

NO. 37825-6-II

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 MAR 30 PM 3:55

STATE OF WASHINGTON,

Respondent,

v.

ROBIN HYLTON,

Appellant.

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

The Honorable Scott E. Blinks, Judge

CO. AP. 2
STATE OF WASHINGTON
BY [Signature]
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FILED
COURT OF APPEALS
DIVISION II

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE PROSECUTOR'S MISSTATEMENT OF THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT WAS FLAGRANT MISCONDUCT.

It is well-established that prosecutorial closing argument may not diminish or undermine the presumption of innocence or the burden of proof beyond a reasonable doubt. E.g., State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996); State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). When a prosecutor disregards this well-established rule and informs the jury that it may convict if the State's theory of guilt is merely reasonable, that prosecutor has thus committed flagrant, ill-intentioned misconduct. Fleming, 83 Wn. App. at 214-15.

The State responds that the prosecutor's remarks in this case were isolated misstatements, not calculated to undermine the burden of proof. To a certain extent, this analysis calls for mind-reading. But the rationale underlying Fleming is that when an experienced prosecutor misstates a fundamental rule of law, the courts should not presume it was an accident.

The State attempts to distinguish Fleming because of the sheer quantity of various incidences of misconduct in that case. But the widespread misconduct was not a part of the Fleming court's conclusion that

violation of a well-established rule of law is flagrant misconduct. The Fleming court first took each instance individually. The first instance of misconduct at issue was the argument that in order to acquit, the jury would have to find the State's witness was lying. Fleming, 83 Wn. App. at 214. Discussing that argument alone, the court stated, "We note that this improper argument was made over two years after the opinion in Casteneda-Perez, supra. We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial." Id. Similarly, misstating reasonable doubt is well-established as a violation of the rules governing closing argument. Warren, 165 Wn.2d at 26-27. It should therefore likewise be deemed flagrant and ill-intentioned when a prosecutor violates this well-established rule.

2. DIRECT EVIDENCE OF THE JURY'S THOUGHT
PROCESS IS NOT REQUIRED TO FIND A
SUBSTANTIAL LIKELIHOOD THAT MISCONDUCT
AFFECTED THE OUTCOME OF THE TRIAL.

The State relies on State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984), to argue the jury was likely not affected by the prosecutor's mangled statements regarding the burden of proof beyond a reasonable doubt. In that case, the jury's written inquiry demonstrated that it considered the prosecutor's improper argument. Id. at 759. But the vast majority of the time, the jury's deliberations are entirely secret. See State v.

Elmore, 155 Wn.2d 758, 770, 123 P.3d 72 (2005) (discussing cardinal principle that jury deliberations remain secret). Thus, Davenport cannot be the required standard for showing a substantial likelihood that misconduct affected the outcome of the trial.

3. WHEN THE PROSECUTOR DISTORTS THE VERY LANGUAGE USED IN THE REASONABLE DOUBT INSTRUCTION, THE ERROR IS NOT CURABLE BY INSTRUCTION.

Finally, the State argues this error could have been cured by instruction. However, the cases relied upon by the State involve errors in a different class than that which occurred here. First, an instruction may be sufficient when the prosecutor's argument misstates the law pertaining to only one element of the crime. State v. Classen, 143 Wn. App. 45, 176 P.3d 582 (2008) (definition of negligence or recklessness as accident may have been error); State v. Barajas, 142 Wn. App. 24, 177 P.3d 106 (2007) (premeditation). These cases do not involve the definition of reasonable doubt, which the jury must apply to every element.

Second, an instruction may be sufficient when the prosecutor's attempts to reduce the burden of proof to a mathematical equation and misstates the probability principles underlying that equation. State v. Copeland, 130 Wn.2d 244, 293, 922 P.2d 1304 (1996). In that case, the court can merely instruct the jury that reasonable doubt is not, and cannot be

reduced to, a mathematical equation. A similarly simple curative instruction was at issue in State v. Hart, where the prosecutor told the jury that the mere fact that the trial occurred was proof there was sufficient evidence to convict. State v. Hart, 26 Wn.2d 776, 795, 175 P.2d 944 (1947). Again, the court needed only to disabuse the jury of this blatantly false notion. Neither the mathematical/statistical principle in Copeland nor the blatant reversal of the burden in Hart used language that the jury would necessarily rely on in the written instruction defining reasonable doubt, as was the case here.

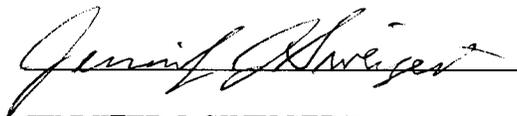
B. CONCLUSION

For the foregoing reasons and the reasons contained in the Brief of Appellant, Hylton respectfully requests this court reverse his conviction.

DATED this 30th day of March, 2009.

Respectfully submitted,

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Attorney for Appellant

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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 30TH DAY OF MARCH, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MARCH, 2009.

x Patrick Mayovsky