

63681-2

63681-2

NO. 63681-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD BARKHOFF,

Appellant.

FILED
DEC 10 2009
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Jeffrey Ramsdell, Judge

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DEC 10 PM 4:31

OPENING BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| <u>Issues Pertaining to Assignments of Error</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 2 |
| 1. <u>Procedural Facts</u> | 2 |
| 2. <u>Substantive Facts</u> | 3 |
| C. <u>ARGUMENT</u> | 5 |
| 1. IN FAILING TO INSTRUCT THE JURY TO BEGIN DELIBERATIONS ANEW AFTER AN ALTERNATE JUROR WAS SEATED, THE COURT VIOLATED BARKHOFF’S RIGHT TO A UNANIMOUS VERDICT..... | 5 |
| 2. REVERSAL IS ALSO REQUIRED BECAUSE THE COURT FAILED TO ENSURE THE ALTERNATE JUROR REMAINED IMPARTIAL AND PROVIDE THE PARTIES NOTICE AND AN OPPORTUNITY TO BE HEARD. | 7 |
| a. <u>The Court Erred in Failing to Ensure the Impartiality of the Alternate Juror and Provide a Hearing</u> | 8 |
| b. <u>By Replacing a Juror Without a Hearing to Ensure Impartiality, the Court Violated Barkhoff’s Constitutional Rights to Be Present, to Assistance of Counsel, and to an Impartial Jury</u> | 9 |
| 3. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT VIOLATED BARKHOFF’S RIGHT TO A FAIR TRIAL. | 12 |
| a. <u>The Prosecutor Misstated the Law and Diminished the Burden of Proof By Telling the Jury It Should Search for Truth, Not Reasonable Doubt</u> | 12 |

TABLE OF CONTENTS (CONT'D)

| | Page |
|--|------|
| b. <u>The Prosecutor's Distortion of the Burden of Proof Was So Flagrant and Ill-Intentioned It Could Not Have Been Cured by Instruction</u> | 16 |
| D. <u>CONCLUSION</u> | 18 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Ashcraft
71 Wn. App. 444, 859 P.2d 60 (1993)..... 6, 7, 8, 9, 10, 11

State v. Belgarde
110 Wn.2d 504, 755 P.2d 174 (1988)..... 12, 16

State v. Bennett
161 Wn.2d 303, 165 P.3d 1241 (2007)..... 13, 17

State v. Caliguri
99 Wn.2d 501, 664 P.2d 466 (1983) 11

State v. Davenport
100 Wn.2d 757, 675 P.2d 1213 (1984)..... 13, 14

State v. Davis
141 Wn.2d 798, 10 P.3d 977 (2000) 10

State v. Fire
145 Wn.2d 152, 34 P.3d 1218 (2001)..... 10

State v. Fleming
83 Wn. App. 209, 921 P.2d 1076 (1996)..... 12

State v. French
101 Wn. App. 380, 4 P.3d 857 (2000)..... 12

State v. Hicks
163 Wn.2d 477, 181 P.3d 831 (2008)..... 10

State v. Johnson
137 Wn. App. 862, 155 P.3d 183 (2007)..... 9

State v. McHenry
88 Wn.2d 211, 558 P.2d 188 (1977)..... 13

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|---|----------------|
| <u>State v. Parnell</u> 77 Wn.2d 503, 463 P.2d 134 (1969) | 10 |
| <u>State v. Petrich</u> 101 Wn.2d 566, 683 P.2d 173 (1984)..... | 5 |
| <u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984)..... | 12 |
| <u>State v. Ronald Miller</u> Court of Appeals Number 63367-8-I (10/22/2009)..... | 16 |
| <u>State v. Stanley</u> 120 Wn. App. 312, 85 P.3d 395 (2004)..... | 6, 7, 8, 9, 11 |
| <u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008)..... | 14 |
| <u>FEDERAL CASES</u> | |
| <u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... | 13 |
| <u>Kentucky v. Stincer</u> 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) | 8, 10 |
| <u>McDonough Power Equip., Inc. v. Greenwood</u> 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) | 9 |
| <u>Sullivan v. Louisiana</u> 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)..... | 13 |
| <u>United States v. Gagnon</u> 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) | 10 |
| <u>United States v. Pine</u> 609 F.2d 106 (3d Cir. 1979) | 15 |

TABLE OF AUTHORITIES (CONT'D)

Page

United States v. Shamsideen
511 F.3d 340 (2d Cir. 2008) 15

United States v. Wilson
160 F.3d 732 (D.C. Cir. 1998)..... 15

OTHER JURISDICTIONS

Commonwealth v. Perez
30 Mass. App. Ct. 934, 569 N.E.2d 836 (1991)..... 11

People v. Chang
129 A.D.2d 722, 514 N.Y.S.2d 484 (1987) 14

People v. Harbold
124 Ill. App. 3d 363, 464 N.E.2d 734 (1984)..... 14

State v. Purnell
126 N.J. 518, 601 A.2d 175 (1992) 14, 15

RULES, STATUTES AND OTHER AUTHORITIES

CrR 6.5..... 1, 2, 5, 7, 9

U.S. Const. amend. 5 8

U.S. Const. amend. 6 8, 9

U.S. Const. amends 14..... 8, 9

Wash. Const. art. 1, § 3 8, 9

Wash. Const. art. I, § 21 5

Wash. Const. art. 1, § 22 8, 9

A. ASSIGNMENTS OF ERROR

1. The court erred in replacing a deliberating juror with an alternate without instructing the jury to begin deliberations anew.

2. Appellant was denied his constitutional right to a unanimous jury.

3. The court erred in replacing a deliberating juror with an alternate without ensuring the alternate juror remained impartial and providing appellant an opportunity to be heard.

4. Appellant was denied his constitutional right to an impartial jury.

5. Appellant was denied the constitutional right to be present at all critical stages of the proceedings.

6. Appellant was denied the constitutional right to assistance of counsel at a critical stage of the proceedings.

7. Prosecutorial misconduct denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. When a deliberating juror is replaced with an alternate, CrR 6.5 requires the trial court to protect the constitutional right to a unanimous jury by instructing the jury to disregard all prior deliberations and begin deliberations anew. Must appellant's convictions be reversed

because a deliberating juror was replaced and there is no record the jury was properly instructed?

2. CrR 6.5 also contemplates a formal proceeding with the opportunity to question the alternate juror to ensure impartiality has been maintained. Must appellant's convictions be reversed because the trial court failed to ensure the alternate juror remained impartial and denied appellant any opportunity to be heard?

3. Prosecutors may not misstate the law thereby diminishing the burden of proof beyond a reasonable doubt. Here, the prosecutor told the jury it should search for truth, not reasonable doubt. Did prosecutorial misconduct deprive appellant of a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged Clifford Barkhoff with first-degree robbery, first-degree burglary, second-degree taking a motor vehicle without permission, second-degree theft, and unlawful imprisonment. CP 18-20. Deadly weapon enhancements were also charged on three of the counts. CP 18-20. A jury found Barkhoff guilty as charged, but the court granted a mistrial as to the deadly weapon enhancements when the jury could not reach a verdict. CP 108-11. The court sentenced Barkhoff to

concurrent sentences totaling 150 months. CP 143. Notice of appeal was timely filed. CP 151.

2. Substantive Facts

Clifford Barkhoff agreed to have sexual relations with E.H. in exchange for money. Ex. 31.¹ Barkhoff and E.H. agreed that for their second encounter, Barkhoff would recruit a friend to join them. 13RP² 37. Instead, Barkhoff invited two friends and agreed with them to take E.H.'s money and leave without performing the agreed-upon services. Ex. 31.

Barkhoff tried to limit the violence that ensued, but admitted putting E.H. in a chokehold and holding him still while his friend bound E.H.'s feet and hands with duct tape. Ex. 31. The other two punched E.H. repeatedly. 13RP 50-51, 57. At Barkhoff's request, E.H. told them the location of his wallet and car keys and revealed his bank pin number. 13RP 59, 63. Barkhoff then left to withdraw money using E.H.'s card. Ex. 31.

