls, glass shattered around her, and a broken -Aldrete was anxious and nervous, and he was avoiding eye contact. He pretended to cry but was unable to produce tears.

There were no signs of forced entry to the building or to the apartment. Other than Levy- moved and there were no signs of sexual assault of his mother.

There were also no signs of a struggle between Levy-Aldrete and the alleged intruder. A Clorox wipe with Levy- - a recycling bin. There was a trail of Levy- going down one stairwell to the parking garage where the glove and the Clorox wipe were found. The police also observed that the apartment was recently cleaned and smelled like a cleaning agent, and the detectives found a trash can full of Clorox wipes in the apartment.

In a recorded interview with the police, Levy-Aldrete claimed that he woke up to the sound of his mother screaming. He walked into the hallway from his bedroom and saw an intruder. The intruder fought with him, Levy-Aldrete

Levy-Aldrete stated that he then left the apartment and chased after the intruder. He did not find the intruder, so he went back to his apartment and called 911. Levy-Aldrete stated that is hands were covered in blood, so he needed to use a Clorox wipe to clean the blood off his phone before he was able to dial 911.

The police officers did not believe Levy- The police noted that Levy- demeanor was inconsistent with that of someone whose mother had just been

brutally murdered.

II. TRIAL

The State charged Levy-Aldrete by amended information with premeditated murder in the first degree and murder in the second degree.

A. CASE THEORIES AND EVIDENCE

The State alleged that Levy-Aldrete killed his mother in their shared apartment by striking ark bottle and then strangling her to death in

her bed. The State argued that Levy-Aldrete did so because he had spent nearly all the money that his mother had given him to purchase their new home, which purchase was to be finalized that day, and he did not want her to discover that he had spent the money. The State also argued that he killed her because he stood to inherit almost $250,000 from her estate.

The State asserted that after killing his mother, Levy-Aldrete attempted to dispose of the evidence by cleaning the apartment with Clorox wipes. He hid a Clorox wipe and a pair of gloves -Aldrete also ran up and down the

stairwell to make it appear as though he chased an intruder. And, before calling 911, Levy-Aldrete changed his clothes and flipped his sweatshirt inside out. Levy-

Aldrete had not spent a lot of the money his mother had given him; he did not have large expenditures; and he still had over $10,000 in his bank account, which was more than enough to cover the closing costs to buy a house as they had planned. Further, defense counsel argued that several neighbors testified to hearing more than one person in the apartment that early morning and multiple persons running up and down the stairwell.

Blood experts called by the State and the defendant testified that they would have expected

blood spatter on Levy- clothing had he been wielding the forcefully

striking his mothe e, but there was no blood spatter found on his sweatshirt or jeans, and

blood spatter was only found on the walls abutting the mattress where his mother was found.

B. JURY INSTRUCTIONS

The court instruction stated:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP) at 108. C. CLOSING ARGUMENT

1. Puzzle Analogy

Shortly after the prosecutor began closing argument, he displayed a PowerPoint slide to

Proof Beyond a Reasonable Doubt

Doubts as to elements

Think of it like a puzzle

Verbatim Report of Proceedings (VRP) (Nov. 8, 2018) at 2570, 2573; Supplemental CP State

Closing PowerPoint, slide 6. 2 The prosecutor continued in relevant part as follows:

[Prosecutor]: The State has to prove these charges to you beyond a reasonable doubt, and what that means is you look at the evidence, you have a doubt related to an element of the crime, and that doubt persists in light of all the evidence in the in isolation, but assessing that issue or that question as to an element in light of

everything you know in the case.

When you think about the proof or the burden of proof in this case, consider it in the way you would a puzzle state, you may sit down

[Defense counsel]: Objection to the puzzle analogy.

The Court: Overruled.

VRP (Nov. 8, 2018) at 2572 (emphasis added). The prosecutor then continued:

2 The transcript is not clear as to when this slide was presented or whether defense counsel objected at that time. You may sit down at the table and you may find a pile of puzzle pieces, and maybe with enough time as to what the image is.

that point even though pieces of the puzzle are broken, torn, ripped, or frayed. But

mage that you are confident of.

