

FILED
Court of Appeals
Division II
State of Washington
8/24/2018 4:34 PM

No. 50888-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

YVETTE YAMAUCHI,

Appellant.

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

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

A. ARGUMENT 1

 1. *The argument constituted misconduct.* 1

 2. *Ms. Yamauchi is entitled to reversal because the misconduct prejudiced her.* 2

B. CONCLUSION..... 4

TABLE OF AUTHORITIES

CASES

<i>In re Pers. Restraint of Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	3
<i>State v. Allen</i> , 182 Wn.2d 364, 341 P.3d 268 (2015)	3
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988), <i>aff'd</i> , 119 Wn.2d 711, 837 P.2d 599 (1992).....	3
<i>State v. Classen</i> , 143 Wn.App. 45, 176 P.3d 582 (2008)	3
<i>State v. Guenther</i> , 2017 WL 2445520 (June 6, 2017)	1

A. ARGUMENT

The Prosecutor's argument was not a reasonable inference and constituted misconduct.

1. *The argument constituted misconduct.*

The State's statement of facts implicitly concedes there was no evidence presented that Ms. Yamauchi was five feet tall. Brief of Respondent at 1-6. Instead, the State argues the prosecutor's argument was a reasonable inference because the suspect was the same height as the security stanchion and Ms. Yamauchi was a suspect, *ergo* she was the person in the video. Brief of Respondent at 7-8. This argument puts the cart before the horse; it assumes Ms. Yamauchi committed the offenses.

Further, the State cites an unpublished decision, *State v. Guenther*, for the proposition that the argument was not misconduct. 2017 WL 2445520 (June 6, 2017). There were in fact three separate instances of misconduct by the prosecutor in *Guenther* alleging arguing facts not in evidence. In fact, in *Guenther* there were sufficient facts, *albeit* tenuous, that supported a reasonable inference. *Id.* Further, the arguments by the prosecutor regarding facts that simply were not relevant to the issues before the jury. Finally, at least one of the

arguments *was* misconduct because there was no evidence to support it, but the Court deemed the error was harmless.

Here, there was no evidence concerning Ms. Yamauchi's height introduced at trial. The fact of being five feet tall was critical evidence for the jury since the issue before the jury was identity. To the extent the jury could observe Ms. Yamauchi in the courtroom during the trial, there was nothing for the jury to compare Ms. Yamauchi's height to. Ms. Yamauchi was not asked her height, the State did not produce her driver's license, which presumably would have had her height listed, and the jury had nothing to compare Ms. Yamauchi's height. The prosecutor's argument was misconduct.

2. *Ms. Yamauchi is entitled to reversal because the misconduct prejudiced her.*

Initially, the State argues Ms. Yamauchi was required to seek a curative instruction. Brief of Respondent at 15. The State is in error. Ms. Yamauchi objected to the misconduct. Thus, she did not have to request a curative instruction. *State v. Allen*, 182 Wn.2d 364, 381, 341 P.3d 268 (2015) ("Allen is required to request a curative instruction only if he did not timely object"); *State v. Classen*, 143 Wn.App. 45, 64, 176 P.3d 582 (2008).

To the extent the State is arguing the existing instructions cured the error, the State is again wrong. “If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), *aff’d*, 119 Wn.2d 711, 837 P.2d 599 (1992). Here, as argued, there was no evidence to support the argument. In addition, Ms. Yamauchi’s initial objection was sustained putting the prosecutor on notice of the misconduct.

Finally, the State argues Ms. Yamauchi was not prejudiced because the prosecutor’s argument was not misconduct. Brief of Respondent at 15-16. This conflates the two steps; misconduct and prejudice. The Court reaches prejudice once it determines the argument was misconduct.

In fact, Ms. Yamauchi was prejudiced by the argument. “[T]he question is whether there is a substantial likelihood that the instances of misconduct affected the jury’s verdict.” *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012). “The focus must be on the misconduct and its impact, not on the evidence that was properly admitted.” *Id.*

As argued in the previously filed Brief of Appellant, the issue in the case was identity; who was the person in the video from the store admitted by the State. The prosecutor's argument told the jury Ms. Yamauchi was the same height as the security stanchion, thus she was the person who committed the offenses. Since this was *the* issue in the case, the prosecutor's claim established this element for the jury in the absence of any evidence. Ms. Yamauchi suffered prejudice from the argument and is entitled to reversal and remand for a new trial.

B. CONCLUSION

For the reasons stated, Ms. Yamauchi asks this Court to reverse her conviction and remand for a new trial.

DATED this 24th day of August 2018.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 610

Seattle, WA. 98101

(206) 587-2711

tom@washapp.org

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 50888-5-II
)	
YVETTE YAMAUCHI,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF AUGUST, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KELLY RYAN, DPA	()	U.S. MAIL
CLARK COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
[prosecutor@clark.wa.gov]	(X)	E-SERVICE VIA PORTAL
PO BOX 5000		
VANCOUVER, WA 98666-5000		
[X] YVETTE YAMAUCHI	(X)	U.S. MAIL
1000 N ANCHOR WAY	()	HAND DELIVERY
APT 209	()	_____
PORTLAND, OR 97217		

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF AUGUST, 2018.

X  _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

August 24, 2018 - 4:34 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50888-5
Appellate Court Case Title: State of Washington, Respondent v. Yvette Yamauchi, Appellant
Superior Court Case Number: 15-1-02520-1

The following documents have been uploaded:

- 508885_Briefs_20180824163244D2489141_5112.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.082418-05.pdf

A copy of the uploaded files will be sent to:

- cntypa.generaldelivery@clark.wa.gov
- kelly.ryan@clark.wa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180824163244D2489141