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King County Prosecutor
Appellate Unit

NO. 69812-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN CLARDY, JR.,

Appellant.

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

The Honorable Hollis Hill, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct in closing argument requires reversal of all of appellant's convictions.

2. The trial court erred in defining "recklessness" for the jury. CP 244 (Instruction 40).

Issues Pertaining to Assignments of Error

1. In closing argument the prosecutor told the jury that to acquit appellant of any offense, it had to find the State had failed to prove all element of the offense beyond a reasonable doubt. The defense objection based on misstatement of the law was overruled.

a. Did the prosecutor misstate the law when, to acquit a jury need only find the State failed to prove any element of the offense beyond a reasonable doubt?

b. Must all of appellant's convictions be reversed because there is a substantial likelihood that the prosecutor's misstatement of the law affected the jury verdicts?

2. Must appellant's drive-by shooting conviction be reversed because the trial court improperly defined recklessness in a manner that relieved the State of proving an element of the crime beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. *Procedural Facts*

The State charged appellant Kevin Clardy, Jr., with first degree robbery, first degree burglary, first degree assault, drive-by shooting and first degree unlawful possession of a firearm. CP 113-16. The State also alleged the robbery, burglary and assault were committed while Clardy (or an accomplice with regard to the robbery and burglary) was armed with a firearm. CP 113-15. The charges arose out of the robbery of the Federal Way home of Anthony Dao, Dao's wife Danielle Wright, their infant daughter M.D., and Dao's seven-year old son B.D., allegedly committed by Clardy and four others in early March 2011. CP 6-9.

A trial was held October 16, 2012 through November 21, 2012, before the Honorable Hollis R Hill.¹ 1RP; 2RP.² A jury found Clardy guilty as charged, including the firearm enhancement allegations. CP 263-

¹ By the time of trial, Clardy's four codefendants had entered guilty pleas to various charges for their role in the incident. CP 157-58. None of the codefendants testified at Clardy's trial.

² There are ten volumes of verbatim report of proceedings referenced as follows: **1RP** - single volume for the dates of December 9, 2011, October 17, 2012, November 6 & 21, 2012, and January 11, 2013; and **2RP** - a nine-volume consecutively paginated set for the dates of October 16, 17, 22-25 & 31, 2012, and November 6-8, 13-15, & 19-20, 2013.

67, 270, 272. Clardy was sentenced to 430 months (35.83 years). CP 296-307; 1RP 47-48. He appeals. CP 294-95.

2. *Substantive Facts*

According to Dao, late in the evening on March 8, 2011, an Asian-looking woman was at his front door. 2RP 289, 293-95. She claimed she was B.D.'s aunt and was there to pick him up for his mother, Chandra Sok, and insisted that Dao open the door. 2RP 283, 295-97. Dao told the woman he had not heard from B.D.'s mother, that Brandon was asleep and to come back the next day. 2RP 295. At the woman's insistence, however, Dao eventually opening the front door, but kept the storm door closed and locked. 2RP 295-99. Upon opening the front door he saw a black man with a shotgun outside who immediately tried to break into his home. 2RP 298-300.

Dao said the man tried to break in the storm door by hitting it with the butt of the shotgun, but it would not break. 2RP 302-03. Dao immediately closed the front door and yelled to Wright, who was upstairs, to call police. 2RP 303. Dao said he then saw the man and woman run around to the back of the house and shove the barrel of the gun through a back window. 2RP 304-05. In response, Dao ran out his front door and to his neighbors' house to ask them to call 911. 2RP 304. As he was leaving

he could hear more glass breaking, which turned out to a sliding glass door at the back of the house. 2RP 305-06.

After the four to five minutes it took to alert his neighbors, Dao returned to his home and entered the front door. 2RP 311. He found no robbers inside, but he could see three or four people running away from the back of the house, so he grabbed a large knife and gave chase on foot. 2RP 312-16. The robbers had made their way through his backyard into an adjacent neighborhood. 2RP 317. Dao said the robbers taunted him as they ran away, even firing the shotgun at him once, and that he responded by telling them he had called police and that they were all going to jail. 2RP 319, 321.

