

No. 45588-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER MOTHERSHEAD,

Appellant.

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

The Honorable Linda CJ Lee

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. Discussions regarding, and the ultimate removal of, jurors for cause during sidebars and conferences violates the right to a public trial.

The State predictably relies on Division Three's decision in *State v. Love*, 176 Wn.App. 911, 309 P.3d 1209 (2013), *review granted*, 181 Wn.2d 1029 (2015), for the propositions that 1.) Ms. Mothershead did not prove the courtroom was closed and, 2.) use of secret ballots for peremptory challenges do not violate the right to public trial. Brief of Respondent at 15-17.

The Supreme Court granted review of the decision in *Love* and oral argument occurred on March 10, 2015. *See* http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=at_c_supreme_issues.display&fileID=2015Jan. As a result, to the extent the decision in Ms. Mothershead's matter turns on the decision in *Love*, Ms. Mothershead asks this Court to stay consideration of her matter pending the decision of the Supreme Court in *Love*.

2. The trial court's refusal to allow other suspect evidence violated Ms. Mothershead's constitutionally protected right to present a defense.

The trial court required Ms. Mothershead to show motive and opportunity before admission of other suspect evidence plainly

violating Ms. Mothershead's constitutionally protected right to present a defense. As noted in Ms. Mothershead's opening brief, this issue is controlled by the Supreme Court's decision in *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014). Most telling in the State's response is any attempt to distinguish or otherwise argue that *Franklin* does not control this situation. The State's failure is an apparent concession that the trial court erred in excluding Ms. Mothershead's evidence.

As noted in the opening brief, the trial court in *Franklin* required the defendant show more than just motive and opportunity, instead requiring specific facts that someone else committed the offense. 180 Wn.2d at 376-77. The test for admission of "other suspect" evidence is there must be "some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." *Franklin*, 180 Wn.2d at 381.

Here as argued in the Brief of Appellant, the trial court recognized Ms. Mothershead proved Mr. Bowie had motive and opportunity to commit the crime. 10/2/13 RP 12-19. Based on this ruling, the trial court precluded Ms. Mothershead from pointing the finger at Mr. Bowie and from admitting evidence that he had a syringe with liquid in it in the "man room" in which K.M. stayed when she was

at his home. 9/23/13 RP 169-71; 9/24/13 9-14; 10/2/13 RP 12-19; *see* 9/23/13 RP 126-27 (testimony re “man room”), 181-87, 190 (excluding testimony that Bowie offered to pay to abort Mothershead’s pregnancy). As in *Franklin*, this additional requirement burdened Ms. Mothershead’s constitutionally guaranteed opportunity to present a meaningful defense. Most importantly, it placed a greater requirement on Ms. Mothershead than even the State had to meet - for the State could offer no direct evidence that Ms. Mothershead had taken a step towards assaulting K.M.

Further, contrary to the State’s conclusory statement that Ms. Mothershead failed to establish prejudice, the case against Ms. Mothershead was circumstantial—no one could attest to her tampering with the medication, whereas Mr. Bowie also cared for K.M. on his own and administered the Tobramycin drops to K.M. *E.g.*, 9/23/13 RP 132-35, 138, 173-77. Indeed Mr. Bowie was watching K.M. in the barn when the eye injury was first discovered and he was alone with her when the spot on her head was discovered. 9/23/13 RP 139, 159-60, 163, 167-68; *see* 10/2/13 RP 13. Moreover, Ms. Mothershead had maintained K.M.’s health throughout her first year, including by taking her to regular well check-ups. *E.g.*, 9/26/13 RP 108, 111-12. On the

other hand, K.M. had only recently been staying with Mr. Bowie regularly, Ms. Mothershead was recently pregnant with Mr. Bowie's child, and Mr. Bowie was motivated by their recent affair to keep her close to him (she was particularly dependent on her friends while K.M. was unhealthy). *E.g.*, 9/23/13 RP 128-30, 141-42; 10/2/13 RP 12-14. In addition to this evidence, the court prevented Ms. Mothershead from presenting evidence that Mr. Bowie had a liquid-filled syringe in K.M.'s room and offered to pay to end Ms. Mothershead's pregnancy. 9/23/13 RP 169-71, 181-87, 190. The motive and opportunity aligned such that the jury might have reached a different verdict if it had been allowed to consider all the evidence. Consequently, like in *Franklin*, which once again the State failed to distinguish or address, the conviction must be reversed and remanded for a new trial

3. The prosecutor's comments in closing argument constituted reversible misconduct.

Ms. Mothershead argued in her opening brief that the prosecutor's comments regarding her failure to produce evidence was prosecutorial misconduct. In response, the State claims the comments were not misconduct because they were proper comments regarding Ms. Mothershead's testimony and were not a comment on her right to

silence. Brief of Respondent at 39-42. The prosecutor mischaracterizes Ms. Mothershead's argument regarding burden shifting.

Each of the cases cited by the State, including those cited in its Statement of Additional Authorities filed February 27, 2015, involve whether the prosecutor's comments violated the defendant's right to silence. *See Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980); *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008); *State v. Young*, 89 Wn.2d 613, 574 P.2d 1171 (1978). Contrary to the State's conclusion, Ms. Mothershead's argument was not that the prosecutor's comments were comments on her right to remain silent, rather, the comments impermissibly shifted the burden of proof to her, suggesting she bore the burden of proving her innocence as opposed to the State proving her guilty.

The State generally may not comment on the defendant's lack of evidence, because the defendant has no duty to present evidence. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); *State v. Fleming*, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996). "A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise." *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008); *accord Cheatam*, 150 Wn.2d at 652 ("Generally, a

prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence.”). A prosecutor may commit misconduct at closing by arguing that the defense failed to present witnesses or by stating that the jury should find the defendant guilty based simply on the defendant’s failure to present evidence to support the defense theory of the case. *State v. Sells*, 166 Wn.App. 918, 930, 271 P.3d 952 (2012).

As argued in the opening brief, the State, in closing argument, and over defense objection, pointed out to the jury that Ms. Mothershead had failed to testify or offer affirmative evidence proving her innocence. The State characterizes this argument as merely commenting on Ms. Mothershead’s credibility. Brief of Respondent at 41-43. But again, this argument is based on the faulty assumption that the State can comment on Ms. Mothershead’s credibility by telling the jury she failed to produce affirmative evidence proving her innocence. Ms. Mothershead did not have a burden of proof here; the State did. The prosecutor improperly shifted the burden of proof and this constituted misconduct. Ms. Mothershead is entitled to reversal of her conviction for this misconduct.

B. CONCLUSION

For the reasons stated in the Brief of Appellant as well as this reply brief, Ms. Mothershead asks this Court to reverse her conviction and exceptional sentence.

DATED this 25th day of March 2015.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

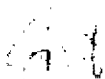
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)	
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v.)	NO. 45588-9-II
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JENNIFER MOTHERSHEAD,)	
)	
Appellant.)	

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

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