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NO. 65817-4-I

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

REC'D
MAR 11 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ROBERT GUERRERO,

Appellant.

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

The Honorable Regina Cahan, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

2011 MAR 11 10:52 AM
JENNIFER M. WINKLER
Attorney for Appellant
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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct in closing argument denied the appellant a fair trial.

Issue Pertaining to Assignment of Error

The State improperly invoked the missing witness doctrine in closing argument, but the court incorrectly overruled a defense objection. Because the prosecutor's argument improperly shifted the burden to the defense, and because the State cannot prove beyond a reasonable doubt that the error was harmless, should the appellant's convictions be reversed?

B. STATEMENT OF THE CASE¹

1. Charge and introduction to facts

The King County prosecutor charged appellant Robert Guerrero with forgery and attempted first degree theft as well as various aggravators. CP 64-65. The State alleged Guerrero presented a forged court order purporting to dismiss 1984 convictions and used the order to file an unsuccessful lawsuit against King County. CP 3-7.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 7/28 and 11/3/09; 2RP – 11/3, 11/4, 11/5, and 11/9/09; 3RP – 11/20/09, 2/18 and 2/22/10; 4RP – 2/22 and 2/24/10; 5RP 2/24 and 2/25/10; 6RP – 2/25 and 3/1/10; 7RP – 3/1, 3/2 and 4/18/10; and 8RP – 7/30/10.

Guerrero did not dispute the order was forged, but he denied he was responsible. He suspected his former attorney, James McLees, who was later disbarred for stealing from clients, sent him the false order in 1994 to cover up incompetence. 6RP 1161-62, 1174-76, 1206-07, 1211-12, 1220; 7RP 1364-65, 1374-76.

A jury convicted Guerrero of the underlying offenses, although it rejected the aggravators. CP 400-03. Guerrero was sentenced within the standard range. CP 426-32; 8RP 28-30.

2. Trial testimony

In 1983, Guerrero pleaded guilty to two sex offenses in King County Superior Court. Ex. 1 (redacted judgment and sentence); 8RP 834-35. Seattle attorney Wesley Hohlbein represented Guerrero, although Tacoma attorney McLees assisted at times. 6RP 1127-33, 1162, 1176-77. In February 1984, Judge James McCutcheon sentenced Guerrero to 10 years probation and deferred the remainder of the sentence on the condition that he complete treatment at Western State Hospital and other requirements.² Id.; 4RP 719-22. The sentence permitted Guerrero to

² Former RCW 9.95.200 (1981) (pre-Sentencing Reform Act statute permitting court to order probation).

move for dismissal of the charges after the 10-year probation period. Ex. 1; 4RP 796; 5RP 858.³

Guerrero met all probation requirements and his Department of Corrections supervision ended in 1994. Ex. 2 (redacted order); 4RP 745-46; 5RP 837-38; 6RP 1161. Guerrero returned to school, obtained bachelor's and master's degrees, and was working on a doctorate when, in 2004, he was arrested for failing to register as a sex offender. 6RP 1177, 1166, 1181; 7RP 1208-09, 1217. Guerrero was acquitted, but he learned he was still required to register. 6RP 1064, 1070; 7RP 1215. As a result, Guerrero lost his job at Centralia Community College. 5RP 914-16. Around that time, Guerrero also began suffering from brain cancer and had surgery to remove a tumor. 6RP 1140-41.

In 2004, Guerrero moved for dismissal of the 1984 convictions and for relief from the registration requirement. 4RP 763-64. King County prosecutor Lisa Johnson opposed the motions; at first based on the erroneous belief that the statutes did not permit dismissal, and later because she believed the public had the right to know about the convictions. 4RP 768, 796; 5RP 858.

³ See also former RCW 9.95.240 (1957) (permitting court to permit withdrawal of verdict and to dismiss the case upon completion of probation).

