

No. 71959-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD JAY SANDERS,

Appellant.

2014 DEC -9 AM 11:39
COURT OF APPEALS
STATE OF WASHINGTON
ES

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

The Honorable Charles R. Snyder

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 4

The prosecutor’s misstatement of the State’s burden of
proving guilt beyond a reasonable doubt requires reversal
of Mr. Sanders’ conviction..... 4

1. Prosecutorial misconduct during closing argument violates a
defendant’s constitutionally protected right to a fair trial. 4

2. The State bears the burden of proving the defendant guilty
beyond a reasonable doubt and arguments misstating that
burden are improper. 6

3. The misconduct had a substantial likelihood of affecting the
jury’s verdict. 8

F. CONCLUSION 11

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI..... 4

U.S. Const. amend. XIV 4, 6

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22 4

Article I, section 3 4

FEDERAL CASES

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314
(1934)..... 6

In re Matter of Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368
(1970)..... 6

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1
(1985)..... 6

WASHINGTON CASES

In re the Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d
673 (2012)..... 8

State v. Anderson, 153 Wn.App. 417, 220 P.3d 1273 (2009) 7, 8

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) 6

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997)..... 8

State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)..... 4

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978)..... 5

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) 4

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 8

<i>State v. Espey</i> , ___ Wn.App. ___, 336 P.3d 1178 (2014)	9, 10, 11
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967, <i>cert. denied</i> , 528 U.S. 922 (1999).....	4
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009)	4
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014).....	6
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	8
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011)	4
<i>State v. Venegas</i> , 155 Wn.App. 507, 228 P.3d 813 (2010)	7
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008)	6

A. SUMMARY OF ARGUMENT

Richard Sanders was arrested and charged with attempting to elude a police officer. The primary issue for the jury was the credibility of the police versus Mr. Sanders' credibility. During closing argument, the prosecutor misstated the State's burden of proving him guilty beyond a reasonable doubt. Mr. Sanders' objection was overruled. On appeal, Mr. Sanders submits the prosecutor's argument was misconduct and there was substantial likelihood the misconduct affected the jury's verdict. Mr. Sanders submits his conviction must be reversed.

B. ASSIGNMENTS OF ERROR

1. The prosecutor in closing argument misstated the beyond a reasonable doubt standard.

2. The prosecutor's misconduct violated Mr. Sanders' constitutionally protected right to a fair trial.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Due process requires the State prove a defendant guilty beyond a reasonable doubt. Here, the prosecutor committed misconduct by misstating the State's burden of proving guilt beyond a reasonable doubt during his closing argument. Was there a substantial likelihood

that the misconduct affected the jury's verdict thus requiring reversal of Mr. Sanders' conviction?

D. STATEMENT OF THE CASE

On December 2, 2013, Whatcom County Sheriff's deputies were dispatched to a loud party. RP 25, 59. Upon arriving at the house, Deputy Joseph Anders got out of his car and immediately saw a Toyota pick-up truck starting its engine. RP 61. As the truck came to the edge of the driveway, the driver apparently saw the police and began backing up. RP 61. Deputy Anders activated his overhead lights, got out of his car and signaled the driver of the truck to stop. RP 63. Deputy Anders stated he recognized the driver of the truck as appellant, Richard Sanders, someone he had contacted on prior occasions. RP 64. Deputy Anders was aware Mr. Sanders had an outstanding arrest warrant. RP 66.

Deputy Anders saw the truck drive across the front lawn of a house, through a small ditch, then flee. RP 66. Deputy Anders and Deputy Ratayczak pursued the truck but lost sight of it and were unable to locate it. RP 38-48, 67-70. Mr. Sanders was arrested on December 7, 2013, on the outstanding warrant. RP 109-16.

Mr. Sanders was charged with attempting to elude a pursuing police vehicle; the allegation being that he attempted to flee from Whatcom County Sheriff's deputies on December 2, 2013. CP 4.

Mr. Sanders testified he owned the truck but had not yet registered it. RP 130-32. He further testified the truck had been stolen around October 28, 2013. RP 133. He admitted having an outstanding warrant, admitted being at the house where the deputies were dispatched, but denied driving the truck and failing to yield to the deputies on December 3, 2013. RP 134-36.

During his closing argument, the prosecutor misstated the beyond a reasonable doubt burden of proof:

What about the Defendant's testimony, is it reasonable? That's what we're talking about. We're talking about reasonable doubt. Is the Defendant's testimony, is the Defendant's explanation of what he was doing reasonable? I submit --

RP 177. Mr. Sanders immediately objected, noting the prosecutor had misstated the reasonable doubt standard. *Id.* In response, the court told the jury: "The jury will follow the instruction as to the definition of reasonable doubt." *Id.*

Mr. Sanders was subsequently convicted as charged. CP 30.

E. ARGUMENT

The prosecutor's misstatement of the State's burden of proving guilt beyond a reasonable doubt requires reversal of Mr. Sanders' conviction.

1. Prosecutorial misconduct during closing argument violates a defendant's constitutionally protected right to a fair trial.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a “duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). “A “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

Arguments by the prosecution that misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). Here, the prosecutor's misstatement regarding the State's burden of proof constituted misconduct and must result in reversal of Mr. Sanders' conviction as there was a substantial likelihood that the misconduct may have affected the jury's verdict.

2. The State bears the burden of proving the defendant guilty beyond a reasonable doubt and arguments misstating that burden are improper.

Due process requires the State prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Matter of Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The presumption of innocence is the bedrock upon which the criminal justice system stands The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.

