

No. 36761-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT E. EVATT,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

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

The Honorable Frank E. Cuthbertson, Katherine M. Stolz and
Thomas P. Larkin, Judges

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

pm 7-10-08

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A. ASSIGNMENTS OF ERROR

1. Evatt's Article 1, § 9 and 5th Amendment rights were violated and the prosecutor committed serious, prejudicial misconduct in closing argument by repeatedly commenting on Evatt's exercise of his right not to testify at trial.

2. The prosecution cannot meet the heavy burden of proving the constitutional errors harmless.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A prosecutor commits misconduct and it is constitutional error when the prosecutor comments on the defendant's exercise of a constitutional right. The state and federal constitutions guarantee the accused the right to remain silent, which includes the right to decide not to testify. A prosecutor improperly comments on the defendant's exercise of this right when the prosecutor makes comments about the failure of the defense to dispute or contradict the prosecution's evidence and the non-testifying defendant is the only witness who could have provided that contradiction.

In this case, two officers, a store security guard and the defendant were the only people present for the bulk of the incident from which the criminal charges arose. The officers and guard testified but the defendant did not.

1. Did the prosecutor commit misconduct and violate Evatt's constitutional rights to remain silent when, in closing argument, the prosecutor repeatedly commented that the testimony of the officers and guard was uncontradicted, that there had been no evidence that contradicted

what they said occurred, and that the jury had only heard “one consistent story,” which was that Evatt was guilty?

2. Where the prosecutor comments on the defendant’s exercise of a constitutional right, the constitutional harmless error standard applies and the error is presumed prejudicial unless the untainted evidence was so overwhelming it necessarily leads to a finding of guilt. To meet this burden, the prosecutor must also prove, beyond a reasonable doubt, that any reasonable jury would have reached the same result absent the error.

Is reversal required where the prosecution’s case was far from “overwhelming,” the jury’s verdicts reflect that it did not believe the state’s version of events in its entirety and a reasonable jury could well have found Evatt not guilty absent the error?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Scott E. Evatt was charged by amended information with first-degree burglary, third-degree assault, third-degree theft, resisting arrest, and obstructing a law enforcement officer. CP 47-49; RCW 9A.36.031(1)(a); RCW 9A.52.020(1)(b); RCW 9A.56.020(1)(a); RCW 9A.56.050(1); RCW 9A.76.020(1); RCW 9A.76.040(1).

Pretrial proceedings and motions were held on April 18, May 9 and 22, June 11 and 27, July 31 and August 9, 2007, before the Honorable Judges Katherine Stolz and Frank Cuthbertson, and trial was held before

the Honorable Judge Thomas Larkin on August 16, 20-23, 2007.¹ The jury found Mr. Evatt not guilty of first-degree burglary and third-degree assault but guilty of second-degree burglary, third-degree theft, resisting arrest and obstruction. CP 259-264.

On September 14, 2007, Judge Larkin imposed a DOSA sentence. CP 368-83; 8RP 336.

Mr. Evatt appealed and this pleading follows. CP 389.

2. Relevant facts

It was just after 9 p.m. on March 27, 2007, when Scott Evatt went into a Rite Aid drug store in Tacoma. 8RP 78-79. At the time, Christopher Comstock, “loss prevention” officer for the store, was in the back room, near a store video surveillance system. 8RP 102. At the later trial, Comstock testified that Evatt was someone Comstock recognized from previous encounters in the store, so Comstock decided to watch Evatt. 8RP 101-104. Comstock said Evatt went to the “coolers” at the back of the store and took out a beer. 8RP 103-104. According to Comstock, Evatt then picked up an 18-pack of beer and spent about 5 or 6 minutes fumbling with it, trying to conceal it under his jacket. 8RP 103-104.

