

64081-0

64081-0

NO. 64081-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOEY WAYLAND,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. There was insufficient evidence that Joey Wayland committed theft in the third degree as charged in count I.

2. The prosecution's misrepresentation of its burden of proof and the presumption of innocence denied Wayland a fair trial by jury.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecution was required to prove Wayland stole property from a grocery store with the intent to deprive the store of this property. Security guards immediately detained Wayland when he walked outside the store but never found any of the items he supposedly took. Did the prosecution fail to prove the essential element of theft that Wayland stole property with the intent to deprive the owner of it?

2. The prosecution bears the burden of proving all essential elements beyond a reasonable doubt and the jury must presume the accused person is not guilty. In the prosecutor's closing argument, she explained that the jury must find Wayland guilty unless it identifies a specific reason to doubt his guilt, which misrepresents both the burden of proof and presumption of innocence. Did the prosecution's flagrant misrepresentation of the

basic principles of due process of law deny Wayland a fair trial by jury?

C. STATEMENT OF THE CASE.

On September 21, 2008, Joey Wayland began drinking heavily in the late afternoon, and sometime after midnight he ended up at a QFC grocery store in Seattle's Capitol Hill neighborhood. 6/9/09RP 22-24; 6/10/09RP 129-30.<sup>1</sup> Wayland does not remember much of the evening. 6/10/09RP 132.

Undercover security guards Todd Gierzak and Matthew Evans were posing as shoppers while walking around the store. Evans thought he saw Wayland take two six packs of beer and put them into a backpack that was inside a shopping cart, then leave the store. 6/10/09RP 126-28. Evans alerted Gierzak, who did not see Wayland take anything, and they confronted Wayland outside the store. 6/9/09RP 31, 56.

Gierzak and Evans walked in front of Wayland to stop him from leaving. 6/9/10RP 34; 56; 6/10/09RP 19. Because they thought Wayland would try to flee, both Evans and Gierzak grabbed Wayland before he could begin to run away. 6/9/10RP

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<sup>1</sup> The verbatim report of proceedings ("RP") is referred to herein by the date of proceeding followed by the page number.

59; 6/10/09RP 21. Gierzak “wrapped [his] arms around [Wayland]’s waist,” and Evans used an “arm bar takedown,” both trying to force Wayland to the ground and put handcuffs on him. 6/9/09RP 39; 6/10/09RP 21, 42. Gierzak and Evans used various arm, shoulder, and waist grabs to keep Wayland on the ground as Wayland struggled to free himself. 6/9/09RP 58, 61; 6/10/09RP 23, 42-43. They held on to Wayland and tried to put hand restraints on him, but could not control both of his hands. 6/9/09RP 63; 6/10/09RP 26. They only got one handcuff on him before the police arrived. Id. at 64.

At some point, Gierzak noticed that Wayland did not have the backpack in which Evans thought he smuggled beer from the store. 6/9/09RP 47. They could not find the backpack anywhere. 6/10/09RP 32. They did not recall Wayland taking off the backpack as they struggled with him. 6/9/09RP 47. They never found any property Wayland may have taken from the store. 6/9/09RP 48.

Wayland was charged with two counts of second degree robbery, for this incident and another incident where he was similarly accused of taking property from the same QFC and struggling with store security guards outside the store. CP 9-10. The prosecution also accused Wayland of first degree burglary, but

in the middle of trial, the prosecution conceded it could not prove the burglary allegation because there was no evidence anyone ever told Wayland that the store considered him “trespassed,” meaning he was not permitted to enter this grocery store.

6/10/09RP 119-25.

After a jury trial, Wayland was convicted of two counts of the lesser included offenses of third degree theft for both incidents.<sup>2</sup> CP 12, 13.

The court imposed consecutive sentences for the two gross misdemeanor convictions. CP 59-61. Wayland timely appeals.

Pertinent facts are addressed in further detail in the relevant argument sections below.

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<sup>2</sup> This appeal does not challenge the second incident resulting in a third degree theft conviction because Wayland agreed in his testimony that he committed this theft when he took food from the grocery store. 6/10/09RP 151.

