ROP v. Worswick, 3 ROP Intrm. 269 (1993)

REPUBLIC OF PALAU,
Plaintiff/Appellee,

v.

ISMAEL WORSWICK,
Defendant/Appellant.

CRIMINAL APPEAL NO. 1-89
Criminal Case No. 396-87

Supreme Court, Appellate Division
Republic of Palau

Appellate decision
Decided: July 19, 1993

Counsel for Appellant: David F. Shadel

Counsel for Appellee: Gerald G. Marugg III

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; and JANET H. WEEKS, Part-time Associate Justice.

MILLER, Associate Justice:

This appeal is from a judgment convicting defendant Ismael Worswick of first degree murder in the stabbing death of Walker Meltel. Appellant challenges the conviction on three grounds: (1) that the trial judge's instructions to the two special judges who heard the case were erroneous; (2) that there was insufficient evidence to convict defendant of the charge of first degree murder; and (3) that the prosecution wrongfully withheld certain materials from defendant and thus deprived him of a fair trial. We affirm, addressing each argument in turn.

I. INSTRUCTIONS TO JURY

Defendant first contends that the trial judge failed properly to inform the special judges that intoxication could ⊥270 negate the specific intent required to be proven in a prosecution for first degree murder. The Government does not question the legal premise of defendant's argument -- that proof of intoxication may serve to reduce first degree murder to a lesser charge [1] -- but asserts that the instruction given by the trial judge was fully adequate.

[1] The Government does disagree with defendant's assertion that an intoxication defense will reduce first degree murder to voluntary manslaughter, contending instead that defendant could still be convicted of second degree murder. In light of our holdings that the decision to convict defendant of the first degree murder charge was based on adequate instructions, and is supportable on the record, *see* Part II infra, we need not resolve that dispute here.

Defendant's specific complaint about the instructions given to the special judges is as follows:

> "The Court's instruction . . . failed to provide that intoxication could negate the elements of specific intent and of wilful, deliberate and malicious." Appellant's Brief at 15.

In order to evaluate the merit of this complaint, we must review the Palau murder statute and relevant portions of the instructions that were given.

Palau's first degree murder statute, 17 PNC 1701, provides:

> "Every person who shall unlawfully take the life of another with malice aforethought by poison, lying in wait, or any other kind of wilful, deliberate ,and malicious and premeditated killing , or while in the perpetration of or in the attempt to perpetrate any arson, rape, burglary or robbery, shall be guilty of murder in the first degree . . ." (Emphasis added.)

⊥271

In his instructions to the special judges, the trial judge quoted the highlighted portions of this statute as set forth above, omitting as irrelevant the references to "poison" and "lying in wait", as well as the language pertaining to the doctrine of felony murder. That portion of his instructions was not objected to by defendant, nor, significantly, was the following summary of the elements of first degree murder:

> "Three essential elements are required to prove the offense of first degree murder. First, the act of killing a human being unlawfully. Second, doing such act with malice aforethought. Third, doing such act with premeditation."

The trial judge then gave the special judges detailed explanations of the terms "malice aforethought" and "premeditation", as well as definitions of "wilful", "deliberate" and "malicious".

Finally, in response to defendant's request for an instruction regarding intoxication, the trial judge added the following, adapted from a leading U.S. treatise:

> "Evidence has been introduced that Ismael Worswick was intoxicated at the time of the commission of the crime. As I stated a moment ago, to convict a person of Murder in the First Degree, you must find that the killing was done with "malice aforethought" and "premeditation." "Malice aforethought," you will recall, is "an intent at the time of the killing wilfully to take the life of a human being, or an intent wilfully to act in a callous and wanton disregard of the consequences to human life." "Premeditation" is "a period of time in which the accused coolly deliberates or thinks the matter over before acting . . . Any interval of time between the forming of the specific intent to kill and the carrying out of that intent

> which is of sufficient duration for the accused to be fully conscious and mindful of what he intended willfully to set out to do is sufficient to justify a finding of premeditation." "Malice aforethought" and "premeditation," as defined in these instructions, are essential elements of this crime. The evidence of intoxication may be sufficient to ⊥272 create a reasonable doubt in your minds as to whether Ismael Worswick was able to form the required intent to commit First Degree Murder."

