72619-6

FILED
March 27, 2015
Court of Appeals
Division I
State of Washington

NO. 72619-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN COOK,

Appellant.

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

The Honorable George Appel, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Prosecutorial argument that misstated the burden of proof beyond a reasonable doubt violated appellant's right to a fair trial.

2. Counsel rendered constitutionally ineffective assistance in failing to object to the prosecutor's misstatement of the burden of proof during closing argument.

Issues Pertaining to Assignments of Error

1. Prosecutors have a duty not to misstate the law, and the law pertaining to the burden of proof beyond a reasonable doubt is particularly important, the bedrock of our criminal justice system. The prosecutor here argued repeatedly that the standard does not mean a reason to doubt. Does this distortion of the burden of proof require reversal of appellant's conviction?

2. Effective assistance of counsel is required to ensure a fair trial. Here, counsel failed to object to prosecutorial argument that undermined the burden of proof beyond a reasonable doubt. Must appellant's conviction be reversed for ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Steven Cook with indecent liberties by forcible compulsion and second-degree rape. CP 94.

The jury acquitted him of second-degree rape but found him guilty on the indecent liberties charge. CP 54-55. The court imposed an indeterminate sentence with a minimum of 68 months, the top of the standard range and a maximum of life. CP 21. Notice of appeal was timely filed. CP 1.

2. Substantive Facts

Cook is 64 years old and recently embarked upon a new career. 3RP[1] 220. He opted for massage in hopes of spending his last working years doing meaningful work that would help others. 3RP 221-22. Upon his graduation, the school's positive recommendation led to employment with a chiropractic clinic. 3RP 222.

His employer encouraged Cook to build his practice by soliciting chiropractic clients who were obtaining massage services elsewhere. 3RP 222-23. N.R. was one such client. 3RP 224. He had met her several times in the reception area of the chiropractic clinic before she appeared for her first appointment with him. 3RP 224-25.

He accommodated her schedule to have massages on Sunday evenings when the clinic was normally closed. 3RP 226. This practice was also encouraged by his employer in order to accommodate patients and help build the practice. 3RP 199.

[1] There are six volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 22, 2014; 2RP – Sept. 22, 2014; 3RP – Sept. 23, 2014; 4RP – Sept. 24, 2014; 5RP – Sept. 25, 2014; 6RP – Oct. 23, 2014.

After four uneventful massages, on July 6, 2014, Cook was aware that something awkward had happened, and admitted as much when Detective Arnett questioned him about the incident. 3RP 169, 243. Noting the tension in her shoulders, Cook suggested a boxer's massage in the seated position. 3RP 230. While in the seated position on the massage table, N.R. repeatedly dropped the sheet, exposing her breasts. 3RP 233. Unlike most clients, he testified, N.R. seemed comfortable with nudity and frequently lied on his massage table nude without a sheet covering her. 3RP 234-35. Because of this history, Cook decided to simply proceed with the massage. 3RP 234-35. He acknowledged this was a "gray area" but he opted to proceed according to the client's comfort level. 3RP 235.

As he proceeded with the massage, he noticed N.R. flinched as he worked on her hip and the upper inside of her thigh, but she did not say anything and he simply proceeded with the massage. 3RP 236-37.

At the end of the massage, he waited for her in the reception area. Although she said she needed to pick some people up, he suggested they get something to eat sometime. 3RP 239. He did this simply as a matter of friendliness with a person he was getting to know as a client. 3RP 239-40. He also discussed scheduling their next appointment. 3RP 238-39. N.R. told him she would be on vacation the following week and could not stay to schedule an appointment. 3RP 238-39.

The next day he called N.R. to inquire about scheduling future appointments. 3RP 240-41. He called again a week later for the same reason. 3RP 242. Since some of her appointments were on his day off, he needed to know whether to keep his schedule open. 3RP 242-43. He denied ever leaving any message for her. 3RP 242, 255.

