

SUPREME COURT OF WASHINGTON

State v. Brush

183 Wash. 2d 550 (2015) · Decided July 2, 2015

OPINION

OWENS, J.

Owens, J. ¶1 Brian Brush was convicted of first degree murder for killing his ex-fiancée. The trial court imposed an exceptional sentence based on the jury’s finding that the murder was an aggravated domestic violence offense. Brush appeals the domestic violence finding on two grounds.

First, he challenges a jury instruction defining “prolonged period of time” in the context of the domestic violence aggravating factor. He contends that this instruction violated the constitutional rule against judges commenting on the evidence. Const, art. IV, § 16.

The Court of Appeals agreed, and we affirm. The instruction defining “prolonged period of time” essentially resolved a factual question for the jury and thereby constituted an improper comment on the evidence. Accordingly, we reverse Brush’s exceptional sentence and remand to the trial court with instructions that, if requested, it may impanel a jury to consider evidence of a prolonged pattern of abuse. ¶2 Second, Brush challenges the trial court’s decision to admit certain hearsay statements made by the victim’s daughter during the sentencing phase of his trial.

Although we reverse his exceptional sentence on another ground, we address this issue because it is likely to come up on remand. We hold that the trial court did not abuse its discretion when it allowed the victim’s daughter to testify because her testimony related to an incident where Brush stalked her and her mother.

The judge properly ruled that her mother’s statements made at the time of the incident fell under the excited utterance and present sense impression exceptions to the rule against hearsay. FACTS ¶3 On September 11, 2009, Brush shot his ex-fiancée four times with a shotgun.

The shooting occurred on a beach in view of several witnesses, including three police officers who were patrolling an event on the beach. The officers arrested Brush immediately at the scene. The State charged him with first degree murder and alleged multiple aggravating factors, including — at issue here — that the offense involved aggravated domestic violence.

The trial was bifurcated into a guilt phase and a penalty phase. At the end of the guilt phase, the jury found Brush guilty of first degree murder. The jury also found multiple aggravating factors, including that Brush’s conduct manifested deliberate cruelty to the victim, that the victim’s

injuries *554substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense, and that the crime was an aggravated domestic violence offense. ¶4 The two issues in this case both involve the penalty phase — specifically, the testimony of the victim’s daughter and the jury instruction on the domestic violence aggravating factor.

Testimony by the Victim’s Daughter ¶5 The only evidence presented during the penalty phase was testimony by the victim’s daughter. She testified about an incident that had occurred in August 2009, when she and her mother went for a walk outside her mother’s house and Brush began following them in his truck. She testified that her mother was very scared and that as Brush revved the engine near them, her mother realized that he was not going to simply drive by and said, “ ‘He’s not stopping.

Run.’ ”11 Verbatim Report of Proceedings (VRP) (Dec. 6, 2011) at 179 (formatting omitted). They ended up hiding behind some cars in a nearby parking lot. Her mother was bawling, shaking, and throwing up. Her mother stated that a similar stalking incident had happened earlier that same day.

The victim’s daughter then described a number of phone calls and text messages she had received from Brush that day about her mother cheating on him. ¶6 The defense challenged all of the victim’s daughter’s statements as hearsay, and the judge ruled that the statements fell within the excited utterance exception to the hearsay rule. Domestic Violence Aggravating Factor ¶7 During the penalty phase, the trial court instructed the jury to determine whether the crime was an aggravated domestic violence offense.

To find that Brush’s crime was an aggravated domestic violence offense, the jury had to find two elements: (1) that the victim and the defendant were family or household members and (2) that *555the offense was part of an ongoing pattern of psychological abuse of the victim “manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.535(3)(h)(i). ¶8 The instruction at issue in this case explained, “An ‘ongoing pattern of abuse’ means multiple incidents of abuse over a prolonged period of time.

The term ‘prolonged period of time’ means more than a few weeks.” Clerk’s Papers (CP) at 229. ¶9 The evidence at trial showed that the other incidents of abuse occurred during a two-month period prior to the September 11, 2009 murder. Brush hit the victim’s car with a hammer after an argument occurred in July 2009, and the stalking described by the victim’s daughter occurred in August 2009.

A defense expert acknowledged, “I know he was following [the victim] around and calling her and dogging her throughout this period of time after [the July 2009 incident].” 9 VRP (Dec. 5, 2011) at 139. The defense expert also referenced statements made by Brush that he would financially ruin the victim. Brush made those statements at couples counseling around that same time period. ¶10 The jury found that Brush’s offense was an aggravated domestic violence offense.

Exceptional Sentence and Appeal ¶11 The standard range sentence was 240-320 months. The trial judge imposed an exceptional sentence of 1,000 months and a 60-month firearm enhancement. The trial judge explained that the exceptional sentence was justified by the aggravating factors found by the jury and that those factors “taken together or considered individually constitute [d] sufficient cause to impose the exceptional sentence.” CP at 54.

