Vermont Department of State's Attorneys

Vermont Criminal Law Month

December 2017 – February 2018

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

THREAT TO USE A DEADLY WEAPON NEED NOT BE A THREAT OF IMMEDIATE USE

State v. Kuzawski, 2017 VT 118. DEFINITION OF DEADLY WEAPON: CAPABLE OF CAUSING DEATH OR GREAT BODILY INJURY AS USED FOR COMPLETED CRIMES, AND AS THREATENED TO BE USED FOR ATTEMPTED CRIMES. OBJECTIVE PERCEPTION OF WEAPON'S DANGEROUSNESS. SPECIFIC INTENT TO THREATEN: SUFFICIENCY OF THE EVIDENCE.

Full court published opinion. Aggravated assault with a deadly weapon affirmed. The defendant held a box cutter against a child's stomach and told her that he would kill her in her sleep. The box cutter was designed so that it could not accidentally cause a cut; the blades were very short and recessed under a safety guard. The defendant argued that such a box cutter could not be a deadly weapon. 1) The statute defines a deadly weapon as one which, in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury. Whether an object is a deadly weapon is tied to the way that it is used or intended to be used in the commission of a crime, and not to its intrinsic use or purpose. Thus, an object which is used or intended to be used in a manner which could injure or kill is a deadly weapon. 2) The phrase "as used" refers to completed crimes, and the phrase "is intended to be used" refers to attempted crimes. 3) A threat to use a deadly weapon does not require an actual imminent threat. Whether an object can, in the moment of the incident giving rise to a charge of first degree aggravated domestic assault, cause death or serious bodily injury is immaterial. Whether an object qualifies as a deadly weapon turns on the objective perception of the item's dangerousness, or whether the object is capable of producing death or serious bodily injury. 4) An objective perception of the cutting tool used here is objectively viewed as capable of causing death or serious bodily injury, although not necessarily at the time of the threat. The tool was being used to cut boxes, and objectively, then could be understood to have sharp edges and, by extension, like any other box cutter to be capable of producing death or serious bodily injury. The victim need not have been in immediate danger. 5) The evidence was sufficient to show that the defendant

specifically intended to threaten the child. The defendant need not have meant to carry out the threat, merely to have meant to convey that a threat would be carried through. The evidence that the defendant lied to the police about the incident, and that he told his brother following his arrest that he had threatened the child because he was annoyed with her, was sufficient to support the trial court's decision. Robinson, with Skoglund, dissenting. Does not agree that the defendant threatened to use the otherwise nondeadly tool at issue here in a way that converted it to a deadly weapon. The defendant merely poked the box cutter into her belly, a threatened use that could not bring about the serious bodily harm that might otherwise transform this everyday household tool into a deadly weapon. There has to be some connection between the actual or threatened use of an implement, and its capacity to case serious bodily injury. Doc. 2016-244, December 15, 2017.

DEFENDANT VOLUNTARILY EXITED HIS VEHICLE AFTER TRAFFIC STOP, AND EXPANSION OF STOP WAS SUPPORTED BY REASONABLE SUSPICION OF DRUG TRAFFICKING

State v. Tetreault, 2017 VT 119. TRAFFIC STOP: EXIT ORDER AND VOLUNTARY EXIT; REASONABLE SUSPICION OF DRUG TRAFFICKING JUSTIFYING EXPANSION OF TRAFFIC STOP. REASONABLENESS OF EXTENT OF EXPANSION OF TRAFFIC STOP; LOOKING UP DEFENDANT'S NOSE. WITHDRAWAL OF CONSENT TO SEARCH: UNEQUIVOCAL ACT OR STATEMENT.