Evatt went to the front of the store to a register where Georgiana

¹The verbatim report of proceedings consists of 13 volumes, which will be referred to as follows:

April 18, 2007, as “1RP;”

May 9, 2007, as “2RP;”

May 22, 2007, as “3RP;”

June 11, 2007, as “4RP;”

June 27, 2007, as “5RP;”

July 31, 2007, as “6RP;”

August 9, 2007, as “7RP;”

the six chronologically paginated volumes containing the proceedings of August 16, 20-23 and September 14, 2007, as “8RP.”

Braddick was working. 8RP 78-79. Braddick said Evatt put a can of beer on the counter and asked if the bathroom was open. 8RP 78-79. When Braddick said no, Evatt said, "I have to take a pee." 8RP 79-82. Evatt then threw money down on the counter and ran outside, leaving the can of beer behind. 8RP 79-82.

At that point, Comstock ran out from the back part of the store, following Evatt. 8RP 103-104. Rather than running or even walking away, Evatt was still outside the door. 8RP 81-82. Braddick said that she went outside to see if Comstock needed help and saw the two men outside the store, on the right hand side of the door. 8RP 81-82. Although Braddick claimed that Evatt was "kind of threatening" Comstock, when asked to explain Braddick could only say that Evatt was saying to Comstock, "[d]on't touch me. You'll be in for it," or something like that. 8RP 81-83.

The police report later prepared on the incident included an indication that Braddick told police she heard Evatt threaten to "punch out" Comstock. 8RP 90-92. When asked about that statement, however, Braddick denied it. 8RP 90-92. In fact, Braddick was sure she never spoke to police or made a statement. 8RP 90-92.

Comstock claimed that, when he approached Evatt, Evatt was trying to unzip his pants. 8RP 108. Evatt told Comstock he was drunk and needed to "take a pee." 8RP 108. Comstock said Evatt could come back inside to go to the bathroom, but that Evatt needed to pay for the beer. 8RP 104-108. According to Comstock, Evatt responded that he *had* paid for the beer, but the security officer said Evatt had not paid for "*this* beer," grabbing the 18-pack from under Evatt's coat and setting it on the ground.

8RP 107-108.

At that point, Comstock said, Evatt walked 5 or 6 feet down along the outside wall of the store, took down his pants and started urinating. 8RP 108-109. Comstock testified that he tried to get Evatt to stop but was unsuccessful, in part because Comstock did not want to grab or touch Evatt and “get anything.” 8RP 109.

The police report recorded nothing about Evatt peeing on the store, but Comstock claimed he told the officers about it. 8RP 148.

According to Comstock, when Evatt was through urinating, he zipped up his pants and headed back to Comstock. 8RP 108-110. Comstock then told Evatt not to touch him, and repeated that Evatt needed to come back inside the store, threatening to “make him” do so. 8RP 110-12. At that point, according to Comstock, Evatt said he could just pick up the beer and walk away and there was nothing Comstock could do about it. 8RP 110. Comstock claimed that Evatt also pushed Comstock in the chest, using both hands. 8RP 110.

Police who interviewed Comstock that night wrote in their report that Comstock claimed Evatt had pushed him with one hand. 8RP 117. When asked about this discrepancy, Comstock speculated that the police “maybe” wrote the information down “wrong.” 8RP 117.

According to Comstock, after Evatt pushed him, Evatt turned and started walking away across the parking lot. 8RP 110-11. Comstock started following, about 3-4 feet behind. 8RP 110-11. By that time, the police, who had been called by a store employee, had arrived. 8RP 110-11. Evatt was then about halfway across the parking lot and Comstock

“signaled” to them, pointing to Evatt. 8RP 110-12. Comstock said he heard the officers identify themselves as police, after which Evatt took off running. 8RP 112.