When Detective Arnett approached him, Cook testified he told her there may have been some possible contact in the area near the vagina, and that may have been why N.R. flinched. 3RP 244-45. He denied any sexual contact with N.R. 3RP 245.

N.R. testified the session on July 6th was odd from the beginning. She claimed Cook accompanied her into the massage room and stood fidgety in the doorway rather than leaving her alone to get undressed. 2RP 58. He told her the massage would be a bit different and asked her to sit. 2RP 58-59. He only left after she suggested that she get changed first. 2RP 59. She waited for him as he suggested, seated on the table with the sheet draped over her so that only her back was exposed. 2RP 59.

She testified he told her he was going to do a boxer's massage like on the men. 2RP 60. He began massaging her shoulders and back, then came around to the front and asked her to hold her arms out to the sides. 2RP 62. She held out one arm while holding the sheet with the other. 2RP 62-63. A couple of times, she switched arms when he said he needed the

other arm. 2RP 62-63. She claimed she never dropped the sheet and he began to chuckle before asking her to lie down on the table, which she did while completely covered by the sheet. 2RP 62-64.

She testified what followed was five to ten minutes of a normal back massage. 2RP 64. However, she claimed the massage of her hips proceeded quickly to her buttocks, and the massage was soft, not the deep tissue massage she was used to. 2RP 65-66. She described it as like her husband, not a masseur, used to do. 2RP 65-66. Then, she claimed he very quickly inserted his finger into her vagina three times. 2RP 66, 67. She testified he told her her pussy was hot and to say that it felt good. 2RP 68. She testified she tried to get up, but his hand was pressing on her low back so she could not rise up off the table. 2RP 68, 69. Then she felt his breath between her legs as, she claimed, he tried to kiss her between the legs. 2RP 68-69. She testified she was kicking her legs and trying to close them when she also felt a kiss on the back of her leg. 2RP 70.

She testified she told him the massage needed to stop, and he continued for a few minutes before stopping. 2RP 71. According to N.R., while he wiped the massage oil off his hands, he asked if she had a vibrator at home and told her internal vibrations were good for the low back. 2RP 72. When he left the room, he left the door open instead of closing it as usual. 2RP 73. N.R. testified she closed the door after him and leaned

against it while she dressed. 2RP 73. Although she had her cell phone and knew she would have to go past him in reception to get out, she did not call police or a friend. 2RP 74. She also paused to talk to him on her way out. 2RP 74-75.

She testified he told her he was so embarrassed, but was so attracted to her he just could not help himself. 2RP 74. He told her he wanted to take her out for drinks and dinner. 2RP 74. She testified he made similar comments when he called the next day. 2RP 77. She claimed he said he was very sorry, needed to know she would forgive him, and did not want to lose her as a client. 2RP 77. She hid how upset she was because her children were present, but decided to call 911. 2RP 78-80. She also filed a health department complaint and hired a civil attorney to investigate options regarding security, privacy, and financial remedies. 2RP 124-25, 144-45.

Detective Arnett contacted Cook on July 15 and told him she wanted to talk to him about N.R. 3RP 161. When Arnett asked about the last massage, Cook told her about the boxer's massage and N.R. dropping the sheet. 2RP 163-64. Cook told her N.R. had been uncomfortable, and Arnett asked why. 2RP 169. She testified Cook said he accidentally touched N.R.'s vagina. 2RP 169. Arnett claimed this was before she had told Cook about N.R.'s allegations. 2RP 169. Arnett said Cook then backtracked and said he only might have touched N.R.'s vagina. 3RP 169-70. Detective

Jorgensen, who was present for the interview, testified Cook told Arnett he massaged deep into N.R.'s pelvic area, his hand touched the outside of her vagina, and she was very uncomfortable. 3RP 270.

