No. 43573-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Woodward,

Appellant.

Mason County Superior Court Cause No. 11-1-00088-5

The Honorable Judge Toni A. Sheldon

Appellant's Opening Brief

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15. The trial judge violated Mr. Woodward's right to due process and his right to a jury determination of every fact used to increase the penalty for a crime by sentencing him under RCW 9.94A.507 for offenses that may have occurred prior to enactment of that statute.

16. The trial judge erred by sentencing Mr. Woodward under RCW 9.94A.507 absent a jury finding that the three offenses were committed after September 1, 2001 (the effective date of the statute).

17. Mr. Woodward should have been sentenced to a determinate sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is misconduct for a prosecutor to shift the burden of proof during closing argument. In this case, the state's attorney improperly equated the lack of medical evidence presented by the defense with the failure of a prosecutor to prove an offense. Did the prosecutor commit misconduct that infringed Mr. Woodward's Fourteenth Amendment right to due process?

2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Woodward denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. A new trial is required whenever the erroneous denial of a challenge for cause results in a jury that includes a biased juror. In this case, the trial judge erroneously refused to excuse for cause Juror 27, who sat on the jury that convicted Mr.

Woodward. Did the convictions violate Mr. Woodward's Sixth and Fourteenth Amendment rights to due process and to an impartial jury?

4. The state constitutional right to a jury trial is violated when an accused person is forced to exhaust peremptory challenges to remove a biased juror, after the trial judge erroneously denies a challenge for cause. In this case, the trial judge incorrectly denied three challenges for cause, and Mr. Woodward was forced to exhaust his peremptory challenges removing two of the three biased jurors; the third remained on the jury. Did the trial judge violate Mr. Woodward's state constitutional right to a jury trial?

5. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred at the same time and place and if they were committed for the same overall criminal purpose against the same victim. In this case, Mr. Woodward was convicted of raping and molesting A.G., but the prosecution did not allege or prove that the offenses occurred on different occasions. Did the trial judge abuse his discretion by scoring counts two and three separately?

6. An accused person has a right to have the jury determine every fact which increases the penalty for a crime. In this case, the jury did not find that counts two and three occurred at separate times or places, or that any of the three offenses occurred after September 1, 2001 (the effective date of RCW 9.94A.507). Did the sentencing court violate Mr. Woodward's state and federal rights to a jury trial and to due process by scoring counts two and three as separate criminal conduct and by sentencing Mr. Woodward under RCW 9.94A.507?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Robert Woodward suffers several severe health problems, including arthritis, a stroke, a blood disease and hepatitis C, the last of which required two separate and very difficult treatment periods. RP 901, 976, 996-1002, 1057-1060. His illnesses and treatments affected his ability to hold jobs, to use his hands, to perform sexually, and to participate in family activities. RP 976-977, 988, 996-1002, 1030, 1057-1061, 1071.

Mr. Woodward and his wife Amanda Woodward effectively raised her grandchildren, A.G. and H.G. (born in 1994 and 1996, respectively). RP 805-806, 817, 835-837, 882, 896, 926-927, 966, 1054. As A.G. got older, she wanted more independence. Mr. Woodward built her a bedroom in an outbuilding near the house. RP 807, 839. A.G. was allowed to have friends stay with her there. RP 845-846, 893-894, 985, 1070. When she was sixteen, she wanted her boyfriend to stay with her. The Woodwards said no, which angered A.G. RP 879, 1015, 1051-1052. She moved to her aunt's house, where her boyfriend joined her. RP 779, 804, 809, 819, 917.

When Mrs. Woodward asked her to come home, A.G. said she would not because Mr. Woodward had molested her. RP 858-860, 1023.

A police report was made: A.G. alleged that Mr. Woodward molested H.G. as well, and H.G. eventually supported that story.[1] RP 767-781, 877-879.

The state charged Mr. Woodward with two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. Count one alleged molestation of H.G. between January 1, 1999 and August 30, 2008. Count two alleged molestation of A.G. between January 1, 1999 and January 31, 2006. Count three alleged rape of A.G. between January 1, 1999 and January 31, 2006. CP 21-23.

The case went to trial, and the jury was unable to reach a verdict. RP 40, 564-568. The court declared a mistrial and the state tried Mr. Woodward again. RP 567, 570-1163.