Heroin trafficking and conspiracy to sell or deliver a regulated drug affirmed. 1) The Vermont State Trooper who effected a traffic stop did not violate the Vermont Constitution when he asked the defendant to exit his car and sit in the cruiser. The record supports the trial court's conclusion that the defendant voluntarily exited the vehicle. The request did not immediately follow the officer's request for the defendant's driver's license and registration and followed a discussion about the defendant's trip to Massachusetts and his search for an engagement ring, as well as the possibility that the defendant's speedometer was malfunctioning. The trooper's demeanor was relaxed and friendly, and he expressly told the defendant that he could refuse to leave the vehicle. 2) The officer was in possession of information that gave rise to a reasonable suspicion of wrongdoing on the part of the defendant – nervous demeanor, inconsistent explanations of his travel plans; a prepaid untraceable TracFone and air freshener; information from a confidential informant that the defendant would travel to Massachusetts or Connecticut to buy heroin and pills to sell; and the presence of what appeared to be marijuana shake on the center consol. 3) The defendant was not subjected to an overly long or intrusive detention in the cruiser. About five minutes elapsed before the officer asked for permission to search the car. This was not an unreasonable amount of time for the trooper to investigate his reasonable suspicion that the defendant was engaged in drug-related activity, and the questions about the defendant's drug use were not overly intrusive under the circumstances. 4) The court does not condone the officer's request to look up the defendant's nose. A warrantless intrusion into an area of the body that is hidden from view ordinarily requires a clear indication that evidence of a crime will be found in that location. Although the officer had reasonable suspicion that the defendant was involved in some form of drug-related activity – likely trafficking – there was no specific indication that any evidence would be found in the defendant's nose (nor was there). However, because

the evidence challenged in this case did not result from the officer's request, the request does not affect the ultimate conclusion that the trial court properly denied the motion to suppress. 5) The defendant's statements about the use of a police dog in the search of his car did not constitute an unequivocal act or statement of withdrawal of consent. 6) The defendant's claim that the trial court erred by denying his renewed motion to suppress without permitting him to present additional evidence is not addressed on appeal, because he never mentioned any new evidence to the trial court. Doc. 2016-258, December 22, 2017.

GRABBING STRANGERS' BUTTOCKS SUPPORTED A LEWD AND LASCIVIOUS CHARGE

State v. Discola, 2018 VT 7. Full court published opinion. SUFFICIENCY OF THE EVIDENCE: PRESERVATION; LEWDNESS; SEXUAL INTENT. SUGGESTIVE IDENTIFICATION; IMPROPER CLOSING ARGUMENT.

Lewd and lascivious conduct, and lewd and lascivious conduct with a child, affirmed. 1) A defendant who does not present any evidence preserves his claim of insufficiency of the evidence when he makes the motion at the close of the State's case, even if he does not renew it upon resting without presenting evidence, and without renewing it within days after the verdict. This Court's three-justice entry order in State v. Whittemore is not followed in this respect. 2) The evidence of lewd and lascivious conduct was sufficient where it showed that the defendant grabbed the buttocks of a woman who was a stranger to him, after leering and stalking her. A reasonable trier of fact could consider this criminally offensive under community standards of decency and morality. 3) The evidence was sufficient to support a finding that the defendant acted with the intent of arousing, appealing to, or gratifying his lust, passions, or sexual desires, as required for the lewd and lascivious conduct with a child counts. The defendant touched each minor victims' buttocks repeatedly and stared and smirked at the minor victims. Based on the context and nature of these acts, the jury could reasonably infer that the defendant touched the minors with lustful intent. 4) The trial court did not err when it denied the defendant's motion to suppress based upon a suggestive identification process. The defendant did meet the requirements for the first part of the test – whether the circumstances surrounding the identification were unnecessarily suggestive. The identifications occurred at a motion hearing during the pendency of the criminal trial in which the defendant was the named defendant. Two of the witnesses had seen a photo of the defendant shortly before the hearing. And the identifications took place in the courtroom, while the defendant was seated at defense counsel table wearing a prisoner's uniform and shackles. However, the indicia of reliability outweigh the corrupting effect of the suggestive identification. The witnesses provided descriptions of the defendant at the hearing that matched their descriptions of him soon after the incident, and which matched photographs of the defendant taken on the day of the incidents, at the same site. The victims' descriptions of him matched the defendant's quite distinctive appearance on that day, and these initial descriptions were not offered under suggestive circumstances and included information that could not be readily gleaned from pictures of the defendant viewed after the event or from seeing him seated in the courtroom during the hearing. 5) The Court announces that it is formally abandoning one fact – witness certainty – that it has previously identified as relevant to the reliability determination under this two part test, because scientific evidence concerning the fallibility of

eyewitness identification, and specifically the effect of suggestive circumstances on the degree of certainty the witness expresses in an identification, has made various courts and the legal community re-think witness certainty as an admissible factor in the determination of identification reliability. 6) The Court strongly disapproves of the State's inappropriate remarks in closing argument, that the defense claim that the behavior was not lewd and lascivious was "sad," and "egregious," and that the jury should "send a message" that this behavior will not be tolerated. However, it was not objected to and was not plain error given that the remarks were isolated and were followed by a jury instructions concerning the role of the jury and the nature of closing argument. Doc. 2016-303, January 19, 2018.

