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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 37099-9-II

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DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

William Feddersen,

Appellant.

Pierce County Superior Court

Cause No. 06-1-02203-5

The Honorable Judges Brian Tollefson and Vicki L. Hogan

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

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ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT BY SHIFTING THE BURDEN OF PROOF.

A prosecutor commits misconduct by shifting the burden of proof in closing argument. *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir., 2006). The prosecutor in this case shifted the burden by pointing out that jurors “heard no testimony from” the defendant’s ex-girlfriend. RP 177. This comment was meant to undermine Mr. Feddersen’s testimony (that he’d left his license at his ex-girlfriend’s house when he moved out, and thus had not been the person who had provided the license during a traffic stop and then sped away while the officer checked on the license).

The prosecutor went beyond arguing that the evidence provided no support for Mr. Feddersen’s defense. Instead, the prosecutor faulted Mr. Feddersen for not presenting *additional* evidence, beyond that introduced at trial. Respondent’s argument on appeal (that the prosecutor’s closing argument merely pointed out the absence of evidentiary support for Mr. Feddersen’s theory, and was therefore not misconduct) is incorrect.¹ Brief of Respondent, pp. 8-9.

¹ Respondent’s argument that “The Prosecutor does not ever state that it was the defense who failed to call the witness” is disingenuous, since the context unequivocally establishes that the prosecuting attorney intended the jury to understand that Mr. Feddersen failed to call his ex-girlfriend. RP 177. Likewise, Respondent’s claim that “Defendant did

Nor does the missing witness doctrine help the state's argument on appeal. The Supreme Court's latest word on the missing witness doctrine is set forth in *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). Under *Montgomery*, the prosecutor's remarks were improper: (a) Mr. Fedderson's ex-girlfriend was not particularly under his control, (b) her absence was explained by the status of their relationship, (c) the prosecutor's argument shifted the burden of proof by suggesting that he should have called her to testify, and (d) the missing witness argument was not raised until after both sides had rested. *See Montgomery* at 598-599. Respondent does not address *Montgomery*, but relies instead on standards drawn from earlier authority. Brief of Respondent, pp. 10-13. Respondent's failure to apply *Montgomery* is fatal to the state's argument on appeal.

Prosecutorial misconduct infringing a constitutional right is presumed prejudicial. *State v. Moreno*, 132 Wn. App. 663, 672, 132 P.3d 1137 (2006). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way

not object..." is misleading, since defense counsel obtained a ruling outside the presence of the jury.

affected the final outcome of the case. *State v. Gonzales Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008). To meet this standard, Respondent must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

In this case, a reasonable jury could have acquitted Mr. Feddersen, because the issue at trial hinged on credibility. Jurors could have entertained a reasonable doubt about the officer's identification of Mr. Feddersen. Jurors could also have found credible Mr. Feddersen's testimony (that he'd lost his ID and was not driving). Under these circumstances, the state cannot show that all reasonable juries would have convicted Mr. Feddersen, and thus cannot meet the stringent constitutional test for harmless error. In fact, Respondent has made no effort to establish harmless error. Brief of Respondent, pp. 7-13.

By shifting the burden of proof, the prosecutor violated Mr. Feddersen's constitutional right to a fair trial. His conviction must be reversed and the case remanded for a new trial.

II. THE TRIAL COURT VIOLATED MR. FEDDERSEN'S RIGHT TO DUE PROCESS BY ADMITTING TAINTED IDENTIFICATION TESTIMONY INTO EVIDENCE.

Mr. Feddersen stands on the argument made in his Opening Brief.

III. THE STATE DID NOT PROVE THAT EACH POLICE VEHICLE WAS EQUIPPED WITH “SIRENS” (PLURAL).

RCW 46.61.024(1) unambiguously requires proof that a pursuing police vehicle be equipped with “sirens” (plural).² The plain language of this statute does not require construction, and should be given effect. *State Owned Forests v. Sutherland*, 124 Wn.App. 400, 409-410, 101 P.3d 880 (2004); *State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006).

Respondent seeks to avoid this rule by claiming the legislature meant the word “sirens” (plural) to mean “siren” (singular). Brief of Respondent, p. 22. Respondent argues that the plain language must be rewritten, changing “sirens” to “siren,” to avoid absurdity. Brief of Respondent, pp. 22-23. But the Supreme Court has forbidden such legislation from the bench:

If a statute contains an inconsistency but remains rational as a whole, this court will not correct any supposed legislative omission in order to make the statute more perfect, more comprehensive and more consistent.

In re Det. of Martin, 163 Wn.2d 501, 512-513, 182 P.3d 951 (2008) (citations omitted).

The evidence in this case did not establish beyond a reasonable doubt that each pursuing vehicle was equipped with “sirens” (plural).

² A pursuing officer need only activate one siren; however, this does not relieve the state of its obligation with regard to the car’s equipment. RCW 46.61.024(1).

Accordingly, the conviction must be reversed and the case dismissed. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

IV. RESPONDENT’S CONCESSION THAT THE “TO CONVICT” INSTRUCTION WAS INADEQUATE ENTITLES MR. FEDDERSEN TO AUTOMATIC REVERSAL.

Respondent acknowledges that the “to convict” instruction was based on a prior version of the statute, and omitted essential elements. Brief of Respondent, p. 24. Mr. Feddersen did not concede the issue at trial; accordingly, he is entitled to automatic reversal. *State v. Seek*, 109 Wn. App. 876, 883, 37 P.3d 339 (2002); *State v. DeRyke*, 149 Wn.2d 906, 912, 913 n. 1, 73 P.3d 1000 (2003). Respondent’s attempt to avoid automatic reversal in favor of the constitutional harmless error standard is erroneous; as *Seek* and *DeRyke* suggest, automatic reversal follows omission of an essential element from the “to convict” instruction where the accused person does not concede the missing element at trial. Brief of Respondent, pp. 24-25.

Furthermore, even if the constitutional harmless error standard applied, reversal would be required in this case. A juror could have a reasonable doubt that each pursuing car was equipped with lights and sirens (plural); thus it cannot be said that the error was harmless beyond a reasonable doubt. *Gonzales Flores, supra; Burke, supra.*

The “to convict” instruction omitted an essential element and relieved the state of its burden of proof. Accordingly, the conviction must be reversed and the case remanded for a new trial with proper instructions. *See, supra.*

V. MR. FEDDERSEN’S JUDGMENT AND SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR A NEW SENTENCING HEARING.

The prosecuting attorney sought to establish criminal history through “bare assertions” in violation of *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). Mr. Feddersen’s “failure to object to such assertions [did not] relieve the State of its evidentiary obligations.” *Ford*, at 482. Because the state presented no evidence at sentencing, Mr. Feddersen’s Judgment and Sentence must be vacated, and the case remanded for a new sentencing hearing.³ *Ford, supra.*

VI. CERTAIN FACTS RELATING TO PRIOR CONVICTIONS MUST BE PROVED TO A JURY BEYOND A REASONABLE DOUBT BEFORE SUCH PRIOR CONVICTIONS CAN BE USED TO ENHANCE A SENTENCE (INCLUDED FOR PRESERVATION OF ERROR).

Mr. Feddersen stands on the argument made in his Opening Brief.

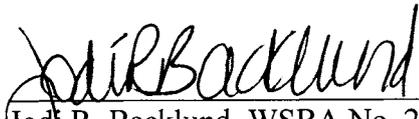
³ The Supreme Court recently heard argument on this issue. *See State v. Mendoza*, No. 80477-0; *State v. Henderson*, No. 80553-9.

CONCLUSION

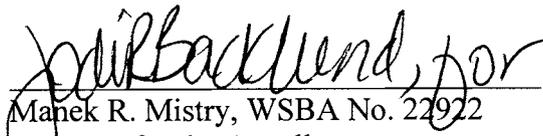
Mr. Feddersen's conviction must be reversed and his case dismissed. In the alternative, the conviction must be reversed and the case remanded for a new trial. If the conviction is not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on November 7, 2008.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



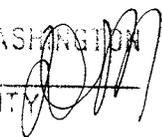
Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

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CERTIFICATE OF MAILING

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I certify that I mailed a copy of Appellant's Reply Brief to

William Feddersen, DOC #704724
Washington Corrections Center
P. O. Box 900
Shelton, WA 98584

and to:

Pierce County Prosecuting Attorney
County-City Building
930 Tacoma Ave. South, Room 946
Tacoma, WA 98402-2171

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 7, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 7, 2008.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant