

COURT OF APPEALS

05/17/2011 1:32 No. 34597-8-II

*SW*

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

---

STATE OF WASHINGTON,

Respondent,

v.

RANDY FLORENCE,

Appellant.

---

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

---

The Honorable Beverly G. Grant, Judge

---

APPELLANT'S OPENING BRIEF

---

KATHRYN RUSSELL SELK  
WSBA No. 23879  
Counsel for Appellant

RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 135  
Seattle, Washington 98115  
(206) 782-3353

*PM 11-1-06*

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR ..... 1

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

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

    1. Procedural Facts ..... 2

    2. Overview of relevant facts ..... 2

D. ARGUMENT ..... 4

    THE PROSECUTOR COMMITTED FLAGRANT,  
    PREJUDICIAL MISCONDUCT WHICH DEPRIVED  
    APPELLANT OF A FAIR TRIAL AND COUNSEL  
    WAS INEFFECTIVE ..... 4

        a. Relevant facts ..... 5

        b. These arguments were flagrant, prejudicial  
        misconduct and counsel was ineffective ..... 7

E. CONCLUSION ..... 14

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978). . . . . 5

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) . . . . . 8

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) . . . . . 12

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) . . . . . 4

State v. Mak, 105 Wn.2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986), overruled in part and on other grounds by, State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994) . . . . . 7

State v. McHenry, 88 Wn.2d 211, 558 P.2d 188 (1977) . . . . . 8

State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955) . . . . . 8

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, review denied, 129 Wn.2d 1016 (1995) . . . . . 11

WASHINGTON COURT OF APPEALS

State v. Castle, 86 Wn. App. 48, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997) . . . . . 9, 11

State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991) . . . . . 9

State v. Huckins, 66 Wn. App. 213, 836 P.2d 230 (1992), review denied, 120 Wn.2d 1020 (1993). . . . . 8

State v. Madison, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989) . . . . . 12

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998). . . . . 12

State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) . . . . . 4

State v. Wright, 76 Wn. App. 811, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995) . . . . . 9

FEDERAL AND OTHER CASELAW

Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990),  
overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62,  
73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ..... 8

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

14<sup>th</sup> Amendment ..... 1, 5  
6<sup>th</sup> Amendment ..... 1, 5, 12  
Article I, § 22 ..... 1, 12  
Article I, § 3 ..... 1, 5  
RCW 69.50.4012. .... 2

A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial misconduct which deprived appellant of his rights to the fair trial, guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments and Article I, § 3, of the Washington constitution.

2. Appellant did not receive effective assistance of counsel as required under the 6<sup>th</sup> Amendment and Article I, § 22, of the Washington constitution.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

For the defense, the only issue in this case was whether the prosecution's confidential informant was credible in his testimony and whether the jury should believe his claim that he had been able to keep substances he got from separate people separate by holding them in different hands. The defense position was that the informant was not reliable and likely got the substances mixed up, so that appellant was not guilty of the charged crime but rather of one with which he had never been charged.

1. Reasonable doubt can arise from the evidence admitted at trial or from a lack of evidence. Did the prosecutor commit misconduct in closing argument and misstate the law of the standard of reasonable doubt by 1) telling the jury it had to determine whether the prosecution had met that standard by only considering the evidence that had been admitted and 2) telling the jury it must reject the defense argument that the prosecution had not provided sufficient evidence because the defense presented no evidence to rebut the state's case?

2. Did the prosecutor commit misconduct in telling the jury that they could not accept the defense without violating the jury instructions and the jury's "duty" and "honor?"

3. Counsel failed to object to and request instruction on the prosecutor's misconduct at trial. If the misconduct could have been cured, is reversal required based upon counsel's ineffectiveness in failing to request such a remedy on his client's behalf?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Randy Florence was charged with delivery of a substance in lieu of a controlled substance.<sup>1</sup> CP 1-5; RCW 69.50.4012.

Mr. Florence was convicted after a jury trial held before the Honorable Beverly Grant on November 3, 7-8, 14-16, 2005<sup>2</sup>; CP 34. On January 13, 2006, Judge Grant denied a motion to vacate. 2RP 7-9. On February 24, 2006, Judge Grant ordered a DOSA sentence. CP 95-108.

Mr. Florence appealed, and this pleading follows. See CP 109-21.

2. Overview of relevant facts<sup>3</sup>

On June 27, 2005, James Josey acted as an "informant" for the Tacoma police, taking prerecorded "buy" money and driving a car "wired"

---

<sup>1</sup>A sentencing enhancement added by amended information was dismissed by the prosecution the day of trial as unsupported under the law. See RP 20.

<sup>2</sup>The eight volumes of the verbatim report of proceedings will be referred to as follows:

The six chronologically paginated volumes of the trial, as "RP;"  
The motion proceeding of January 13, 2006, as "2RP;"  
The sentencing of February 24, 2006, as "SRP."

