

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 65443-8-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
JOSÉ ANGEL BLANCO,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>July 25, 2011</u>
)	
)	

Cox, J. – A defendant who does not timely object and request a curative instruction waives any claim of prosecutorial misconduct on appeal unless the argument 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.”¹ Here, José Angel Blanco appeals his conviction for first degree murder, claiming that the prosecutor committed flagrant and ill-intentioned misconduct during closing argument. Specifically, he claims the prosecutor argued that “in order for a juror’s doubt as to an element of the charged crime to be ‘reasonable,’ all 12 jurors must agree.” Blanco did not object to the prosecutor’s actual remarks. Moreover, Blanco misconstrues the prosecutor’s actual remarks. The prosecutor’s actual remarks were neither flagrant nor ill-intentioned. Accordingly, Blanco waived the argument by failing to object. We

¹ State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

affirm.

Blanco was married to Noemi Lopez and the couple had three children together. The marriage was dissolved in 2007. After the dissolution, Blanco threatened to kill Lopez if he saw her with another man.

On Thanksgiving Day, November 27, 2008, Lopez and her children spent the day with Lopez's family. That night, Lopez went out with her sister and mother. When they returned to Lopez's mother's house, Blanco was there waiting. He confronted Lopez, and they argued.

The next night, Lopez went out with her sister to a club. Blanco was waiting for them at the club and parked his car next to Lopez's vehicle. He was angry and told her to go home. Blanco then left and Lopez went into the club. A few minutes later Blanco called Lopez's cell phone and yelled at her. He also sent a text message to Lopez's brother-in-law that night stating, "I am going to take care of [Lopez]." Blanco left Lopez several additional messages over the Thanksgiving weekend complaining that she was going out and seeing other men.

On Sunday morning, November 30th, Blanco was at Lopez's house. Their oldest daughter heard them arguing. The children went to church with their aunt Rosalba and their grandmother around 12:30 or 1:00 p.m., leaving Lopez and Blanco alone at Lopez's house.

Around 3:00 pm, Blanco called his cousin and stated that he had "just made a big stupidity" and killed Lopez. Blanco also left a voicemail message for

his oldest daughter telling her not to go home, and asking for her to forgive him and take care of her brother and sister.

When Rosalba took the children home after church, they found Lopez dead on the living room floor. Lopez had been stabbed 58 times with a knife.

Later that day, Blanco confessed to his girlfriend that he had killed Lopez. Blanco then fled to Mexico. He returned to Seattle and turned himself in to the police in December.

The State charged Blanco with one count of first degree murder with a deadly weapon enhancement.

During closing argument, the prosecutor discussed the State's burden of proving every element of the charged crime beyond a reasonable doubt. Blanco did not object to the prosecutor's remarks. The jury convicted Blanco as charged.

Blanco appeals.

PROSECUTORIAL MISCONDUCT

Blanco argues that the prosecutor committed misconduct by improperly arguing that a juror's doubt as to an element of the crime charged is not reasonable unless all 12 jurors agree. We disagree.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict.² A defendant claiming prosecutorial

² State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

misconduct bears the burden of demonstrating that the conduct was both improper and prejudicial.³ This court reviews allegedly improper comments in the context of the prosecutor's entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.⁴ Jurors are presumed to follow the court's instructions.⁵

A defendant who does not timely object and request a curative instruction waives any claim of prosecutorial misconduct on appeal unless the argument 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."⁶ The absence of a contemporaneous objection strongly suggests that the comments did not appear critically prejudicial to the defendant in the context of trial.⁷

Here, the court instructed the jury as follows:

Instruction No. 1

. . . .

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. . . . You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.^[8]

³ State v. Harvey, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983).

⁴ State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

⁵ State v. Ingle, 64 Wn.2d 491, 499, 392 P.2d 442 (1964).

⁶ Brown, 132 Wn.2d at 561.

⁷ State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

⁸ Clerk's Papers at 25.

Instruction No. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime 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.^[9]

Instruction No. 3

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.^[10]

During closing argument, the prosecutor addressed the State's burden of proving every element of the charged crime beyond a reasonable doubt. After quoting Instruction 2, the reasonable doubt instruction, he argued:

What I'd like to note to you about this paragraph is some of the things that it doesn't say. It doesn't say that a reasonable doubt means the following. A reasonable doubt does not mean beyond all doubt or beyond all unreasonable doubt or beyond any doubt or to an absolute certainty.

⁹ Id. at 27.

¹⁰ Id. at 28.

There are very few things in this world that occur with mathematical precision and that is built into our criminal justice system. It's beyond a reasonable doubt. ***A reasonable doubt is one that you would feel comfortable and do feel comfortable talking about with your fellow jurors, putting out there for a discussion, and once a thorough discussion of 12 reasonable people is done in regard to it, it is still believed to be reasonable.***

You don't leave your reason or your common sense at the door. And if at the end of your deliberations you have an abiding belief in the truth of the charge of murder in the first degree then the defendant is guilty. It's a pretty high burden. The State embraces it however. It's what our law requires.^[11]

Blanco did not object.

He now argues that the above emphasized portion of the prosecutor's argument was improper and prejudicial because it told the jury that a juror's doubt is not reasonable unless every juror agrees with him. This argument mischaracterizes the prosecutor's actual remarks.

The plain words of the above quotation show that the prosecutor did not argue that a juror's doubt is not reasonable unless every juror agrees with him. Rather, the prosecutor urged the jury to discuss their doubts with each other in order to determine whether such doubts are reasonable. This argument was proper and consistent with the court's instructions to the jury. It was neither flagrant nor ill-intentioned.

Instruction 3 directed the jury to "discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." Instruction 3 also states

¹¹ Report of Proceedings (April 15, 2010) at 11-12.

that each juror “must decide the case for yourself . . . [and] not surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.” The prosecutor’s argument did not suggest that a juror could not maintain his doubts even if all of the other jurors did not agree with him. It merely urged the jurors to deliberate, as required by law.¹²

For these reasons, the absence of a timely objection is fatal to the claim now raised for the first time on appeal.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spencer, J.

Edenborn, J.

¹² State v. Cross, 156 Wn.2d 580, 616, 132 P.3d 80 (2006) (“We want juries to deliberate, not merely vote their initial impulses and move on.”).