

COURT OF APPEALS  
DIVISION II

03 JUL 17 2008

No. 35942-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMY JAMES CLEVELAND,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Rosanne Buckner, Judge

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*APPELLANT'S REPLY BRIEF*

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY ..... 1

THE PROSECUTION’S ATTEMPTS TO MINIMIZE OR  
DISMISS THE CONSTITUTIONALLY OFFENSIVE  
MISCONDUCT ARE UNPERSUASIVE AND THE STATE HAS  
NOT MET THE CONSTITUTIONAL HARMLESS ERROR  
STANDARD ..... 1

B. CONCLUSION ..... 9

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995). . . . . 2  
State v. Harsted, 66 Wash. 158, 119 P.2d 24 (1911). . . . . 4-6

WASHINGTON COURT OF APPEALS

State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995) . . . . . 3  
State v. Flores, 18 Wn. App. 255, 566 P.2d 1241 (1977), review denied, 89 Wn.2d 1014 (1978) . . . . . 5, 6  
State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). . . . . 7, 8  
State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975) . . . . . 7

FEDERAL AND OTHER STATE CASELAW

Chalmers v. Mitchell, 73 F.3d 1262 (2<sup>nd</sup> Cir.), cert. denied, 519 U.S. 834 (1996) . . . . . 7  
Commonwealth v. Rembiszewski, 461 N.E.2d 201 (Mass. 1984). . . . . 4  
Dunn v. Perrin, 570 F.2d 21 (5<sup>th</sup> Cir. 1978), cert. denied, 437 U.S. 910 (1978) . . . . . 7  
In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) . . . 2  
Scurry v. United States, 347 F.2d 468 (U.S. App. D.C. 1965), cert. denied, sub nom Scurry v. Sard, 389 U.S. 883 (1967). . . . . 3  
Siberry v. State, 133 Ind. 677, 33 N.E.681 (1893) . . . . . 6  
State v. Francis, 561 A.2d 392 (Vt. 1989) . . . . . 4



A. ARGUMENT IN REPLY

THE PROSECUTION'S ATTEMPTS TO MINIMIZE OR DISMISS THE CONSTITUTIONALLY OFFENSIVE MISCONDUCT ARE UNPERSUASIVE AND THE STATE HAS NOT MET THE CONSTITUTIONAL HARMLESS ERROR STANDARD

The bulk of the prosecution's arguments in response were adequately addressed in Mr. Cleveland's opening brief and need not be addressed. A few of the prosecution's claims regarding the prosecutor's misconduct below, however, require some reply.

In its response, the prosecution first declares that there was no prosecutorial misconduct committed below, then that any improper argument was "waived" by counsel's failures to object. Brief of Respondent ("BOR") at 8-18. This Court should reject each of these arguments in turn.

First, regarding the trial prosecutor's arguments that he did not have the burden of proving "knowledge," the prosecution correctly notes that one part of those arguments referred specifically to the "to-convict" instruction for the lesser included offense of simple possession, for which no proof of "knowledge" is required. BOR at 10. And if the trial prosecutor had limited his argument that he did not have to prove knowledge to just that instance, the prosecution's arguments on appeal would carry some weight.

But the trial prosecutor's comments were not so limited. In arguing that he had proven the elements of "unlawful possession of a controlled substance with intent to deliver," the prosecutor specifically told the jury, "*knowledge is not in any of the elements to convict*" for that

crime. RP 230-31 (emphasis added). The trial prosecutor's arguments, relieving himself of proving the essential element of knowledge, were *not* limited to just the lesser included offense for which the argument was proper but also clearly included the offense for which Cleveland was convicted - and for which knowledge *was* required. The prosecution's attempts to minimize the scope of the prosecutor's improper argument below thus fail.

The prosecution also claims on appeal that, even if the prosecutor "incorrectly" argued the essential elements of the crime of unlawful possession with intent to deliver and erroneously told the jury that the prosecution did not have to prove the essential "knowledge" element, the issue was "waived" because of counsel's failure to object below. BOR at 11.

This claim, however, ignores the type of misconduct in which the prosecutor engaged. The requirement of proving all of the essential elements of the crime - including the essential element of knowledge for unlawful possession with intent - is a *constitutional* mandate. In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995). The prosecutor's misconduct did not simply misstate the applicable law; it also relieved him of his constitutionally mandated burden of proving all of the elements of the crime for which Mr. Cleveland was convicted. Such constitutional error compels reversal even absent an objection below unless the prosecution can prove, beyond a reasonable doubt, that "any reasonable jury would have reached the same result in the absence of the

error.” See State v. Fiallo-Lopez, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995). Notably, the prosecution has not even attempted to meet that standard, despite Cleveland’s extensive argument on this point in his opening brief. See Brief of Appellant (“BOA”) at 20-23; BOR at 11-12.

