

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

RONALD J. HART

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

FILED
COURT OF APPEALS
DIVISION II

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct during closing argument deprived appellant of a fair trial.

Issue Pertaining to Assignment of Error

Is reversal required when the prosecutor argued during closing argument that to find the defendant not guilty the jury would have to conclude the officer lied and made up the whole story?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grays Harbor County prosecutor charged appellant Ronald Hart with unlawful possession of a firearm. CP 1. After a hearing pursuant to CrR 3.5, his statements to police at the time of his arrest were ruled voluntary and admissible. CP 8. A jury found him guilty and the court sentenced him within the standard range. CP 22, 25.

2. Substantive Facts

On April 16, 2008, Hart asked his mother to drive him to the trailer park on Fairgrounds Road because he had left his backpack in the truck of a friend who lives there. 2RP¹ 5-6, 34, 38. They returned with an average sized backpack containing Hart's clothes. 2RP 12-13, 34. They had been back only about fifteen minutes when Detective Peterson of the Grays

¹ There are two volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 30, 2008; 2RP – June 26 and July 14, 2008.

Harbor County Sheriff's Office arrived and arrested Hart on an outstanding warrant. 2RP 13, 20.

According to Peterson's testimony, he was acting on a tip that Hart had just left Fairgrounds Road in his mother's car. 2RP 18-19. After the arrest, Peterson testified, he received additional information that Hart had taken a pistol grip shotgun from a car near the Fairgrounds Road house. 2RP 21. Peterson could not recall who gave him this information. 2RP 30. Peterson returned to Hart's mother's home, searched with her consent, and found a 12-gauge, pistol grip shotgun in a downstairs room. 2RP 21-23. The gun was not loaded, and Peterson did not find any shells in the house. 2RP 32. He also found a backpack. 2RP 30.

Hart's mother was surprised to see the gun because she does not allow guns in her home. 2RP 9, 11, 14. She lives there with her husband, her mother, and sometimes her daughter. 2RP 4. She testified no one else went down to the downstairs room where the gun was found. 2RP 16-17. But Hart's grandmother was also in the house when Hart was arrested and his sister had just left. 2RP 16.

Peterson tested the shotgun for fingerprints, but found none. 2RP 24. Nor did he ever see Hart with the shotgun. 2RP 31. He fired the shotgun once to determine it was functional. 2RP 24.

Peterson also testified about statements he claims Hart made while in custody. According to Peterson, Hart said he was sent to Fairgrounds Road to pick up a stolen firearm. 2RP 28. Peterson claimed Hart said he went to Fairgrounds Road with his mother, retrieved the gun from a blue pickup, and returned to his mother's house. 2RP 28. Peterson testified he asked Hart what type of gun it was, and Hart correctly identified it as a pistol grip shotgun. 2RP 28.

A written statement was also admitted, pursuant to the court's ruling at the CrR 3.5 hearing. 2RP 29. Detective Peterson admitted it was he who wrote the statement, but he claimed he did so based on information Hart gave him. 2RP 29. He testified he reviewed the statement with Hart and Hart signed the statement of his own volition. 2RP 29. The statement read:

I got word to go pick up a stolen shotgun from the back of a truck in Fairgrounds Trailer Park in Elma. My mom knew nothing about getting a gun. I had her drive me over to the trailer park in her car. I jumped out and grabbed a pistol-gripped shotgun from a truck. My mom was mad at me when she saw it. I brought it into her house without her knowing. I put it in the back bar room. The truck was a big blue Chevy truck.

Ex. 1 (Attached as Appendix). Hart stipulated he had previously been convicted of possessing a stolen firearm. 2RP 32; CP 9.

Hart testified he only retrieved clothes from the house on Fairgrounds Road. 2RP 34. He denied making any oral statements

regarding the shotgun to Officer Peterson. 2RP 37. He testified he only signed the written statement because Peterson threatened to charge his mother with harboring a fugitive. 2RP 35. Although Peterson denied making any threat, Peterson admitted he “discussed” with Hart the possibility of his mother being charged with harboring a fugitive. 2RP 42-44. He told Hart, “he had put his mother in a hard position.” 2RP 44.

During closing argument, the prosecutor repeatedly returned to the question of Hart’s statement to police. Initially, the prosecutor merely commented, “Did this officer make up the whole thing? Is he so desperate that he made up the whole thing?” 2RP 51. On rebuttal, the prosecutor repeatedly told the jury what they needed to do in order to acquit:

To find the defendant not guilty, the first thing you have to decide is that the defendant read and signed the statement that wasn’t true. You think he did that? No he did not. The other thing you would have to conclude is that the officer somehow slipped this into – put in information that he didn’t tell him.