Judge Nicole MacInnes, McCutcheon's successor, held a series of hearings on the matter in 2004 and 2005. At the first hearing, Guerrero's attorney Thomas Dinwiddie⁴ argued that the order terminating DOC supervision effectively dismissed the charges. 4RP 792-93; Ex. 2, 36. Johnson disagreed, and argued Guerrero should provide a sexual deviancy evaluation. RP 797. Guerrero agreed to the evaluation. 4RP 798.

By the next hearing, occurring in February of 2005, Guerrero had obtained an evaluation, but Johnson argued the court still did not have enough information. 5RP 806, 851. Judge MacInnes told the parties the hearing could be continued so Guerrero could provide additional information, or she could rule on the information before her. 5RP 806. Guerrero asked for a continuance. 5RP 807-08.

On the day before the scheduled hearing, Johnson received a fax from Dinwiddie's office, which included a 1994 court order dismissing the 1984 charges. 5RP 811-12; Ex. 11. Johnson was surprised because Guerrero had not previously mentioned the order. 4RP 792, 800, 807-08. The order appeared to have been signed by Judge McCutcheon, King County prosecutor Brian Baird, and Hohlbein, the defense attorney on the original charges. 5RP 811-12.

⁴ Dinwiddie died in 2007. 7RP 765-66.

Johnson could not locate the order in the prosecutor's case files or the superior court files. 5RP 812-13. The clerk's office was likewise unable to find the order. 5RP 819, 892-94. Prosecutor Baird had no memory of signing the order, but believed his signature appeared authentic. 4RP 734; 5RP 819. The other two signers were deceased. 8RP 1094. Both Johnson and Baird testified the order appeared somewhat odd, but there was no standard form in 1994, and it occurred to neither that the order was forged. 7RP 739-40, 748; 8RP 815-16, 829-30, 832; see also 7RP 754 (opining layperson would be unaware the order was forged).

Because Johnson could not prove the order was invalid, she agreed dismissal was appropriate and drafted a new order incorporating the 1994 order, which Judge MacInnes signed in October 2005. 5RP 820; Ex. 3 (redacted 2005 order of dismissal). The order also relieved Guerrero of his registration requirement. 5RP 823.

In 2006 or 2007, Johnson learned from civil division prosecutor John Cobb that Guerrero was suing the county. 5RP 824. Cobb questioned the order's authenticity, however, because he noticed the signatures appeared identical to the signatures on the judgment and sentence. 5RP 824, 930-32, 935. When confronted with this fact,

Guerrero agreed to dismiss the suit.⁵ 5RP 932. On Johnson's motion, Judge MacInnes rescinded the 2005 dismissal order. 5RP 824-26; 5RP 968.

Brett Bishop, the State's forensic document examiner, testified the signatures on the purported order of dismissal were, in fact, identical to the signatures on the 1984 judgment and sentence. 5RP 968. Bishop concluded the signatures were transferred to the document through a "cut and paste" method." 5RP 971. Bishop could not determine whether the signatures were transferred using mechanical means (scissors and a photocopier) or electronic means (a computer program). 5RP 944, 979-80

In June 2008, Guerrero spoke with Detectives Leland Adams and Mary Lisa Priebe-Olson. 5RP 993. Guerrero told the detectives attorney Hohlbein sent him the dismissal order at his father's address in 1994. 5RP 997-98; 6RP 1025. Guerrero made one copy of the order for himself and gave another copy to his father for safekeeping. 6RP 1026. Guerrero told detectives he was "desperate" to find the order in 2004 but had no luck until his brother, John,⁶ found the order in a box in the father's bedroom.

⁵ According to Cobb, Guerrero filed paperwork indicating the suit was *not* suitable for arbitration, which was mandatory for all claims under \$50,000 under the local rules. 5RP 911.

⁶ Guerrero's father is also named John, but "John" in this brief refers to the brother.

6RP 1007, 1026. Guerrero admitted he had a motive to forge the order, but adamantly denied doing so. 5RP 1000; 6RP 1028-29. He also told detectives he did not think Hohlbein would have forged the order. 6RP 1005, 1028-30.

Guerrero's father lived with John in 2004 and 2005. John knew Guerrero was looking for the dismissal order around that time. 6RP 1035. One day, John heard his father shuffling around his bedroom and went to help. 6RP 1036. John found a bundle of Guerrero's court papers, including the dismissal order, near the top of a box in the father's closet. 6RP 1037, 1046. John was suspicious; one of the documents had a signature that appeared to be affixed using tape and white-out, and Guerrero was in the father's room with the door locked the week before John found the order. 6RP 1039. John admitted, however, he did not mention his suspicions to the detectives. 6RP 1041. He also admitted there was "bad blood" between him and Guerrero. 6RP 1042.

Jeremy Randolph, a former Lewis County prosecutor, represented the State in Guerrero's November 2004 trial for failing to register. 6RP 1063. Neither Guerrero nor attorney Dinwiddie mentioned a dismissal order, which would have obviated the registration requirement. 6RP 1065-66, 1068. Randolph acknowledged, however, that Guerrero raised a successful defense and that Dinwiddie may have advised Guerrero not to

mention the order because they could not prove it existed. 6RP 1064, 1069-70, 1075, 1077-78.

Guerrero confirmed he told Dinwiddie he had received an order of dismissal. He testified, however, that he followed Dinwiddie's advice as to the defense, a decision that paid off. 6RP 1178-79.

Guerrero testified that after completing probation in 1994, he asked Hohlbein to obtain an order dismissing the 1984 charges. 6RP 1161-62. When Hohlbein failed to respond,⁷ he visited McLees's office in Tacoma, which was closer to his residence. 6RP 1162. Guerrero was present when McLees called Hohlbein and asked him to send Guerrero's file so he could work on obtaining the dismissal order. 6RP 1162.

Guerrero played in a band in the 1990s and worked with McLees on music-related business. 6RP 1163-65, 1168. Guerrero and McLees had an agreement that McLees would share in royalties from sales of the band's CDs. 7RP 1212. McLees also contributed artwork for the band, using a computer to "cut and paste" the band's logo onto promotional materials. 6RP 1169-71; 7RP 1211-12.

Only after the State filed the current charges did Guerrero begin to suspect McLees forged the dismissal order. He learned from his current

⁷ Guerrero later learned Hohlbein was dying of cancer around that time. 5RP 1162.

attorney that in 2002 McLees stipulated to suspension of his license for stealing from a client.⁸ 6RP 1173-75; 7RP 1205-06, 1219-20, 1224.

Guerrero disputed John's testimony and denied he visited his brother's house around the time the order was found. 7RP 1219. Rather, Guerrero was experiencing seizures, a complication of brain surgery, and was unable to drive. 7RP 1219.

Bruce Cook, former college classmate of Guerrero's, confirmed he and other friends cared for Guerrero during the summer of 2005 because Guerrero was suffering from seizures. 6RP 1137-1140-41, 1143-45, 1149, 1152. Cook, a professional artist, was also familiar with the artwork McLees prepared for Guerrero's band. 6RP 1137-38, 1142.

The parties stipulated that a copy of the order Guerrero said he made in 1994 used a form of toner that manufacturers began phasing out in 2000, although some machines still used it. 6RP 1094-95. The parties submitted to the jury a written stipulation regarding the toner findings as an exhibit. Ex. 31.

The parties also stipulated, consistent with the prior testimony, that certain parties were deceased. Finally, they stipulated that "it is unknown whether James McLees is alive or dead[;] both the State and the Defendant

⁸ A bar association representative testified that the stipulation, which included an agreement never to practice law again, carried consequences worse than disbarment. 7RP 1226.

have made diligent efforts to locate . . . McLees and these efforts have been unsuccessful. 6RP 1094. This stipulation was not presented in writing to the jury.

C. ARGUMENT

PREJUDICIAL PROSECUTORIAL MISCONDUCT DENIED
GUERRERO A FAIR TRIAL.

