NO. 44221-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DUANE ALLEN MOORE,

Appellant.

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

The Honorable Sally F. Olsen, Judge

OPENING BRIEF OF APPELLANT

RITA J. GRIFFITH
Attorney for Appellant

RITA J. GRIFFITH, PLLC
4616 25th Avenue, #453
Seattle, WA 98105
(206) 547-1742

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STATUTES, RULES, AND OTHER AUTHORITY:

A. ASSIGNMENTS OF ERROR

1. The prosecutor's misconduct in misstating and trivializing the state's burden of proof in voir dire and closing argument denied Mr. Moore his state and federal constitutional rights to the presumption of innocence and due process of law.

2. The court's allowing the complaining witness to testify with a service or comfort dog was an unconstitutional comment on the evidence.

3. The court's allowing the complaining witness to testify with a service or comfort dog denied Mr. Moore his state and federal constitutional rights to the presumption of innocence, the confrontation of witnesses, and due process of law.

4. The prosecutor's unrequested testimony about the complaining witness's being traumatized and allegations about uncharged crimes violated the real facts doctrine and denied Mr. Moore his state and federal constitutional rights to due process and a fair sentencing proceedings.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the prosecutor's misconduct, during voir dire and closing argument, deny Mr. Moore the presumption of innocence and due process by: (a) asserting that the state knew more facts about the case than would be presented at trial; (b) trivializing the reasonable doubt standard by comparing it to a common sense belief that the world is round; (c) implying to the jurors

that they should reach a verdict by weighing the credibility of the state's witnesses against the credibility of the defendant; and (d) focusing the jurors on how certain they had to be to convict rather than what should make them hesitant to convict?

2. Did the trial court's allowing the complaining witness to testify with a court service or comfort dog constitute an unconstitutional comment on the evidence, under the Washington Constitution, where it necessarily conveyed to the jury that the court found she had been so traumatized by the alleged incident that she needed the assistance of the dog to testify?

3. Did the trial court's allowing the complaining witness to testify with a court service or comfort dog deny Mr. Moore the presumption of innocence and his state and federal constitutional rights to confrontation and due process where it necessarily conveyed to the jury that the court found she had been so traumatized by the alleged incident that she needed the assistance of the dog to testify and where the presence of the dog shielded her from a true face-to-face confrontation?

4. The complaining witness told the prosecutor that she did not want to appear at sentencing, but asked him to read her statement at the sentencing hearing. Her statement indicated that she had "mixed feelings" about the case, showed her love for Mr. Moore and her wish that he could

receive treatment so it would never happen again. She did not request any other assistance from the prosecutor. Under these circumstances, did the prosecutor's unsworn testimony at sentencing that the complaining witness had been more frightened to testify than any other victim he had ever seen and that she said she had a long history of prior domestic violence with Mr. Moore and that she learned of other instances involving other people, violate the real facts doctrine and deny Mr. Moore his state and federal constitutional rights to a fair trial?

C. STATEMENT OF THE CASE

1. Procedural history

The Kitsap County Prosecuting Attorney's Office charged Duane Moore with one count of second degree assault, by strangulation.[1] RCW 9A.36.021(1) (g); CP 1-6. A jury convicted Mr. Moore, as charged, after trial before the Honorable Sally F. Olsen, and found him guilty of the domestic violence special allegation. CP 39, 40.

On November 16, 2012, Judge Olsen imposed a sentence of 62 months, a term within the standard range, and rejected the defense request

[1] The Court instructed the jury that "a person commits the crime of assault in the second degree when he or she assaults a person by strangulation," and that to convict Mr. Moore of second degree assault, it had to find that he assaulted the complaining witness by strangulation. CP 28, 32.

for an exceptionally low sentence. CP 58-68; RP(11/16/12) 23-24, 35.[2] Mr. Moore filed a timely notice of appeal from his judgment and sentence. CP 70.

2, Trial testimony

The assault charge arose from an argument that took place on the evening of July 22, 2012, between Mr. Moore and his wife Sabrina Moore. RP 149-150, 166, 198. The two, who were separated at the time, met at church that morning and had dinner and watched a movie later in the day, together with Mr. Moore's brother Alvin. RP 166, 198-200. It was undisputed that they quarreled and yelled at one another that evening and had been very angry at the time. RP 167-169, 201.