DOCTRINES OF SUCCESSIVE PETITIONS AND ABUSE OF THE WRIT CLARIFIED

In re Towne, 2018 VT 5. PETITIONS FOR POST-CONVICTION RELIEF: SUCCESSIVE PETITIONS AND ABUSE OF THE WRIT.

Full court published decision. Dismissal of two petitions for post-conviction relief affirmed. 1) Prior decisions of this Court have been inconsistent on the issue of whether courts are affirmatively barred from considering claims raised and decided on the merits in earlier PCR proceedings, or whether the ends of justice can be considered in deciding whether to reconsider the issue. This split is not resolved in this case, as under either test the dismissal of the petition would be affirmed. Any issues previously resolved would be precluded under the first test, and the trial court here reasonably determined that the ends of justice did not require that they be reconsidered, and the Supreme Court would defer to that judgment. 2) The doctrine of abuse of the writ applies when a petitioner files a second or subsequent petition. The government bears the burden of pleading abuse of the writ, setting forth a petitioner's writ history, identifying the claims that appear for the first time, and alleging that the petitioner has abused the writ. The burden then shifts to the petitioner to show cause for failing to raise the claim previously and actual prejudice from the default. The petitioner must show some objective factor external to the defendant that impeded counsel's effort to raise the claim in an earlier proceeding. There is a split of authority on the standard of review for decisions dismissing petitions for abuse of the writ – for abuse of discretion, or without deference. Again, this need not be resolved in this case because the trial court's ruling would be affirmed under either standard. 3) In Martinez v. Ryan the U.S. Supreme Court ruled that ineffective assistance of PCR counsel in arguing ineffective assistance of trial counsel during the petitioner's initial state PCR proceeding can constitute cause under federal habeas corpus review to allow the court to entertain a claim of ineffective assistance of counsel at trial even if the petitioner failed to raise the claim in the initial PCR proceeding. This ruling was based on equity and not the constitution, and the Court did not purport to require states to adopt a similar rule. The Court declines to decide whether to adopt such a rule because even if it did so, the petitioner's claims in this case would fail, as he has failed to show prejudice from the claimed ineffectiveness of trial counsel with respect to identifying alibi witnesses and securing their testimony, and he has failed to show prejudice in connection with his claim of ineffective assistance of counsel on direct appeal of his conviction. Docs. 2013-191 and 2015-382, January 26, 2018.

FAILURE TO GIVE UNANIMITY INSTRUCTION WAS HARMLESS ERROR

State v. Bellanger, 2018 VT 13. SEXUAL ASSAULT: NEED FOR UNANIMITY INSTRUCTION. AGGRAVATED SEXUAL ASSAULT ON CHILD BASED ON REPEATED NONCONSENSUAL SEXUAL ACTS: NONCONSENT CAN BE PROVEN BY AGE. SUFFICIENCY OF THE EVIDENCE: NONMARRIAGE. IMPROPER CLOSING ARGUMENT: GOLDEN RULE; MATTERS OUTSIDE THE EVIDENCE; REMINDING JURORS OF PROMISE DURING VOIR DIRE.