Comstock was sure the officers had arrived in one car. 8RP 110-11, 150-51. The officers, however, testified that they arrived in two separate cars, not one as Comstock claimed. 8RP 169-71, 198-99, 201. One of the officers, Officer Metzger, testified that Evatt only started walking away from Comstock when she started walking towards the two men and identified herself. 8RP 201-202. The other officer, Officer Birge, testified that he got out of his car, yelled, “[p]olice, stop,” and Metzger then ran by him, headed towards Evatt. 8RP 171.

Both officers testified that, when they ran after Evatt, he tripped and fell at some point, but got back up and started running again. 8RP 172-74, 198-202. The officers chased Evatt for about six seconds, during which time they shouted for him to stop. 8RP 172-74, 198-202.

According to the officers, Evatt was tackled and taken down to the ground. 8RP 172-74, 198-202. Metzger, who had her knee in Evatt’s back, said Evatt was “fighting,” trying to push himself off the ground and keeping his hands under him even when the officers told him to stop resisting. 8RP 202-203. Birge said it took about four or five seconds to get Evatt handcuffed. 8RP 172-75. Metzger also said that Evatt pulled his arms back underneath himself once when the officers had grabbed his hands. 8RP 202-205.

While the officers took Evatt to a police car, Metzger started advising Evatt of his rights. 8RP 202-205. According to Metzger, while

they were walking back, Evatt was cursing, saying “fuck you, bitch.” 8RP 203-206. Metzger testified that Evatt also said he was going to “get” Metzger, that she was “going down,” and that she was a “lying fucking bitch” and a “lying fucker.” 8RP 203-206. At some point, Metzger claimed, Evatt said, “I know I’m a shit head and I deserve this.” 8RP 206. He also threatened to sue her for arresting him for a felony. 8RP 206.

Birge did not recall Evatt saying anything as they were headed back to the car. 8RP 182.

Once at jail, Evatt continued to complain, saying he was “sick of this rookie cop shit.” 8RP 220-221.

At trial, Comstock claimed that Evatt had been “trespassed” from Rite Aid before the date of the incident, because of intoxication and customer complaints that Evatt was asking them for money or beer. 8RP 114. Comstock said he had kicked Evatt out 6 or 8 times and had told Evatt he was not welcome back into the store. 8RP 114-15. The night of the incident, however, he told police it had happened only “a couple of times.” 8RP 116.

Comstock could not produce any record of the complaints he said were made about Evatt. 8RP 114-15. Neither the loss prevention officer nor any other person from the store had ever called the police about any such complaints or for any other reason relating to Evatt. 8RP 116-18. Comstock had no written “trespass” notice and had never written a report or even taken notes indicating anything about contact with Evatt. 8RP 114-15. No one else testified that they had “trespassed” Evatt, and Braddick said she had never seen him in the store before that night. 8RP 90-92.

Comstock claimed he had no written support for his claim of having previously “trespassed” Evatt because Evatt always refused to come back in the store to give identification and Comstock did not know Evatt’s name. 8RP 114-15. Comstock also said that he never called police because he was “trying to be nice” to Evatt. 8RP 119.

Comstock’s claims about trespassing Evatt and the incident itself were inconsistent with what he told police, the prosecutor and the defense investigator. Comstock told the prosecutor Evatt had been “hanging around for several months” at the time of the incident. 8RP 124. At trial, however, Comstock admitted that, in fact, Comstock had not seen Evatt for at least a month, possibly two, prior to the incident. 8RP 123.

Comstock told the defense investigator that he had kicked Evatt out of the store two times and told Evatt twice not to come back. 8RP 124. He told police that Evatt had been told not to return “a couple of times.” 8RP 116. But at trial, Comstock said he had talked to Evatt “many times” before and that he had kicked him out 6-8 times in the past. 8RP 114-16.

At trial, Comstock testified that Evatt was standing when Comstock came out of the store. 8RP 118. Indeed, Comstock testified, Evatt was never sitting down during the entire incident. 8RP 118. Comstock told the defense investigator, however, that Evatt was sitting down to the right of the doorway outside the store when Comstock first came outside. 8RP 236. Although Comstock claimed he had taken the 18-pack from Evatt, the police reports had Comstock saying Evatt had “dropped the 18-pack of beer on the ground,” shoved Comstock, and started walking away. 8RP 138.

There were security cameras outside the store, but Comstock did not

produce the recordings from those cameras for that night. 8RP 113-16. He first testified that, when he reviewed the outside cameras for the case, the “only thing” he could see was the police bringing Evatt back in handcuffs across 72nd, but it was too dark out to see the police chasing Evatt across that same road. 8RP 114. A few moments later, Comstock again said the outside cameras showed the police officers walking Evatt back across the road, and “walking [Evatt] back in handcuffs.” 8RP 117, 121. In later cross-examination, however, Comstock claimed there were no cameras which aimed in the relevant direction and that he had “never” said that the cameras he viewed showed officers walking Evatt back to the police car. 8RP 164.

Comstock told Lea Sanders, the defense investigator, that when he reviewed the material from the outside cameras for the night of the incident, all he could see “was the police officer escorting Mr. Evatt to the police car.” 8RP 240. Although Comstock denied it at trial, he told the investigator the officers were actually dragging Evatt physically at the time. 8RP 121-122, 239-40. Comstock also denied erasing the information from the outside cameras when questioned about it at trial. 8RP 121-22. In a follow-up to the defense interview, however, he admitted he had erased that information. 8RP 242, 244.

Evatt represented himself at trial and did not testify. 8RP 252.

Evatt was acquitted of assaulting Comstock and of committing first-degree burglary based upon having committed that alleged assault. CP 259-64; 8RP 314-20. He was found guilty, however, of second-degree burglary, third-degree theft, obstruction and resisting arrest. CP 259-64;

8RP 314-20.

D. ARGUMENT

MR. EVATT'S ARTICLE 1, SECTION 9 AND FIFTH AMENDMENT RIGHTS TO SILENCE WERE VIOLATED BY THE PROSECUTOR'S IMPROPER, PREJUDICIAL COMMENTS ON EVATT'S DECISION NOT TO TESTIFY AND THE CONSTITUTIONAL ERROR WAS NOT HARMLESS

Under both the federal and state constitutions, the accused have the right to remain silent. See State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996); Fifth Amend.; Art. I, § 9. That right includes the right to be free from self-incrimination, as well as the right to decide not to testify at trial. State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995); State v. Ramirez, 49 Wn. App. 332, 742 P.2d 726 (1987).

It is a violation of these rights and an error of constitutional magnitude for the prosecutor to comment on the defendant's exercise of his right to decide not to testify. Ramirez, 49 Wn. App. at 339; see State v. Messinger, 8 Wn. App. 829, 509 P.2d 382, review denied, 82 Wn.2d 1010 (1973), cert. denied, 415 U.S. 926 (1974). When such a comment occurs, the error is presumed to be prejudicial and reversal is required unless until the prosecution can meet the heavy burden of satisfying the constitutional harmless error test. Ramirez, 49 Wn. App. at 339; see Fiallo-Lopez, 78 Wn. App. at 729.

In this case, this Court should reverse, because the prosecutor repeatedly commented on Evatt's decision not to testify, and the prosecution cannot prove these constitutional errors harmless.

a. Relevant facts

In initial closing argument, the prosecutor began by arguing that the

videotape of Evatt within the store proved he had committed the burglary. 8RP 281. The prosecutor then declared that there was “no contradiction of the video.” 8RP 281.

A moment later, the prosecutor argued that he had proven the obstruction charge because Comstock and the officers had testified that Evatt had run away after the police had arrived and identified themselves. 8RP 282-84. The prosecutor went on:

And the other thing on obstruction is, there's no - - all of the witnesses testified, basically, the same way, that he took off running after he was told and he had to be tackled. *There's no evidence that contradicts that.*

8RP 284 (emphasis added).