Mr. Moore testified that the two were yelling"face-to-face" and "chest-to-chest," and that Ms. Moore pushed him as one pushes someone who has invaded her space. RP 201-203. He denied having hit, grabbed or choked her, nor did he put his forearm on her throat. RP 201-203, 207. Mr. Moore decided to leave when his friend Thomas Flores drove up, but Ms. Moore followed him out to Mr. Flores's car trying to continue the argument. RP 204-205.

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[2] The verbatim report of proceedings of the voir dire and trial, on October 24 and 25, 2012, are in two, consecutively-number volumes designated RP. Other volumes of the verbatim report of proceedings are designated by date.

According to Sabrina Moore, Mr. Moore had become belligerent during the evening and yelled and pointed his finger at her telling her to shut up. RP 168. He pointed his fingers at her and pushed his face and fingers towards her face and chest. RP 168-169. She testified that he followed her down the hall and into the bedroom. RP 169-170. When she got out of the bedroom and back to the living room, Mr. Moore went into the kitchen and picked up a plastic bottle with a tea drink in it and threw it at her. RP 170. Ms. Moore went out to the porch and Mr. Moore followed her and, she said, put one forearm behind her neck and one forearm across her neck in front and applied pressure for about one minute: "he pretty much had his forearm of his left hand behind my head, his right forearm around my throat, or on my throat." RP 172-173. A neighbor intervened. RP 173-174. According to Ms. Moore, Mr. Moore's friend drove up, Mr. Moore walked to the street and she went inside and called 911. RP 174-175. She described a series of pictures she took of herself one or two days later which she said showed some bruises and scratches on her arms and leg. RP 179-180. She explained that she bruises very easily. RP 180, 182.

Ms. Moore admitted that she never sought any medical attention, RP 182, and that when Mr. Moore had his forearm across her throat, she was against the porch railing leaning backwards, rather than up against a

solid wall. RP 182.

Two neighbors heard the argument. Mariah Jacobs had been on her back porch, and walked through her house and out the front door to see what was happening. RP 188. There was another house in between her house and Ms. Moore's house; she estimated she was about thirty feet away from what was happening. RP 189. Ms. Jacobs testified she saw the Moores come outside and that what she saw going on between them happened "very, very quickly." RP 189. Moreover, Ms. Jacobs initially was viewing from behind a bush because she did not want the neighbors to know she was calling the police. RP 191. She said that "what really sticks in my mind is he did put her up against a wall and looked like her hit her." RP 189. On further examination, she agreed that it "looked like" he placed his arm against her throat and then hit her. RP 190. She said she also thought she heard the words, "he's choking me." RP 190. Ms. Jacobs told the police that evening that Mr. Moore was hitting Ms. Moore with one hand and hit her perhaps five times. RP 191. She also told the police that Ms. Moore followed Mr. Moore out to a car as he was trying to leave and continued to yell at him. RP 192.

Tobias Gomez, an across-the-street neighbor, heard the argument and went over and confronted Mr. Moore who she said was grabbing Ms. Moore. RP 194. When asked if she saw Mr. Moore hitting Ms. Moore,

she responded equivocally, "When I first got there – because I went over there because of the commotion, I don't like domestic violence and it really pisses me off . . . I went and confronted him." RP 195 (emphasis added).

Officer Lawrence Green arrived to find a crowd of twenty to thirty people in front of the Moore house. RP150. Ms. Moore was very upset and crying when he talked to her. RP 151-152. She showed him a bottle of tea she said was thrown at her. RP 152. He took pictures of her neck, and the small of her back which she said was hit by the thrown tea bottle, and her injured finger. RP 152-155.[3] Officer Green had not observed any injury to Ms. Moore's face. RP 157.

3. The service dog

Ms. Moore asked, through the prosecutor, to have the courtroom service dog with her at the witness stand because she was nervous and scared. RP 164. At the court's suggestion the dog, Keris, was brought in before the jurors entered the courtroom. RP 164.

4. The prosecutor's argument during voir dire

During voir dire, the prosecutor began a discussion of the "concept

[3] Defense counsel noted in closing argument that, in the pictures, Ms. Moore's hair, jewelry and hair were not in disarray. RP 228. Counsel noted as well that the redness at the neck was as if she were flushed on a warm July night. RP 228.

of beyond a reasonable doubt" by asking if this standard is "100%." RP 98. After eliciting several responses to this question, the prosecutor stated that the jurors were "in a difficult position because inevitably we know more about the case than you do." RP 100. He followed this with a further statement that the jurors had to consider only the facts given through the evidence" and a concluding question, "If you don't think 100% is going to be given, and you think there's going to be stuff left out, are you going to be able to make a decision?" RP 100-101.

