

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LUIS FERNANDO VARGAS-GUTIERREZ,

Appellant.

No. 40299-8-II

UNPUBLISHED OPINION

Worswick, A.C.J. — Luis Vargas-Gutierrez appeals his conviction and sentence for possessing cocaine with intent to deliver. He argues that (1) the State’s trial assistant improperly contacted a witness out of court and (2) he received ineffective assistance of counsel when his attorney did not object to jury instructions that required that the jury be unanimous to return a “no” on the special verdicts. In a statement of additional grounds¹ (SAG), he asserts that the police illegally questioned him after he invoked his right to remain silent. We affirm.

FACTS

As part of a drug task force investigation of Ivan Cepeda-Cepeda, the police executed a search warrant on the apartment where Vargas-Gutierrez was living. The police recovered methamphetamine, marijuana, cocaine, and four firearms from the apartment. The police found the cocaine, along with a pistol, inside a laundry detergent box. There were no guns or drugs in Vargas-Gutierrez’s bedroom.

Detective Tim Boardman interviewed Vargas-Gutierrez at the apartment, but because

¹ RAP 10.10.

Vargas-Gutierrez spoke Spanish and not English, Officer Frank Gomez translated for him.

Vargas-Gutierrez agreed to speak to the police after being read his *Miranda*² rights in Spanish.

Vargas-Gutierrez initially told Detective Boardman that he had no knowledge of the guns or drugs. But Vargas-Gutierrez later admitted that he knew there were guns and drugs in the apartment. Vargas-Gutierrez said he did not want to talk about the contraband at first because he feared retaliation if he did.

Vargas-Gutierrez said that he went with Cepeda-Cepeda to pick up the detergent box from an unknown location. He later changed this statement, saying that he and Cepeda-Cepeda took the box to show it to some people Vargas-Gutierrez did not know, and then brought it back to the apartment.

The State charged Vargas-Gutierrez with possession of cocaine, methamphetamine, and marijuana, all with intent to deliver, alleging that all three counts occurred within 1,000 feet of a school bus stop³ and that he was armed with a firearm during the offenses.⁴ The State also charged Vargas-Gutierrez with three counts of possession of a stolen firearm.

The trial court allowed Detective Spencer Harris to remain in the courtroom as the State's representative, and granted the State's ER 615 motion to exclude the other witnesses from the

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

³ Under RCW 9.94A.533(6) and RCW 69.50.435(c), a person who possesses a controlled substance with intent to deliver within 1,000 feet of a school bus stop receives a 24-month sentence enhancement.

⁴ Under RCW 9.94A.533(3), a person who possesses a controlled substance with intent to deliver while armed with a firearm receives a three year sentence enhancement.

courtroom during testimony.⁵ At a CrR 3.5 hearing, Detective Boardman testified as to Vargas-Gutierrez's statements. Officer Gomez also testified at the CrR 3.5 hearing that Vargas-Gutierrez had admitted that he knew there were guns and drugs in the apartment. Officer Gomez testified that he did not remember any more specific admissions.

The trial court found Vargas-Gutierrez's statements admissible under *Miranda*. But the trial court ruled that Detective Boardman's testimony regarding these statements would be excluded as hearsay because Detective Boardman only understood Vargas-Gutierrez's statements as translated by Officer Gomez. The trial court ruled that the State could introduce Vargas-Gutierrez's statements through Officer Gomez, however.

Officer Gomez testified at a subsequent offer of proof hearing. At this hearing, Officer Gomez reviewed a probable cause statement that documented what Vargas-Gutierrez had said at the interview. The trial court told Officer Gomez, "[W]e want to make it very clear that we are asking you what your recollection is from [the interview], not just reciting what you've learned by reading the probable cause statement." 2 Report of Proceedings (RP) at 210-11.

