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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 39216-0-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

SALVADOR GOMEZ REBOLLAR,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Richard D. Hicks, Judge

Cause No. 09-1-00014-3

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the prosecutor in rebuttal closing argument to argue that Gomez failed to produce evidence to corroborate his testimony and thereby improperly shifted burden of proof to Gomez.
2. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State committed prosecutorial misconduct in trying this matter, which deprived Gomez of a fair trial? [Assignment of Error No. 1].
2. Whether there was sufficient evidence to uphold Gomez's conviction for violation of a no contact order? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Salvador Gomez Rebollar (Gomez) was charged by information filed in Thurston County Superior Court with one count of violation of a no contact order—third or subsequent violation (making the crime a felony). [CP 4].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Gomez was tried by a jury, the Honorable Richard D. Hicks presiding. Throughout the trial, a certified court interpreter in Spanish was available for Gomez. [RP 5-7; 4-23-09 RP 3] Gomez had no objections and took no exceptions to the Court's Instructions to the Jury. [CP 23-38; RP 49-

50]. The jury found Gomez guilty of violation of a no contact order and entered two special verdicts—one finding that Gomez had two prior convictions for violating a no contact order and one finding that Gomez and Josie Gomez were members of the same family or household. [CP 20, 21, 22; RP 88-92].

The court sentenced Gomez to a standard range sentence of 12-months plus one day based on an offender score of 1. [CP 39-40, 41-50; 4-23-09 RP 9-12].

Timely notice of appeal was filed and this appeal follows.

2. Facts

On January 2, 2009, Thurston County Sheriff Deputy Malcolm McIver (McIver) was on routine patrol stopped at a light facing westbound on Troser Road in Thurston County. [RP 16-17]. He noticed a car across from him facing eastbound with its left turn signal on to enter the southbound freeway. [RP 17]. McIver conducted a registration check on the car's license and learned that the registered owner of the car had a suspended driver's license. [RP 17-18]. McIver stopped the car and identified the driver as Gomez; he also noted several other people in the car—an adult female and several children. [RP 18]. He identified that adult female Josie Gomez with a date of birth of November 4, 1981. [RP 19]. State's Exhibit No. 3 was admitted which was Josie Gomez's DOL

photo and McIver testified that the photo appeared to be the same person he saw in the car with Gomez on January 2, 2009. [RP 19].

After identifying Gomez, McIver confirmed that Gomez's license was suspended and arrested him. [RP 20]. McIver then learned that Gomez was the respondent on a valid no contact order and that Josie Gomez was the protected party. [RP 21-22]. State's Exhibit No. 1 was admitted, which was the no contact order in effect against Gomez on January 2, 2009. [RP 22-23]. Gomez admitted to McIver that he was aware of the no contact order, but, according to McIver, that he, Gomez, needed to be with his wife and kids to provide for his family. [RP 23]. McIver admitted that he spoke to Gomez in English and that Gomez's English was "broken a little bit." [RP 24]. McIver testified that he then confirmed the adult female's identity as Josie Gomez by checking her driver's license. [RP 25]. Gomez was then also arrested for violation on a no contact order. [RP 25]. Upon arriving at the jail for booking, McIver learned that Gomez had prior convictions for violating a no contact order. [RP 26]. State's Exhibits Nos. 2 and 4 were admitted which were a felony judgment and sentence against Gomez for violating a no contact order (indicating two prior convictions for violating a no contact order) and the Thurston County District Court docket indicating two guilty findings

against Gomez for misdemeanor violations of a no contact order. [RP 26-27].

McIver admitted that his report for the incident fails to include a description of the adult female with Gomez, fails to include any mention that McIver confirmed her identity by checking her driver's license contrary to his testimony, and that he failed to write down her driver's license number. [RP 29-32].

Gomez testified in his own defense. He admitted knowing that his wife, Josie Gomez, had a no contact order against him and that he had at least two prior convictions for violating a no contact order. [RP 44-45, 47]. However, Gomez testified that on January 2, 2009, he had been at Costco with his girlfriend, Jenny Sanchez, not his wife as well as his three children (Modesta, Ulisa, and Salvador Jr.) and Sanchez's child (Maria) when he was stopped by McIver. [RP 37-43]. He denied telling McIver that he was with his wife and insisted he told McIver that he was with his family referring to his girlfriend and the children and was trying to provide for them. [RP 37-43, 47-48].

D. ARGUMENT

(1) THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN TRYING THIS MATTER, WHICH DEPRIVED GOMEZ OF A FAIR TRIAL.

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney, here the State, is a quasi-judicial officer. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He 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. State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956),

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), *citing* State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).

A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. Id. In cases of professional misconduct, the touchstone of due process analysis is fairness, i.e., whether the misconduct prejudiced the jury, thereby denying the defendant

a fair trial guaranteed by the due process clause. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

a. Overview Of What Occurred

Gomez was charged with violating a no contact order by being with Josie Gomez on January 2, 2009. At trial the State presented the testimony of McIver that the adult female in the car with Gomez was Josie Gomez and exhibits including a valid no contact order prohibiting Gomez from contact with Josie as well as documents indicating Gomez had at least two prior convictions for violating a no contact order. Gomez testified that he was not with Josie Gomez when he was stopped by McIver; he was with Jenny Sanchez. During rebuttal closing argument without objection the State argued as follows:

[Defense Counsel] is absolutely correct that he does not have to prove anything; that the defendant did not have to take the stand; that the burden is solely mine.

When you look at the State's evidence, what we have is Deputy McIver saying that he identified that female, and that she stated her name was Josie Gomez and gave her date of birth and then he checked out her identification, not because she was a suspect in any way, but in order to let someone drive the car home he has to make sure they have a valid license and that was his purpose in doing that. She wasn't a suspect. In his mind, what he told you, there

was no need to gather her physicals, put them in the report because she wasn't a suspect. She was the alleged victim. That's what he testified to.

There is no evidence that the children in the car were anyone besides Josie and the defendant's. The only person who testified to that was the defendant. No one else has testified today that a child belonged to Jenny. No one named Jenny has testified today saying she was in the car, solely based on what the defendant told you.

[Emphasis added]. [RP 81].

b. The Prosecutor Committed Misconduct In Rebuttal Closing Argument By Improperly Shifting The Burden Of Proof To Gomez.

Due process requires that the State bear the burden of proving every element to the crime beyond a reasonable doubt. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 944 (2008). The constitutional harmless error standard applies when a prosecutor's comment implicates a constitutional right other than the right to a fair trial. State v. Moreno, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006). A constitutional error is only harmless when the appellate court is convinced, beyond a reasonable doubt, that the prosecutor's comment did not affect the verdict. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The court will presume constitutional errors to be prejudicial and, as such, the State bears the burden to show the error was not harmless. Id.

It is improper to imply that the defense has a duty to present evidence as such an argument constitutes the unconstitutional shifting of

the State's burden to the defense in violation of due process. State v. McKenzie, 157 Wn.2d 44, 58-59, 134 P.3d 221 (2006); *see also* State v. Toth, Slip Opinion No. 38223-7-II (filed September 29, 2009). The remedy once such misconduct is found is to reverse and remand to dismiss. State v. Dixon, 150 Wn. App. 46, 58-59, 207 P.3d 459 (2009).

Here, the State's case against Gomez on the essential fact of the identity of the women in his car on January 2, 2009 was weak. The State only had the testimony of McIver that he identified the woman at the scene as Josie Gomez coupled with his in court identification of Josie Gomez's DOL photo as appearing to be the woman he saw with Gomez. However, McIver's report fails to contain any information about the woman other than her name and date of birth. McIver's report contained no description of the woman, her driver's license number was not taken down, and there was no identification of the children in the car either by name or description.

Gomez testified that the woman he was with when he was stopped by McIver was not his wife; it was Jenny Sanchez. He also explained his language difficulties in understanding McIver and insisted that he told the officer that he was taking care of his family meaning Jenny and the children; he did not tell McIver that he was with his wife, Josie Gomez.

Given these facts and the weakness of its case, the State sought a conviction by any means resulting in it arguing to the jury that it should not believe Gomez's testimony and convict him because he had not called Jenny Sanchez to testify. This argument was a wholly improper shifting of the burden of proof to Gomez and constituted prosecutorial misconduct.

Moreover, this error was not harmless beyond a reasonable doubt because it did affect the outcome of the case as evidence by the number of jury questions requesting a review of McIver's report. [CP 13, 14, 18, 19]. The jury was not given the report as it was not admitted into evidence, but the significance of the report was to call into question McIver's identification of the woman with Gomez as Josie Gomez. It appears that the jury had concerns regarding McIver's identification. It also appears that the State's improper argument tipped the scales, i.e. affected the outcome, as Gomez was convicted.

Finally it should be noted, where as here, a defendant fails to object to the State's misconduct, reversal of a conviction is required if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Belgrade, 110 Wn.2d 504, 509-10, 755 P.2d 174 (1988). The same rationale set forth above in addressing whether the State's misconduct was harmless is equally applicable here in that there is a substantial likelihood that the State's improper closing shifting the burden

of proof to Gomez resulted in his conviction as the record indicates that the jury appears to have questions regarding the identification of the woman with Gomez on January 2, 2009, which was the key issue in the entire case.

c. Gomez Was Prejudiced By His Counsel's Failure To Object To The State's Improper Rebuttal Closing Argument.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the errors claimed and argued above by failing to object to the State's improper rebuttal closing argument that unconstitutionally shifted the burden to Gomez,¹ then both elements of ineffective assistance of counsel have been established. For the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to make such an objection, and had counsel done so, the trial court would have declared a mistrial due to the State's misconduct.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel's failure to object to the State's improper rebuttal closing argument the trial court would have been compelled to declare a mistrial with the result that the Gomez would not have been convicted.

¹ While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

d. Conclusion.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). Sadly, this is what has occurred in the instant case. The only issue involved in the instant case was whether Gomez violated a no contact order by having contact with Josie Gomez. Instead of focusing on presenting evidence on this issue, the State by its misconduct improperly focused the jury on the fact that Gomez failed to produce evidence supporting his testimony thereby unconstitutionally shifting the burden of proof to Gomez in order to obtain a conviction. It cannot be said based on the totality of this record that the jury rendered a verdict based solely on the evidence given that the State's misconduct tainted this trial. This court should reverse and dismiss Gomez's conviction.

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO FIND GOMEZ GUILTY BEYOND A REASONABLE DOUBT OF FELONY VIOLATION OF A NO CONTACT ORDER.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any

rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Gomez was convicted of violating a no contact order. [CP 4, 20, 21, 22]. The sole issue in dispute at trial which the State bore the burden of establishing beyond a reasonable doubt was the identity of the woman found with Gomez in his car on January 2, 2009. This is a burden the State cannot sustain.

The Sum of the State’s evidence against Gomez was the testimony of McIver that he identified the woman at the scene as Josie Gomez coupled with his in court identification of Josie Gomez’s DOL photo as appearing to be the woman he saw with Gomez. However, McIver admitted on cross-examination when asked about his report of the incident

that it failed to contain any information about the woman other than her name and date of birth. McIver's report contained no description of the woman, her driver's license number was not taken down, and there was no identification of the children in the car either by name or description. Based on these facts, McIver's identification of the woman as Josie Gomez is questionable.

More importantly, Gomez testified that the woman he was with when he was stopped by McIver was not his wife; it was Jenny Sanchez. He also explained his language difficulties in understanding McIver and insisted that he told the officer that he was taking care of his family meaning Jenny and the children; he insisted that he did not tell McIver that he was with his wife; Josie Gomez.

Given the totality of the evidence elicited at trial it cannot be said beyond a reasonable doubt that it was Josie Gomez in Gomez's car on January 2, 2009 and without sufficient evidence on this point Gomez was not guilty of violating a no contact order. This court should reverse and dismiss Gomez's conviction.

E. CONCLUSION

Based on the above, Gomez respectfully requests this court to reverse and dismiss his conviction.

DATED this 9th day of October 2009.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 9th day of October 2009, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 9th day of October 2009.

Patricia A. Pethick
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