At that point Dao abandon his foot chase and decided to try to pursue the robbers in his minivan. 2RP 289-90, 320-23. Dao recalled driving around the surrounding area until he found himself stopped next to a red sedan at a stoplight. 2RP 323, 326. He saw four people in the car, two men in the backseat and two women in the front seats. According to Dao, one of the women was the one he first encountered at his front door, and one of the men was the one with the shotgun he had seen at his house. 2RP 324-25. When the light turned green, the red car sped off and Dao followed. 2RP 327.

Dao claim that as he followed the car the man with the shotgun fired at him three to four times as they drove along, and that he could hear the shotgun pellets hitting his car. 2RP 329-31. Dao also claim that at one point the red car stopped in a neighborhood, the man with the shotgun got out, fired two to three shotgun blasts at him from a distance of between 30 and 60 feet, picked up the spent shotgun cartridges and then got back in the car, which sped off again. 2RP 333-36. Dao continued to follow. 2RP 336.

Dao recalled that about 10 to 15 minutes into the chase he saw a law enforcement officer engaged in a traffic stop. 2RP 337. Dao said he pulled his car up to the officer, told the officer he had just been robbed and needed assistance, and then sped off again in pursuit of the red car. 2RP 337-39. Having stopped to alert the officer, Dao lost sight of the red car, so he drove as fast as he could until about five to ten minutes later he started seeing debris on the roadway, which he recognized as his property. 2RP 339-40. As he continued on he came upon the red car, which had crashed into a guardrail. 2RP 339-40. No one was in the car. 2RP 340-41. Eventually the officer he had alerted before showed up, directed Dao to park his car and wait for more assistance to arrive. 2RP 341-42. Dao complied. 2RP 342.

At trial, Dao, for the first time, identified Clardy as the man he thought was wielding the shotgun the night of the robbery. 2RP 301, 342, 383-84. Dao admitted, however, that he only got a glimpse of the man with the shotgun at his front door, and that the man he saw with the shotgun in the back of the car was only "possibly" the same man he had seen at his front door. 2RP 334, 388. He eventually admitted he was "not sure" it was Clardy he saw in the backseat of the red car when they were stopped at the stoplight. 2RP 403.

According to Wright, when Dao answer the late-night knock, she saw a short, stocky Samoan-looking woman with a hood on her head, and no one else. 2RP 468-69, 471. When there was a sudden bang on the front door, Wright recalled Dao slamming the door and yelling at her to "[r]un babe. They got guns. Run. Go, go, go." 2RP 471-72. Wright recalled immediately running upstairs, retrieving here infant daughter and a cell phone from the master bedroom and heading for B.D.'s bedroom. 2RP 474-75. As she passed the stairs on the way to B.D.'s bedroom she saw at least two black men, one larger than the other, and maybe a third person, coming up the stairs at her, so she ducked into B.D.'s room, lay M.D. on the floor and lay over the top of her to try to protect her. 2RP 477-78, 480-81.

Wright recalled at least two of the robbers entered B.D.'s bedroom, one of whom started hitting her hard in the back numerous times with what she thought was a large gun, and another was holding a pistol to her head and demanding to know where the money was and threatening to kill her. 2RP 483-85. In the meantime she could hear what she thought was someone rummaging through the rest of the house. 2RP 485-86.

After about 30 to 40 seconds, the robbers left Wright in B.D.'s room, and went to the master bedroom. 2RP 486-88. Moments later Wright she saw the two men and a woman fleeing back downstairs with one of the men carrying Dao's briefcase. 2RP 489-90. Wright heard them leave the house through the back door. 2RP 491.

