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No. 51254-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES GORMAN-LYKKEN

Appellant.

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

REPLY BRIEF OF APPELLANT

KATE BENWARD
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-271

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A. ARGUMENT IN REPLY

1. The trial court's denial of Mr. Gorman-Lykken's request for a continuance was a due process violation that deprived him of a fair trial.

The prosecutor wrongly claims that Mr. Gorman-Lykken requested a continuance solely to consult an expert in somnambulism. Respondent's Brief at 15. The record shows that after the trial court dismissed Mr. Gorman-Lykken's proffer of an expert as not meeting the *Frye* test, Mr. Gorman-Lykken argued generally about the fact that there could be a "cocktail" of other drugs that the toxicology test could illuminate:

THE COURT: That was just a proposal for research, so what that says is there's absolutely nothing out in the scientific community that would make this meet any of those criteria.

MR. DEBRAY: She was also under the influence or at least potentially under the influence of a cocktail of other drugs. She had recently been in a car accident and she also had some alcohol on board. How much alcohol on board we don't know because of the tox screen not being available.

RP 10.

The trial court focused only on the issue of whether Mr. Gorman-Lykken's proffered expert met the *Frye* criteria, ignoring the larger issue of Mr. Gorman-Lykken's right to have the results of the toxicology test. This was an abuse of discretion that deprived Mr. Gorman-Lykken of due process.

Mr. Gorman-Lykken maintained that Ms. Kunkle did not accurately describe her drug use, but he was unable to obtain this evidence in support of his defense. On appeal, the prosecutor does not appear to dispute that the substances Ms. Kunkle consumed that night remained unknown at trial. Respondent's Brief at 4 (stating the possibility that Ms. Kunkle was "stupid drunk," the term Sergeant Kirk Wiper attributed to Mr. Gorman-Lykken's description of her level of intoxication). The fact that the toxicology tests could have supported Mr. Gorman-Lykken's claim that Ms. Kunkle did not accurately report her drug intake, including what he claimed was her non-prescribed use of Adderall, a stimulant, prejudiced him at trial because the SANE nurse was able to extensively opine about the effect of the drugs based only on what Ms. Kunkle reported that she took the night before.

The question is not, as claimed by the State, whether the trial outcome would have been different "had the witness testified." Brief of Respondent at 17 (citing *State v. Lane*, 56 Wn. App. 286, 296, 786 P.2d 277 (1989)). In *Lane*, the defense requested additional time to locate an informant-witness it claimed was crucial to its defense. *Id.* But it was unknown in *Lane* whether the missing witness could be found with more time, and the defense could not "make any guaranties of success." *Id.* at 297. Here, the toxicology report had been sent off for expedited testing,

and the prosecutor believed it could be obtained by the day of the requested trial date. RP 9. Thus there was no probability calculation in assessing whether the missing evidence could be obtained by the time of trial as in *Lane*. And here the prosecutor's expedited effort to have the test results analyzed before trial leaves no doubt this evidence was relevant. Because this evidence was central to the disputed issue at trial, the trial court erred in denying Mr. Gorman-Lykken the opportunity to obtain this evidence.

The court's refusal to let Mr. Gorman-Lykken obtain the toxicology results deprived him of his constitutional due process and fair trial right, where the question about Ms. Kunkle's drug use and the accuracy of her self-reported consumption was so central to Mr. Gorman-Lykken's defense.

2. The “to convict” instruction relieved the prosecution of having to prove every element of the offense beyond a reasonable doubt.

- a. There is no question that this instructional error was manifest constitutional error.

The erroneous “to convict” instruction relieved the State from having to prove **each** element (1) and (2), instead requiring it only prove **either** of the elements beyond a reasonable doubt. CP 29. This was a clear misstatement of law that undermined the foundational requirement of due

process that “protects the accused against conviction except upon proof beyond a reasonable doubt” *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art I, § 22.

This error is manifest because the trial record is sufficient to establish that Mr. Gorman-Lykken was prejudiced by this misstatement of the State’s burden of proof. As described in *O’Hara*, for an error to be “manifest” under RAP 2.5(a)(3) there must be a showing of actual prejudice, which is defined as a “plausible showing...that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009), *as corrected* (Jan. 21, 2010). “Actual prejudice” exists when it is “so obvious on the record that the error warrants appellate review.” *Id.* at 99–100.

In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *Id.* “To determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *Id.* at 100.

Here is abundantly clear from the record on appeal that there was a prejudicial error in the “to convict” instruction. What the prosecutor calls a

“scrivener’s error” was a key word that misinformed the jury that the State was not required to prove each element beyond a reasonable doubt.

