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JUN 19 2012
King County Prosecutor
Appellate Unit

NO. 67779-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN PABLO GIRON-CLAROS,

Appellant.

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

The Honorable Mary Yu, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by allowing over defense objection repeated replaying of videotaped testimony of the complaining witness' interview with a child interview specialist.

2. Prosecutorial misconduct deprived appellant of his right to a fair trial.

Issues Pertaining to Assignments of Error

1. The complaining witness gave a videotaped interview with a child interview specialist in which he alleged the appellant touched his penis "lots of times." 9RP¹ 25; Exhibit 6. At trial, the witness alleged sexual contact occurred only once. The videotaped interview was admitted into evidence at trial and played once in open court. Defense counsel repeatedly requested the deliberating jury not be permitted to view the videotape again because it would unduly emphasize the evidence. The trial court declined counsel's request and sent playback equipment to the jurors so they could view the videotape without limitation. Did these replays (1) improperly shift the jury's focus to one portion of the evidence,

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – June 21, 2011; 2RP – June 23, 2011; 3RP – July 5, 2011; 4RP – July 6, 2011; 5RP – July 11, 2011; 6RP – July 12, 2011; 7RP – July 13, 2011 (morning session); 8RP – July 13, 2011 (afternoon session); 9RP – July 14, 2011; 10RP – July 19, 2011; 11RP – July 20, 2011; 12RP – July 21, 2011; 13RP – July 22, 2011; 14RP – September 16, 2011.

(2) cause undue prejudice to the appellant and (3) lend credibility to the complaining witness' allegations in a case where the verdict hinged on the credibility of the complainant and the appellant?

2. During closing argument the prosecutor repeatedly told jurors appellant could have produced witnesses, including an expert, "at no cost to him," to support his theory of the case. 11RP 39-40. Defense counsel twice objected to the comments as "improper burden shifting" and "improper argument." 11RP 40. Both objections were overruled. Is reversal required where the prosecutor's improper arguments shifted the burden of proof to appellant, diminished the beyond a reasonable doubt standard, and created a substantial likelihood the misconduct affected the verdict?

B. STATEMENT OF THE CASE

1. Trial Testimony

Teresa Flores and her five-year-old son, O.F., rented a bedroom in appellant Juan Pablo Giron-Claros' apartment. 6RP 41, 51; 10RP 45. Giron-Claros used a separate bedroom with an attached bathroom. A third bedroom was rented by a couple with a son. Another man slept on the living room couch. 6RP 52; 10RP 47.

Flores sometimes cooked and ate with Giron-Claros. 6RP 55-57; 10RP 74. O.F. also spent time with Giron-Claros. O.F. and Giron-Claros

played a belly tickling game and O.F. played an Xbox in Giron-Claros' bedroom. 6RP 57-58; 10RP 51, 72.

Initially, the bedroom door was left open when O.F. went inside to play Xbox. After several weeks, Flores noticed the door was closed while O.F. was inside. 6RP 58-61; 7RP 36. She assumed the door was closed because Giron-Claros was sleeping. 6RP 58. The door "would open right away" when Flores knocked. 6RP 59; 7RP 36-37. Once she saw Giron-Claros sleeping while O.F. played the Xbox. 6RP 59. Flores never asked O.F. what he did inside the bedroom. She did ask O.F. if Giron-Claros "ever touched him." 6RP 61. O.F. responded, "no, mommy." 6RP 62; 7RP 38.

After she questioned O.F., Flores noticed the bedroom door was sometimes locked while O.F. was inside. 6RP 60-62; 7RP 36. Flores was not concerned because the daughter of Giron-Claros' girlfriend often stayed in the bedroom, and O.F. previously denied any sexual activity. 6RP 62.

One evening, O.F. asked if he could stay at the apartment with Giron-Claros while Flores went to work. O.F. denied Giron-Claros had asked him to stay. Flores let O.F. stay at the apartment instead of taking him to a babysitter. 6RP 64.