Having reviewed these instructions, the question for this Court is whether the trial judge's failure to instruct specifically that intoxication could negate the "wilful[ness], deliberate[ness] and malicious[ness]" of defendant's acts was erroneous, and, if so, whether that error was harmful. ROP Cr. Pro. 52(a).[2]

We find no error, and certainly not one that was ultimately harmful to defendant. While wilfulness, deliberateness and maliciousness are, strictly speaking, independent elements of first degree murder, they are, as a common sense matter, states of mind encompassed by the principal elements of malice aforethought and premeditation, or both. Having set forth -- without objection -- a definition of first degree murder containing these two principal elements (in addition, of course, to an unlawful killing), we find no error in the trial judge's adhering to that definition in discussing intoxication. Since the explanation of these two elements ⊥273 included the allegedly omitted elements, [3] we believe that the instructions adequately conveyed to the special judges the full scope of their discretion in evaluating defendant's intoxication. *See generally* 8A J. Moore, *Moore's Federal Practice* (2d ed. 1983), 30.04[1] at 30-22 to 30-23 (citing cases) ("[T]he reviewing court will view the charge as a whole, and will not reverse if the defendant's proffered instruction was substantially included in the trial court's general charge.").

Even if the trial judge's failure to mention separately the elements of wilfulness, deliberateness and maliciousness amounted to error, it was an error that was plainly harmless:

> "An error in giving (or refusing to give) a particular instruction will not be considered reversible error unless, considering all the instructions, the evidence and the arguments that the jury heard, it appears that the jury was misled or did not have a sufficient understanding of the issues and its duty to determine them . . . . Reversal is inappropriate unless the jury's understanding of the issues

---

[2] The objection that the trial judge failed to say that intoxication could negate "specific intent", denominated as such, is beside the point. Though first degree murder is, in legal terms, a specific intent crime, the words "specific intent" do not appear in Palau's statute, and did not have to be addressed as such in the court's instructions. The question whether the trial judge gave sufficient instructions with respect to specific intent is, instead, subsumed within the question whether the trial judge properly instructed with respect to the species of specific intent actually contained in the statute.

[3] *See* pp. 3-4 supra (defining "malice aforethought" as an "intent at the time of the killing wilfully to take the life of a human being, or an intent wilfully to act in a callous and wanton disregard of the consequences to human life"; defining "premeditation" as involving a "period of time in which the accused coolly deliberates") (emphasis added).

> was seriously affected to the prejudice of the complaining party." *Simmons, Inc. v. Pinkertons, Inc.*, 762 F.2d. 591, 597 (7th Cir. 1985).

The conclusion reached by the special judges (and the trial judge) on the subject of intoxication, which addresses the very elements that they are asserted not to have been made aware of, leaves no doubt that defendant suffered no such prejudice:

⊥274

> "The lack of observable physical and mental effects of alcohol intoxication and the existence of indicia of rational thought proves that Ismael Worswick was not so intoxicated as to have been acting unconsciously or without being aware of what he was doing. Therefore, he was fully capable of acting wilfully, deliberately and maliciously , and with premeditation and malice aforethought." (Emphasis added.)

II. SUFFICIENCY OF EVIDENCE

Defendant next argues that "there was insufficient evidence and it was unreasonable for the trial court . . . to conclude that [defendant] was not intoxicated to the point at which he lacked . . . specific intent and the ability to possess malice aforethought." Appellant's Brief at 7. Our review of the sufficiency of evidence is extremely circumscribed, limited to the question "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *ROP v. Chisato*, 2 ROP Intrm. 227, 239 (1991), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Stated negatively, we cannot reverse unless the defendant can show that no rational trier of fact could have found that the elements of first degree murder had been proven.

