

62118-1

62118-1

NO. 62118-1-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

DEMEKO HOLLAND,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

LILA J. SILVERSTEIN  
Attorney for Appellant

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

2009 AUG 27 PM 4:45

FILED  
CLERK OF COURT  
K

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE .....2

    a. The Shooting. .... 2

    b. The Interrogation. .... 6

    c. The CrR 3.5 Hearing..... 10

    d. The Trial. .... 11

D. ARGUMENT ..... 14

    1. THE TRIAL COURT ERRED IN ADMITTING MR. HOLLAND’S STATEMENTS TO LAW ENFORCEMENT IN THE ABSENCE OF PROOF THAT MR. HOLLAND KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS..... 14

        a. Statements of the accused elicited during a custodial interrogation may not be admitted against him at trial unless the State proves that the accused knowingly, intelligently and voluntarily waived his Fifth Amendment rights. .... 14

        b. The State did not meet its heavy burden to prove that Mr. Holland knowingly, intelligently and voluntarily waived his Fifth Amendment rights. .... 15

        c. The error was not harmless, and reversal is required.... 18

    2. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT BY SHIFTING THE BURDEN OF PROOF TO MR. HOLLAND. .... 20

a. The State commits misconduct if it suggests the defendant has a duty to introduce exculpatory evidence.....	20
b. The prosecutor engaged in misconduct by implying Mr. Holland bore the burden of producing exculpatory evidence.....	21
c. The misconduct prejudiced Mr. Holland, requiring reversal. ....	25
E. CONCLUSION.....	26

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>State v. Carr</u> , 160 Wash. 83, 294 Pac. 1016 (1930).....	20
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	15
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008) .....	25

### **Washington Court of Appeals Decisions**

<u>State v. Cleveland</u> , 58 Wn. App. 634, 794 P.2d 547 (1990) ...passim	
<u>State v. Dixon</u> , 150 Wn. App. 46, 207 P.3d 459 (2009).....	22, 24, 25
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996) ....	passim
<u>State v. Maupin</u> , 63 Wn. App. 887, 822 P.2d 355 (1992) .....	19, 26

### **United States Supreme Court Decisions**

<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) .....	18, 19
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) .....	18, 20
<u>Coffin v. United States</u> , 156 U.S. 432, 15 S.Ct. 394 (1895) .....	21
<u>Dickerson v. United States</u> , 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).....	18
<u>Fare v. Michael C.</u> , 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) .....	15, 17
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	21
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) .....	15

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694  
(1966) ..... 14, 15

North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d  
286 (1979) ..... 15

**Decisions of Other Jurisdictions**

United States v. Garibay, 143 F.3d 534 (9<sup>th</sup> Cir. 1998) ..... 15

**Constitutional Provisions**

U.S. Const. amend. V ..... 14

## A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that Demeko Holland knowingly, intelligently, and voluntarily waived his rights to remain silent and to an attorney, and in admitting his post-Miranda<sup>1</sup> statements at trial.

2. In the absence of substantial evidence, the trial court erred in finding that “the defendant stated that he acknowledged and understood” his Miranda rights. CP 79.

3. The prosecutor committed misconduct in closing argument by shifting the burden of proof to Mr. Holland.

4. The trial court erred in ignoring Mr. Holland’s objection to the prosecutor’s burden-shifting during closing argument.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecution bears the burden of proving that the totality of the circumstances shows a defendant waived his Fifth Amendment rights to silence and counsel. Where a detective read Mr. Holland Miranda warnings but read only one of two waiver questions, Mr. Holland did not explicitly waive his Miranda rights either orally or in writing, Mr. Holland was only 20 years old, was

---

<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

high on marijuana and PCP, was exhausted, sweaty, and crying, indicated he thought only written statements could be used against him, and was worn down by six hours of questioning, did the trial court err in concluding he had implicitly waived his Miranda rights by nodding his head and answering the detectives' questions?