During jury selection for the retrial, the court conducted individual questioning for several jurors, including Jurors 3, 26, and 27. Juror 3 said his wife and her younger sister had both been "forcibly raped" by their mother's boyfriend years earlier. RP 601. He said that they had made a report and pursued prosecution, but that the offender "got off." Because of this, Juror 3 said that he might have difficulty being fair. He said that

[1] H.G. didn't wish to cooperate with the prosecution, and even had her own attorney. She did end up testifying and did tell the jury that Mr. Woodward molested her. RP 2, 34, 780-783, 801-803, 924-962, 1044-1045.

even though his wife is 51 now, she still has problems stemming from the offense. RP 601. The court engaged Juror 3 in a colloquy:

> THE COURT: And what we are really trying to get at is can you wall off those life experiences so that they don't affect your ability to hear the evidence and make a fair determination, fair to both sides?
> JUROR NUMBER 3: I believe I probably could, but, you know, that's where I'm at on that.
> THE COURT: Okay.
> JUROR NUMBER 3: Of all the different things that could –this would be the more disgusting thing for me. So in all the possibilities of people doing whatever they do, this is not – this is not really good at all. So, I mean I – I...
> RP 602.

The prosecutor also asked questions of Juror 3:

> MR. DORCY: And so the – the question boils down to can – can you make that decision? And can you base that decision on the evidence that you hear in court, without letting what you know of your wife's experience affect the way you would decide the case? Okay?
> JUROR NUMBER 3: Well –
> MR. DORCY: Does that make sense?
> JUROR NUMBER 3: Yes.
> MR. DORCY: Okay.
> JUROR NUMBER 3: What I can tell you is I would try.
> MR. DORCY: Okay.
> JUROR NUMBER 3: That's about as good as you're going to get. I would weigh everything I would hear.
> MR. DORCY: Uh huh.
> JUROR NUMBER 3: When – when I came in here and they said what the – what the crime was, I have a – all I can tell you is I have a shiver go up my spine –
> MR. DORCY: Uh huh.
> JUROR NUMBER 3: – that's all. So it's – you know, so that's – I don't know if I can stop that or not from happening. But –
> ....

MR. DORCY: And you can base that decision on the evidence and the law?
JUROR NUMBER 3: Well, it would be the evidence and I guess, the Judge would tell me what the law is.
MR. DORCY: Right, that's right.
JUROR NUMBER 3: So – so –
MR. DORCY: Okay, great. Thank you.
JUROR NUMBER 3: But that would be one thing.
RP 604-607.

Juror 27 was a teacher; he knew the alleged victims as well as several other people on the witness list. RP 679-681. He told the court that he was the IEP manager for one of the witnesses, and that serving as a juror would be "awkward". RP 679-682. The prosecuting attorney noted that he and his brother had grown up with the children of this particular teacher. RP 681. The teacher claimed that he could be fair. RP 680-681.

Juror 26 said that she might be too sympathetic to be an appropriate juror, and that she was not sure that she could check her sympathy at the door. RP 707. Upon further questioning, she said she did not believe that she could put her sympathy aside. RP 707-708. She continued to equivocate when questioned by the prosecutor. RP 709-710. In the end, after repeatedly expressing how uncertain she was, she said only "I think I can do that" when asked if she could decide the case based on the evidence and the law. RP 710.

The defense moved to excuse all three of these jurors for cause, but the court denied the motions. RP 607-608, 682-683, 711. Mr. Woodward

used his peremptory challenges to remove Jurors 3 and 26, and exhausted his challenges without removing Juror 27. RP 742-745; Jury Roll Call, Supp. CP; Jury Panel, Supp. CP.

At trial, Mr. and Mrs. Woodward both testified about his medical conditions, the treatments he had undergone, and the effects on his life. RP 963-1095.