Because of the time that had passed, Arnett believed did not believe DNA testing would be helpful, so he let N.R. decide whether to obtain a forensic sexual assault examination. 3RP 177-78. The forensic nurse examiner took vaginal swabs, but they were never tested. 3RP 179. She found no bruising or trauma, which was consistent both with N.R.'s account and with nothing at all having happened. 3RP 209-13.

The nurse also recounted N.R.'s version of events. She testified N.R. said that, at the chiropractic clinic, Cook held down her low back, put his fingers in her vagina, tried to kiss between her legs, kissed the back of her leg, and left the door open when he left. 3RP 205-06.

During closing argument, defense counsel argued there were many reasons to doubt the State's case such as the failure to test the vaginal swabs for DNA or even massage oil and inconsistencies in N.R.'s statements. 4RP 33-37. In rebuttal, the prosecutor's theme was that the burden of proof beyond a reasonable doubt does not mean a reason to doubt:

> Of course, there are many standards of proof, but there's one thing that I take issue with and the instructions do. Beyond a reasonable doubt is not a reason to doubt. The instructions define it a little differently. It's not a reason to doubt. It says

> what beyond a reasonable doubt is also: an abiding belief in the truth of the charges. That's your standard.
>
> Ms. Silbovitz talked about – and I explained briefly – probable cause and preponderance of the evidence and clear, cogent, and convincing, and then beyond a reasonable doubt. But beyond a reasonable doubt is not absolute certainty because the only one that's absolutely certain what happened is the defendant and Ms. Robinson. The law doesn't require that.
>
> The law simply requires, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt" – and these are to an element of the offense – "as would exist in the mind of a reasonable person after fully, carefully – fairly, and carefully considering all of the evidence or lack of evidence. But if you have – if, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."
>
> So it's not a reason to doubt. Gee, I guess there was a small chance that the DNA could have been recovered on the swab that was also used to test whether she had any sexually transmitted diseases. It's not a doubt to an element of the offense. It's not a reasonable doubt. It may be for you, but that's for your determination.

4RP 44-45 (emphasis added).

C. ARGUMENT

1. THE PROSECUTOR'S ARGUMENT MINIMIZING THE BURDEN OF PROOF DENIED COOK A FAIR TRIAL.

The presumption of innocence and the corresponding burden of proof beyond a reasonable doubt forms the bedrock of our criminal justice system. State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). When a prosecutor misstates the law pertaining to the burden of proof, there

is a grave risk that the jury will be misled and the accused thereby deprived of his or her constitutional due process right to a fair trial. State v. Warren, 165 Wn.2d 17, 27-28, 195 P.3d 940 (2008); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996).

A prosecutor's misconduct is reversible error when the argument was improper and, under the circumstances, prejudice resulted. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The mere failure to object is not waiver when no instruction could have cured the prejudice and the prejudice had a substantial likelihood of affecting the verdict. State v. Pinson, 183 Wn. App. 411, 416, 333 P.3d 528 (2014) (citing State v. Emery, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012)).

Here, the prosecutor committed prejudicial misconduct when he argued, "Beyond a reasonable doubt is not a reason to doubt." 4RP 44. To compound the problem, he also suggested the reasonable doubt standard was something different from the "abiding belief" also required under the pattern instruction: "It's not a reason to doubt. It says what beyond a reasonable doubt is also: an abiding belief in the truth of the charges. That's your standard." 4RP 44. Four times, the prosecutor told the jury reasonable doubt is not a reason to doubt. 4RP 44-45. This argument distorted and minimized the burden of proof and requires reversal of Cook's conviction.

a. The Prosecutor Distorted and Diminished the Burden of Proof by Arguing Reasonable Doubt Is Not a Reason to Doubt.

"Statements made by the prosecutor or defense to the jury must be confined to the law as set forth in the instructions given by the court." Davenport, 100 Wn.2d at 760; State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). Specifically, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. Warren, 165 Wn.2d at 26-27; State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). The prosecutor's repeated arguments that reasonable doubt does not mean a reason to doubt were an incorrect statement of law that undermined the burden of proof beyond a reasonable doubt.

