

NO. 65817-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO GUERRERO,

Appellant.

REC'D
JUL 14 2011
King County Prosecutor
Appellate Unit

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

The Honorable Regina Cahan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

I. THE PROSECUTION IMPROPERLY INVOKED THE MISSING WITNESS DOCTRINE.

In his opening brief, appellant Robert Guerrero asserts he was denied his constitutional right to a fair trial when the prosecutor improperly and prejudicially invoked the missing witness doctrine, thereby, shifting the burden to the defense. Brief of Appellant (BOA) at 10-17. In response, the State does not argue that invocation of the missing witness doctrine constitutes misconduct; instead, the State claims that it never invoked that doctrine. Brief of Respondent (BOR) at 12, 19-21. However, the State conveniently ignores the prosecutor's actual words.

During closing argument, the prosecutor made the following statement:

Now, [it] became clear through the course of the trial that the Defense has picked the person that they want you to pin the blame on. That person is James McLees, heard the name many times, this 81 year old disgraced former attorney conveniently was not around...for no one to find.

7RP 1353-54 (emphasis added). "Conveniently" means: "in a way that gives you an advantage or opportunity and is often slightly

dishonest.¹” In choosing this term, the prosecutor implied the defense gained some kind dishonest advantage from McLees’ unavailability – the underlying inference being that McLees’ testimony would have been unfavorable to Guerrero. Thus, contrary to the State’s argument on appeal, the prosecutor did invoke the missing witness inference during closing argument.

Where the prosecutor improperly invokes the missing witness doctrine, prosecutorial misconduct occurs. State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008); State v. Cheatam, 150 Wn.2d 626, 653, 81 P.3d 830 (2003). As explained in detail in appellant’s opening brief, the prosecutor was not entitled to invoke the missing witness inference because the witness was unavailable to both parties. BOA at 10-13; see also, State v. Dixon, 150 Wn. App. 46, 55, 207 P.3d 459 (2009) (explaining the missing witness inference cannot be invoked when the witness is not particularly available to the defendant). Thus, misconduct occurred here.

¹<http://www.macmillandictionary.com/dictionary/american/conveniently>

II. THE PROSECUTOR WAS NOT JUSTIFIED IN MAKING THE OFFENDING COMMENT.

In response, the State claims the offending comment was justified as a 'pertinent reply to the defense argument'² and as a proper strategy for attacking appellant's credibility and defense. BOR at 19-21. Case law does not support this contention. This Court has previously explained that even when the defense puts forth an exculpatory theory, there are still limits to the State's ability to invoke the missing witness doctrine:

When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.

State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

The stipulation submitted in this case made clear McLees was unavailable to either party. Thus, the State was not justified in invoking the inference that McLees' testimony would have been unfavorable to Guerrero.

² The record shows the prosecutor made the offending comment prior to defense argument. 7RP 1354.

The State also seems to suggest the fact that it objected to the admissibility of Guerrero's other-suspect defense before trial somehow legitimizes the offending statement. BOR at 13-14. Yet, the trial court properly ruled the defense had adequately met its burden of demonstrating the admissibility of the "other suspect" evidence. Thus, however much the State may have disagreed with the trial court's decision to admit Guerrero's other suspect defense, the prosecutor was still not entitled to invoke the missing witness inference in response to this defense.

The State also claims the offending statement was appropriate as some kind of tactical effort by the prosecutor to preemptively defend against the jury's potential application of an "inchoate version of the 'missing witness' doctrine *against the State.*" BOR at 21-22. This argument makes no sense under the facts of this case.

Given the neutrality of the stipulation indicating the witness was unavailable to neither party, it was highly unlikely the jury would have actually invoked the missing instruction against the State. Without argument suggesting that McLees' unavailability was "convenient" to either party, the jury would have reasonably assumed McLees was simply unavailable to both parties, drawing

no inference either way. Moreover, if the State were legitimately concerned the jury would draw an improper inference, rather than resorting to improperly invoking the missing witness doctrine, it should have added language to the stipulation protecting against this or asked for some kind of limiting instruction.

For the reasons stated above and those set forth in appellant's opening brief, the State's offending comment was not justified.

III. THE STATE'S IMPROPER INVOCATION OF THE MISSING WITNESS INFERENCE RESULTED IN UNCONSTITUTIONAL BURDEN SHIFTING.

The State argues this case does not involve unconstitutional burden shifting. BOR at 23-24. The State is incorrect. It is axiomatic that a criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise. Montgomery, 163 Wn.2d at 597 (citations omitted). There are a few well-defined situations in which this principle does not apply – one of them being when the missing witness doctrine properly applies. State v. Blair, 117 Wn.2d 479, 486-488, 816 P.2d 718 (1991).

When the missing witness doctrine is applicable, the State may point to the absence of a witness and argue that jury may infer

that the absent witness's testimony was have been unfavorable to the defendant. Montgomery, 163 Wn.2d at 598. Because McLees was unavailable to both parties and this was satisfactorily explained to the jury, however, that doctrine did not apply here. Id. at 598-99; 6RP 1094. Hence, there existed no exception whereby the State could comment on Guerrero's failure to call McLees without improperly shifting the burden. See, Dixon, 150 Wn. App. at 58-59.

IV. THE STATE'S IMPROPER BURDEN SHIFTING CONSTITUTED HARMFUL ERROR.

It is appellant's position that it should be analyzed under the constitutional harmless error analysis. BOA at 14. The State argues that this case should be analyzed under the "substantial likelihood" standard. BOR at 22-23. Admittedly, the case law in this area is murky. Division II has recently explained:

Various opinions of Division One and Three of this court have held that prosecutorial misconduct affecting a constitutional right is subject to the constitutional harmless error test, rather than the prosecutorial misconduct two part test. See, e.g., State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000); State v. Contreras, 57 Wn. App. at 473, 788 P.2d 1114. We held in State v. Traweek that a prosecutor's comment is "subject to the stricter standard of constitutional harmless error" if it "also affects a separate constitutional right, such as the privilege against self-incrimination." 43 Wn. App. 99, 107-08, 715 P.2d 1148 (1986), overruled on other grounds by State v. Blair, 117 Wn. 2d at 485-86, 816

P.2d 718. See also State v. Davenport, 100 Wn. 2d 757, 761-62 & n. 1, 675 P.2d 1213 (1984) (holding that harmless error analysis does not apply to cases of trial irregularity involving prosecutorial misconduct, but that such trial irregularity does not “independently violate a defendant's constitutional rights”).

But in State v. Warren, the Washington Supreme Court recently declined to reach “the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right,” noting that the prosecutorial misconduct two part test “has long been our approach to analyzing prosecutorial misconduct.” 165 Wn. 2d 17, 26 n. 3, 195 P.3d 940 (2008). Because the misconduct meets the two-part test, we decline to analyze it under the stricter constitutional harmless error analysis.

Dixon, 150 Wn. App. at 58, no. 4.

Given the murkiness of this area of the law and the absence of a Supreme Court opinion to the contrary, there is no reason why this Court should not follow its previous decisions that apply the constitutional harmless error standard when evaluating the effect of a prosecutor’s burden shifting argument. State v. Staten, 60 Wn. App. 163, 802 P.2d 1384 (1991); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546 (1990).

As argued in detail in appellant’s opening brief, based on this record, it cannot be said beyond a reasonable doubt the State’s

improper burden shifting did not contribute to the verdict. BOA at 14-17. Reversal is, therefore, required.

B. CONCLUSION

For the reasons stated above and previously argued, this Court should reverse the appellant's convictions.

DATED this 14 day of ~~June~~^{July}, 2011.

Respectfully submitted,

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