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COURT OF APPEALS
DIVISION TWO

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NO. 34737-7-II

STATE OF WASHINGTON

BY



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

STATE OF WASHINGTON,

Respondent,

v.

SANTORIO BONDS,

Appellant.

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

The Honorable Ronald E. Culpepper, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence of identification to prove beyond a reasonable doubt the elements of the crime of violation of a no contact order.

2. The prosecutor committed multiple acts of misconduct during closing argument.

Issues Presented on Appeal

1. Was there insufficient evidence of identification to prove beyond a reasonable doubt the elements of the crime of violation of a no contact order?

2. Did the prosecutor commit multiple acts of misconduct during closing argument?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On April 20, 2005 the state filed an information charging Santorio Bonds with 3 counts of violation of a contact order, one count of malicious mischief in the third degree and one count of burglary in the first degree. CP 1-4.1 The state filed an amended information on August 15, 2005 reducing the burglary in the first degree to attempted residential burglary. CP 16-18. Mr. Bonds

¹ CP refers to the clerk's papers designated from Pierce County Superior Court cause

was convicted of a single count of violation of a domestic violence order. CP 37-49.

This timely appeal follows. CP 50-63.

2. SUBSTANTIVE FACTS

Without objection, the state established through the testimony of Kimberly Schultz, a Pierce County District Court window clerk that Mr. Bonds wa. convicted on January 24, 2004, June 23, 2004 of violating two valid no contact orders issued under cause numbers 3YC010930 and 4YC010193 with Surina Crumble identified as the prohibited contact. RP 22-29; Plaintiff's exhibits 2-6. The state also established the existence of a no contact order in effect at the time of the current offense. RP 22, Plaintiff's exhibit 1.

Surina Crumble, the complainant in the instant case did not call 911 And did not testify at trial. Her neighbor across the street Michael Anthony Horton called 911 on February 22, 2006 because he heard something that sounded like a gun shot. RP 30-31. The sound Mr. Horton heard that resembled a gunshot was evidently the sound of a broken car window, but Mr. Horton did not see anyone break a window. RP 36.

It was dark outside as Mr. Horton went to his front window and saw a

man he could not identify standing with his hands on the front hood of Ms. Crumble's car while she and her daughter moved toward their front door. RP 31-33, 40. Mr. Horton never saw the man's face but his build was consistent with Mr. Bonds' general build. RP 40.

Mr. Horton saw the man go toward a make shift garage without entering it and then disappear out of sight near some bushes. RP 35, 39. Mr. Horton also saw another person close the garage door and the garage light. RP 47. Mr. Horton asked his girlfriend to call 911. RP 39.

Officer Patrick Dos Remedios of the Pierce County Police Department responded to the 911 call on 2-22-06. RP 51-52. He arrived five minutes after the call and contacted Ms. Crumble and her daughter and observed that Ms. Crumble's car window was broken. RP 54, 60. Over an excited utterance objection, Dos Remedios testified that Ms. Crumble was nervous and agitated and stated after being asked "what happened" that her ex-boyfriend broke the window and left, and that she had a no contact order out against him. RP 54, 61-62. Ms. Crumble did not identify Mr. Bonds as the ex-boyfriend and there was no testimony identifying the "ex-boyfriend".

During Closing Argument, the prosecutor made the following improper comments:

We didn't hear from Ms. Crumble. She's not here. Why she's

not here, we don't know. We just don't know. I could tell you my theory; Mr. Chin could tell you his theory. You may have your own theory. But what we do know is that if this was so easy, if Mr. Bonds didn't do this and she loved him so much that she didn't want him to get into trouble, she could have sat here and told you that.