During his closing argument, the prosecutor made the following argument to the jury:

> [S]omehow those treatments or illnesses starting in 1999 prevented him from having either the opportunity or the sexual interest to have committed the crimes that he's alleged to have committed. And yet both parties are entitled to the– you know, your verdict is to be based upon the evidence and lack of evidence. If after a full and fair consideration of the case, based on the evidence and lack of evidence that you have, you have an abiding belief – belief in the truth of the charge, then you are satisfied beyond a reasonable doubt. And your instructions tell you that both sides have – are entitled to the benefit of the evidence, regardless of who introduced evidence. I would submit to you that that extends implicitly, if not explicitly in the instructions, to the lack of evidence.
>
> And when the claim is made that the defendant has some sort of medical issue that prevents him from even being capable of committing the crime that he's accused to have committed, and when any reasonable person with a medical claim that would have prevented them from some medical condition having the ability to commit the crimes with which he was committed would come forward with some sort of medical evidence that here's – here's the evidence, here's the doctor – here's the – the doctor, the nurse, here's the medical records, something that documents that I have this condition and that it – it has resulted in these effects of erectile dysfunction, or the lack of any sexual desire, or the lack of an ability to achieve an erection, or the lack of the ability to ejaculate.

> Those things would be presented to you by a reasonable person. And – and you don't have any evidence along those lines in this case.
>
> RP 1133-1134.

This time, the jury convicted Mr. Woodward of all three charges. CP 6.

The court's instructions did not require the jury to specify the timeframe within which each offense occurred. Nor did the instructions require the jury to find that counts two and three (offenses against A.G.) occurred at separate times or at different places. Court's Instructions, Supp. CP. Nor did the jury return special verdicts on any of these topics. Verdict Forms, Supp. CP.

At sentencing, the parties agreed that Mr. Woodward had no criminal history. RP 1169.

Without argument or comment, the court found that counts two and three were not the same course of conduct, and scored the two offenses separately. CP 6-7. The court determined that Mr. Woodward had an offender score of six, and sentenced him to life in prison, with a minimum term of 130 months (counts one and two) and 216 months (count three). CP 8.

Mr. Woodward timely appealed. CP 5.

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 Glasmann, ___ Wash.2d ___, ___, 286 P.3d 673 (2012).[2] 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 v. 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 v. Irby, 170 Wash.2d 874, 886, 246 P.3d 796 (2011).

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[2] Citations are to the lead opinion in Glassman. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers "agree[d] with the lead opinion that the prosecutor's misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct." Glasmann, at ___ (Chambers, J., concurring). Justice Chambers wrote separately because he was "stunned" by the position taken by the prosecution. Id.

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

The state and federal constitutions secure for an accused person the right to a fair trial. Glasmann, at ___; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. Prosecutorial misconduct can deprive an accused person of this right. Glasmann, at ___.

A prosecuting attorney commits misconduct by making a closing argument that shifts or misstates the burden of proof. State v. Dixon, 150 Wash. App. 46, 55, 207 P.3d 459 (2009); United States v. Perlaza, 439 F.3d 1149, 1171 (9th Cir. 2006). It is improper even to imply that the defense has a duty to present evidence relating to an element of the charged crime. Toth, at 615. Similarly, "[m]isstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." Glasmann, at ___.

In this case, the prosecutor misstated the burden of proof when he told jurors:

> And your instructions tell you that both sides...are entitled to the benefit of the evidence, regardless of who introduced evidence. I would submit to you that that extends implicitly, if not explicitly in the instructions, to the lack of evidence.
> RP 1134 (emphasis added).

This argument falsely equated a prosecutor's failure to produce evidence with an accused person's failure to produce evidence. This is burden shifting. When the prosecution fails to produce evidence on an element, the result is acquittal; however, when the defense fails to produce evidence, the lack of such evidence does not require conviction.

By linking this improper argument to the lack of medical testimony (regarding the impact of Mr. Woodward's medical conditions and the side effects of his treatments), the prosecutor suggested that Mr. Woodward was obligated to produce such evidence, and that his failure to do so required conviction in the same way that a failure of the state's proof would require acquittal. These arguments improperly shifted and misstated the burden of proof. They are flagrant and ill intentioned, and are presumed prejudicial. Glasmann, at ___; Toth, at 615.

Mr. Woodward's defense rested in part on medical impossibility. By equating the absence of medical evidence of this defense with a failure of proof by the prosecution, the prosecutor violated Mr. Woodward's right to a fair trial. Glasmann, at ___. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

II. MR. WOODWARD 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 v. 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 "[i]n 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 v. Wainwright, 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 Constitution." United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective

standard of reasonableness; and (2) that the deficient performance resulted in prejudice - "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). (citing Strickland v. 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 legitimate 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 v. 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 evidence of ... prior convictions has no support in the record.").

C. Mr. Woodward 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 has 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 jury.... Such an approach preserves the continuity of each

> closing argument, avoids calling 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 v. 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 misstating or shifting 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. Woodward's lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. Id.

Furthermore, Mr. Woodward was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. See Glasmann, at ___. The failure to object deprived Mr. Woodward of his 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. Id.

III. THE TRIAL JUDGE VIOLATED MR. WOODWARD'S RIGHT TO DUE PROCESS AND HIS RIGHT TO AN IMPARTIAL JURY BY ERRONEOUSLY DENYING THREE CHALLENGES FOR CAUSE.

A. Standard of Review

Constitutional violations are reviewed de novo. Bellevue School Dist. v. E.S., 171 Wash.2d 695, 257 P.3d 570 (2011). A ruling on a challenge for cause is reviewed for abuse of discretion. State v. Gonzales, 111 Wash. App. 276, 278, 45 P.3d 205 (2002).

B. Mr. Woodward was convicted by a jury that included a biased juror when the trial judge refused to excuse Juror 27 for cause.

A potential juror should be excused for actual bias whenever the juror cannot "try the case impartially and without prejudice to the substantial rights of the party challenging that juror." RCW 4.44.170(2); City of Cheney v. Grunewald, 55 Wash. App. 807, 780 P.2d 1332 (1989). Any doubts regarding bias must be resolved against the juror. United States v. Gonzalez, 214 F.3d 1109, 1114 (9th Cir. 2000); State v. Cho, 108 Wash. App 315, 329-330, 30 P.3d 496 (2001). Erroneous denial of a challenge for cause requires reversal whenever the biased juror participates in the decision to convict the accused person. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; State v. Fire, 145 Wash.2d 152, 165, 34 P.3d 1218 (2001) (plurality) (citing U.S. v. Martinez-Salazar, 528

U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), and State v. Roberts, 142 Wash.2d 471, 14 P.3d 713 (2000)).

In this case, Juror 27 knew A.G. because he had her in class. He also was the IEP manager for one of the witnesses. In addition, his children had grown up with the prosecutor (and his brother). RP 679-683. Even though Juror 27 did not wish to admit to bias—he spoke, instead, of "awkwardness"—these circumstances establish that he should have been excused for cause.

Despite this, the judge refused to excuse Juror 27 for cause. RP 683. Mr. Woodward exhausted his peremptory challenges removing other jurors, and Juror 27 sat on the jury that voted to convict. This deprived Mr. Woodward of his constitutional right to a fair trial by an impartial jury. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Gonzales, at 282. His convictions must be reversed and the case remanded for a new trial. Id.

C. The trial judge violated Mr. Woodward's state constitutional right to a jury trial by forcing him to exhaust peremptory challenges to remove biased jurors who should have been excused for cause.

1. Gunwall analysis suggests that the state constitutional right to a jury trial is broader than the corresponding federal right.

As with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal

right. See, e.g., City of Pasco v. Mace, 98 Wash.2d 87, 97, 653 P.2d 618 (1982). Wash. Const. Article I, Section 21 provides that "[t]he right of trial by jury shall remain inviolate..." Wash. Const. Article I, Section 22 provides that "[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury..." The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986).[3]

The first Gunwall factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that "[t]he right of trial by jury shall remain inviolate..." The strong, simple, direct, and mandatory language ("shall remain inviolate") implies a high level of protection, and, in fact, the court has noted that the language of the provision requires strict attention to the rights of individuals. Sofie v. Fibreboard Corp., 112 Wash.2d 636, 656, 771 P.2d 711 (1989). In addition, Wash. Const. Article I, Section 22 (amend. 10) provides that "[i]n criminal prosecutions the accused shall have the right

[3] In Fire, supra, the court noted that the defendant had not provided a Gunwall analysis. The court reviewed its prior cases and determined that none compelled a departure from the federal standard. Fire, at 159-163 (plurality). The court did not sua sponte undertake a Gunwall analysis. Since no published opinion has ever examined the issue under Gunwall, Mr. Woodward provides the analysis here. Applying the Gunwall factors to this issue, an independent application of the state constitution requires reversal of Mr. Woodward's convictions.

to. . . a speedy public trial by an impartial jury..." Again, the direct and mandatory language ("shall have the right") implies a high level of protection. The existence of a separate section specifically referencing criminal prosecutions further emphasizes the importance of the right to a jury trial in criminal cases. Thus, the language of Article I, Section 21 and Article I, Section 22 favors the independent application of the state constitution advocated by Mr. Woodward.