2. A prosecutor commits misconduct if he or she suggests that the defendant bears the burden of producing exculpatory evidence. If the State cannot prove beyond a reasonable doubt that the misconduct was harmless, the conviction must be reversed. Must Mr. Holland's conviction be reversed where the prosecutor argued that the defendant did not present any evidence about the effects of "sherm" or any testimony about how Mr. Holland might have learned a "kid" was shot, where the trial court ignored Mr. Holland's timely, specific objection to the argument, and where the single eyewitness to the crime was only 70% sure Mr. Holland was the perpetrator? (Assignments of Error 2-3)

### C. STATEMENT OF THE CASE

a. The Shooting. At around 11:00 a.m. on August 18, 2003, Michael Anderson was driving his car near the intersection of 35<sup>th</sup> Avenue Southwest and Southwest Juneau in West Seattle when he saw a stocky black man with nappy hair shoot a teenaged bicyclist

eight or nine times. 6/10/08 RP 18-25. Mr. Anderson called the police and followed the shooter in his car, but lost sight of him around 38<sup>th</sup> Avenue. 6/10/08 RP 25-28.

About an hour later, police officers stopped appellant Demeko Holland to investigate whether he was involved in the shooting, and brought Mr. Anderson to the same location to see if he could identify Mr. Holland as the perpetrator. Even though Mr. Holland was the only suspect shown to Mr. Anderson, and Mr. Holland was handcuffed and surrounded by police officers, Mr. Anderson stated he was only 70% sure that Demeko Holland was the shooter. 6/10/08 RP 38, 59. Mr. Anderson thought Mr. Holland looked older than the shooter, had lighter skin than the shooter, and had longer hair than the shooter. 6/10/08 RP 58. Mr. Anderson was the only person who witnessed the shooting of the bicyclist.

Several other people saw a black man walking and jogging through West Seattle around the same time. Julian Medina, who was doing landscaping work in the area, saw a "black guy" walk up a hill. Mr. Medina soon heard shots, then saw the same person come back down the hill with a gun in his hand. 6/9/08 RP 4-7. When police officers showed Mr. Medina a six-person photographic montage that included Demeko Holland's picture, Mr. Medina did

not identify any of the six as the person he saw with the gun.

6/9/08 RP 11.

Wade Bartlett was doing landscaping with Mr. Medina. He was in the backyard when he heard a series of pops. He called 911 and ran out front. He saw a bike and body on the ground, then saw a "very black" man with a "large, puffy jacket" running by.

6/9/08 RP 17-31. Police officers later showed Mr. Bartlett the six-person montage that included Demeko Holland, but, like Mr. Medina, Mr. Bartlett did not believe that any of the six people portrayed in the photographs was the person he saw after the shooting. 6/9/08 RP 25, 33.

James Olsen was meeting with Wade Bartlett when he heard shots. He ran out to the street, and someone ran right past him. That person was "dark-skinned" and wore a down jacket and red sweat pants. 6/10/08 RP 67-75. Mr. Olsen called 911 and got into his truck and followed the person, but lost sight of him in an alley. 6/10/08 RP 72-73, 111. As they had done with Michael Anderson, police officers later brought Mr. Olsen to the location at which they had detained Demeko Holland in order to do a one-person showup. But Mr. Olsen could not say that Demeko Holland was the suspect he had chased. 6/10/08 RP 118, 136.

Teenagers Adam Wallace and Michael Jacinto were sitting on the latter's front porch when they saw someone run across Fauntleroy Street. 6/10/08 RP 142-45; 6/11/08 RP 6-8. Adam described the person as a black male with nappy hair, gray pants, and a puffy coat. 6/10/08 RP 145-46. Michael described the runner as an African American with loose clothing, short hair, and a hat. 6/11/08 RP 8, 14. Neither chose Demeko Holland in the photographic montage police later showed them. 6/11/08 RP 15.

William Arnett looked out the window of his West Seattle home and saw someone running between his house and his neighbor's house. 6/11/08 RP 16-18. He called 911 and described the intruder as a person with a dark complexion wearing a hooded sweatshirt and blue jeans. 6/11/08 RP 19, 42. Mr. Arnett was not asked to identify the intruder in a photographic montage.

