

64742-3

64742-3

VS

NO. 64742-3-I

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

2011 JUN 24 11:06 AM  
COURT REPORTER  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD MOORE,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT  
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct violated appellant's right to a fair trial.

Issue Pertaining to Assignment of Error

Did prosecutorial misconduct deprive appellant of a fair trial when the prosecutor argued the defense had not presented an alternative explanation for the facts, improperly shifting the burden of proof?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County prosecutor charged appellant Richard Moore with second-degree assault with a deadly weapon and alleged he was armed with a deadly weapon for purposes of the deadly weapon sentence enhancement. CP 42. The jury found him guilty and found by special verdict that he was armed with a deadly weapon. CP 23, 24. The court imposed the maximum sentence permitted under the standard range and the mandatory enhancement for a total of 24 months.

2. Substantive Facts

Todd Johnson, Moore's neighbor at a clean and sober house in Bellingham, testified Moore banged on his door, demanded to know where his scales were, and stabbed him in the chest. RP 122-128. Michelle

Leininger claimed to have heard the entire altercation from an enclosed porch area where she was hiding. RP 43-49.

Moore lived at Sunset House, a clean and sober house just outside Bellingham. RP 99-101. Todd Johnson lived in the room next door. RP 35. When Moore was away, he permitted Michelle Leininger to stay in his room in exchange for keeping an eye on his things. RP 34, 36. Other than this arrangement, the two did not know each other well. RP 90-91. Moore made one attempt at a romantic overture, but when she turned him down, he was considerate and respected her wishes. RP 41-42. The two had also discussed the possibility of her moving in as Moore's roommate because the rent was going up. RP 37.

Late in the evening of June 1, 2009, Johnson testified he heard a loud banging or thumping on his door. RP 122. Leininger, who was on his enclosed porch, assumed it was Moore at the door, and, not wanting to see him, quickly told Johnson to say she was not there. RP 47. The thumping continued, and Johnson answered the door, while Leininger remained unseen on the porch. RP 122-23.

According to Johnson, Moore asked where the girls were, and Johnson dutifully told him they had all left. RP 123. He testified Moore then asked where his scales were. RP 126. Johnson claimed he knew Moore's scales were missing earlier in the day, but had not been involved in

that incident. RP 125. He claimed to be unaware of any “beef” Moore might have had with him. RP 147. Standing in the doorway with Moore, there was no warning, Johnson testified; he simply felt what he initially thought was a punch. RP 126-27. Then he saw a stream of blood shoot out from his chest onto the floor and knew he had been stabbed. RP 128. Leininger and Johnson both called 911. RP 50, 135. Johnson was treated in the emergency room for a critical four-inch knife wound to the chest. RP 62-63.

Johnson initially told police he saw Moore stab him in the chest with a fixed blade knife. RP 164-65, 167. But at trial, Johnson contradicted himself, testifying he did not see the blow, but did see Moore fold up a folding knife and return it to his pocket. RP 129-30, 167. Johnson also claimed Moore simply left and went back to his own room after the stabbing, yet no blood was found in or near Moore’s room. RP 130-31, 176.

Moore was later arrested walking along a street a couple of miles from Sunset House. RP 21, 29. Another resident testified Moore routinely carried a knife, but the knife used to attack Johnson was never found. RP 103. The arresting officer saw no blood on Moore. RP 27. Photographs of Moore’s hands showed two “specks,” on his fingernails that the deputy claimed appeared to be blood. RP 174. There was no evidence they were ever tested to verify that assumption. RP 182.

Only Johnson and Leininger identified Johnson's assailant.

Leininger never saw the assailant. RP 50-51. She simply assumed it was Moore, with whom she had only spent a total of a few hours time in her entire life, before even hearing his voice. RP 90-92. Johnson had previously been convicted of two crimes of dishonesty, and admitted he may have smoked marijuana the day of the incident. RP 145, 161.

The defense theory of the case was that Leininger was likely mistaken as to her identification of Moore and Johnson was simply not credible given the lack of physical evidence and the contradictions in his testimony. RP 208-212. But according to the prosecutor, merely poking reasonable holes in the State's case was not sufficient for the jury to convict.

In rebuttal, the prosecutor began, "If there are other plausible theories of the defense, the one person that could present those to you is unable to; that's the defense counsel." RP 217. The prosecutor continued, telling the jury, "She never provided an alternative to that the Defendant did what he's charged with doing." RP 217. Defense counsel objected that this put the burden of proof on the defendant. RP 217. The court responded, "The objection's noted," and the rebuttal continued. RP 217. The objection was not sustained.

Moments later, the prosecutor returned to this theme, arguing, “Is there an alternative explanation even though none has been presented?” RP

218. After the argument was finished, the court stated,

I’ll remind the jury that Instruction Number 3 does state in the first paragraph, ‘The Defendant has no burden of proving that a reasonable doubt exists. As to these elements, the proof lays with the prosecutor.’ Be sure you read the instructions carefully and consider all the terms in those instructions when it says you’re to consider them as a whole when you make your decision.

RP 221.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DEPRIVED MOORE OF A FAIR TRIAL WHEN THE PROSECUTOR SHIFTED THE BURDEN TO MOORE TO DISPROVE THE STATE’S ALLEGATIONS.

The presumption of innocence, and the corresponding burden on the State to prove every element of the offense beyond a reasonable doubt, is “the bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). “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). Therefore, a prosecutor commits misconduct by making arguments that shift the burden of proof to the defense. See State v. Cleveland, 58 Wn. App. 634, 647-48, 794 P.2d 546 (1990) (prosecutor cannot make arguments that shift this burden to the defense).