The second Gunwall factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. The Federal Sixth Amendment and Wash. Const. Article I, Section 22 are similar in that both grant the "right to . . . an impartial jury." But Wash. Const. Article I, Section 21, which declares "[t]he right of trial by jury shall remain inviolate . . . ." has no federal counterpart. The Washington Supreme Court in Pasco v. Mace found the difference between the two constitutions significant, and determined that the state constitution provides broader protection.[4] Thus, differences in the language between the state and federal constitutions also favor an independent application of the state constitution in this case.

[4] The court held that under the state constitution "no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime." This is in contrast to the more limited protections available under the federal constitution. Pasco v. Mace, at 99-100.

Under the third Gunwall factor, this court must look to state constitutional and common law history. Article I, Section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." Pasco v. Mace, at 96. See also State v. Schaaf, 109 Wash.2d 1, 743 P.2d 240 (1987); State v. Smith, 150 Wash.2d 135, 151, 75 P.3d 934 (2003). No Washington territorial cases address the situation presented here. The majority of other states did not require reversal where an accused person was forced by an erroneous ruling to exhaust peremptory challenges. See, e.g., State v. Winter, 72 Iowa 627 (1887); Ochs v. People, 25 Ill.App. 379 (1887). But see Hartnett v. State, 42 Ohio St. 568 (1885) (reversal required when court erroneously denies challenge for cause and forces defendant to exhaust peremptory challenges). Accordingly, the third Gunwall factor does not support Mr. Woodward's argument.

The fourth Gunwall factor "directs examination of preexisting state law, which 'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.'" Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wash.2d 791, 809, 83 P.3d 419 (2004) (quoting Gunwall, at 62).

Under a long line of Washington cases, an accused person was entitled to a new trial when forced to exhaust peremptory challenges to remove a juror who should have been excused for cause. See, e.g., State v.

Moody, 7 Wash. 395, 35 P. 132 (1893); State v. Rutten, 13 Wash. 203, 43 P. 30 (1895); State v. Stentz, 30 Wash. 134, 70 P. 241 (1902); State v. Muller, 114 Wash. 660, 195 P. 1047 (1921); McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 236 P. 797 (1925); State v. Patterson, 183 Wash. 239, 48 P.2d 193 (1935); State v. Parnell, 77 Wash.2d 503, 508, 463 P.2d 134 (1969), overruled in part on other grounds by Fire, supra. Washington differed from the majority of other states in this way. Thus, pre-existing state law favors the interpretation urged by Mr. Woodward.

The fifth Gunwall factor (structural differences in the two constitutions) always points toward pursuing an independent analysis, "because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power." State v. Young, 123 Wash.2d 173, 180, 867 P.2d 593 (1994).

The sixth Gunwall factor deals with whether the issue is a matter of particular state interest or local concern. The protection afforded a criminal defendant through peremptory challenges is a matter of state concern; there is no need for national uniformity on the issue. Gunwall factor number six thus also points to an independent application of the state constitutional provision in this case.

Five of the six Gunwall factors favor an independent application of Article I, Sections 21 and 22 in this case. Other than factor 3 (common law

and state constitutional history), the Gunwall factors establish that our state constitution provides greater protection to criminal defendants than does the federal constitution. The substance of the state constitutional protection can be inferred from the long line of cases requiring reversal of a conviction whenever an accused person is erroneously forced to exhaust peremptory challenges removing a biased juror. Moody, supra; Rutten, supra; Stentz, supra; Muller, supra; McMahon, supra; Patterson, supra; Parnell, supra. Although these cases were not based on the state constitutional right, they provide the context in which the right must be understood. Applying the reasoning and values set forth in those decisions, a conviction must be reversed whenever the erroneous denial of a challenge for cause forces an accused person to exhaust peremptory challenges.

2. The refusal to excuse Jurors 3, 26, and 27 forced Mr. Woodward to exhaust his peremptory challenges.

Here, the trial court should have excused Juror 27 for cause, as outlined elsewhere in this brief. In addition, the court should have excused Jurors 3 and 26.

