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Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 74544-7

Title of Case: State of Washington v. Laris L. Pete

File Date: 10/14/2004

Oral Argument Date: 06/30/2004

SOURCE OF APPEAL

Appeal from Superior Court,

County

Honorable Anthony P Wartnik

JUSTICES

Authored by Gerry L Alexander

Concurring: Faith Ireland

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Charles W. Johnson

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)

) No. 74544-7

Respondent,)

)

v.) En Banc

)

LARIS L. PETE,)

)

Petitioner.)

) Filed October 14, 2004

ALEXANDER, C.J.--Laris Pete was convicted of second degree robbery in King County Superior Court. Following the Court of Appeals' affirmance of his conviction, we granted review. In his petition, Pete contends that he should be afforded a new trial because the jury improperly considered extrinsic evidence that was not admitted at trial. We agree with Pete and reverse the Court of Appeals.

I

On November 17, 2001, at approximately 1:00 a.m., Seattle Police Officers Linda Cook and Amy Branham were on routine patrol in West Seattle. While they were at the corner of Delridge Way and Southwest Orchard, a motorist drove up to their vehicle and informed them that 'there's two guys beating up another guy right over there.' Verbatim Report of Proceedings (VRP) (Mar. 12, 2002) at 99. The informant pointed to a location north of Delridge Way.

When Officers Cook and Branham arrived at the location designated by the informant, they saw Gregorio Olivares-Bahena lying on the ground with two individuals, Laris Pete and Herman Longtimesleeping, standing over him. The officers observed Longtimesleeping in the act of kicking Olivares-Bahena in the head. The officers also witnessed what they thought was Pete's attempt to take a case of beer from Olivares-Bahena's hands. As the officers parked their vehicle, they observed Pete complete the taking of the beer from Olivares-Bahena and begin walking away from Olivares-Bahena together with Longtimesleeping. After the officers commanded Pete and Longtimesleeping to stop, Pete complied. Longtimesleeping, however, fled from the scene but was apprehended by Officer Cook after a brief pursuit on foot. A search of Pete's pants pocket revealed two bottles of beer. A case of beer was found in a grassy area near where Pete was standing. The police officers both observed that Olivares-Bahena had injuries to his face. Olivares-Bahena informed them that he was in the process of going to his home from a gas station when he was approached by Pete and

Longtimesleeping. He told the officers that he had engaged in a conversation with the two men and that they eventually asked him if they could have a beer. Olivares-Bahena said that he responded by giving each of them a beer. According to Olivares-Bahena, when they asked for more beer, he declined their request. He said that Longtimesleeping then struck him in the face. Olivares-Bahena indicated that the blow caused him to fall to the ground where he was then kicked by Longtimesleeping. He advised the officers that Longtimesleeping was the one who assaulted him while Pete attempted to take the case of beer out of his hands. All of the statements Olivares-Bahena made to the officers at the scene were admitted at trial as excited utterances pursuant to ER 803(a)(2).

Olivares-Bahena's testimony at trial differed in some respect from the statements he allegedly gave to the officers at the scene. He testified that he gave beer to Pete and Longtimesleeping so that the two men would leave him alone. Olivares-Bahena also testified that Longtimesleeping asked him for money after he had given Pete and Longtimesleeping the beer. He indicated that he responded by saying that he had no money. Olivares-Bahena testified, additionally, that he tried to move his wallet from his back pocket to his front pocket in order to prevent Longtimesleeping from taking it from him. In doing so, he fell and hit his head on the ground. He said that he did not remember if either of the defendants hit him after that.

While being transported to a police precinct station after his arrest, Pete told another officer that 'he only took some beer' from Olivares-Bahena and

that Longtimesleeping was the one who actually assaulted Olivares-Bahena.

Clerk's Papers (CP) at 32. Pete also told the officer that Olivares-Bahena received facial injuries when he fell to the ground after wrestling with Longtimesleeping. At the precinct station, Pete signed a written statement, in which he indicated that Olivares-Bahena offered him a beer and at which time 'the other guy {Longtimesleeping} . . . came up.' Id. at 33. His written statement also contained the assertion that Olivares-Bahena 'handed' him the rest of the beer and that he then walked away as instructed by Olivares-Bahena. Id.

Pete and Longtimesleeping were charged together in King County Superior Court with robbery in the first degree. Before trial, a CrR 3.5 hearing was held. At the conclusion of this hearing, the trial court determined that the oral and written statements Pete gave to the police officers were admissible. Neither statement, however, was offered into evidence at trial. The jury was instructed on the lesser included crime of robbery in the second degree.

