

No. 40443-5-II

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

---

STATE OF WASHINGTON,

Respondent,

v.

GARY B. CLARK,

Appellant.

10 OCT 25 PM 2:58  
STATE OF WASHINGTON  
BY [Signature] DEPUTY

COURT OF APPEALS  
DIVISION II

---

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

---

The Honorable Rosanne Buckner, 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

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR ..... 1

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

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

    1. Procedural facts ..... 2

    2. Overview of testimony at trial ..... 3

D. ARGUMENT ..... 4

    1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT SEVEN OF THE CONVICTIONS AT TRIAL AND THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE NEW EVIDENCE IN CLOSING ARGUMENT IN ORDER TO REMEDY THAT INSUFFICIENCY ..... 4

        a. Relevant facts ..... 5

        b. The prosecution failed to present sufficient evidence to support seven of the convictions and the trial court erred in allowing that evidence to be presented in rebuttal closing argument, thus sanctioning the prosecutor’s misconduct ..... 9

    2. THE PROSECUTOR COMMITTED FURTHER MISCONDUCT IN SHIFTING A BURDEN OF PROOF TO CLARK AND COUNSEL WAS INEFFECTIVE ... 14

        a. Relevant facts ..... 14

        b. These arguments were flagrant, prejudicial misconduct ..... 15

    3. THE SPECIAL VERDICT MUST BE STRICKEN AND COUNSEL WAS AGAIN PREJUDICIALLY INEFFECTIVE ..... 20

E. CONCLUSION ..... 25

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

Breckenridge v. Valley General Hosp., 150 Wn.2d 197, 78 P.3d 944 (2003) ..... 11

State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) ..... 21-24

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) ..... 22

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990). ..... 19

State v. Clausing, 147 Wn.2d 620, 56 P.3d 550 (2002) ..... 21

State v. Dennison, 72 Wn.2d 842, 435 P.2d 526 (1967) ..... 11

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) ..... 21, 24

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), overruled in part and on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) ..... 4, 9

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) ..... 19

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). ..... 9

State v. Salas, 127 Wn.2d 173, 897 P.2d 1246 (1995) ..... 10

State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005) ..... 5

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999) ..... 19

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009) ..... 22

WASHINGTON COURT OF APPEALS

Richards v. Overlake Hosp. Med. Center, 59 Wn. App. 266, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991) ..... 11

<u>State v. Balisok</u> , 123 Wn.2d 114, 866 P.2d 631 (1994) . . . . .	12
<u>State v. Boehning</u> , 127 Wn. App. 511, 111 P.3d 899 (2005) . . . . .	11, 17
<u>State v. Briggs</u> , 55 Wn. App. 44, 776 P.2d 1347 (1989) . . . . .	12, 13
<u>State v. Contreras</u> , 57 Wn. App. 471, 788 P.2d 1114, <u>review denied</u> , 115 Wn.2d 1014 (1990) . . . . .	16
<u>State v. Dixon</u> , 150 Wn. App. 46, 207 P.3d 459 (2009), <u>disagreed with on other grounds by State v. Jackson</u> , 150 Wn. App. 877, 209 P.3d 553, <u>review denied</u> , 167 Wn.2d 1007 (2009) . . . . .	16-18
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>review denied</u> , 131 Wn.2d 1018 (1997) . . . . .	15, 17
<u>State v. Hunt</u> , 75 Wn. App. 795, 880 P.2d 96, <u>review denied</u> , 125 Wn.2d 1009 (1994) . . . . .	11
<u>State v. Jones</u> , 144 Wn. App. 284, 183 P.3d 307 (2008) . . . . .	17
<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662, <u>review denied</u> , 113 Wn.2d 1002 (1989) . . . . .	19
<u>State v. Saunders</u> , 91 Wn. App. 575, 958 P.2d 364 (1998) . . . . .	20
<u>State v. Toth</u> , 152 Wn. App. 610, 217 P.3d 377 (2009) . . . . .	16, 18

FEDERAL AND OTHER CASELAW

<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) . . . . .	4, 15
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979) . . . . .	9
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) . . . . .	19

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, § 22 ..... 1, 19

Article I, § 3 ..... 5

Charles Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187 (1979) ..... 18

Fourteenth Amend. .... 5

RCW 10.99.020. .... 3, 10

RCW 26.50.110 ..... 3

Sixth Amend. .... 1, 5, 19

OTHER AUTHORITIES

Charles Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187 (1979) ..... 18

A. ASSIGNMENTS OF ERROR

1. The prosecution failed to present constitutionally sufficient evidence to prove all the essential elements of seven of the charged crimes against appellant Gary Clark.