Officer Gomez again testified that he remembered Vargas-Gutierrez saying that Vargas-Gutierrez knew there were guns and drugs in the apartment. Officer Gomez testified that this was all he remembered from the interview. The trial court ruled that, because Officer Gomez had testified as to what he independently recollected, any further attempt to refresh his memory would contaminate his memory. Therefore, his testimony regarding Vargas-Gutierrez's other statements

⁵ The State's motion read, "To exclude witnesses. ER 615. However, the State will reserve the right to have VPD/CCAT Detective Spencer Harris, the primary investigating officer in this case, remain at counsel table during trial." Clerk's Papers (CP) at 17.

would be inadmissible.

However, from his testimony it appeared that Officer Gomez was under the impression that he was only allowed to testify as to what he remembered without refreshing his recollection. Officer Gomez stated that he had not testified about anything from the probable cause statement because he “did not independently recollect it.” 2 RP at 221. Officer Gomez further stated that he had testified only as to what he remembered without looking at the probable cause statement.

Officer Gomez subsequently testified before the jury, repeating his testimony that Vargas-Gutierrez said he knew there were guns and drugs in the apartment. The next day, the State sought to recall Officer Gomez. The State explained that Officer Gomez had been confused by the instructions to testify only as to what he independently recollected. The State informed the court that Officer Gomez was not claiming that he remembered new information, but rather that he had mistakenly believed he was not allowed to testify about all the statements he remembered.

At a hearing outside the presence of the jury, Officer Gomez confirmed that he had been confused and had believed he was allowed to testify only about facts he remembered without refreshing his memory. Vargas-Gutierrez objected to the State recalling Officer Gomez. But the trial court found Officer Gomez credible and allowed the State to recall him. Officer Gomez then testified before the jury, relating Vargas-Gutierrez’s statements concerning the detergent box. Vargas-Gutierrez attempted to impeach Officer Gomez on cross-examination by highlighting the fact that Officer Gomez had not mentioned these statements during his prior testimony.

Before the close of trial, the trial court dismissed all the charges for insufficient evidence, except for the cocaine charge. The trial court gave jury instructions on the special verdicts which

stated, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Clerk’s Papers (CP) at 101-02. Vargas-Gutierrez’s counsel did not object to this instruction. The jury found Vargas-Gutierrez guilty of possession of cocaine with intent to deliver and returned “yes” verdicts on both special verdicts.

Vargas-Gutierrez moved for a new trial based on the State’s recalling Officer Gomez. The trial court held a hearing on this motion. At this hearing, Detective Harris testified that he had contacted Officer Gomez outside of court because Officer Gomez appeared confused as to what he could testify about during his initial testimony before the jury. Detective Harris denied coaching Officer Gomez as to what to say. The trial court denied the motion for a new trial. Vargas-Gutierrez appeals.

ANALYSIS

I. Detective Harris’s Out-of-Court Contact

Vargas-Gutierrez first argues that the trial court’s failure to exclude Officer Gomez’s second round of testimony violated his right to a fair trial. He argues that Detective Harris’s out of court contact with Officer Gomez constituted “egregious misconduct” because it violated the trial court’s order excluding witnesses. He asks this court to reverse his conviction based on this misconduct. We reject this argument.

The trial court’s order did not prohibit all out-of-court contact between witnesses. The State’s motion read, “To exclude witnesses. ER 615.” CP at 17. The trial court granted this motion without adding any prohibitions on witnesses contacting each other out of court.

ER 615 provides, “At the request of a party the court may order witnesses excluded so

that they cannot hear the testimony of other witnesses.” “The intent of ER 615 is ‘to discourage or expose inconsistencies, fabrication, or collusion.’” *State v. Skuza*, 156 Wn. App. 866, 896, 235 P.3d 842 (2010) (quoting Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 615.2, at 623 (5th ed. 2007)). A conversation that does not contravene this intent does not violate an ER 615 order. *See Skuza*, 156 Wn. App. at 897. But a conversation between excluded witnesses that promotes fabrication or collusion may violate an ER 615 order. *Skuza*, 156 Wn. App. at 897.