For resisting arrest, the prosecutor said the charge had been proven because the jury had “heard from both Officer Birge and Metzger” that Evatt had struggled with police while he was down on the ground, even after they told him to stop. 8RP 284-85. The prosecutor then said:

That is the proof that you have on that. *Again, they [the officers] both testified to the same thing, and there was no evidence that contradicts that.*

8RP 285 (emphasis added). A moment later, in arguing that he had met his burden of proving that the arrest Evatt was alleged to have been resisting was “lawful,” the prosecutor declared the burden met because “[n]o one is claiming” that the arrest was unlawful and “there’s been no evidence” the arrest was not lawful. 8RP 285.

At the end of the initial closing argument, the prosecutor told the jury to “look at all of the evidence,” reminding the jury that it would be strange if everyone’s testimony had given a “story” that was “exactly the

same,” because memories can fade. 8RP 290. The prosecutor then declared:

[W]hat you saw here was four people, four witnesses, give, basically, the same account of this incident. There was no real contradiction between any of their versions. They, basically, gave the same account of what occurred, *and it has been uncontradicted throughout. I want you to take that into account when you're looking at this evidence.*

8RP 290 (emphasis added).

In rebuttal closing argument, the prosecutor reminded the jury:

You and you alone are the sole judges of the credibility of the witnesses, and Jury Instruction 1 talks about that. You heard all of the testimony from my four witnesses, from his investigator. You get to judge their credibility. You also get to judge what was said here. *There's only one consistent story, and that is the defendant is guilty of these crimes.*

8RP 303-304 (emphasis added).

- b. The arguments were misconduct in violation of Evatt's constitutional rights and the prosecution cannot prove the constitutional error harmless

The prosecutor's arguments were improper comments on Evatt's exercise of his state and federal constitutional rights to decide not to testify under the Fifth Amendment and Article 1, section 9 of the Washington constitution.

A prosecutor need not specifically refer to the defendant to make such improper comments. See State v. Ashby, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969). Nor must the comments be blatant. Id.; see State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442, review denied, 91 Wn.2d 1013 (1978). Instead, a prosecutor commits such misconduct when he makes statements which are “of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify.”

See State v. Sargent, 40 Wn. App. 340, 346, 698 P.2d 595 (1985).

In addition, where the prosecutor refers to state's evidence as "uncontested" or "uncontradicted," if the non-testifying defendant is the only person who could have testified to contest the state's evidence, the prosecutor's statements amount to improper comments on the defendant's rights under the Fifth Amendment and Article 1, section 9. See Ashby, 77 Wn.2d at 37-38; Fiallo-Lopez, 78 Wn. App. at 729. Because, "as a matter of constitutional law," the accused is not required to testify, to allow the prosecution to draw any negative inferences from the exercise of that right "would render this constitutional privilege meaningless" and penalize the exercise of the right by the accused. State v. Reed, 25 Wn. App. 46, 48, 604 P.2d 1330 (1979), citing, Griffin v. California, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S. Ct. 1229 (1965).

Thus, in Fiallo-Lopez, the prosecutor committed misconduct and commented on the defendant's exercise of his rights to decide not to testify, even though the prosecutor's comments did not refer to the defendant. 78 Wn. App. at 728. That defendant, Fiallo-Lopez, was accused of being involved in a drug deal which had been negotiated in several locations. 78 Wn. App. at 728. In closing, the prosecutor declared that there was "no evidence" to explain why Fiallo-Lopez was present at those locations. 78 Wn. App. at 728.