RP 157. Defense counsel objected on grounds of speculation and the judge sustained the objection but did not offer a curative or cautionary instruction. Id. There was no testimony regarding the nature of the relationship between Mr. Bonds and Ms. Crumble. Later during closing argument the prosecutor told the jury that Mr. Bonds was the only person who could have committed the charged crimes. RP 159

Was it the defendant? Was that person Santorio Bonds? And the answer is yes because there's nobody else and there's no reason for any other story to come out. This is not just a question of what evidence is there - -

RP 159. Defense objected on grounds that this was a comment on the evidence. The Court did not make a ruling but the prosecutor continued and discussed the burden of proof reiterating the definition of proof beyond a reasonable doubt. RP 159-160. The prosecutor proceeded to tell the jury that the defendant was guilty.

Do you know the defendant contacted Surina Crumble? It's a simple yes or no. When you say to yourself, I know he did it but I really wish there was something else. Listen to what you are saying to yourself: I know he did it.

RP 161. Defense objected that the argument was not appropriate and the judge overruled the objection. Id. During rebuttal closing argument the prosecutor again argued that he knew Mr. Bonds was guilty. RP 171.

I think we can pretty safely assume that that's not every African American male in Pierce County and every African American men in America, as counsel wanted you to start to think about, that this could be anybody. No. We have to assume - - we don't have to assume anything. We know he's got the no contact order so we know that it's the same guy that she's talking about.

RP 171. Defense objected that the argument was not correct and the judge overruled the objection. Id.

C. ARGUMENT

1. THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME OF DOMESTIC VIOLENCE VIOLATION OF A COURT ORDER: THAT MR. BONDS WAS PRESENT WHEN THE ALLEGED CRIME OCCURED.

Mr. Bonds was charged with domestic violence violation of a court order. The standard of review for a sufficiency of the evidence claim is whether, after viewing evidence in the light most favorable to the State, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. S. linas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of

insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201.

A reviewing court will reverse a conviction for insufficient evidence where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201. The reviewing court "may infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). Credibility determinations are for the trier of fact and are not subject to review. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029, 133 P.3d 474 (1996); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

RCW § 26.50.110 domestic violence court order violation is defined as follows:

§ 26.50.110. Violation of order -- Penalties

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in *RCW 26.52.020*, and the

respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under *RCW 10.31.100(2) (a)* or *(b)*, is a gross misdemeanor except as provided in subsections (4) and (5) of this section. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

Id..

Identity and presence at the scene of the crime are elements of violation of a no contact order which must be proved beyond a reasonable doubt. Id. See also, State v. Thomas, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), 123 Wn.2d 877, 872 P.2d 1097(1994) (like assault, violation of a no contact order requires proof of identity and presence at the scene of the crime).

Identity and presence at the scene of the crime are questions of fact for the jury to determine. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 619 (1974). There is insufficient evidence that on February 22, 2006 Mr. Bonds was at the

residence of Ms. Crumble. The state did not present a single witness who could identify Mr. Bonds at the scene of the crime and the state failed to present a single witness who could affirmatively represent that Ms. Crumble's reference to her ex-boyfriend referred to Mr. Bonds. The evidence allowed the jury to speculate that perhaps the man at the scene was Mr. Bonds, but the evidence did not rise to proof beyond a reasonable doubt. .

By the terms of the no contact order, Mr. Bonds was not permitted to have any contact with Ms. Crumble. RP 22. Since there were no allegations of any contact other than actual in person contact, under the facts presented the state was required to prove Mr. Bonds actual presence at Ms. Crumble's home while she was also present. Since a rational trier of fact could not find the essential element of Mr. Bonds' presence at the scene of the alleged crime beyond a reasonable doubt, the charge of violation of a domestic violence protection order must be reversed and the charges dismissed.

2. THE PROSECUTOR COMMITTED MULTIPLE ACTS OF MISCONDUCT DURING CLOSING AND REBUTTAL ARGUEMENTS WHICH DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

a. Prosecutors Have Special Duties Which Limit Their Advocacy.

A prosecuting attorney's misconduct during closing argument can

deny an accused's constitutional right to a fair trial. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). The prosecutor, as a quasi-judicial officer, must seek a verdict that is both free of prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 21 L.Ed.2d 787, 89 S.Ct. 886 (1969). The Court in Huson ruled:

[The prosecution] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of his office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. . . . No prejudicial instrument . . . will be permitted.

Huson, 73 Wn.2d at 663.

Prosecutors are public officers whose "devotion to duty is not measured, like the prowess of the savage, by the number of their victims."

State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1994), quoting, State v. Montgomery, 56 Wash. 443, 447-48, 105 P. 1035 (1909). The Court of

Appeals more recently ruled:

A prosecutor must always remember that he or she does not conduct a vendetta when trying a case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided. We recognize that the conduct of a trial is demanding and that if prosecutors are to perform as trial lawyers, a zeal and enthusiasm for their cause is necessary.

However each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done. If prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendant's by unfair means. Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril.

State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

To determine whether the prosecutor's comments denied Mr. Bonds a fair trial, this Court must determine whether the comments were improper and, if they were, whether a substantial likelihood exists that the comments affected the jury. Reed, 102 Wn.2d at 145.

b. It Is Improper To Make Arguments Without Evidentiary Support.

It is improper for the state, which bears the burden of proof, to argue facts that are not in evidence. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). In doing so, the prosecutor becomes an unworn witness against the defendant. Id. See also, State v. Case, 49 Wn.2d 66, 68-70, 298 P.2d 500 (1956) (no evidence supported prosecutor's argument that incest victims often reported belatedly; argument constituted misconduct).

In Belgarde, the prosecutor informed the jury that members of the group to which defendant belonged (AIM) were butchers who killed people

indiscriminately. The Supreme Court made it clear that this type of misconduct, which amounts to testimony in the guise of argument, requires reversal. No curative instruction could erase the prejudicial effect of such flagrant, ill-intentioned misconduct. Belgarde, 110 Wn.2d at 507-08.

In the instant case, Mr. Bonds was never identified as the person at Ms. Crumble's house. Ms. Crumble did not testify and she never told police that the man at her residence was Mr. Bonds. The neighbor similarly could not positively identify Mr. Bonds as the man at the house because it was dark outside and he never saw his face; he simply assumed it was Mr. Bonds, because the man was of the same race and similar build. The prosecutor told the jury that Mr. Bonds was the man at the house because there was a no contact order out against him and it therefore could not be any other person.

I think we can pretty safely assume that that's not every African American male in Pierce County and every African American men in America, as counsel wanted you to start to think about, that this could be anybody. No. We have to assume - - we don't have to assume anything. We know he's got the no contact order so we know that it's the same guy that she's talking about.

RP 171.

Was it the defendant? Was that person Santorio Bonds? And the answer is yes because there's nobody else and there's no reason for any other story to come out. This is not just a question of what evidence is there - -

RP 159. This was unworn testimony from the prosecutor that was not supported by the evidence. The court overruled the objections.

Ms. Crumble did not identify Mr. Bonds and her history of boyfriends and history of obtaining no contact orders was never presented into evidence.

The prosecutor testified in violation of the law. Belgarde, supra, and Torres, supra. Absent the prosecutor's remarks regarding the fact that Mr. Bonds had to be the person described by the neighbor, the jury would have been left with absolutely no evidence beyond a reasonable doubt that Mr. Bonds was at Ms. Crumble's house on February 22, 2006.

The prosecutor's improper remarks made it unnecessary for the jury to evaluate the evidence. Specifically, (1) whether the neighbor's assumption that perhaps the man at the house was Mr. Bonds was sufficient to establish his identify beyond a reasonable doubt; (2) as well as making it unnecessary for the jury to evaluate whether or not the police officer's relaying that Ms. Crumble's statement regarding whether "ex-boyfriend" meant Mr. Bonds rather than some other man. The jury likely reasoned that if the prosecutor argued that said Mr. Bonds was the man at the house, they were relieved of having to make this most significant determination.