Full court published opinion. Aggravated sexual assault of a child and lewd or lascivious conduct with a child affirmed. 1) A specific unanimity instruction should have been given in this case, because the victim's testimony distinguished between the details of various isolated incidents of sexual contact, and therefore the evidence was sufficiently materially distinguishable to enable jurors to isolate the specific instances of sexual contact that they found formed the factual basis for aggravated sexual assault of a child. Although the pattern of circumstances surrounding each incident was similar or the same, the victim testified to different kinds of acts – penis-to-mouth contact, mouth-to-vulva, finger-to-vulva, and attempted vaginal penetration. The locations of the instances also varied. 2) The failure to give a unanimity instruction will be reviewed for plain error because the defendant did not renew his objection before the jury retired. During the charge conference the defense requested an instruction on unanimity. The instruction that was given as a result of this request did not reflect the defendant's concern, and therefore the defendant should have clearly notified the trial court of this after the instruction was given. 3) There was no plain error because there was no reasonable probability of a different outcome had the requested instruction been given. During the charge conference the defense conceded that this was an "all or nothing" case, that the jury would either believe all of the acts, or none of them. There was no extrinsic evidence other than the child's testimony concerning the acts, and therefore the verdict could have rested only on the jury's determination as to the child's credibility. Given the verdict, the jury likely found the child credible. 4) The defendant was charged with having committed a sexual assault against a child under the age of 16 in violation of section 3252 of Title 13, plus one aggravating factor, in this case, repeated nonconsensual sexual acts. The court instructed the jury that the "nonconsensual" element could be satisfied simply by virtue of the victim being under the age of 16. The defendant argues that in this context, there must have been actual nonconsent, that the State cannot rely solely upon the age of the victim. The Court disagrees – the element of nonconsent can be proven by showing that the victim was under the age of 16, just as when a defendant is charged with aggravated sexual assault (not necessarily against a child), aggravated by repeated nonconsensual sexual acts, as held in State v. Deyo, 181 Vt. 89 (2006). 5) Given this interpretation, the court correctly instructed the jury that they had to find that the defendant and the victim were not married. The defendant argues that there was insufficient evidence on this point, as there was no testimony to this effect. However, there was ample evidence from which the jury could conclude beyond a reasonable doubt that they were not married. She testified that she lived with her mother and siblings, and that the defendant lived with them and took care of the children; her mother testified that she had dated the defendant and had a sexual relationship with him, that she ended the relationship with him and he moved out that day. 6) The prosecutor did not violate the Golden Rule when she stated that most people

remember how stressful it was in fourth or fifth grace to give an oral report. This was an invitation to the jurors to think about how difficult it was for the victim to testify, which, in context, addressed the victim's credibility, a permissible subject for argument. 7) The prosecutor's suggestion that a ten year old would not know about ejaculate unless the charged events had actually occurred, did not go beyond the evidence presented and did not overtly express her own opinion. It was a statement that the victim's detailed knowledge of sexual acts supported her credibility. 8) The prosecutor's statement that the victim had no motive to lie, because there was no pending custody matter and she wasn't in trouble in school, was not related to the evidence. The defense did not attempt to suggest that the victim might have some extraneous reason to fabricate the allegations. But any possible error was harmless, as the comments were limited and had no bearing on the defense's theory, nor was it directed at the defendant's character or calculated to inflame the jury against the defendant. 9) The prosecutor reminded the jurors that they had implicitly promised during voir dire that they could convict solely on the word of a child. This edges beyond the scope of evidence presented during the trial and is therefore technically improper. However, there was no plain error – the comment was isolated, did not impinge on the defense, and was not directed at the defendant. Doc. 2016-221, February 9, 2018.

HEARSAY DECLARANTS ARE SUBJECT TO IMPEACHMENT

State v. Larkin, 2018 VT 16. IMPEACHMENT OF HEARSAY DECLARANT. HARMLESS ERROR.

Full court published opinion. Second-degree aggravated domestic assault reversed. The victim did not testify, and the State relied upon her statements in a 911 call, to the ambulance personnel who responded to the scene, and to a nurse in the emergency room. The defense sought to admit evidence of the victim's conviction for giving false information to a police officer in order to impeach her statements, but the trial court refused to allow it, because the victim had not testified at trial. 1) The statements should have been admitted pursuant to V.R.E. 806, allowing impeachment of hearsay declarants. The defendant preserved this claim of error, even though he did not cite specifically to Rule 806, because he cited to rule 609 (impeachment with prior conviction), and Rule 806 is merely a rule of interpretation of Rule 609. Citing to Rule 609 was sufficient, as Rule 609 was the basis for admission of the conviction. 2) The exclusion of the conviction was not harmless error because the State's case here was comparatively weak. The case essentially came down to the victim's word against the defendant's, and the State lacked strong direct evidence of guilt. Further, where the outcome hinges largely on the credibility of a witness, evidence concerning credibility is particularly important. Reiber and Carrol, dissenting: Disagrees that the State's case was weak or that the excluded evidence was highly significant. Would find harmless error. Doc. 2018-16, February 16, 2018.