When a prospective juror responded that "If you haven't completely convinced me, I'm not going to put a man in jail," the prosecutor replied:

> I agree with you. The burden is on the State. So we have the burden to prove beyond a reasonable doubt that the defendant committed the crime, and it's a high burden.
>
> But what I'm trying to get across to you is that it's not an impossible burden.
>
> Now let me give you an example, No. 36.
> If I were to say to you, I will give you $100,000 if you can prove to me that the world is round in the next hour, could you do that?

RP 101-102.

The jurors then suggested authority such as Copernicus, Galileo, Newton, photos from space, and a science experiment as proof. RP 102-103. The prosecutor responded by asking whether you can be sure that

when you type in "NASA" on the computer, you are seeing something real. RP 103. After a few more exchanges, the prosecutor summarized:

> Okay. I think we all know the earth is round, I think you're telling me, the resources that you would use going to encyclopedias, if those still exist, Google, the Internet, things of that nature, is [sic] you're satisfied, Juror No. 17, correct me if I'm wrong, beyond a reasonable doubt that the earth is a sphere, correct. Are you satisfied beyond that the earth is a sphere based on what you know?
>
> . . . [juror responses]
>
> "You've never been to space.
>
> . . . [juror responses]
>
> Is it fair for me to say that you're satisfied beyond a reasonable doubt based on a common sense appreciation of the facts, is that correct?
>
> . . . [juror responses]
>
> That's kind of my point. The standard of beyond a reasonable doubt, it's difficult to wrap your head around. It will be defined for you too.
>
> . . . [objection sustained to the prosecutor's giving a legal definition of beyond a reasonable doubt]
>
> . . . My point is, you can be satisfied beyond a reasonable doubt based on a common sense appreciation of the facts that you're presented with. It's not an impossible standard.

RP 102-106.

Then, in closing argument, the prosecutor referred back to the discussion of reasonable doubt in voir dire before paraphrasing one

portion of the reasonable doubt instruction ("If after fully, fairly, and carefully considering all of the evidence you have what's called an abiding belief in the truth of the charge then you are satisfied beyond a reasonable doubt")[4] and telling the jurors that "abiding" belief meant a lasting or enduring belief. RP 212-213.

But towards the end of closing, the prosecutor once again harkened back to voir dire.

> Also I want you to think about the concept of beyond a reasonable doubt. I talked about the example in voir dire of how the world is round, and what makes you think the world is round, why are you satisfied beyond a reasonable doubt the world is round. What we discuss, and what we agreed on, is that you can be satisfied beyond a reasonable doubt based on a common sense appreciation of the facts. I want you to think about that in this case. If you look at the witnesses's testimony, specifically Officer

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[4] The Court's Instruction was:

> The defendant has entered a plea of not guilty. The plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 21-35 (emphasis added),

> Green, Sabrina Moore, Tobias Gomez and Mariah Jacobs, their testimony corroborates what happened. Their testimony makes sense.
>
> If you look at the defendant's testimony that nothing happened, the argument never became physical, Sabrina was in fact the one who assaulted him, it just doesn't make sense. . . .

RP 223-224.

5. The prosecutor's presentation at sentencing.

The prosecutor stated at sentencing:

> I spoke with the victim Sabrina Moore yesterday. She did not wish to be present for sentencing. She has been extremely traumatized by this event. It's has a significant impact on her life. She's afraid of the Defendant. She indicated that there has been a long history of domestic violence between the two of them and this is the first incident that was actually reported. I think they've been married for approximately two years. She said she was unaware of a previous domestic violence history that the Defendant had and it was kind of shocking to her and just kind of a huge realization in her life when this incident brought that aspect of the Defendant's life to light. I can tell you prior to her testifying she was sitting in my office with her teeth chattering, and, quite frankly, in all of the time that I've been doing this, I've never seen a victim quite so scared to come into the courtroom and face ---

RP(11/16/12) 3-4. The court overruled defense counsel's objection that the prosecutor was testifying as to his own opinion, RP11/16/12) 4.