On review, the Court found those comments misconduct and improper comments on Fiallo-Lopez' exercise of his rights not to testify. 78 Wn. App. at 729. Only Fiallo-Lopez, the snitch and an undercover officer were alleged to have been involved in the negotiations, and the snitch and

officer had testified on behalf of the state, incriminating Fiallo-Lopez. 78 Wn. App. at 729. Because only Fiallo-Lopez's testimony could have provided "the explanation the State's [comments] demanded," i.e., why Fiallo-Lopez was present at the locations if he was *not* involved in the deal, the prosecutor's comments were improper comments on Fiallo-Lopez's constitutionally protected decision not to testify, and thus were constitutional error. 78 Wn. App. at 729;² see also, Messinger, supra (prosecutor's comments that there was no evidence "denying" that certain incriminating conversations involving the defendant took place improperly drew attention to the defendant's failure to testify).

Similarly, in Reed, supra, the prosecutor's comments were "flagrant error" in violation of the constitutional right to remain silent and decide not to testify. Reed, 25 Wn. App. at 49. The defendant, a farm laborer, was accused of stabbing his boss, the farm owner. 25 Wn. App. at 47. Part of the evidence against him was that he was not around when the body was discovered and that the defendant had left - suspiciously - without getting paid for his work. 25 Wn. App. at 47. The defendant, Reed, later supposedly said to cellmates that he had killed an old man and taken his car and money, and was going to "do away" with a cellmate "just like I've done" the victim. 25 Wn. App. at 47.

On review, the Reed Court held that the prosecutor's comments during closing argument compelled reversal, because they were comments

²The Court did not reverse despite that misconduct, because it found that the evidence of Fiallo-Lopez' guilt was so significant that the constitutional harmless error standard was met. Fiallo-Lopez, 78 Wn. App. at 729.

on Reed's exercise of his constitutional right to remain silent. 25 Wn. App. at 47. In closing argument, the prosecutor told the jury that there was "no contention" that Reed had been paid, that "[n]obody" had testified "[y]es, I was paid," and there was "nothing to rebut" the claim that Reed was not paid. 25 Wn. App. at 48-49. Because Reed was the only person who could have made such a rebuttal and said, "[y]es, I was paid," the prosecutor's comments were deemed highly improper references to the accused's failure to testify. 25 Wn. App. at 49. Even though counsel did not object to the comment, the Court found, there was "no escape" from the prosecutor's "flagrant error." 25 Wn. App. at 49.

Here, the prosecutor's comments were even more egregious than the comments made in Fiallo-Lopez. According to the state's own witnesses, only Evatt, Comstock and the two officers were present outside the store that night. 8RP 84-85, 108-81, 197-231. Indeed, the prosecution's own witness, Comstock, virtually ensured that there was no other evidence of what happened outside the store, by failing to produce and possibly destroying the recordings from the outside security cameras, the only non-witness records that might have contradicted the state's version of events. 8RP 113-14, 121, 244.

Thus, the only witnesses who could testify as to what happened from the time the officers arrived to the time of Evatt's return to the car were Evatt, Comstock, and the officers. Comstock and the officers testified on behalf of the state. The only other person present - the only witness who could have provided the "contradiction" the state's comments repeatedly sought - was Evatt.

The prosecutor's repeated comments about the lack of testimony contradicting the state's witnesses in their version of events were therefore improper comments on Evatt's failure to testify. When the prosecutor told the jury that there was "no contradiction" of the video, he was commenting on Evatt's failure to take the stand to explain his version of the events the video showed.

More egregious, however, were the comments arguing that the prosecution's case had been proven - and Evatt was thus guilty - because there was no evidence to contradict it. When the prosecutor told the jury that he had proven the essential "knowledge" element of the obstruction charge because there was "no evidence" to contradict the testimony of the state's witnesses that Evatt had run away and officers had to tackle him to stop him, only Evatt could have given that evidence. When the prosecutor commented that he had proven the arrest was lawful because "no one" was claiming to the contrary and there was "no evidence" the arrest was not lawful, again, those comments drew attention to the lack of testimony from the only person present during those incidents who had *not* testified - Evatt.