He stated, “This Court would impose the same sentence if only one of the [aggravating factors] is valid.” Id. ¶12 Brush appealed, and the Court of Appeals affirmed his conviction but reversed his exceptional sentence. *State v. Brush*, noted at 181 Wn. App. 1009, 2014 WL 1912009, at *556*8, 2014 Wash. App. LEXIS 1183, at *23.

The Court of Appeals ruled that not one of the aggravating factors could be sustained based on the record. 2014 WL 1912009, at *8, 2014 Wash. App. LEXIS 1183, at *23. On the issue now in front of this court, the Court of Appeals held that the jury instruction on “prolonged period of time” constituted an improper comment on the evidence. 2014 WL 1912009, at *7, 2014 Wash. App.

LEXIS 1183, at *20-21. The Court of Appeals remanded to the superior court “for resentencing with instructions that the trial court may, if requested, impanel a jury to consider evidence of a prolonged pattern of abuse.” 2014 WL 1912009, at *8, 2014 Wash. App. LEXIS 1183, at *23-24. ¶13 The State petitioned this court for review solely on the issue of the “prolonged period of time” jury instruction.

Brush filed an answer and cross petition raising a number of additional issues. We granted the State’s petition and review of one issue raised by Brush: whether the trial court abused its discretion when it admitted the victim’s daughter’s testimony regarding statements made by her mother. *State v. Brush*, 181 Wn.2d 1007, 335 P.3d 940 (2014). ISSUES ¶14 1. Did the pattern jury instruction defining “prolonged period of time” constitute an improper comment on the evidence? ¶15 2.

Did the trial court abuse its discretion when it ruled that the victim’s daughter’s testimony regarding her mother’s statements qualified as excited utterances? ANALYSIS 1. The Pattern Jury Instruction on “Prolonged Period of Time” Constituted an Improper Comment on the Evidence in This Case ¶16 The Washington State Constitution does not allow judges to “charge juries with respect to matters of *557fact, nor comment thereon.” Const, art. IV, § 16.

Instead, they “shall declare the law.” Id. “A jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge.” *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). But, as described below, the jury instruction regarding “prolonged period of time” in this case did not accurately state the law.

Since the definition essentially resolved a contested factual issue (whether the abuse occurred over a “prolonged period of time”), it constituted an improper comment on the evidence and effectively relieved the prosecution of its burden of establishing an element of the domestic violence aggravating factor.

As a result, we reverse Brush’s exceptional sentence, which was based on that aggravating factor.

A. The Jury Instruction Incorrectly Interpreted Case Law and Resulted in an Improper Comment on the Evidence ¶17 The jury instruction used in this case reflected the pattern jury instruction, which states, “The term ‘prolonged period of time’ means more than a few weeks.” 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.17, at 719 (3d ed.

2008) (WPIC). This pattern jury instruction is based on *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001). In *Barnett*, a trial judge imposed an exceptional sentence based on four factors, including that the offenses were part of a pattern of abuse over a “ ‘prolonged two week period of time.’ ” *Id.* at 202.

The Court of Appeals reversed the exceptional sentence, finding that “[t]wo weeks is not a prolonged period of time.” *Id.* at 203. The Court of Appeals reviewed three prior Court of Appeals cases and concluded that they “suggested] that years are required” in order to find a “prolonged period of time.” *Id.* (citing *State v. Schmeck*, 98 Wn. App. 647, 651, 990 P.2d 472 (1999); *State v. Duvall*, 86 Wn.

App. 871, 877, 940 P.2d 671 (1997); *State v. Quigg*, 72 Wn. App. 828, 841, 866 P.2d 655 (1994)). *558 ¶18 Thus, the *Barnett* holding that two weeks was not a “prolonged period of time” resulted in the pattern jury instruction: “The term ‘prolonged period of time’ means more than a few weeks,” WPIC 300.17. That language is an inaccurate interpretation of the holding of *Barnett* because it implies that any abuse that occurs for more than a few weeks is a “prolonged period of time.” However, *Barnett* did not provide a legal definition of “prolonged period of time.” It held only that two weeks was not legally sufficient to be a “prolonged period of time” — not that abuse occurring longer than two weeks would be legally sufficient. ¶19 Furthermore, the question faced by the court in *Barnett* was whether the specific facts in that case were legally sufficient for the court to uphold an exceptional sentence based on abuse occurring over a “prolonged period of time.” This is not an appropriate basis on which to create a jury instruction defining “prolonged period of time.” Thus, we clarify that legal definitions should not be fashioned out of courts’ findings regarding legal sufficiency. ¶20 Perhaps more importantly, we question the propriety of instructing the jury based on case law that did not take into account the jury’s role in determining facts that increase the penalty for a crime.