The prosecutor continued that "she was very afraid of the Defendant," but provided a statement from Ms. Moore for the court to read. RP(11/16/12) 4. Although the statement was not read into the

record or made a part of it,[5] the prosecutor indicated that the statement made it clear that Ms. Moore had mixed feelings about the case and "obviously loves" Mr. Moore and wants him to get treatment, but that she did not want what happened to her to happen to someone else. RP(11/16/12) 4-5.

A number of people spoke on behalf of Mr. Moore and told the court about his good works in the community. Members of his family spoke of his being a loving and compassionate brother, and about his having turned his life around four years earlier when he became a community advocate and supporter of the church. RP(11/16/12) 9-10, 13, 19.18. Others spoke of Mr. Moore's help to provide necessities to men, women and children who lacked them. RP(11/16/12) 15-16, 20-21. Others filed letters in support of Mr. Moore. RP(11/16/12) 22.

Defense counsel requested an exceptional sentence below the standard range. RP(11/1/6/12) 24. Mr. Moore asked the judge for mercy. RP(11/16/12) 32.

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[5] "She said she didn't want to see the Defendant. She did, however, forward to me a statement that she wished I would read to the Court for the purpose of this sentencing hearing, and with your permuission I would like to do that now. She did not want to file it with the court."RP(11/16/12) 4 (emphasis added).

D. ARGUMENT

1. THE PROSECUTOR'S MISCONDUCT IN MISSTATING AND TRIVIALIZING THE STATE'S BURDEN OF PROOF DURING VOIR DIRE AND CLOSING ARGUMENT ROBBED MR. MOORE OF THE PRESUMPTION OF INNOCENCE AND DUE PROCESS, IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

Both during voir dire and closing argument, the prosecutor committed misconduct by trivializing the reasonable doubt standard and communicating to the jury an erroneous understanding of the state's burden to prove its case beyond a reasonable doubt.

During voir dire, the prosecutor told the jurors that the prosecution "inevitably" knew more facts about the case than they would hear: "You may have questions about there being something more, but you'll have to evaluate the case on what you are given." RP 100. The prosecutor continued his discussion of reasonable doubt with an exercise which he said demonstrated that they all believed the world is round even if they could not easily prove it to be so. RP 101-102. The prosecutor then concluded by telling the jurors that the reasonable doubt standard, like our belief that the world is round, is a matter of having a common sense "appreciation" of the facts; rather, by implication, than a matter of having the state overcome all of their reasonable doubts by the evidence presented at trial.

In closing argument, the prosecutor reminded the jurors of the voir dire discussion of reasonable doubt and his conclusion that the reasonable doubt standard is a matter of applying common sense—of having a common sense appreciation of the facts. RP 223-224. The prosecutor then demonstrated how he thought this standard applied to Mr. Moore's case, arguing that the testimony of the state's witnesses "corroborates what happened" and makes sense, while Mr. Moore's testimony did not make sense. RP 224. He argued that if they evaluated the witnesses' credibility, the jurors would find that Mr. Moore committed the crime. RP 224.

The prosecutor's arguments on reasonable doubt were misconduct because (1) he implied that the state knew more evidence establishing Mr. Moore's guilt than would be admitted at trial: (2) he trivialized and misstated the reasonable doubt standard—which is not the same as making everyday decisions or accepting the truth of science we cannot understand or prove; (3) he implied that the jurors' role was to weigh the credibility of the state's witnesses against Mr. Moore's credibility and decide which it found more credible; and (4) he improperly focused the jurors' attention on how certain they would have to be to reach a verdict beyond a reasonable doubt, rather than on what would make them be hesitant to convict. All this robbed Mr. Moore of the presumption of innocence to which he was entitled and a fair trial as guaranteed by the state and federal

constitutions. Because this misconduct has been identified in the past in published decisions, the prosecutor's reliance on improper arguments was so flagrant and ill-intentioned that it denied Mr. Moore his due process rights to a fair trial. In any event, because Mr. Moore took the stand and testified, and because the jury's verdict would primarily involve assessing the credibility of the witnesses, nothing short of a new trial can cure the prejudice of the misconduct.

"Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial." State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1935) (the remarks of the prosecutor are reversible error if they impermissibly prejudice the defendant). In Berger, the Supreme Court noted that improper innuendoes carry too much weight with jurors who have the expectation that prosecutors operate only from the highest motivation to conduct a fair trial. Berger, 295 U.S. at 88.

