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NO. 71426-1-I

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

REC'D
MAY 06 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

WALTER JIMERSON, JR.,

Appellant.

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

The Honorable William Downing, Judge

Filed
5-6-14

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The prosecutor committed misconduct requiring reversal when he improperly shifted the burden of proof to the defense during closing argument.

Issue Pertaining to Assignment of Error

During closing argument, the prosecutor referred to the state's evidence and testimony and then argued there was "no other evidence presented that this was not Mr. Jimerson." Upon defense counsel's objection, the court merely told the prosecutor to "go ahead." Did the prosecutor's comment constitute reversible misconduct because it improperly shifted the burden of proof to the defense and was likely to impact the jury's decision?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Walter Jimerson with one count of second-degree burglary. CP 1. The court instructed the jury on two defenses: that the premises were open to the public at the time and that the defendant reasonably believed the owner would have permitted him to enter. CP 33. The court also instructed the jury on the lesser-included offense of criminal trespass. CP 34-35. The jury found Jimerson

guilty as charged, and the court imposed an exceptional sentence below the standard range. CP 14, 39, 41. Notice of appeal was timely filed. CP 47.

2. Substantive Facts

Approximately 15 minutes before the store was due to open for the day, the manager of a north Seattle drug store glanced at the security feed and noticed someone reaching into the cash register where the key to the cigarette case is kept and attempting to unlock the case. 2RP¹ 23. He confronted the man and, when the man would not accompany him to the back room, choked him until he stopped struggling, took him down to the ground, and sat on him until police arrived. 2RP 23-27. The police arrived and searched Jimerson, finding two 20 ounce bottles of soda and two Bic brand cigarette lighters. 2RP 27-28. The surveillance video showed him stopping by the soda cooler and the lighter display before proceeding to the cigarette case. 2RP 16-19; Ex. 1.

During this entire incident, the front door was unlocked and the lights were on. 1RP 47-48; 2RP 35. However, because the automatic door mechanism had not yet been turned on, the doors had to be manually opened. 2RP 36. The manager testified that, occasionally, if there are people waiting outside and the cashier is ready, he opens the store a few minutes early by turning on the automatic door mechanism. 2RP 9-11. He testified that,

¹ There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Dec. 3, 2013; 2RP – Dec. 4, 2013; 3RP – Jan. 14, 2014.

when this incident occurred, the cashier had not yet arrived and the store was closed. 2RP 9, 14.

During closing argument, the prosecutor told the jury, “You’ve seen the video, you’ve heard the testimony. You’ve heard the driver’s license was taken off of Mr. Jimerson’s person, had his name on it. There’s been no other evidence presented that this was not Mr. Jimerson.” 2RP 65. Defense counsel objected that this argument improperly shifted the burden of proof to the defense. 2RP 65. The court simply responded, “Go ahead.” 2RP 65.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT THAT IMPROPERLY
SHIFTED THE BURDEN OF PROOF DENIED JIMERSON A
FAIR TRIAL.

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)); see also State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011) (“A prosecutor generally cannot comment on the defendant’s failure to present evidence because the defendant has no duty to present evidence.”). Thus, a prosecutor commits misconduct by shifting the burden of proof to the defendant during closing argument. State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012).

A prosecutor is a quasi-judicial officer who represents the people of the state in the search for justice. State v. Monday, 171 Wn. 2d 667, 676, 257 P.3d 551, 556 (2011). But “defendants are among the people the prosecutor represents.” Id. Thus, “the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” Id. 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. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Prosecutorial misconduct generally requires reversal where there is a substantial likelihood it affected the verdict. State v. Fisher, 165 Wn. 2d 727, 747, 202 P.3d 937 (2009).

Here the prosecutor’s argument that there was “no other evidence presented that this was not Mr. Jimerson” suggested the defense was obliged to put on evidence to refute the State’s case. 2RP 65. It suggested the jury should weigh the State’s evidence against Jimerson’s, rather than determining whether there was any reason to doubt. This was improper. Emery, 174 Wn.2d at 759-60.

In Emery, the prosecutor committed misconduct and shifted the burden of proof by arguing that, to find a reasonable doubt, the jury needed to be able to “fill in the blank” with the reason for their doubt. Id. The court explained the jury “need do nothing” in order to find the defendant not

guilty, and the “fill in the blank” argument subtly shifted the burden to the defense. Id.

The burden shifting argument in this case was not a mere reference to a lack of corroboration, which courts have found not necessarily improper. See, e.g., State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006) (citing cases holding that comment on lack of corroboration does not shift burden of proof). Instead it drew the jury’s attention to the fact that Jimerson did not testify or put on any witnesses and suggested the jury could draw adverse inferences from that fact.

Because defense counsel objected at trial to the prosecutor’s misconduct, Jimerson need only “show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” Emery, 174 Wn.2d at 760. The prosecutor’s burden shifting was substantially likely to have affected the verdict in this case. In general, 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).

Additionally, in this case, the court’s failure to sustain the proper objection “increased the likelihood that the misconduct affected the verdict.” State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006). Defense counsel’s objection was proper. 2RP 65. By arguing there was no evidence

it was not Jimerson, the State suggested the defense had some obligation to present such evidence. 2RP 65. The court should have sustained the objection. However, the court instead made no comment on the objection and told the prosecutor to “go ahead.” 2RP 65.

The court’s instruction that the prosecutor should simply continue suggested to the jury there was nothing wrong with the argument. Thus, “the trial court augmented the argument’s prejudicial impact by lending its imprimatur to the remarks.” Perez-Mejia, 134 Wn. App. at 920. Because the trial court legitimized the prosecutor’s argument, its instruction to the jury to “disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions” did not cure the prejudice. CP 26. On the contrary, the message sent to the jury was that there was nothing wrong with the prosecutor’s argument and the lack of defense evidence or testimony was something the jury could consider in its deliberations. See Davenport, 100 Wn.2d at 764 (court’s overruling of counsel’s objection “lent an aura of legitimacy to what was otherwise improper argument.”).

There were many reasons to doubt Jimerson’s intent to commit theft, an essential element of the burglary charge. As defense counsel pointed out, Jimerson closed the door behind him, rather than leave it open for a quick get away. 2RP 85. He meandered slowly through the store like a person shopping rather than a person trying to steal something. 2RP 84-85. He did

so despite the visible surveillance cameras. 2RP 84-85. A reasonable juror could have concluded Jimerson mistakenly came into the store before it was open and was in the process of gathering items for purchase. But the prosecutor's argument regarding the lack of defense evidence was likely to encourage the jury to resolve these issues in the State's favor because Jimerson did not actually testify about his intent. The prosecutor's argument was improper burden-shifting, and the State cannot show it was harmless. This Court should reverse.

D. CONCLUSION

For the foregoing reasons, this Court should reverse Jimerson's conviction.

DATED this 6th day of May 2014.

Respectfully submitted,

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COA NO. 71426-1-I

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 6TH DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WALTER JIMERSON
GENERAL DELIVERY
BELLEVUE, WA 98004

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF MAY 2014.

x *Patrick Mayovsky*