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NO. 61479-7-1

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 MAY 15 PM 4:49

STATE OF WASHINGTON,

Respondent,

v.

TYLER HAWKER,

Appellant.

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

The Honorable Steven J. Mura

APPELLANT'S REPLY BRIEF

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U.S. Const. amend. 149

Law Reviews, Journals, and Treatises

Karl B. Tegland, Washington Practice: Evidence Law and Practice
(5th ed. 2007)4

A. ARGUMENT IN REPLY

Repeated instances of deliberate prosecutorial misconduct during cross-examination and in closing argument denied Tyler Hawker a fair trial. The trial court also violated the public trial right secured by the First and Sixth Amendments of the federal constitution and article I, section 10 of the Washington Constitution when the court sua sponte and without weighing the five requirements in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), closed a portion of jury voir dire to the public.¹

Both Washington and federal courts have found comments similar to the prosecutor's improper comments here to be reversible error regardless of whether there is an objection from defense counsel. Nonetheless, the State claims alternatively (1) the prosecutor did not commit misconduct; (2) the error is waived; and (3) defense counsel had a 'tactical' reason for not objecting. None of the State's arguments has merit. Because the misconduct had the likely effect of swaying the jury in a close case, Hawker's conviction must be reversed.

¹ On analogous facts, this Court found a closure order did not violate the right to a public trial in State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), review granted, 163 Wn.2d 1012 (2008). This Court has stayed the instant appeal pending the decision of the Washington Supreme Court in Momah; thus, no further argument on this issue is presented in this reply.

1. THE PROSECUTOR'S EFFORT TO OBTAIN A CONVICTION BY URGING THE JURY TO CONCLUDE IT MUST FIND THE STATE'S WITNESSES WERE LYING IN ORDER TO ACQUIT WAS REVERSIBLE MISCONDUCT.

a. Hawker did not 'invite' the prosecutor to commit misconduct by cross-examining the deputy regarding the thoroughness of his investigation. It is settled law in Washington that a prosecutor commits misconduct where he engages in cross-examination or makes comments that compare the honesty of the defendant to law enforcement witnesses, or tries to get an accused person to say that law enforcement witnesses are lying or mistaken. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Nonetheless, the State claims Hawker invited the prosecutor's multiple improper comments here by cross-examining Deputy Reimer regarding the thoroughness of his investigation. Br. Resp. at 27-30. This is a specious claim.

The thoroughness of a police investigation is an entirely permissible line of inquiry in a criminal trial. An accused person does not "open the door" to prosecutorial misconduct by questioning a government witness regarding his report-taking

practices, or by offering testimony that contradicts the evidence offered by the State. State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307 (2008).

A criminal defendant can “open the door” to testimony on a particular subject matter, but he does so under the rules of evidence. A defendant has no power to “open the door” to prosecutorial misconduct.

Id.

In Jones, the prosecutor repeatedly committed misconduct by vouching for the credibility of law enforcement witnesses and inviting the jury to speculate about facts not in evidence. Id. at 295-98. On appeal, the State made the same contention proffered by the appellate prosecutor here: that Jones invited the improper comments under the open door doctrine. Rejecting this claim, the Court explained,

[T]he State misconstrues the doctrines of opening the door and invited error. The doctrines are not synonymous and neither excuses the State's fair trial duties here.

The “opening the door” doctrine is an evidence doctrine that pertains to whether certain subject matter is admissible at trial. The term is used in two contexts:

- (1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and
- (2) a party who is the first to raise a particular subject

at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007). Because this “opening the door” doctrine pertains to the admissibility of evidence, it must give way to constitutional concerns such as the right to a fair trial.

Id. at 297-98.

By contrast, the “invited error” doctrine applies to the circumstance where a party induces the trial court to err. Id. at 298. As the Court in Jones explained, the “invited error” doctrine may not be applied to sanction prosecutorial misconduct:

We have not found one published case in which a Washington court applied the invited error doctrine in the context of prosecutorial misconduct for which the trial court's alleged “error” is in entering a conviction against a defendant who did not receive a fair trial. We hold that the invited error doctrine does not apply to prosecutorial misconduct.

Id.

This Court should reject the claim that Hawker “opened the door” to prosecutorial misconduct by his entirely proper inquiry into the thoroughness of the officer’s investigation.

b. The trial prosecutor impermissibly urged the jury to conclude it could only acquit if it found the State’s witnesses were lying. The appellate prosecutor alternatively claims that the

prosecutor below did not urge the jurors to conclude that in order to acquit Hawker, they would need to conclude Reimer was lying. Br. Resp. at 34-36. The appellate prosecutor ignores the trial deputy's most objectionable argument making precisely this claim:

You know, really what are we getting down to with the defendant's allegations about Deputy Reimer's statements is the allegation he's dishonest. Is that what's going on? Is that what you believe you heard? Dishonesty. The defendant's statements on the stand were absolutely outrageous. There's no way that Deputy Reimer would have failed to put those in his report, failed to remember that he had said them. Absolutely no way. Makes no sense at all.

7RP 378-79.

The prosecutor plainly and unmistakably told the jurors that Hawker's defense rested on the jury concluding that Reimer was lying and Hawker telling the truth. The prosecutor bolstered this inflammatory appeal by telling the jury that if Reimer were to purposefully include inaccuracies in his report, he would lose his job.² Cf., Jones, 144 Wn. App. at 295-96 (efforts to bolster witness's credibility by referring facts not in evidence was misconduct).