Mr. Arnett's neighbor, Mark Griswold, also saw the individual running between their houses. 6/11/08 RP 47-49. He described him as a stocky "black or Samoan" man wearing sweatpants. 6/11/08 RP 53. He did not identify Demeko Holland in the photographic montage police later showed him. 6/11/08 RP 57.

Grace Martinez was working in her garden in West Seattle when she heard helicopters and saw a black man run down 41<sup>st</sup>

Street and hide under a tree. 6/11/08 RP 64-69. She called 911, but the police did not show her a photographic montage or ask her to identify anyone. 6/11/08 RP 66.

Marcus Olson was working on his truck outside his girlfriend's apartment in West Seattle. 6/12/08 RP 3-5. A police officer approached him, told him someone had been shot, and asked him to keep his eyes out for a black suspect. 6/12/08 RP 6. About five minutes later, Demeko Holland came through the neighborhood and Mr. Olson told Mr. Holland what the officer had told him. 6/12/08 RP 8. After being told that police were looking for a black man, Mr. Holland took off running. He was apprehended by police officers in the parking lot of a car dealership. 6/12/08 RP 9-10.

b. The Interrogation. Officer Richard Heideman detained Mr. Holland. 6/3/08 RP 17. Mr. Holland was sweating and breathing hard and had scratches around his upper body. 6/3/08 RP 20; 71, 76, 95. He had smoked "sherm" that day, and had both marijuana and PCP in his system. 6/3/08 RP 74, 96; 6/19/08 RP 60-61.

According to Officer Heideman, Mr. Holland stated, "Why are you stopping me? I'm just jogging." 6/3/08 RP 18. Mr. Holland also

said that his name was Damarius Holland and that he was 17 years old. 6/3/08 RP 19. He later revealed that his name was Demeko Holland and he was 20 years old. 6/16/08 RP 128.

A couple of minutes later, Officers Chris Hairston and Caryn Lee arrived. 6/3/08 RP 19. They arrested Mr. Holland and placed him in Officer Lee's car. 6/3/08 RP 20, 47. Officer Lee read Mr. Holland the Miranda warnings from a card, but did not read the second of two questions from the waiver section. 6/3/08 RP 47, That is, she did not ask, "Having these rights in mind, do you wish to talk to us now?" 6/3/08 RP 133-34.

According to Officer Lee, Mr. Holland "understood" and "acknowledged" the Miranda warnings, meaning he at least nodded his head in response to them. 6/3/08 RP 55. Officer Lee "didn't ask him to waive it or not." 6/3/08 RP 55.

Officer Hairston then asked Mr. Holland "what he was doing out here," and Mr. Holland responded that he was jogging. 6/3/08 RP 39. Officer Hairston then asked if Mr. Holland knew why he was being stopped, and Mr. Holland asked, "Is this about the shooting? Is the kid all right?" 6/3/08 RP 40.<sup>2</sup>

---

<sup>2</sup> Around this time other officers brought witnesses Anderson and Olsen by to see if they could identify Mr. Holland as the person they had seen earlier. Olsen could not identify Mr. Holland as the perpetrator. Anderson stated he was

Detective Cloyd Steiger arrived and asked Mr. Holland some questions. According to Detective Steiger, “[f]irst [Mr. Holland] said he’d been working in his yard and then he said he’d been jogging in the area of the Alaskan Junction and then he said he had gotten off a bus near Lincoln Park ... and eventually he said he may have been over by where the shooting happened.” 6/3/08 RP 60.

Officer Hairston then transported Mr. Holland to police headquarters and placed him in a holding cell. 6/3/08 RP 41, 69. Mr. Holland was disheveled, covered in scratches and stains, had difficulty breathing, and was coughing and spitting into cans. 6/3/08 RP 71, 95. Detectives Rob Blanco and Donna O’Neal interrogated Mr. Holland for six hours, starting around 2:30. 6/3/08 RP 85.