Consider a trial in much the same way. The State has the burden of presenting you evidence, enough pieces of evidence that tell you the defendant is guilty beyond a reasonable doubt, and you may reach that conclusion even though there are pieces of evidence, like pieces of the puzzle, that were never presented. down. You may reach that conclusion even though there are pieces of evidence

that you aside. You may reach that conclusion even though there are pieces of evidence like

pieces of the puzzle that have warts and flaws.

The point is, when you view all the evidence in total, warts and all, if what you have in place tells you beyond a reasonable doubt that the defendant is guilty of the crime, warts and all, holes and all, then the defendant is guilty and your verdict reflects that.

VRP (Nov. 8, 2018) at 2572-74 (emphasis added).

During rebuttal, the prosecutor again referred to a puzzle analogy:

If you go back to my discussion about proof beyond a reasonable doubt and the idea of the puzzle, remember, when sit down to do the puzzle, sometimes pieces are just gone before you even got there and yet the question is what you have in front of you, is that enough to create the image. This is a missing puzzle piece, a missing piece of evidence that you never had at the start.

g to be a missing piece of evidence. done. The question is what you have in front of you, what image does that paint for

you.

VRP (Nov. 8, 2018) at 2689 (emphasis added). 2.

The prosecutor argued the following in his closing statement:

all the State is obligated to prove is that he did it, and through this evidence you

know that he did it, and it is time that your verdict reflects the truth. Thank you, ladies and gentlemen.

VRP (Nov. 8, 2018) at 2619 (emphasis added). Levy-Aldrete did not object.

3. D Self-Inflicted Cuts

The prosecutor also argued evidence that was not contained in the record:

that person needs to make it look like an act of self-defense and so they have to harm themselves, or five where they survive and so they have to harm themselves to kind of deflect

suspicion, and however it happens, the mechanism of injury is always the same.

face - And that happened here.

VRP (Nov. 8, 2018) at 2578. Levy-Aldrete did not object. To underscore the point, the prosecutor

those wounds to the superficial cuts shown on the photo of Levy- face. VRP (Nov. 8,

2018) at 2578; State Closing PowerPoint, slide 9, 10.

The jury found Levy-Aldrete guilty of one count of second degree felony murder. Levy-

Aldrete appeals his conviction. ANALYSIS

I. STANDARDS OF REVIEW

To make a successful claim of prosecutor misconduct, the defense must establish that the

both improper and prejudicial. In re PRP of Sandoval, 189

Wn.2d 811, 832, 408 P.3d 675 (2018) (quoting State v. Davis, 175 Wn.2d 287, 330, 290 P.3d 43

(2012), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018)). We

where a defendant meets the burden of establishing both

that (1) the State committed misconduct by making inappropriate remarks and (2) those remarks

had prejudicial effect. State v. Fuller, 169 Wn. App. 797, 812, 282 P.3d 126 (2012).

A State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). rguments

are improper. Lindsay, 180 Wn.2d at 437; State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653

(2012). Finally, a prosecutor commits misconduct by arguing matters outside the record. Davis,

175 Wn.2d at 330-31. To prove prejudice, a defendant must show that the misconduct had a

substantial likelihood of affecting Davis, 175 Wn.2d at 331. Further, when a

abuse of discretion. Davis, 175 Wn.2d at 331.

so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not

have been neutralized by an admonition to the jury. Davis, 175 Wn.2d at 330-31 (quoting State

v. Stenson, 132 Wn.2d 668, 719, 904 P.2d 1239 (1997)).

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. Monday, 171 Wn.2d 667, 675, 257 P.3d 551

(2011) (internal quotation marks omitted) (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d

221 (2006)).

II. PROSECUTORIAL MISCONDUCT

A. PUZZLE ANALOGY

Levy-Aldrete first argues that the prosecutor used an improper puzzle analogy, which

minimized and trivialized burden of proof. We agree and hold that the use of the puzzle

analogy was improper.

arguments. Fuller, 169 Wn. App. at 797;

State v. Curtiss, 161 Wn. App. 673, 700, 250 P.3d 496 (2011); State v. Johnson, 158 Wn. App.