D. ARGUMENT.

THE LACK OF EVIDENCE WAYLAND STOLE  
PROPERTY COUPLED WITH THE STATE'S  
MISREPRESENTATION OF ITS BURDEN OF  
PROOF DENIED WAYLAND A FAIR TRIAL BY  
JURY

1. The State must prove the essential elements of a criminal offense. In Washington, the state constitutional right to a trial by jury "provides greater protection for jury trials than the federal constitution." State v. Williams-Walker, \_\_ Wn.2d \_\_, 2010 WL 118211, \*2 (2010); Wash. Const. art. I, §§ 21, 22. The jury must unanimously decide every element of the charged offense after receiving complete and accurate instructions on the law. Williams-Walker, at \*2.

The prosecution bears the burden of proving each element of a criminal charge beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In Re Winship, 397 U.S. 359, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006); U.S. Const. amends. 6, 14; Const. art. I, § 3. When the sufficiency of the evidence is challenged on appeal, the Court examines all of the evidence and decides whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v.

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The evidence must be viewed in the light most favorable to the State, with all reasonable inferences construed against the accused. Id.

When an innocent explanation creates a reasonable doubt about the accused's guilt, the prosecution must offer evidence dispelling that innocent explanation. United States v. Law, 528 F.2d 888, 896 (D.C. Cir. 2008); United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9<sup>th</sup> Cir. 1993). "[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt." United States v. Lopez, 74 F.3d 575, 577 (5<sup>th</sup> Cir. 1996).

Speculation and conjecture are not a valid basis for upholding a jury's guilty verdict. State v. Prestegard, 108 Wn.App. 14, 23, 28 P.3d 817 (2001).

2. The State presented insufficient evidence to prove Wayland stole property, an essential element of theft. To convict Wayland of third degree theft, the prosecution had to prove he "wrongly obtain[ed] or exert[ed] unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.050;<sup>3</sup>

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<sup>3</sup> A recent amendment to the theft statute increased the maximum value to \$750. Laws 2009, ch. 431.

RCW 9A.56.020(1)(a); CP 53. Third degree theft applies to property valued at an amount less than \$250. RCW 9A.56.050(1)(a); CP 9-10; CP 53.

It is essential that a person take property with the intent to keep it from its owner in order to commit a theft, although the State does not need to prove the intent to permanently keep it. See State v. Souza, 60 Wn.App. 534, 537, 805 P.2d 237, rev. denied, 116 Wn.2d 1026 (1991). The prosecution claimed Wayland put beer of an unknown type into a backpack that rested inside a shopping cart while he was inside a store and that outside the store, the backpack disappeared. The security guards immediately grabbed Wayland as he exited the store but never saw the backpack afterward and never looked inside the backpack to verify that Wayland took the store's beer outside the store. The prosecution did not prove Wayland tried to deprive the store of its property.

Security officer Gierzak did not see Wayland take anything from the grocery store. 6/9/09RP 86-87. Gierzak explained that as an undercover guard, "I pretend I'm a shopper," and he tries not to let customers to suspect he is a security guard. 6/9/09RP 11.

Gierzak had worked as a security guard for one year and was considered a senior employee who trained others. Id. at 53.

When Gierzak thought Wayland might have noticed he was watching him, Gierzak immediately walked away and went outside the store. 6/9/10RP RP 82. He did not want to “spook” Wayland, presumably meaning he did not want to encourage Wayland to believe he was being watched and decide not to steal property. Id.

Gierzak said he “did not see” Wayland “select an item from the shelf.” 6/9/09RP 98-87. He did not see Wayland take or conceal property and did not keep him in constant surveillance. 6/9/09RP 98-87. Gierzak wrote a report after the incident in which he described the incident as an assault based on what occurred outside the store, but curiously, did not report the incident as a theft. 6/9/09RP 76.

Gierzak’s partner that night, a relatively new trainee named Matthew Evans, followed the same rules and constraints as Gierzak. 6/9/09RP 118-19. Like Gierzak, he worked undercover and did not want people to notice that he was watching them. Id. at 119.

Evans and Gierzak used their cell phones to communicate. 6/9/09RP 82-84. Evans called Gierzak to tell him that he should

watch Wayland. 6/9/09RP 28. When Gierzak walked away because he did not want to “spook” Wayland by watching him, he spoke with Evans on his cell phone so they could remain in contact with each other. Id. at 31. Gierzak did not get good cell phone reception inside the store, so he went outside the store to speak with Evans. Id. at 83.