2. The prosecutor committed misconduct in introducing new evidence for the first time in closing argument and relying on that evidence to prove guilt, and the trial court erred in allowing the misconduct despite counsel's objection.

3. The prosecutor committed flagrant, prejudicial misconduct in shifting a burden to Clark to disprove the state's case.

4. Clark was deprived of his Sixth Amendment and Article I, § 22 rights to effective assistance of counsel.

5. Jury Instruction 20, the instruction on the domestic violence special verdict, misstated the law and deprived Clark of his rights to the benefit of any reasonable doubt and the presumption of innocence.<sup>1</sup>

That instruction provided, in relevant part, as follows:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 115.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove Clark guilty, the prosecution had to show that he knowingly violated a protective order on the relevant dates, as set forth in

---

<sup>1</sup>A copy of the instruction is attached for convenience as Appendix A.

the “to convict” jury instructions. Did the prosecutor fail to present sufficient evidence to support seven of the convictions where the evidence he introduced at trial for those convictions showed only the days on which the communications occurred without providing any indication of the year?

2. Once the prosecutor’s failure to present sufficient evidence to prove the relevant dates was pointed out by Clark’s counsel in closing argument, the prosecutor then, in rebuttal closing argument, produced new evidence to support its case. Was this flagrant, prejudicial misconduct and did the trial court err in overruling counsel’s objection to the prosecutor’s introduction of and reliance on this evidence which the prosecutor had apparently forgotten to admit at trial?

3. Clark did not testify, nor did he present any evidence in his defense. Did the prosecutor commit flagrant, prejudicial misconduct in suggesting several times in rebuttal closing argument that Clark had failed to present evidence to rebut the state’s case? Further, was counsel prejudicially ineffective in failing to object and at least attempt to cure the prejudice his client suffered as a result of this misconduct?

4. Is dismissal of the special verdict required because the jury was improperly told that they had to be unanimous not only to answer the special verdict “yes” but also to answer it “no?”

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Gary B. Clark was charged by second amended information with nine counts of domestic violence violation of a court

order, with each charged as a “domestic violence incident.” CP 75-79; RCW 26.50.110; RCW 10.99.020. Jury trial was held before the Honorable Rosanne Buckner on February 18 and 22, 2010, after which one of the counts was dismissed and Clark was convicted of the others. CP 80-87, 144-45; RP 76. On March 12, 2010, Judge Buckner ordered Clark to serve a standard-range sentence. RP 123-38. Clark appealed and this pleading follows. See CP 141.

2. Overview of testimony at trial<sup>2</sup>

Deanna Reed testified that, on September 11 of 2006, she asked for a “no contact” order against her then-boyfriend, Gary Clark. RP 50. Reed said they had known each other for months and had lived together at some point. RP 50.

After Reed got the order, she still engaged in a relationship with Clark, letting him live with her “off and on” and seeing him for a total of about another year and a half. RP 50. Ultimately, she said, the relationship had ended in October of 2008, although another order of protection was entered earlier, on September 5, 2008. RP 24; see Ex. 3.

Reed testified that Clark had continued to contact her with calls and “visits” even after the relationship was over. RP 27-28. She also said he had sent her “text messages.” RP 28. According to Reed, she reported these contacts to police within a day or so of each. RP 28-36. Ultimately, she spoke to a detective, who took photos of messages Reed had on her phone, as well as recordings which she said were of messages Clark had

---

<sup>2</sup>More detail of the relevant facts is provided in the argument section, *infra*.

left. RP 28, 34. Reed said she knew they were from Clark because she had programmed her phone to indicate her nickname for him - "Rabbit" - when someone called or texted from his phone number. RP 30.