Respondent’s Brief at 20. Certainly a trial court would have corrected this clearly identifiable error because the error is readily apparent and so constitutionally significant. It thus falls squarely into the category of an erroneous “to convict” instruction that is manifestly apparent and affects a constitutional right, requiring review by this Court under RAP 2.5(a)(3).

- b. The State cannot establish beyond a reasonable doubt that this error did not affect the verdict.

Because the instruction was a misstatement of the law of constitutional magnitude, it is the State’s burden to show the erroneous instruction did not affect the outcome at trial by proof beyond a reasonable doubt. *See e.g. State v. Grimes*, 165 Wn. App. 172, 186, 267 P.3d 454 (2011) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (the State has burden to show harmless error beyond a reasonable doubt)). The State simply cannot meet that burden.

The State asserts, based on *State v. Smith*, that because the failed “to convict” instruction includes all “essential elements,” the court can review it in combination with the other jury instructions. Brief of Respondent at 21 (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). But *Smith* does not support this claim. Though *Smith* involved

an omitted element in a “to convict” instruction, in Mr. Gorman-Lykken’s case, the error is a legal misstatement about the State’s burden of proof, and so the underlying principle underscored in *Smith* applies: “the jury has the right... to regard the ‘to convict’ instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand.” *Smith*, 131 Wn.2d at 263.

It is irrelevant that Mr. Gorman-Lykken was able to argue his theory of the case, as claimed by the prosecutor on appeal, when after this argument, the jury was told in the “to convict” instruction that the prosecutor did not have to prove the very element that defense counsel argued in closing argument. Respondent’s Brief at 23. Especially because the jury was instructed that the lawyer’s arguments are not evidence, and that they “must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” CP 19.

The State cannot establish that this manifest error in the “to-convict” instruction, which relieved the State from having to prove *each* element beyond a reasonable doubt, is harmless error.

3. The corrections officer singled Mr. Gorman-Lykken while he testified, which was an intolerable erosion of the presumption of innocence; the court's failure to examine the justification for such a drastic security procedure requires reversal.

The trial court failed to examine the necessity of a corrections officer singling Mr. Gorman-Lykken out by moving to sit near him when he testified. The court's failure to exercise discretion requires reversal of his conviction.

A corrections officer sat near Mr. Gorman-Lykken through trial, and then moved to sit near him when he testified. This movement of the corrections officer to sit near Mr. Gorman-Lykken when he testified was an impermissible "reminder of the defendant's special status" which deprived Mr. Gorman-Lykken of a fair trial, requiring reversal. *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 1346, 89 L. Ed. 2d 525 (1986).

The prosecutor tries to liken Mr. Gorman-Lykken's case to *State v. Butler*, but in *Butler*, the court found the officer's presence in the courtroom did not "suggest that this was anything other than just another security measure." *State v. Butler*, 198 Wn. App. 484, 489, 394 P.3d 424 (2017), *review denied*, 189 Wn.2d 1004, 400 P.3d 1261 (2017). Nevertheless, the *Butler* court also instructed the jury that the presence of the officer was a part of a routine shift change, which would have

dispelled any possibility that the jury would have thought the extra security measure was directed at the defendant. *Id.* at 489-490.

By contrast, here, the trial court recognized that the corrections officer's presence next to Mr. Gorman-Lykken had already singled him out, noting that it was not "any surprise" to the jury what the corrections officer was doing in the courtroom. RP 342. There can be no doubt that the corrections officer moving to sit near Mr. Gorman-Lykken when he testified only amplified the message to the jury that he was "dangerous or untrustworthy." *Holbrook*, 475 U.S. at 567; RP 342-343.

The court noted that the jail policy required corrections staff "to be in close proximity to somebody who is testifying." RP 342. The court was then required to exercise its discretion to determine if this invasive security measure that so drastically undermined Mr. Gorman-Lykken's right to a fair trial was "necessary to maintain order and prevent injury." *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981). The trial court's observation that the corrections officer on duty that day was smaller than other officers was not a valid exercise of this discretion because it did not address the need for the extreme security measure in light of Mr. Gorman-Lykken's right to be presumed innocent. RP 341.

The court's denial of Mr. Gorman-Lykken's right to be presumed innocent without a balancing of the need for such a drastic security measure requires reversal. *Butler*, 198 Wn. App. at 493.

4. The prosecutor's numerous instances of misconduct were flagrant, ill-intentioned, and could not have been cured by an instruction.