A claim of prosecutorial misconduct is established by a showing of improper conduct and prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice is demonstrated where there is a substantial likelihood the misconduct affected the verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2001). Where there is a "substantial

likelihood" that a prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

If defense counsel does not object to the misconduct at trial, however, appellate review is still not precluded where "the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." Belgarde, 110 Wn.2d at 507; State v. Johnson, 158 Wn. App. 677, 686, 243 P.3d 936 (2012); State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237 (1989); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). Misconduct has been deemed flagrant and ill-intentioned where the misconduct has previously been established. Belgarde, at 509-510; State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

a. Arguing facts not in evidence

A prosecutor commits misconduct by arguing facts not in evidence. Belgarde, 110 Wn.2d at 507-509; State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990). When a prosecutor does so, he or she essentially testifies in front of the jury and denies the defendant the Sixth and Fourteenth Amendment rights to confront and cross-examine "witnesses." Belgarde, 110 Wn.2d at 509. While the prosecutor did not argue specific facts not in evidence in this case, he told the jurors that he knew more about the case

than they would hear, that they would "inevitably" not hear all of the evidence and that they should use their common sense when resolving factual issues where they "questioned" whether they received all of the evidence. RP 100. This not only focused on facts not in evidence, it directly contradicted the court's instruction that a reasonable doubt may arise from the absence of evidence. CP 26. This was misconduct.

b. Implying that the jurors' job is to convict if they find the state's witnesses are more credible than the defendant

It has long been recognized that a prosecutor commits misconduct by arguing to jurors that in order to aquit the defendant, they would have to find that the state's witnesses were lying. State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); State v. Fleming, 83 Wn. App. 209, 213-214, 921 P.2d 1076 (1996). Here, the prosecutor did not make this argument directly, but certainly implied that the jurors' job in reaching a verdict was to determine whether it was the state's witnesses or the defendant who were telling the truth. This is commensurate to the misconduct of implying that to acquit, the jury would have to find the state's witnesses not credible.

In Fleming, the court held:

> The prosecutor's argument misstated the law and

> misapprehended both the role of the jury and the burden of proof. The jury would not have to find D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony.

Fleming, 83 Wn. App. at 213 (emphasis in original). Because the same arguments which had been found improper in prior courts, the Fleming Court found them to be flagrant and ill-intentioned. Id. The misconduct shifted "the burden to the defendants to disprove the State's case." Id.

As in Fleming, the prosecutor's application of what he called "a common sense appreciation of the facts" to the facts of Mr. Moore's case, invited the jurors to convict if they found the state's witnesses more credible than the defendant. As in Fleming, the jurors were required to acquit unless they had an abiding belief in the truth of Ms. Moore and the state's other witnesses.

c. Trivializing and misstating the burden of proof

Most importantly, the prosecutor committed misconduct by misstating the burden of proof. In State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), the Court of Appeals reversed because of the prosecutor's misconduct in arguing that to find the defendant not guilty they would have to say, "I doubt the defendant is guilty and my reason is (blank)." This subverted the presumption of innocence. Id. The Court also held that the prosecutor's setting the reasonable doubt discussion in the

context of everyday decision-making such as elective surgery, babysitting, etc., the prosecutor "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing the State's case against the defendant": "[F]ocusing on the degree of certainty the jurors would have to have to be willing to act, rather than what would cause them to hesitate to act," conveyed that they should convict unless they had a reason not to. Id, at 431-432. Similarly, in State v. Johnson, supra, the prosecutor committed misconduct not only with a "fill in the blank type" argument about reasonable doubt, but by trivializing the state's burden by focusing on the certainty the jurors would have to have to act. The prosecutor in Johnson argued that being satisfied beyond a reasonable doubt was like being convinced of what a jigsaw puzzle pictured even without all of the pieces – which was precisely the point of the prosecutor's the-world-is-round example in this case. Similarly, in State v. Venegas, 155 Wn. App. 507, 523, 228 P.3d 813 (2010), the appellate court reversed for prosecutorial argument which misstated the burden of proof.

In Johnson, supra, the Court reversed, even in the absence of a trial objection, because the prejudice was deemed to be incurable by jury instruction. Johnson, at 686. The Court, in Johnson, also noted the holding in Fleming, that engaging in well-recognized forms of misconduct should be deemed flagrant and ill-intentioned. Id.

