NO. 44221-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DUANE ALLEN MOORE,

Appellant.

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

The Honorable Sally F. Olsen, Judge

REPLY BRIEF OF APPELLANT

RITA J. GRIFFITH
Attorney for Appellant

RITA J. GRIFFITH, PLLC
4616 25th Avenue, #453
Seattle, WA 98105
(206) 547-1742

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A. ARGUMENT IN REPLY

1. RESPONDENT OVERLOOKS THE FACT THAT NEITHER OF THE NEIGHBORS WHO TESTIFIED AT TRIAL CONFIRMED SABRINA MOORE'S DESCRIPTION OF BEING STRANGLED.

The Kitsap County Prosecutor's Office charged Mr. Moore with second degree assault of his estranged wife Sabrina Moore. CP 1-6. The jury was instructed that to convict it had to find that he assaulted her by strangulation. CP 21-35. Mr. Moore was not charged with any other method of assault. CP 1-6. Thus, the issue for the jury was whether the evidence supported a finding, beyond a reasonable doubt, that he strangled Ms. Moore.

Both Mr. Moore and Ms. Moore testified at trial, and it was clear from their testimony that the two argued heatedly on the evening of July 22, 2012. RP 149-150, 168-169; 200-201. They differed on whether strangulation was involved. Mr. Moore denied that he choked his wife. RP 201-203, 207. According to Ms. Moore, however, when the two were outside on the porch, he put one forearm behind her neck and one forearm across her neck in front and applied pressure for about a minute, choking her in that way. RP 172-174. She said they were against the porch railing, not against a solid wall, when this happened. RP 182.

The accounts of Mr. and Ms. Moore differed in other ways as well.

Mr. Moore testified that when he decided to leave with a friend, Ms. Moore followed him outside to continue the argument. RP 204-205. Ms. Moore said that she went inside to call 911. RP 175.

Two neighbors testified as witnesses to the argument, and neither confirmed Ms. Moore's account of a strangulation. Mariah Jacobs, who was about thirty feet away at the time, said that what she saw happened "very, very quickly," but "what really sticks in my mind is he did put her *up against a wall and it looked like he hit her*." RP 189-190 (emphasis added). Although, when asked at trial, she said she thought she had heard the words "he's choking me," she did not describe seeing this. RP 190. She told the police that evening that Mr. Moore held Ms. Moore with one hand and hit her with the other. RP 101. Moreover, she confirmed Mr. Moore's testimony that when Mr. Moore was trying to leave, Ms. Moore followed him and continued to yell at him. RP 192.

When asked if she saw Mr. Moore hitting Ms. Moore, the second neighbor witness, Tobias Gomez, responded inconclusively that she went to the house because of the "commotion" and her dislike of domestic violence. RP 195.

The responding officer testified that he did not observe any injury to Ms. Moore's face. RP 157. Defense counsel noted in closing argument that, in the pictures taken by the officer, Ms. Moore's hair and jewelry

were not in disarray, RP 228, and described the redness at her neck as looking like she were flushed on the warm evening. RP 228.

2. THE PROSECUTOR'S MISCONDUCT IN MISSTATING AND TRIVIALIZING THE STATE'S BURDEN OF PROOF DURING VOIR DIRE AND CLOSING ARGUMENT ROBBED MR. MOORE OF THE PRESUMPTION OF INNOCENCE AND DUE PROCESS, IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The issue of prosecutorial misconduct on appeal is whether trial prosecutor's arguments on reasonable doubt were misconduct because (1) he implied that the state knew more evidence than would be admitted at trial and the jurors should not consider such lack of evidence in determining whether they were convinced beyond a reasonable doubt; (2) he trivialized and misstated the reasonable doubt standard—which is not the same as making everyday decisions or accepting the truth of science we cannot understand or prove; (3) he implied that the jurors' role was to weigh the credibility of the state's witnesses against Mr. Moore's credibility and decide which it found more credible; and (4) he improperly focused the jurors' attention on how certain they would have to be to reach a verdict beyond a reasonable doubt, rather than on what would make them be hesitant to convict.

