

original

NO. 35585-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HERMAN SATTERWHITE,

Appellant.

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

The Honorable Thomas J. Felnagle

APPELLANT'S OPENING BRIEF

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REPORT

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A. ASSIGNMENT OF ERROR

The deputy prosecutor committed misconduct in rebuttal argument, denying Herman Satterwhite his right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A prosecutor commits misconduct when he shifts the burden of proof to the defendant in a criminal trial. Here, the prosecutor in rebuttal argument suggested that Mr. Satterwhite bore some burden of proof. Did these comments constitute misconduct requiring reversal?

2. A prosecutor commits misconduct when he improperly comments on the role of defense counsel, thereby chilling or penalizing the defendant's right to counsel under the Sixth Amendment. In rebuttal, the prosecutor told the jury there was "no reason" why Mr. Satterwhite's former defense counsel could not testify on his behalf. Did the prosecutor's remarks constitute misconduct requiring reversal?

C. STATEMENT OF THE FACTS

1. Procedural Facts. On January 10, 2006, the Prosecuting Attorney for Pierce County charged Herman Satterwhite with one count of unlawful possession of cocaine, one count of unlawful possession of marijuana (40 grams or less), and two counts of bail

jumping. CP 24-26. Following a jury trial before the Honorable Thomas J. Felnagle, Mr. Satterwhite was convicted as charged. CP 114-18. Judge Felnagle imposed a sentence of 24 months for possession of cocaine, 90 days for possession of marijuana, and 40 months for each of the bail jumping charges, all to run concurrently. This appeal timely followed. CP 119-32.

2. Testimony at Trial.

a. Testimony of Herman Satterwhite. With regard to Count III, a charge of bail jumping arising from a failure to appear on August 31, 2005, Mr. Satterwhite testified he did not intentionally miss his court date. RP 265. He was aware that he was obligated to appear in court on August 31, 2005. RP 260. He tried to get to court on time but arrived about two hours late. RP 260-61. He had caught the bus in Federal Way around 7:30 a.m., but arrived at the courthouse between 10:45 and 11:15 a.m. RP 260-61.

He then spoke to the court administration clerk, who told him his former attorney, Mary Martin, had a medical emergency and Robert Depan was now representing him. RP 262. Mr Satterwhite went to the Department of Assigned Counsel (DAC) office, but Mr. Depan was not there. RP 262. Instead, he spoke to DAC clerical staff and attorney Helene Chabot and was told that a quash warrant

hearing could not yet be scheduled because the warrant had not yet issued. RP 262-63, 323. Over the next several weeks, Mr. Satterwhite repeatedly tried to reach Mr. Depan, but Mr. Depan never returned his phone calls. RP 263, 311, 322. Mr. Depan eventually did set a quash warrant hearing but did not inform Mr. Satterwhite of the hearing. RP 264. Mr. Satterwhite never did meet or speak to Mr. Depan. RP 324.

b. Testimony of Former Pierce County Deputy Prosecutor Frank Loomis. Mr. Loomis explained pre-trial hearings and procedures and authenticated a number of documents relevant to the bail jump charges. RP 154-60. In particular, Mr. Loomis testified that an omnibus hearing was set for 8:30 a.m. on August 31, 2005, with the scheduling order signed by Mr. Satterwhite, his attorney Mary Martin, and prosecutor Bryce Nelson. RP 191, 195. On August 31, 2005, Mr. Loomis moved for the issuance of a bench warrant for Mr. Satterwhite based on a failure to appear. RP 194. An order authorizing the issuance of the warrant was issued that day. RP 198. Mr. Loomis could not specifically recall that day, but testified it was his practice, for hearings scheduled in the morning, to wait until 11 or 11:30 a.m. before requesting a bench warrant. RP 194-95. Mr. Loomis testified the hallways in that area of the

courthouse are typically very congested in the morning, he typically spent most of his time sitting at his desk, and he could not recall patrolling the hallways for Mr. Satterwhite that morning. RP 197, 204-05.

c. Testimony of Pierce County Deputy Prosecutor Dione Ludlow. Ms. Ludlow testified that on August 31, 2005, she was the "barrel deputy" working in courtroom 550, where Mr. Satterwhite's omnibus hearing was scheduled. RP 108-09. Ms. Ludlow testified she did not specifically recall that day, but typically Mr. Loomis would prepare a bench warrant request and bring it to her, she would call out the defendant's name, and if she heard no response, she would hand the request up to the judge. RP 212-14. Ms. Ludlow also testified Mr. Satterwhite did not appear at a quash warrant hearing on September 20, 2005.

d. Testimony of Pierce County Deputy Sheriff Patrick Dos Remedios. Deputy Dos Remedios testified that on December 6, 2005, he took custody of Mr. Satterwhite, who had already been arrested by the Federal Way Police Department on a warrant from Pierce County. RP 24-25. Deputy Dos Remedios advised Mr. Satterwhite of his *Miranda* rights and asked him if he knew about

the warrant; Mr. Satterwhite replied that he did and was trying to take care of it. RP 26-28.

D. ARGUMENT

PROSECUTORIAL MISCONDUCT IN REBUTTAL ARGUMENT DENIED MR. SATTERWHITE OF A FAIR TRIAL, REQUIRING REVERSAL.

In rebuttal argument, the prosecutor committed misconduct when she attempted to shift the burden of proof onto Mr. Satterwhite in the following remarks:

But, wouldn't you expect to hear from Mary Martin, his own attorney, about the encounters that they had? He didn't call her. He also didn't call his attorney Bob Depan. And you can say, well, according to him, he never met Bob Depan. That's his version. There's no other corroborating evidence on this. He has attorneys – he's had attorneys at Department of Assigned Counsel. There are certainly records about this. Mr. Depan, certainly, no reason to indicate he couldn't have come in and said, you know what, I never met Mr. Satterwhite. I do remember that I got maybe 12 or more messages from him wanting to quash the warrant. No, I never called him back. I asked my staff to do it, or I was just negligent, but you know what, it's certainly not his fault. Or, you know, I told him to come in and do this, this is what we had to do, or I couldn't reach him because of this problem or this problem or this problem, but yes, he tried, and he left messages.

You heard from Ms. Chabot that Ms. Martin and Mr. Depan work at the Department of Assigned Counsel. Why didn't he bring these individuals in here to corroborate his version of events to you? Why didn't he call them?

RP 389.

1. Prosecutors have special duties which limit their advocacy. The prosecutor, as a quasi-judicial officer, must seek a verdict 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 (1969). The court in *Huson* stated:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. . . .

Huson, 73 Wn.2d at 663 (citation omitted); *see also*, *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (citation omitted) (prosecutor has a special responsibility “to act impartially in the interest only of justice”).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper and, if so, whether a “substantial likelihood” exists that the comments affected the jury. *Reed*, 102 Wn.2d at 145. The burden is on the defendant to show that

prosecutorial comments rose to the level of misconduct, requiring a new trial. *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

2. The prosecutor improperly implied that Mr. Satterwhite had a burden to prove his innocence. In a criminal trial, the State has the burden of proving every element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997)(citations omitted). The defendant is not required to present any evidence on his own behalf. *Fleming*, 83 Wn. App. at 215.

Where a prosecutor suggests a shift in the burden of proof in a criminal trial, misconduct occurs. *State v. Traweck*, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986), *review denied*, 106 Wn.2d 1007 (1986). In *Traweck*, the prosecutor noted that Mr. Traweck's failure to testify could not be used against him, but continued:

That doesn't mean defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hasn't it be [sic] presented if there are explanations, which there aren't?

Id. at 106. These statements were found to be improper as they emphasized in the minds of the jurors that the defense had failed to present any witnesses when it is clear that a defendant has no duty

to call any witnesses on her behalf. *Id.* at 107.

