No. 44031-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Patrick McAllister,

Appellant.

Jefferson County Superior Court Cause No. 11-1-00141-1

The Honorable Judge Craddock Verser

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A prosecutor commits reversible misconduct by stating "facts" that have not been introduced into evidence. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Here, in closing, the prosecutor personally provided expert "testimony" about battering relationships and immigration law. RP 648, 688, 694-695, 697. Because this information[1] was not in evidence, the prosecutor committed reversible misconduct. *Id.*

There is no exception for matters discussed in *voir dire.* The *Magers* decision does not hold otherwise. *See State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008) (cited in Brief of Respondent, p. 16). In *Magers,* the prosecutor committed misconduct by merely referencing matters discussed in *voir dire,* without providing substantive "testimony" of the sort at issue here. The *Magers* court did not approve of the prosecutor's misconduct; instead, the court remarked that it was "not nearly as flagrant" as the misconduct in the case cited by the Petitioner, and thus did not require reversal. *Id,* at 192. The prosecutor's expert "testimony" here was not as benign as the misconduct in *Magers.*

[1] Some of which was highly misleading. *See* Appellant's Opening Brief, pp. 19-23.

Nor did the state's attorney merely ask jurors to draw reasonable inferences from the evidence. *See* Brief of Respondent, pp. 16 (citing "Title 8 CFR") and 17 (citing 8 CFR § 245.5). Nothing in the record allowed jurors to "infer" the provisions of "Title 8 CFR."[2]

Furthermore, the prosecutor's misconduct was not a proper rebuttal to any arguments made by Mr. McAllister's attorney. Brief of Respondent, pp. 17, 18. A criminal defendant "has no power to 'open the door' to prosecutorial misconduct." *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008). The prosecutor had no right to refer to matters outside the record, even in response to arguments made by defense counsel.[3]

The prosecutor also shifted the burden of proof. *See* Appellant's Opening Brief, pp. 23-27. The state's argument that Mr. McAllister should have presented additional evidence was improper under the circumstances: the prosecutor did not follow the rules for a missing witness/missing argument. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009); *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267

[2] Respondent makes a confused argument regarding the crime victim's visa that does not address the issue raised by Mr. McAllister.

[3] Respondent does not allege that defense counsel made improper arguments. Even if counsel had, the proper course of action would have been for the prosecutor to object. *Id.*

(2008). The arguments were also improper because some of the "missing" evidence was privileged. *State v. Blair,* 117 Wn.2d 479, 490, 816 P.2d 718 (1991). Respondent does not address the requirements of *Montgomery, Dixon,* or *Blair.* Brief of Respondent, pp. 18-19.

Nor does Respondent address Mr. McAllister's argument that the prosecutor improperly appealed to passion and prejudice. Appellant's Opening Brief, pp. 27-28. Instead, Respondent suggests that the improper arguments were nothing "but a part of the common knowledge already possessed by jurors." Brief of Respondent, p. 19. This is irrelevant. A prosecutor may not appeal to passion or prejudice, even if the basis for the argument is introduced into evidence. *Glasmann,* 175 Wn.2d at 704.

Finally, Respondent does not argue that the errors were harmless. Brief of Respondent, pp. 12-20. This failure to argue harmlessness may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The prosecutor committed flagrant and ill-intentioned misconduct on numerous occasions. Because of this, Mr. McAllister's convictions must be reversed. *Jones*, 144 Wn. App. at 301.

II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

Mr. McAllister rests on the argument set forth above and in the Opening Brief.

III. THE TRIAL COURT VIOLATED MR. MCALLISTER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION, TO PRESENT A DEFENSE, AND TO A FAIR TRIAL.

Mr. McAllister rests on the argument set forth in his Opening Brief.

IV. THE STATE FAILED TO PROVE PENETRATION AS TO COUNT 18.

A conviction for rape requires proof of penetration. RCW 9A.44.050; RCW 9A.44.010. Lorega did not testify to penetration regarding count 18. CP 5; RP 325. Respondent argues her testimony established that Mr. McAllister "forc[ed] sexual activity upon her." Brief of Respondent, p. 41. Proof of forced sexual activity establishes indecent liberties;[4] it does not establish rape, absent proof of penetration.