State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), *citing State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

In *State v. Anderson*, the prosecutor argued to the jury that “in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” 153 Wn.App. 417, 431, 220 P.3d 1273 (2009). Division Two held that the argument was improper because it subverted the presumption of innocence by implying that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him. *Id.* at 431.

Similarly, in *State v. Venegas*, the prosecutor argued, “In order to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is - blank.’” 155 Wn.App. 507, 523, 228 P.3d 813 (2010). Following its decision in *Anderson*, Division Two reiterated that this argument was improper. *Venegas*, 155 Wn.App. at 523 n. 16.

The prosecutor’s comment here was no less insidious. The prosecutor’s argument diminished the State’s burden of proof substantially by equating a simple reasonable standard with the beyond a reasonable doubt standard. The prosecutor was implying that by finding Mr. Sanders’ testimony unreasonable, the State had necessarily

proven its case beyond a reasonable doubt. This was an egregious error and constituted prosecutorial misconduct.

3. The misconduct had a substantial likelihood of affecting the jury's verdict.

Once a defendant establishes that a prosecutor's statements were improper, courts then determine whether the defendant was prejudiced; the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *Anderson*, 153 Wn.App. at 427.¹

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

In re the Personal Restraint of Glasmann, 175 Wn.2d 696, 712, 286 P.3d 673 (2012) (internal citations omitted).

¹ Since he objected to the misconduct, Mr. Sanders need not show that a curative instruction could not have cured the prejudice. See *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) ("Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'"), quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Here, the critical issue for the jury was the credibility of the witnesses, as evidenced by the prosecutor's argument. *See* RP 169 ("Now, obviously, this is a case that relies heavily on witness testimony. So, I'm asking each of you as jurors to follow the instructions and weigh the credibility of those witnesses and the stories that each of them told you."); RP 180 ("I'm asking you to weigh the credibility of each one of the witnesses, weigh that testimony."). Deputy Anders testified he was sure the driver of the truck which failed to stop was Mr. Sanders. RP 64.² Mr. Sanders denied being the driver of the truck; he testified that the truck had been stolen prior to the date of the incident. RP 132-34.

Instructive on the issue of harmless error is Division Two of this Court's recent decision in *State v. Espey*, ___ Wn.App. ___, 336 P.3d 1178 (2014). In *Espey*, after concluding the prosecutor committed misconduct during closing argument by commenting on the defendant's right to counsel, and in the absence of an objection, the Court determined the error was substantially likely to affect the jury verdict,

² The other pursuing deputy, Deputy Ratayczak, testified he did not get a good look at the driver, thus was unable to identify who was driving the truck. RP 48.

where the issue for the jury was the credibility of the witnesses. 336

P.3d at 1181-83.

Under these facts, the State fails to carry its heavy burden of showing the error was harmless. As described above, Espey's credibility was the central issue in this case, where the jury was offered a choice between two versions of events: Campbell's and Bischof's, or Espey's and Resnick's. Again, the State's comments on Espey's meetings with counsel were designed to discredit Espey's and Resnick's story. *See* RP (Mar. 20, 2012) at 27 ("Keep in mind he had already consulted with two attorneys, Chip Mosley and Gary Clower. He had lots of time to figure out what story he was going to tell the police."). But even after taking the prosecution's comments into consideration, the jury acquitted Espey of assault, which indicates that the jury may not have believed *everything* Campbell and Bischof said. Absent the prosecution's improper reliance on Espey's meetings with counsel, there is a reasonable doubt that the jury may have reached a different result. Accordingly, we reverse the guilty verdict on the charge of first degree burglary (count II) and remand for a new trial.

Id. at 1183 (emphasis in original). While the Court applied the constitutional harmless error test instead to the "substantially affects the jury verdict" standard, the outcome is the same. The Court, in determining whether Espey's failure to object waived the issue, found that the issue was not waived because "[t]his error was both incurable and substantially likely to affect the jury verdict because it attacked Espey's credibility, which was dispositive in this case." *Id.* at 1182.

Here as noted, the issue as framed by the prosecutor as it was in *Espey*, was the relative credibility of the witnesses, primarily Mr. Sanders'. The prosecutor, while misstating the State's burden of proof, urged the jury to find Deputy Anders to be more credible than Mr. Sanders. Given the similarity between the decision in *Espey* and this case, there is a substantial likelihood the prosecutor's improper statements affected the jury's verdict. Mr. Sanders asks this Court to reverse his conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Sanders asks this Court to reverse his conviction and remand for a new trial.

DATED this 5th day of December 2014.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

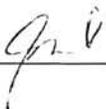
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 71959-9-I
)	
RICHARD SANDERS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF DECEMBER, 2014, 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"/>	WHATCOM COUNTY PROSECUTOR'S OFFICE [Appellate_Division@co.whatcom.wa.us] 311 GRAND AVENUE BELLINGHAM, WA 98225	<input type="checkbox"/>	U.S. MAIL
		<input type="checkbox"/>	HAND DELIVERY
		<input checked="" type="checkbox"/>	E-SERVICE VIA COA PORTAL BY AGREEMENT
<input checked="" type="checkbox"/>	RICHARD SANDERS 8566 GOLDEN VALLEY DR MAPLE FALLS, WA 98266	<input checked="" type="checkbox"/>	U.S. MAIL
		<input type="checkbox"/>	HAND DELIVERY
		<input type="checkbox"/>	_____

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF DECEMBER, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711