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No. 86033-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AARON OLSON,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

SUPPLEMENTAL BRIEF OF PETITIONER AARON OLSON

LILA J. SILVERSTEIN
Attorney for Petitioner Aaron Olson

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

ORIGINAL

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A. ISSUES PRESENTED

1. Constitutional violations require reversal unless the State proves beyond a reasonable doubt that the error did not contribute to the verdict obtained. Nonconstitutional errors, on the other hand, result in reversal only where the defendant proves prejudice. In this case, the State violated Mr. Olson's constitutional right to due process by stating in closing argument that the jury was required to convict unless it could provide a reason for acquittal. Must the State bear the burden of proving beyond a reasonable doubt that its due process violation did not contribute to the verdict obtained?

2. A trial court should grant a motion to sever defendants if necessary to achieve a fair determination of the guilt or innocence of a defendant. Where a defendant demonstrates that the prejudice inflicted by a joint trial outweighs concerns of judicial economy, severance is appropriate. Specific prejudice may be demonstrated by showing antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive. Where Mr. Olson's defense was that the prosecution "got the wrong guy" and he was not involved at all, but his co-defendant's defense was that both he and Mr. Olson committed the acts in question with the victim's consent, did the trial court abuse its discretion in denying

multiple motions to sever defendants, requiring reversal and remand for a new trial?¹

B. STATEMENT OF THE CASE

Petitioner Aaron Olson and co-defendant Anthony Emery were charged with multiple crimes for an incident that occurred on February 27, 2006. CP 72-73, 252-94. They were tried together notwithstanding Mr. Olson's repeated motions to sever defendants. 1/6/09 RP 58; 1/8/09 RP 84; 1/15/09 RP 621-23; 1/20/09 RP 780-81.

During closing argument, the prosecutor told the jury that its job was to "speak the truth," and that the truth was Mr. Olson was guilty. The prosecutor also admonished the jurors that in order to acquit the defendants, they had to say, "I doubt the defendant is guilty and my reason is _____." 1/21/09 RP 830-32; CP 246. The prosecutor told the jurors they had to "fill in the blank with a reason" if they found the defendants not guilty. 1/21/09 RP 830-32; CP 246. The prosecutor purported to be explaining the court's instruction on the burden of proof:

What is a reasonable doubt? Jury Instruction Number 3 defines it. ... What it means is, in order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in the blank.

¹ For this issue, Mr. Olson relies on his argument in the petition for review.

1/21/09 RP 829-30. While saying the above to the jury, the prosecutor presented the following PowerPoint slide:

WHAT IT SAYS

A doubt for which a reason exists

In order to find the defendant not guilty, you have to say:

"I doubt the defendant is guilty, and my reason is _____."

And you have to fill in the blank

CP 246; see also Appendix A (full-size slide).

Mr. Olson and his co-defendant were convicted on all counts as charged. CP 339. On appeal, Mr. Olson argued, *inter alia*, that the prosecutor committed flagrant misconduct in closing argument when he told the jury it had to start with a presumption of guilt and could not acquit unless it filled in the blank with a reason. The Court of Appeals agreed that the prosecutor committed flagrant misconduct, but affirmed on the basis that Mr. Olson did not prove prejudice.

C. ARGUMENT

The constitutional harmless error standard must be applied where prosecutors invert the presumption of innocence and tell juries they cannot acquit unless they provide a reason for doing so.

1. The Court of Appeals has properly held that Pierce County's systematic use of a fill-in-the-blank closing argument constitutes flagrant and ill-intentioned misconduct. Every prosecutor is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is misconduct for a prosecutor to suggest a shift in the burden of proof during a criminal trial. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 547 (1990) (holding prosecutor committed misconduct by stating defense attorney "would not have overlooked any opportunity to present admissible, helpful evidence"); "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The Pierce County Prosecutor's Office violated this fundamental principle of due process as a matter of course, making the fill-in-the-blank argument in many criminal trials over a long period of time. See State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied 245 P.3d 226 (2010); State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010), review denied 245 P.3d 226; State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied 249 P.3d 1029 (2011); State v. Emery, 161 Wn. App. 172, 253 P.3d 413 (2011), review granted 253 P.3d 413; State v. Evans, 163 Wn. App. 635, 260 P.3d 934 (2011); State v. Sakellis, ___ Wn. App. ___, ___ P.3d ___, WL 4790918 (No. 37588-5-II, filed 10/4/11); State v. Walker, ___ Wn. App. ___, ___ P.3d ___ (No. 39420-1-II, filed 11/8/11). The Court of Appeals has correctly held that the argument is improper, and that the error may be raised for the first time on appeal because the misconduct is flagrant and ill-intentioned. E.g., Venegas, 155 Wn. App. at 524-25; Johnson, 158 Wn. App. at 684-86.²

Telling the jury that in order to acquit it must "fill in the blank" with a reason constitutes a flagrant violation of due process.

