

FILED  
November 23, 2015  
Court of Appeals  
Division I  
State of Washington

No. 73262-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

GARY BENTLEY, JR.,

Appellant.

---

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

The Honorable Chad Allred

---

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The prosecutor impermissibly shifted the burden of proof to Mr. Bentley during closing argument.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State bears the burden of proving each element of the charged offenses beyond a reasonable doubt. Where the prosecutor implies in closing argument that the defendant bears the burden of providing favorable or exculpatory evidence, the prosecutor commits misconduct. Here the prosecutor did just that, implying that Mr. Bentley bore the burden of proving he did not burglarize the victim's residence and take his vehicle where Mr. Bentley was not charged with burglary. Is Mr. Bentley entitled to reversal of his convictions where the misconduct went directly to an element of the charged offenses, thus denying Mr. Bentley a fair trial?

C. STATEMENT OF THE CASE

Gustavo Pena was leaving on a trip out of the country. 11/13/2014RP 86. As he sat in his South Seattle home awaiting the taxicab that would take him to the airport, Mr. Pena saw a person sitting in the park across the street smoking a cigar and looking directly at his house. 11/13/2014RP 84-85. Mr. Pena could not see anyone else

in the park. 11/13/2014RP 84. Concerned about this person looking at his house, but also concerned about missing his flight, Mr. Pena left the house. 11/13/2014RP 86. Mr. Pena later learned that his house was burglarized after he left and his 2006 Land Rover was one of the items which had been taken. 11/13/2014RP 87-88.

Approximately three days after Mr. Pena had left on his trip, William Juell was driving southbound on State Route 509 in Burien when he came upon a Land Rover stalled in the middle of the road and being pushed to the side by two men, one of which was later identified as appellant, Gary Bentley. 11/17/2014RP 6. The Land Rover had run out of gas, so Mr. Juell assisted the two men in getting gas. 11/17/2014RP 7.

About this time, a passing King County deputy saw the Land Rover, realized it was the stolen car, and radioed to other deputies regarding its location. 11/13/2014RP 49. Deputy Christopher Dearth answered the call, pulled up behind Mr. Juell's car and spoke briefly with him. 11/13/2014RP 50-51. While he waited for other deputies to arrive, Deputy Dearth engaged Mr. Bentley and a man later identified as his uncle, Russell Bentley, in a casual conversation. 11/13/2014RP 56-57. Once an additional deputy arrived, Deputy Dearth attempted to

handcuff Mr. Bentley and a struggle ensued between Mr. Bentley and Deputies Dearth and Broderson. 11/13/2014RP 62, 11/17/2014RP 27-32.

Mr. Bentley was ultimately arrested and charged with two counts of third degree assault and one count of possession of a stolen vehicle. CP 1-2. During the examination of Mr. Pena at trial, the State sought to question him about some human hair left behind on his bathroom sink, allegedly from an African-American person, inferring that Mr. Bentley, who is African-American, was the person who burglarized the house. 11/13/2014RP 94-95. Mr. Pena had been unable to identify Mr. Bentley in a photograph lineup. 11/13/2014RP 95. Mr. Bentley objected, noting he was not charged with burglary and the evidence and the State's argument were far too attenuated.

11/13/2014RP 95. The trial court sustained the objection:

I'm going to sustain the objection. I don't see that the photographs that were testimony regarding the hair [sic], that this witness has sufficient knowledge. If there is any probative value at all, it's very minor, and I think any minor probative value is outweighed by confusion of the issues and prejudicial effect under ER 403.

11/13/2014RP 95-96.

Despite this ruling, in closing argument, the prosecutor again attempted to link Mr. Bentley to the burglary:

He [Mr. Pena] was preparing to go on vacation on August 26. it [sic] was hot out, he had the doors open, and he was going to call a cab or an Uber to take him to the airport when he noticed a person across the street who seemed to be intently watching his home and his comings and goings, and you'll remember that was a park and the person sitting on the bench and there wasn't anybody out that day, there wasn't a game going on, and the person, instead of facing the way you'd watch a game, was instead turned around watching his house, and this caught his attention. Why? Because he knew he was about to be leaving his house with suitcases and going away for a while. And you remember he said, "I watched the person, I looked at them a number of times because I was a little concerned." *And he described an African American male with a balding head, a goatee and no shirt, somewhat muscular build. A person not unlike the defendant.* Now it's true that Mr. Pena could not pick him individually out when he got back three or four weeks later . . .