Here, the case was the kind of case where the misconduct would be most prejudicial. The complaining witness's testimony was not particularly corroborated by the two eye-witnesses – one of whom told the police that Ms. Moore followed Mr. Moore out to his friend's car as he was leaving, yelling and shouting at him. RP 204-205. Mr. Moore took the stand and testified in his own behalf. Credibility was necessarily an issue, and the jurors' being told that they could fill in any missing evidence they would like to have seen with their own "common sense" and that their job was to balance the state's case against the defendant's testimony and base their verdict on who they found most credible could hardly have been more unfairly prejudicial. The prosecutor's voir dire was improper, but when he incorporated it again into his closing argument, the prejudice could not have been cured.

Although the prosecutor referred to the court's reasonable doubt instruction, he referred to only its final sentences, taken out of context to eliminate the references to the state's burden and the presumption of innocence. In effect, the prosecutor used those sentences to redefine the reasonable doubt standard as one in which the state need only give the jury a lasting common sense impression that the defendant was guilty.

Because of the prosecutor's misconduct in trivializing and misstating the burden of proof, Mr. Moore's conviction should be reversed and his case

remanded for retrial.

2. THE USE OF THE SERVICE OR COMFORT DOG BY THE COMPLAINING WITNESS WHEN SHE TESTIFIED DENIED MR. MOORE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE, DUE PROCESS AND CONFRONTATION OF WITNESSES.

Without any analysis or consideration of prejudice, the trial court allowed Sabrina Moore to testify with the court's service dog at her side. RP 164. The only acknowledgement of the prejudice of using the dog during her testimony was the court's suggestion that the dog be at the witness stand when the jury entered the courtroom again. RP 164.

To have the dog present was error as it conveyed to the jury that the trial judge had determined that the witness was so traumatized that she needed comfort and assistance to be able to testify in the presence of Mr. Moore. This not only commented on the evidence, it denied Mr. Moore his state and federal constitutional rights to due process, the presumption of innocence and confrontation of witnesses.

a. Comment on the evidence

Article 4, section 16 of the Washington, provides that "judges shall not charge juries with respect to matter of fact, nor comment thereon, but shall declare the law." A judge comments on the evidence "if [he or she]

conveys or indicates to the jury a personal opinion or view . . .regarding the credibility, weight, or sufficiency of some evidence introduced at trial." State v. Theroff, 95 Wn.2d 385, 3880389, 622 P.2d 1240 (1980).State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981). A comment is constitutional error where it expresses "the court's attitude toward the merits of the case or the court's evaluation relative to a disputed issue is inferable from the statement." State v. Hansen, 46 Wn. App. 272, 300, 730 P.2d 706 (1986) (emphasis in original).

Because a comment on the evidence is constitutional error, it can be raised for the first time on appeal. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Hansen, 46 Wn. App. at 300. A comment on the evidence is presumed to be prejudicial. State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076 (2009). It is irrelevant whether the court intended the statement to be a comment. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968). The prejudice of comments on the evidence must be reviewed in light of the facts and circumstances of the case. Painter, 27 Wn. App. at 715.

Here, the presence of the service or comfort dog represented to the jury the trial court's view that Sabrina Moore was so traumatized by the incident that she could not testify without the support of the specially-trained dog. There was no other explanation for the presence of the dog: Sabrina

Moore was not disabled, nor was she a child who might be intimidated by the courtroom whether or not she had experienced trauma. Allowing Ms. Moore to testify with a court dog implied the court's view that Mr. Moore had caused the trauma and was guilty as charged. This was prejudicial error and denied Mr. Moore a fair trial. He should be given a new trial in which none of the witnesses testified with the aid of a service or comfort dog.

b. Denial of due process and confrontation

Although the court rejected the challenge to the use of a service dog in State v. Dye, 170 Wn.340, 283 P.3d 1130 (2012), the Washington Supreme Court granted review of that case on February 5, 2013, No. 87929-0. Moreover, Dye is distinguishable from the facts of the case. The witness in Dye was disabled and found to be functioning at the level of a child. Dye, at 344. And, unlike here, the jury in Dye was instructed not to infer anything from the presence of the dog. Id., at 348.

In agreeing to let Sabrina Moore testify with the aid of a service dog, the trial court lost sight of its paramount responsibility to insure that Mr. Moore, the accused person, received a fair trial.[6] Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); U.S. Const. amends.

[6] No doubt there are many accused persons who are anxious and traumatized by being in the courtroom facing a prison sentence, but it is hard to imagine the trial court providing comfort dogs to them.