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find the defendant not guilty, the prosecutor made it seem as though the jury had to find the defendant guilty unless it could come up with a

² Because the argument violates due process, the error may also be raised for the first time on appeal under RAP 2.5(a)(3). State v. Moreno, 132 Wn. App. 663, 672 n.26, 132 P.3d 1137 (2006).

reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper.

Venegas, 155 Wn. App. at 524. The fill-in-the-blank argument “subverted the presumption of innocence” and shifted the burden of proof by implying “that the defendant bore the burden of providing a reason for the jury not to convict him.” Johnson, 158 Wn. App. at 684. “Washington has long recognized the ‘in order to find the defendant not guilty’ argument as flagrant and ill-intentioned.” Anderson, 153 Wn. App. at 433 (Quinn-Brintnall, J., concurring in the result).

2. Because the prosecutor’s argument created a presumption of guilt and shifted the burden of proof, the constitutional harmless error standard applies. Where a prosecutor commits misconduct but does not violate the defendant’s constitutional rights, the defendant bears the burden of proving a substantial likelihood that the misconduct affected the jury’s verdict. See, e.g., State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (defendant bore burden of proving prejudice where prosecutor committed misconduct by violating evidentiary ruling); State v. Jones, 144 Wn. App. 284, 300, 183 P.3d 307 (2008)). (defendant bore burden of proving prejudice where prosecutor committed misconduct by bolstering witness’s credibility and arguing facts not in evidence); State v. Echevarria, 71 Wn. App. 595, 598-99, 860 P.2d 420 (1993) (defendant

bore burden of proving prejudice where prosecutor committed misconduct by inflaming jury's passions).

But where a prosecutor violates a defendant's constitutional rights, the State bears the burden of proving beyond a reasonable doubt the misconduct did not contribute to the verdict obtained. See, e.g., Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendants' exercise of constitutional right to silence); Monday, 171 Wn.2d at 680 (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor engaged in racial stereotyping in violation of constitutional right to impartial jury); State v. Moreno, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendant's exercise of his constitutional right to proceed pro se).

The constitutional harmless error standard applies to this case because the prosecutor violated a core constitutional right. The Fourteenth Amendment guarantees the twin rights to presumption of innocence and proof beyond a reasonable doubt. U.S. Const. amend. XIV; Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972) (presumption of innocence); Winship, 397 U.S. at 364 (burden of proof).

These rights form the bedrock of our criminal justice system. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). “This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.” Id. at 316.

Thus, a jury instruction misdescribing the reasonable doubt standard is one of the few errors subject to automatic reversal without any showing of prejudice. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). It is the type of error which “infect[s] the entire trial process, and necessarily render[s] a trial fundamentally unfair.” Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).³

A prosecutor’s flagrant misrepresentation of the court’s reasonable doubt instruction is arguably an even more insidious violation, and if not structural error must at least be subject to the constitutional harmless error standard. The State in this case told the jury that the court’s instruction defining reasonable doubt required them to “fill in the blank with a reason” if they found the defendants not guilty, but that the court would

³ And when a jury instruction lowers the prosecution’s burden of proof as to a single element of the crime, the constitutional harmless error standard applies. The State must prove beyond a reasonable doubt the error did not contribute to the verdict obtained. Neder, 527 U.S. at 15; State v. Mills, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005); State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996); State v. McCullum, 98 Wn.2d 484, 498, 656 P.2d 1064 (1983). Furthermore, the error may be raised for the first time on appeal. Mills, 154 Wn.2d at 6; Deal, 128 Wn.2d at 698; McCullum, 98 Wn.2d at 487-88.

not require them to do any work to find the defendants guilty. 1/21/09 RP 829-30; CP 46. He reiterated, "If you think that you have a doubt, you must fill in that blank. ... That is what the law requires." 1/21/09 RP 830. The imprimatur of both the government and the judiciary was thus placed on this assignment to fill in the blank with a reason in order to acquit. See Evans, 163 Wn. App. at 940 ("The prosecutor's arguments in closing cleverly mixed requests for the jury to "hold me to the burden of proof exactly" with subtle twists of the jury's role and the State's burden of proof").