Contrary to the response by Respondent, all of these errors are supported by the record and the relevant authority. *See* Brief of

Respondent (BOR) at 7-8, 11 n.2.

In *State v. Anderson*, 153 Wn.2d 417, 431-432, 220 P.3d 1273 (2009), and *State v. Johnson,* 158 Wn. App. 677, 686, 243 P.3d 936 (2012), the appellate courts reversed because the prosecutor in each case trivialized the reasonable doubt standard and subverted the presumption of innocence by setting the discussion of it in context of everyday decision-making such as choosing a babysitter or being convinced of what a jigsaw puzzle pictured even without all of the pieces. In *Johnson*, the court reversed even without a trial objection, and noted that engaging in well-recognized forms of misconduct should be deemed flagrant and ill-intentioned. *Id.* The prosecutor's misconduct in voir dire and closing argument in this case were like those in *Anderson* and *Johnson*, and as just as egregious -- if not more so.

The misconduct arose not from voir dire on the issue of whether reasonable doubt required being 100% convinced, as Respondent asserts (BOR at 8-9), but in trivializing the standard and the presumption of innocence in the same ways that have been held to be reversible error in prior cases. In voir dire, the prosecutor asked the jurors if they could accept the fact that they would "inevitably" hear less about the case than "we" know and whether they could make a decision even if they "think

there is going to be stuff left out."[1] RP 100-101. For the jurors to agree to do so directly contradicts the court's instruction that reasonable doubt can arise from lack of evidence. CP 21-35 ("A reasonable doubt is one for which a reason exists and may arise from evidence or a lack of evidence"). Further, the prosecutor was referring not to being100% convinced, but being convinced without receiving 100% of the relevant facts. RP 100-101.

The prosecutor gave the example of the jurors believing the world is round even if they could not prove it, based on "a common sense appreciation of the facts you're presented with." RP 102-106. This suffers the same infirmity as the jigsaw puzzle or everyday decision analogies in *Anderson* and *Johnson* and continues to improperly suggest that the jurors could not consider the lack of evidence in deciding whether the reasonable doubt standard had been met. Referring to such decision-making "failed to convey the gravity of the State's burden and the jury's role in assessing the State's case against the defendant": "[F]ocusing on the degree of certainty the jurors would have to have to be willing to act,

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[1] It is misconduct to argue facts not in evidence. *See* Opening Brief of Appellant (AOB) at 16-17. Although Respondent quotes the prosecutor's closing argument that "you can't consider whether there is something missing. You really can't," approvingly, BOR 11 n.2, this is improper too. The lack of evidence may be considered in deciding whether guilt have been proven beyond a reasonable doubt.

rather than what would cause them to hesitate to act" conveyed that they should convict unless they had a reason not to. *Anderson*, at 431-432.

The prosecutor harkened back to this portion of the voir dire in closing argument, asking the jurors to convict for the same reasons that they "[are] satisfied beyond a reasonable doubt the world is round," and because "what we agreed on, is that you can be satisfied beyond a reasonable doubt based on a common sense appreciation of the facts." [2] RP 223.

Respondent does not address the decisions in *Anderson*, *Johnson* or *State v. Venegas*, 155 Wn. App. 507, 523, 228 P.3d 813 (2010), at all in its responding brief. Under these cases, the prosecutor's misconduct in trivializing the reasonable doubt standard was reversible error.

In *State v. Fleming*. 83 Wn. App. 209, 213-214, 921 P.2d 1076 (1996), and other cases cited in AOB at 17, the court held that it is misconduct to argue to the jurors that in order to acquit, they would have to find the state's witnesses were lying. Here the prosecutor argued:

> What we discussed, and what we agreed on, is that you can be satisfied beyond a reasonable doubt based on a common sense appreciation of the facts. I want you to think about that in this case. If you look at the witnesses's testimony, specifically Officer Green, Sabrina Moore, Tobias Gomez and Mariah Jacobs [the state's witnesses], their testimony corroborates what happens.