The prosecution also argues that the trial prosecutor did not misstate the crucial burden of proof beyond a reasonable doubt by telling the jury that it had to “have a reasonable doubt, a doubt that you have a reason to support” in order to acquit, or by comparing the degree of certainty the jury would use in guessing what picture a puzzle depicted to the standard of proof beyond a reasonable doubt. BOR at 12-14.

Taking the second argument first, the prosecution cites not a single authority in support of its claim that the puzzle analogy “was merely an effort to demonstrate that a person could obtain a fairly high level of certainty regarding an issue even when every single piece of information is not available.” BOR at 13. Nor does the prosecution address a single one of the many cases on which Cleveland relied. BOR at 13-14; see BOA at 17-20.

But those cases clearly illustrate that it is highly improper to compare the degree of certainty people use in making even important everyday decisions to the degree of certainty required to satisfy the burden of proof beyond a reasonable doubt. See BOA at 17-20. Being convinced beyond a reasonable doubt is *not* the same as being willing to act even in “the more weighty and important matters in your own affairs.” See Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert. denied, sub nom Scurry v. Sard, 389 U.S. 883 (1967).

Indeed, court after court has held that analogies to even the degree of certainty used in making serious personal decisions “trivializes the proof-beyond-a-reasonable-doubt standard” and denies the defendant the benefit of the true reasonable doubt standard. See State v. Francis, 561 A.2d 392, 396 (Vt. 1989); Commonwealth v. Rembiszewski, 461 N.E.2d 201, 207 (Mass. 1984).

Rather than offering this Court some authority or even a well-reasoned theory about why the Court should fail to follow the bulk of the courts in this country in recognizing the serious impropriety of the prosecutor’s comments here, the prosecution merely declares them to be not improper. That kind of cursory response is simply not enough especially where, as here, the prosecutor’s comments told the jury not to consider the degree of certainty they would use in deciding something important - like whether to get a divorce or buy a house - but rather something trivial - guessing what picture a puzzle depicted without all of the pieces showing.

Finally, the prosecution’s claims that it was not misconduct to repeatedly tell the jury that the jury had to “articulate a reason to support” any reasonable doubt fare little better. The prosecution claims that the cases relied on by Cleveland do not apply because “they deal with challenged jury instructions.” BOR at 14-16. The prosecution then declares that the prosecutor’s remarks were not improper under State v. Harsted, 66 Wash. 158, 119 P.2d 24 (1911). BOR at 14-16.

At the outset, the prosecution fails to cite *all* the relevant language of the instruction in Harsted. The entire instruction provided:

The burden is on the state of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt. It is not sufficient that the state should prove these facts by a mere preponderance of the testimony, nor, on the other hand is it necessary that they should prove conclusively in such manner as to leave room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible to absolute proof. We can have a moral certainty or a reasonable certainty, which may vary in degree, but rarely an absolute certainty. *The expression 'reasonable doubt' means in law just what the words imply - - a doubt founded upon some good reason. It must not arise from a merciful disposition or a kindly sympathetic feeling, or a desire to avoid performing a disagreeable duty. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible and fair minded man might with reason entertain, consistently with a conscientious desire to ascertain the truth.* You must use your common sense as men of experience, possessing some knowledge of worldly affairs, and if, after examining carefully all the facts and circumstances in this case, you can say and feel that you have settled and abiding conviction of guilt of the defendant, then you are satisfied of guilt beyond a reasonable doubt. If you have not such a conviction then you should acquit him.

66 Wash. at 162 (emphasis added).

The failure of the prosecution to provide the *entire* instruction is telling, given the basis for the Harsted Court's ruling. In finding there was no error in the instruction, the Court specifically referred to the need for a "substantial doubt" or a doubt "having a reason for its basis, as distinguished from a fanciful or imaginary doubt" as the proper definition of reasonable doubt. 66 Wash. at 162-63. The instruction did not require the jury to come up with a specific doubt in order to acquit but merely told the jury that fanciful or imaginary doubts did not amount to "reasonable" doubts. Id.

Thus, the Harsted Court followed the maxim later echoed in State v. Flores, 18 Wn. App. 255, 256-57, 566 P.2d 1241 (1977), review denied,

89 Wn.2d 1014 (1978), that a court reviewing a reasonable doubt instruction refuses to “isolate a particular phrase” and instead construes the instructions as a whole. Because the instruction in Harsted made it clear that it was not requiring the jury to provide a reason for its doubt but simply distinguishing between a real doubt and a doubt which is “fanciful or imaginary,” the instruction was proper. Harsted, 66 Wash. at 163-63.