First, it is simply incorrect to say that reasonable doubt is not a reason to doubt. "[A] 'reasonable doubt, at a minimum, is one based upon reason.'" Bennett, 161 Wn.2d at 311 (quoting Victor v. Nebraska, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (internal quotation marks omitted)). Washington's pattern jury instruction explains, "a reasonable doubt is one for which a reason exists." CP 64; 11 Washington Practice, Pattern Jury Instructions- Criminal, WPIC 4.01 (3d Ed). Under this instruction, reasonable doubt means a reason that causes a person to doubt, a "reason to doubt."

The Bennett court expressed concern that the presumption of innocence may be "diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." 161 Wn.2d at 316. The prosecutor's argument in this case makes reasonable doubt sound illusive and illusory. If a reasonable doubt is not a reason to doubt, then what could it possibly be? The argument undermines the presumption of innocence by making reasonable doubt appear meaningless.

It is certainly true that jurors need not be able to articulate a specific reason to doubt in order to find reasonable doubt and acquit. Emery, 174 Wn.2d at 759-60.[2] But this does not mean that reasons to doubt may be disregarded when they arise. While the jury need not be able to point to a reason for doubt in order to acquit, if the jury identifies such a reason, it has a duty to acquit. 11 Washington Practice, Pattern Jury Instructions-Criminal, WPIC 4.01 (3d Ed). The prosecutor's argument was improper because it essentially invited the jury to set aside valid reasons to doubt.

The prosecutor also argued that, instead of a reason to doubt, "beyond a reasonable doubt means an abiding belief in the truth of the charges." 4RP 44. Although technically a correct statement of the law if taken in isolation, the prosecutor's abiding belief argument compounded the

[2] See also State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523 n. 16, 525, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431-42, 220 P.3d 1273 (2009).

misleading nature of the argument about reasonable doubt. This aspect of the argument encouraged the jury to ignore reasonable doubt and focus only on "abiding belief in the truth of the charges."

The truth is not the primary question before the jury. The "single, crucial, hard-core question," in a criminal case "should be framed by reference not to a general search for truth, but to the reasonable doubt standard." United States v. Shamsideen, 511 F.3d 340, 347 (2d Cir. 2008). The reasonable doubt standard has long been recognized "as the best means to achieve the ultimate goals of truth and justice." Id. By describing reasonable doubt in such a way as to render it meaningless, and urging the jury instead to focus on its "abiding belief in the truth of the charges," the prosecutor steered the jury away from what should be its primary concern: reasonable doubt.

The prosecutor's rebuttal argument diminished and distorted the meaning of proof beyond a reasonable doubt, thereby diminishing the State's burden and undermining the presumption of innocence. This was improper. See, e.g., Warren, 165 Wn.2d at 27 (prosecutorial argument that undermines the burden of proof is "simply improper").

b. Reversal Is Required Because the Improper Argument Incurably Undermined the Jury's Understanding of the Burden of Proof and Likely Affected the Verdict.

Flagrant and ill-intentioned argument that is incurable by instruction cannot be waived by the mere failure to object. Pinson, 183 Wn. App. at 419 (citing Emery, 174 Wn.2d 760-61). Misstatements of law pertaining to the burden of proof cannot be easily dismissed. Fleming, 83 Wn. App. at 213-14 (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill intentioned," and required a new trial despite lack of objection).

A prosecutor's disregard of a well-established rule of law, such as the burden of proof is flagrant and ill-intentioned misconduct. Fleming, 83 Wn. App. at 214. Because the burden of proof beyond a reasonable doubt is so fundamental and so difficult to correctly explain, Washington's courts have repeatedly warned against misguided attempts to add further explanation to the pattern instruction. See, e.g., Emery, 174 Wn.2d at 759-60 (argument that reasonable doubt requires filling in the blank with a reason for doubt is improper); Warren, 165 Wn.2d 26-27 (argument that reasonable doubt does not mean to give the defendant the benefit of the doubt undermined presumption of innocence); Bennett, 161 Wn.2d at 317-18 (recognizing the temptation to expand upon the pattern instruction and exercising supervisory

authority to require use of the pattern instruction). Beneath the backdrop of these repeated warnings, the prosecutor's argument was flagrant misconduct.