The next day, Flores asked O.F. about his evening at the apartment. O.F. said “Pablo wants me to touch his penis all the time.” 6RP 65-68. O.F. told Flores “Pablo” like having his penis touched because it would “get hard.” 6RP 65-66. O.F. did not like feeling pubic hair on his hand. 6RP 66. O.F. said his penis did not “get hard” when “Pablo” touched it. 6RP 66-69.

After O.F.’s disclosure, Flores went to work. 6RP 68, 72. Flores’ boss recommended she take O.F. to a police station, which she did. 6RP 69-70. Flores said O.F. told police that “Pablo” touched his penis and “little tail.” 6RP 78-80. She explained O.F.’s “little tail” was his anus. 6RP 81. The officer understood the allegations involved a roommate touching O.F.’s groin and buttocks. 6RP 4, 7-8.

Child interview specialist Carolyn Webster spoke with O.F. several days later. 8RP 48, 71. Webster showed O.F. nine cards and asked questions to determine whether he knew the difference between a truth and a lie. O.F.’s answers on three cards were incorrect. 9RP 21. She said most five-year-old children answer the truth/lie cards correctly. 9RP 10. Webster had no opinion as to whether O.F. understood the difference between a truth and a lie. 8RP 69; 9RP 14-15.

O.F. told Webster he and “Pablo” would take their clothes off in the bedroom. O.F. touched Pablo’s penis so it would “get hard.” Pablo’s

penis had hairs on it. Exhibit 6. O.F.'s answers to Webster's questions regarding ejaculation were inconsistent. O.F. said it looked like "Pablo" was peeing. He also said nothing came out of "Pablo's" penis. "Pablo" touched O.F.'s penis and bottom with his hands. 9RP 14-16; Exhibit 6. O.F. told Webster the alleged incidents happened "lots of times." 9RP 25; Exhibit 6.

After the interview, a police detective drove O.F. and Flores to the hospital. 6RP 16-17, 27-28. O.F. told pediatrician Rebecca Wiester he touched "Pablo's" penis and it got hard. 8RP 5, 19. O.F. said nothing came out of "Pablo's" penis. 8RP 19. O.F. had his clothes on during the incidents. 8RP 18. O.F. said "Pablo" had touched him in the front and the back. 8RP 18. He denied "Pablo" had touched him with his mouth or put anything inside his body. 8RP 18-19. O.F. had no physical injuries. 8RP 22. Wiester did not ask O.F. how many times the alleged incidents happened. 8RP 31-32. She opined O.F.'s allegations were not "implanted memories" caused by repeated questioning.² 8RP 37-38.

Meanwhile, police arrested Giron-Claros, who agreed to speak with the detective. 6RP 28-32; 9RP 28. Giron-Claros said he enjoyed playing with O.F. because it reminded him of his son. He said he wrestled

² Defense counsel objected and moved to strike Wiester's answer to the prosecutor's direct examination question. The objection was overruled. 8RP 37-38.

with and hugged O.F. 9RP 34-35. Giron-Claros denied any sexual touching occurred between him and O.F. He did not know how O.F. knew he had pubic hair. 9RP 35.

Based on this evidence, the state charged Giron-Claros with one count of first degree child rape and three counts of first degree child molestation. CP 8-10.

At trial, Flores said O.F. disclosed additional details of alleged sexual contact after his interview with Webster. 6RP 85-86. Flores testified her son told her "Pablo" put his mouth on O.F.'s penis and his penis in O.F.'s anus. O.F. said the alleged incidents happened in "Pablo's" bathroom. 6RP 85-86. Flores acknowledged O.F. had once briefly seen pornography on television and once walked in on Flores having sexual intercourse. 7RP 17-18. Flores denied O.F. saw anyone naked during the sexual intercourse incident. 7RP 17.