VI, XIV; Wash. Const. Art. 1, section 3, 22. This is because the presence of the dog inevitably conveys to the jury a belief by the court that the adult, non-disabled witness needs the comfort and security provided by the dog because the witness has been victimized.

While the Dye court rejected the analogy to the screening of the child victim in Coy v. Iowa, 487 U.S. 1012, 1022, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), the presence of the security dog can deny confrontation in two ways. Dye, 170 Wn.2d at 346. First, as set forth by Justice Scalia in Coy, a witness "may feel different when he has to repeat his story looking at the man whom he will have harmed greatly by distorting or misstating the truth." Coy, 487 U. S. at 1019 (quoting Z. Chafee, The Blessings of Liberty 35 (1956). It is simply harder to tell a lie about a person "to his face" than "behind his back." Id. The presence of the dog for "security" and "comfort" may dilute the effect of the face-to-face encounter by providing a psychological, if not physical, screen. Second, jurors may interpret the reactions of the dog and the defendant has no ability to confront the dog about its reactions.

Further, the implicit implication that the dog is necessary because the defendant victimized the witness denies due process right to a fair trial. Courts in other jurisdictions have recognized this, even where the witness is a child who is the alleged victim of abuse. In State v. Palabay, 9 Haw. 414,

844 P.2d 1 (1992), the court held that it was error to allow a twelve-year-old witness to testify holding a teddy bear, absent a finding of necessity. In State v. Aponte, 249 Conn. 735, 745-47, 738 A. 117 (1999), the court reversed, as a due process violation, where the prosecutor gave the child witness a Barney doll to during her testimony. The court noted that perhaps it might have reached a different result if the doll had not been a gift from the prosecutor.[7] Aponte, at 745. In State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944), the court reversed where the prosecutor arranged for the child witness to hold the mother's doll on the witness stand.

Here, the court erred in allowing Sabrina Moore to testify before the jury with a security or comfort dog beside her. Whether the jurors inferred that she needed protection (security) or comfort, both of these inferences were improper and denied Mr. Moore a fair trial. His conviction should now be reversed and remanded for trial without the service dog.

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[7] When the state provides the "comfort" there is always the possibility that this will make the witness testify more favorably in exchange for this benefit.

3. THE PROSECUTOR'S TESTIFYING ON BEHALF OF THE COMPLAINING WITNESS AT SENTENCING VIOLATED THE REAL FACTS DOCTRINE AND DENIED MR. MOORE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW.

At the sentencing hearing, the prosecutor told the court that Ms. Moore did not wish to be present and gave the court her statement to be considered in sentencing Mr. Moore. RP(11/16/12 3-4. The prosecutor went beyond this to tell the court that Ms. Moore had been "extremely traumatized" by the incident, that there "has been a long history of domestic violence between the two of them" and that because of this incident she had learned of Mr. Moore's "previous" history of domestic violence with others. RP(11/1/6/12) 3-4. The prosecutor continued by describing Ms. Moore as being terrified, with her teeth chattering, before she testified – "quite frankly, in all of the time that I've been doing this, I've never seen a victim quite so scared to come into the courtroom and face ---"RP(11/16/12) 3-4. At that point, defense counsel's objection to the prosecutor's testifying was overruled. RP(11/16/12) 4.

Although Ms. Moore's statement was not made part of the record, it was described, by the prosecutor, as showing that Ms. Moore had "mixed feelings" about the case and that she"obviously loves" Mr. Moore and wants him to get treatment so that it would never happen again. RP(11/16/12) 4-5. This is a quite different statement than what the prosecutor represented as

Ms. Moore's feelings. The prosecutor's statements were improper, violated the real facts doctrine and denied Mr. Moore due process of law.

The Victims' Rights amendment and RCW 7.69.030 outline specifically the duties of the state and the rights of the victims.[8] As stated by

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[8] Article I, section 35 of the Washington Constitution states:

> Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.
>
> Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights.

RCW 7.69.030 reads in relevant part:

> There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court and/or juvenile court proceeding:
> ....
>
> (12) With respect to victims and survivors of victims, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions upon request by a victim or survivor;

the Court in State v. Carreno-Maldonado, 135 Wn. App. 77, 86, 143 P.3d 343 (2006), neither the constitutional amendment nor the statute provide the prosecutor with the independent right or the duty to speak on behalf of the victim.

> Article I, section 35 and RCW 7.69.030 RCW 7.69.030 give the victims the right to speak or not speak on their own behalf. But they do not provide the State with the right to speak for the victims when they have decided not to speak and have not requested assistance in otherwise communicating with the court such as by presenting a victim impact statement.

In fact, the prosecutor "'is a quasi-judicial officer, representing the People of the state." State v. Case, 49 Wn.2d 66, 298 P.2d 500 (19560; see also, State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). His or her obligation is to prosecute defendants impartially and to seek verdicts based on reason and free of prejudice. State v. Charlton, 90 Wn.2d 657, 585 P.2d

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> (13) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;
>
> (14) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions.
> ....
>
> (16) With respect to victims and survivors of victims, to present a statement in person, via audio or videotape, in writing or by representation at any hearing conducted regarding an application for pardon or commutation of sentence.

142 (1978); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). There is no authority suggesting that a prosecutor can act both as counsel for the people of the state and counsel for particular individuals at the same time

WSBA opinion 1020 (1986) notes that "[b]ecause witnesses do not 'belong' to either party it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that he not submit to an interview by opposing counsel." (emphasis added).

Thus it was improper for the state to go beyond the Victims' Rights Amendment and its statutory duty. It was improper for the prosecutor to present evidence at sentencing which contradicted, at least in part, the statement provided by Ms. Moore and which violated the real facts doctrine.

The real facts doctrine, as set out in RCW 9.94A.530, provides that "In determining a sentence other than a sentence above the standard range, the trial court my rely on no more information than is . . . admitted, acknowledged, or proved in a trial or at the time of sentencing. . ." Here, there was no proof at trial of other incidents of domestic violence, either against Ms. Moore or anyone else; and no evidence that Ms. Moore had been more frightened of Mr. Moore that any other witness the prosecutor had encountered. The testimony by the prosecutor purporting to supply these facts violated the real facts doctrine, to Mr. Moore's prejudice.

Moreover, evidence admitted at sentencing, while not subject to the rules of evidence, must still meet due process requirements. State v. Bell, 116 Wn. App. 78, 678, 684, 67 P.3d 527, review denied, 150 Wn.2d 1023 (2003). By essentially testifying as an unsworn witness, the prosecutor deprived Mr. Moore of the notice that he would be accused of other acts of domestic violence and the opportunity to defend against these accusations. This was fundamentally unfair, and violated Mr. Moore's right to due process. See State v. Galbreath, 69 Wash. 2d 664, 667, 419 P.2d 800 (1966) (the concept of fundamental fairness is inherent in the due process clause of U.S. Const. amend. 14); State v. Tang, 75 Wash. App. 473, 478, 878 P.2d 487 (1994).

Although the trial court imposed a sentence at the mid-point of the standard range, and four months below the sentence advocated by the prosecutor, RP(11/16/12) 8, 35, Mr. Moore requested consideration of a sentence below the standard range. RP(11/16/12) 24. Defense counsel noted that it was Mr. Moore's extensive misdemeanor history that was predominately reflected in his standard range sentence, where a person with no criminal history could commit a significant and more brutal assault and receive a standard range sentence of from three to nine months. RP(11/16/12) 24. A number of Mr. Moore's family members and a number of people who were aware of Mr. Moore's considerable efforts in the

community testified in his behalf. RP(11/16/12) 24-34. They testified how he had turned his life around in the past four years in particular and devoted considerable time and effort to helping others. Id.

Under these circumstances, it is very likely that the prosecutor's improper testimony at sentencing unfairly prejudiced Mr. Moore. As a result, he should be given a new sentencing hearing without the improper representations.

E. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and remanded for retrial and resentencing.

DATED this 11th day of March, 2013.

Respectfully submitted,

_____/s/_____
RITA J. GRIFFITH; WSBA #14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 11th of March, 2013, I caused a true and correct copy of Appellant's Opening Brief to be served on the following by e-mail

Counsel for the Respondent:

Randall Avery Sutton
Kitsap County Prosecutor
kcpa@co.kitsap.wa.us

And by first class mail to:

Duane Moore
932369
Coyote Ridge Corrections Center
1301 N. Ephrata Avenue
Connell, WA 993362

_____/s/_____3/11/2013_____
Rita Griffith DATE at Seattle, WA

GRIFFITH LAW OFFICE

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