The written instructions did not cure the prejudice. Although jurors were instructed to disregard any argument not supported by the written instructions,[3] the instructions also encouraged jurors to consider the lawyers' remarks when applying the law. See CP 61 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law.").

Regardless of any instruction, jurors would be particularly tempted to follow the prosecutor's approach of ignoring reasonable doubt to focus on abiding belief because the standard reasonable doubt instructions are not a model of clarity. See Bennett, 161 Wn.2d at 317 (recognizing that even under the pattern instructions, the concept of reasonable doubt seems at times difficult to define and explain, making it tempting to expand the definition). Focusing solely on belief provides a simple (albeit mistaken) way for jurors to decide guilt or innocence.

This case demonstrates the prejudice that was absent in Warren. In that case, the prosecutor argued reasonable doubt did not mean the jury should give the defendant the benefit of the doubt. Warren, 165 Wn.2d at 27. The court declared that, had there not been an effective and thorough

[3] See CP 61 ("You must disregard any remark, statement, or argument that is not supported by . . . the law in my instructions.").

curative instruction, it "would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error." Id. at 28. No such instruction was given in this case, and Cook's conviction should be reversed.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT WHEN THE PROSECUTOR UNDERMINED THE BURDEN OF PROOF DURING REBUTTAL CLOSING ARGUMENT.

If this Court should conclude the full potency and protection of the burden of proof could have been restored by a curative instruction, then counsel was ineffective in failing to request such an instruction. The Sixth Amendment as well as Article I, Section 22 of Washington's Constitution guarantee the right to effective assistance of counsel for the defense of accused persons. "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975

P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Under the second prong, the court must reverse if it finds a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694). Reversal is required when the attorney's error undermines confidence in the outcome. Id.

Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing). Here, reasonably competent counsel would have objected to the blatant misstatement of the burden of proof during the prosecutor's rebuttal closing argument. There is no possible strategic reason for permitting the jury to be misled about the burden of proof beyond a reasonable doubt, the fundamental concept underlying the criminal justice system.

The burden of proof beyond a reasonable doubt is essential to the fair trial required by constitutional due process. See, e.g., State v. McHenry, 88

Wn.2d 211, 214, 558 P.2d 188 (1977) (describing failure to instruct on burden of proof as "grievous constitutional failure" and citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970)). Because the prosecutor so flagrantly misstated this crucial aspect of the jury's role, the court would likely have given a curative instruction if one had been requested. However, without an instruction, the jury was likely operating under a misunderstanding about the nature and significance of reasonable doubt, and confidence in the outcome is undermined.

In light of the prosecutor's misstatements, it is far from certain whether the jury understood the burden of proof, and the fairness of Cook's trial is starkly in doubt. Thus, if this Court finds the error waived by counsel's failure to object, counsel was ineffective in failing to request a curative instruction to ensure her client received a fair trial.

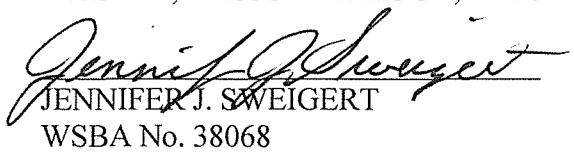
D. CONCLUSION

For the foregoing reasons, this Court should reverse Cook's conviction.

DATED this 27th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
Appellant,	)	
v.	)	COA NO. 72619-6-I
STEVEN COOK,	)	
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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 27TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MARCH 2015.

X Patrick Mayovsky