<sup>3</sup>More detailed discussion of facts relevant to issues is contained in the argument section, *infra*.

by police into a specific area with the intent to buy drugs from people who would later be arrested for selling. RP 120, 125-27.

That day, Mr. Josey said, he saw a signal from two men on the street, pulled over, let them get in the car and bought suspected drugs from each of them. RP 127-31. The activity in the truck was recorded and the men believed to be involved were later arrested. RP , 80-99, 125-41, 169-72. Randy Florence was identified as one of the men involved. RP 174-76.

Mr. Josey said he kept the substances each man sold him separate by keeping them clenched in his hand until he turned them over to police at their rendezvous point after the transaction. RP 133-36, 41-45. Mr. Josey testified that he drove the mile or mile and a half between the transaction and the meeting place, making stops and turns on the way, but kept each hand closed and the items in each separate. RP 142-43. He claimed there was "no chance" that he got the substances mixed up. RP 136-37.

One substance tested positive for drugs while the other did not. RP 99-109. Mr. Florence was charged with delivering a substance in lieu of a controlled substance but not with delivering actual drugs. CP 1-5; see RP 4-16 (discussion about whether the prosecution could add such a charge the day of trial).

Police officers testified that, in the search they did of Mr. Josey prior to the transaction, they did not search his underwear. RP 68-69, 87-89. The officer who conducted the search and had contact with Mr. Josey throughout the incident did not know for sure how many times Mr. Josey

had been in trouble for possessing crack cocaine and was not actually sure whether Mr. Josey had ever been in trouble for crimes of dishonesty. RP 83-85. The officer thought Mr. Josey had been caught for possession once so he worked off his charge as an informant. RP 88. In fact, Mr. Josey's charges included delivery and conspiracy to deliver drugs. RP 146.

Mr. Josey admitted he used crack for over 12 years, probably 300,000 times. RP 146. He also admitted that he was using crack cocaine for about six years after starting to work as a confidential informant. RP 120-22, 146-47. He did not know if his police "handlers" during that time knew he was abusing drugs while working with them. RP 147. This was because never, during that entire time, did any of the officers he was working for ask if he was using drugs, nor did they ever ask for him to take any urine or blood tests or any field sobriety tests. RP 147.

An officer testified that he had found Mr. Josey to be "reliable" as an informant. RP 91-92. The officer later admitted, however, that confidential informants had previously caused problems by lying to him or trying to steal money or drugs, and that, until they were found out, those informants were also deemed "reliable" by police. RP 92-93.

D. ARGUMENT

THE PROSECUTOR COMMITTED FLAGRANT,  
PREJUDICIAL MISCONDUCT WHICH DEPRIVED  
APPELLANT OF A FAIR TRIAL AND COUNSEL WAS  
INEFFECTIVE

Prosecutors are quasi-judicial officers, entrusted with special public duties which no other attorney shoulders. See State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662,

440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Foremost among these is the duty to seek justice and ensure that the accused receives a fair trial. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). When a prosecutor fails in this duty, the defendant is deprived of the rights guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments, as well as Article I, § 3, of the Washington constitution. See id.

In this case, the prosecutor committed misconduct, by misstating the fundamental standard of the burden of proof beyond a reasonable doubt and denigrating counsel for failing to disprove the prosecution's case. Further, counsel was ineffective in handling this flagrant, prejudicial misconduct.

a. Relevant facts

In closing argument, the prosecutor emphasized Mr. Josey's "experience" as an informant and that he had worked for several law enforcement agencies over the last ten years. RP 194-96. The prosecutor argued that Mr. Josey's claim he kept the substances separate was credible because Mr. Josey "does it all the time" and knows how important it is to do so. RP 194. The prosecutor also reminded the jury that both the prosecutor and defense counsel had asked Mr. Josey if there was "any possibility these samples were mixed up" and the man had testified he was sure there was "[n]o way." RP 195.

The prosecutor concluded that the "evidence in this case is clear" and that the "sum of the evidence that you have been presented with in this case" proved Mr. Florence's guilt and that Mr. Josey kept the substances separate. RP 196-97.

In concluding, the prosecutor said:

You have now been instructed by the Court that taking this evidence into consideration *and only the evidence that you have been presented with into consideration*, you must deliberate and I ask you at this point that based upon the evidence that you have heard to return the only verdict that is supported by that evidence.

RP 197-98 (emphasis added).

