

NO. 45081-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CORY SUNDBERG,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Cory Sundberg's constitutional right to due process was violated when the prosecutor improperly shifted the burden of proof in his closing argument.

2. The trial court erred in denying Mr. Sundberg's motion for new trial due to prosecutorial misconduct.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Mr. Sundberg was accused of possession of methamphetamine found in a pocket of his work overalls. He stated that the overalls were borrowed at a jobsite by a temporary employee Mr. Sundberg hired. The employee did not testify at trial. Due process prohibits a prosecutor from referring to a missing witness when the reference serves to shift the burden of proof by implying a defendant has a burden of producing evidence. Here, in closing argument the prosecutor suggested Mr. Sundberg should have called his employee, who frequently borrowed the overalls while working on the job site, to corroborate his testimony regarding unwitting possession of methamphetamine. Did this argument improperly shift the burden of proof from the State to Mr. Sundberg, in violation of his right to due process? Assignment of Error 1.

2. Did the trial court err in denying Mr. Sundberg's motion for

a new trial based on prosecutorial misconduct? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural history:

The Mason County Prosecutor's Office charged Cory Sundberg with possession of a controlled substance (methamphetamine), contrary to RCW 69.50.4013(1). Clerk's Papers (CP) 131. The State amended the information in December, 2012 to add one count of bail jumping, contrary to RCW 9A.76.170. CP 121-22. The bail jumping charge was subsequently severed from the drug possession charge and was ultimately dismissed by the court. Report of Proceedings (RP) at 48, 51, 55, 296.¹

Mr. Sundberg was tried by a jury on January 4, 2013, the Honorable Toni A. Sheldon presiding. RP at 51-217. He was convicted of possession of methamphetamine as charged. RP at 209. CP 79.

Mr. Sundberg filed a motion for a new trial pursuant to CrR 7.5 due to prosecutorial misconduct regarding a missing witness. CP 70-78; RP at 262-67. The court denied the motion, ruling that there was no prosecutorial misconduct pertaining to the missing witness and that the defense did not show there was a substantial likelihood the outcome of the trial would have

¹The record of proceedings consists of the following:
RP --- August 20, 2012, August 22, October 16, December 17, December 24, December 31, 2012, January 2, January 4, January 8, January 9, January 28, February 19, February 22, March 18, March 20, April 1, April 8, April 15, April 18, and June 10, 2013.

been affected. RP at 267-68.

At sentencing the parties agreed that based on an offender score of "5" the standard range sentence was 6 to 18 months. CP 12-29. The court denied the defense's request to apply the Drug Offender Sentencing Alternative and imposed a sentence of 366 days. RP at 314, 321; CP 12-29.

Timely notice of appeal was filed April 19, 2013. CP 9-10. This appeal follows.

2. Testimony at trial:

Cory Sundberg was repairing a modular home in Mason County, Washington on June 6, 2012. He had been doing work on the structure for approximately a week and a half and was assisted by Paul Wood. RP at 121, 122. Mr. Sundberg stated that when Mr. Wood was on the job, he frequently wore Sundberg's bib overalls to crawl under the modular home because Mr. Wood did not have the proper clothing to go under the structure. RP at 126. Mr. Sundberg stated that Mr. Wood borrowed the overalls four days out of the six days that he was on the jobsite. RP at 126.

Mr. Sundberg was arrested on June 6, 2012, pursuant to a warrant. When arrested he was wearing the bib overalls that Mr. Wood had used. Mr. Wood lost interest in the job and was not at the job on June 6 when Mr. Sundberg was arrested. Mr. Sundberg was pressure washing the modular

home when he was arrested and his clothing was wet. RP at 121. Mr. Sundberg had not worn the overalls for a week until the time he was arrested. RP at 126, 127. He asked the arresting officer if he could change his wet clothes before being taken into custody but was told that he could not. RP at 107, 121, 122. He was taken to the Mason County Jail in Shelton, Washington, where he was initially patted down, and then subsequently issued jail clothing. RP at 99, 100, 107. At the jail, an officer conducted an inventory search of his clothing, including the pocket of the overalls. RP at 101. In the front pocket of the bib, an officer found a clear plastic baggie that contained a white crystal substance. RP at 101, 112. Defense counsel stipulated that the substance was .01 gram of methamphetamine. RP at 116. Paul Wood did not testify at trial.