[2] The prosecutor quoted part of the reasonable doubt instruction, but did not include the "or lack of evidence" language.

Their testimony makes sense.

> If you look at the defendant's testimony that nothing happened, the argument never became physical, Sabrina was in fact the one who assaulted him, it just doesn't make sense.

RP 223-224. This certainly implies that the juror's job in reaching a verdict beyond a reasonable doubt was to determine whether it was the state's witnesses, collectively, or the defendant who were telling the truth. It certainly does not convey to the jury that "it was *required* to acquit *unless* it had an abiding conviction in the truth of" the witnesses. *Fleming*, 83 Wn. App. at 213 (emphasis in original).

In fact, the witnesses did not corroborate Ms. Moore's testimony in most regards and conflicted with it important ways– and supported Mr. Moore's testimony that Ms. Moore followed him and continuing the argument when he tried to leave.

The prosecutor misstated the burden of proof and this misconduct should result in reversal of Mr. Moore's conviction,

3. THE USE OF THE SERVICE OR COMFORT DOG BY THE COMPLAINING WITNESS WHEN SHE TESTIFIED CONSTITUTES A COMMENT ON THE EVIDENCE DENIED MR. MOORE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE, DUE PROCESS AND CONFRONTATION OF WITNESSES.

Respondent correctly points out that the prosecutor represented that he had discussed the use of the service dog with defense counsel and counsel

did not object. BOR 16; RP 164. This, however, does not relieve the trial court of its constitutional charge, under Article 4, section 16 of the Washington Constitution, not to comment on the evidence. Respondent cites no authority that such an obligation can be waived; and, in any event, a waiver of a constitutional right must be shown to have been "knowing, intelligent and voluntary." *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). To establish such a waiver, the state must prove "an intentional relinquishment or abandonment of a known right or privilege." *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). Respondent does not purport to establish such an intentional abandonment or relinquishment. BOR at 15-19.

Here, allowing the complaining witness to testify with the assistance of a service dog had only one implication for the jury– that, in the opinion of the trial judge, the witness was so traumatized by the accused that she could not testify without the support of the specially-trained dog. There was no other explanation for the presence of the dog.[3]

A comment on the evidence is presumed to be prejudicial, *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2009), and the comment alone

[3] Appellant cites a number of cases from other jurisdictions recognizing that, even where the witness is a child, the implication that the dog or other comfort item is necessary because the defendant victimized the witness denies due process and a fair trial. AOB 24-25.

should justify a new trial.

In addition to commenting on the evidence, the trial court was unreasonable in allowing Ms. Moore to testify with the assistance of the service dog because this violated Mr. Moore's state and federal constitutional rights to due process and confrontation. *See* AOB 23-25.

4. THE PROSECUTOR'S TESTIFYING ON BEHALF OF THE COMPLAINING WITNESS AT SENTENCING VIOLATED THE REAL FACTS DOCTRINE AND DENIED MR. MOORE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW.

Respondent asserts on the issue of the prosecutor's misconduct in testifying at the sentencing hearing: "even assuming that the prosecutor's minor statements were improper, any error was clearly harmless . . . " BOR at 19.

In fact, the prosecutor's statements were far from minor or harmless; they included testimony that there had been a "long history of domestic violence," that Ms. Moore was "extremely traumatized" by the incident, and that she was more frightened to testify than any other witness the prosecutor had ever seen. RP(11/16/12) 3-4. These "facts" provided by the prosecutor are akin to those facts which could form the basis of an exceptional sentence. *See e.g.,* RCW 535(2) (b) (unscored prior history); 3(i) (multiple incidents); (h)(i) (on-going pattern); (iii) (deliberate cruelty or intimidation). They

contrasted with Ms. Moore's letter which apparently discussed her "mixed feelings" about the case, her "obvious love" for Mr. Moore, and her desire for him to get treatment. RP(11/16/12) 4-5. Indeed, it seems clear that the prosecutor's factual representations and the argument based on them were introduced at sentencing precisely because they might persuade the trial court to impose a longer sentence than the court might have imposed considering only the letter from Ms. Moore.