Further, when the prosecutor reminded the jury that it heard only four witness to the incident and that those witnesses gave "basically" the same version of events which was "uncontradicted throughout," the prosecutor again emphasized Evatt's failure to testify and provide that contradiction.

Finally, when the prosecutor, in conclusion, declared that the jury had heard "only one consistent story," which was "that the defendant is guilty of these crimes," that comment again emphasized for the jury that

Evatt had exercised his right not to testify, because only Evatt could have provided an *inconsistent* story to the version of events the prosecution's witnesses had already provided.

Because Evatt was the only one present at those events who had not testified for the state, he was the only one who could have provided the missing "contradiction." Just as in Fiallo-Lopez, the prosecutor's comments were improper misconduct directly relating to Evatt's exercise of his constitutional rights to be free from self-incrimination.

Reversal is required. Where, as here, a prosecutor improperly comments on the defendant's constitutionally protected decision not to testify, it is constitutional error, presumed prejudicial. Ramirez, 49 Wn. App. at 339. Regardless of the "wide latitude" prosecutors enjoy in closing argument and even if there is no objection below, this Court will reverse based on comments on the defendant's exercise of a constitutional right unless the prosecution can meet the heavy burden of meeting the constitutional harmless error test. See Fiallo-Lopez, 78 Wn. App. at 728 (applying constitutional harmless error to the issue despite the lack of an objection below). The burden is not light - the constitutional harmless error test is only satisfied if the prosecution can convince this Court that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425.

The prosecution cannot meet that burden here. The "overwhelming

evidence” is *not* the same as the test this Court uses when a defendant argues that there is insufficient evidence to support a conviction. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Instead, the “overwhelming evidence” test for constitutional harmless error is a far higher standard, requiring far greater scrutiny of the case. See id. As a result, the question facing this Court is *not* whether the evidence, viewed in the light most favorable to the state, would support a reasonable fact-finder in finding guilt. See id. And even if the evidence would support upholding a conviction against a sufficiency challenge, that same quantum of evidence is simply not adequate to meet the “overwhelming evidence” test for constitutional harmless error. See id.

Romero is instructive. In Romero, the defendant was arrested and charged with first-degree unlawful possession of a firearm. 113 Wn. App. at 783-84. The charges stemmed from a report of shots fired at a mobile home park in the middle of the night. 113 Wn. App. at 783-84. An officer using a flashlight responded to the report and saw Romero coming around the front of a mobile home. Id. Romero was holding his right hand behind his body and, when ordered to do so, refused to show his hands or step away from the home. Id. Romero ultimately ran around the side of the home and disappeared. Id.

Officers later found Romero inside that same mobile home. Id. Also inside was a shotgun. Id. And next to that same home’s front porch, on the ground, were shell casings. Romero, 113 Wn. App. at 783.

Descriptions of the shooter pointed to Romero. 113 Wn. App. at 784. Indeed, an eyewitness identified Romero as the shooter. Id. The

witness was “one hundred percent” positive about the identification, although she also said the shooter was wearing a blue-checked shirt and Romero’s shirt was grey-checked, not blue. Id. And when shown the shirt Romero had worn that night, the witness identified it as the shirt the shooter was wearing. Id.

On appeal, Romero made several arguments, including that there was insufficient evidence to support the conviction for unlawful firearm possession. 113 Wn. App. at 783-95. Applying the standard of review appropriate for a “sufficiency of the evidence” challenge, the reviewing court concluded that the evidence, taken in the light most favorable to the state, was sufficient to support the conviction. 113 Wn. App. at 794.

