

No. 68167-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

GEORGE STEPHEN McGOWAN,

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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COURT OF APPEALS  
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The deputy prosecutor committed misconduct by telling the jury it must be able to articulate a reason in order to acquit Mr. McGowan.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State bears the burden to prove the elements of the crime beyond a reasonable doubt. In order to acquit a defendant, the jury need find only that the State failed to meet its burden. The jury need not articulate a reason for why it finds the State's evidence insufficient. Did the deputy prosecutor commit misconduct by telling the jury it must be able to articulate and identify a reason for acquitting Mr. McGowan?

C. STATEMENT OF THE CASE

In October 2008, George McGowan was living with his uncle, John McGowan, at Providence Vincent House in Seattle. RP 157-58. George<sup>1</sup> assisted his uncle by performing chores around the apartment. RP 159-60.

At George's request, John rented a laptop computer from Rent-A-Center. RP 160. John accompanied George to the rental store,

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<sup>1</sup> Because George and John McGowan share the same last name, they will be referred to by their first names in this brief in order to avoid confusion.

signed the paperwork, and paid the monthly fee. RP 161. The McGowans rented the laptop for six to 12 months. RP 162. George would use the laptop almost every day. RP 163. He would sit in the community room of the building and use the laptop to surf the Internet or check his email. RP 360, 365-66.

George saw his uncle use the laptop two times. RP 358. John shut off the computer when George entered the room. RP 359. John knew George's password. RP 359. John and George did not spend all of their time together, so John may have used the computer at times when George was not present. RP 358.

The laptop became infected with viruses several times. RP 366. When that happened, George would bring the computer back to Rent-A-Center. RP 366. Usually, an employee at the store would "restore" the computer and give it back to him. RP 105.

Chad Criss was the manager of Rent-A-Center. RP 87. He "restored" the laptop for George at least three times. RP 105. Mr. Criss suspected the laptop was experiencing so many viruses because someone had used it to download pornography from the Internet. RP 109-10. One day, when George brought the laptop in for servicing, Mr. Criss decided to find out if any pornography had been downloaded onto

the computer. RP 110. He opened the computer, turned it on, and clicked on the “recent documents” folder. RP 110. He clicked on about four images contained in the folder, which then appeared on the screen. RP 110. The images appeared to be of nude children. RP 110-11. Mr. Criss closed the computer and told George he did not have any working computers to rent at that time. RP 111-12. He said he would call him when one became available. RP 111-12. After George left, Mr. Criss called police, who came to the store. RP 112. Mr. Criss then called George and told him he had a computer available. RP 112. When George came back to the store to pick up the computer, police arrested him. RP 113.

George was charged with one count of possession of depictions of minors engaged in sexually explicit conduct under former RCW 9.68A.070 (2006).<sup>2</sup> CP 16.

At the jury trial, the State presented evidence of several images of children engaged in sexually explicit conduct that had been saved on the laptop. RP 261-68. George testified he did not search for or save the images and did not know who did. RP 352, 360.

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<sup>2</sup> The former statute provided, “A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class B felony.” Former RCW 9.68A.070 (2006).

In closing argument, the deputy prosecutor told the jury:

I want to talk first about the burden of proof. The burden of proof in this case is beyond a reasonable doubt. And the judge read the instruction about what a reasonable doubt is. I'm going to talk about that for just a second. There's four things that make up a reasonable doubt. The reason must exist. That means you just can't throw up your arms and say this is a really tough job. You have to actually, *if you are considering whether there's a reasonable doubt, you have to be able to articulate and identify a reason.*

RP 385-86 (emphasis added).

The jury found Mr. McGowan guilty as charged. CP 56.

#### D. ARGUMENT

##### THE DEPUTY PROSECUTOR COMMITTED MISCONDUCT BY TELLING THE JURY IT MUST BE ABLE TO ARTICULATE A REASON IN ORDER TO ACQUIT MR. MCGOWAN

1. It is well-established that the prosecutor's argument was improper. The prosecutor's conduct in this case was plainly improper.<sup>3</sup> In State v. Emery, the prosecutor stated in closing argument, "[I]n order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have

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<sup>3</sup> In a prosecutorial misconduct claim, the defendant bears the burden to prove that the prosecutor's conduct was both improper and prejudicial. State v. Emery, \_\_ Wn.2d \_\_, 278 P.3d 653, 662 (2012).

a doubt, you must fill in that blank. 278 P.3d at 659. The Supreme Court held the comment was improper because it shifted the burden of proof to the defendant. Id. at 663. The court explained:

The argument starts with the phrase, “[I]n order for you to find the defendant not guilty.” This is a bad beginning because a jury need do nothing to find a defendant not guilty. And although the argument properly describes reasonable doubt as a “doubt for which a reason exists,” it improperly implies that the jury must be able to articulate its reasonable doubt by filling in the blank. This suggestion is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. By suggesting otherwise, the State's fill-in-the-blank argument subtly shifts the burden to the defense.

Id. at 663-64 (citations omitted); see also In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (State bears burden to prove elements of crime beyond a reasonable doubt). A prosecutor’s argument that the jury must be able to find a reason to find the defendant not guilty shifts the burden of proof to the defendant and constitutes misconduct. Emery, 278 P.3d at 664.

In several cases before Emery, this Court similarly held that a prosecutor’s argument that the jury must be able to provide a reason for finding a defendant not guilty improperly shifted the burden of proof to the defendant. State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding prosecutor’s “fill-in-the-blank” argument suggested

that jury had to provide a reason for finding defendant not guilty and therefore improperly shifted burden of proof to the defense); State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011) (same); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010) (same); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010) (same).