Evans watched Wayland while crouching under a rack holding gift cards, and believed he saw Wayland put beer of an unknown brand into a shopping cart and then into a backpack. 6/9/10RP 128. He observed from a distance as he spoke with Gierzak on his cell phone while trying not to let Wayland suspect he was being watched. 6/9/10RP 128, 134.

Once Wayland left the store, Gierzak and Evans both said they approached Wayland from the front of his body, and thought he wore the backpack on his back. 6/9/10RP 35; 6/10/09RP 19. When Wayland did not immediately stop, Gierzak said he grabbed Wayland's waist and Evans said he took hold of Wayland's arm. 6/9/10RP 39; 6/10/09RP 21. Gierzak and Evans said a lengthy and very physical struggle ensued immediately, during which Gierzak and Evans held on to Wayland and tried to bring him to the ground and keep him there. Wayland never escaped from Gierzak

or Evans, although he kept flailing and would not stay on the ground. 6/9/09RP 40, 42. They put one hand restraint on him and kept trying to attach the second cuff but were not able to get both hand restraints attached until the police arrived. 6/9/09RP 42. The police arrested Wayland and took him away. 6/9/09RP 63-64.

Yet Wayland was not wearing a backpack and no backpack was in sight when their struggle ended. 6/9/09RP 48. There was no beer anywhere in the area. Id.; 6/10/09RP 32. Neither Evans nor Gierzak had any recollection of how or when Wayland took off the backpack. Evans said he looked for the backpack throughout the area but did not see it. 6/10/09RP 32.

Wayland testified at his trial that he had no recollection of the evening. 6/10/09RP 129-30. He had been drinking for a long period of time and did not remember going inside the QFC or anything that may have happened inside the store. 6/10/09RP 146-47. He did not believe he had a backpack with him. 6/10/09RP 132.

The trial testimony does not establish that Wayland took property out of the grocery store with the intent to deprive the owner of it. As soon as Wayland left the store, Gierzak and Evans promptly restrained him and struggled with him. They never saw or

felt him put this backpack anywhere. Although they thought he left the store with it, they could not find it anywhere, and the very physical wrestling they had with Wayland refutes the inference that he was wearing a backpack filled with two six-packs of beer while two large men wrestled him to the ground and held him against a car or tree.

In sum, the backpack disappeared and there was no proof Wayland tried to retain it. There was no other evidence establishing the theft inside or outside the store: no pictures, no videotape, and no description of the type of beer or kind of backpack. The State did not prove Wayland took property with the intent to deprive the owner thereof when there was no explanation as to how, why or when the backpack with the purportedly stolen beer disappeared.

3. The prosecution improperly diluted its burden of proof.

The presumption of innocence may be diluted or even “washed away” by confusing or incorrect explanations of its meaning. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court’s obligation to vigilantly protect the presumption of innocence, and the prosecution’s duty to accurately explain the law. Id. A prosecutor is a quasi-judicial officer and her arguments to the

jury “are apt to carry much weight against the accused,” and thus, she must be especially vigilant in not misstating the law or relying upon improper arguments to secure a conviction. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

The failure to object to misconduct does not waive the error on appeal if the remark amounts to a manifest constitutional error. State v. Dixon, 150 Wn.App. 46, 57, 207 P.3d 459 (2009). Where a prosecutor’s remarks are so flagrant and ill-intentioned that they create “an enduring and resulting prejudice,” the court will grant relief without regard to whether there was a trial objection. State v. Fisher, 165 Wn.2d 727, 747, 202 P.2d 937 (2009).

The prosecutor in Wayland’s case told the jury that to find a “reasonable doubt” and acquit Wayland they had to identify a specific “reason to doubt.” 6/11/09RP 60. She explained, “what that means is that **you must have a reason**, a reason to doubt Mr. Wayland’s guilt.” Id.(emphasis added).