While Barkhoff was gone, the other two threatened E.H. with a knife, poured pine-sol around the home as if preparing to set it on fire, and took E.H.'s laptop computers and briefcase. 13RP 67-72. When E.H. told

¹ A supplemental designation of clerk's papers and exhibits was filed on Dec. 8, 2009.

² There are 17 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Apr. 2, 2008; 2RP – Nov. 18, 2008; 3RP – Nov. 24, 2008; 4RP – Dec. 1, 2008; 5RP – Dec. 2, 2008; 6RP – Dec. 3, 2008 (morning session); 7RP – Dec. 3, 2008 (afternoon session); 8RP – Dec. 4, 2008; 9RP – Dec. 8, 2008; 10RP – Dec. 9, 2008; 11RP – Dec. 10, 2008; 12RP – Dec. 11, 2008; 13RP – Dec. 15, 2008; 14RP – Dec. 16, 2008; 15RP – Dec. 17, 2008; 16RP – Dec. 18, 2008; 17RP – May 8, 2009.

them his roommate would be coming home soon, they locked him in the basement. 13RP 76, 81.

Barkhoff returned from his trip to the bank and left the car only a few blocks from E.H.'s home because he did not know his way around the neighborhood and could not drive E.H.'s standard-transmission car. Ex. 31. Later, Barkhoff used E.H.'s card to withdraw \$300. Ex. 31. E.H. was able to exit through a basement door and alert his neighbors to call the police. 13RP 84-89.

Defense counsel argued Barkhoff and his friends were "knuckleheads" with no real intent to do harm. 15RP 66, 69. During closing argument, the prosecutor told the jury, "Your job is to search for the truth in this matter and not to search for reasonable doubt, but to search for the truth." 15RP 64.

Deliberations began on December 17, 2008. 15RP 89-91. The jury deliberated from 2:30 p.m. until 4:00 p.m. that day. Supp. CP ____ (sub no. 60F 12/1/08). The next day, a snowstorm caused court to be delayed by two hours. 16RP 3. One of the jurors was unable to reach the courthouse due to the snow. 16RP 3.

When counsel for the parties arrived at 2:20 p.m. that day, the court informed them that the alternate juror had been contacted and that the newly constituted jury had been deliberating since before noon. 16RP 3-4.

According to the minutes, deliberations started at 11:40 a.m. Supp. CP ____ (sub no. 60F 12/1/08). There is no record regarding whether the jury was instructed to begin deliberations anew, disregarding prior deliberations. Nor is there any record of whether the alternate juror had remained impartial during his temporary discharge.

C. ARGUMENT

1. IN FAILING TO INSTRUCT THE JURY TO BEGIN DELIBERATIONS ANEW AFTER AN ALTERNATE JUROR WAS SEATED, THE COURT VIOLATED BARKHOFF'S RIGHT TO A UNANIMOUS VERDICT.

Washington's constitution guarantees no one will be convicted of a crime except upon a unanimous jury verdict. Const. art. 1, § 21; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). To that end, when a deliberating juror is replaced with an alternate, the court must instruct the jury on the record to "disregard all previous deliberations and begin deliberations anew." CrR 6.5;³ State v. Stanley, 120 Wn. App. 312, 318, 85

³ CrR 6.5 provides in relevant part:

Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that jurors ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations. Such alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

P.3d 395 (2004); State v. Ashcraft, 71 Wn. App. 444, 463, 466 n.10, 859 P.2d 60 (1993). The failure to instruct the jury to begin deliberations anew is manifest constitutional error. Ashcraft, 71 Wn. App. at 467. Reversal is required unless the appellate court can determine from the record that jury unanimity has been preserved. Id. at 462, 465.

The facts of this case are strikingly similar to State v. Ashcraft. 71 Wn. App. 444. In that case, deliberations began on December 18, 1990, and lasted approximately three hours. Id. at 450. Due to inclement weather, deliberations did not resume until noon on December 21. Id. At that time, the minutes noted that a juror who had a flight to Belgium was replaced with the alternate. Id. At 3:22 p.m. that day, the jury reached a verdict. Id. The record did not show whether or not the trial court had instructed the jury to disregard prior deliberations after the arrival of the alternate. Id. at 464.