NO ALCOHOL CONDITION WAS PROPER WHERE DEFENDANT DID NOT SHOW THAT HE WAS AN ALCOHOLIC OR ALCOHOL ABUSER

State v. Urban, 2018 VT 25. PROBATION CONDITIONS: NO ALCOHOL; BURDEN ON DEFENDANT TO SHOW HE IS ALCOHOLIC OR ALCOHOL ABUSER; REASONABLE RELATION TO OFFENSE;

CONDITIONS AGREED UPON IN PLEA AGREEMENT.

Probation conditions imposed in connection with a plea agreement affirmed. 1) Although a no-alcohol condition may not be imposed when the defendant is an alcoholic or an alcohol abuser, it may still be imposed when that is not the case, and where the condition is reasonably related to the crime of conviction. (The court notes that it might also be permissible where it is part of a properly court-ordered alcohol treatment program). 2) The defendant bears the burden of showing that he is an alcoholic or alcohol abuser, if he seeks to avoid the imposition of such a condition. 3) The defendant here stipulated that he was not an alcoholic, and there was no evidence that he was an alcohol abuser. The trial court did not abuse its discretion when it imposed this condition, given the court's finding that his alcohol consumption on the day in question played a significant role in the events leading to his arrest, and that refraining from alcohol would aid in the defendant's rehabilitation. Although the defendant argues that there were less restrictive options available, the question is not whether the court could have reasonably chosen to impose a lesser restriction, but whether there was a reasonable basis for imposing the restriction that it chose. 4) The defendant's challenge to the other conditions on the grounds that the court made inadequate findings to justify their imposition is denied. The court did not make any findings because the defendant stipulated to these conditions as part of the plea agreement. Under such circumstances, the defendant can be successful only if there is no set of circumstances under which the court could conclude that such conditions are sufficiently tailored and supported by the record. He does not allege that that is the case here. Doc. 2017-098, February 23, 2018.

TRIAL COURT CAN ORDER A HOLD WITHOUT BAIL EVEN AFTER BAIL IS GRANTED IN AN AFTER-HOURS ORDER

State v. Morton, 2018 VT 22. HOLD WITHOUT BAIL ORDER AFTER BAIL GRANTED IN AFTER-HOURS ORDER.

Three-justice published bail appeal. Order holding defendant without bail is affirmed. The defendant was arrested and charged with an offense carrying a penalty of life imprisonment. In an after-hours order, the trial court imposed a surety bond or cash in the amount of $150,000. The defendant was then arraigned later that day, and the trial court granted the State's request to hold the defendant without bail pending a weight-of-the-evidence hearing. The defendant argues that once he was originally granted bail, the trial court could not order him held without bail without findings sufficient to support bail revocation pursuant to 13 VSA 7575. The Court disagrees. A court can hold a defendant without bail following an initial appearance even though the prior after-hours order set conditions of release, including bail. This is because of the temporary nature of the after-hours bail determination, which is often based on an incomplete, ex parte recitation of the relevant facts, for which no record exists. Doc. 2018-044, February Term, 2018.

COURT FAILED TO CONSIDER ALL RELEVANT FACTORS IN FINDING DEFENDANT NOT ENTITLED TO ASSIGNED COUNSEL

State v. Kittredge, 2018 VT 6. DENIAL OF ASSIGNED COUNSEL: FACTORS

BEYOND FEDERAL POVERTY GUIDELINES.

Full court published entry order. Denial of public defender services reversed. The trial court found that the defendant was not a needy person because his income "exceed[ed] financial guidelines," and due to his "income and family size." These findings suggest that the trial court based its decision upon the fact that the defendant's income was at or below poverty income guidelines. However, the presumption for such persons is not the exclusive circumstances under which a person can be found to be needy. Although persons meeting that criterion are presumed to be needy, the opposite is not true. The matter is remanded for the trial court to conduct the broader analysis of the "needy person" question, which requires consideration of income, property owned, outstanding obligations, and the number and ages of dependents. Doc. 2017-442, January Term, 2018.

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions "may be cited as persuasive authority but shall not be considered as controlling precedent." Such decisions are controlling "with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued."

SITTING ON SOMEONE IS NOT STRANGULATION, AND THEREFORE DOES NOT REQUIRE THE MENTAL STATE OF INTENTIONALLY TO SUPPORT A CONVICTION OF DOMESTIC ASSAULT

In re Naylor, 3 justice entry order. SERIOUS BODILY INJURY: SITTING ON SOMEONE IS NOT STRANGULATION, AND DOES NOT REQUIRE A MENTAL STATE OF INTENTIONALLY.