O.F. testified his mother had told him something about "Pablo," but he could not remember what it was. 7RP 67-68. His trial testimony differed from his interview with Webster. O.F. told jurors he took off his clothes three times in "Pablo's" bedroom. 7RP 60, 64. O.F. said nothing happened after he took his clothes off. 7RP 64. He said he touched "Pablo's" penis with his hands in "Pablo's" bedroom. 7RP 59-60, 69. O.F. did not put his mouth on "Pablo's" penis. 7RP 61. He denied

“Pablo’s” penis “stood up” or “got bigger” when he touched it. 7RP 60-61. O.F. testified “Pablo” touched and put his mouth on O.F.’s penis once. 7RP 58-59, 61. He later denied “Pablo” ever touched his penis or body. 7RP 65. O.F. said “Pablo” never touched his bottom with his hand or penis. 7RP 63.

Giron-Claros denied ever wrestling with O.F. or being alone in a room with him. 10RP 72, 77. He denied saying anything to the detective about O.F. 10RP 70-72. Giron-Claros denied any sexual contact occurred between him and O.F. 10RP 57-58. The detective acknowledged she failed to identify or speak with Giron-Claros’ other tenants. 9RP 36-38.

After hearing the above, a King County jury found Giron-Claros not guilty of first degree child rape and guilty of three counts of first degree child molestation. CP 64-67; 13RP 3-7. The trial court imposed concurrent standard range indeterminate sentences of 105 months to life for each child molestation conviction. CP 68-77; 14RP 7. Giron-Claros timely appeals. CP 79-89.

2. Child Interview Videotape

The videotaped interview of O.F. by Webster was admitted into evidence at trial. Exhibit 6. The exhibit was played once without defense objection before O.F.’s trial testimony. 8RP 74.

Before deliberations, Giron-Claros asked that the jury not be permitted to view the videotape again because doing so would unduly emphasize the evidence. 10RP 66, 83. The court stated the request was premature but indicated it would be inclined to permit the jury to view the videotape in the jury room because it was an admitted exhibit. 10RP 84-85.

The jury did in fact request to view the videotape, and the court permitted the viewing. 11RP 47-48. Giron-Claros again objected and requested that if the trial court allowed the viewing, it play the videotape one time in open court. 11RP 47-50. The court declined Giron-Claros' request, stating:

And I would ordinarily do what you're suggesting, Mr. Flora, if there was anything else on that video that required the Court somehow to cue up a certain portion and only play that certain portion, but given that we only have the DVD that contains the entire video that was admitted I'm going to go ahead and send that back. And it's not the Court's business to inquire whether or not they view it once, twice, 25 times or just a portion. Again, they would be doing the same with a photo or a document. They could have reread all those pieces of paper that went back there five times. 11RP 50.

The court then sent playback equipment to the jury room so the jurors could view the videotape without limitation. 11RP 50-51.

3. Burden Shifting

The defense theory was that O.F.'s allegations were not credible because his testimony regarding the alleged incidents was inconsistent. Counsel argued this point during closing argument. 11RP 23-24, 34. Counsel also asked the jury to consider whether O.F.'s allegations were the result of repeated questioning by adults. Defense counsel stated:

When Detective [Dione] Thompson was on the stand she told us that she had mentioned the thought that Officer [David] Schlaegal was there with her, and as it turns out he wasn't when she was interviewing Mr. Giron-Claros. Well, how did that come about? Well, what she told us was I filled in my memory that he was in the room. Okay, that's perfectly plausible. It kind of happens all the time. But is it possible or likely, it doesn't happen all the time where a five year old not only gets his memory filled in but he gets the memory or a whole hog? [sic] Five year olds aren't different from professional witnesses like Detective Thompson. In fact, they may be even more susceptible to having mom or other people, circumstances put ideas in their head that haven't actually happened. And then they tell it so much that they reach a point where something like that happened. 11RP 22.

Defense counsel also questioned why Flores' boyfriend had not testified at trial: "Where is Hiyell [boyfriend] by the way? How come we haven't heard from him?" 11RP 25. The prosecutor did not object to either argument made by defense counsel.