No ER 615 violation occurred here. The record reflects that Detective Harris and Officer Gomez did not discuss the substance of Officer Gomez’s testimony or collude to alter or fabricate Officer Gomez’s testimony. Officer Gomez testified that he had been confused and had believed he was only allowed to testify as to information he remembered without refreshing his memory. The trial court found him credible. There is nothing in the record to suggest that the contact between Detective Harris and Officer Gomez violated the trial court’s ER 615 order.

Vargas-Gutierrez cites *State v. Granacki*, 90 Wn. App. 598, 604, 90 P.2d 667 (1997), for the proposition that allowing Officer Gomez to testify the second time violated Vargas-Gutierrez’s right to a fair trial. *Granacki* reversed the defendant’s conviction after the State’s trial assistant was seen reading defense counsel’s trial notes and speaking to a juror. 90 Wn. App. at 600. The trial court dismissed the charges with prejudice and the *Granacki* court affirmed, holding that the “egregious” behavior of the State’s trial assistant prejudiced the defendant’s right to counsel. 90 Wn. App. at 603-04.

Citation to *Granacki* is inapposite here. Here there was no misconduct, let alone

egregious conduct prejudicing a constitutional right. Vargas-Gutierrez's argument on this point fails.

II. Special Verdict Unanimity Instruction

Vargas-Gutierrez next argues that he received ineffective assistance of counsel when defense counsel failed to object to the unanimity instructions at trial. We disagree.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). We review ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

In order to show that he received ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citation omitted). There is a strong presumption that counsel's performance was not deficient. *Grier*, 171 Wn.2d at 33.

State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003), held that unanimity is not required for a jury to answer "no" on a special verdict. But the *Goldberg* jury was not given written instructions that it must be unanimous to return a "no" verdict. 149 Wn.2d at 893. Instead, the jury returned a non-unanimous "no" on a special verdict and the trial court verbally instructed them to continue deliberating to attempt to reach unanimity. *Goldberg*, 149 Wn.2d at 892. After additional deliberations, the jury returned a unanimous "yes" verdict. *Goldberg*, 149 Wn.2d at 891-92. *Goldberg* reversed the special verdict, holding that returning the jury for

continued deliberations was error because unanimity is not required for a finding of “no” on a special verdict. 149 Wn.2d at 894.

Prior to Vargas-Gutierrez’s trial, Division Three of this court decided *State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (2008), *rev’d*, 169 Wn.2d 133, 234 P.3d 195 (2010). Just as in the instant case, the trial court in *Bashaw* instructed the jury, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 144 Wn. App. at 201. *Bashaw* held that this instruction was not error under *Goldberg* because *Goldberg* was limited to its facts and did not apply to jury instructions. 144 Wn. App. at 202.

Our Supreme Court subsequently reversed, holding that it is error to instruct the jury that it must be unanimous to answer “no” on a special verdict increasing the maximum penalty for a crime. *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). However, Vargas-Gutierrez’s trial occurred before this reversal. At the time of Vargas-Gutierrez’s trial, Division Three’s opinion in *Bashaw* was valid precedent. As noted above, there is a strong presumption that counsel’s performance is not deficient. Under this presumption, we cannot say that it was deficient performance for counsel to rely on a published Court of Appeals opinion. Although the Supreme Court ultimately reversed the Court of Appeals in *Bashaw*, we will not hold counsel’s performance deficient for failure to anticipate a Supreme Court decision. Because Vargas-Gutierrez has not shown deficient performance, his ineffective assistance claim fails.

STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Vargas-Gutierrez asserts that his right to remain silent was violated when police questioned him after he invoked said right. Vargas-Gutierrez bases this argument on one

line of Detective Boardman’s CrR 3.5 testimony, where Detective Boardman testified that Vargas-Gutierrez “said he didn’t want to talk about” the drugs found in the apartment. 1 RP at 115.

Taken in context, it is clear that Detective Boardman was relating Vargas-Gutierrez’s explanation for why he initially denied all knowledge of drugs in the apartment but later changed his story.

Detective Boardman did not testify or imply that Vargas-Gutierrez invoked his right to remain silent. Vargas-Gutierrez’s claim on this point fails.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Armstrong, J.

Hunt, J.