Summary judgment to the State in a petition for post-conviction relief affirmed. The petitioner pleaded guilty to first-degree aggravated domestic assault. He argued in his petition that the trial court failed to advise him during the change of plea that the State had to prove the mental state of intentionally. His reasoning is as follows: the State alleged that he had sat on the complainant, thus causing her difficulty breathing, and thus attempted to cause or willfully or recklessly caused serious bodily injury. Strangulation, when it is the basis for an aggravated assault charge, involves intentionally impeding normal breathing. By sitting on the complainant, the petition impeded her normal breathing. Therefore, he "strangled" her, and the State had to prove that he acted intentionally. The Court disagreed: strangulation occurs where someone intentionally impedes breathing or blood circulation "by applying pressure on the throat or neck or by blocking the nose or mouth of another person." 13 VSA 1021(a)(2)(B). The petitioner did not do this, he sat on the complainant's chest. Therefore, he did not strangle her, and therefore the State did not need to prove an intentional act. And, even in a real strangulation case, the State can proceed under either the intentional strangulation definition, or under the general causing bodily injury definition. Doc. 2017-145, January 8, 2018.

CHALLENGE TO PSI WAIVED WHEN DEFENSE STATED IT HAD NO OBJECTION TO ANY OF THE STATEMENTS IN THE PSI

State v. Harrington, 3 justice entry order. SENTENCING: RELIABILITY OF FACTS IN PSI – WAIVER. EVIDENCE SUPPORTING TRIAL COURT'S FINDINGS.

Sentence for sexual assault affirmed. 1) The defendant's challenge to the reliability of the facts in the PSI was waived when, at the sentencing hearing, the defense stated that it had no objection to any statement contained in the PSI. 2) The evidence supported the trial court's finding that the defendant had relapsed multiple times over the years, and that treatment had not worked because the defendant had reoffended after prior treatment. 3) The trial court stated that the defendant's case was "typical" of people with troubled lives, and that with a ten year sentence the defendant would be eighty upon his release and at that point would not be a threat to the community. The defendant failed to show how he was prejudiced by either of these statements. The troubled life comment referred to a mitigating factor argued by the defendant's attorney, and the defendant's advanced age was also considered as a mitigating factor, since the court's point was that if the defendant had been younger, it would have imposed a longer sentence. Doc. 2017-116, January 8, 2018.

JURY INSTRUCTION FAILED TO REQUIRE UNANIMITY

State v. Osgood, three-justice entry order. JURY INSTRUCTION: FAILURE TO ENSURE UNANIMITY; PLAIN ERROR.

Domestic assault reversed. The evidence in the case concerned two incidents. The defendant's girlfriend stated that the defendant held her face in his hands at one point, and that she felt some pain. They then drove a short distance where, according to the testimony of other witnesses, the defendant choked her. The girlfriend did not corroborate this incident. The trial court charged the jury on aggravated domestic assault, and on domestic assault as a lesser included offense. The court stated that the elements of domestic assault were that the defendant attempted to cause bodily injury to the girlfriend by "putting his hands on her neck or face and squeezing." The court later restated this as "putting his hands on her neck and face and squeezing." The jury convicted the defendant of domestic assault. This instruction was plain error because it did not ensure that the jury would be unanimous as to which act constituted the crime – the first incident or the second. Doc. 2017-214, February 2, 2018.

Vermont Supreme Court Slip Opinions: Single Justice Rulings

COURT ERRONEOUSLY CONSIDERED INCOME OF COHABITANT IN FINDING DEFENDANT NOT ENTITLED TO ASSIGNED COUNSEL

State v. Cote, single justice entry order. DENIAL OF ASSIGNED COUNSEL: CONSIDERATION OF COHABITANT'S INCOME.

Denial of appointed counsel reversed. The trial court erroneously considered the income of the defendant's cohabitant in determining whether the defendant was needy and eligible for appointed counsel. Cohabitant income is relevant only in determining a co-pay or reimbursement. The defendant's income and assets demonstrate that she is needy and eligible for appointed counsel, and the matter is remanded for determination of her potential co-pay and reimbursement. January Term, 2018, Robinson, J.