677, 685, 243 P.3d 936 (2010); Lindsay, 180 Wn.2d at 436. puzzle analogy on a case-by-case basis, considering the context of the argument as a whole. Fuller,

169 Wn. App. at 825.

In Fuller, we held that the use of a jigsaw puzzle analogy was not improper. 169 Wn. App.

at 825-28. There, the prosecutor argued:

What I am going to do now is use a jigsaw puzzle to illustrate the concept of beyond a reasonable doubt. . . . We get a few of the pieces of the puzzle. . . . [W]e might

[W]e do not have enough pieces or enough evidence beyond a reasonable doubt . . . But we may not yet have enough pieces, enough evidence to know beyond a reasonable oma. Now, we have more pieces. We have more evidence and we can see beyond a reasonable doubt that this is a picture of Tacoma. ose end tied up and every question

answer[ed]. What matters is this: Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?

Fuller, 169 Wn. App. at 827 (alternations in original) (internal quotation marks omitted). The

State then asked the Fuller Fuller, 169 Wn. App. at 827 (internal quotation marks

omitted).

In Fuller, we explained that the State did not improperly quantify the level of certainty

necessary to satisfy the beyond a reasonable doubt standard. 169 Wn. App. at 827- The State did say, however, that the jury could be convinced beyond a reasonable doubt even without 100 percent certainty. Fuller, 169 Wn. App. at 827.

Similarly, in Curtiss, we held that puzzle analogy was not improper. 161 Wn. App. at 700 01. There, the prosecutor stated, There will come a time when you re putting that puzzle together, and even with pieces missing, you ll be able to say, with some certainty, beyond a reasonable doubt Curtiss, 161 Wn. App. at 700. because it did not quantify the level of certainty required to satisfy the beyond a reasonable doubt standard, nor did it minimize or shift the burden of proof to the defendant in the context of the argument as a whole. Curtiss, 161 Wn. App. at 700-01.

In Johnson, however, we held that the was improper and that the prejudice was incurable. 158 Wn. App. at 685-86. The prosecutor analogized burden of proof to a partially completed puzzle, and argued ou add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt Johnson, 158 Wn. App. at 682 (emphasis added).

There, the quantified the level of certainty required to satisfy its burden of proof, and when combined with other flagrant and ill-intentioned misconduct, despite Johnson, 158 Wn. App. at 685-86.

In Lindsay, our Supreme Court explained the key difference between our holdings in Curtiss and Johnson. In Curtiss reference to being able to discern the subject of a puzzle with some pieces missing was general, unlike in Johnson, where the prosecutor

improperly quantified the number of pieces and percentage of completion required for reasonable doubt. Lindsay, 180 Wn.2d at 435. In Lindsay

quantifying the standard of proof by using a jigsaw puzzle analogy was improper and prejudicial. 180 Wn.2d at 436. The prosecutor improperly argued that ut 10 more pieces and

see this picture of the Space Needle. Now you can be halfway done with that puzzle and you know

percent of those puzzle pieces

Lindsay, 180 Wn.2d at 436 (internal quotation marks omitted).

Here, the prosecutor went further than what the prosecutor properly argued in Curtiss.

; here, the prosecutor repeatedly used a

puzzle analogy. First, the visual presented on the PowerPoint slide comparing the reasonable

Presentation, slide 6. Although not objected to, this argument was improper. See State v. Salas, 1 Wn. App. 2d 931, 945, 408 P.3d 383 (2018) (we held that PowerPoint slides should not be used

to communica Second, the prosecutor then argued that the jury sh as a puzzle, and that even though pieces may be missing and the box showing the image may be

missing, eventually, the jury could discern what the image was supposed to be. VRP (Nov. 8, 2018) at 2572-74. The prosecutor argued that the number of pieces required was subjective for

8, 2018) at 2573. The prosecutor made the same argument during his rebuttal. The prosecu analogy to an incomplete puzzle implied that a reasonable doubt may not arise from a lack of

These arguments improperly

equated the beyond a reasonable doubt standard to being confident about what is depicted in an incomplete jigsaw puzzle. The puzzle analogy used repeatedly by the prosecutor wrongfully

implied that the jury was responsible for solving the incomplete jigsaw puzzle. The prosecutor

trivialized and misstated gy.