In rebuttal closing, the prosecutor told the jury to evaluate the defense evidence and testimony "...with the same critical eye that you evaluate any of the State's witnesses." 11RP 39. The prosecutor continued

by stating, “The defendant also can have any witness appear at no cost to him. So when Defense Counsel says where is Hiyell, where is the roommate, they had the opportunity to present that too.” 11RP 39-40. Defense counsel immediately objected to the statements as “improper burden shifting.” 11RP 40. The trial court overruled the objection. 11RP 40.

The prosecutor continued, and the following dialogue occurred:

Prosecutor: Defense Counsel keeps bringing up the notion of an implanted memory. There was no evidence during this trial of an implanted memory, of a mistaken memory or anything of the sort. There is no evidence to support that whatsoever. The defendant could have brought an expert to testify to that issue.

Defense Counsel: Your Honor, that’s clearly improper argument.

The Court: Overruled. Go ahead.

Prosecutor: And that expert could have been made to appear at no cost to him. There is no evidence of an implanted memory.

11RP 40.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO REPEATEDLY VIEW THE VIDEOTAPED INTERVIEW OF O.F. DURING DELIBERATIONS.

a. Replay of the Videotape was Unduly Prejudicial.

Under the Sixth Amendment and Const. article 1, § 22, a defendant is guaranteed the right to a fair trial before an impartial trier of fact. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Before admitting a videotaped replay, the trial court should balance the need to provide relevant portions of testimony against the danger of allowing a witness to testify a second time. State v. Koontz, 145 Wn.2d 650, 657, 41 P.3d 475 (2002). Tape-recorded statements may be replayed only if, in the trial court's discretion, they bear directly on the charge and are not unduly prejudicial. State v. Frazier, 99 Wn.2d 180, 189, 661 P.2d 126 (1983). Whether a tape is unduly prejudicial turns on whether it was "likely to stimulate an emotional response rather than a rational decision[.]" State v. Castellanos, 132 Wn.2d 94, 100, 935 P.2d 1353 (1997) (quoting State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)).

Here, the content of O.F.'s interview with Webster was likely to stimulate an emotional response from the jury rather than a reasoned decision. Moreover, because jurors also heard Webster's live account of the interview, the tape was the only evidence that permitted jurors to hear that

testimony multiple times. Because the videotaped interview contained detailed information about the allegations and the trial court failed to consider the undue prejudice of repeatedly replaying the evidence, the trial court abused its discretion by allowing the jury unlimited access to the evidence.

Frazier and Castellanos are instructive by way of contrast. In Frazier, the court held the trial court did not abuse its discretion by admitting as an exhibit and allowing the jury to twice replay the defendant's taped statement to a police officer during its deliberations. Frazier, 99 Wn.2d at 189-91. In finding allowance of playback of the confession was not an abuse of discretion, Frazier noted that "by admitting the tape recorded exhibit without a playback machine, the trial court judge assured himself that he would be apprised of and would retain some degree of control over the number of times the jury could review that particular piece of evidence." Frazier, 99 Wn.2d at 191.

In reaching its conclusion, the court cited several out-of-state cases for the proposition that taped confessions are simply modern substitutes for statements written in longhand. Frazier, 99 Wn.2d at 190. See, e.g., State v. Gensmer, 235 Minn. 72, 51 N.W.2d 680 (1951), cert. denied, 344 U.S. 824, 73 S. Ct. 24, 97 L. Ed. 642 (1952); People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (1957). But Frazier distinguished between written confessions

and evidence such as depositions which “are said to be too susceptible of undue emphasis beyond the scope of ordinary testimony[.]” Frazier, 99 Wn.2d at 189 (citing People v. Caldwell, 39 Ill. 2d 346, 236 N.E.2d 706 (1968)).