But that very same evidence was insufficient to satisfy the constitutional harmless error test in light of improper comments an officer made about Romero’s exercise of a constitutional right. 113 Wn. App. at 794. At trial, the officer made a single, unsolicited comment about Romero’s exercise of his right to remain silent and be free from self-incrimination, i.e., that Romero chose not to waive his rights and “would not talk” to the officer. 113 Wn. App. at 793. In applying the constitutional harmless error test, the Court noted that the state’s evidence was disputed, because there was another man present that night wearing a checked shirt of the color the witness said she saw. Id. Despite the strength of the identification and all of the other evidence against Romero, the Court held, because there was disputing evidence, the jury was “[p]resented with a credibility contest” and the improper comments “could have” had an effect on the jury’s verdict. 113 Wn. App. at 795-96. The

Court could not say that “prejudice did not likely result due to the undercutting effect on Mr. Romero’s defense,” and the constitutional harmless error test was thus not met. 86 Wn. App. at 794.

Similarly, in State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), the constitutional harmless error test was not met despite the very strong case against the defendant, on trial for child rape. The constitutional error claimed were very brief comments on the defendant’s exercise of Fifth Amendment rights. 86 Wn. App. at 594. The untainted evidence consisted of a child’s testimony that she had been improperly touched in May or June of 1990, evidence that she had told her sister about it in 1991, and evidence that she had disclosed the abuse to her friend in 1994. 86 Wn. App. at 594-95. Not only the child but the people she told testified to that effect. 86 Wn. App. at 591.

In finding that the constitutional harmless error test was not satisfied, the Court noted that, despite the fact that the state’s case was strong, there was also disputing evidence in the defendant’s favor. 86 Wn. App. at 594-95. One of the claims she made to an investigating officer - that it had occurred when her father spent the night at a hotel - was questioned, because her father had not spent the night at a hotel during the relevant time. Id. In addition, there was a dispute over whether the child had, as she claimed, reported the abuse to her teacher. 86 Wn. App. at 595. Applying the requirement that “overwhelming untainted evidence” must “necessarily lead[] to a finding of guilt” to overcome the constitutional, error, the Court reversed. 86 Wn. App. at 594-95.

Here, it is arguable whether there is enough evidence to withstand a

challenge based on sufficiency of the evidence. But even if that minimal standard could be met, the constitutional harmless error standard could not. The evidence of Evatt's guilt was far from "overwhelming" and was, in fact, disputed by the serious questions and inconsistencies in the state's case. Comstock's testimony was often inconsistent with the version of events he gave officers (one handed push versus two handed, etc), as well as the defense investigator (whether he had erased the outside tapes, whether Evatt was sitting calmly on the curb when Comstock came outside, etc.), and contradicted the officers (one police car versus two, etc). The officers themselves gave somewhat differing versions of events, starting with when Evatt started running, whether one officer was "walking" towards him or running towards him at the time, etc.

Indeed, the jury's verdicts reflect, at least, questions about Comstock's versions of events. If the jury had truly believed Comstock's testimony in full, it would not have acquitted Evatt of the assault Comstock claimed Evatt had committed. Nor would the jury have acquitted Evatt of first-degree burglary based upon that assault. The fact that it *did* acquit Evatt of those crimes illustrates the problems with the prosecution's case and illustrates the lack of "overwhelming evidence" against Evatt on the remaining counts.

There was not overwhelming evidence against Evatt, and the prosecution cannot meet its heavy burden of proving that any reasonable jury would have found Evatt guilty absent the prosecutor's repeated comments on Evatt's failure to testify. The prosecution therefore cannot satisfy the constitutional harmless error standard. This Court should so

hold and should reverse.

E. CONCLUSION

In closing argument, the prosecutor repeatedly made comments on Evatt's failure to testify. Not once or twice but multiple times, the prosecutor reminded the jury that there was no evidence contradicting the state witnesses' version of events, and Evatt was the only person who could have provided that evidence. Because the prosecution cannot prove these constitutional errors harmless beyond a reasonable doubt, this Court should reverse.

DATED this 10th day of July, 2008.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of 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. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Scott Evatt, DOC 706544, McNeil Island Corr. Center, P.O. Box 88-1000, Steilacoom, WA. 98388-1000.

DATED this 10th day of July, 2008.



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353