Juror 3 (whose wife and sister and law had been forcibly raped by their mother's boyfriend) was hesitant about saying he could be fair and expressed concern that the charged crimes would be "the more disgusting

thing" for him. RP 602. He said that he had "a shiver go up [his] spine" when he heard the charges, and that he didn't know if he could "stop that or not from happening" during the trial. RP 604. He said that he "would try" to be fair, and "[t]hat's about as good as you're going to get." RP 604. In light of the similarity between the charged offenses and the crimes committed against Juror 3's wife and sister-in-law, the trial judge should have excused Juror 3 for cause. This is especially true because Juror 3 expressed an inability to be fair, because the prosecution against his wife's assailant had failed, and in the end Juror 3 was not fully rehabilitated.

Similarly, Juror 26 repeatedly said that she might be unable to set her sympathy aside. RP 707-710. In light of this, the court should have excused her for cause when she (like Juror 3) was able to give only a tepid reassurance. RP 710.

The judge should have excused all three jurors. Grunewald, supra; Cho, supra. The failure to excuse Jurors 3, 26, and 27 forced Mr. Woodward to exhaust his peremptory challenges to remove two of the three jurors. He was therefore unable to use his final peremptory challenge on any of the twelve jurors who were seated on the jury. RP 742-750. This violated his state constitutional right to a fair trial by an impartial jury. Wash. Const. Article I, Sections 3, 21, and 22. His convictions must be reversed and the case remanded to the superior court for a new trial.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY SCORING COUNTS TWO AND THREE SEPARATELY INSTEAD OF FINDING THAT THEY COMPRISED THE SAME CRIMINAL CONDUCT.

A. Standard of Review

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wash.2d 103, 110, 3 P.3d 733 (2000).

B. Multiple offenses comprise the same criminal conduct if committed at the same time and place, against the same victim, and with the same overall criminal purpose.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. State v. Dolen, 83 Wash. App.

361, 365, 921 P.2d 590 (1996), review denied at 131 Wash.2d 1006, 932 P.2d 644 (1997) (citing RCW 9.94A.110); State v. Jones, 110 Wash.2d 74, 750 P.2d 620 (1988); State v. Gurrola, 69 Wash. App. 152, 848 P.2d 199, review denied, 121 Wash.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court "'should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next....'" State v. Garza-Villarreal, 123 Wash.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting State v. Dunaway, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987)). A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. State v. Williams, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); State v. Porter, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

Charges of child molestation and child rape against a single victim comprise the same criminal conduct if they are committed during a single incident, where the offender does not take the time to pause and reflect between one offense and the next. State v. Tili, 139 Wash.2d 107, 119-125, 985 P.2d 365 (1999); see also Dolen, at 364-365; State v. Walden, 69 Wash. App. 183, 188, 847 P.2d 956 (1993); State v. Palmer, 95 Wash. App. 187, 975 P.2d 1038 (1999).

In this case, the prosecutor alleged that Mr. Woodward molested and raped A.G. between January 1, 1999 and January 31, 2006. CP 21. A.G. was not asked to separate occasions on which she was molested from occasions on which she was raped, and the jury was never instructed to find that counts two and three were "separate and distinct" from each other. RP 835-911; Court's Instructions, Supp. CP. Nor did the prosecution attempt to prove at sentencing that the two charges stemmed from different incidents, or that Mr. Woodward took time to pause and reflect between offenses.[5] RP 1166-1187.

Accordingly, the evidence was insufficient to establish that the two offenses scored separately under RCW 9.94A.589. The court should have found counts two and three to be the same criminal conduct and scored them as a single offense. RCW 9.94A.589(1)(a); Garza-Villarreal. Had the court done so, it would have sentenced Mr. Woodward with an offender score of three, rather than six. Accordingly, his sentence must be vacated and the case remanded for resentencing with an offender score of three. Id.

[5] Had the state attempted to do so, any finding of separate conduct would have been subject to challenge under Blakely, as outlined elsewhere in this brief.

V. MR. WOODWARD'S SENTENCE WAS IMPOSED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY DETERMINE EVERY FACT THAT INCREASED THE PENALTY FOR EACH OFFENSE.

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., at 702.

B. The trial court imposed a sentence above the statutory maximum without a jury determination beyond a reasonable doubt of the facts used to increase the penalty.