Tacoma Police Department Detective Christine Coulter had a forensic technician come take photos of Reed's phone as it displayed text messages at the police station on January 29 of 2009. RP 53-56, 59-60. The officer said the photos were taken with Reed manipulating the phone and keeping control of it to display the various texts. RP 67-68. The officer also took out her little "pocket recorder" and had Reed play several voice messages Reed said Clark had made, with the officer holding a microphone on the recorder up to the earpiece on the cell phone in order to tape-record the messages. RP 71. Reed testified that the voice on the tape was Clark's. RP 39-45.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT SEVEN OF THE CONVICTIONS AT TRIAL AND THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE NEW EVIDENCE IN CLOSING ARGUMENT IN ORDER TO REMEDY THAT INSUFFICIENCY

Under both the state and federal due process clauses, the prosecution bears the burden of proving all the essential elements of every crime, beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), overruled in part and on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d

368 (1970); Sixth Amend.; Fourteenth Amend.; Article I, § 3. When the prosecution fails to meet that burden, reversal and dismissal is required. State v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In this case, this Court should reverse and dismiss seven of the convictions, because the prosecution failed to present constitutionally sufficient evidence to prove those convictions at trial. Further, this Court should hold that the trial court erred in allowing the state to introduce new evidence for the first time in closing argument in an effort to remedy that failure, and that the prosecutor's actions in presenting that new evidence was flagrant, prejudicial misconduct.

a. Relevant facts

The nine counts of “domestic violence court order violation” with which Clark was charged were each alleged to have occurred on a specific date, as follows: one on September 5, 2008 (count I), one on November 14, 2008 (count II), one on December 16, 2008 (count III), one on December 23, 2008 (count IV), one on December 24, 2008 (count V), one on January 4, 2009 (count VI), one on January 7, 2009 (count VII), one on January 24, 2009 (count VIII), and one on February 18, 2009 (count IX). CP 75-79. The February 18 count was dismissed by the court prior to the case going to the jury. RP 76.

At trial, Reed testified that she had saved messages from Clark between September of 2008 through February of 2009. RP 31. One of the text messages from the number for “Rabbit” was dated September 5, with no year, and it said, “I love you, BYBOX.” RP 33. Reed said that she did not know what “BYB” was but “OX” was “hugs and kisses.” RP 33. The

message was left at 12:47 p.m. RP 33. Another text message was dated November 5, again with no year, again from the number for “Rabbit.” RP 37-38.<sup>3</sup> A third text message was from November 14, again with no year, again from the same phone number. RP 37-38. A fourth was from December 16 and had text with an “attachment” RP 39. No copy of the attachment was made or admitted at trial and again, there was no year listed on the text, which came from the number Reed had programmed for “Rabbit.” RP 39-40, 65. A fifth message had the date December 23 and another attachment. RP 40. Again, no year was on the message and the message came from the same place. RP 40. The attachment was two photos, according to Reed, but no photos were taken by police of the attachments. RP 41, 67. A final text message was dated January 24, with no year. RP 42. An officer testified that there was a “link” in the message for an address “in very close proximity” to Reed’s. RP 42, 70.

Three recorded phone messages were also introduced, with Reed testifying that she recognized the voice on them as belonging to Clark. RP 45. One of the phone messages indicated that it was from Sunday, January 4 but had no year. See RP 102; Ex. 11. Another indicated it was from January 7 but again had no year. See RP 102; Ex. 11. A third indicated it was from December 24, 2008. See RP 92, 105; Ex. 11.

At trial, Reed admitted that, although she thought Clark had contacted her at some point after she spoke to the officer, Reed said she “can’t be sure of the date.” RP 47. Indeed, she said, she “can’t be sure of

---

<sup>3</sup>The information did not charge any alleged offense for November 5. CP 75-79.

the dates” for any of the messages, although she recalled them occurring.  
RP 48.

No police reports were admitted into evidence indicating any dates on which Reed made any reports of alleged contacts. See RP 1-79.

The “to convict” instructions proposed by the prosecution included the requirement of proving the relevant dates. See CP 41-44; 91-114.<sup>4</sup> Instruction 8 corresponded with count I of the information and required the jury to find that “on September 5, 2008, there existed a protection order or no-contact order applicable to the defendant,” and that Clark knowingly violated that provision “on or about” that same date. CP 92. Instruction 9, reflecting the date alleged in count II, required the jury to find the order existed on November 14, 2008, and was violated on or about that date. CP 93. Instruction 10 mandated finding the order existed on and was violated “on or about” December 16, 2008, as charged in count III. CP 94. Instruction 11 required the order to exist on and the violation to have occurred “on or about” December 23, 2008, as count IV alleged. CP 95. For instruction 12, the order had to exist on and the violation occur “on or about” December 24, 2008 (count V). CP 96. For instruction 13, the relevant date was January 4, 2009 (count VI); for instruction 14, the date was January 7, 2009 (count VII), and for instruction 15, it was January 24, 2009 (count VIII). CP 97-99.