Like Dao, Wright claimed at trial that Clardy was the man with the shotgun, even asserting she had positively identified Clardy as one of the robbers during a show-up of four of the suspects arrested near where the red car had crashed. 2RP 479, 507, 518-19, 550, 554. Wright admitted, however, that she had been drinking that night, which Dao confirmed, recalling she "had a few glasses" of wine with dinner at 9 p.m. 2RP 395, 464, 545. At least one law enforcement officer who was involved in interviewing Dao and Wright said he could still smell alcohol on Wright's breath even hours after the incident. 2RP 1029-30, 1048. Moreover, the officer that conducted the show-up identification with Wright, Officer

Andrew Hensing, said Wright flew into a tirade of profanity and yelling and was unable to make a positive or negative identification of any suspect. 2RP 575-76. And the officer in charge of presenting the suspects for the show-up with Wright, Lieutenant Kurt Schwan, said he only showed her three, none of whom were Clardy. 2RP 713-14. Despite Hensing's testimony to the contrary, it was Schwan's recollection that Hensing told him Wright had positively identified all three suspect she was shown. 2RP 715.

Five suspects were eventually taken into custody in the early morning hours of March 9, 2011, in an abandon quarry near where the red car had crashed; two black men, including Clardy, and three women. 2RP 703-05, 708-09, 767, 810-13, 1007-08. In addition, law enforcement recovered two guns in the underbrush near the crash site, a single barrel shotgun and .45 caliber handgun. 2RP 924, 928, 942, 947-48. They also found in the red car both live and spent shotgun shells, a case for a .45 caliber handgun and a soft case for a rifle. 2RP 8151067, 1069-71. A broken brief case and various papers and documents, some of them bearing Dao's name, were found strewn on the roadway near the crash site. 2RP 816.

Although male DNA was recovered from the handgun, shotgun and shotgun shells, none of it was conclusively identified as belonging to

any of the suspects. 2RP 651-53. There was no fingerprint evidence presented at trial.

During the prosecutor's initial closing remarks to the jury he was discussing the "to convict" instructions, noting that they "lay out for you what the elements of the crimes the Defendant has been charged with." 2RP 1200. The prosecutor further explained:

To put it in less legal terms, it gives you a set, a list, a checklist of things you need to consider and make a decision on. If you decide all of them one way, the defendant is guilty; if you decide all of them another way, he's not guilty; if you can't decide or you reach different conclusions on different elements, then you can't render a verdict.

2RP 1200. In response to defense counsel's objection that this was a misstatement of the law, the court replied, "Excuse me a moment. Overruled." 2RP 1200.

In the defense closing, counsel did not contest the fact that a violent robbery was committed against Dao and Wright at their Federal Way home. 2RP 1230-31. Instead, counsel argued that the State had failed to prove beyond a reasonable doubt that Clardy was involved, noting no one had ever identified Clardy as one of the robbers prior to trial. 2RP 1231. Counsel noted that to the extent Wright claimed she had identified Clardy at a show-up, this was rebutted by officers who conducted the show-up and said that Clardy was never shown to Wright

and that she failed to positively identify anyone. 2RP 1231-32. Counsel also argued the jurors should be skeptical of the Dao's and Wright's in-court identifications of Clardy as one of the robbers because of the suggestive nature of the circumstances in which they were made, and in light of the lack of a detailed description of the robber provided by either at any point prior to trial that came close to matching Clardy. 2RP 1241-42, 1246-52.

Counsel argued that even if the jurors concluded the State had proved beyond a reasonable doubt that Clardy was involved, it had failed to prove the necessary intent element for the first degree assault charge beyond a reasonable doubt. 2RP 1236. Counsel also argued that the extent the jury were to consider finding Clardy guilty as an accomplice to the burglary and robbery charges, counsel argued there was no basis to find he had affirmatively aided in the commission of those offenses, and to the extent he may have provided aid after-the-fact, that might make him guilty of rendering criminal assistance, but not as an accomplice to the charged crimes. 2RP 1238-40.

Finally, counsel noted the lack of any physical evidence, such as DNA or fingerprints, linking Clardy to any of the crimes. 2RP 1252-54.

C. ARGUMENTS

1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT REQUIRES REVERSAL OF ALL OF CLARDY'S CONVICTIONS.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair tactics. Monday, 171 Wn.2d at 676 (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted). Prejudice is established where there is a

substantial likelihood that the misconduct affected the jury's verdict. Id. at 578.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). "A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury." Id. (citing State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). When the prosecutor mischaracterizes the law and there is a substantial likelihood the misstatement affected the verdict, the right to a fair trial is violated. Id. (citing State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988)).

