

No. 48008-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jared Evans,

Appellant.

Pierce County Superior Court Cause No. 15-1-00951-8

The Honorable Judge Stanley Rumbaugh

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct that violated Mr. Evans's Fourteenth Amendment right to due process.
2. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by "testifying" to "facts" not in evidence during closing argument.
3. The prosecutor committed misconduct by telling jurors that the novelty flashlight/taser possessed by the defendant was capable of starting a fire.

ISSUE 1: A prosecutor commits misconduct by "testifying" to "facts" not in evidence. Must the convictions here be reversed because of the prosecutor's improper "testimony" regarding Mr. Evans's novelty flashlight/taser?

4. The prosecutor committed flagrant and ill-intentioned misconduct by mischaracterizing the law in argument to the jury.
5. The prosecutor committed misconduct by telling jurors they could conclusively presume knowledge and malice from "the act in itself," if Mr. Evans started the fire.

ISSUE 2: To obtain a conviction, the prosecution must prove each element of an offense. Did the prosecutor commit misconduct by telling jurors they could conclusively presume knowledge and malice from proof that Mr. Evans started the fire?

6. Mr. Evans's conviction violated due process because the evidence was insufficient for conviction.
7. The state failed to prove that Mr. Evans acted with malice.
8. The state failed to prove that Mr. Evans lit the waste-paper fire in the bathroom garbage can with an "evil intent, wish, or design to vex, annoy or injure another person."

ISSUE 3: Conviction of arson requires proof of malice, defined as an evil intent, wish, or design to vex, annoy or injure

another person. Did the state fail to prove that Mr. Evans acted maliciously when he lit waste paper on fire in a public bathroom's garbage can?

9. The trial court erred by giving Instruction No. 3.
10. The trial court erred by refusing to give Mr. Evans's proposed instruction defining reasonable doubt.
11. The trial court's reasonable doubt instruction violated Mr. Evans's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.
12. The trial court's reasonable doubt instruction violated Mr. Evans's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
13. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
14. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 4: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Evans's constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jared Evans was 26 years old and lived with his parents. He suffered from attention-deficit hyperactivity disorder, as well as a mood disorder. RP (8/26/15) 56; (9/2/15) 12.

In February of 2015, Jared Evans was waiting for his brother at St. Anthony Hospital Urgent Care. RP (8/26/15) 58. To kill time, he played with his phone and his new flashlight taser¹, and he talked with his brother's girlfriend. RP (8/25/15) 11, 14, 20, 30; RP (8/26/15) 58. He sat on a bench for a time. When asked to move, he wandered around the area, eventually going into a bathroom. RP (8/26/15) 61.

Paratransit van driver Donoghue went into the bathroom, saw smoking paper towels and went out into the hallway and yelled fire. RP (8/25/15) 61-64. He saw Jared Evans in the bathroom, taking burning towels out of the metal garbage and putting them onto the floor. RP (8/25/15) 69-70; RP (8/26/15) 48. Police and the fire department came, and Jared Evans was arrested. RP (8/26/15) 30-36. He denied that he started the fire. RP (8/26/15) 62.

The state charged Jared Evans with arson in the first degree. CP 1.

¹ Jared Evans bought the device online for \$30 the week before. RP (8/26/15) 59.

The state did not present any physical evidence of the fire itself, in the form of any burned items, or photos. Nor did they present the results of any arson investigation. RP (8/25/15) 38-72; RP (8/26/15) 8-54.

The state did ask witnesses to describe the flashlight-taser that Jared Evans had. RP (8/25/15) 36. The police had not seized it as evidence. RP (8/26/15) 66. The prosecutor did not ask any law enforcement witnesses, or anyone else, whether a taser could start a fire. RP (8/25/15) 38-72; RP (8/26/15) 8-54. Jared Evans also had a lighter in his backpack, but it was not tested or seized as evidence. RP (8/26/15) 36.

In his closing argument, the prosecutor told the jury that a taser can start a fire. He said

Everybody knows what a taser is. It causes an electrical charge and it's designed to shock people. Well, that electrical charge obviously creates heat, and that heat can start a fire. So the Defendant had a device that would allow him to start the fire.
RP (8/27/15) 17.

In response to the defense argument that the state had not presented any evidence a taser could start a fire, the prosecutor returned to his theme:

Of course a taser can start a fire with paper material. It's an electrical charge. It's quite a bit of heat. It's obvious that that device could be used to start a fire.
RP (8/27/15) 35-36.

The prosecutor also discussed the *mens rea* for arson:

Really, if you determine that the Defendant acted in this case, that the Defendant started the fire, the act in itself is knowing and malicious. Clearly, you don't start a fire unless you know what you're doing, and you don't do so unless you're being malicious under your instructions.
RP (8/27/15) 15.

The court gave a jury instruction regarding reasonable doubt that included the following: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 54.

The jury convicted Jared Evans of arson 1. CP 67. Jared Evans timely appealed. Notice of Appeal, Supp. CP.

ARGUMENT

I. PROSECUTORIAL MISCONDUCT DEPRIVED MR. EVANS OF HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

A defendant seeking a new trial based on prosecutorial misconduct must show that the prosecutor's challenged conduct was both improper and prejudicial "in the context of the record and all of the circumstances of the trial." *In re Restraint of Glasmann*, 175 Wn.2d 696, 704, 206 P.3d 673 (2012). To establish prejudice, the defendant must "show a substantial likelihood that the misconduct affected the jury verdict." *Glasmann*, 175 Wn.2d at 704.

A defendant who failed to object at trial must also show “that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *Glasmann*, 175 Wn.2d at 704. Where a prosecutor engages in more than one act of misconduct, the reviewing court does not examine each in isolation to decide whether the appellant has shown sufficient prejudice. Instead the court looks at the cumulative effect of all the improper conduct. *Glasmann*, 175 Wn.2d at 707-12.

Prosecutorial misconduct during argument can be particularly prejudicial. There is a risk that jurors will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” *Glasmann*, 175 Wn.2d at 706 (quoting commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8).

Prosecutorial misconduct may require reversal even where ample evidence supports the jury’s verdict. *Glasmann*, 175 Wn.2d at 711-12. The focus of the reviewing court’s inquiry “must be on the misconduct and its impact, not on the evidence that was properly admitted.” *Glasmann*, 175 Wn.2d at 711.

A. The prosecutor improperly “testified” to “facts” not in evidence.

A prosecutor commits misconduct by referring to facts not admitted into evidence. *Glasmann*, 175 Wn.2d at 704-706. Here, the

prosecutor improperly “testified” that Mr. Evans’s novelty flashlight/taser was capable of starting a fire, despite the absence of any testimony on the subject.

According to the prosecutor, a taser’s electrical charge “obviously creates heat, and that heat can start a fire.” RP (8/27/15) 17. When defense counsel pointed out the lack of evidence on this point,² the prosecutor improperly “testified” to additional “facts” to rebut counsel’s argument:

Of course a tazer [sic] can start a fire with paper material. It's an electrical charge. It's quite a bit of heat. It's obvious that that device could be used to start a fire.
RP (8/27/15) 35-36.

The prosecutor committed misconduct by arguing “facts” not in evidence. *Glasmann*, 175 Wn.2d at 704-706. The misconduct prejudiced Mr. Evans.

Once implanted in the jurors’ minds, the prosecutor’s repeated assertions could not be dislodged by a curative instruction.³ The cumulative effect of the prosecutor’s statements denied Mr. Evans a fair trial. The conviction must be reversed and the case remanded for a new trial. *Glasmann*, 175 Wn.2d at 714.

² See RP (8/27/15) 25 (“That tazer was never confiscated. It was never brought into court. It was never demonstrated it could start a fire. How do we know?”)

³ Accordingly, the error requires reversal, even though Mr. Evans did not object in the trial court. *Glasmann*, 175 Wn.2d at 704.

B. The prosecutor improperly mischaracterized the law in his argument to the jury.

The state's argument "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor's misstatement regarding the law is "a serious irregularity having the grave potential to mislead the jury." *Id.*, at 763. In this case, the prosecutor misstated the law regarding the state's burden to prove that Mr. Evans acted knowingly and maliciously.

To obtain a conviction, the state was required to prove that Mr. Evans knowingly and maliciously caused a fire in an occupied building. RCW 9A.48.020(1). The prosecutor's argument improperly eliminated the *mens rea* from the equation.

Instead of pointing to proof that Mr. Evans acted knowingly and maliciously, the prosecutor told jurors they could convict if Mr. Evans started the fire:

[I]f you determine that the Defendant acted in this case, that the Defendant started the fire, *the act in itself is knowing and malicious*. Clearly, you don't start a fire unless you know what you're doing, and you don't do so unless you're being malicious... RP (8/27/15) 15 (emphasis added).

This was flagrant and ill-intentioned misconduct.

A person who starts a fire accidentally is not guilty of first-degree arson. Similarly, a person who intentionally starts a fire for a legitimate

purpose—for example, to light a cigarette—is also not guilty of first-degree arson, even if she or he is reckless. Indeed, a person who lacks a wholly legitimate purpose cannot be convicted of arson if their actions are without malice.⁴

The prosecutor’s improper argument cannot even be characterized as an attempt to convey the permissive inference outlined in RCW 9A.04.110(12).⁵ The prosecutor did not acknowledge the “willful disregard” language of that provision. Nor did he use the word “may” or otherwise convey the permissive nature of the inference. Nor did he outline the other requirements of the statute, such as the “rights of another,” “without just cause or excuse,” and “social duty” concepts. RCW 9A.04.110(12).

Furthermore, the jury was not instructed on the permissive inference. CP 49-64. Accordingly, it was improper for the prosecutor to rely on the inference. *Cf. Davenport*, 100 Wn.2d at 760, 763.

The misconduct prejudiced Mr. Evans. The state provided no evidence, whether direct or circumstantial, bearing on Mr. Evans’s mental

⁴ For example, a person might be motivated by curiosity, to see if a taser *can* ignite a paper towel, as the prosecutor improperly claimed in his unsupported argument to the jury. RP (8/27/15) 17, 35-36.

⁵ Under that provision, an inference of malice may be drawn “from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.” RCW 9A.04.110(12).

state at the time the fire started. By improperly instructing jurors that they could conclusively presume knowledge and malice from “the act in itself,”⁶ the prosecutor tipped jurors toward conviction.

Mr. Evans’s arson conviction must be reversed. *Id.* The case must be remanded to the trial court for a new trial. *Id.*

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. EVANS OF FIRST-DEGREE ARSON.

Due process requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). In challenging the sufficiency of the evidence,⁷ the appellant admits the truth of the state’s evidence and all reasonable inferences that can be drawn from it. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

However, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). To prove even a *prima facie* case, the state’s evidence must be consistent with guilt and inconsistent with a hypothesis of

⁶ RP (8/27/15) 15.

⁷ A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

innocence. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (addressing *prima facie* evidence in the *corpus delicti* context).⁸

Here, the state’s theory was that Mr. Evans used his taser to light waste paper in a metal garbage can. Although it is possible that he did this maliciously— with “an evil intent, wish, or design to vex, annoy or injure another person”⁹—it is just as possible that acted out of boredom or curiosity, and was simply indifferent to the effect on any other person. Indeed, the state lacked evidence of malice, as can be seen from the prosecutor’s improper argument that the jury could conclusively presume malice from “the act in itself.” RP (8/27/15) 15.

The evidence was consistent with a hypothesis of “innocence” of the charged crime. The state failed to prove even a *prima facie* case of malice. This is so despite the statutory provision permitting an inference of malice to be drawn “from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.” RCW 9A.04.110(12). Such an inference *allows* a finding of malice under these circumstances; however, it does not make the evidence inconsistent with a hypothesis of innocence. *Brockob*, 159 Wn.2d at 329.

⁸ In this context, “innocence” does not mean blamelessness; rather, it relates to the defendant’s culpability for the *charged* crime. *Id.*

The evidence was insufficient to prove the required *mens rea*. The conviction for arson must be reversed and the charge dismissed with prejudice. *State v. Mau*, 178 Wn.2d 308, 317, 308 P.3d 629 (2013).

III. THE COURT’S “REASONABLE DOUBT” INSTRUCTION INFRINGED MR. EVANS’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH.”

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury’s task “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760.

Here, over objection, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 54. The court rejected the instruction proposed by Mr. Evans, which omitted the optional language found in the pattern instruction. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed).

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a

⁹ Instruction No. 7, CP 58; RCW 9A.04.110 (12).

“belief in the truth of the charge,” the court confused the critical role of the jury. CP 54.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 54. Jurors were obligated to follow the instruction.

Without analysis, Division I has twice rejected a challenge to this language. *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014). This court should not follow Division I.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I’s position.

In *Bennett*, the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called

Castle instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.¹⁰ *Id.*

The *Fedorov* court also relied on *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In *Pirtle*, as in *Bennett*, the defendant favored the “truth of the charge” language. *Id.*, at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.*, at 656.¹¹ The *Pirtle* court was not asked to rule on the constitutionality of the “truth of the charge” provision.

Neither *Bennett* nor *Pirtle* should control this case. Division II should not follow Division I’s decisions in *Kinzle* and *Fedorov*.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

¹⁰ The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

¹¹ The challenged language in *Pirtle* read as follows: “If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.” *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction “invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit.” *Id.*, at 656.

Improper instruction on the reasonable doubt standard is structural error.¹² *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Evans his constitutional right to a jury trial.

Mr. Evans’s conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Evans’s conviction must be reversed and the case dismissed with prejudice. If the charge is not dismissed, the case must be remanded for a new trial.

¹² RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

Respectfully submitted on February 18, 2016.

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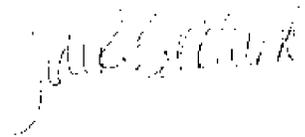
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 18, 2016.



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