BAIL WAS REASONABLY CALCULATED TO ASSURE APPEARANCE EVEN THOUGH IT WAS HIGHER THAN THE DEFENDANT COULD AFFORD

State v. Hulst, single justice bail appeal. BAIL: REASONABLY CALCULATED TO ASSURE APPERANCE DESPITE DEFENDANT'S INABILITY TO AFFORD IT.

Bail of $100,000 for first-degree aggravated domestic assault, second-degree aggravated assault, disorderly conduct, two counts of violation of conditions of release for contacting the complaining witness, one count of obstruction of justice, twenty-eight counts of violating conditions of release, affirmed. The court did not abuse its discretion, in light of evidence of the defendant's alleged plan to flee after posting the lesser amount of bail set earlier, as well as the fact of the defendant's past flight from the courthouse during an arraignment, which resulted in an escape charge. The fact that the bail was set in an amount higher than the defendant can afford does not change the outcome, as it was reasonably calculated to be the least restrictive means to ensure his appearance. Doc. 2018-010, January Term, 2018. Skoglund, J.

ARTICLE OF INTEREST

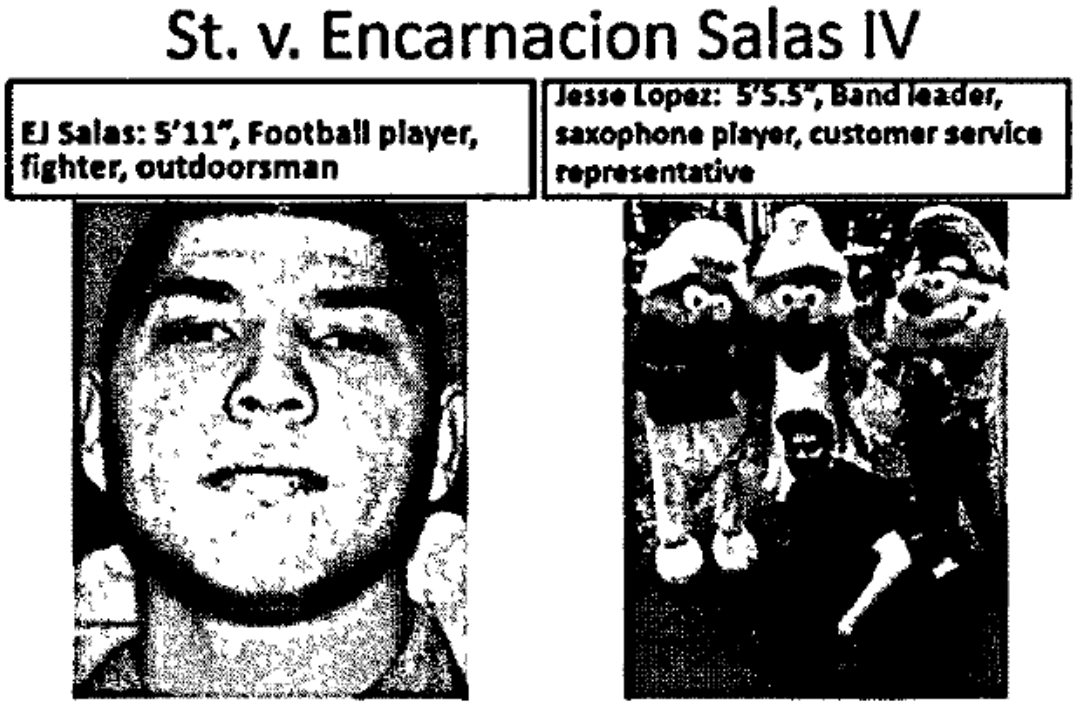
Missing the Point: Prosecutors Somehow Manage Yet Another PowerPoint-Related Reversal (from the NDAA)

by Bert | Jan 10, 2018

An appellate court in Washington reversed a murder conviction this week because a prosecutor committed misconduct in closing argument through improper use of a PowerPoint presentation. If there is one jurisdiction in which prosecutors should know that they must be careful in how they deploy PowerPoint, it is Washington state. Courts there have actively policed these presentations, recognizing the powerful effect that visual advocacy can have upon a jury.

A glimpse into the most recent reversal and the wider context reveal that prosecutors seem to be missing the point. Reluctant as ever to restrain themselves—despite, or perhaps because of, their ample powers—prosecutors continue to push the envelope. Good courts, like the ones in Washington, push back.