The prosecutor attempts to minimize and justify the individual instances of misconduct throughout closing argument and rebuttal, but the sheer amount and variety of the misconduct that permeated the entirety of the argument, from closing through rebuttal, could not have been cured by an instruction.

Even if this Court agreed with the prosecutor that the individual claim that Mr. Gorman-Lykken "got up on the stand and lied" was not alone misconduct, this singular accusation must be placed within the context of the prosecutor's disparagements of defense counsel and the defense theory, and the mischaracterization of Mr. Gorman-Lykken's testimony. *See State v. Lindsay*, 180 Wn.2d 423, 438, 326 P.3d 125 (2014) (Given that comment, in context with the "crook" accusation and the "sit here and lie" argument, we hold that the prosecutor in this case impermissibly expressed his personal opinion about the defendant's credibility to the jury); *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (a court reviews allegedly improper statements in the context

of the entire argument, the issues in the case, the evidence, and the jury instructions).

A prosecutor “may not express a personal opinion with comments intended to incite the passion of the jury.” *State v. Stith*, 71 Wn. App. 14, 21, 856 P.2d 415 (1993). Here, the prosecutor’s blatant mischaracterization of the defense theory was precisely this, as was the prosecutor’s claim that Mr. Gorman-Lykken was putting Ms. Kunkle on trial by cross-examining her.

On appeal, the prosecutor continues to insist that Mr. Gorman-Lykken advanced the objectionable theory that “drug addicts can’t be raped” to the jury, without citation to the record, claiming: “Defense counsel argued in closing that the victim was both a drug addict and a liar. The argument’s imputation was that she was not raped because she was a drug addict.” Respondent’s Brief at 33; RP 443. This continues to be an inaccurate and inflammatory misstatement of Gorman-Lykken’s argument regarding Ms. Kunkle’s credibility. Brief of Appellant at 38-41. This repeated misstatement about the defense theory is simply not a reasonable inference from the facts concerning witness credibility as claimed by the prosecutor on appeal. Respondent’s Brief at 34.

The prosecutor’s explanation about how the prosecutor might have had a different concept of the term “recent” in regard to the fact that

Randy Kunkle came forward with his testimony the day before trial is not supported by the record. RP 386-387; Brief of Appellant at 35-38. And even if this disagreement about the timing of Mr. Kunkle coming forward had merit, this different perception of this evidence would still not justify the prosecutor's open disparagement of defense counsel's argument to be "as false as the accusations or testimony that the defendant gave." RP 440.

The prosecutor on appeal also fails to address the blatant misrepresentation of Mr. Gorman-Lykken's testimony and the law of consent. Brief of Appellant at 41-43.

The prosecutor mischaracterized the evidence and arguments of defense counsel in a way that improperly inflamed the jury and expressed his personal opinion through disparaging the defendant, defense counsel, and the defense theory. These instances of prosecutorial misconduct cannot be treated in isolation; as a whole they were so flagrant and ill-intentioned that no instruction could have cured them, because they lasted from closing argument through rebuttal, and ranged from blatant mischaracterization of defense counsel's conduct, to misstating evidence and the law. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (despite the defendant's failure to object, "the misconduct ... was so pervasive that it could not have been cured by an instruction.").

5. *State v. Ramirez* requires this Court to strike the \$200 filing fee.

Since Mr. Gorman-Lykken filed his opening brief, our State Supreme Court ruled that a trial court may not impose a criminal filing fee on an indigent person like Mr. Gorman-Lykken.

As argued in Mr. Gorman-Lykken's opening brief, in 2018, the law on legal financial obligations changed. Now, it is categorically impermissible to impose any discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). This includes the previously mandatory \$200 filing fee. LAWS OF 2018, ch. 269, § 17(2)(h).

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 426 P.3d 714, 722 (2018). In other words, the statute applies to cases pending on appeal even though the statute was not in effect at time of the trial court's decision to impose legal financial obligations. *Id.* Applying the change in the law, *Ramirez* ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.* Accordingly, this fee must be stricken from Mr. Gorman-Lykken's judgment and sentence.

B. CONCLUSION

Mr. Gorman-Lykken was deprived of core constitutional protections throughout his trial. The trial court's errors and prosecutor misconduct merit reversal on independent grounds, and when considered cumulatively, there can be no question that these errors denied Mr. Gorman-Lykken a fair trial and violated his constitutional rights, requiring reversal and remand for a new trial.

DATED this 19th day of November, 2018.

Respectfully submitted,

s/ Kate Benward
Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
E-mail: katebenward@washapp.org

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