The court was “substantially . . . troubled” by the trial court’s seating of an alternate juror without a record of reinstruction. Id. at 460. It rejected the State’s argument that the record did not affirmatively show the court had *not* properly reinstructed the jury. Id. at 464-65. Instead, the court held the appellate court “must be able to determine *from the record* that jury unanimity has been preserved.” Id. at 465. The court concluded the failure to instruct the jury on the record to begin deliberations anew was reversible error of constitutional magnitude. Id. at 464.

Ashcraft compels the holding in this case. The jury deliberated for approximately an hour and a half before adjourning on the first day. Supp. CP ____ (sub no. 60F 12/1/08). Without consulting the parties, the court replaced an unavailable juror with an alternate. Supp. CP ____ (sub no. 60F 12/1/08); 16RP 3. As in Ashcraft, the court failed to make any sort of record as to whether the jury was properly instructed to disregard prior deliberations. Id. This error of constitutional magnitude requires reversal of Barkhoff's convictions. Ashcraft, 81 Wn. App. at 467; see also Stanley, 120 Wn. App. at 318.

2. REVERSAL IS ALSO REQUIRED BECAUSE THE COURT FAILED TO ENSURE THE ALTERNATE JUROR REMAINED IMPARTIAL AND PROVIDE THE PARTIES NOTICE AND AN OPPORTUNITY TO BE HEARD.

CrR 6.5 also requires the court to ensure that, during the intervening time of a temporary discharge, the alternate juror has remained impartial. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60 (1993). The rule "clearly contemplate[s] a formal proceeding which may include brief voir dire." Ashcraft, 71 Wn. App. at 462. Before replacing a juror with an alternate, the court must at least make reasonable efforts to obtain the input of the parties. Id. at 467.

These rules implicate the right to an impartial jury, the right to be present at all critical stages of the proceedings, and the right to assistance of

counsel. Stanley, 120 Wn. App. at 466 n.10; Ashcraft, 71 Wn. App. at 463. See also U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (even when not actually confronting witnesses, defendant has constitutional right to be present in person whenever presence is substantially related to the opportunity to defend).

Here, the court failed to ensure the alternate juror was still impartial after his temporary discharge. The court likewise denied Barkhoff and his counsel the opportunity to be present or present argument. Because the court disregarded these rules designed to protect Barkhoff's constitutional rights, this Court should reverse his conviction and remand for a new trial.

a. The Court Erred in Failing to Ensure the Impartiality of the Alternate Juror and Provide a Hearing.

The failure to ensure impartiality of the alternate juror and provide a hearing is error. Stanley, 120 Wn. App. at 318. In Stanley, a juror called in sick on the second day of deliberations, and the court called in the alternate. Stanley, 120 Wn. App. at 313. The record did not indicate whether Stanley or his attorney was present for the replacement procedure, whether the jury was instructed to begin deliberations anew, or whether the alternate juror was questioned to ensure he had remained impartial. Stanley, 120 Wn. App. at 313. The court noted, "[T]his was error." Id. Although the did not decide

whether this error required reversal, the court found the trial court “compounded the error by not seeking out the parties to obtain input before seating the alternate juror.” Id. at 318.

The Ashcraft court also expressed its concern about the failure to provide a hearing. Providing a hearing would protect the accused’s constitutional right to be present at all critical stages of the proceedings. Ashcraft, 71 Wn. App. at 466 n.10. The court concluded the trial court “should have made a reasonable effort to contact the parties through their counsel to obtain their input” before seating the alternate juror. Id. at 467. As in Stanley, the court did not need to decide whether this ground alone required reversal, but noted, “The failure to make this effort was error.” Id.

b. By Replacing a Juror Without a Hearing to Ensure Impartiality, the Court Violated Barkhoff’s Constitutional Rights to Be Present, to Assistance of Counsel, and to an Impartial Jury.