In the murder prosecution of Encarnacion Salas, the State closed with a PowerPoint presentation that sought to undercut the defendant's claim of self-defense. Relying in large part on a slide that contrasted an image and description of the defendant with one of the victim, the prosecution set up a trope based on what the appellate court described as "high school stereotypes." The image of this slide in the opinion is small and a little blurry, but here it is:



As you can see, the victim, Mr. Lopez, is portrayed squatting in front of "three people dressed in cartoon costumes."

The Washington courts have addressed PowerPoint misconduct in a number of previous cases, including: *State v. Walker* (reversing conviction); *In re Glasmann* (reversing conviction); *State v. Hecht* (reversing conviction); and *State v. Fedoruk* (reversing conviction on other grounds and also finding prosecutorial misconduct). The court in Salas's case acknowledged that the problem with the prosecutor's presentation was not as egregious as some of these other earlier cases in which prosecutors superimposed the word "GUILTY" on photos of the defendant or otherwise altered exhibits. Nevertheless, it drew upon the principles the courts have laid down, explaining that "the broader proposition is that slide shows may not be used to inflame passion and prejudice." It then described the problem with the first slide:

"PowerPoint slides should not be used to communicate to the jury a covert message that would be improper if spoken aloud. The juxtaposition of images and captions in the first slide communicates what the prosecutor could not, and did not, argue aloud: Salas was by nature an aggressive and intimidating person, and therefore had no reason to fear Lopez, who by nature was childlike and submissive."

Even though the relative physical size of the defendant and victim was legally relevant because Mr. Salas had claimed self-defense, the court found that these photos do not actually compare the sizes of the two individuals because Mr. Lopez is crouching down. Instead, this was a naked attempt to use character evidence and evoke stereotypes that reinforce the prosecution's version of events. The court concluded that the State's presentation was prejudicial, and granted Mr. Salas a new trial.

Ken Armstrong at *The Marshall Project* has provided excellent coverage of the growing body of cases evaluating prosecutorial misconduct committed through electronic presentations. His most extensive piece, https://www.themarshallproject.org/2014/12/23/powerpoint-justice, notes how active the Washington state courts have been in this area. (This article contains several images from slideshow presentations in different cases.) He also published a follow up when the Washington Supreme Court decided the *Walker* case out of misconduct-hotbed Pierce County in 2015.

Another expert on prosecutorial misconduct, Bennett Gershman, has also written on the subject. And, we have touched upon the matter in previous posts as well.

Prosecutors need to spend less time tweaking images, toggling with font color options, and blowing up the size of words like "GUILTY" and more time looking at the case law. There appear to be several categories of cases in which PowerPoint can land a prosecutor in hot water. Generally, prosecutors must avoid altering exhibits, incorporating photographs or other items that were not presented or admitted at trial, and using words and phrases that convey the State's opinions at the expense of the defendant's presumption of innocence. (As a service to those prosecutors reading this with an interest in following the rules, this helpful entry in the American Law Reports provides useful guidance: 28 A.L.R.7th Art. 3). While a thoughtful use of PowerPoint can fall within the bounds of effective advocacy, the preparation demands an ounce of care, if not a bit more.

One major concern may be that prosecutors are receiving bad guidance from their own

leaders. Ken Armstrong's article highlights the work of the NDAA:

In 2003, the training arm of the National District Attorneys Association—"America's School for Prosecutors," is how it bills itself—published a 290-page book that advises prosecutors on how to use visual aids. . . . Unsubtle visual jokes figure prominently in the lessons. One chart displays evidence on a loaf of bread: "HOWEVER YOU SLICE IT DEFENDANT IS GUILTY." Another, which summarizes the prosecution's evidence on stacked bricks, says: "THE WRITING IS ON THE WALL." Spelling gimmicks—"memorable for the jurors'"—work especially well with slide shows . . . ."

Although we do not know whether the NDAA has updated this book in light of the findings of misconduct described above, we know the organization disavows science, objects to the term 'prosecutorial misconduct,' and consistently challenges efforts to hold prosecutors responsible for constitutional violations, so there are reasons to be concerned. Until the NDAA and the prosecutors it represents begin to see the value in protecting individual constitutional rights, we can anticipate more decisions like the one in *State v. Salas*.

Vermont Criminal Law Month is published bi-monthly by the Vermont Department of State's Attorneys. For information contact David Tartter at david.tartter@vermont.gov.