In response, defense counsel disputed whether the officers actually knew the man they were using as a confidential informant, because Mr. Josey had testified that he was still using crack cocaine throughout until 2001 so he was “working as a CI under the influence.” RP 199-200. Counsel pointed out that the officers did not test Mr. Josey for drugs at all and that the officer handling Mr. Josey had no idea the extent of his criminal history. RP 200-202. Counsel questioned whether the video showed that Mr. Josey had actually kept the items separated in different hands, then asked the jury to imagine how hard it would be to drive, turn, stop and navigate for a mile and a half with rocks in both hands. RP 202-203. Counsel declared it “unbelievable” that Mr. Josey was able to do just that, and posited that Mr. Josey’s memory and credibility on that point were in serious question. RP 203.

Counsel concluded that the prosecution had not provided sufficient evidence that the substance actually delivered was a noncontrolled substance, as charged, rather than a controlled substance, a crime with which Mr. Florence was not charged. RP 210-11.

In rebuttal closing argument, the prosecutor challenged the defense theory that Mr. Florence was not guilty because the samples could have been mixed up, arguing that officers would not have continued to use Mr.

Josey as an informant if they had found him unreliable. The prosecutor then went on to tell the jury that the defense theory that the prosecution had not meet its burden because the samples could have been mixed up was “problematic” in light of the jury instructions. RP 213-14. Referring to the instructions, he told the jury they had to determine “which facts have been proved in this case *from the evidence produced in Court,*” that it was their “duty” to do so and that there was no evidence presented to the jury to prove that the samples were or could have been mixed up. RP 213-15 (emphasis added). The prosecutor told the jury it could not consider the arguments of counsel that the samples could have been mixed up because they were arguments not “evidence” and that the jury could only consider the “evidence in this case” which had been admitted at trial by the prosecution. RP 215-16.

The prosecutor concluded by saying:

I charge you once again, as members of this jury, to uphold your honor is to rely upon the evidence that’s been presented in this case and return the only verdict that is supported by that evidence and that is to find this defendant guilty as charged.

RP 216.

b. These arguments were flagrant, prejudicial misconduct and counsel was ineffective

This Court should reverse, because the prosecutor committed misconduct with his arguments, in two ways. First, the prosecutor committed serious, prejudicial misconduct and relieved himself of the full weight of his constitutionally mandated burden of proof by misstating the crucial standard of reasonable doubt. It is misconduct for any attorney to mislead the jury as to the relevant law. See State v. Mak, 105 Wn.2d 692,

726, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986), overruled in part and on other grounds by, State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992), review denied, 120 Wn.2d 1020 (1993). It is especially egregious when the attorney misstating the law is the prosecutor, because of the potential for such misconduct to have a great effect on the jury, and because of the prosecutor's quasi-judicial duties to ensure a fair trial. See Davenport, 100 Wn.2d at 763; State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

Further, reasonable doubt is the touchstone of the criminal justice system, and correct application of it is in fact the "prime instrument for reducing the risk of convictions resting on factual error." Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, it is so vital to our system that failure to properly define it and the "concomitant necessity for the state to prove each element of the crime by that standard" is not just error, it is "a grievous constitutional failure." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

Here, the prosecutor misstated the standard of reasonable doubt in both initial closing argument and rebuttal closing argument, by telling the jury it was required to decide the case based solely upon the evidence which was admitted, not based upon a lack of evidence in the record. First, the prosecutor told the jury that the "evidence" was clear, and the

“sum of all the evidence *that you have been presented with in this case*” resulted in a conclusion of guilt. RP 196-97 (emphasis added). Next, the prosecutor told the jury that the instructions they had been given required that they take “only the evidence *that you have been presented with* into consideration” in deciding the case, and had to return “the only verdict that is supported by” the evidence. RP 197-98 (emphasis added).

These arguments in initial closing are problematic. Their implication is fairly clear - that the jury should decide whether the prosecution has met the standard of proving its case beyond a reasonable doubt by considering only the evidence admitted at trial.

But determining whether the prosecution has met its burden is not done based solely on what was *admitted*, but also what was *not*. In other words, the lack of evidence, or the lack of a sufficient quantum of evidence, can give rise to reasonable doubt about the prosecution’s case. t also the *lack* of evidence, or the lack of a sufficient quantum of evidence. See State v. Castle, 86 Wn. App. 48, 59, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997) (reasonable doubt can arise from lack of evidence); see also State v. Wright, 76 Wn. App. 811, 821-26, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995) (reasonable doubt can be based upon the state’s failure to present sufficient evidence even if it presents *some* evidence); 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).

Thus, the prosecutor’s initial comments in closing argument were questionable. They would not, however, alone compel reversal. A juror could still likely decide the case properly even after hearing the

prosecutor's arguments, if the juror was reminded that the lack of evidence could also give rise to a reasonable doubt about the state's case.