11/17/2014RP 105-06 (emphasis added). Mr. Bentley immediately objected and referenced the court's prior ruling. 11/17/2014RP 106.

The court overruled the objection:

It's overruled for purposes of closing argument. You're going to have your chance to make your counter argument.

11/17/2014RP 106.

Following the completion of the jury trial, Mr. Bentley was convicted as charged. CP 44-46.



#### D. ARGUMENT

##### **Prosecutorial misconduct in closing argument violated Mr. Bentley’s right to due process and a fair trial.**

1. *Mr. Bentley had a constitutionally protected right to a fair trial free from prosecutorial misconduct.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a “duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). “A “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

Where the defendant objects to the misconduct, the defendant need only show that there was a substantial likelihood the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

2. *The prosecutor cannot imply to the jury in closing argument that the defendant has a burden to present favorable or exculpatory evidence.*

The State always bears the burden of proving each and every element of the charged offenses. U.S. Const. amend XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Argument by the prosecution that shifts this burden of proof onto the defendant constitutes misconduct. *State v. Thorgerson*, 172 Wn.2d 438, 466, 258 P.3d 43 (2011); *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). Any argument by the State which implies that the defendant has a duty to present favorable evidence is improper. *State v. Barrow*, 60 Wn.App. 869, 872, 809 P.2d 209 (1991); *State v. Cleveland*, 58 Wn.App. 634, 648, 794 P.2d 546 (1990).

During the trial, the court refused to allow any testimony suggesting Mr. Bentley had burglarized Mr. Pena's residence and taken his car, primarily because Mr. Bentley was not charged with burglary. 11/13/2014RP 52-54. Despite this admonition by the court, in closing

argument, the prosecutor implied that Mr. Bentley had committed the burglary, an offense for which he was not charged. 11/17/2014RP 105-06. This argument shifted the burden of proof to Mr. Bentley to prove that he did *not* commit the burglary. This argument was plainly misconduct.

The court's ruling on Mr. Bentley's objection compounded the error, suggesting that Mr. Bentley could present a counter argument to the State's impermissible argument, putting forth the favorable or exculpatory evidence that he was not constitutionally required to present in the first place.

3. *The prosecutor's misconduct prejudiced Mr. Bentley and requires reversal of his convictions.*

To prevail on a claim of prosecutorial misconduct, the defendant needs to show both improper conduct and resulting prejudice.

*Thorgerson*, 172 Wn.2d at 442. To show prejudice the defendant must show that there was a substantial likelihood that the misconduct affected the jury verdict. *Id.*

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

*In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012) (internal citations omitted).

Initially, the prosecutor's misconduct primarily prejudiced Mr. Bentley regarding the possession of a stolen vehicle count. One of the elements the State was required to prove was that Mr. Bentley knew the Land Rover was stolen. *See State v. Hatch*, 4 Wn.App. 691, 693, 483 P.2d 864 (1971) (an essential element of the crime of possession of stolen property is knowledge that the property was wrongfully acquired). The prosecutor in her argument was attempting to link Mr. Bentley to the burglary thus establishing his knowledge the Land Rover was stolen. The prosecutor's proof on this particular element was extremely weak and this argument by the State was designed to buttress the proof of this element.

But the misconduct also prejudiced Mr. Bentley as to the remaining assault counts. The prosecutor's argument turned the entire burden of proof for all offenses given the imprimatur of the trial court regarding the argument that Mr. Bentley bore some burden of proof despite constitutional guarantee otherwise. The jury could have been waiting for Mr. Bentley to provide some exculpatory evidence

regarding the assault counts and his apparent failure may have been held against him by the jury.

Mr. Bentley suffered prejudice as a result of the prosecutor's misconduct. Mr. Bentley is entitled to reversal of his convictions and remand for a new trial.

E. CONCLUSION

For the reasons stated, Mr. Bentley asks this Court to reverse his convictions and remand for a new trial.

DATED this 23<sup>rd</sup> day of November 2015.

Respectfully submitted,

*s/Thomas M. Kummerow*

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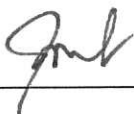
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23<sup>RD</sup> DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2015.

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