Similarly, in *Fleming*, two defendants faced second degree rape charges. 83 Wn. App. at 212. One eyewitness believed the sexual intercourse between the defendants and the complainant was consensual. *Id.* The medical evidence was ambiguous as to whether the intercourse was the result of force or consent. *Id.* In closing argument, the prosecutor argued there was no evidence to support a claim that the complainant had fabricated the event and that based on that lack of evidence, the defendants were guilty of rape. *Id.* at 214. This Court noted:

These statements improperly shifted the burden of proof to the defendants to disprove the State's case. The comments also infringed upon the defendants' election to remain silent, when viewed in conjunction with the following remark: "[I]t's true that the burden is on the State. *But you . . . would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter].* And several things, they never explained."

Id. (emphasis in original).

Noting that a defendant bears no burden to present evidence in a criminal case, the *Fleming* Court found the prosecutor's comments infringed on the defendants' constitutional right to remain silent and suggested they also improperly shifted the burden of proof to the defendants. *Id.* at 215. The Court found the

prosecutor's comments "rose to the level of manifest constitutional error," reversed the defendants' convictions, and remanded the case for a new trial. *Id.* at 216.

Here, Mr. Satterwhite did testify and his testimony was contrary to that of the State's witnesses. The prosecutor shifted the burden when she pointed out that Mr. Satterwhite's former attorneys, Ms. Martin and Mr. Depan, had not testified on his behalf, speculated as to what Mr. Depan's favorable testimony might have been, and rhetorically asked why Mr. Satterwhite had not called them.

As the *Traweek* and *Fleming* opinions made clear, a defendant may not be penalized for holding the State to its burden of proof. By suggesting that Mr. Satterwhite had some burden of proving his own innocence, the prosecutor shifted the burden of proof onto the defendant, rising to a similar level of misconduct as in *Traweek* and *Fleming*.

3. The prosecutor improperly commented on the role of Mr. Satterwhite's defense counsel, thereby violating his right to counsel. The Sixth Amendment of the United States Constitution guarantees the right to counsel in a criminal proceeding.¹ *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Gideon v. Wainwright*, 372 U.S. 335, 340, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Washington Supreme Court has recognized that "[t]he State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right." *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

As noted above, in rebuttal argument the prosecutor asked why Mr. Satterwhite had not called his former defense attorney Robert Depan as a witness. RP 389. The prosecutor stated there was "certainly, no reason to indicate" Mr. Depan could not have testified and suggested what Mr. Depan would have said if his

¹ U.S. Const. Amend. VI reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

testimony were favorable to the defense. RP 389 (emphasis added).

In fact, as the prosecutor was presumably well aware, there are compelling reasons why Mr. Depan could not have testified, under statutory and evidentiary and ethical rules.

RCW 5.60.060(2)(a) states:

An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

The attorney-client privilege is reiterated in Rule of Evidence 501.

In addition, it is an ethical violation for an attorney to

reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)

Rule of Professional Conduct 1.6. This obligation continues after the representation is terminated. RPC 1.9(c). If Mr. Depan had testified he might well have been in violation of these rules.

In *State v. Sullivan*, the Supreme Court has held that even though an attorney was effective in his representation of the defendant and did not violate any court or ethical rules, the fact that he testified for the State “rendered his services less effective and

invaded the accused's right to unhampered representation at the trial." 60 Wn.2d 214, 221, 373 P.2d 474 (1962). In that case, the defendant was convicted of murdering her husband, whose body was found buried on her property. *Id.* at 216. The prosecutor called defense counsel to the stand and elicited testimony that he had contacted the sheriff and given him information leading to the discovery of the victim's body, and that he had been present when the body was exhumed. *Id.* at 216-17. The Court held the testimony was prejudicial and protected by the attorney-client privilege, reversed the conviction, and remanded for retrial. *Id.* at 220, 226.

