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2010 MAR 25 PM 5:01

No. 63544-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

EDGAR D. AMAYA ROCHEZ,

Appellant.

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

The Honorable Jay V. White

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY COMMENTING ON MR. ROCHEZ'S FAILURE TO CALL A WITNESS TO CORROBORATE HIS TESTIMONY, REQUIRING REVERSAL.

The prosecutor committed misconduct by commenting on Mr. Rochez's failure to call his cousin to corroborate his testimony that he was not living with the cousin at the time of the incident. In closing argument, the prosecutor argued that Mr. Rochez should have called his cousin to corroborate his testimony that he was not living with his cousin at the time of the incident. "[W]e haven [sic] heard from his cousin who he said he didn't live with, but who he wouldn't talk about." 3/25/08 RP 120-21. This argument improperly shifted the burden of proof to Mr. Rochez by suggesting that he was required to prove his innocence by presenting corroborating evidence. Moreover, this argument was raised only after both parties had rested, at which time Mr. Rochez had no opportunity for rebuttal or explanation.

"A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise." *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008); accord *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009) ("It is

improper to imply that the defense has a duty to present evidence.”). Accordingly, a prosecutor may not invoke the “missing witness doctrine” unless (1) the missing witness’s potential testimony is material and not cumulative, (2) the witness is particularly available to the defendant, (3) the witness’s absence is not satisfactorily explained, (4) the State’s argument does not shift the burden of proof, and (5) the argument is “raised early enough in the proceedings to provide an opportunity for rebuttal or explanation.” *Montgomery*, 163 Wn.2d at 598-99; accord *State v. Blair*, 117 Wn.2d 479, 488-90, 816 P.2d 718 (1991).

The State now contends the prosecutor merely argued that Mr. Rochez was not credible because of his testimony, rather than because he failed to produce corroborating evidence. Br. of Resp. at 17. This contention is demonstrably incorrect from the record. See 3/25/08 RP 120-21. The prosecutor clearly challenged Mr. Rochez’s credibility both because of his failure to call his cousin as well as because of his testimony.

The State attempts to distinguish *Toth, supra*, by characterizing the prosecutor’s argument in that case as an “extended invective” that contained “a deliberate and inflammatory remark.” Br. of Resp. at 16. Yet the “missing witness doctrine” is

not limited to extended invective or deliberate inflammatory remarks. Rather, the well-established limitations on the doctrine prohibit prosecutorial comments that shift the burden of proof to the defendant and the comments are made too late in the proceedings to provide an opportunity for rebuttal or explanation, as in the present case. See *Montgomery*, 163 Wn.2d at 598-99; *State v. Dixon*, 150 Wn. App. 46, 55, 207 P.3d 459 (2009). It may be noted, with the exception of *Blair, supra*, none of the cases relied upon by the State involve the missing witness doctrine. The State's distinctions are inapt.

The prosecutor's improper comments require reversal. Prosecutorial misconduct that implicates the constitutional right to have the State prove its case beyond a reasonable doubt is presumed prejudicial and requires reversal unless it is harmless beyond a reasonable doubt. *Toth*, 152 Wn. App. at 614-15; accord *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1975). The primary defense theory was that Mr. Rochez lived with Ms. Smith and accordingly had lawful authority to enter the apartment. The prejudice of the comment was manifested by the statements of several jurors to defense counsel after the verdict

questioning why Mr. Rochez had not called his cousin to testify.

See CP 76 (Certification of Counsel).

The State argues the prosecutor's comments on the missing witness were not prejudicial because the evidence established Ms. Smith tried to keep Ms. Rochez out of the apartment and because Mr. Rochez was angry when he was refused entry. Br. of Resp. at 18-19. However, this evidence merely described the incident, and did not answer whether Mr. Rochez was actually living at the apartment. The State's argument is not persuasive.

The misconduct was not harmless beyond a reasonable doubt. Reversal is required.

B. CONCLUSION

The prosecutor's comment on Mr. Rochez's failure to call his cousin to corroborate his testimony was improper and prejudicial. For the foregoing reasons and the reasons set forth in the Brief of Appellant, Mr. Rochez respectfully requests this Court reverse his conviction for burglary in the first degree and remand for a new trial.

DATED this 25th day of March 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S.M.H.', with a stylized flourish extending from the end.

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