The state and federal constitutions guarantee an accused person the right to due process and the right to a trial by jury. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 3, 21, and 22. Any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. State v. Recuenco, 163 Wash.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. Article I, Section 21).

3. The trial court should have scored counts two and three as the same criminal conduct, absent a jury finding that the two offenses were separate and distinct.

Where the state proves that multiple current offenses are separate and distinct from each other, they score separately, resulting in a higher offender score and a longer standard range. RCW 9.94A.589.

In this case, the prosecution offered evidence of multiple incidents of child molestation and rape to prove counts two and three. CP 21-23; RP 758-962, 1119-1135, 1148-1154. The jury was not required to find that each count involved separate and distinct conduct; accordingly, the jury was permitted to convict based on a single incident that involved both molestation and rape. Court's Instructions, Supp. CP. In the absence of some showing that the jury convicted based on two separate incidents,[6] the jury's verdict did not authorize the court to impose the higher sentence that goes with scoring the offenses separately. Blakely, supra.

The enhanced sentence violated Mr. Woodward's right to a jury trial and to proof beyond a reasonable doubt, under both the state and federal constitutions. Blakely, supra; Recuenco, supra. The sentence must be vacated, and the case remanded to the trial court for resentencing with an offender score of three. Id.

4. The trial court should have sentenced Mr. Woodward using the sentencing scheme in effect prior to September 1, 2001, absent a jury finding that each offense occurred after that date.

In 2001, the legislature changed the sentencing scheme for certain sex offenses. Under the prior regime, sex offenders were sentenced to determinate sentences within a standard range, in accordance with the

[6] Such as a special verdict indicating that the two offenses involved different incidents.

general sentencing scheme set forth in the SRA. See former RCW 9.94A.120 (1999). After September 1, 2001, the court was required to impose the statutory maximum for a sex offense, and set a minimum release date within the standard range. Laws of 2001, 2nd Sp. Session, Ch. 12, Section 303.

The charging period in this case stretched from January 1, 1999 through August 30, 2008 (count one), and through January 31, 2006 (counts two and three). The children did not specify particular offense dates in their testimony, and the jury was not asked to convict Mr. Woodward only for acts that occurred after September 1, 2001. CP 21-23; RP 758-962, 1119-1135, 1148-1154; Court's Instructions, Supp. CP. Nor did the jury return a special verdict, indicating that the convictions were based on incidents occurring after that date. See Verdict Forms, Supp. CP.

In the absence of a jury finding that each offense occurred after September 1, 2001, the court was not authorized to sentence Mr. Woodward under the "determinate plus" scheme now codified at RCW 9.94A.507. Blakely, supra. Despite this, the sentencing judge imposed a life sentence on each charge (the statutory maximum for first-degree child molestation and child rape), and set a minimum release date, rather than imposing a determinate sentence within the standard range. CP 6.

The sentence imposed violated Mr. Woodward's right to due process, as well as his state and federal constitutional right to have the jury determine every fact used to increase the penalty.[7] Blakely, supra; Recuenco, supra. Accordingly, the sentence must be vacated and the case remanded for resentencing within the standard range, as it existed prior to September 1, 2001. Id.

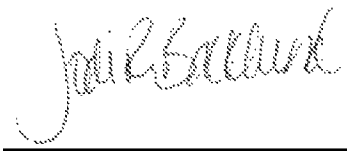
[7] See also State v. Aho, 137 Wash.2d 736, 744, 975 P.2d 512 (1999) (due process violated where charging period spans the effective date of statute defining the offense).

CONCLUSION

For the foregoing reasons, Mr. Woodward's convictions must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for resentencing with an offender score of three, using the sentencing scheme in effect prior to September 1, 2001.

Respectfully submitted on December 26, 2012,

BACKLUND AND MISTRY



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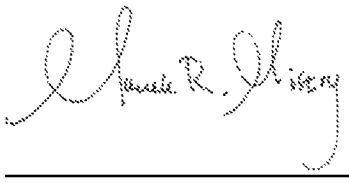

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Robert Woodward, DOC #357466
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001

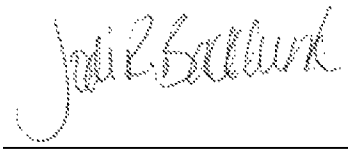
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney
timw@co.mason.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 26, 2012.



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