Like Frazier, Castellanos did not involve videotaped witness testimony. Castellanos, 132 Wn.2d at 96-97. Rather, at issue was whether the trial court erred by permitting deliberating jurors’ unlimited access to tape-recordings of drug purchases between Castellanos and a wired confidential informant. Castellanos, 132 Wn.2d at 97-102. Relying primarily on Frazier, and the nature of the evidence, the court upheld the trial court’s decision to permit unlimited access to the tapes by giving the jury a playback machine. Castellanos, 132 Wn.2d at 98-100. The court distinguished between playback of recordings of criminal acts and testimonial exhibits, the latter of which are not permitted because “such documents would, in effect, ‘act as a speaking, continuous witness[.]’” Castellanos, 132 Wn.2d at 101 (quoting Pino v. State, 849 P.2d 716, 719 (Wyo. 1993)). Concluding the tape recordings at issue were not testimonial but rather recordings of the criminal act itself, the court found submitting the recordings to the jury was not an abuse of discretion. Castellanos, 132 Wn.2d at 102.

Finally, State v. Elmore,³ addressed a trial court's decision to permit deliberating jurors unlimited access to audio tapes of the defendant's confession and his interview with police. Elmore, 139 Wn.2d at 295-97. Relying on Castellanos and Frazier, the court found the recordings at issue were non-testimonial and upheld the trial court. Elmore, 139 Wn.2d at 295-97.

Giron-Claros' case is distinguishable from Frazier, Castellanos, and Elmore. Unlike the above cases, here the videotape was not a recording of the criminal act itself, but rather, testimonial evidence from the complaining witness. The defendant's statements to police and those captured via body wire were also unlikely to stimulate the emotional response that five-year-old O.F.'s testimony about alleged sexual abuse could. See United States v. Kennedy, 643 F.3d 1251, 1257 (9th Cir. 2011) (recognizing "evidence relating to the sexual abuse of children is likely to stir emotion[.]"). Accordingly, they were less likely to meet the unfair prejudice test set forth in Castellanos, which was "evidence . . . likely to stimulate an emotional response rather than a rational decision" Castellanos, 132 Wn.2d at 100. Indeed, in neither Frazier, Castellanos nor Elmore did the defendants claim the evidence was unduly prejudicial under that standard, a fact pointed out in Castellanos, at 132 Wn.2d at 100.

³ 139 Wn.2d 250, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000).

Moreover, Frazier, Castellanos and Elmore discuss jury access to *audio* tapes rather than the *video* recording at issue here. The Washington Supreme Court has recognized that videotaped recordings present unique concerns: “The unique nature of videotaped testimony requires trial courts to apply protections against undue emphasis that consider both the effect and the manner of the video replay.” Koontz, 145 Wn.2d at 657. This is because “videotaped testimony allows the jury to hear and see more than the factual elements contained in a transcript.” Koontz, 145 Wn.2d at 655.

Koontz is instructive in this regard. There, the court reversed where the jury was permitted to view videotapes of trial testimony of the defendant, child witness and daycare provider. The court replayed the taped testimony after the jury indicated it would be helpful to bring them out of their deadlock. Koontz, 145 Wn.2d at 651. The entire testimony of all three witnesses was played in open court and the jury was instructed not to unduly emphasize this testimony. Koontz, 145 Wn.2d at 652.

In reversing, the court first noted that “reading back testimony during deliberations is disfavored.” Koontz, 145 Wn.2d at 654 (citing United States v. Portac, Inc., 869 F.2d 1288, 1295 (9th Cir. 1989)). This is because the jury may place undue emphasis on testimony considered a second time at such a late stage in the trial. Koontz, 145 Wn.2d at 654.

The court suggested that the following protections may prevent undue emphasis: replay in open court, court control over replay, and review by both counsel before presentation to the jury. The court further advised that the trial court should also consider the extent to which the jury is seeking to review the facts, the proportion of testimony to be replayed in relation to the total amount of testimony presented and the inclusion of elements extraneous to a witness's testimony. Koontz, 145 Wn.2d at 657. The court also warned that it is "seldom proper to replay the entire testimony of a witness." Koontz, 145 Wn.2d at 657.