The right to an impartial jury is guaranteed in both the United States and the Washington constitutions. U.S. Const. amend. 6, 14; Const. art. I, §§ 3, 22. At the beginning of a trial, voir dire of potential jurors protects the right to an impartial jury by exposing biases. State v. Johnson, 137 Wn. App. 862, 869, 155 P.3d 183 (2007) (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)). The additional voir dire contemplated by CrR 6.5 is no different. While the

scope of voir dire is generally within the trial court's discretion, reversal is required when the court abused its discretion and prejudiced the defendant's right to a fair trial by an impartial jury. State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000). That is the case here.

“Not only should there be a fair trial, but there should be no lingering doubt about it.” State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). The right to effective assistance of counsel must also be preserved during voir dire. See, e.g., State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008) (holding counsel's performance during voir dire was deficient). Additionally, accused persons enjoy the right to be present in person whenever presence has a substantial relation to the ability to defend. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Such a substantial relation may be established when the defendant's presence “would have been useful in ensuring a more reliable determination.” Stincer, 482 U.S. at 747. Just as with jury unanimity, the court should be able to determine from the record that the rights to presence, counsel and an impartial jury were preserved. Ashcraft, 71 Wn. App. at 465. This Court should reverse Barkhoff's convictions because the court failed to take even the minimal steps of briefly questioning the alternate juror on the record in the presence of the parties to ensure impartiality was maintained.

The Massachusetts appellate court has held that replacing a deliberating juror without a hearing is reversible constitutional error. Commonwealth v. Perez, 30 Mass. App. Ct. 934, 569 N.E.2d 836 (1991). In Perez, the trial judge replaced a missing juror, stating only that she was sick, and instructed the jury to start deliberations over. Id. at 934-35. However, neither defense counsel, nor the defendant, nor the prosecutor was present for this event. Id. The court held, “a proceeding to hear evidence of a juror’s illness and possible replacement requires the defendant’s presence.” Id. The court set aside the verdict and reversed the judgment because the lower court erred in discharging the juror and violated the defendant’s right to be present. Id.

In Washington, courts have concluded ex parte contact between a judge and deliberating jury is presumptively prejudicial. Ashcraft, 71 Wn. App. at 463-64 (citing State v. Caliguri, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983)). “Where the only persons with knowledge of what took place are the judge who erred and the jurors affected by the error, the argument for a conclusive presumption of error has more force.” Caliguri, 99 Wn.2d at 509. Even without a presumption, the court’s ex parte action in this case requires reversal because it deprived Barkhoff of any opportunity to ensure the alternate juror remained impartial. Stanley, 120 Wn. App. at 318; Ashcraft, 71 Wn. App. at 466. Barkhoff had a constitutional right to be

present, at least through counsel, to ensure that the replacement of the juror was necessary and that the alternate juror remained impartial. The failure to contact Barkhoff before replacing the unavailable juror requires reversal.

3. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT VIOLATED BARKHOFF'S RIGHT TO A FAIR TRIAL.

- a. The Prosecutor Misstated the Law and Diminished the Burden of Proof by Telling the Jury It Should Search for Truth, Not Reasonable Doubt.

Prosecutorial misconduct is established when 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 at trial, 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); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of objection does not preclude appellate review. Fleming, 83 Wn. App. at 216. 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).

In this case, the prosecutor misstated the law by telling the jury to search for the truth, not to search for reasonable doubt. 15RP 64. Within our criminal justice system, justice is served by the search for reasonable doubt. The prosecutor misled the jury by suggesting the search for reasonable doubt was contrary to a search for truth.

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) (quoting In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). For that reason, the failure to give clear instruction on reasonable doubt is not only error, it is a “grievous constitutional failure” mandating reversal. McHenry, 88 Wn.2d at 214; Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Here, the court gave a correct instruction, but the prosecutor misstated the law. Rather than acknowledging that reasonable doubt is the bedrock of our criminal justice

system, the prosecutor portrayed reasonable doubt as a defense ploy to obfuscate the truth.

A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt); People v. Harbold, 124 Ill. App. 3d 363, 371, 464 N.E.2d 734, 742 (1984) ("[A]rguments which diminish the presumption of innocence are forbidden.")