The law is clear, due process requires that to convict a defendant, the State must prove every element of the charged crime beyond a reasonable doubt. Sullivan v. Louisiana, 508 U.S. 275, 277-78, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); State v. Washington, 135 Wn. App. 42, 48, 143 P.3d 606 (2006), review denied, 160 Wn.2d 1017, 161 P.3d 1028 (2007). Conversely, a jury is duty bound to acquit the accused if it concludes the State has failed to prove even just a single element of a charged offense beyond a reasonable doubt. State v. Smith, 174 Wn. App. 359, 298 P.3d 785, 789-90 (Slip Op. filed April 9, 2013). When a prosecutor makes comments in closing argument

Here, the prosecutor told the jury that to acquit Clardy of any charged offense, it had to find the State failed to prove any of the elements listed in the "to convict" instruction, not just one. This was clear error. Unfortunately, the trial court seemingly approved of the prosecutor's misstatement by overruling defense counsel's "misstates the law" objection. 2RP 1200. This error requires reversal of all of Clardy's convictions because there is a substantial likelihood the prosecutor's misstatement affected the verdicts.

By arguing the jury had to conclude the State failed to prove beyond a reasonable doubt all of the element listed in the to convict instructions in order to enter a "not guilty" verdict, the prosecutor set up an impossible hurdle for the defense to overcome to obtain an acquittal on any charge. See In re Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) ("Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt."). This is so because, for example, an element in each of the to-convict instructions was that the "acts occurred in the State of Washington."³ Given that the defense did not dispute that the robbery, subsequent car chase and shootings

³ CP 212-13 (Instruction 10 - first degree robbery), 215 (Instruction 12 - first degree burglary), 217 (Instruction 14 - first degree assault), 219 (Instruction 16 - first degree unlawful possession of a firearm), 221 (Instruction 18 - drive-by shooting).

occurred, or than any of the alleged events took place in the State of Washington, acquittal was impossible under the prosecutor's erroneous version of the law. As such, the best the defense could have hoped for was a hung jury.

It is, of course, impossible to know what the jury verdicts would have been had the prosecutor not misstated the law, or had the court not overruled defense counsel's appropriate and timely objection. 2RP 1200. But what is clear from the record is that guilty verdicts were no certainty. For example, despite concluding arguments occurring the morning of November 20, 2012, and so the jury had the afternoon to deliberate, no verdicts were rendered until the following day. See CP 266-67 (verdict forms file on November 21, 2012); 2RP 1228, 1230, 1255 (shows arguments conducted in the morning of November 20, 2012); 1RP 29-31 (shows jury still deliberating on morning of November 21, 2012).⁴ The record also shows the jurors wanted more evidence before rendering any verdicts, having requested "a copy . . . of all police reports", none of which had been admitted for evidentiary purposes, and to once again hear the recording of Wright's 911 call. CP 273, 275; 1RP 29. This is not surprising

⁴ Missing from the appellate record is the verbatim report of proceedings from the in-court presentation of the verdicts, which occurred on November 21, 2012. The transcript has been ordered but not yet received.

in light of the lack of any physical evidence conclusively linking Clardy to any of the charged offenses, and the lack of a pretrial identification of Clardy as once of the robbers by any of the victims.

Because there is a substantial likelihood the prosecutor's misstatement of the law in closing affected the jury's verdicts, all of Clardy's conviction should be reversed. Walker, 164 Wn. App. at 736.

2. THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTION DEFINING "RECKLESS" REQUIRES REVERSAL OF CLARDY'S DRIVE-BY SHOOTING CONVICTION.⁵

The trial court's instructions misstated the law by giving the jury an incorrect definition of "reckless", thereby relieving the State of its burden of proving an essential element of the crime of drive-by shooting. This requires reversal of Clardy's conviction for that offense.