Because the prosecutor improperly interfered with the jury's determination based solely on the facts presented at trial, and his comments

likely affected the verdict, the comments were improper. The prosecutor's
flagrant misconduct, which obviated the jury's needs to decide an essential
element of the crime charged: identity, requires reversal.

c. The Prosecutor Committed Misconduct
By Improperly Shifting the Burden Of
Proof to Appellant.

A defendant has no duty to present evidence and the state bears the
entire burden of proving each element of its case beyond a reasonable doubt.
In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970);
Smith, 155 Wn.2d at 501; City of Seattle v. Norby, 88 Wn. App. 545, 554, 945
P.2d 269 1997); State v. Flemming, 83 Wn.App. 209, 215, 921 P.2d 1076
(1996), rev. denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). It is error for a
prosecutor to suggest in his closing argument that a defendant bears the burden
to produce evidence in his defense. Flemming, 83 Wn. App. at 215.

In the instant case the prosecutor improperly stated in closing
argument that Mr. Bonds had an obligation to prove his innocence by stating
that:

We didn't hear from Ms. Crumble. She's not here. Why she's
not here, we don't know. We just don't know. I could tell you
my theory, Mr. Chin could tell you his theory. You may have
your own theory. But what we do know is that if this was so
easy, if Mr. Bonds didn't do this and she loved him so much
that she didn't want him to get into trouble, she could have sat

here and told you that.

157.

This remark improperly shifted the burden of proof to Mr. Bonds to bring forth evidence to disprove the testimony of the police officer and commented on his constitutionally protected right to remain silent. The above remarks imputed some duty to Mr. Bonds to bring forth witnesses to testify on his behalf.

“Due process prohibits the state from drawing adverse inferences from a defendant’s exercise of a constitutional right.” State v. Hancock, 109 Wn.2d 760, 767, 748 P.2d 611, citing, Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The right to remain silent is protected by the Fifth Amendment to the United States Constitution and Const.. Art. 1 § 22. Moreover, reference to Ms. Crumble’ absence implicates “the missing witness doctrine [which] ” is improper if the prosecutor’s comments infringe on the defendant’s constitutional rights, for example, the right to remain silent.” State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991). In Blair, the defendant testified, and the witnesses were particularly available to the defendant, thus there was no misconduct.

In the instant case, unlike in Blair, Mr. Bonds did not testify and the complainant was not a witness particularly within the control of defense. The

prosecutor's comment on her failure to testify was an impermissible comment on Mr. Bonds right to remain silent and violated his due process rights. While the judge sustained the objection, a curative instruction was not requested or offered and none could have cured the misconduct. The jury likely determined that if Mr. Bonds was innocent, he would have brought forth Ms. Crumble to testify.

"The question in all cases is not whether the court, if trying the case, would disregard the obnoxious evidence but whether the court is assured the jury has done so." State v. Suleski, 67 Wn. 2d 45, 51, 406 P.2d 613 (1965), quoting, State v. Meader, 54 Vt. 126, 132 (1881). The Washington State Supreme Court, citing the United States Supreme Court has ruled that [t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury. . . all practicing lawyers know to be unmitigated fiction." State v. Newton, 109 Wn.2d 69, 74 n2, 743 P.2d 254 (1987), citing, Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed.790 (1949). "Prosecutorial misconduct can be so prejudicial that it cannot be cured by objection and/or instruction." State v. Stith, 71 Wn. App, 14, 24, 856 P.2d 415 (1993). If misconduct is so flagrant that no instruction can cure it, there is in effect, a mistrial and a new trial is the only and the mandatory remedy. Belgarde, 110 Wn.2d at 508. In the instant case a curative instruction would

not have mitigated the damage of the prosecutor telling the jury that in essence Mr. Bonds had to prove his innocence.

The following remarks constitute the same type of improper burden shifting as well:

Do you know the defendant contacted Surina Crumble? It's a simple yes or no. When you say to yourself, I know he did it but I really wish there was something else. Listen to what you are saying to yourself: I know he did it.

RP 159. The court overruled defense objection. This comment relieved the jury of proof beyond a reasonable doubt by informing them that they need not consider the burden of proof, but rather if they had any inkling that Mr. Bonds was guilty, that would be sufficient to render a verdict of guilty.

