NO. 33279-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN CASTRO,

Appellant.

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

The Honorable Scott R. Sparks, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE STATE FAILED TO PRODUCE ANY EVIDENCE SHOWING CIRCUMSTANCES EVINCING AN INTENT TO USE TOOLS IN A BURGLARY, AN ESSENTIAL ELEMENT OF THE CRIME OF MAKING OR HAVING BURGLAR TOOLS UNDER THE LAW OF THIS CASE

By the very definition of making or having burglar tools provided to the jury, the State was required to prove that Castro possessed burglar tools "commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intended to be so used." CP 36. Here, the State's evidence showed only circumstances evincing an intent to use such tools in the commission of car thefts or car prowls, not burglaries. See Br. of Appellant at 10 (marshalling the State's evidence to demonstrate that none of it pertained to unlawfully entering or remaining in a building). Because none of the State's evidence showed Castro's intent or knowledge to use the tools in a burglary, the State presented insufficient evidence to convict Castro of making or having burglar tools.

This was the holding of State v. Miller, 90 Wn. App. 720, 730, 954 P.2d 925 (1998), which compels reversal and dismissal of the burglar tools conviction here. This court determined, "one of the elements of the crime of making or having burglary tools is that they are possessed under

circumstances evincing an intent to use them in a burglary." Id. (emphasis added). Because the circumstances in Miller involved Miller's use of tools to remove locks from coin boxes, theft not burglary, this court properly concluded the "circumstances involved in the present case could not constitute burglary" and therefore, "the defendant's possession of the tools for criminal purposes was insufficient to establish the crime of making or having burglary tools." Id.

The same is true here. At most, the State's evidence showed Castro's intent to employ tools in future vehicle prowls and perhaps vehicle thefts. The State adduced no evidence whatsoever showing Castro's evinced intent to use the tools to enter or remain unlawfully in a building. Because the State did not demonstrate Castro's intent to use the tools in a burglary, the State's evidence failed to meet the definition of making or having burglar tools. CP 36 (requiring intent that tools "be used or employed in the commission of a burglary").

The State attempts to circumvent Miller's plain holding by pointing out that Castro *could have* used many of the tools he possessed to commit burglary as part of his "wide crime spree." Br. of Resp't at 10-12. The State confuses the evidence it perhaps could have presented with the evidence it actually did present. At trial, there was not even a hint that Castro had used or planned to use any tool in a burglary. Because this evidence was

completely lacking, there was insufficient evidence for any rational juror to conclude that Castro was guilty of making or having burglar tools. Miller, 90 Wn. App. at 730.

The State also points to other items in Castro's possession, including handcuffs, a taser, and a modified airsoft gun. Br. of Resp't at 11-12. But these items have nothing in common with the items enumerated in the burglar tools statute, RCW 9A.52.060(1), which include "any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary . . . ." Nor does the State explain how handcuffs or weapons in Castro's possession qualified as implements that had been adapted, designed, or commonly used for the commission of a burglary.

Under the statutory maxim ejusdem generis, "general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or 'comparable to' the specific terms." Simpson Investment Co. v. Dep't of Revenue, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). Here, the general term "implement" in RCW 9A.52.060(1) cannot refer to anything and everything the prosecutor might imagine could be employed to commit a crime. Rather, "implement" must mean something comparable to the other items listed in RCW 9A.52.060(1), all of which appear to be geared towards defeating physical security

measures, such as locks, chains, and the like. Because tasers, handcuffs, and pellet guns are not implements designed, adapted, or commonly used to break or overcome physical security measures, they are unlike the specific burglar tools listed in RCW 9A.52.060(1) and therefore do not support a conviction for making or having burglar tools.

Because the State failed to present sufficient evidence that Castro intended to use any of the tools he possessed in the commission of an actual burglary—an essential element of the crime of making or having burglar tools—this court must reverse the burglar tools conviction and remand for dismissal of this charge with prejudice.

2. THE PROSECUTION ARGUED JURORS MUST ARTICULATE A REASON TO ACQUIT, WHICH IS PLAIN MISCONDUCT

The State attempts to elevate form over substance with respect to its misconduct, arguing that, because the prosecutor did not say "in order for you to find the defendant not guilty," her arguments were not burden shifting. Br. of Resp't at 13-14. But it is burden shifting to argue that jurors must have a reason to return a not guilty verdict, and the prosecutor's avoidance of a particular turn of phrase does not make it otherwise.

Numerous cases stand for the proposition that it is improper for the prosecutor to argue that jurors must have a reason for having a reasonable doubt because such arguments shift the burden of proof and production to

the defense. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); State v. Walker, 164 Wn. App. 724, 731-32, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Although many of these cases involved "fill in the blank" arguments, together they stand for a broad proposition: under no circumstances is it acceptable for the prosecution to argue that acquittal is conditioned on jurors' ability to articulate a reason for having reasonable doubt.