3. Closing Argument:

During closing argument the prosecutor argued Mr. Sundberg should have subpoenaed Paul Wood, Mr. Sundberg's employee who borrowed his overalls several times while working on the modular home, to corroborate his testimony that the methamphetamine was not his. RP at 195. The defense objected to the argument on the ground that it shifted the burden of proof to the defense. RP at 195. The court denied the objection. RP at 195.

D. ARGUMENT

**1. MR. SUNDBERG WAS ENTITLED TO A
NEW TRIAL DUE TO PROSECUTORIAL
MISCONDUCT**

A criminal defendant's constitutional right to due process requires the State to prove every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

A defendant has no duty to call a witness, and the absence of that duty is a "corollary of the State's burden to prove each element of the crime charged beyond a reasonable doubt." *State v. Contreras*, 57 Wn. App. 471, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990). It is misconduct for a prosecutor to argue that a defendant has a duty to present exculpatory evidence, as this shifts the prosecution's burden to prove its case onto the defendant - to *disprove* it. *See State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990), *review denied*, 15 Wn.2d 1029, *cert. denied*, 499 U.S. 948 (1991).

A prosecuting attorney's misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22 (amend. 10); *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). A prosecutor is a quasi-judicial

officer, obligated to seek verdicts free of prejudice and based on reason. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969).

Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. A prosecutor must always refrain from making statements that are not supported by the evidence. *Belgarde*, 110 Wn.2d at 507-08; *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), *cert. denied*, 396 U.S. 1019 (1970).

In the instant matter, misconduct occurred when, in rebuttal argument, the prosecutor was allowed to point out to the jury that Mr. Sundberg should have called Mr. Wood as a witness. The prosecutor argued:

Mr. Rider testified that the—this enigmas—mysterious mystery man named Paul Wood—he might as well be called John Doe—shows up at the house and he's in his 20's. But that's inconsistent with what the defendant said. He said he was in his 40's.

Now it's the defendant's burden—and this is the reason I asked the defendant these questions. I asked him okay, tell us about Paul Wood; describe him for us, do you know him, how do you know him. He says he sees him about twice a week. He says he can get a hold of him. Why isn't he here testifying? It's their burden. He's not here.

RP at 195. Defense counsel objected and was overruled. RP at

195. The State continued:

Now let's go to the defendant. The defendant is also inherently biased. He has a stake in the outcome. That gives him bias to lie. The testimony was obviously self-serving, it was obviously designed to tell a story to corroborate his defense. And again, it was his burden. He didn't bring in Paul Wood.

RP at 195-96. This argument violated the limitations of the missing witness doctrine. First, the prosecutor's argument shifted the burden to Mr. Sundberg by suggesting that he was required to prove his innocence by presenting corroborating evidence.

Second, the argument was not raised until after the evidence had been presented and both parties had rested, at which time Mr. Sundberg had no opportunity for rebuttal or explanation.

Moreover the argument was improper because Mr. Wood was not available because he would have incriminated himself if he had testified that he had put the methamphetamine in Mr. Sundberg's overalls.

The prosecutor's improper use of the missing witness doctrine shifted the burden of proof in violation of Mr. Sundberg's constitutional right to due process and was not harmless beyond a reasonable doubt. Reversal is required.

E. CONCLUSION

Based on the above, Cory Sundberg respectfully requests this Court to reverse and dismiss his conviction.

DATED: February 28, 2014.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

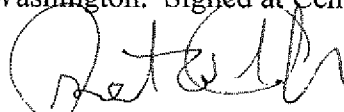
The undersigned certifies that on February 28, 2014, that this Appellant's Opening Brief was sent by JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a true and correct copy was mailed by first class mail, postage prepaid to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 28, 2014.



PETER B. TILLER

TILLER LAW OFFICE

February 28, 2014 - 4:53 PM

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