Even though the trial judge imposed a middle-range sentence, Mr. Moore had requested a sentence below the standard range. The prosecutor's misconduct very likely influenced the judge, who might otherwise have imposed a sentence at the bottom of the standard range or below the standard range.

Ms. Moore had the right to present a statement at sentencing under the Victims' Rights Amendment and RCW 7.69.030, which she exercised; the trial court read her statement. RP(11/16/12) 6. The prosecutor did not have the right to go beyond that. As the Court held in *State v. Carreno-Maldanado*, 135 Wn. App. 77, 86, 143 P.3d 143 (2006), neither the Victims' Rights Amendment nor RCW 7.69.030 provides the prosecutor with the independent right or duty to speak on behalf of the victim. *See also*, WSBA opinion 1020 (1986) (witnesses do not belong to either party).

Although Respondent asserts that *Carreno-Maldonado* does not hold

that "a prosecutor may not mention his personal observations of the victim at a sentencing hearing," BOR 21, in *Carrendo-Maldonado*, the absence of an independent right of the prosecutor to do more than assist the victim in his or her own communication with the court, such as through a victim impact statement, was critical to the holding that the prosecutor breached the plea agreement. Accordingly, the decision does hold that the prosecutor has no independent right to speak about or on behalf of the victim, and Respondent cited no authority that the prosecutor does have such a right.

With regard to the violation of the real facts doctrine, Respondent tries to limit the trial prosecutor's statements that introduced new facts to the testimony that Ms. Moore's teeth were chattering. BOR at 21. In fact, defense counsel objected after the prosecutor began providing information beyond the record to the trial court, RP(11/16/12) 3-4, and the trial court overruled the objection indicating that the prosecutor would be permitted "indicate" his "observations" and declined to limit the prosecutor's testimony. This was not, as Respondent again argues, harmless. BOR 22.

There was no proof at trial of other incidents of domestic violence, either against Ms. Moore or anyone else; and no evidence that Ms. Moore had been more frightened of Mr. Moore than any other witness the prosecutor had encountered, as well as no evidence her teeth were chattering. These were highly prejudicial assertions and not harmless.

Finally, respondent does not address the due process component of the prosecutor's unsworn testimony. *See* AOB at 29. In fact, the prosecutor's testifying deprived Mr. Moore of the notice that he would be accused of other acts of domestic violence and the opportunity to defend against these accusations. This was fundamentally unfair, and violated Mr. Moore's right to due process. See *State v. Galbreath*, 69 Wash. 2d 664, 667, 419 P.2d 800 (1966) (the concept of fundamental fairness is inherent in the due process clause of U.S. Const. amend. 14); *State v. Tang*, 75 Wash. App. 473, 478, 878 P.2d 487 (1994).

The misconduct was not harmless, and it deprived Mr. Moore of a fair sentencing hearing.

B. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and remanded for retrial and resentencing.

DATED this 8th day of July, 2013.

Respectfully submitted,

/s/
RITA J. GRIFFITH; WSBA #14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 8th day of July, 2013, I caused a true and correct copy of Appellant's Opening Brief to be served on the following by e-mail:

Counsel for the Respondent
Jeremy A. Morris
Kitsap County Prosecutor
kcpa@co.kitsap.wa.us

And by first class mail to:

Duane Moore
932369
Coyote Ridge Corrections Center
1301 N. Ephrata Avenue
Connell, WA 993362

_____/s/_____7/8/2013_____
Rita Griffith DATE at Seattle, WA

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