Barnett was published prior to the United States Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In *Blakely*, the Court held

that a defendant has the right for a jury to determine any fact that increases the penalty for a crime. Id. at 301, 313-14.

The Court of Appeals has explained that after *Blakely*, the jury must determine whether a particular pattern of abuse occurred over a “prolonged period of time” — not the trial court. See *State v. Epefano*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). Given this change, we are hard pressed to see why a jury should be instructed on pre-*Blakely* case law involving a trial court’s judgment regarding whether abuse occurred over a “prolonged period of time.” ¶21 Having concluded that the jury instruction incorrectly interpreted the law, we must now determine whether the instruction constituted an improper comment on the evidence.

We hold that the instruction constituted an improper comment on the evidence because it resolved a contested factual issue for the jury. The instruction essentially stated that if the abuse occurred over a time period that was longer than a few weeks, it met the definition of a “prolonged period of time.” This is similar to *State v. Levy*, 156 Wn.2d 709, 721-22, 132 P.3d 1076 (2006), where the jury instructions referred to a crowbar as an example of a deadly weapon.

We held that those instructions were an improper judicial comment on the evidence because they relieved the State of its burden to prove the crowbar was used in a way that met the definition of a “deadly weapon.” In the same way, the instruction here relieved the State of its burden to show that the pattern of abuse occurred over a “prolonged period of time.” As long as the State showed that the abuse lasted longer than a few weeks, the jury was instructed to find that the abuse occurred over a “prolonged period of time.” B. A Judicial Comment on the Evidence Is Presumed To Be Prejudicial, and the Record in This Case Does Not Rebut That Presumption ¶22 “Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” Id. at 723. ¶23 In this case, the evidence showed that incidents of abuse occurred during a two-month period prior to the murder.

As a result, defining a “prolonged period of time” as “more than a few weeks” likely affected the jury’s finding on this issue. The abuse occurred over a time period just longer than a few weeks, and a straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of a “prolonged period of time.” Most certainly, the State does not meet the high burden of showing from the record that “no prejudice could have resulted.” Id. As a result, the Court of Appeals correctly reversed Brush’s exceptional sentence on this basis.

2. The Trial Court Did Not Abuse Its Discretion by Admitting the Victim’s Daughter’s Testimony regarding Statements Made by Her Mother during a Stalking Incident ¶24 During the penalty phase of trial, the judge allowed the victim’s daughter to testify about statements her mother made.

The defense objected to the statements as hearsay, but the judge ruled that the statements fell under the “excited utterance” exception to the hearsay rule. 11 VRP (Dec. 6, 2011) at 166. ¶25 Although hearsay is generally not admissible, ER 802, there are two exceptions that apply in this case.

First, under the excited utterance exception, “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is not excluded as hearsay. ER 803(a)(2).

Second, under the present sense impression exception, “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter” is not excluded as hearsay. ER 803(a)(1). ¶26 The trial judge was largely correct that the victim’s daughter’s statements fell under exceptions to the hearsay rule.

The victim’s daughter’s testimony mostly related to her experiences and observations during the stalking incident. This included describing statements made by her mother about the events as they were happening (as they were realizing that Brush was not slowing his truck and that they needed to run away and hide from him).

For example, she described her mother’s statements regarding where they should hide and whether to call the police. Most of her mother’s statements fell directly under the present *561sense impression and excited utterance exceptions to the hearsay rule because they either (1) related to a startling event or condition and were made while under the stress of excitement caused by the event or condition or (2) were describing or explaining an event or condition made while her mother was perceiving the event or condition. ¶27 The only testimony that might not have fit within a hearsay exception was the victim’s daughter’s testimony relating her mother’s brief description of an event that happened earlier that same day as the stalking incident, when Brush similarly drove by in his truck.

The victim’s statements about that earlier incident included only the fact that he had driven by and that the victim had been “ ‘really, really scared.’ ” 11 VRP (Dec. 6, 2011) at 185-87 (formatting omitted). Even if admitting those two statements was error, it was harmless in light of the victim’s daughter’s testimony about Brush following them in his car later that evening and her observations of her mother’s fear during that time.

CONCLUSION ¶28 We affirm the Court of Appeals and hold that the pattern jury instruction incorrectly stated the law on what constitutes a “prolonged period of time.” The instruction resulted in an improper comment on the evidence in this case.

We reverse Brush’s exceptional sentence and remand to the trial court with instructions that, if requested, it may impanel a jury to consider evidence of a prolonged pattern of abuse. Madsen, C.J., and Johnson, González, and Gordon McCloud, JJ., concur.

