

69217-8

69217-8

Case No. 69217-8-I

WASHINGTON STATE COURT OF APPEALS
DIVISION 1

STATE OF WASHINGTON
Respondent

vs.

 ORIGINAL

MICHAEL BAILEY
Appellant

STATEMENT OF ADDITIONAL GROUNDS

Michael Bailey-360745
P.O. Box 777
Monroe, WA. 98272

2013 JUL -2 PM 1:42
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

ASSIGNMENTS OF ERROR.....1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS.....2

ARGUMENT.....5

GROUND 1. **The prosecutor committed misconduct that was flagrant and ill-intentioned.....5**

 A. Standard of Review.....5

 B. The prosecutor improperly shifted and misstated the burden of proof in closing argument.....5

GROUND 2. **MR. BAILEY WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.....7**

 A. Standard of Review.....7

 B. An accused person in constitutionally entitled to the effective assistance of counsel.....7

 C. Mr. Bailey was denied the effective assistance of counsel by his attorney's failure to object to repeated instances of prosecutorial misconduct that were flagrant and ill-intentioned.....8

CONCLUSION.....9

TABLE OF AUTHORITIES

Federal Cases

Gideon vs. Wainwrite, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....7

Hodge vs. Hurley, 426 F.3d 368 (6th Cir. 2005).....8

Strickland vs. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984).....8

United States vs. Perlaza, 439 F.3d 1149 (9th Cir. 2006).....5

United States vs. Salemo, 61 F.3d 214 (3rd Cir. 1995).....7

Washington State Cases

In re Glassman, ___ Wash.2d ___, 286 P.3d 673 (2012).....5, 6, 9

State vs. A.N.J., 168 Wash.2d 91, 225 P.3d 956 (2010).....7

State vs. Dixon, 150 Wash.App. 46, 207 P.3d 459 (2009).....5

State vs. Hendrickson, 129 Wash.2d 61, 917 P.2d 563 (1996).....8

State vs. Irby, 170 Wash.2d 874, 246 P.3d 796 (2011).....5

State vs. Reichenbach, 153 Wash.2d 126, 101 P.3d 80 (2004).....8

State vs. Toth, Wash.App. 610, 217 P.3d 377 (2009).....5, 6

Constitutional Provisions

U.S. Const. Amend. VI.....1, 7, 9

U.S. Const. Amend. XIV.....1, 7, 9

Wash. Const. Article I, Section 22.....7

ASSIGNMENTS OF ERROR

1. The prosecutor committed prejudicial misconduct that violated Mr. Bailey's Fourteenth Amendment right to due process.
2. The prosecutor improperly shifted the burden of proof in closing argument by repeatedly pointing out that certain evidence was uncontradicted.
3. The prosecutor improperly misstated the burden of proof by suggesting that jurors need only to believe that "somebody" robbed Daniel Chang, and didn't need to prove the value.
4. Mr. Bailey was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel was ineffective for failing to object to prosecutorial misconduct during closing argument.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is misconduct for a prosecutor to shift the burden of proof in closing argument. In this case, the prosecutor repeatedly said that certain evidence was uncontradicted. Did the prosecutor commit misconduct that infringed upon Mr. Bailey's Fourteenth Amendment right to due process?
2. It is misconduct for a prosecutor to misstate the burden of proof during closing argument. In this case, the prosecutor improperly suggested that jurors need only to believe that "somebody" robbed Chang, and didn't need to prove the value. Did the prosecutor commit misconduct that infringed upon Mr. Bailey's Fourteenth Amendment right to due process?
3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to repeated instances of prejudicial misconduct during the prosecuting attorney's closing argument. Was Mr. Bailey denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Michael Bailey with one count first degree robbery with a deadly weapon enhancement, to wit; a knife. RCW 9A.56.200(1)(a)(ii); 9A.56.190. CP 1-6.

The charge stemmed from an attempted rape and car jacking by the alleged victim, Daniel Chang. RP 3-25 at 166. Mr. Bailey was not arrested at the time of the alleged robbery, and no weapon was positively identified and/or recovered.

The case proceeded to trial. The state introduced testimony of the alleged victim, Daniel Chang. RP 248-295, 9-87. As well as that of attempted rape and car jacking victim, Ashley Valle. RP 141-172, 368-387. The state submitted text-messages, video surveillance, and speculative testimony to support the alleged robbery.

Mr. Bailey did not testify. He did offer the testimony of Ashley Valle who said Mr. Bailey was not at the scene of the attempted rape and car jacking, and did not rob Chang. RP 20-25 at 149. According to Ms. Valle, "Daniel Chang was drunk and being extremely aggressive." RP 7-8 at 385. The intoxicated Chang was groping Ms. Valle's breast's and inner thighs against her will. He peeled off his pants, climbed into her back seat, and started masturbating violently.

When Ms. Valle refused to give in to Chang's sexual demands he lapsed into a drunken rage and stole Ms. Valle's keys out of the ignition; and then demanded that she give him a "blow job." Valle: Chang "was..sexually aggressive toward me, and I realized it was a mistake being with him when he entered the car...he was really drunk...he takes his pants off...he goes into the back seat...he was jacking off back there...he pulled my head down to his private part...he was masturbating...and starting the top of my dress and inner thighs...I was shoving him off...and he got mad...he took the keys out of the ignition ...he said that if I would suck his dick he'll give me my keys back...I was...pleading...please just give me my keys back." RP 152-166.

Luckily, Ms. Valle was able to snatch her keys back from Chang and escape; leaving the drunk pantless pervert in the parking lot. RP 24-25 at 166, 1-5 at 167.

Chang feared arrest for the attempted rape and car jacking and fled the area.

