

72619-6

FILED
August 13, 2015
Court of Appeals
Division I
State of Washington

72619-6

NO. 72619-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN COOK,

Appellant.

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

The Honorable George Appel, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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A. STATEMENT OF THE CASE IN REPLY

As a preliminary matter, Cook wishes to clarify one aspect of the State's Statement of the Facts. The State's brief declares, "The defendant's DNA was not found on the swabs taken from N.R." Brief of Respondent at 8 (citing 9/23/14RP 208-10). While technically correct, this statement is misleading. The detective's testimony makes clear that the swabs were never tested for DNA, and the forensic nurse's testimony cited by the State does not contradict that assertion. 3RP 179-80, 209-13.

B. ARGUMENT IN REPLY

1. THE PROSECUTOR IMPROPERLY SUGGESTED THE JURY COULD VOTE TO CONVICT DESPITE REASONS TO DOUBT.

The State argues that the prosecutor's argument was only intended to respond to the defense's improper argument "that any reason to doubt required acquittal, changing the burden of proof from beyond a reasonable doubt to absolute certainty." Brief of Respondent at 12. This argument should be rejected. First, the defense argument did not misstate the law.

Defense counsel began by accurately described the varying burdens of proof for different legal proceedings. 4RP 32. Counsel then stated, "But if you have reason to doubt the State hasn't proven to you beyond a reasonable doubt that he's guilty, you have to acquit him." Id. This was again an accurate description of the burden of proof beyond a reasonable

doubt. As the pattern instruction given in this case states, “A reasonable doubt is one for which a reason exists.” CP 64; 11 Washington Practice, Pattern Jury Instructions- Criminal, WPIC 4.01 (3d Ed).

During the rest of defense counsel’s closing, she argued there were reasons to doubt whether Cook was guilty. Those reasons included reasons why N.R.’s account of what happened was not reasonable; reasons why N.R. had a motive to invent these accusations; reasons why the detective may have misinterpreted, misunderstood, or misremembered Cook’s statements; and the possibility that the swabs, if tested, might have supported Cook’s version of events. 4RP 29-43. A jury could validly have found reasonable doubt and acquitted Cook if it agreed with any of these arguments.

Contrary to the State’s argument, counsel did not argue the law required proof beyond all doubt or absolute certainty. The argument expressly referred to a doubt that is warranted by a reason, which is the correct standard. A reason to doubt is no different than a doubt for which a reason exists. Defense counsel’s argument was not improper.

If the State had limited itself to rejecting the concept of absolute certainty or “beyond all doubt,” Cook would not be making this argument on appeal. But the State’s rebuttal crossed the line, misstated the law, and likely misled the jury about the burden of proof. The State argued repeatedly that reasonable doubt does not mean a reason to doubt. 4RP 44-45. The State

then expressly argued that, while reasonable doubt did not mean a reason to doubt, it did mean abiding belief. 4RP 44. The State argues that the prosecutor did not call on the jury to search for the truth. Brief of Respondent at 12. But in support of this argument, the State cites only the pattern jury instruction, not the prosecutor's argument. From the prosecutor's argument, which juxtaposed reasons to doubt with abiding belief, a reasonable jury would conclude it could disregard reasonable doubts so long as it still held an abiding belief.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO ARGUMENT THAT UNDERMINED THE BEDROCK PRINCIPLE OF PROOF BEYOND A REASONABLE DOUBT.

The State argues defense counsel had a strategic reason for not objecting to this flagrant misstatement of the bedrock principle of proof beyond a reasonable doubt. Brief of Respondent at 18. The State argues, "An objection to the prosecutor's characterization of the burden of proof would likely have resulted in the trial court re-stating or emphasizing the proper burden of proof to the jury, thereby undermining the defendant's attempt at shifting that burden in his argument." Brief of Respondent at 18. This argument should be rejected for two reasons.

First, as discussed above, there was nothing improper about defense counsel's argument. Second, defense counsel could not have been making

an “attempt at shifting that burden” because it is well established that the defense has no burden of proof at trial unless raising an affirmative defense. See, e.g., State v. W.R., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014) (“[T]he State cannot require the defendant to disprove any fact that constitutes the crime charged.”) Prosecutorial misconduct in misleading the jury about the burden of proof and counsel’s failure to object require reversal of Cook’s conviction.

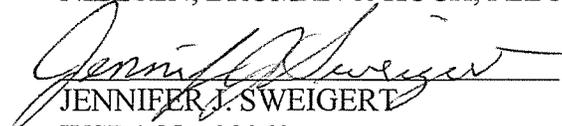
C. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, this Court should reverse Cook’s conviction.

DATED this 13th day of August, 2015.

Respectfully submitted,

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Respondent.)	

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 13TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN COOK
DOC NO. 377462
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONORE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF AUGUST 2015.

x *Patrick Mayovsky*