The Illinois Supreme Court addressed a similar instance of misconduct in People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432 (1966). There, the prosecutor "represented to the jury that it was the burden of the defendant to present evidence creating a reasonable doubt of her guilt." Id. at 469. The Court rejected the State's argument that the misconduct issue was not preserved for review, noting it "will consider errors not properly preserved ... where their nature is such as to deprive an accused of his constitutional rights." Id. at 471. The prosecutor's misconduct deprived the accused of her constitutional rights to the presumption of innocence and proof beyond a reasonable doubt. Id. at 469-70. This was so despite the fact that the jury instructions were correct and other parts of closing argument were proper. Id. at 471. The Court reversed and

remanded for a new trial because “[d]oubt as to [the misconduct’s] harmful effect must be resolved in favor of the defendant.” Id. at 472.

In a Michigan case, the prosecutor in closing argument stated that she had “prepared about eleven questions” for defense counsel to answer in his closing argument, and asked the jury to “pay attention” to see if he “adequately answers those questions in your mind.” People v. Green, 131 Mich. App. 232, 234-35, 345 N.W.2d 676 (1984). She proceeded to ask questions like why the defendant had a gun and why he matched the description of the suspect. Id. at 235. The Michigan Court Appeals held this closing argument constituted misconduct: “a prosecutor may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof.” Id. at 237. After finding misconduct, the court applied the constitutional harmless error standard. “An error such as this is reversible where it is unduly offensive to the maintenance of a sound judicial system or, if not so offensive, the error is not harmless beyond a reasonable doubt.” Id.

Division One properly applied the constitutional harmless error standard where the prosecutor stated in closing argument that “there was no evidence to explain” why the defendant was present at the scene of the crime. State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294

(1995). The court recognized the misconduct was constitutional error because the prosecutor “commented on [the defendant’s] decision not to testify and shifted the burden of proof to the defense.” Id. Thus, the State had to prove beyond a reasonable doubt the error was harmless. Id. at 729.

Mr. Olson and Mr. Emery both exercised their constitutional rights to testify, so there is no issue regarding a comment on the right to silence. However, the fact that the defendants testified renders the prosecutor’s burden-shifting argument even more dangerous, because the implication that the defendants were required to provide the “reason” with which to “fill in the blank” is stronger. Yet an accused person is presumed innocent throughout trial regardless of whether he testifies, and he does not forfeit his Fourteenth Amendment right to the presumption of innocence by exercising his constitutional right to take the stand. Nor does he assume a burden of persuasion by testifying. The prosecutor’s implication to the contrary constituted a flagrant violation of Mr. Olson’s Fourteenth Amendment rights.

In sum, “the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system” not to apply the constitutional harmless error standard when the State subverts it. Bennett, 161 Wn.2d at 317-18. The State must prove beyond a reasonable

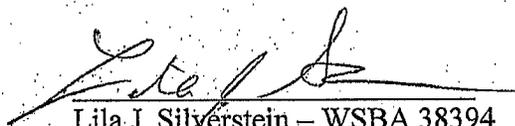
doubt its subversion of the presumption of innocence and shifting of the burden of proof did not contribute to the verdict obtained.

3. The State cannot prove beyond a reasonable doubt that its misconduct did not contribute to the verdict obtained. In Mr. Olson's case, the State cannot meet its heavy burden to disprove prejudice. The victim chose only Mr. Emery in a photo montage and identified only Mr. Emery as her assailant in court. 1/12/09 RP 145, 154; 1/13/09 RP 346-48. The latent fingerprints collected from the scene were connected with Mr. Emery, not Mr. Olson. 1/13/09 RP 403. And although the crime lab reported that Mr. Olson's DNA was found on G.C.'s clothing, Mr. Olson testified that the lab made a mistake and that he was wrongly accused. 1/20/09 RP 725-26, 733. This statement is supported by the victim's reports that the caucasian attacker had blond hair and was about 5'8". 1/12/09 RP 173-74. Aaron Olson is over six feet tall and has always had red hair. 1/20/09 RP 710. Yet the victim, who is herself 5'9", described the white assailant as 5'8" with blond hair. 1/8/09 RP 100. As to Mr. Olson, the State cannot prove beyond a reasonable doubt that its subversion of the presumption of innocence and shifting of the burden of proof did not contribute to the verdict obtained.

D. CONCLUSION

For the reasons set forth above and in his petition for review, Mr. Olson respectfully requests that this Court reverse his convictions and remand for a new trial at which his case will be severed from that of Mr. Emery.

Respectfully submitted this 21st day of November, 2011.



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Petitioner Aaron Olson

APPENDIX A

PowerPoint slide prosecutor
showed jury during closing argument
(CP 246)

WHAT IT SAYS

A doubt for which a reason exists

In order to find the defendant not guilty, you
have to say:

“I doubt the defendant is guilty, and my
reason is _____.”

And you have to fill in the blank