After the comments in rebuttal closing argument, however, such an unbiased decision was no longer possible. There, the prosecutor told the jury not only that they would be acting contrary to the court's instructions if they accepted the defense, but also, implicitly, that Mr. Florence had some duty to disprove the prosecution's claim of events by proving that the substances were switched. RP 213-15. And the prosecutor told the jury it was their "duty" to rely only on what was admitted at trial in making their decision, then exhorted the jurors to "uphold their honor" by relying only on that evidence and not accepting the defense because it had not presented any evidence that the substances *were* mixed up. RP 216.

With these comments, the prosecutor ensured that the jury was given a clear misapprehension of the difficult standard of the true burden of proof beyond a reasonable doubt. Rather than just telling the jurors that the evidence showed that Mr. Josey had kept the substances separate and could be believed, the prosecution went far further and effectively told the jurors that they should find that the prosecution's version of events was correct *because there was no evidence presented to support anything else*. But again, the standard of proof is not that the prosecutor's case is proven if the defense does not present evidence to rebut it. The defense has no duty to do so, and the prosecutor has an independent duty - to prove its case beyond a reasonable doubt regardless whether there is any evidence presented by the defense.

This Court should reverse. Where there was no objection below,

reversal is required where the misconduct is so flagrant and prejudicial that its damaging effects could not have been cured by instruction. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, review denied, 129 Wn.2d 1016 (1995). The misconduct went to the heart of the prosecution's case and the very standard the prosecution had to meet to satisfy its burden of proof. And that standard of proof is not just well-settled - it is the cornerstone of our entire justice system.

Further, the misconduct was of the kind which could not have been cured by instruction. The concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See Castle, 86 Wn. App. at 51-56. And the prosecutor's negative comments denigrating counsel and the defense as asking the jurors to effectively violate their oaths by ignoring the court's instruction were especially likely to have enduring effect as they were likely to have incited strong negative emotions against one who would be so unethical in representing one accused of a crime.

The question of Mr. Josey's credibility and his ability to keep the substances separate was the entire basis of the defense. Given that, the prosecutor's misconduct in relieving itself of the true weight of the standard of proof beyond a reasonable doubt and denigrating the defense was even more likely to have affected the jurors' abilities to fairly decide guilt. This Court should reverse.

In the alternative, if this Court finds that this misconduct could have been remedied by objection and curative instruction, reversal is required because counsel was again ineffective in failing to take necessary steps on behalf of his client. While the decision whether to object is

usually considered “trial tactics,” in egregious circumstances, on important testimony, the failure to object can be ineffective assistance under both the Sixth Amendment and Article 1, § 22 of the Washington constitution. See State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel’s failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

There could be no legitimate tactical reason for counsel to fail to object to the prosecutor’s clear misstatement of the crucial standard of reasonable doubt. Without such an objection and a curative instruction, the jury was left with the improper impression that the prosecution would have met its constitutionally mandated burden of proof if it proved far less evidence than required to meet that burden. Without such an objection and curative instruction, the jury had its emotions inflamed against the defense as asking them to violate their duties as set forth in the court’s instructions. The obvious result of allowing such misconduct to occur without objection was to allow the jury to believe that the state had far less to prove than it did, and that the defense was, in fact, trying to deceive the jury - or worse, that it had a *duty* to disprove the prosecution’s case. This error clearly had a significant effect on the verdict.

Further, given the constitutional importance of the standard of proof beyond a reasonable doubt, it would have been error for the court to

have refused to sustain any objection and properly instruct the jury on the true standard of reasonable doubt.

Finally, given the weaknesses in the claims of the prosecution on the issue of whether the samples were separate, the failure to object clearly affected the verdict. The prosecution's witnesses admitted that they did not conduct a thorough search of Mr. Josey, prior to sending him out to buy the drugs. They also admitted that Mr. Josey had been a continuing drug abuser while working as an informant *for years* and the police had not caught on or even tested him during that time. And there was the clear problem of mechanics - how difficult it would truly have been for Mr. Josey to drive the car, make turns, and engage in all the other necessary actions for more than a mile while clutching the items in closed hands, separately.

Reversal is required for counsel's ineffectiveness in failing to object to the misconduct even if the misconduct alone does not compel reversal.

E. CONCLUSION

Based on the prosecutor's misstatements of the crucial standard of proof beyond a reasonable doubt and counsel's ineffectiveness, this Court should reverse.

DATED this 1st day of November, 2006.

Respectfully submitted,

  
\_\_\_\_\_  
KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 135  
Seattle, Washington 98115  
(206) 782-3353

FILED  
COURT REPORTS

05 NOV -3 PM 1:33

BY 

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;  
to Mr. Randy Florence, DOC 988082, Larch Corrections Center,  
15314 NE Dole Valley Road, Yacolt, Washington, 98675.

DATED this 1st day of November, 2006.



KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 135  
Seattle, Washington 98115  
(206) 782-3353