In Fleming, also a "date rape" case where a conviction depended on a credibility contest between the complainant and the

² The appellate prosecutor properly concedes this remark was misconduct. Br. Resp. at 38.

defendant, this Court condemned arguments like the prosecutor's argument here, finding they misstated the law, misrepresented the role of the jury, and shifted the burden of proof. 83 Wn. App. at 214. Yet, without citation, the State attempts to distinguish Fleming by claiming that the reason why this Court reversed the convictions was because the prosecutor "made **repeated** related improper arguments." Br. Resp. at 35 (emphasis in original). This is both an inaccurate assessment of Fleming and ignores this trial prosecutor's persistent efforts to reiterate his improper theme in cross-examination and closing argument. As this Court found in Fleming, the prosecutor's argument was flagrant misconduct. 83 Wn. App. at 213-16. Hawker's conviction must be reversed.

2. THE PROSECUTOR'S COMMENTS ON
HAWKER'S RIGHT TO BE PRESENT, TO
CONFRONT WITNESSES, AND TO THE
ASSISTANCE OF COUNSEL SEPARATELY
WARRANT REVERSAL.

The trial prosecutor cross-examined Hawker about having "practiced" his testimony with defense counsel, drew the jury's attention to Rabatan having to "go through interviews at the prosecutor's office", and urged the jury to find Rabatan credible because she had no incentive to "go through testifying up here on the stand for you folks with the defense attorney cross-examining

her.” 6RP 288-89; 7RP 376-77. As established in Hawker’s opening brief, these comments violated Hawker’s right to be present, to confront witnesses, and to the assistance of counsel. Br. App. at 27-31.

The appellate prosecutor largely does not respond to these arguments. Nor does the prosecutor address the cases discussed in Hawker’s opening brief that found comments substantially similar to the prosecutor’s comments here were reversible misconduct.

The single case cited by the appellate prosecutor in support of the contention that the prosecutor’s arguments were not improper helps Hawker, not the State. In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the prosecutor in closing argument contended that a witness would not have subjected herself to the trial process just to avenge a broken condom. 158 Wn.2d at 806. The Court found the comments were not improper because “[t]he State did not specifically criticize the defense’s cross-examination of R.S. or imply that Gregory should have spared her the unpleasantness of going through trial.” Id. at 807. The Court distinguished State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993) because in that case, the prosecutor directly implicated Jones’ constitutional right of confrontation. Id. at 807-08.

Unlike Gregory and similar to Jones, the prosecutor here explicitly referred to defense counsel's pretrial interviews and cross-examination of Rabatan. 7RP 378-79. These specific and targeted comments urged a negative inference from the exercise of the rights to be present, to confront witnesses, and to the assistance of counsel. The comments followed in the heels of the improper questions about Hawker having "practiced" his testimony with his lawyer. Gregory is readily distinguishable. This Court should conclude the prosecutor's comments were misconduct.

3. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE IMPROPER CROSS-EXAMINATION AND ARGUMENT WAS DEFICIENT PERFORMANCE.

The State speculates that Hawker's defense attorney had a legitimate tactical reason for not objecting to the prosecutor's misconduct. This claim is without merit.

As the State concedes, absent an objection, a claim of misconduct is waived unless it is so flagrant or ill-intentioned that it creates an incurable prejudice. Br. Resp. at 37. Yet, even though the trial prosecutor engaged in tactics that have long been condemned as flagrant misconduct by the appellate courts of this State, the appellate prosecutor suggests that "Hawker's attorney

may have reasonably chosen to be circumspect with objections[.]” Br. Resp. at 41. The State can articulate no persuasive reason to explain why defense counsel would have refrained from objecting where a timely objection may have secured a curative instruction from the court, prevented the prosecutor from engaging in further misconduct, and precluded the State from asserting the error waived on appeal. In light of the repeated and flagrant instances of misconduct, this Court should hold that a legitimate trial strategy does not include failing to object to misconduct.

4. THE MISCONDUCT WAS NOT “ISOLATED” BUT PERVADED THE TRIAL, CREATING A CUMULATIVE AND ENDURING PREJUDICE.

The cumulative error doctrine requires reversal of a conviction where multiple trial errors combined deny a defendant a fair trial. U.S. Const. amend. 14; Const. art. I, § 3; Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”).

The appellate prosecutor contends the errors here were “limited” and thus do not require reversal. Br. Resp. at 42. The State claims it had “strong” evidence against Hawker. Id. Contrary

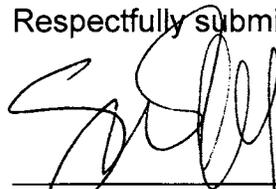
to the State's claim, the evidence against Hawker was weak and controverted. But for the prosecutor's repeated misconduct and defense counsel's inexcusable failure to mount any objection, there is a reasonable probability that the jury may have acquitted Hawker. This Court should conclude the cumulative effect of the trial errors was to deny Hawker a fair trial.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the Brief of Appellant, Hawker's conviction must be reversed and remanded for a new trial.

DATED this 15th day of May, 2009.

Respectfully submitted:



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

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| STATE OF WASHINGTON, |) | |
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| RESPONDENT, |) | |
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| v. |) | NO. 61479-7-I |
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| TYLER HAWKER, |) | |
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| APPELLANT. |) | |

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COURT OF APPEALS
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF MAY, 2009, I CAUSED THE ORIGINAL **REPLY 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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