The Court then held that while neither the prosecutor nor defense counsel violated the rules of the court or the canon of professional ethics, such violations may impinge on a criminal defendant's constitutional rights, and the testimony of defense counsel in this case implicated those issues. *Id.* at 221, citing *State v. Fackrell*, 44 Wn.2d 874, 271 P.2d 679 (1954) (no violation of defendant's rights where prosecutor testified for the state but then refrained from participating in the remainder of the trial).

If defense counsel is required to testify under compulsion, it might well be that defendant's right to complete and unhampered representation is invaded.

Balanced against this, however, is the possibility that defense counsel's testimony is necessary to the state's case in the interest of justice and for the protection of the public... There must always be a sensitive balance between the right of the state to prove its case, in the best manner possible, and the right of the accused to have unhampered and effective representation[.]

Sullivan, 60 Wn.2d at 221-22 (emphasis added). The Court declined to decide whether defense counsel's testimony should be admitted on retrial, but found the testimony "repetitious and not necessary to the State's case," which "tilt[ed] the balance in defendant's favor." *Id.* at 222. Accordingly, *Sullivan* suggests that Mr. Depan's testimony might have been inadmissible even if offered.

Furthermore, the prosecutor's remarks exploited the fact that a jury cannot be expected to be familiar with the rules of evidence and professional conduct. A layperson would assume that an attorney is no different than any other witness and would be led by the prosecutor's remarks to wonder why Mr. Depan was not called to testify, and jump to the conclusion that Mr. Depan had nothing helpful to offer. Because these remarks were made in rebuttal argument, defense counsel had no opportunity to respond. Counsel, has "no right to mislead the jury. This is especially true of

a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial.” *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (conviction reversed where prosecutor discussed accomplice liability in closing argument, although the jury was not so instructed), quoting *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Here, the prosecutor misled the jury by implying that an attorney is like any other witness, who can be called to testify without the special ethical or evidentiary concerns of the attorney-client relationship.

4. The issue of misconduct during rebuttal is properly before this Court. Generally, an objection to prosecutorial misconduct is waived by failure to timely object and request a curative instruction. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). However, the issue may be addressed for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” *Id.* (citations omitted); *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). “When no objection is raised, the issue is

whether there was a substantial likelihood the prosecutor's comments affected the verdict." *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); *Reed*, 102 Wn.2d at 145.

Defense counsel did not object to the prosecutorial misconduct during the prosecutor's argument. Instead, he addressed the court after the jury had reached a verdict but before it was announced:

... I take issue with the fact that comments were made regarding Mr. Depan's failure to testify in this case, and I did not make an issue about it during the time of the closing argument, partly because I hate to stand up in the middle of closing argument to raise that issue, and number two, because I could not confirm, in fact, that Mr. Depan had never signed off on any of the orders in this case. But, I wanted to make sure that I made that record.

RP 396-97.

Although defense counsel failed to preserve these issues, they are properly presented for the first time on appeal as the statements were so "flagrant and ill-intentioned" as to irrevocably prejudice the jury against Mr. Satterwhite and affected the verdict in this case. Because the prosecutor's misconduct denied Mr. Satterwhite a fair trial, he may raise this claim on appeal. RAP 2.5(a)(3).

5. The multiple acts of prosecutorial misconduct in this case require reversal of Mr. Satterwhite's convictions.

Prosecutorial remarks are prejudicial where there is a substantial likelihood they affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The prosecutor's improper comments were not ideas which could have been reversed by a curative instruction. A "bell once rung cannot be unrung." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977). Because the flagrant instances of misconduct denied Mr. Satterwhite a fair trial, reversal of his tainted conviction and remand for retrial is necessary. *Belgarde*, 110 Wn.2d at 508.

E. CONCLUSION

For the reasons stated above, Mr. Satterwhite respectfully requests that this Court reverse his conviction on Count III, the Bail Jump charge arising from August 31, 2005.

DATED this 30th day of April, 2007.

Respectfully submitted,



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