The prosecution *is* correct that, in Harsted, the Court disagreed with the conclusion in Siberry v. State, 133 Ind. 677, 688, 33 N.E.681 (1893), that an instruction was improper because it forced the defendant to provide a reason why he was not guilty. See BOR at 16; Harsted, 66 Wash. at 163-64. But that does not answer the question here. The instruction at issue provided that “a reasonable doubt is a doubt which has some reason for its basis,” which the Harsted Court said did not put a burden on the defendant to provide a reason why he is not guilty, because it simply defined that a reasonable doubt must be based on a reason. 66 Wash. at 164. Again, the Harsted Court focused on whether a reasonable doubt was not “fanciful” or “conjured up” but rather based on some reason. 66 Wash. at 164. That is a far cry from endorsing telling the jury, as the prosecutor did here, that the jury had to be able to “articulate a reason to support” any doubt for it to be reasonable, that the jurors had to “have a reason for that specific doubt,” and that the standard of reasonable doubt was whether they had “a doubt that [they] have a reason to support” in order to acquit. RP 238-39.

The prosecution also claims that Siberry and Flores are somehow not relevant because those cases deal with jury instructions rather than

prosecutorial misconduct. BOR at 17. But the prosecution provides neither explanation nor citation to any authority to establish that the standard of reasonable doubt is any different when it is contained in an instruction as opposed to when it is being declared by a prosecutor at trial. BOR at 17.

Notably, the prosecution does not even address the bulk of the cases upon which Cleveland relies. It does not address State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975), even though in that case the Court specifically held that an instruction was not improper because it did *not* tell the jury that it had to “assign a reason for their doubts,” but simply pointed out that their doubts had to be “based on reason, and not something vague or imaginary.” 13 Wn. App. at 5-6. And the prosecution does not address Chalmers v. Mitchell, 73 F.3d 1262 (2<sup>nd</sup> Cir.), cert. denied, 519 U.S. 834 (1996), or Dunn v. Perrin, 570 F.2d 21 (5<sup>th</sup> Cir. 1978), cert. denied, 437 U.S. 910 (1978), persuasive on this issue. See BOR at 1-28.

Finally, the prosecution has not even attempted to satisfy its burden of proving that the trial prosecutor’s constitutionally offensive misconduct was harmless beyond a reasonable doubt, applying the standard of proof for constitutional harmless error. That standard requires proof that the evidence was so “overwhelming” that any reasonable jury would have reached the same result even absent the misconduct. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002).

The prosecution’s failure to make an effort to satisfy its burden in this case is telling, given the lack of “overwhelming” evidence in this case.

The case against Cleveland was circumstantial. The drugs in the back seat were found next to another man, away from Cleveland, on the other side. RP 120, 140-66. It was that man, not Cleveland, who was seen making the “furtive movement” towards the floorboard, upon which the suspected rug pipe was found. RP 120, 140-46. The drugs in the door could easily have been put there moments before by the man in the back, without Cleveland’s knowledge. And the other drug pipe was nowhere near Cleveland, instead being found again in the back seat, while Cleveland was in the front. RP 145-46.

Similarly, the evidence regarding the drugs and scales in the camera case and the suspected drugs and incriminating items in the backpack was also circumstantial. There was nothing in the camera case indicating to whom it belonged, and the only evidence was that Cleveland had it in his hand for a moment as it was handed from the back seat to the front. RP 171-73. While Cleveland said it was his backpack, the pack was on the floor of the car next to the woman who owned the car, who could easily have slipped the scales, inoperable gun and other materials inside. RP 119, 133-34. The scales were never tested for fingerprints, so there was nothing tying Cleveland to those, either. RP 135-36, 147, 157-58.

Given the circumstantial nature of the evidence, given the high standard of proof required to satisfy the constitutional harmless error standard under Romero and the other cases detailed in Cleveland’s opening brief (BOA at 21-24), the prosecution cannot prove that the evidence of Cleveland’s guilt was so “overwhelming” that the

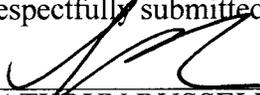
constitutional harmless error standard immunizes the prosecutor's misstatement of his constitutional burden. The prosecutor's misstatements of his constitutional burdens, relieving himself of the full weight of proving the essential elements of the crime, telling the jury that it did not have "reasonable doubt" unless they could come up with a specific reason for their doubts and comparing proof beyond a reasonable doubt to the certainty jurors would use in trivial matters, compel reversal and this Court should so hold.

B. CONCLUSION

For the reasons stated herein and in appellant's opening brief, this Court should reverse.

DATED this 16th day of July, 2008.

Respectfully submitted,

  
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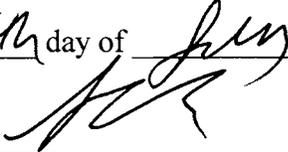
CERTIFICATE OF SERVICE BY MAIL STATE OF WASHINGTON

Under penalty of perjury under the laws of the State of ~~BY~~ DEPUTY  
Washington, I hereby declare that I sent a true and correct copy of the  
attached Appellant's Opening Brief to opposing counsel and to appellant  
by depositing the same in the United States Mail, first class postage pre-  
paid, as follows:

to Ms. Karen Ann Watson, Esq., Pierce County Prosecutor's  
Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA.  
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to Mr. Jeremy Cleveland, DOC 723533, WSP, 1313 N. 13<sup>th</sup> Ave.,  
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