Mr. Holland told the detectives he had smoked sherm (a combination of marijuana and PCP) the night before, and that he sometimes had blackouts after smoking sherm. 6/3/08 RP 72, 75. According to Detective Blanco, Mr. Holland was “very moody,” swinging from crying one moment to excited the next. 6/3/08 RP 76. Mr. Holland had gotten only two hours of sleep the night

---

about 70% sure Mr. Holland was the person he had seen earlier, but that the shooter was younger and had darker skin and longer hair. 6/10/08 RP 38, 58-59, 118, 136

before. 6/3/08 RP 77. The detectives did not read Miranda warnings to Mr. Holland. 6/3/08 RP 86, 110.

The detectives obtained Mr. Holland's consent for a blood draw, and lab tests confirmed the presence of marijuana and PCP in Mr. Holland's blood. 6/3/08 RP 74, 83, 96; 6/19/08 RP 60-61. The detectives also collected swabs from Mr. Holland's hands and face to test for gunshot residue, but the tests came back negative. 6/3/08 RP 74; 6/19/08 RP 55.

Mr. Holland told the detectives he had not handled a gun in the last month. 6/3/08 RP 73, 98. He said he had gotten up that morning, made eggs and hot dogs for his girlfriend and their son, and taken the child to day care on the bus. 6/3/08 RP 77, 101. He then went to his mother's house to do landscaping work. 6/3/08 RP 77, 101. Mr. Holland told them that after working at his mother's house, he went to his grandmother's house, and then went for a jog. 6/3/08 RP 78, 102.

Eventually the detectives confronted Mr. Holland with the fact that he resembled a person who witnesses had seen running from the location of the shooting. 6/3/08 RP 80. At that point, Mr. Holland stated that it was "possible" that he had shot someone and blacked out because of the sherm. 6/3/08 RP 80-81, 102-03.

The detectives showed Mr. Holland a jacket and red shirt they had found in an alley, and Mr. Holland said they looked like his brother's clothing. 6/3/08 RP 81. He then said it was possible he had the items with him that morning but he didn't recall. 6/3/08 RP 82. He also shook his head when detectives asked him if he really went for a jog. 6/3/08 RP 84, 106. The detectives asked Mr. Holland to tell them where the gun was, and, according to Detective Blanco, Mr. Holland "mentioned that if we were to find the gun he would be charged with a weapons enhancement." 6/3/08 RP 85, 108.

When Detective O'Neal brought food for Mr. Holland, Mr. Holland asked her to stay with him. He was crying heavily. Detective O'Neal asked Mr. Holland if he wanted to write a letter to the victim's family to express his remorse. Mr. Holland "said that would be a good idea, but ... he had given statements on two prior occasions for two prior arrests and been burned by it and so he didn't want to give a statement." 6/3/08 RP 107.

No portion of the six-hour interrogation was videotaped. 6/3/08 RP 90, 114.

c. The CrR 3.5 Hearing. Mr. Holland was released following the above interrogation, but he was arrested again years later after

William Arnett found a gun in his yard. 6/17/08 RP 21. Although the gun could not be traced to Mr. Holland, he was ultimately charged with first-degree murder with a firearm enhancement and first-degree unlawful possession of a firearm. CP 30-31.

The State moved to admit all of Mr. Holland's statements to law enforcement officers. Mr. Holland opposed admission of all statements except those given to Officer Heideman before Mr. Holland was placed in Officer Lee's car. Mr. Holland argued that he did not waive his Miranda rights, but the trial court ruled that he had, concluding: "The Court finds that in view of all the facts and circumstances, the defendant was fully aware of his rights and knowingly, intelligently and voluntarily waived those rights by continuing to speak freely with officers and detectives in the absence of any threats, promises or coercion." CP 82.

d. The Trial. At trial, the civilian witnesses and law enforcement officers testified as described above. The State also offered DNA evidence demonstrating that Mr. Holland may or may not have worn the shirt, coat, and bandana collected from West Seattle the day of the shooting. 6/17/08 RP 86, 107; 6/18/08 RP 65. The prosecution admitted that the gun could not be traced to Mr. Holland, and did not have his fingerprints or DNA on it. 6/17/08

RP 38-41, 56, 113; 6/18/08 RP 91. The shell casings, bullets, and bullet fragments also did not have Mr. Holland's fingerprints or DNA on them. 6/17/08 RP 56, 113; 6/18/08 RP 90.