There is ample evidence in the record that defendant consumed a substantial quantity of vodka on the day of the stabbing. The question, however, is whether, notwithstanding his consumption of alcohol and its intoxicating effects, there was nevertheless sufficient evidence in the record from which a reasonable factfinder could find that defendant had the ⊥275 capacity to and did form the specific intent to murder Walter Meltel. We find that there was.

Without reciting here the extensive findings made by the trial judge and the special judges, we find that there was evidence, much of it uncontradicted, that (1) notwithstanding his drinking, the defendant was able in the time leading up to the stabbing to drive his pick-up truck in and around Koror; and that (2) having stopped the truck at a store in Meyuns, he left the truck, walked to the back of the vehicle, stabbed the victim twice in the chest and in the upper arm, spoke coherently to his companions referring to the stabbing, ran away from the scene, and later that evening told someone that he had injured the victim, who would probably die before he reached the hospital. This evidence was sufficient to allow a reasonable facfinder to conclude beyond a reasonable doubt that, notwithstanding the intoxication effects of the liquor, the defendant was capable of forming specific intent and did so -- that he planned the stabbing in his mind, carried it out with an intention to kill, and when it was over, knew what he had done.

The defense theory at trial, ably presented by appointed counsel, was that defendant's drinking had rendered him an automation, unaware of anything he was doing. The ⊥276 special judges were not bound to accept this theory. Rather, making proper inferences from the evidence set forth above, [4] the trial judge and the special judges were entitled to reject it, to find that defendant acted in premeditation and with malice aforethought, and accordingly to convict defendant of first degree murder.

III. PROSECUTORIAL MISCONDUCT

Defendant's third argument rests on an assertion that the prosecution, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, failed to produce two statements written by defendant's companions on the date of the stabbing that would have been exculpatory. The government does not dispute that the principles enunciated in *Brady* are a requirement of the Palau Constitution. It argues, however, that defendant's claim fails as a result of the trial court's factual finding that the statements that the government allegedly failed to disclose simply did not exist. As defendant's counsel conceded at oral argument, if that finding was not clearly erroneous, *see* 14 PNC 604(b), then its *Brady* claim must be denied.

On the record before us, we cannot conclude that the trial judge's factual finding was clearly erroneous. The trial ⊥277 judge had before him the testimony of Lieutenant Mickey Gibson, the police officer who interviewed the witnesses, that no such statements were created. [5] Even were it simply a matter of weighing that testimony against the presumably contradictory evidence offered by the witnesses themselves, we would let the trial judge's finding stand. Credibility is for the trial judge, and "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *ROP v. Chisato* , 2 ROP Intrm. 227, 239 (1991), quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985). [6]

In fact, on the current record, defendant's claim is considerably more tenuous. One of the two witnesses who testified that he had written out his own statement, Alfonsius Temael, contradicted himself on the stand, testifying that "it's been a long time ago so I don't recall" and then stating that his "best recollection" was that "what was written down was what Lieutenant Gibson was writing down as [he was] talking." (R.84) And yet a third witness who was identified by Mr. Temael as also having written out his own statement (*see* R.295), denied having done so, or having seen anyone else ⊥278 do so (R.303, 306; testimony of Talislaus Joseph). In that light, we are in no position to say that we would have decided the issue differently in the

---

[4] "[A]s no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts, and that inference is one of fact . . . ." *Trust Territory v. Minor*, 4 T.T.R. 324, 329 (Tr. Div. 1969), quoting *Stevenson v. United States*, 162 U.S. 313, 322 (1896).

[5] According to his testimony, the only statements taken were transcribed by him and were made available to the defense before trial.

[6] Having reviewed Lieutenant Gibson's testimony on other matters, we have no basis on which to conclude, as was urged at oral argument, that "no reasonable trier of fact could regard [his] testimony as reliable" and should be disregarded entirely. *See ROP v. Tmetuchl*, 1 ROP Intrm. 443, 471 (1988) (concurring opinion).

first instance -- an insufficient basis for reversal -- much less that we are "left with the definite and firm conviction that a mistake has been committed." *Chisato*, 2 ROP Intrm. at 238, quoting *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948).

CONCLUSION

For all of the reasons stated above, defendant's conviction is affirmed.