After deliberating for less than half a day, the jury informed the trial court that it had reached a verdict. Before the verdict was rendered, the trial judge told the parties that two documents had been inadvertently sent to the jury room. One document was the police officer's written report recounting statements that Pete allegedly made during the time he was being transported to the precinct station. The other was Pete's written and signed statement. The trial court noted that as soon as it learned that unadmitted documents had been furnished to the jury, the

bailiff retrieved the officer's statement and 'grabbed' a second document.

VRP (Mar. 14, 2002) at 68. The latter document was mistakenly retrieved because it had been admitted into evidence. When this error was realized, the bailiff returned to the jury room to replace the admitted document and retrieve the other unadmitted document. The bailiff then instructed the jurors to disregard the unadmitted documents during their deliberations.¹ After the parties were informed of these happenings, they agreed that the jury's verdict should be received and that the trial court should then poll the jurors about who saw and/or read the documents that should not have gone to the jury room.

The jury acquitted Pete and Longtimesleeping of the charge of robbery in the first degree but found them both guilty of the lesser included offense of robbery in the second degree. In response to questioning by the trial court, the jurors acknowledged that the bailiff told them to disregard the documents that had been inadvertently sent to the jury room. However, some of the jurors indicated that they had seen and/or read the unadmitted documents.²

Pete moved for a new trial claiming that he was prejudiced by the submission to the jury of the documents that had not been admitted into evidence. The trial court denied the motion concluding that although it was error for the nonadmitted documents to be submitted to the jury, the error was harmless because (1) the documents were only in the jury room for a brief amount of time, (2) the jury was instructed to disregard the documents, and (3) the statements contained in the police report and Pete's

written statement were exculpatory in nature.

Division One of the Court of Appeals affirmed Pete's conviction, concluding that there was no reasonable ground to believe that the jury's exposure to the nonadmitted documents prejudiced Pete and that the other evidence presented was more than sufficient to convict Pete of second degree robbery. *State v. Pete*, No. 50404-5-1, slip op. at 7 (Wash. Ct. App. June 16, 2003). Pete then filed a motion for discretionary review with this court. We granted the petition.

II

Pursuant to CrR 7.5(a)(1), a trial court 'may' grant a defendant's motion for a new trial if it 'affirmatively appears that a substantial right of the defendant was materially affected' by the jury's receipt of 'any evidence, paper, document or book not allowed by the court.' A new trial is warranted in such circumstances only when the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). A trial court's denial of a motion for a new trial will not be reversed on appeal unless there is a clear showing of abuse of discretion. *Id.* An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *Id.*

Generally, we are reluctant to inquire into how a jury arrives at its verdict. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). There must be a strong, affirmative showing of misconduct in order to overcome

the long-standing policy in favor of 'stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.' Id. at 118. It is, however, misconduct for a jury to consider extrinsic evidence and if it does, that may be a basis for a new trial. Id. at 118. "Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document." Id. (quoting *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990)). This type of 'evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal.' Id.

As noted above, the documents that were inadvertently submitted to the jury were the written and signed statement that Pete gave at the precinct station and a written report by the officer who transported Pete to the station. In his written statement, Pete indicated that Olivares-Bahena gave him some beer after which Longtimesleeping walked up to them. Pete went on to state that Olivares-Bahena then handed him the rest of the beer and instructed him to walk away. Pete also said that he did not look back after walking away and was not aware of what Olivares-Bahena and Longtimesleeping 'were doing.' CP at 33. In the written report, the police officer stated that Pete told him that 'he only took some beer, but that the other guy {Longtimesleeping} was the one who actually beat the victim {Olivares-Bahena}.' Id. at 32. The officer also said that Pete told him that Olivares-Bahena received his injuries when he fell onto the sidewalk while wrestling with Longtimesleeping.

As noted above, the Court of Appeals held that the trial court did not

abuse its discretion in denying Pete's motion for a new trial, concluding that Pete could not demonstrate any prejudice from the inadvertent submission of the two documents to the jury. The State asserts that the Court of Appeals' decision was correct, averring that although the inadvertent submission of the two documents was erroneous, the error was harmless. See Suppl. Br. of Resp't at 13. The State asserts that regardless of the inadvertent submission of the two documents, its case against Pete was 'very strong' and the conviction should stand. *Id.* at 12. In support of its argument, the State points to the fact that: (1) two police officers caught Pete and Longtimesleeping in the act of robbing Olivares-Bahena; (2) Olivares-Bahena immediately made statements corroborating what the two police officers had observed; (3) while Olivares-Bahena's testimony at trial differed from his statements made at the scene, Olivares-Bahena never absolved Pete from wrongdoing; rather Olivares-Bahena testified 'he thought the defendants wanted to rob him'; and (4) the two documents that were inadvertently submitted to the jury were exculpatory in nature. *Id.* at 12. We disagree.