Where there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict, the defendant is deprived of a fair trial. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Additionally, prosecutorial argument that undermines the burden of proof or attempts to shift the burden to the defendant is misconduct and may deprive the defendant of the fair trial guaranteed by our state and federal constitutions. U.S. Const. amend. VI, XIV; Const. art. 1, §§ 3, 22; State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). 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).

In closing, the prosecutor improperly shifted the burden of proof to Moore by repeatedly suggesting defense counsel should present an alternative explanation. RP 217-18. The prosecutor's comments even more blatantly shifted the burden of proof than the comments that were held improper in Cleveland. 58 Wn. App. at 647. There the prosecutor merely said, "Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you." Id. Yet the

court held the argument was improper, the objection should have been sustained and the argument stricken and the jury instructed to disregard. Id. at 648. The court held reversal was required unless the error was harmless beyond a reasonable doubt. Id. at 648.

Here the prosecutor directly stated, three times, that the defense had failed to provide an alternative explanation. RP 217-18. Even if this court declines to apply a constitutional harmless error standard,<sup>1</sup> this was error and substantially likely to affect the jury's verdict because it directly undermined the defense strategy of pointing out reasonable doubts based on the many weaknesses and inconsistencies in the State's case. If these weaknesses and inconsistencies amounted to reasonable doubt, the jury was required to acquit, regardless of whether defense counsel had presented some alternative explanation. See, e.g., CP 38 (instructing jury that if it has a reasonable doubt as to either element, "it will be your duty to return a verdict of not guilty.")). The prosecutor's argument constitutes reversible misconduct because it deprived Moore of the full benefit of the beyond a reasonable doubt standard and shifted the burden of proof.

It is "particularly grievous" when a prosecutor, an officer of the court misleads the jury as to the presumption of innocence and the burden of proof

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<sup>1</sup> See State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008) (declining to decide whether constitutional harmless error standard applies when prosecutorial misconduct directly violates a constitutional right).

beyond a reasonable doubt. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). In Warren, the prosecutor also repeatedly misstated the burden of proof beyond a reasonable doubt during closing argument, arguing three times that reasonable doubt did not mean give the defendant the benefit of the doubt. 165 Wn.2d at 24-25. The trial court initially overruled the objection, but after the third time gave an instruction specifically correcting the prosecutor's misstatement of the law:

And if in still having a reasonable doubt that is a benefit to the defendant, then in a sense you are giving the benefit of the doubt to the defendant. So I don't want you to misconstrue the language that somehow there is no benefit here. Indeed there is, because the benefit of the doubt is if you still have a doubt after having heard all of the evidence and lack of evidence, if you still have a doubt, then the benefit of that doubt goes to the defendant, and the defendant is not guilty.

165 Wn.2d at 25. The court in Warren concluded that, were it not for the "appropriate and effective" curative instruction, it would not hesitate to find reversible error. 165 Wn.2d at 28.

As in Warren, the improper argument undermining reasonable doubt in this case was repeated three times. 165 Wn.2d at 27; RP 217-18 . First, twice in quick succession, leading to defense counsel's objection, and then a third time after the objection was "noted." RP 217-18. After so much repetition, the idea that the defense should have to present an alternative

explanation of the facts was likely to stay with the jury and influence its assessment of the evidence.

The jury was substantially likely to be misled because, unlike in Warren, there was no “appropriate and effective curative instruction.” 165 Wn.2d at 28; RP 217-21. When counsel objected, the court simply “noted” the objection without sustaining it or in any way correcting the false impression. RP 217. Even when the court attempted to address the issue, belatedly, after the prosecutor had finished rebuttal, the court gave no indication the argument was improper or incorrect. RP 221. The court merely referred the jury to the written instructions, without drawing any connection between that reminder and the prosecutor’s improper argument. RP 221. The court did not explicitly correct the idea that the defense should present an alternative explanation of the facts. RP 221. Moore’s conviction should be reversed because this case presents misconduct just as egregious as that in Warren, but without the curative instruction.

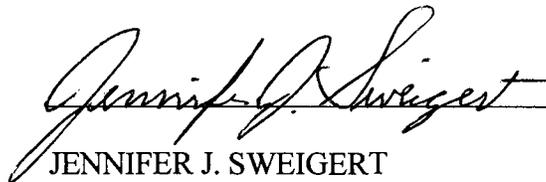
D. CONCLUSION

Because prosecutorial misconduct deprived Moore of the full benefit of the burden of proof beyond a reasonable doubt, Moore requests this Court reverse his conviction and remand for a new trial.

DATED this 24<sup>th</sup> day of June, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert". The signature is written in black ink and is positioned above the printed name.

JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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Respondent,	)	
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RICHARD MOORE,	)	
	)	
Appellant.	)	

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**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 24<sup>TH</sup> DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X]    MACDUFFIE SETTER  
      WHATCOM COUNTY PROSECUTOR'S OFFICE  
      311 GRAND AVENUE  
      BELLINGHAM, WA 98227
  
- [X]    RICHARD MOORE  
      NO. 193526  
      WHATCOM COUNTY JAIL  
      311 GRAND AVENUE  
      BELLINGHAM, WA 98227

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2011 JUN 24 PM 4:06

**SIGNED** IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF JUNE, 2010.

x *Patrick Mayovsky*