

No. 36923-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DARNELL LARRY MORRIS,

Appellant.

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STATE OF WASHINGTON
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DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Bryan Chuschcoff, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Morris' Fifth Amendment and Article I, § 9, rights to be free from self-incrimination and his rights to due process were violated by the prosecutor's closing argument.

2. Mr. Morris was deprived of his Sixth Amendment and Article I, § 22, rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is misconduct and a violation of the rights to be free from self-incrimination and to be free from having to disprove any part of the state's case when a prosecutor makes a comment which the jury would naturally perceive as a comment on the defendant's failure to testify.

Were Morris' rights violated and did the prosecutor commit misconduct when the prosecutor repeatedly noted that the story told by state's witnesses was not contradicted and the jury had not heard any evidence contrary to that story, where the only person who could have provided that contradiction was Morris?

2. If the prejudice caused to Morris could have been cured, was counsel ineffective in failing to object and ask for a curative instruction?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Darnell Morris was charged by information with second-degree burglary. CP 1; RCW 9A.52.030(1).

Trial was held before the Honorable Bryan Chushcoff on August 7-

9 and 13, 2007, after which a jury convicted Morris as charged. CP 41.¹ On October 26, 2007, the court ordered a standard-range sentence based upon the prosecution's calculations of the offender score. RP 202-05; CP 42-53.

Morris appealed, and this pleading follows. See CP 3.

2. Testimony at trial

On March 30, 2007, several "loss prevention" officers working at Macy's in the Tacoma Mall saw a man, later identified as Darnell Morris, take two watches from a "spinner," go into the handbag department and conceal them into either his sleeve or jacket pocket, then leave the store through the mall doors without paying for the watches. RP 53-63, 112-20, 136-142. Loss prevention employees then approached Morris, told him they were security, and asked him to come to the security office in the store. RP 59-61. Once there, during a search, two watches either fell to the floor or were recovered from Morris' jacket pocket. RP 59-61, 142. When Tacoma Police arrived about 40 minutes later, after Morris was read his rights, he said, "I fucked up" and admitted that he had intended to sell the watches. RP 60-62, 69-73.

It was claimed that Morris had previously been "trespassed" from the store, on February 6, 2007. RP 65, 74, 114. That was why the Macy's watch department associate had called "loss prevention" when she saw Morris. RP 75-78. Loss prevention officers produced documents which they said indicated that "trespass." RP 74, 144. One of the documents had

¹The verbatim report of proceedings consists of 5 chronologically paginated volumes, which will be referred to as "RP."

the signature of loss prevention personnel but the other one had no signatures. RP 74.

Morris' signature was not on either document. RP 128. Macy's personnel claimed that the signature was not there because Morris was in handcuffs at the time and thus could not sign. RP 63, 81-83, 128. It was also claimed that Morris was read the "trespass" notice by at least one officer, that Morris said he understood and did not have any questions. RP 83, 86, 89, 126, 144-45.

Morris was never given a copy of the trespass form. RP 85-86, 128. Although cameras recorded the incident on March 30, no video was provided or played in court. RP 147.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED SERIOUS MISCONDUCT IN VIOLATION OF MORRIS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO BE FREE FROM SELF-INCRIMINATION

Unlike other attorneys, prosecutors are "quasi-judicial" officers who have a duty to ensure a fair trial by acting "impartially and in the interests of justice and not as a 'heated partisan.'" See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1989); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). When a prosecutor fails in these duties and commits misconduct, he not only risks depriving the defendant of a fair trial but also taints the honor of his office. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

It is grave misconduct for the prosecutor to argue that the jury should draw a negative inference from a defendant's exercise of a

constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Such argument amounts to a violation of the right in question and also violates due process, because it “chills” the exercise of a right. See Belgarde, 110 Wn.2d at 512; United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). As a result, such misconduct is presumed prejudicial and reversal is required unless the prosecution can meet the heavy burden of proving the constitutional error was harmless beyond a reasonable doubt. See State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000).

In this case, this Court should reverse, because the prosecutor committed misconduct both commenting on Morris’ exercise of his right to be free from self-incrimination and improperly shifting a burden of proof to the defense in violation of due process. Further, counsel was ineffective.

a. Relevant facts

In initial closing argument, the prosecutor argued that Morris had entered the store unlawfully and thus was guilty because the only evidence presented at trial was the testimony of the loss prevention personnel that Morris had been given a trespass warning. RP 162. The prosecutor declared:

The moment that he sets foot in Macy’s on March 30th, he is entering the building unlawfully. *There has been no evidence to contradict that.* You have heard three people testify to that.

RP 162 (emphasis added).

In her closing argument, counsel told the jury that the prosecutor's argument of "nothing has been contradicted" meaning Morris was guilty was "not the way that the law works." RP 164. She argued that Morris had no duty to present any evidence. RP 164. She then argued that the prosecution had not proved the essential element of entering or remaining unlawfully, because Morris was allowed to go into the mall store unless the prosecution proved that he knew he "no longer had a license or privilege to enter." RP 166.

Counsel also questioned the evidence of what Morris was "told on February 6," noting the contradictions in the testimony about that and the fact that Morris did not sign the trespass notice. RP 167-74. She suggested that the inconsistencies in the testimony indicated that the jury should not rely on either the testimony or the trespass form "as to what really happened on February 6th." RP 174. She concluded that people "make mistakes, they don't remember correctly, whatever," and the evidence did not prove whether Morris was told he was trespassed and whether he was read the form on February 6th, and thus he had not been shown to have entered unlawfully on March 30th. RP 176-77.

In rebuttal closing argument, the prosecutor characterized the defense argument as saying that because there were "some inconsistencies," Morris must not be guilty. RP 179. The prosecutor also said that what counsel was saying was, because the stories "differ, they [the Macy's personnel] must be out to get him [Morris]." RP 179. The prosecutor went on to say that the jury had heard "one consistent story,"

which was that Morris “was trespassed,” was “informed of the trespass,” and “understood it.” RP 179-80.

Next, the prosecution told the jury that the defense was asking the jurors to ignore the evidence, regardless of who read the trespass notice to Morris,

regardless of how many times it was read to him. Did he understand that he was not allowed back in that store. What did every single one of them tell you? Yes. She [defense counsel] doesn't focus on that. Ignore that. Ignore the fact that they all said that he understood that he was trespassed.

RP 180. The prosecutor agreed that it had to be proved that Morris knew he was not allowed back in the store, but declared that such knowledge had been proven by the testimony of the loss prevention officers regarding what happened on February 6th. RP 181-82.

The prosecutor went on:

The real question is, when the defendant entered Macy's on the 30th, did he do so unlawfully? That is the question that you need to ask yourselves. That is really what number one [of the jury instructions] is getting at. When he stepped one foot into that building, was he doing so unlawfully. And the answer is, yes, because he was trespassed. He knew of it. He understood the trespass. There is no contradiction between any of the three witnesses. He understood that he was trespassed. He understood that he couldn't come back for one year. If he understands that, then when he sets foot in there, it is unlawful. That's the answer to that question. It is that simple.

RP 184. The prosecutor concluded that the jury should not accept the defense, which he said was “[i]gnore the whole picture,” and should instead do as the prosecutor was asking and focus on “the picture,” which the prosecutor described:

The picture is this: He was read [the] trespass notice. You are going to see a copy of that notice. He was handcuffed at that time.

Everybody testified to that fact. He understood it. Everybody says that he understood that notice, that warning. He was told not to come back for one year. Less than two months later, he is back stealing watches. There is no contradiction about that. When you enter a store and you've previously been trespassed and you commit a theft, that's a Burglary in the Second Degree. That's what I'm asking you to convict him on.

RP 185 (emphasis added).

- b. The arguments were constitutional misconduct, the error was not harmless and counsel was ineffective

By making the arguments, the prosecutor violated Mr. Morris' due process rights as well as his right to be free from self-incrimination.

As a threshold matter, these issues are properly before the Court. Where the prosecution makes comments infringing upon the exercise of a constitutional right, that involves a "claim of manifest constitutional error, which can be raised for the first time on appeal" under RAP 2.5(a)(3). See State v. Curtis, 110 Wn. App. 6, 9, 11-12, 37 P.3d 1274 (2002). Further, when a prosecutor commits serious, prejudicial and flagrant misconduct, the issue may be raised on appeal despite the failure of counsel to object below. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 11292 (1995).

On review, this Court should reverse. Both the state and federal constitutions guarantee the accused the rights to remain silent and to be free from self-incrimination. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240,

49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9.² As part of these rights, a defendant has the right to choose whether to testify at a trial in which he is the accused. See Griffin v. California, 380 U.S. 609, 614-615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). Further, because the state and federal due process clauses mandate that the prosecution bears the burden of proving every element of the crime charged beyond a reasonable doubt, the defendant has no obligation to produce evidence of his innocence. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991).

Both of these principles were violated by the prosecutor's arguments in this case. A prosecutor need not directly declare that the defendant should have taken the stand in his defense in order to make an improper comment on the defendant's right to remain silent. Ramirez, 49 Wn. App. at 336. Instead, a prosecutor makes such a comment if he or she makes comments 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. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442, review denied, 91 Wn.2d 1013 (1978); State v. Sargent, 40 Wn. App. 340, 346, 698 P.2d 595 (1985). While a prosecutor may comment on the defendant's failure to present evidence on a particular issue if persons

²The Fifth Amendment, made applicable to the states through the 14th Amendment, provides in relevant part, no person "shall be compelled in any criminal case to be a witness against himself." Article I, § 9 provides, in relevant part, "[n]o person shall be compelled in any criminal case to give evidence against himself."

other than the accused could have testified as to that issue, where there is no one other than the defendant himself who could have offered the missing testimony, the comments are improper and constitutionally offensive misconduct. See State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 403 (1969); State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995).

Thus, in Fiallo-Lopez, the prosecutor's comments were improper comments on the defendant's exercise of his rights against self-incrimination where the defendant was accused of having been involved in a drug deal negotiated by another at two separate locations. 78 Wn. App. at 717. In closing argument, the prosecutor stated that there was "absolutely" no evidence to explain why Fiallo-Lopez was present" and had contact with that negotiator at both places. 78 Wn. App. at 728. The prosecutor also commented that there was no attempt by the defendant to rebut the prosecution's evidence suggesting that Fiallo-Lopez *was* involved. 78 Wn. App. at 728.

Even though the prosecutor also told the jury that the defense "had no burden to explain Fiallo-Lopez' actions," the appellate Court found the arguments were improper, because they "highlighted the defendant's silence." 78 Wn. App. at 728. Because no one other than the state's witnesses and Fiallo-Lopez were present at the relevant times, "no one other than Fiallo-Lopez himself could have offered the explanation the State demanded." 78 Wn. App. at 728. As a result, the prosecutor's arguments "improperly commented on the defendant's constitutional right not to testify and impermissibly shifted the burden of proof to the

defendant,” and were clear misconduct. 78 Wn. App. at 728.

Similarly, here, the prosecutor’s arguments were clear misconduct. Both in initial and rebuttal closing argument, the prosecutor told the jury that there was “no evidence” to contradict the testimony of the state’s witnesses that Morris *had* been told he was trespassed on February 6. RP 162, 179-80. The prosecutor reminded the jury it had only heard “one consistent story” about whether Morris was informed of and understood he had been trespassed, that “every single one” of the witnesses from the state had told the jury Morris understood he was not allowed back into the store and that “[e]verybody testified to that fact.” RP 179-80, 184. Indeed, the prosecutor characterized the defense as asking the jury to *ignore* the testimony it had heard and that all of the witnesses said Morris “understood that he was trespassed.” RP 180. The prosecutor also told the jury there was “no contradiction” between the witnesses that Morris understood the warnings, and there was “no contradiction about that,” either referring to the theft or the understanding. RP 179-80, 184-85.

But the only witness who could have contradicted the state’s witnesses about whether Morris understood the warnings or was read them on February 6 - the only person in the room on February 6th who had *not* testified - was Morris. Thus, the prosecutor’s comments were improper comments on Morris’ failure to take the stand and tell the jury he had *not* understood that he was trespassed or had not been read the warnings on the relevant date.

Reversal is required. Where, as here, the prosecutor commits

misconduct which affects a constitutional right, the error is presumed prejudicial and this Court must reverse unless the prosecution meets the heavy burden of proving the constitutional error harmless, beyond a reasonable doubt. State v. Guloy, 104 Wn.d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). To meet this standard, the Court must conclude that the untainted evidence of guilt is so overwhelming that it necessarily would lead any reasonable jury to convict, even absent the error. See e.g., State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

Here, the evidence about whether Morris was properly informed that he was not permitted to return to Macy's and had been "trespassed" was conflicting. There was no signature by Morris to indicate he had read and/or understood the trespass notice. RP 63, 81-83, 128. Morris was never given a copy of the trespass form. RP 86-86, 128. And there were conflicts in whether it was read to him by one officer or another or if it was read to him twice. RP 83, 86, 89, 144. The constitutional error was not harmless and this Court should so hold.

Finally, counsel was ineffective in relation to this issue. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show that counsel's representation was deficient and the deficiency caused prejudice. State v. Bowerman, 115

Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a “strong presumption” of effectiveness, it is overcome where counsel’s conduct fell below an objective standard of reasonableness. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Counsel’s failure to object in this case was ineffective. As the prosecutor himself pointed out, the real question in the case was whether Morris knew he had been trespassed and thus was not allowed to come back into the store, so that he could be said to have entered unlawfully. RP 184-85. Morris’ only defense was to cast doubt on the reliability of the conflicting versions of what happened on February 6. The prosecutor’s arguments went to the heart of that defense by telling the jury that it should hold Morris’ failure to *rebut* the evidence against him on that issue by taking the stand. Further, those arguments allowed counsel’s client’s constitutional rights to due process and to be free from self-incrimination to be violated.

Notably, counsel clearly knew the prejudice the prosecutor’s comments was likely to cause, because she specifically addressed those comments, albeit ineffectively, telling the jury that Morris’ failure to present evidence did not equal guilt, despite the prosecutor’s claims. See RP 164-76.

It is questionable whether the prosecution’s improper argument could be cured by instruction, given that the Supreme Court has noted that comments on the right to be free from self-incrimination are the kind of comments which fall under the theory of “the bell once rung cannot be

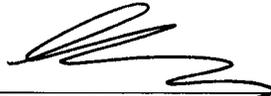
unrung.” See Easter, 130 Wn.2d at 238-39. If this Court finds, however, that the arguments and prejudice could have been cured, it should nevertheless reverse based on counsel’s prejudicial ineffectiveness.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 13th day of September 2008.

Respectfully submitted,



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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,
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DATED this 13th day of September, 2008.


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