In closing argument, defense counsel noted how Reed had “a terrible time remembering dates of when things happened” and could not

---

<sup>4</sup>Copies of those instructions are attached as Appendix B.

give dates. RP 96. Counsel pointed out that the only real witness to the events was Reed and that Coulter's investigation consisted solely of meeting with Reed once, taking photos and making a tape. RP 97. Counsel argued that the prosecution had failed to present sufficient evidence to prove the relevant dates because all of the photos of the text messages indicated only the month and the date of the month, but not the year. RP 98. He pointed out that the prosecution was required to prove the year in order to prove the relevant violations occurred when the protective orders were in effect, noting that the messages could easily have been sent earlier, when the relationship was fine and there were no protection orders. RP 99. Counsel also noted that cell phones can save messages and texts for a long time. RP 99.

Regarding the voicemail messages, counsel argued that there was insufficient evidence of the year they had been left, because two of them, dated "January 4<sup>th</sup> and January 7<sup>th</sup>," did not indicate the year but just the day of the week and the date. RP 101.

In rebuttal closing argument, the prosecutor produced, for the first time, a calendar, declaring, "[c]ounsel apparently wants to get into an argument about calendars. So be it." RP 105. The prosecutor then started presenting information from the calendar about the relevant days of the week for each count, when counsel objected that the calendar was "not admitted into evidence." RP 105. The prosecutor responded, "[c]ommon sense, Your Honor." RP 105. The objection was overruled. RP 105.

At that point, the prosecutor started going through the first exhibit

of the text messages and showed the jury the calendar to prove that the relevant days were in 2008. RP 106. Although admitting that he had known that the text messages “don’t have the year,” the prosecutor told the jury “[y]ou can use a calendar and simply count back” and that the calendar proved that “[a]ll of these correspond to 2008.” RP 106. The prosecutor then declared that the jury could use the calendar and “[s]imple math” to find that the contacts had occurred in 2008, as required to find Clark’s guilt. RP 107.

- b. The prosecution failed to present sufficient evidence to support seven of the convictions and the trial court erred in allowing that evidence to be presented in rebuttal closing argument, thus sanctioning the prosecutor’s misconduct

Reversal is required, because the evidence admitted at trial was insufficient to support the convictions for all of the counts except count V, and the trial court erred in allowing the prosecutor to introduce new evidence to remedy that insufficiency during closing argument, over defense objection. Evidence is only sufficient to support a criminal conviction when, taken in the light most favorable to the prosecution, a rational trier of fact could have found all of the elements of the crime, beyond a reasonable doubt, based upon the evidence admitted at trial. Green, 94 Wn.2d at 221; see Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Where the evidence does not meet that standard, that error may be raised for the first time on appeal and reversal and dismissal is required. See, e.g., State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

Here, the evidence did not meet that standard for all of the

convictions, save one. Clark was charged with felony domestic violence violation of a court order in each count. See CP 75-79. That crime is defined in two statutes: RCW 26.50.110 and RCW 10.99.020(3). Under the relevant provisions of RCW 26.50.110(1)(a)(i), it is a misdemeanor for a person who is restrained by a court order issued under certain statutes, who knows of the order of restraint, to have “contact with a protected party.” RCW 26.50.110(5) makes a violation under subsection (a)(i) a Class C felony if the offender has at least two previous convictions for “violating the provisions of an order issued under this chapter.” And under RCW 10.99.020(5)(r), a crime is a “domestic violence” crime if is a violation of the provisions of a restraining order and the crime is committed by a “family or household member against another,” defined broadly to include any “adult persons . . . who have resided together in the past and who have or have had a dating relationship.” RCW 10.99.020(3).

Thus, to prove Clark guilty of the offenses as charged, the prosecution had to show 1) that Clark was restrained by an applicable court order, 2) that he knew of the restraint, 3) that he had contact with Reed after the order was entered and after he was informed of it, 4) that he had at least two previous convictions for a similar violation, and 5) that Clark and Reed were “family or household members” as that term is defined. Further, because the prosecution chose to specify the dates of each alleged contact in the “to -convict” instructions, it was required to prove that the relevant contact occurred on those specific dates. CP 91-99; Appendix B; see, e.g., State v. Salas, 127 Wn.2d 173, 182, 897 P.2d

1246 (1995) (instructions not excepted to become “law of the case”); State v. Hunt, 75 Wn. App. 795, 806, 880 P.2d 96, review denied, 125 Wn.2d 1009 (1994) (same).

The evidence at trial was simply insufficient to prove that the contacts occurred on the relevant dates, for all but count V. The text messages had the days but not the years. See Ex. 4-10. And two of the phone messages had dates, as well, but not years. See Ex. 11. Thus, the prosecutor failed to present sufficient evidence at trial to prove that the alleged contacts occurred on the relevant date for each conviction, except for count V (December 24, 2008).

Once counsel had pointed out this failure in the state’s case the prosecutor, obviously realizing his serious mistake, then committed flagrant, prejudicial and wholly improper misconduct by trying to remedy his failure of proof by introducing new evidence in rebuttal closing argument, then arguing that the jury should rely on that evidence in finding guilt. It is flagrant, prejudicial misconduct for a prosecutor to rely on evidence which is not in the record in arguing guilt. See, e.g., State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Further, it is misconduct to “bring before the jury extraneous matters not in evidence.” See, e.g., State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

Here, there can be no question that the calendar was extraneous, extrinsic evidence. Evidence is “extrinsic” when it is “outside all the evidence admitted at trial, either orally or by document.” Breckenridge v. Valley General Hosp., 150 Wn.2d 197, 199 n. 3, 78 P.3d 944 (2003), quoting, Richards v. Overlake Hosp. Med. Center, 59 Wn. App. 266, 270,

796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991). Throughout trial, the prosecutor never once made any effort to present a calendar as evidence. RP 1-76. Instead, he simply failed to present that evidence - and thus failed to present evidence sufficient to support the convictions - until his failures were pointed out, after the time for presentation of evidence had passed. Thus, counsel's objection that the calendar was not in evidence was absolutely correct. See RP 105. And the trial court's failure to sustain counsel's objection is unfathomable, as that failure effectively gave judicial imprimatur to the prosecutor's completely improper reference to and reliance on the new evidence of the calendar in arguing Clark's guilt.

Notably, the prosecutor had already been allowed to reopen his case, because he forgot to ensure introduction of the evidence of the stipulation that Clark had two prior convictions as required for the charge to be a felony. See RP 76-77. Thus, the prosecutor's failures in relation to presenting sufficient evidence to support his case had already been cured once by the trial court's largesse.

In another context, courts have made it clear that extrinsic evidence can play no part in a jury's decisionmaking process. See State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Where it is the jurors who improperly introduce new evidence into that process, courts will reverse if there is reasonable grounds to believe the defendant was prejudiced. State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989). This is an objective inquiry, asking "whether the extraneous evidence could have affected the jury's determination," in light of the

purpose for which the evidence was introduced. Id. Further, reversal is required unless the Court can conclude, beyond a reasonable doubt, that the evidence did not contribute to the verdict. Id.

Here, it was not some innocent act of an overzealous juror trying to do a good job which introduced the improper evidence. Instead, it was the deliberate act of a desperate prosecutor who had obviously realized - too late - that he had failed to provide sufficient evidence to prove his case.

There is more than a reasonable probability that this improper misconduct affected the verdict. Without the calendar, the jury would not have had sufficient evidence to convict on counts I-IV and VI-IX. With it, the convictions were gained.

The prosecutor failed to present sufficient evidence at trial to prove that the contacts occurred on the dates alleged, as required under the “to-convict” instructions, for all of the convictions except for Count V. The trial court erred in allowing the prosecutor to introduce the missing evidence in rebuttal closing argument, thus allowing the prosecutor to commit serious, prejudicial and flagrant misconduct. This Court should reverse and dismiss the convictions for counts I-IV and VI-IX, based upon the insufficiency of the evidence. Further, the Court should strongly remind the trial court that the evidence to be used against a defendant must be admitted at trial, not brought in for the first time in rebuttal closing argument.

2. THE PROSECUTOR COMMITTED FURTHER MISCONDUCT IN SHIFTING A BURDEN OF PROOF TO CLARK AND COUNSEL WAS INEFFECTIVE

Even if the prosecution had presented sufficient evidence to support the convictions for counts I-IV and VI-IX, reversal would still be required of those convictions, as well as the conviction for count V, because the prosecutor committed flagrant, prejudicial misconduct in shifting a burden to Mr. Clark to present evidence to disprove the state's case. In addition, counsel was prejudicially ineffective.

a. Relevant facts

In addition to arguing the lack of evidence to prove the relevant dates, counsel also questioned the sufficiency of the state's case in two other ways. First, he questioned why Reed was the sole source of evidence the prosecution had presented to prove that the phone number from which the texts and messages came belonged to Clark. RP 100. On that issue, he asked why the prosecution had not provided any documentation, such as a bill from a phone company, which would have objectively verified Reed's claim, or some investigation by the officer or something of that nature. RP 100-101.

Second, counsel argued that the prosecutor was asking the jury to assume that it was Clark who had sent the messages. RP 100-101. He noted that anyone who had the phone could have sent at least the text messages from the phone, rather than Clark. RP 100-101.

In rebuttal closing argument, after first faulting counsel for arguing that the state should have gotten phone records, the prosecutor declared:

What I have presented to you, and there hasn't been contradiction, is that the defendant came from these phone numbers [sic]. It's his phone number, the defendant's phone number, and the messages came from there. Counsel says, [w]ell, it could have been unbeknownst to him. Someone could have magically stolen his phone, texted I love you, and he could have never known about that. I didn't hear that evidence. Counsel wants you to not rely on speculation, but that's all he did up here. The evidence provided in front of you is that the defendant was texting the victim repeatedly, numerous, from his phone.

RP 108 (emphasis added).

b. These arguments were flagrant, prejudicial misconduct

Under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged, beyond a reasonable doubt. See Winship, supra; 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). As a result, the defendant has no burden to present any evidence at all. See State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

In this case, the prosecutor committed flagrant, prejudicial misconduct in faulting Clark for failing to present evidence to rebut the state's case, thus improperly shifting a burden to Clark and reducing the prosecutor's constitutionally mandated burden.

The boundaries of a prosecutor's comments in closing are circumscribed by whether the defendant presents evidence or testifies in his defense. If the defendant presents evidence and advances an exculpatory theory, the prosecutor may properly comment on the quality of that evidence and whether that evidence fails to corroborate that theory.

See State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114, review denied, 115 Wn.2d 1014 (1990).

However where, as here, the defense presents no evidence and the defendant does not testify, the prosecutor may not then comment on that “failure” to present evidence to rebut the state’s case, because such comment amounts to improperly shifting the burden of proof, which is flagrant, prejudicial misconduct. See State v. Toth, 152 Wn. App. 610, 217 P.3d 377 (2009). Thus, in Toth, this Court recently found that a prosecutor’s comments had impermissibly shifted the burden of proof to the defendant when the prosecutor said that the defendant did not have any burden to present anything but had given a story without presenting “anything at all to corroborate” it and had not “back[ed] his story up.” 159 Wn. App. at 613. “It is improper to imply that the defense has a duty to present evidence,” this Court noted, and the prosecutor’s arguments were prejudicial beyond a reasonable doubt because the jury could have inferred from those arguments that the defendant had a burden to provide evidence to rebut the state’s case. 159 Wn. App. at 614-15.

This Court reached a similar conclusion in State v. Dixon, 150 Wn. App. 46, 207 P.3d 459 (2009), disagreed with on other grounds by State v. Jackson, 150 Wn. App. 877, 209 P.3d 553, review denied, 167 Wn.2d 1007 (2009). In Dixon, the prosecutor argued that there was no evidence that a passenger in the car with the defendant had put drugs in the defendant’s purse, asking the jury why the defense had not called the passenger as a witness. 150 Wn. App. at 52. The defendant has no duty to present evidence, this Court noted. Id. Further, because the defendant

did not testify, the prosecutor improperly shifted a burden of proof to her suggesting that she should have presented evidence to support her defense. 150 Wn. App. at 55.

Here, it was not Clark's duty to present evidence that the phone number was not his. It was the state's duty to prove it was. It was also not Clark's duty to present evidence that someone else had gotten ahold of his phone and sent the messages. It was the state's duty to prove, beyond a reasonable doubt, that it was Clark who personally sent those messages. Counsel's permissible questions about the weaknesses in the state's case did not somehow "open the door" to allowing the prosecutor to then shift his constitutionally mandated burden of proof off onto Clark by suggesting that Clark had somehow failed to rebut the state's case. See, e.g., State v. Jones, 144 Wn. App. 284, 296-300, 183 P.3d 307 (2008). The prosecutor's wholly improper arguments to the contrary improperly shifted a burden of proof to Clark and were flagrant, prejudicial misconduct.

Reversal is required. Where, as here, the prosecutor commits serious, prejudicial misconduct, reversal is required even absent objection by trial counsel where the misconduct is so flagrant and ill-intentioned that it caused enduring prejudice which could not have been cured by instruction. Boehning, 127 Wn. App. at 518. Further, where, as here, a prosecutor makes improper argument after that argument has been condemned as misconduct in caselaw, the very fact that the prosecutor makes the argument indicates the ill intention behind the act. See Fleming, 83 Wn. App. at 214. The argument in this case was made after

this Court's decisions in Toth and Dixon had again reiterated its impropriety. See Toth, 152 Wn. App. at 610 (decided September 29, 2009); Dixon, 150 Wn. App. at 46 (decided May 5, 2009); RP 1 (trial in February of 2010).

In addition, this misconduct was extremely unlikely to be able to be "cured." For the average person, if they were accused of something, it would be normal and natural for them to at least deny it, or present whatever evidence they had to rebut the claim, and the failure to do so will obviously inure to the detriment of the defendant. See e.g., Charles Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1209 (1979) (noting that "the conclusion that there is no innocent explanation becomes more logical when [the defendant] fails to offer one"; pointing out the potential pressure on a defendant to rebut the prosecution's case). The technical concept of the defendant's right not to defend under the law does not change the emotional impact of the prosecutor pointing to the defendant's "failure," given that the average person would feel compelled to present exculpatory evidence if it existed. Even jurors reminded that a defendant had no burden of proof would likely be unable to root out from their minds the seeds of the idea planted by the prosecutor's improper comments, or its concurrent suggestion - that if there was any evidence to disprove the state's case, the defense surely would not have failed to present it. The misconduct in this case was so flagrant and ill-intentioned that it could not have been cured by instruction, and this Court should so hold.

In the alternative, if this Court finds that the flagrant, prejudicial misconduct of the prosecutor in shifting the burden of proof to Clark could have been cured by instruction, reversal is required because counsel was prejudicially ineffective in failing to object and request such instruction. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. 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).

Here, those standards have been met. There was no legitimate tactical reason for counsel to fail to object to the prosecutor's improper shifting the burden of proof to his client. This is especially so because the improper argument occurred in rebuttal, when the prosecutor was having the last word and when the misconduct was more likely to hold sway in the jurors' minds.

Indeed, the only issue in this case was whether the prosecution had presented sufficient evidence to prove its case. The evidence against Clark was thin and depended upon the jury wholly believing Reed's version of events. The misconduct went directly to the weaknesses in the prosecution's proof. Had counsel objected, the trial court would have erred if it had failed to instruct the jurors that Clark had no burden of presenting evidence to disprove the state's case i.e., that it was not his phone number or that he was not the person who had sent the texts. Any reasonably competent attorney would thus have seen the risk of failing to object and would have objected to and attempted to cure the prejudice the improper argument surely caused his client. As a result, even if this Court finds that the misconduct could somehow have been "cured," reversal is still required based upon counsel's ineffectiveness.

3. THE SPECIAL VERDICT MUST BE STRICKEN AND  
COUNSEL WAS AGAIN PREJUDICIALLY  
INEFFECTIVE

In addition, even if the convictions for counts I-IV and VI-IX did not have to be dismissed because they were unsupported by sufficient evidence, reversal would still be required under the controlling precedent

of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). Jury instructions are reviewed de novo, to determine whether they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. See State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The jury instruction on the special verdict, Instruction 20, not only misstated the law but also deprived Clark of the presumption of innocence and of the benefit of a reasonable doubt.<sup>5</sup> The instruction provided, in relevant part:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 115. In Bashaw, the Supreme Court declared, plainly, that “a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding” such as a special verdict. 169 Wn.2d at 146. Instead, unanimity is only required to find the “*presence* of a special finding” but “is not required to find the *absence* of such a special finding. 169 Wn.2d at 147 (emphasis in original); see also, State v. Goldberg, 149 Wn.2d 888, 890, 72 P.3d 1083 (2003).

Thus, not all jurors have to agree that the prosecution has not proven the facts relating to a special verdict in order to answer it “no.” This has the practical effect of ensuring that the defendant receives the benefit of any reasonable doubt - a benefit to which he is clearly entitled

---

<sup>5</sup>A similar issue is pending before the Court in State v. Campbell, No. 40012-0-II.

as part of the presumption of innocence. See State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). If some jurors have such doubts whether the state has met its burden of proving a special verdict, the special verdict is answered “no” and the defendant is given the benefit of those doubts.

Here, by telling the jurors they had to be unanimous in order to answer the special verdict not only “yes” but also “no,” Instruction 20 misstated the law. In addition, although the Bashaw Court did not explicitly so hold, the instruction deprived Clark of the benefit of any reasonable doubt and the presumption of innocence. That presumption is the “bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. Warren, 165 Wn.2d at 26-27. In the context of a special verdict, indicating to jurors that they have to be unanimous not only to answer “yes” but also to answer “no” deprives the defendant of the benefit of the doubts some jurors may have had. As the Bashaw Court noted, where, as here, the jury is under the mistaken belief that unanimity is required, “jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” 169 Wn.2d at 147-48.

Dismissal of the special verdict is thus required, regardless whether the Court orders relief on the other issues raised herein. As the Bashaw Court noted, when the jury is improperly instructed in this way, the deliberative process is so “flawed” that it is not possible to “say with

any confidence what might have occurred had the jury been properly instructed.” 169 Wn.2d at 147-48. As a result, a reviewing court “cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.” 169 Wn.2d at 148.

Notably, the Bashaw Court reached this conclusion even though it had already found that there was sufficient evidence to uphold two of the three special verdicts in that case, despite evidentiary errors. 169 Wn.2d at 143-48. In Bashaw, there were three “school bus route stop” enhancements, one for each of three counts of delivery of a controlled substance. 169 Wn.2d at 140-42. The prosecution relied on evidence from a measuring device which was not properly shown to be reliable. Id. The measuring device indicated that the three deliveries occurred 1) within 924 feet of a school bus route stop, 2) within 100 feet of a school bus route stop and 3) within 150 feet of a school bus route stop. 169 Wn.2d at 142-43). Officers also testified that the first delivery was approximately 1/10 mile (528 feet) or 1/4 mile (1,320 feet) from the stop. 169 Wn.2d at 143-44.

On appeal, the Court first found that there was “no reasonable probability” that error in admitting the faulty measuring device readings was harmful for two of the enhancements because there was “no reasonable probability” the jury would have concluded those deliveries had not taken place within 1,000 feet of the stop even if the device evidence had been excluded. 169 Wn.2d at 144-45. Yet the Court reversed the special verdicts based on the instructional error. 169 Wn.2d at 145-47. The question was not whether there was evidence to support

the enhancement but rather whether the procedure in gaining the verdict rendered it fundamentally flawed. 169 Wn.2d at 147-48. Further, the Court held, it would be improper to allow retrial on just the special verdict. Id.

If this Court grants a new trial based on any of the arguments presented herein, it should do so with instructions that a correct instruction must be used on remand. In addition, even if the Court does not grant relief on any of the other grounds presented herein, dismissal of the special verdict and remand for resentencing to strike the “domestic violence” designation for the offenses is still required under Bashaw. This Court should so hold. Further, because counsel failed to object to the improper instruction even though Goldberg had been decided years before, new counsel should be appointed. See RP 81.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss counts I-IV and VI-IX with prejudice, because there was insufficient evidence admitted at trial to support them. Reversal of the remaining count is also required based upon the prosecutorial misconduct. Finally, because the special verdict instruction was in error, dismissal of the special verdict findings is required.

DATED this 22nd day of October, 2010.

Respectfully submitted,



KATHRYN A. 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

COURT OF APPEALS  
DIVISION II

10 OCT 25 PM 2:39

CERTIFICATION OF SERVICE BY MAIL

STATE OF WASHINGTON  
BY Cs  
DEPUTY

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,  
Tacoma, WA. 98402;

TO: Gary B. Clark, DOC 979649, McNeil Island CC, P.O. Box 88-  
1000, Steilacoom, WA. 98388-1000.

DATED this 22nd day of October, 2010.

  
KATHRYN A. 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

# APPENDIX A

INSTRUCTION NO. 20

You will also be given a special verdict form for the crimes charged in counts one through eight. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

# APPENDIX B

INSTRUCTION NO. 8

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 5, 2008, there existed a protection order or no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 14, 2008, there existed a protection order or no-contact order applicable to the defendant;

(2) That the defendant knew of the existence of this order;

(3) That on or about said date, the defendant knowingly violated a provision of this order;

(4) That the defendant has twice been previously convicted for violating the provisions of a court order; and

(5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 16, 2008, there existed a protection order or no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 23, 2008, there existed a protection order or no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 24, 2008, there existed a protection order or no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 4, 2009, there existed a protection order or no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about January 7, 2009, there existed a protection order or no-contact order applicable to the defendant;

(2) That the defendant knew of the existence of this order;

(3) That on or about said date, the defendant knowingly violated a provision of this order;

(4) That the defendant has twice been previously convicted for violating the provisions of a court order; and

(5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 24, 2009, there existed a protection order or no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.