Over objection, the prosecutor improperly invoked the missing witness doctrine in closing argument, effectively shifting the burden of proof to the defense. Because the State cannot prove beyond a reasonable doubt that the error was harmless, this Court should reverse Guerrero's convictions.

1. Introduction to applicable law

A prosecuting attorney's misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22 (amend. 10). State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Id. at 519. However, he or she may not make statements that are unsupported by the evidence. State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991). Moreover, a prosecutor who misstates the law commits a serious irregularity that has the potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). For example, a prosecutor commits misconduct by shifting the burden of proof to the defendant during closing argument. State v. Miles, 139 Wn. App. 879, 889, 162 P.3d 1169 (2007); United States v. Perlaza, 439 F.3d 1149, 1171 (9th Cir. 2006).

Prosecutorial misconduct generally compels reversal where there is a substantial likelihood it affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). But because prosecutorial burden shifting affects a constitutional right, reversal is required unless the error is harmless beyond a reasonable doubt. State v. Moreno, 132 Wn. App. 663, 671, 132 P.3d 1137 (2006) (citing State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114, review denied, 115 Wn.2d 1014 (1990)); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Under this standard, the reviewing court should reverse unless convinced beyond a

reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. Moreno, 132 Wn. App. at 671 (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)).

2. The prosecutor committed misconduct by improperly invoking the missing witness doctrine in closing argument over defense objection.

“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) (citing State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003)). The absence of a duty to call witnesses is a corollary to the State's burden to prove each element of the crime charged beyond a reasonable doubt. Contreras, 58 Wn. App. at 473; see In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (Fourteenth Amendment requires the State to prove each element beyond a reasonable doubt).

Under the missing witness doctrine, however, when a party fails to call a witness to provide testimony that would properly be part of the case and is within the control of that party, the other party may argue the jury may draw an inference that the testimony would have been unfavorable to the first party. Montgomery, 163 Wn.2d at 598.

Certain factors prohibit application of the doctrine against an accused, however. Id. For example, where the witness is not particularly

available to the defense, or where the witness's absence is explained, no such instruction or argument is permitted. Id. at 598-99.

In closing, the prosecutor argued:

[I]t's not really in doubt that this was a forged order. It's not really in doubt that Mr. Guerrero submitted it to the court. All that's left is who would've done it? I suggest to you that there's no one who fits that description other than Mr. Guerrero, himself. Now, [it] became clear through the course of this trial that the Defense has picked the person that they want you to pin the blame on. That person is James McLees, heard the name many times, this 81 year old disgraced former attorney conveniently was not around --

7RP 1353-54. Guerrero objected that the prosecutor's argument improperly shifted the burden to the defense; the objection was overruled.

7RP 1354.

Guerrero's objection was proper. Based on the parties' stipulation, the State was prohibited from invoking the missing witness doctrine. 6RP 1094; Montgomery, 163 Wn.2d at 598-99. Yet the prosecutor's suggestion that McLees's absence was "convenient" for Guerrero suggested not only that his absence was in Guerrero's control, but also that his testimony would have been unfavorable had Guerrero produced him.

Because the State was not entitled to invoke the missing witness doctrine, the prosecutor improperly shifted the burden to the defense, in violation of Guerrero's constitutional rights. Cheatam, 150 Wn.2d at 652;

Cleveland, 58 Wn. App. at 647-48. The court should have sustained Guerrero's objection.

3. Reversal is required because the misconduct was not harmless.

The next question is whether the misconduct was harmless beyond a reasonable doubt. Id. at 648; see also Montgomery, 163 Wn.2d at 600 (State could not prove unwarranted missing witness instruction was harmless beyond a reasonable doubt). This Court should reverse unless convinced beyond a reasonable doubt the evidence was so overwhelming that it necessarily led to a finding of guilt. Moreno, 132 Wn. App. at 67.