The evidence was insufficient to prove rape as to count 18. The conviction must be reversed and the charge dismissed with prejudice. *State v. Brown*, 137 Wn. App. 587, 592, 154 P.3d 302 (2007).

V. THE DOMESTIC VIOLENCE/DELIBERATE CRUELTY AGGRAVATING FACTOR DOES NOT APPLY TO THIRD-DEGREE RAPE.

Where the language of a statute is clear, legislative intent is derived from the language alone. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). Plain language does not require construction. *State v.*

[4] RCW 9A.44.100.

Punsalan, 156 Wn.2d 875, 879, 133 P.3d 934 (2006). A court "will not engage in judicial interpretation of an unambiguous statute." *State v. Davis*, 160 Wn. App. 471, 477, 248 P.3d 121 (2011).

On the other hand, if a criminal statute is ambiguous, the ambiguity must be interpreted in favor of the defendant. *Id; see also Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009); *State v. Failey*, 165 Wn.2d 673, 677, 201 P.3d 328 (2009). A statute is ambiguous when the language is susceptible to multiple interpretations. *Davis*, 160 Wn. App. at 477.

By its plain terms, RCW 9.94A.535(h)(iii) applies only if "[t]he current offense involved domestic violence, *as defined in* RCW 10.99.020..." (emphasis added). RCW 10.99.020 does not include a general definition of domestic violence. *Cf.* RCW 26.50.010(1).[5] Instead, under the statute, domestic violence "includes but is not limited to any of the following crimes when committed by one family or household member against another..." RCW 10.99.020(5). The list of crimes that follows includes first- and second-degree rape but not third-degree rape. RCW

[5]"Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

10.99.020(5). Under the maxim *expressio unius est exclusio alterius*,[6] the omission of third-degree rape is presumed to be intentional. Accordingly, third-degree rape cannot be a crime of domestic violence "*as defined in* RCW 10.99.020…" RCW 9.94A.535(h)(iii) (emphasis added).

The phrase "includes but is not limited to" cannot be understood to *define* additional domestic violence offenses. RCW 10.99.020; *see* Brief of Respondent, p. 44. Instead, the phrase must be read to allow other statutes to create conflicting definitions of what constitutes a domestic violence offense. For example, RCW 26.50.010 contains a general definition of domestic violence that is far broader than the list in RCW 10.99.020. The "includes but is not limited to" proviso harmonizes the two statutes.

The legislature did not choose to incorporate RCW 26.50's broad definition when it created the aggravating factor set forth in RCW 9.94A.535(h)(iii). Instead, it limited the aggravating factor to crimes defined as domestic violence in RCW 10.99.020. Third-degree rape is not one of those crimes.

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[6] "The expression of one thing is the exclusion of another." *Black's Law Dictionary* (6th ed. 1990). *See, e.g., In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008).

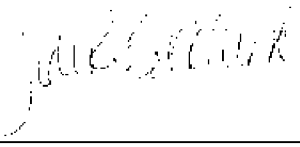
Accordingly, the "deliberate cruelty" aggravating does not apply to third-degree rape.

CONCLUSION

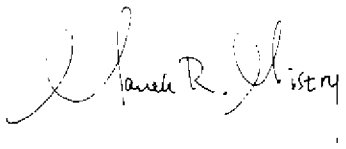
Mr. McAllister's convictions must be reversed. Count 18 must be dismissed with prejudice, and the remaining charges remanded for a new trial. On retrial, the jury should not consider the domestic violence/deliberate cruelty aggravating factor as to third-degree rape.

Respectfully submitted on September 26, 2013,

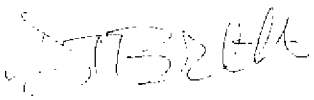
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Patrick McAllister, DOC #360256
Airway Heights Correctional Center
11919 Sprague Avenue
Airway Heights, WA 99001

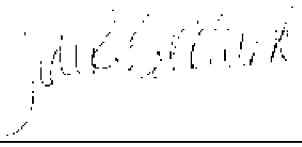
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Jefferson County Prosecuting Attorney
prosecutors@co.jefferson.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 26, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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