The prosecutor's argument in this case is indistinguishable from the arguments the courts held were improper in Emery, Walker, Johnson, Venegas, and Anderson. Here, the prosecutor stated that, in order to find Mr. McGowan not guilty of the crime, the jury "ha[d] to be able to articulate and identify a reason." RP 385-86. This argument was improper because, to the contrary, "a jury need do nothing to find a defendant not guilty." Emery, 278 P.3d at 663-64. The jury need not be able to articulate its reasonable doubt. Id. Because the prosecutor's argument implied otherwise, it improperly shifted the burden of proof to the defendant. Id.

2. The prosecutor's argument was flagrant and ill-intentioned and requires reversal. If the defendant did not object to prosecutorial misconduct at trial, he is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Emery, 278 P.3d at 664. Here, defense counsel did not object to the prosecutor's improper comments. But Mr. McGowan may raise the issue on appeal because the prosecutor's comments were flagrant and ill-intentioned.

In State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), during closing argument, the prosecutor stated that in order to find the defendants not guilty of the crime, the jury had to find either that the victim lied or that she was mistaken. The Court held the comments were improper because they misrepresented both the role of the jury and the burden of proof. Id. The jury did not have to find the victim lied in order to acquit; instead, the jury "was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony." Id. In other words, if the jury was unsure whether the victim was telling the truth, or if it was unsure of her ability to recall and recount what happened, it was required to acquit. Id.

The Court held the prosecutor's comments were flagrant and ill-intentioned because they contravened established case law. Id. at 214. In frustration, the Court explained, "[t]his court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." Id. at 213 (citing State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991); State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995); State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991)). The improper argument was made over two years after the Court's published opinion in Casteneda-Perez. Id. at 214. The Court "therefore deem[ed] it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial." Id. In other words, the prosecutor knew better. If a prosecutor continues to engage in tactics that the Court has clearly and repeatedly held are improper, the prosecutor's conduct must be deemed flagrant and ill-intentioned. Id.

Here, as in Fleming, the prosecutor engaged in conduct that this Court had clearly and repeatedly held was improper. The closing argument took place on November 16, 2011, after this Court's published opinions in Walker, Johnson, Venegas, and Anderson. In

other words, the prosecutor engaged in conduct that was clearly contrary to the established case law. The prosecutor knew better. The prosecutor must be deemed to have deliberately disregarded this Court's published opinions. Therefore, the prosecutor's conduct was flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214.

In Emery, the Supreme Court stated, “[r]eviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” 278 P.3d at 665. But Emery did not mention Fleming or expressly overrule it. Binding precedent will not be overruled *sub silentio*. State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Therefore, Emery does not stand for the proposition that a prosecutor’s improper comments are flagrant and ill-intentioned *only* if they could not be cured by an instruction. As in Fleming, a prosecutor’s comments are flagrant and ill-intentioned if they are in direct contravention to this Court’s published case law. Fleming, 83 Wn. App. at 214.

In addition, the comments in Emery were made *before* this Court held such comments were improper and therefore they were not flagrant and ill-intentioned under the standard set forth in Fleming.

The prosecutor's oral argument in Emery was held in January 2009, before the Court of Appeals issued its opinions in Walker, Johnson, Venegas, and Anderson, which held that the "fill-in-the-blank" argument was improper. See State v. Emery, 161 Wn. App. 172, 184, 253 P.3d 413 (2011), aff'd, 278 P.3d 653 (2012) (trial began January 8, 2009). Because the prosecutor's argument was not contrary to clearly established case law, it was not flagrant and ill-intentioned. See Fleming, 83 Wn. App. at 214. Thus, Emery is distinguishable from this case. Fleming still controls the outcome here.

In Fleming, the Court held the prosecutor's comments were prejudicial because the State's evidence was not overwhelming. 83 Wn. App. at 215-16. The Court noted that "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Id. at 215 (internal quotation marks and citation omitted).

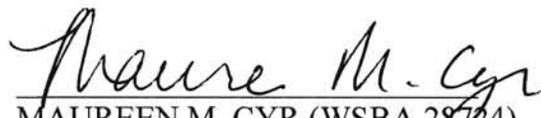
Here, as in Fleming, the prosecutor's comments were prejudicial because the evidence was not overwhelming. Although it was undisputed that images of children engaged in sexually explicit conduct were found on the laptop computer, the evidence that George

McGowan knowingly possessed those images was not overwhelming. George was not the only person with access to the computer. His uncle John had access to the computer and knew how to use it. RP 160-61, 353-54, 358-60. The employees at Rent-A-Center also had access to the computer. RP 104-06, 121, 137-39, 148. In addition, sometimes George would leave the laptop in the apartment when he and John went out. RP 166. It is possible someone else used the computer at those times. In sum, a rational juror could have doubted—without being able to articulate a reason for the doubt—that the State proved George knowingly possessed the images. The prosecutor’s improper comments shifting the burden of proof to Mr. McGowan were flagrant and ill-intentioned and require reversal of the conviction.

E. CONCLUSION

Because the deputy prosecutor committed misconduct during closing argument, the conviction must be reversed.

Respectfully submitted this 31st day of July 2012.

  
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DIVISION ONE**

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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	)	
GEORGE MCGOWAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF JULY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> GEORGE MCGOWAN 354027 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272-0777	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

*2012 JUL 31 11:56*  
*COURT OF APPEALS*  
*STATE OF WASHINGTON*

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF JULY, 2012.

X \_\_\_\_\_ 

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