

NO. 49162-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS KIRBY,

Appellant.

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

The Honorable Gary R. Tabor, Judge

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. Prosecutorial misconduct denied Mr. Kirby a fair trial.

Prosecutorial misconduct is established if the prosecutor's comments were improper and were substantially likely to affect the outcome of the proceedings. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Even if not objected to prosecutorial misconduct requires reversal when the prosecutor's comments were so flagrant and ill-intentioned they could not have been cured by instruction. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Misconduct that directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. *State v. French*, 101 Wn. App. 380, 386, 4 P.3d 857 (2000). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. *State v. Fleming*, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996).

The touchstone of a prosecutorial misconduct analysis is the fairness of the trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Fundamental unfairness occurs if an accused person may be convicted "on the strength of the same evidence as would suffice in a civil case." *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The prosecutor's explanation of reasonable doubt during closing

argument violated Mr. Kirby's right to a fair trial by significantly reducing the burden of proof below even that required in a civil case.

a. The prosecutor improperly told the jury reasonable belief is the same as proof beyond a reasonable doubt.

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The proof beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence." *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). The failure to properly instruct jurors on these principles is structural error and requires reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 280-81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *McHenry*, 88 Wn.2d at 212-215.

"Statements made by the prosecutor or defense to the jury must be confined to the law as set forth in the instructions given by the court." *Davenport*, 100 Wn.2d at 760; *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A prosecutor's misstatement of the law is a serious error with "grave potential to mislead the jury." *Davenport*, 100 Wn.2d at 763. A prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990).

Here, the prosecutor significantly diminished the burden of proof by arguing, “what it comes down to is do you believe that everything on those checklists that we talked about earlier happened, and if you have that belief . . . you are convinced beyond a reasonable doubt.” 4RP at 639.

The prosecutor's argument reduced the burden of proof below even the preponderance of the evidence standard required in civil cases. Under the prosecutor's argument, if the evidence equally supports both guilt and innocence, the jury should vote to convict because it is "reasonable" to believe the defendant is guilty.

The prosecutor also undermined the "abiding belief" language in the pattern jury instruction. The instruction told the jury, "If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 37. But the prosecutor dismissed the standard by telling the jury, “Abiding belief is the basis for a reasonable doubt . . . but what it comes down to is do you believe . . . and if you have that belief . . . you are convinced beyond a reasonable doubt.” 4RP at 639. This argument distorted and minimized the burden of proof and requires reversal of Mr. Kirby's conviction. What the prosecutor essentially argued is if you believe it happened, it's beyond a reasonable doubt. This argument told jurors they could ignore the word "abiding" and convict Mr. Kirby if they had mere belief or opinion that the charges were true.

The prosecutor's argument inverted the definition of reasonable doubt. This significantly lowered the burden of proof and was likely to confuse the jury's understanding of the properly worded written instructions.

b. The misstatement of the burden of proof was flagrant, ill-intentioned, and incurable by instruction.

A prosecutor's disregard of a well-established rule of law is flagrant and ill-intentioned misconduct. *Fleming*, 83 Wn. App. at 214. It is well established that a prosecutor may not misstate the law or undermine the presumption of innocence by diminishing the burden of proof beyond a reasonable doubt. *Davenport*, 100 Wn.2d at 760.

Although jurors are instructed to disregard any argument not supported by the court's instructions, CP 34, a misstatement of the law pertaining to the burden of proof cannot be easily dismissed. *Fleming*, 83 Wn. App. at 213-14 (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill intentioned," and required a new trial).

The jury instructions also encouraged jurors to consider the lawyers' remarks when applying the law. CP 34 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law.") Jurors would have followed the prosecutor's interpretation of reasonable doubt because to a layperson, the prosecutor's description sounds correct and provides a simple (albeit

mistaken) way for jurors to decide guilt or innocence. Jurors would be particularly tempted to follow the prosecutor's approach because the standard reasonable doubt instructions are not a model of clarity. *Bennett*, 161 Wn.2d at 317 (recognizing that even under the pattern instructions, the concept of reasonable doubt seems difficult to define and explain, making it tempting to expand the definition).

This misstatement of the burden of proof could not have been cured by instruction because it was couched in the very words used to define proof beyond a reasonable doubt in the pattern jury instruction. The court instructed the jury that "If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 37. The prosecutor's reference to believing something happened, or thinking something happened echoes the "abiding belief" language used in the reasonable doubt instruction. 4RP at 639. But the prosecutor equated proof beyond a reasonable doubt with merely thinking or believing something happened. This argument invited the jury to ignore the word "abiding" and convict so long as it is reasonable to believe the defendant committed the crimes charged.

Additionally, the prosecutor distorted the instruction's use of the word, "reasonable," by telling the jury that reasonable proof was enough to find proof beyond a reasonable doubt. The comments were incurable because further instruction by the court was likely only to confuse the jury more. After the prosecutor twisted the very words used in the pattern

instruction, the jury could not be expected to properly apply it to Mr. Kirby's case.

"[T]he presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system." *Bennett*, 161 Wn.2d at 317-18. A misdescription of the burden of proof in a jury instruction "vitiates all the jury's findings." *Sullivan*, 508 U.S. at 281. Because the prosecutor's argument distorted the definition of reasonable doubt in the written jury instructions, Mr. Kirby was denied a fair trial.

2. Remand to limit the plethysmograph testing is necessary.

Mr. Kirby asks the plethysmograph testing requirement of community custody be remanded to specify it is strictly for compliance testing. Brief of Appellant at 16-18; CP 24. As it appears on the judgment and sentence, the condition exceeds permissible authority because it requires Mr. Kirby "[s]ubmit to polygraph and/or plethysmograph testing upon direction of your CCO." CP 24. The condition must be limited to a requirement for submission to such tests when asked by a treatment provider, not at the behest of the CCO. The CCO's scope of authority is limited to ordering plethysmograph testing for the purpose of sexual deviancy treatment and not for monitoring purposes. *State v. Johnson*, 184 Wn. App. 777, 781, 340 P.3d 230 (2014).

The State agrees the testing should be limited to treatment purposes and DOC should be made aware its use of the plethysmograph as such. Brief of Respondent at 15. Remand is appropriate to accomplish the agreed relief.

3. Remand is necessary to correct the scrivener's errors on the dates of the offenses listed on the judgment and sentence.

The State concedes remand is necessary to correct scrivener's errors. Brief of Respondent at 16-17. The judgment and sentence lists the wrong incident dates for the offenses. CP 4-5, 12, 39-42.

4. The State will not request appellate costs.

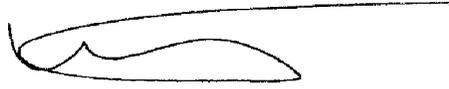
The State agrees it will not request appellate costs if Mr. Kirby does not substantially prevail on appeal. Brief of Respondent at 16.

B. CONCLUSION

The State's misstatement of reasonable doubt and its burden of proof in closing argument requires reversal of Mr. Kirby's convictions.

In the alternative, Mr. Kirby's case should be remanded to define and limit DOC's use of the plethysmograph testing and correct the judgment and sentence scrivener's errors as to the date of the offenses.

Respectfully submitted May 2, 2017.

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LISA E. TABBUT/WSBA 21344
Attorney for Douglas Kirby

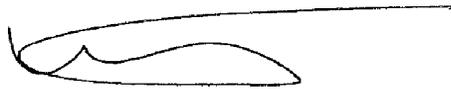
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Reply Brief to (1) Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Douglas Kirby/DOC#766513, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

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

Signed May 2, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Douglas Kirby, Appellant

LISA E TABBUT LAW OFFICE
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