The prosecutor reiterated this theory that the jury had to have a reason to doubt Wayland’s guilt in order to find him not guilty throughout her argument. She explained that they should believe Gierzak and Evans’ testimony because, “[t]here is no reasonable explanation for why” they would be dishonest about

Wayland taking property from the store. 6/11/09RP 63. Claiming that testimony must be believed unless there is a reason that the witnesses would lie reverses the State's burden of proof and the presumption of innocence. State v. Anderson, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009).

The prosecution also noted that Wayland's attorney argued that the State did not ever locate or offer a backpack as evidence against Wayland. The prosecution said, "[t]hose are not reasons to doubt," emphasizing the importance of supplying specific, articulable reasons to doubt someone's guilt as the required framework for finding the prosecution did not prove its case. Id. at 94.

This argument reversed the jury's constitutionally proper deliberative process. The jury is not required to give a specific reason to find the prosecution has not proven its case. Anderson, 153 Wn.App. at 431. When confronted with a similar prosecutorial request that the jury have a reason to find the defendant not guilty, the court in Anderson said "the prosecution made made it seem as though the jury had to find Anderson guilty *unless* it could come up with a reason not to." Id. The court held that implying a duty to convict is contrary to the presumption of innocence and was further

improper because it implied “that Anderson was responsible for supplying such a reason to the jury in order to avoid conviction.” Id.; see State v. Toth, 152 Wn.App. 610, 615, 217 P.3d 317 (2009) (reversing where State implied defendant had duty to present corroborating evidence).

The prosecutor told the jury that it “must have a reason” to find Wayland not guilty and faulted Wayland for failing to supply a reason to disbelieve the State’s witnesses. This argument misstates the fundamental burden of proof and the critical framework under which the jury must decide if the prosecution has proven its case.

4. The remedy is reversal of the conviction. If an appellate court holds that evidence is insufficient to support a conviction, then double jeopardy bars retrial for that offense, and the matter must be dismissed. Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). The insufficient evidence establishing Wayland’s theft requires reversal of the conviction and dismissal of the charge.

Furthermore, the principle of reasonable doubt is integral to the fairness of a criminal conviction and the failure to properly explain reasonable doubt to the jury relieves the prosecution of its

burden of proof. See Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); Bennett, 161 Wn.2d at 317-18.

The prosecutor's misrepresentation of its burden of producing evidence the overcomes the presumption of innocence, rather than Wayland's burden of supplying a reason to doubt the State's case or the jury's obligation to supply a specific reason in order to acquit Wayland confuses and misrepresents its fundamental burden of proof. See State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008). Here, the prosecutor's flagrant misstatement of its bedrock burden of proof and the presumption of innocence encouraged the jury to convict Wayland absent clear evidence that he stole any property. While the jury appropriately did not convict Wayland of the more serious offenses with which he was charged based on the lack of evidence, the prosecution's misrepresentation of its burden of proof encouraged the jury to convict Wayland of an offense upon which they had shaky evidence of a theft. Given the absence of proof that Wayland in fact stole beer from the store, the State's misstatement of law swayed the jury and led to the conviction notwithstanding the lack of evidence. Accordingly, if this Court does not reverse Wayland's

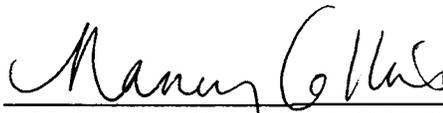
conviction due to insufficient evidence, it should reverse based on prosecutorial misconduct.

E. CONCLUSION.

For the foregoing reasons, Mr. Wayland respectfully requests this Court reverse and dismiss the conviction for third degree theft in count I, based on insufficient evidence.

DATED this 2<sup>nd</sup> day of March 2010.

Respectfully submitted,



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

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| STATE OF WASHINGTON, | ) |             |
|                      | ) |             |
| Respondent           | ) | NO. 64081-0 |
|                      | ) |             |
| v.                   | ) |             |
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| JOEY WAYLAND,        | ) |             |
|                      | ) |             |
| Appellant.           | ) |             |

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**DECLARATION OF SERVICE**

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 2ND DAY OF MARCH, 2010, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

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2024 Cedar Road  
Lake Stevens, WA 98528

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**SIGNED IN SEATTLE, WASHINGTON THIS 2nd DAY OF MARCH, 2010**

x *Ann Joyce*