Koontz then found that while the trial court did take some precautions (played it in open court, properly instructed the jury), it "failed to consider the improper effect of the video replay and none of the protections it employed could correct this failure." Koontz, 145 Wn.2d at 659. Because the jury was not limited to discrete portions of testimony and it was specifically looking for indications of credibility, "facial expressions and whatnot," they were seeking an "improper repetition of the complete trial testimony of three critical witnesses." Koontz, 145 Wn.2d at 659.

Similarly, in United States v. Binder,⁴ the court held that allowing the jury to replay the child victims' videotaped testimony alleging sexual abuse

⁴ United States v. Binder 769 F.2d 595 (9th Cir. 1985), overruled in part on other grounds by, U.S. v. Morales, 108 F.3d 1031, 1035 (9th Cir. 1997).

by the defendant was an abuse of discretion. 769 F.2d at 600. There, the tape was played in the jury room and the court found that allowing the jury to see and hear the children a second time unduly emphasized that testimony. Binder, 769 F.2d at 601.

While Koontz and Binder involved videotaped testimony not previously admitted into evidence, the legal principles established in those cases should apply here. Like Koontz and Binder, here the trial court failed to consider the improper effect of allowing the jury to replay the videotape of O.F.'s testimony without limitation. The repeated playing of the videotape was not only likely to invoke an emotional response from the jurors given O.F.'s age and his detailed allegations, but it also unduly emphasized this evidence.

Moreover, although the videotape did not contain live trial testimony, it was played at trial and served to supplement both the child's testimony and that of child interview specialist Webster by adding further details. Such evidence was "too susceptible of undue emphasis beyond the scope of ordinary testimony." Frazier, 99 Wn.2d at 189, (citing Caldwell, 39 Ill. 2d at 359, 236 N.E.2d 706). As a consequence, this Court should find the trial court abused its discretion by allowing the jury to hear the emotionally charged evidence repeatedly.

b. The Error Was Not Harmless.

The trial court's error was not harmless given the nature of the evidence in this case. An evidentiary error requires reversal, if within reasonable probability, the error materially affected the verdict. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002).

In Koontz, the court found replaying the videotaped testimony was not harmless because it materially affected the outcome. The court noted there was no physical evidence that tied Koontz to the assault and the testimony that was replayed was directed at the central issue of whether Koontz had an opportunity to commit the assault. Koontz, 145 Wn.2d at 660. Binder likewise found the error was not harmless because no other witnesses corroborated the specific allegations and the defense was a complete denial of the charges. Binder, 769 F.2d at 602.

As in Koontz and Binder, here the jury was allowed "an improper repetition" of O.F.'s testimony. No corroborating witnesses or physical evidence connected Giron-Claros to the alleged incidents. Because there was no physical evidence and Giron-Claros denied the charges, the question was whether Giron-Claros or O.F. was more credible. O.F.'s testimony at trial regarding the number of alleged incidents and where and how they occurred was inconsistent. In contrast, during the 42-minute videotaped interview O.F. alleged incidents had happened "lots of times." Exhibit 6.

The prosecutor emphasized this point during closing argument, and urged the jury to replay the videotaped testimony during deliberation:

Regarding the child interview DVD, don't take my word for what's on there, don't take Defense Counsel's word, watch the DVD again for yourself and pay attention to [O.F.]'s original response to Ms. Webster when she asked did this happen one time or more than one time, and his first response was something about it happened a lot of times. 11RP 40-41.

Given the totality of the circumstances, it is reasonably probable the jury's decision was materially affected by the ability to repeatedly play the evidence. Giron-Claros' convictions should therefore be reversed.

2. THE PROSECUTOR COMMITTED MISCONDUCT BY IMPROPERLY SHIFTING THE BURDEN OF PROOF DURING CLOSING ARGUMENT

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 duty to present favorable evidence, and it is improper for the prosecution to shift the burden of proof and invite the jury to draw an adverse inference from a defendant's failure to produce evidence. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); State v. Cleveland, 58 Wn. App. 634, 647-48, 794 P.2d 546 (1990), rev. denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991).