The prosecutor came dangerously close to quantifying the beyond a reasonable doubt standard of proof even though he did not explicitly place a percentage on how many puzzle pieces were necessary for proof beyond a reasonable doubt. But even if the prosecutor did not explicitly quantify the burden of proof, we hold that the puzzle analogy was still improper as used in this case. B. SPEAK THE TRUTH

Levy-Aldrete next argues that the speak the truth argument, inviting the jury to render a verdict that , also misstated the burden of proof and was improper. We agree and hold that this statement also was improper.

are improper. Lindsay, 180 Wn.2d at 437; Emery, 174 Wn.2d at 760. [T] duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt. Lindsay, 180 Wn.2d at 437 (quoting State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009)). As such, the statement was

.

Although Levy-Aldrete did not object to this statement, it was flagrant and ill-intentioned. There are numerous published cases holding that speak the truth arguments are improper, but the prosecutor disregarded that clear law.

C. EVIDENCE OUTSIDE THE RECORD

Levy-Aldrete next claims that the prosecutor improperly argued evidence outside the record, citing Levy-Aldrete self-inflicted cuts should be compared to television characters who try to fool others into believing they were attacked. We hold that this

argument referring to evidence outside the record was improper.

A prosecutor can commit reversible misconduct by urging the jury to decide a case based

on evidence outside the record. State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).

The prosecutor argued that the superficial cuts on Levy- were not consistent

with cuts from a bottle, as Levy-Aldrete claimed. The prosecutor argued to the jury that television story lines in which a perpetrator inflicts wounds on himself in order to trick the

police demonstrated that Levy- -inflicted.

The State presented no evidence to support its argument that Levy-Aldrete, taking a cue

from television story lines, inflicted his wounds on himself. The television characters was outside the evidence, and it improperly invited the jury to rely on their

own knowledge of television dramas to determine whether Levy-Aldrete cut himself to create a

fictional intruder. This argument explicitly directed the jury to use their knowledge of outside

evidence and presumably, each juror had different knowledge and basis of understanding to

decide whether Levy- -inflicted. We hold that this statement was improper.

Again, Levy-Aldrete did not object to this argument. However, because it is well-settled

that prosecutors are prohibited from arguing matters outside the evidence, this is flagrant and ill-

intentioned.

D. PREJUDICE

Levy-Aldrete argues that there is a substantial likelihood that these instances of misconduct

affected the verdict, any resulting prejudice could not have been cured by an instruction, and that

the cumulative effect of these prejudicial errors requires reversal. We agree and hold that Levy-

Aldrete has met his burden to show reversible misconduct.

When the defendant did not object, such as here, to the speak the truth or to

argument outside of the evidence, we determine whether the statement was so flagrant and ill-

intentioned that no set of instructions could have cured the resulting prejudice. See Lindsay, 180

Wn.2d at 430. Lindsay, 180 Wn.2d at 443

(internal quotation marks omitted). Cumulative error applies when numerous errors deny the State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

We have already determined that the prosecutor misstated the burden of proof by use of a

puzzle analogy, by asking the jurors to reflect[] that in their verdict, and by arguing

evidence outside of the record. VRP (Nov. 8, 2018) at 2619. We look at the effect of each error

on the verdict.

The improper puzzle analogy invited the jury comparing the beyond a reasonable doubt standard to determining what image is depicted in an

incomplete jigsaw puzzle; this argument improperly allowed the jury to think that a lack of

evidence was not a basis for reasonable doubt. This improper argument had a substantial

likelihood of affecting the verdict.

reflect that case rather than focusing on

whether the State met its beyond a reasonable doubt burden of proof. The timing of this argument

increased the prejudice, and no instruction at that time could have been cured the resulting

prejudice.

The argument asking the jury to consider evidence outside the record, considered alone,

may have been harmless error because absent the cumulative effect of the misconduct, it might

have been curable with an instruction. But after arguing that Levy- -

inflicted, the prosecutor then showed the jury the showing the horrific and

significant cuts made on her face with a broken bottle and asked them to compare

those wounds to the superficial cuts on Levy- face. Showing the photograph

was entirely proper as that evidence had been admitted, but when combined with asking the jurors to consider television characters they had seen wound themselves, the prosecutor could not unring

the bell, and we conclude that no instruction could have cured the resulting prejudice.

The cumulative effect of these repeated instances of misconduct were substantially likely

to have affected the verdict. Thus, we hold that Levy-Aldrete has met his burden to show

reversible prosecutorial misconduct.

CONCLUSION

We reverse and remand for a new trial.

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.

SUTTON, A.C.J. We concur:

MAXA, J

CRUSER, J.