Other jurisdictions have specifically condemned the practice of implying that the reasonable doubt standard is inimical to truth. "[T]he prosecutor's statement that the trial was 'a search for the truth-not a search for reasonable doubt' was clearly improper." People v. Chang, 129 A.D.2d 722, 723, 514 N.Y.S.2d 484, 485-86 (1987). The New Jersey Supreme Court also warned that an instruction suggesting that the "concept of reasonable doubt is a simple search for truth may run the risk of detracting from both the seriousness of the decision and the State's burden of proof." State v. Purnell, 126 N.J. 518, 545, 601 A.2d 175, 187-88 (1992).

The reasonable doubt standard has long been recognized “as the best means to achieve the ultimate goals of truth and justice.” United States v. Shamsideen, 511 F.3d 340, 347 (2d Cir. 2008). Therefore, if it is necessary in a criminal case to identify for the jury one “single, crucial, hard-core question,” that question “should be framed by reference not to a general search for truth, but to the reasonable doubt standard.” Id. Instructing the jury to search for truth is inconsistent with the burden of proof beyond a reasonable doubt. United States v. Wilson, 160 F.3d 732, 747 (D.C. Cir. 1998) (observing potential inconsistency between jury instruction to “determine where the truth lies” and burden of proof beyond a reasonable doubt); United States v. Pine, 609 F.2d 106, 108 (3d Cir. 1979) (instructing jury “[y]our basic task is to evolve the truth” could “dilute and thereby impair the constitutional requirement of proof beyond a reasonable doubt”).

In this case, the prosecutor detracted from the seriousness of the jury’s decision and from the State’s burden of proof by arguing, “Your job is to search for the truth in this matter and not to search for reasonable doubt, but to search for the truth.” 15RP 64; Purnell, 126 N.J. at 545. This argument should be condemned because it told the jury that the reasonable doubt standard is inimical to the truth, rather than the best means to achieve it. Shamsideen, 511 F.3d at 347.

b. The Prosecutor's Distortion of the Burden of Proof Was So Flagrant and Ill-Intentioned It Could Not Have Been Cured by Instruction

The prosecutor undermined the burden of proof beyond a reasonable doubt by telling the jury to look for the truth instead. This improper argument requires reversal because it was so flagrant and ill intentioned that an instruction could not have cured the prejudice. Belgarde, 110 Wn.2d at 508.

This misconduct was ill-intentioned because it is well-established that prosecutors may not diminish the burden of proof. Fleming, 83 Wn. App. at 214. (holding prosecutor's argument flagrant and ill-intentioned because it was made over two years after the argument had been declared improper).⁴ Misstatements of law pertaining to the burden of proof beyond a reasonable doubt 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). Although jurors are instructed to disregard any argument not supported by the court's instructions,⁵ they are also instructed to consider the lawyers' remarks

⁴ Additionally, this misstatement does not appear to be unintentional, as the same prosecutor made virtually the same argument in State v. Ronald Miller, Court of Appeals Number 63367-8-I, Brief of Appellant filed 10/22/2009.

because they are “intended to help you understand the evidence and apply the law.” CP 70. The standard reasonable doubt instructions are not a model of clarity. See Bennett, 161 Wn.2d at 317 (recognizing that even under the pattern instructions, reasonable doubt is difficult to explain). Therefore, jurors would be particularly tempted to follow the prosecutor’s approach, to search for truth instead of reasonable doubt.

An objection to the prosecutor’s argument that the jury should search for truth, not reasonable doubt, would have been useless. By objecting, defense counsel would have confirmed the prosecutor’s implicit allegation that the defense does not want the jury to know the truth. The defense would have appeared to be hiding behind “technicalities” such as reasonable doubt. The prosecutor’s argument boxed the defense into a corner. This misstatement of the bedrock of criminal justice requires reversal of Barkhoff’s conviction.

⁵ See CP 70 (“You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.”).

D. CONCLUSION

For the foregoing reasons, this Court should reverse Barkhoff's convictions and remand for a new trial.

DATED this 10th day of December, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 63681-2-I |
| |) | |
| CLIFFFORD BARKHOFF, |) | |
| |) | |
| Appellant. |) | |

FILED
CLERK OF COURT
STATE OF WASHINGTON
2009 DEC 10 PM 4:31

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CLIFFFORD BARKHOFF
DOC NO. 307720
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*