The prosecutor's comments were prejudicial and not harmless. The prosecutor's comments and the court's failure to sustain all of the objections and failure to give curative instructions permitted the jury to consider that Mr. Bonds failed to bring forth evidence of innocence and allowed the jury to erroneously apply a lesser burden of proof. Because the prosecutor's comments and the court's error improperly influenced the jury's verdict, this Court should reverse Mr. Bonds' conviction. Flemming, supra.

3. THE CUMULATIVE EFFECT OF
PROSECUTORIAL MISCONDUCT
DURING CLOSING ARGUMENT
REQUIRES REVERSAL

The cumulative effect of multiple acts of prosecutorial misconduct compels reversal where a single act would not. State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (conviction reversed for cumulative errors); State v. Henderson, 100 Wn. App. 794, 998 P.2d 907 (2000); Torres, 16 Wn. App. at 263. Many of the state's flagrant and ill-intentioned arguments, each standing alone, may be sufficiently serious to constitute grounds to reverse Mr. Bond's conviction. Assuredly, their combined effect compels this Court to reverse Mr. Bonds conviction. Alexander, 64 Wn. App. 147.

The egregious nature of the prosecutor's misconduct is analogous to the cumulative misconduct of the prosecutor in Henderson, supra. In Henderson, the Court found four incidents of prosecutorial misconduct sufficient to require reversal.

Here we have found prosecutorial misconduct based on (1) the defendant's right to remain silent; (2) repeated reference to a second fight between Henderson and Rodgers that resulted in injuries to Rodgers; (3) the reference to photographs that the sheriff had 'on hand'; and (4) the challenge to the defense counsel's use of "altercation" when in the prosecutor's opinion the crime was really a "robbery". And the evidence was far from overwhelming that Henderson participate in a robbery. He admitted being present but denied taking part. The State's only evidence establishing his participation in the crime consisted of the victim's testimony as to statements he made during the alleged robbery, and both victims were impeached because they had not reported the alleged statements to police. We hold that, when viewed

against the evidence, the cumulative effect of the incidents of prosecutorial misconduct were so ill-intentioned and flagrant as to have materially affected the outcome of the trial. No instruction could have erased the error.

Henderson, 100 Wn. App. 804-05. (citations omitted).

In the instant case, the prosecutor committed more egregious acts of misconduct than in Henderson. Moreover, like Henderson, this case is not a strong one. It was founded on speculation and assumption. No one saw Mr. Bonds at the scene of the alleged crime and no one identified Mr. Bonds as the person at the scene of the crime. Like Henderson, the weakness of the evidence and the prosecutor's systematic "ill-intentioned and flagrant" acts of misconduct are determinative.

The prosecutor, much like his counter part in Henderson, unrelentingly used improper argument to improperly undermine Mr. Bonds' case. The prosecutor's introduction of facts not in evidence, shifting of the burden of proof and expressed his personal opinion as to Mr. Bond's guilt all of which undermined the fairness of Mr. Bonds' trial.

Henderson demonstrates the danger of permitting overzealous prosecutors to commit a number of improper acts in a case where the evidence is weak. Like Henderson, the prosecutor's actions in the instant case were such that they materially affected the outcome. Reversal is required.

D. CONCLUSION

In sum, the state failed to prove the crime of violation of a no contact order beyond a reasonable doubt, specifically the identity of Mr. Bonds as the person present during the criminal activity. Mr. Bonds was also denied his constitutional right to a fair trial by the prosecutor's prejudicial and repeated misconduct. For these reasons, Mr. Bond respectfully requests this Court reverse his conviction and dismiss with prejudice.

DATED this 31st day of July 2006.

Respectfully submitted,

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WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Santorio L. Bonds DOC # 715928MCC/MSUPO Box 7001 Monroe, WA 98272 ~~WA 98584~~ a true copy of the document to which this certificate is affixed, on August 1, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature