

COA NO. 45733-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID NEASE,

Appellant.

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

The Honorable Marilyn K. Haan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. PROSECUTORIAL MISCONDUCT DEPRIVED NEASE OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

a. The Prosecutor Committed Misconduct By Equating Proof Beyond Reasonable Doubt With A Feeling In The Heart And Gut.

The State claims there is nothing wrong with the prosecutor equating the proof beyond a reasonable doubt standard to what a juror's heart or guts says, citing State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496, review denied, 172 Wn.2d 1012, 259 P.3d 1109 (2011). Curtiss is easily distinguished. Unlike the prosecutor in Nease's case, the prosecutor in Curtiss did not equate the beyond a reasonable doubt standard to what a juror's heart and gut says. Compare Curtiss, 161 Wn. App. at 701 ("Do you know in your gut — do you know in your heart that Renee Curtiss is guilty as an accomplice to murder?") with 3RP 140 ("What does your head, what does your heart, what does your gut say? Okay. If it says that he's guilty, then you are convinced beyond a reasonable doubt."). Nease asks this Court to join the other courts around the country that have condemned the kind of argument made by prosecutor in this case.

Unlike in Curtiss, the prosecutor's argument here was not a nebulous appeal to the jury's emotion, but rather a specific appeal for jurors to tie the beyond a reasonable doubt standard to a visceral standard

unmoored from objectivity. The generic packet instruction directing the jury to decide the case based on the facts and the law rather than sympathy, prejudice or personal preference did nothing to counteract the harmful effect of that pernicious argument. See State v. Schnabel, 127 Haw. 432, 454, 279 P.3d 1237 (Haw. 2012) (in relation to the prosecutor's improper "gut feeling" argument, "the court's instruction that 'pity, passion and prejudice have no play' in determining 'reasonable doubt' was . . . insufficient to cure the misconduct because the instruction did 'not relate[] to the prejudicial effects of the prosecutor's assertions' or 'specifically address and correct the misstatements [] given.'")

Although jurors are instructed to disregard any argument not supported by the court's instructions, the problem is that the jury was in no position to determine whether the prosecutor's misstatement of the law was actually supported by the instructions. The prosecutor's argument has a seductive attraction even though it is wrong. The harm in this case is that jurors concluded the prosecutor's misstatement of the law was consistent with the jury instructions and provided a convenient and understandable way to decide whether the State had met its burden of proof.

Indeed, the instructions encouraged jurors to consider the lawyers' remarks when applying the law. CP 11 ("The lawyers' remarks,

statements, and arguments are intended to help you understand the evidence and apply the law."). The standard reasonable doubt instructions are not a model of clarity. See State v. Bennett, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007) (recognizing concept of reasonable doubt difficult to explain even under the pattern instructions, making it tempting to expand the definition). Jurors would be particularly tempted to follow the prosecutor's approach because his comment had the ring of truth. To a layperson, the prosecutor's description of reasonable doubt — what the heart and gut tell you — sounds correct and provided a simple (albeit mistaken) way for jurors to decide guilt or innocence.

b. The Prosecutor Committed Misconduct In Disparaging Defense Counsel.

With reference to the "red herring" and "misdirection" comments, the State claims the prosecutor merely pointed out evidence that did not deserve focus. BOR at 26. That is an inaccurate representation of what went on here. The prosecutor did not simply argue the evidence failed to support the defense theory. The prosecutor attacked defense counsel through language that conveyed a message that counsel was trying to mislead the jury. The "red herring" and "misdirection" comments came after the prosecutor had accused counsel of not being upfront with the jury. That is the context in which they were made.

That no Washington case has addressed the specific language used by the prosecutor is of little moment. Prosecutorial misconduct comes in nearly infinite forms and shades. But one thing is clear: the implication of deception and dishonesty on the part of defense counsel is improper. State v. Lindsay, 180 Wn.2d 423, 433-34, 326 P.3d 125 (2014); State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). In context, the prosecutor's "red herring" and "misdirection" comments fall squarely into that category. See State v. Campos, 309 P.3d 1160, 1174-75 (Utah Ct. App. 2013) (prosecutor committed misconduct in comparing the defense theory with a "red herring" where in doing so the prosecutor accused defense counsel of intentionally trying to distract and mislead the jury), review denied, 320 P.3d 676 (2014); Pickworth v. State, 95 Nev. 547, 550, 598 P.2d 626, 627 (1979) (holding State's characterization of the defendant's theory of the case as a red herring was highly improper).

Nease otherwise stands by the arguments made in the opening brief. Repeated instances of misconduct did occur. The opening brief lays out the argument for why reversal is required under a cumulative impact analysis.

c. In The Alternative, Counsel Was Ineffective In Failing To Object To The Misconduct Or Request Curative Instruction.

The State claims there is no prejudice from defense counsel's failure to object because Nease made a statement that he "removed Vossen's underwear and pants and started oral sex with her before she moaned." BOR at 29. That is hardly the proverbial smoking gun. In the context of sexual relations, common sense suggests a woman would not moan until something happened that caused her to moan. Nease, in his statements to police, claimed Vossen consented because she moaned and seemed to enjoy it. 3RP 59; Ex. 4.

The key question is whether the sex happened while she was asleep. And on this point, the State's case was shaky. See BOA at 22. Again, at one point in her testimony Vossen described Nease performing oral sex on her *after* she woke up and noticed her clothes were missing: "I remembered waking up and freaking out: Where are my fucking pants, David? Why are they off me? I don't understand. And then I -- and then he was on top of me -- or, no, *then* he was licking me, and I was like: No, don't, don't." 3RP 23-24 (emphasis added). Counsel's deficient performance, in failing to properly object to prosecutorial misconduct, undermines confidence in the outcome.

2. THE COURT VIOLATED NEASE'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

The State makes the broad claim that engaging in sidebar conferences does not constitute a courtroom closure in the public trial context. BOR at 34. In making that claim, it overstates the holding in State v. Smith, __ Wn.2d __, 334 P.3d 1049 (2014). In Smith, "[t]he issue [was] whether sidebar conferences on evidentiary matters in a hallway outside the courtroom implicate the public trial right." Smith, 334 P.3d at 1052. The Supreme Court held such sidebar conferences do not implicate the public trial right. Id. at 1051-52, 1055-56.

But the Supreme Court cautioned "merely characterizing something as a 'sidebar' does not make it so. To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record. Whether the event in question is actually a sidebar is part of the experience prong inquiry and is not subject to the old legal-factual test." Id. at 1054 n.10. The State ignores that important caveat in the Smith decision.

As argued in the opening brief, experience shows peremptory challenges are regarded as part of the jury selection process on par with

for cause challenges and therefore must be exercised in open court. Peremptory challenges conducted at sidebar do not qualify as a "traditional subject area" for sidebars and thus are not immune from a public trial challenge. There is no indication in this record that exercising peremptory challenges in private was done to avoid disrupting the flow of trial. They could have been exercised just as easily by having the attorneys announce their respective challenges in open court while the panel was present. A "struck juror list" was filed, but a member of the public unversed in "voir dire code" would find it difficult to determine how the peremptory challenge process unfolded. CP 80. Further, it was never announced in open court that such a document had been filed or was available for immediate viewing. Nease stands by the public trial argument made in his opening brief.

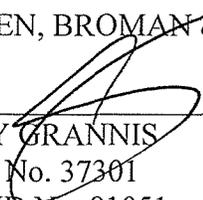
B. CONCLUSION

For the reasons set forth above and in the opening brief, Nease requests that this Court reverse the convictions and strike the challenged conditions of community custody.

DATED this 10th day of November 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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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 10TH DAY OF NOVEMBER, 2014, 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.

[X] DAVID NEASE
DOC NO. 299854
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF NOVEMBER, 2014.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

November 10, 2014 - 2:59 PM

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