Here, the prosecutor asked, "Do you think you have a reason to doubt in this case? He's got this car and he's got all this stolen property on him. Do you have any reason to doubt that he knew that it was stolen? Absolutely not." RP 142-43. This argument erroneously indicated to jurors that they must return a guilty verdict unless they could point to a reason to doubt. This argument plainly shifted the burden to Castro to provide jurors with a reason to doubt. According to the prosecutor, if the jurors could not come up with such a reason, they were required to convict. This was misconduct and it requires reversal.

The State also repeatedly asserts that its arguments were acceptable because it was merely arguing that no reasonable doubt existed. Br. of Resp't at 16-20. These assertions fail to acknowledge the clear difference

between a "reasonable doubt" and a "reason to doubt." Castro takes no issue with prosecutorial arguments explaining why, based on reasoned consideration, the State's evidence supports conviction beyond a reasonable doubt. But when the prosecution tells jurors they must have "a reason" to doubt, the prosecution shifts the burden to the defense. Because the State will avoid supplying a reason to doubt its own evidence, asserting jurors must have a reason to doubt in order to acquit requires the defense or the jury to come up with a reason. This impermissibly shifts the burden.

Given that prosecutorial articulation-of-reasonable-doubt arguments have been repeatedly held to qualify as misconduct in the case law, this court should hold the prosecutor's misconduct in this case was flagrant and ill intentioned. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (holding misconduct qualifies as flagrant and ill intentioned when "case law and professional standards . . . were available to the prosecutor and clearly warned against the conduct").

Furthermore, as discussed in his opening brief and in the following section, the reasonable doubt instruction itself erroneously requires articulation of reasonable doubt in order to acquit. Br. of Appellant at 15-16. In light of Washington's repugnant and unconstitutional definition of reasonable doubt, no instruction was available to cure the prosecutor's burden shifting misconduct in this case. Castro asks that this court reverse.

3. WPIC 4.01 IS UNCONSTITUTIONAL AND IT IS TIME FOR THE COURTS TO ADDRESS ITS UNCONSTITUTIONALITY

The State does not address the substance of Castro's argument that Washington's pattern jury instruction on reasonable doubt requires articulation and is therefore constitutionally infirm. Instead, the State merely cites cases approving of WPIC 4.01. Br. of Resp't at 21-22. But these cases do not address the problems Castro identifies or explain how WPIC 4.01 does not contain an unconstitutional articulation requirement.

The State relies on State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007), which required that WPIC 4.01 be given in every criminal case. Br. of Resp't at 21. But, as discussed in Castro's opening brief, the Bennett court was not asked to decide whether WPIC 4.01 contained an unconstitutional articulation requirement, so its analysis flows from the unquestioned premise that WPIC 4.01 is correct.[1] Br. of Appellant at 26-27.

The State also relies on Division One's recent decision in State v. Lizarraga, ___ Wn. App. ___, 364 P.3d 810 (2015). That case did not

[1] The State posits "it would be odd indeed for the Court of Appeals to find that [WPIC 4.01], required by the Supreme Court, is actually unconstitutional." Br. of Resp't at 21. What seems odder to Castro is that no appellate court to date has been willing to meaningfully address the actual substance of his analysis. By refusing to address the arguments and authorities supporting the instant challenge to WPIC 4.01, the courts dishonor the constitutional right to appeal under article I, section 22. This is especially true given that the Washington Supreme Court in Bennett acknowledged that WPIC 4.01 has room for improvement. 161 Wn.2d at 318 (requiring WPIC 4.01 "until a better instruction is approved" (emphasis added)).

provide thoughtful analysis of Castro's arguments, but instead dodged them, predictably hiding behind Bennett. Lizarraga, 364 P.3d at 830. Neither Bennett nor Lizarraga addressed Castro's arguments, so neither forecloses them.

As Castro argued in the opening brief, the case law is inconsistent with respect to the articulation of reasonable doubt. Br. of Appellant at 28-33. There is no difference between requiring a reason to exist and requiring a reason to be given—both impose an articulation requirement on the reasonable doubt standard. Cf. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015). Rather than joining other courts in avoiding the issue, this court should address Castro's arguments head on. WPIC 4.01's articulation requirement is unconstitutional and requires reversal.

B. CONCLUSION

Castro's burglary tools conviction must be dismissed for insufficient evidence. The prosecutorial misconduct and the unconstitutional instruction on reasonable doubt require reversal of Castro's other convictions and remand for a fair trial.

DATED this 4th day of March, 2016.

Respectfully submitted,

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State v. Benjamin Castro

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Certificate 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 4th day of March, 2016, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 4th day of March, 2016.

X Patrick Mayovsky