Finally, the State played audio tapes of 911 calls and police radio traffic. The tapes included mention of a stocky, ponytailed black man in khaki pants changing clothes near a dumpster at 36<sup>th</sup> Avenue Southwest and Southwest Morgan. 6/11/08 RP 114; exs. 51-52. But Officer Waters testified that the person he detained briefly at that location was a thin Hispanic teenager. 6/23/08 RP 83-89.

In closing argument, the prosecutor repeatedly emphasized Mr. Holland's statements "Is the kid all right?" and "if you find the gun I will get an enhancement." 6/24/09 RP 1, 9, 17.

Mr. Holland's attorney argued that the State failed to prove he was the shooter, because none of the many witnesses chose him from a photographic montage and the one witness who saw the shooting was only 70% sure Mr. Holland was the perpetrator even though Mr. Holland was the only suspect shown to the witness. Mr. Holland's attorney also noted the inconsistent descriptions of the fugitive and the lack of evidence connecting the gun to Mr. Holland. She further stressed the officers' failure to follow up on other leads

regarding black men running and changing clothes in the area, and mentioned that Mr. Holland could have heard that a kid had been shot without having been the shooter himself. In sum, Mr. Holland argued he was simply a black man in West Seattle at the wrong time. 6/24/09 RP 21-56.

On rebuttal, the prosecutor argued:

[The defense attorney] talked to you about the ugly consequences of addiction and how the defendant can't get up here and tell you what he doesn't remember because of it. Really? Is there any testimony about the defendant's addiction to sherm or any other drug? Is there any testimony at all about the effects of sherm that he smoked that night? Is there any testimony on how it might or might not affect your memory? No.

6/24/08 RP 59. Then, when discussing the source of Mr. Holland's apparent knowledge that a "kid" was shot, the prosecutor argued:

She suggests that this could have been overheard on the phone. By golly, those witnesses were up there. Why didn't she ask them?

6/24/08 RP 61-62. The trial court ignored Mr. Holland's timely objection to the prosecution's burden-shifting. 6/24/08 RP 62.

The jury acquitted Mr. Holland of first-degree murder but convicted him of the lesser-included offense of second-degree

murder. CP 74-75. It also found him guilty of first-degree unlawful possession of a firearm. CP 72.

Mr. Holland appeals. CP 94.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING MR. HOLLAND'S STATEMENTS TO LAW ENFORCEMENT IN THE ABSENCE OF PROOF THAT MR. HOLLAND KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS.

a. Statements of the accused elicited during a custodial interrogation may not be admitted against him at trial unless the State proves that the accused knowingly, intelligently and voluntarily waived his Fifth Amendment rights. The Fifth Amendment provides, "No person ... shall be compelled in any criminal case to be a witness against himself..." U.S. Const. amend. V. A suspect must be advised of his Fifth Amendment rights to silence and counsel before a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Furthermore, statements elicited during a custodial interrogation may not be admitted at trial unless the defendant knowingly, intelligently and voluntarily waived his constitutional rights. State v. Sargent, 111 Wn.2d 641, 648, 762

P.2d 1127 (1988). It is the State's "heavy burden" to demonstrate a valid waiver. Miranda, 384 U.S. at 475.

Courts evaluate whether the State has met this heavy burden by considering the totality of the circumstances. North Carolina v. Butler, 441 U.S. 369, 374-75, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979) (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). This includes the age, education, intelligence, background, experience, and conduct of the accused, as well as whether he has the capacity to understand the warnings given, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. Butler, 441 U.S. at 374-75; Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). "The courts must presume that a defendant did not waive his rights." Butler, 441 U.S. at 373.

b. The State did not meet its heavy burden to prove that Mr. Holland knowingly, intelligently and voluntarily waived his Fifth Amendment rights. The circumstances of this case indicate that Mr. Holland did not waive his rights. First, there was no explicit waiver, written or oral. See United States v. Garibay, 143 F.3d 534, 538 (9<sup>th</sup> Cir. 1998) (listing "whether the defendant signed a written waiver" as a consideration in the analysis, and reversing for invalid

waiver). Although the officer who read the Miranda warnings to Mr. Holland stated that he “acknowledged” them, she admitted that she “didn’t ask him to waive it or not.” 6/3/08 RP 55. Furthermore, the officer conceded that Mr. Holland’s “acknowledgement” may have been nothing more than a nod of the head.<sup>3</sup> 6/3/08 RP 55. And not only did the detective fail to obtain an explicit waiver, she did not even read the second half of the waiver portion of the Miranda card, which provides, “Having these rights in mind, do you wish to talk to us now?” 6/3/08 RP 134.

The State emphasized the fact that Mr. Holland refused to write a letter to the victim’s family because “he had given statements on two prior occasions for two prior arrests and been burned by it and so he didn’t want to give a statement.” 6/3/08 RP 107, 143. But this misunderstanding cuts the other way – it indicates that Mr. Holland thought only written or recorded statements could be used against him, not oral statements. And no officer corrected this misapprehension. Indeed, the detective testified to this effect:

DETECTIVE: [Mr. Holland said] he’d been burned by giving a statement, so why would I do it again and get thrown in jail again.

---

<sup>3</sup> Thus, the trial court erred in finding that “the defendant stated that he acknowledged and understood” his Miranda rights. CP 79.

PROSECUTOR: By "statement" you mean writing something down or going on tape and recording it?

DETECTIVE: Yes.

PROSECUTOR: As opposed to continuing to talk to you the way he had been?

DETECTIVE: Right.

6/3/08 RP 118-19.

Mr. Holland was young – only 20 years old at the time of the interrogation. CP 88. He was described as appearing exhausted, scratched up, disheveled, coughing, crying, and sweaty. 6/3/08 RP 20, 71, 76, 95. He had had only two hours of sleep the night before. 6/3/08 RP 113. The record indicates that Mr. Holland was worn down by lengthy questioning. 6/3/08 RP 85, 113; see Michael C., 442 U.S. at 726-27 (considering length of questioning in totality-of-circumstances analysis). When the detective brought him food, he asked her to stay with him while he ate, and he was crying heavily at the time. 6/3/08 RP 107. Mr. Holland had smoked sherm that day, and had both marijuana and PCP in his system. 6/3/08 RP 74, 96; 6/19/08 RP 60-61.

Finally, the State did not videotape any portion of the six-hour interrogation, so it could not and did not present any

recordings of Mr. Holland as proof that he waived his Miranda rights. 6/3/08 RP 114.

In sum, the totality of circumstances shows that Mr. Holland did not knowingly, intelligently, and voluntarily waive his Fifth Amendment rights. The State failed to carry its heavy burden in this case.

c. The error was not harmless, and reversal is required.

Miranda is a constitutional requirement. Dickerson v. United States, 530 U.S. 428, 438, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). As such, the State bears the burden of proving that the admission of a statement obtained in violation of Miranda was harmless beyond a reasonable doubt. Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In other words, the State must show that the admission of the confession did not contribute to the conviction. Fulminante, 499 U.S. at 296 (citing Chapman, 386 U.S. at 26).

The State cannot meet this heavy burden here. The evidence of the shooter's identity was weak, and there is no question that Mr. Holland's statements contributed to the conviction. None of the many witnesses chose Mr. Holland from

the photographic montages the police officers presented them.

One of the two witnesses who were brought to observe Mr. Holland in a one-person showup refused to identify him as the suspect he had seen, and the other would only say he was the perpetrator with 70% certainty. This was so even though one-person showups are inherently suggestive. See State v. Maupin, 63 Wn. App. 887, 896, 822 P.2d 355 (1992). Mr. Holland's fingerprints and DNA were not on the gun, the magazine, the bullets, or the shell casings.

Presumably because of the dearth of physical and eyewitness evidence, the prosecution relied heavily on Mr. Holland's statements, particularly his question about how "the kid" was doing, his admission that he smoked sherm and could have blacked out and shot someone, and his statement that if a gun were found he would get an enhancement. 6/3/08 RP 40; 6/12/08 RP 53-54; 6/16/08 RP 127, 130; 6/23/08 RP 102; 6/24/08 RP 1, 9, 17.

"A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." Fulminante, 499 U.S. at 296 (internal quotation omitted). Mr. Holland's statements indicating he knew a kid had been shot, that he may

have blacked out and shot someone, and that he would be subject to an enhancement if he revealed the gun, were repeated to the jury many times. The State cannot show that this “probative and damaging” evidence did not contribute to the convictions. Because the State cannot show that the improper admission of Mr. Holland’s statements was harmless beyond a reasonable doubt, the convictions should be reversed and the case remanded for a new trial. Chapman, 386 U.S. at 24.

2. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT BY SHIFTING THE BURDEN OF PROOF TO MR. HOLLAND.

a. The State commits misconduct if it suggests the defendant has a duty to introduce exculpatory evidence. As a representative of the State, a prosecuting attorney has the obligation to ensure due process in a criminal case. “The prosecuting attorney is a quasi-judicial officer, and it is his duty to see that one accused of a public offense is given a fair trial.” State v. Carr, 160 Wash. 83, 90, 294 Pac. 1016 (1930).

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the

administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A defendant has no duty to present evidence. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (reversing conviction because prosecutor argued that “you . . . would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence”). It is misconduct for a prosecutor to suggest a shift in the burden of proof during a criminal trial. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 547 (1990) (holding prosecutor committed misconduct by stating defense attorney “would not have overlooked any opportunity to present admissible, helpful evidence”).

b. The prosecutor engaged in misconduct by implying Mr. Holland bore the burden of producing exculpatory evidence. The prosecutor here argued on rebuttal:

[The defense attorney] talked to you about the ugly consequences of addiction and how the defendant can't get up here and tell you what he doesn't

remember because of it. Really? Is there any testimony about the defendant's addiction to sherm or any other drug? Is there any testimony at all about the effects of sherm that he smoked that night? Is there any testimony on how it might or might not affect your memory? No.

6/24/08 RP 59. Then, when discussing the source of Mr. Holland's apparent knowledge that a "kid" was shot, the prosecutor argued:

She suggests that this could have been overheard on the phone. By golly, those witnesses were up there. Why didn't she ask them?

6/24/08 RP 61-62. The trial court ignored Mr. Holland's timely objection to the prosecution's burden-shifting. 6/24/08 RP 62. The court erred in ignoring the objection. The argument constituted misconduct because it suggested that Mr. Holland had a duty to introduce exculpatory evidence. Fleming, 83 Wn. App. at 215; Cleveland, 58 Wn. App. at 648.

The argument above is similar to the arguments this Court held were improper in Fleming, Cleveland, and State v. Dixon, 150 Wn. App. 46, 207 P.3d 459 (2009). In Fleming, this Court ruled that the following prosecutorial comments improperly shifted the burden of proof:

There is absolutely no evidence that D.S. has fabricated any of this or that in any way she's confused about the fundamental acts that occurred upon her back in that bedroom. And because there is

no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.

It's true that the burden is on the State. But you would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter]. And several things, they never explained.

Fleming, 83 Wn. App. at 214.

Cleveland is also instructive. There, the prosecutor argued:

None of the people who testified here have any interest in trying to create a case of sexual abuse where none exists. Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you.

Cleveland, 58 Wn. App. at 647. This Court held the above argument was improper because it “was not strictly limited to a comment on the State’s own evidence.” Rather, the prosecutor implied “that Cleveland had a duty to present favorable evidence if it existed.” Accordingly, “[c]ounsel’s objection should have been sustained, the comment should have been stricken, and the jury admonished to disregard it.” Id. at 648.