Although two police officers did testify that they saw Pete and Longtimesleeping in the act of robbing Olivares-Bahena, that evidence was refuted somewhat by Olivares-Bahena's testimony at trial that he 'gave' beer to Pete and Longtimesleeping so that they would leave him alone. Furthermore, the two statements that were improperly sent to the jury room are not, as the State contends, entirely exculpatory. Although both statements point to Longtimesleeping as the one who assaulted Olivares-

Bahena, they do not absolve Pete from all wrongdoing. Significantly, the transporting officer's report indicates that Pete told the officer that 'he only took some beer.' CP at 32. This statement may be considered inculpatory because it indicates that Pete participated in taking property from Olivares-Bahena while Olivares-Bahena was being assaulted by Longtimesleeping. In addition, when the two unadmitted statements are viewed together, they are harmful to Pete in the sense that they are contradictory and could suggest to a jury that Pete is a liar who cannot be believed.

While it is undisputed that the jury received evidence that it should not have seen, the critical question that remains is whether the jury's receipt of this evidence prejudiced Pete. Pete's defense throughout the trial was a general denial of participation in any wrongdoing. Although Pete did not testify, he clearly relied on Olivares-Bahena's testimony at trial that Pete did not speak to him or touch him the night of the incident, that Olivares-Bahena voluntarily gave the beer to Pete, and that Olivares-Bahena had problems remembering what actually transpired that night. The submission of the two documents to the jury seriously undermined this defense and nothing short of a new trial can correct the error. 3 We conclude that the introduction of these documents into the sanctity of the jury room did prejudice Pete and that the trial court, therefore, abused its discretion in not granting a new trial.⁴

Lastly, even though the State downplays the trial court error by pointing out that the evidence was deemed admissible during Pete's CrR 3.5 hearing,

the fact remains that the documents were not offered or admitted at trial.

The jury's receipt of this extrinsic evidence after the close of its evidence presented a 'no win' situation for Pete because he was not able to object to or explain the extrinsic evidence. Furthermore, his counsel was unable to cross-examine either the transport officer or the officer who took Pete's statement. The fact that the bailiff instructed the jurors to not consider the extrinsic evidence does not, in our view, mitigate the harmfulness of the error. Even if the trial court had given the instruction, which would be the appropriate practice, the same can be said.

III

The Court of Appeals' decision affirming the trial court's denial for a new trial is reversed and this case is remanded for a new trial.

WE CONCUR:

1The record does not indicate how much time elapsed between the time the bailiff took the exhibits into the jury room and the time she removed the two inadmissible exhibits from the room. The record only indicates that the bailiff retrieved the exhibits 'as soon as she realized' that the mistake occurred. VRP (Mar. 14, 2002) at 68.

2The record that has been furnished to us does not contain the questions propounded to the jurors by the trial judge or the answers that they gave to these questions. However, the following colloquy between Longtimesleeping's attorney and the trial court indicates that at least two

or three jurors viewed the extrinsic evidence:

'MR. FLORA: Well, your Honor, I don't know if the record is clear that in response to your question {regarding the extrinsic evidence} to the jurors, it looked like virtually all of them nodded their heads yes to the effect--

'THE COURT: I don't know {if} all of them did but some did. More than one. There were at least two or three that I recognized as reacting that way.' VRP (Mar. 14, 2002) at 71.

3The dissent asserts that 'the majority's argument raises only a possibility that Pete was prejudiced by the evidence improperly furnished to the jury.' Dissent at 2. We disagree. The dissent discounts the fact that Pete did not testify at trial. The jury's consideration of those documents was tantamount to Pete actually testifying without the opportunity for explanation by his counsel.

4The dissent also implies that our decision reversing the Court of Appeals and granting Pete a new trial establishes a 'per se rule requiring a new trial every time a jury is improperly presented with evidence.' Dissent at 2. We have not endorsed a per se rule by our decision here. We continue to apply the long standing rule that 'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.' State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (emphasis added) (citing State v. Burke, 124 Wash. 632, 215 P. 31 (1923)); see also Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959).

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