The State cannot meet that burden here. Given the nature of the testimony, it is likely the prosecutor's argument affected the jury's evaluation of the parties' competing versions of events. See State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993) (where a case essentially becomes a swearing contest, the likelihood of the verdict being affected by prosecutorial misconduct is substantial).

In Montgomery, the jury was presented with two competing interpretations of the purchases Montgomery and a companion made during a single day at various stores. The State's theory was that the items purchased, as well as the manner in which they were purchased, indicated an intent to manufacture methamphetamine; for example, Montgomery

and his companion shopped at a number of stores, purchased different kinds of cold medication at different stores, and purchased acetone and hydrogen peroxide. Montgomery, 163 Wn.2d at 585-86. Montgomery, on the other hand, offered innocent explanations for the purchases. Id.

The State argued Montgomery's grandson and landlord were "natural witnesses" for Montgomery to call, particularly as to Montgomery's explanation for purchasing the chemicals. Id. at 596. The trial court gave a "missing witness" instruction, and the prosecutor repeatedly referred to the defense's failure to call the grandson and landlord to corroborate Montgomery's version of events. Id. at 597.

Montgomery's daughter, a sheriff's deputy, offered testimony corroborating her father's explanations for the purchase of the chemicals and explaining the absence of one of the witnesses. Id. at 596. The Supreme Court nevertheless reversed the conviction, holding the combination of the missing witness instruction and the prosecutor's repeated references to the absence of Montgomery's grandson and landlord was not harmless." Id. at 600-01.

Here, as in Montgomery, the parties presented the jury with two plausible explanations for the forged document. The State's theory was that Guerrero – who undeniably had a motive to do so – forged the

document and, knowing it was forged, sued the county for harms resulting from having lost the nonexistent document.

According to Guerrero's version, however, attorney McLees had an incentive to maintain Guerrero as his client, as well as the demonstrated ability to "cut and paste" using his computer. McLees was later essentially disbarred for his dishonest behavior. Moreover, it took a full two years for the experienced prosecutors to conclude the order was forged. It is thus reasonable to believe that had Guerrero not forged the document, he would not have known it was fake.⁹

More significantly, perhaps, the jury presented the court a note during deliberations requesting "to see stipulated issues." CP 398. The note suggested jurors were confused whether, despite the stipulation, they could use McLees's absence against Guerrero. The record makes it clear which stipulation confused the jury, because there was only one subject of possible confusion: Unlike the toner-related stipulation, submitted to the jury as Exhibit 31, the stipulation regarding McLees's availability was not reduced to written form for jurors. Unlike the stipulation that certain

⁹ Moreover, Guerrero saw a DOC document indicating that his probation officer requested an order dismissing the charges. 6RP 1183; 7RP 1294; Ex. 36.

parties were deceased, there was no testimony as to the facts contained in the McLees stipulation.

Under these facts, the State cannot prove beyond a reasonable doubt that the jury was not affected by the prosecutor's argument that McLees's absence was simply too "convenient" for Guerrero. The implications of such argument would not be lost on a reasonable juror. See State v. Smails, 63 Wash. 172, 183, 115 P. 82 (1911) (jurors are presumed to be "sensible and intelligent").

As discussed above, even under a non-constitutional harmless error standard, there was a substantial likelihood the prosecutor's misconduct affected the verdicts. State v. Dixon, 150 Wn. App. 46, 207 P.3d 459 (2009) (reversing conviction under "substantial likelihood" standard based in part on prosecutor's unobjected-to improper missing witness argument). Reversal is, therefore, required. Fisher, 165 Wn.2d at 747.

D. CONCLUSION

This Court should reverse Guerrero's convictions because prosecutorial misconduct denied him a fair trial.

DATED this 11th day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65817-4-1
)	
ROBERT GUERRERO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 11TH DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT GUERRERO
1015 S. WASHINGTON STREET
TACOMA, WA 98405

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MARCH, 2011.

x Patrick Mayovsky

2011 MAR 11 11:19 PM
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA