

04803-2

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NO. 64863-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAUL ILERNA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

WHERE MR. ILERNA'S CONSTITUTIONAL
RIGHT TO A FAIR TRIAL WAS VIOLATED
BY PROSECUTORIAL MISCONDUCT
DURING CLOSING ARGUMENT,
REVERSAL IS REQUIRED.

1. The prosecutor's misstatement of the law during
rebuttal argument requires reversal and a new trial. During
rebuttal, the prosecutor argued:

So the law tells you, yes, you can presume things by
your reasonable and rational inferences. Because
the law tells you to make a presumption. The law
doesn't tell you that you can make presumptions in
favor of one party and not in favor of another. It tells
you to be reasonable and rational. And it tells you
most importantly to use your common sense.

12/30/09 RP 129 (emphasis added).

This undermining of the presumption of innocence was so
remarkable that several moments later, the trial court, sua sponte,
interrupted the prosecutor. The court then briefly instructed the
jury:

The presumption of innocence does not mean that
you accord the State that same presumption in
any way, either in evaluating the evidence or
anything else. The presumption of innocence is
not an evidentiary rule. Do not be confounded by
that.

12/30/09 RP 130 (emphasis added).

The prosecutor's dramatic dismissal of the presumption of innocence during closing argument must be soundly rejected as a clear violation of Mr. Ilerna's right to a fair trial and due process of law. State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930) (holding that a prosecutor is a quasi-judicial officer, whose duty it is to assure a defendant a fair and impartial trial, "in the character of fair play").

The State seems to concede that the trial court's curative instruction here distinguishes the instant case from State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). In Warren, the Supreme Court held that where the prosecutor offered a similarly "remarkable misstatement of the law" during closing argument, the trial court's curative instruction was sufficient to cure the error. 165 W.2d at 28. The Warren Court's curative instruction was significantly more detailed than the trial court's instruction here, however; therefore, the cases are distinguishable.

In the instant case, following the prosecutor's flagrantly misleading comments regarding the presumption of innocence, the trial court's attempt to give a curative instruction – minus the proper jury instruction on the presumption of innocence -- was insufficient to cure the harm caused by the prosecutor's misconduct. Even the

court seemed to understand the confusion that the prosecutor's argument had caused, as is clear from the court's admonition to the jury: "Do not be confounded by that." 12/30/09 RP 130.

2. The deputy prosecutor's misconduct had a substantial likelihood of affecting the verdict. Because it was "flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect," this Court must address the prosecutor's misstatement of law. Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). "When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's comments affected the verdict." State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (reversal where prosecutor repeatedly called defendant a liar in closing argument).

Although the State argues that Mr. Ilerna waived his objection to these comments (Resp. Brief at 21), the misconduct issue is nonetheless properly presented for the first time on appeal, since the comments misstating the presumption of innocence were so "flagrant and ill-intentioned" as to irrevocably prejudice the jury,

lowering the burden of proof and impacting the verdict in this case – thus affecting Mr. Ilerna’s constitutional right to due process.

RAP 2.5(a)(3). Because Mr. Ilerna’s conviction resulted from prejudicial prosecutorial misconduct, it must be reversed. See also State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (finding manifest constitutional error and reversing conviction, despite failure of defense counsel to object at trial, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense in closing argument).

3. The prosecutor’s additional misconduct in closing argument denied Mr. Ilerna a fair trial. The prosecutor also made additional comments rising to the level of misconduct in closing argument, violating Mr. Ilerna’s right to due process of law.

First, the prosecutor repeatedly employed improper rhetoric, labeling Mr. Ilerna a “smart criminal,” and asking the jury not to “reward this Defendant for being smart.” 12/30/09 RP 107, 131, 134. Although defense counsel promptly objected to the disparaging use of the word “criminal” during closing argument, the objection was overruled by the trial court. 12/30/09 RP 131-32.

In addition to the “criminal” comments, the prosecutor denigrated the defense by stating, “The Defense is doing his job.

He's arguing to you about what reasonable doubt is." 12/30/09 RP 133.

This argument is tantamount to implying that defense counsel is resorting to trickery, or is operating smoke and mirrors in order to "get a client off," and is improper. See, e.g., State v. Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (reversing where prosecutor disparaged defense counsel by stating that while the defense has an obligation to his client, the prosecutor only seeks justice). The prosecutor's argument also undermined the concept of reasonable doubt – implying that a cornerstone of the American legal tradition and a fundamental right is just another defense trick to be pulled out of defense counsel's hat. But see, e.g., In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amend. 14.

4. Reversal is required. The cumulative effect of various instances of prosecutorial misconduct violated Mr. Ilerna's right to a fair trial. See State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d

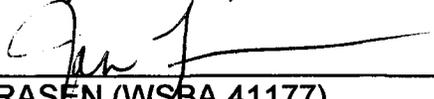
1069 (1976). Due to the several instances of misconduct in the closing argument during Mr. Ilerna's trial, there is a substantial likelihood the cumulative effect affected the jury's verdict; thus, this Court should reverse his conviction. Reed, 102 Wn.2d at 146-47; see also United States v. Holmes, 413 F.3d 770, 778 (8th Cir. 2005) (reversing due to prosecutor's denigration of defense in closing argument, which court finds particularly egregious due to comments made during rebuttal, giving defense no opportunity to respond).

B. CONCLUSION

For the foregoing reasons, Mr. Ilerna respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 7th day of October, 2010.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	
)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF OCTOBER, 2010, 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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