Where there is 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). 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 federal and State 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).

In closing, the prosecutor improperly shifted the burden of proof to Giron-Claros by suggesting defense counsel should have produced witnesses in support of his defense theory. 11RP 39-40. The prosecutor's repeated comments that Giron-Claros could have produced witnesses, including an expert, "at no cost to him," were as blatant as the burden shifting comments held improper in Cleveland, 58 Wn. App. at 647-49.

There the prosecutor stated, "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." Cleveland, 58 Wn. App. at 647. The court noted, "the inference from this argument is that Cleveland had a duty to present

favorable evidence if it existed.” Cleveland, 58 Wn. App. at 648. The court found the prosecutor’s comments “clearly suggest” Cleveland did not present favorable evidence because none existed. Cleveland, 58 Wn. App. at 647. The court held the argument was improper, and the objection should have been sustained and the argument stricken and the jury instructed to disregard. Cleveland, 58 Wn. App. at 648.

Like Cleveland, Giron-Claros’ timely objections should have been sustained, the comments stricken, and the jury admonished to disregard them. Instead, the prosecutor’s burden shifting directly undermined the defense strategy of pointing out reasonable doubts based on the many weaknesses and inconsistencies in the State’s case. This was substantially likely to affect the jury’s verdict because if these weaknesses and inconsistencies amounted to reasonable doubt, the jury was required to acquit, regardless of whether defense counsel had presented any evidence. See, e.g., CP 47, 50-52 (instructing jury that if it has a reasonable doubt as to any elements of the charges, “it will be your duty to return a verdict of not guilty.”). The prosecutor’s argument constitutes reversible misconduct because it deprived Giron-Claros 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 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 jurors were to give the defendant the benefit of the doubt. Warren, 165 Wn.2d at 24-25. The trial court initially overruled the objections, but after the third objection gave an instruction specifically correcting the prosecutor's misstatement of the law. Warren, 165 Wn.2d at 25. The court concluded that, were it not for the "appropriate and effective" curative instruction, it would not hesitate to find reversible error. Warren, 165 Wn.2d at 28.

As in Warren, the improper argument undermining reasonable doubt in this case was repeated multiple times. Warren, 165 Wn.2d at 27. After so much repetition, the idea that Giron-Claros should have presented witnesses in support of his theory of the case was likely to stay with the jury and influence its assessment of the evidence.

Unlike Warren however, here the jury was substantially likely to be misled because there was no "appropriate and effective curative instruction." Warren, 165 Wn.2d at 28. Despite counsel's timely objections for "improper burden shifting" and "improper argument," the court simply "overruled" the objections without correcting the false impression that Giron-Claros had a duty to present any favorable evidence. 11RP 39-40. This signaled to the

jury that the trial court believed the prosecutor's argument was proper. See State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (trial court's overruling of defense objection and failure to give curative instruction to improper prosecutorial argument "augmented the argument's prejudicial impact by lending its imprimatur to the remarks.").

Giron-Claros' convictions should be reversed because this case presents misconduct just as egregious as that in Warren, but without the curative instruction.

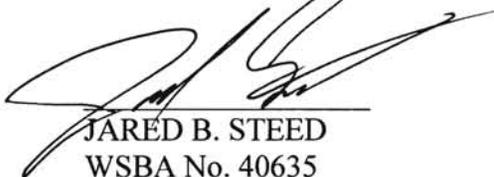
D. CONCLUSION

For the reasons discussed above, Giron-Claros' convictions should be reversed and the case remanded.

DATED this 19th day of June, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 67779-9-1
)	
JUAN PABLO GIRON-CLAROS,)	
)	
Appellant.)	

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 19th DAY OF JUNE, 2012, 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] JUAN PABLO GIRON-CLAROS
DOC NO. 351424
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF JUNE 2012.

x *Patrick Mayovsky*

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