A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area

⁵ Clardy may raise this issue for the first time on appeal despite not objecting below because it involves manifest constitutional error. RAP 2.5(a)(3); State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001) (finding manifest constitutional error reviewable for the first time on appeal because instructions relieved State of burden to prove essential element); accord State v. O Hara, 167 Wn.2d 91, 95, 217 P.3d 756, 759 (2009) (no manifest constitutional error in self-defense instruction where State was not relieved of its burden to disprove self-defense). Any claim by the State to the contrary should be rejected.

of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

RCW 9A.36.045(1)(emphasis added).

The "to convict" instruction for this offense provides:

To convict the defendant of **Drive-by Shooting** as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period of time intervening between March 8, 2011, and March 9, 2011, the defendant recklessly discharged a firearm;

(2) That the discharge created a substantial risk of death or serious physical injury to another person;

(3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and

(4) That the acts occurred in the State of Washington.

...

CP 221 (Instruction 18, emphasis in original).

RCW 9A.08.010(1)(c), in addressing general levels of culpability, states "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

Instruction 40, defining "reckless or acts recklessly" for Clardy's jury provides:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 244 (emphasis added).

The underlined portion of Instruction 40 misstates the law. It does not adequately convey the mental state required to convict Clardy of drive-by shooting. To accurately hold the State to its burden of proof, the instruction should have replaced the term "a wrongful act" with "death or serious physical injury to another person." See State v. Harris, 164 Wn. App. 377, 385, 263 P.3d 1276 (2011).

In State v. Harris, the defendant was charged with first degree assault of a child, which required the State to prove "the person . . . [i]ntentionally assaults the child and . . . [r]ecklessly inflicts great bodily harm." 164 Wn. App. at 383 (quoting RCW 9A.36.120(1)(b)(i)). The first paragraph of the instruction defining recklessness was identical to the one used in Clardy's case. 164 Wn. App. at 384.

To convict Harris of first degree assault of a child, the jury needed to find he recklessly disregarded the substantial risk that "great bodily harm" would occur as a result of his actions under RCW 9A.36.120(1)(b)(i), not that "a wrongful act" would occur. Id. at 385. The instruction defining recklessness relieved the State of its burden to prove Harris acted with disregard that a substantial risk of great bodily harm would result when he shook the child. Id. at 385-86. A jury instruction defining the recklessness requirement must account for the specific risk contemplated under that statute, *i.e.*, "great bodily harm" rather than some undefined "wrongful act." Id. (citing State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005)) ("the risk contemplated per the assault statute is of 'substantial bodily harm'").

Instruction 40 given to Clardy's jury is flawed for the same reason. It needed to account for the specific risk contemplated by the drive-by shooting statute, *i.e.*, "death or serious physical injury to another person" as opposed to a generic "wrongful act." The instruction relieved the State of its burden of proving Clardy acted with a disregard that a substantial risk of death or serious physical injury to another person when he discharge a firearm.

The error was not harmless. There was evidence presented that would support a finding that discharge of the shotgun in this instance did

not create a substantial risk of "death or serious physical injury to another person" because the lethality range was only about 15 yards. 2RP 1096. Defense counsel specifically reminded the jury of the evidence in closing argument, albeit in the context of the first degree assault charge, which involved the same acts as those that make up the drive-by shooting charge. 2RP 1236.

Under the instructions provided, jurors could conclude Clardy was guilty of the drive-by-shooting even if they concluded he did not discharged the shotgun with disregard that he was creating a "substantial death or serious physical injury to another person". This is because Instruction 40 informed them that they only needed to find he did so merely with disregard that it would result in some undefined "wrongful act or result." CP 244.

The trial court's instruction defining "reckless" relieved the State of its burden to prove an essential element of the crime of drive-by shooting as charged. This denied Clardy his constitutional right to a fair trial, and the error was not harmless. This Court should therefore reverse Clardy's conviction for drive-by shooting.

D. CONCLUSION

For the reasons stated, Clardy requests reversal of his convictions.

DATED this 1st day of August ~~July~~ 2013

Respectfully Submitted,

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A handwritten signature in black ink, appearing to read "C. Gibson", followed by the handwritten number "18487" and the word "for".

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