Chang: "I jumped multiple fences with barbed wire...actually, three barbed wire (fences)...I have...barbed wire cuts...a gash here...my body was scraped up." RP 6-11 at 139.

During closing argument, the prosecutor misstated the evidence when he repeatedly said that the "mark" on Chang's neck was from a "knife". RP 427, 432, 433, 435, 436, 437, 439. Knowing full well that the "mark" on Chang's neck was self-inflicted when he drunkenly jumped over three (3) barbed wire fences.

And Chang admitted that the "mark" on his neck was not from an alleged knife.

Defense: "...you didn't tell anybody that you were cut...because you weren't cut by the assailent, right?"

Chang: "Right!"

RP 12-15 at 291.

The prosecutor continued his misconduct by shifting and misstating the burden of proof.

Prosecutor: "(I) don't have to prove the value of what was taken....All I've got to prove is that he got out of the car and ("somebody") used a knife to take property from him."

RP 8-13 at 451.

Which is false and misleading. The state must prove beyond a reasonable doubt that:(1) Michael Bailey was at the scene of the alleged robbery;(2) That it was Michael Bailey who allegedly robbed Chang;(3) That Michael Bailey used an alleged knife, and;(4) That the value of the alleged theft was \$1500.00.

The jury convicted Mr. Bailey, and he timely appealed.
CP 69-70, 94.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. In re Glassman, ___ Wash.2d ___, ___ 286 P.3d 673 (2012). Even absent an objection, error may be reviewed if it is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." Id, at ___. Furthermore, prosecutorial misconduct may be argued for the first time on appeal if it is a manifest error that affects a constitutional right. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. State vs. Toth, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show harmlessness beyond a reasonable doubt. State vs. Irby, 170 Wash.2d 874, 886, 246 P.3d 796 (2011).

B. The prosecutor improperly shifted and misstated the burden of proof in closing argument.

A prosecuting attorney commits misconduct by making a closing argument that shifts and misstates the burden of proof. State vs. Dixon, 150 Wash.App. 46, 55, 207 P.3d 459 (2009); United States vs. Perlaza, 429 F.3d 1149, 1171 (9th Cir. 2006).

It is improper to even imply that the defense has a duty to present evidence relating to an element of the charged crime. Toth, at 615. Similarly, "misstating the basis on which the jury can acquit insidiously shifts the requirement that the state prove the defendant's guilt beyond a reasonable doubt. Glassman, at ____.

In this case, the prosecutor repeatedly emphasized that the "mark" on Chang's neck was from a "knife" seven times. RP 427, 432, 433, 435, 436, 437, 439. The prosecutor also suggested that the state didn't need to prove the value of the alleged theft, and that jurors need only believe that "somebody" robbed Chang. RP 8-13 at 451. Which is false and misleading. These arguments improperly shifted and misstated the burden of proof. They are flagrant, ill-intentioned, and are presumed to be prejudicial. Glassman, at ____; Toth, at 615.

Mr. Bailey's defense rested in part to the fact that there was no evidence that Mr. Bailey was at the scene of the alleged robbery, there was no evidence of a knife, and in part on Ms. Valle's testimony that Chang is a drunken pervert who was left pantless in a parking lot after a failed rape and attempted car jacking; and Chang lied to cover it up. RP 8-12 at 489.

By repeatedly emphasizing to jurors that certain evidence was uncontradicted, and by suggesting that the state didn't need to prove the value of the alleged theft, and that they need only to believe that "somebody" robbed Chang; the prosecutor violated Mr. Bailey's right to a fair trial. Glassman, at ____.

Accordingly, the convictions must be reversed and the case remanded for a new trial. ID.

II. MR. BAILEY WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *State vs. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV.; *Gideon vs. Wainwrite*, 372 U.S. 335, 342, 83 S.Ct 792 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Sixth Amendment." *United States vs. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show that: (1) Defense counsel's conduct was deficient, falling below an objective standard of reasonableness, and;(2) The deficient performance resulted in prejudice..."a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different."

State vs. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). (citing Strickland vs. Washington, 466 U.S. 668, 104 S.Ct 2052 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable tactic explaining counsel's performance. Reichenbach, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., State vs. Hendrickson, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996)(the state's argument that counsel "made a tactical decision by not objecting to the introduction of...prior convictions has no support in the record").

C. Mr. Bailey was denied the effective assistance of counsel by his attorney's failure to object to repeated instances of prosecutorial misconduct that were flagrant and ill-intentioned.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

At a minimum, an attorney who believes that opposing counsel made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out (of) the hearing of the jurySuch an approach preserves the continuity of each closing argument, avoids calling the the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge vs. Hurley, 426 F.3d 368, 386 (6th Cir. 2005).

Here, defense counsel should have objected to the prosecutor's flagrant and ill-intentioned misconduct. The prohibition against shifting and misstating the burden of proof is well established.

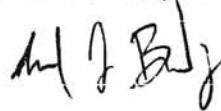
By failing to object, counsel's performance thus fell below an objective standard of reasonableness. At a minimum, Mr. Bailey's lawyer should have either requested a sidebar and/or lodged an objection when the jury left the courtroom.

Furthermore, Mr. Bailey was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. See, Glassman, at _____. The failure to object deprived Mr. Bailey's Sixth and Fourteenth Amendment right to the effective assistance of counsel. Hurley. Accordingly, the convictions must be reversed and the case remanded for a new trial.

CONCLUSION

For the foregoing reasons, Mr. Bailey's robbery convictions must be reversed and the case remanded for a new trial.

Dated this 17th day of April, 2013.



Michael Bailey
Petitioner