The same is true here. The prosecutor’s argument was not limited to a comment on the State’s evidence; rather, it pointed to

the absence of defense evidence. 6/24/08 RP 59. As in Cleveland, the State in this case implied that Mr. Holland had a duty to present favorable evidence if it existed. The argument was therefore improper. Cleveland, 58 Wn. App. at 648.

The prosecutor's argument in Dixon, a case in which this Court reversed the conviction for prosecutorial misconduct, was similar to the argument at issue here. Dixon involved a charge of drug possession, and the defense attorney in closing argument stated that there was doubt about the defendant's control over the purse in which drugs were found because there "was an unknown person in the car." Dixon, 150 Wn. App. at 52. In rebuttal, the prosecutor stated:

I want to pose this question to you: Why didn't [Dixon] bring that passenger in to testify for her? ... Did the defendant make any statement that "he put that in my purse?" No. We didn't hear any of that testimony. There's nothing, absolutely nothing, that indicates that that passenger had anything to do with this.

Id. On appeal, the defendant argued that the prosecutor unconstitutionally shifted the burden of proof, and this Court agreed. Id. This Court cited Cleveland for the proposition that a prosecutor "may not comment on the lack of defense evidence

because the defendant has no duty to present evidence.” Id. at 54 (quoting Cleveland, 58 Wn. App. at 647).

As in Dixon, the prosecutor in Mr. Holland’s case improperly rebutted the defense argument by asking why the defendant did not present certain evidence. 6/24/08 RP 59-62. As in Dixon, the conviction should be reversed for prosecutorial misconduct.

c. The misconduct prejudiced Mr. Holland, requiring reversal. Where a prosecutor improperly suggests that a defendant has a duty to present any favorable evidence that exists, and the trial court overrules a timely objection, reversal is required unless the error is harmless beyond a reasonable doubt. Cleveland, 58 Wn. App. at 648; see Fleming, 83 Wn. App. at 216 (constitutional harmless error standard also applies where there was no objection and therefore no curative instruction); cf. State v. Warren, 165 Wn.2d 17, 27 n.3, 195 P.3d 940 (2008) (constitutional harmless error standard not applied where trial court promptly intervened with a curative instruction).

Here, the State cannot show the error was harmless beyond a reasonable doubt. As discussed above, the evidence against Mr. Holland was weak. It was so weak that the State did not even charge Mr. Holland with the crime until years later, after they found

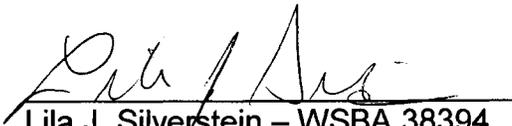
the gun – a gun they could not trace to Mr. Holland. Just one person witnessed the crime, and that person was only 70% sure that Mr. Holland was the perpetrator, even though Mr. Holland was subjected to an inherently suggestive one-person showup. See Maupin, 63 Wn. App. at 896. Nobody else saw the shooting, and none of the witnesses who saw someone running through the neighborhood chose Mr. Holland in the photographic montages presented. Because the evidence was weak, the error in allowing burden-shifting during closing argument was not harmless beyond a reasonable doubt, and the convictions should be reversed. Fleming, 83 Wn. App. at 216.

E. CONCLUSION

For the reasons set forth above, Mr. Holland respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 26<sup>th</sup> day of August, 2009.

Respectfully submitted,

  
Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	NO. 62118-1
Respondent,	)	
	)	
v.	)	
	)	
DEMEKO HOLLAND,	)	
	)	
Petitioner.	)	

---

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 27TH DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

Prosecuting Atty King County  
King Co Pros/App Unit Supervisor  
W554 King County Courthouse  
516 Third Avenue  
Seattle WA 98104

Demeko Holland  
840533  
Washington Correction Center  
PO Box 900  
Shelton, WA 98584

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF AUGUST, 2009

X 