2RP 57-58. Moments later, he continued, “Do you think Officer Peterson lied? Do you think Officer Peterson made up this whole story and then had the defendant sign it?” 2RP 58. This portion of the argument concluded with the prosecutor telling the jury, “If you believe Officer Peterson lied and made this up, find him not guilty.” 2RP 60.

C. ARGUMENT

THE PROSECUTOR UNDERMINED THE
PRESUMPTION OF INNOCENCE BY ARGUING THE JURY
COULD ONLY ACQUIT IF IT BELIEVED THE OFFICER
WAS LYING.

Prosecutorial misconduct is established if the prosecutor's comments were improper and were substantially likely to affect the outcome of the proceedings. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Even if not objected to at trial, prosecutorial misconduct requires reversal when the prosecutor's comments were so flagrant and ill intentioned they could not have been cured by instruction. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Misconduct that directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. Fleming, 83 Wn. App. at 216.

1. The Prosecutor's Closing Argument Undermined the Presumption of Innocence and Misled the Jury.

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett,

161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Indeed, the failure to properly instruct jurors on these principles is structural error and requires reversal. Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

“Statements made by the prosecutor or defense to the jury must be confined to the law as set forth in the instructions given by the court.” State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A prosecutor’s misstatement of the law is a particularly serious error with “grave potential to mislead the jury.” Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990); see also State v. Warren, 134 Wn. App. 44, 59-61, 138 P.3d 1081 (2006) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt), rev. granted, 161 Wn.2d 1001 (2007); People v. Harbold, 124 Ill. App. 3d 363, 371, 464 N.E.2d 734, 742 (1984) (“[A]rguments which diminish the presumption of innocence are forbidden.”).

A prosecutor undermines the presumption of innocence and shifts the burden of proof by arguing the jury must find the State’s witnesses are lying in order to acquit the defendant. E.g., State v. Wheless, 103 Wn. App. 749,

758, 14 P.3d 184 (2000); Fleming, 83 Wn. App. at 214. This argument misleads the jury by presenting a false choice: “The testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.” State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) (improper cross examination to repeatedly ask defendant if police witnesses were lying).

In State v. Wheless, 103 Wn. App. 749, 14 P.3d 184 (2000), the court reversed the conviction in part because the prosecutor misled the jury by implicitly creating an either/or decision. During closing argument, the prosecutor in Wheless told the jury the defense’s theory of the case required finding “every officer in that chain is lying,” one officer in particular was “confused or mistaken,” or the officer was “a big fat liar,” and “made this up.” 103 Wn. App. at 757. The court found the excessive emphasis on whether the officer was lying was improper. Id. at 759. Additionally, the court concluded the argument was “blatant and pervasive and may well have misled the jury.” Id.

By contrast, prosecutors are permitted to state the obvious, that conflicting versions of events cannot both be correct. State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995). In Wright, the prosecutor

pointed out the discrepancies between the testimony of the State's witness and the defendant, pointing out that in order to believe the defendant, the jury would have to believe the State's witness "got it wrong." 76 Wn. App. at 820. The court found the prosecutor's argument acceptable for two reasons. First, the argument related to the defendant's credibility, not guilt or innocence. Id. at 824, 826. It is a permissible inference to say that, to believe the defendant, the jury would have to conclude the State's witness was mistaken. Id. at 825. On the other hand, to argue that the jury could not acquit the defendant unless it concluded the witness was mistaken would be to improperly shift the burden of proof. Id. at 825. Second, the prosecutor in Wright did not present the jury with the false choice described in Castaneda-Perez because he merely argued the jury would have to find the State's witness was mistaken, not that the witness was lying. Id. at 824, 826. Under Wright, the only permissible variant of this argument is that in order to believe (not acquit) the defendant, the jury would have to conclude the State's witness was mistaken (not lying). Id. at 826.

As in Wheless, the prosecutor created an improper either/or choice for the jury when he argued, "If you believe Officer Peterson lied and made this up, find him not guilty." 2RP 60. Either they must find Officer Peterson was lying and find Hart not guilty, or they must find Officer Peterson was telling the truth and convict. See Wheless, 103 Wn. App. at 758.

The prosecutor's excessive emphasis on whether Officer Peterson was lying was also "blatant and pervasive." See Wheless, 103 Wn. App. at 759. In the initial closing argument, the prosecutor asked the jury, "Did this officer make up the whole thing? Is he so desperate that he made up the whole thing?" 2RP 51. The theme continued on rebuttal when the prosecutor made this impermissible argument twice more, saying, "To find the defendant not guilty The other thing you would have to conclude is that the officer somehow slipped this into – put in information that he didn't tell him," and "Do you think Officer Peterson lied? Do you think Officer Peterson made up this whole story?" 2RP 57-58. Finally, the prosecutor argued, "If you believe Officer Peterson lied and made this up, find him not guilty." 2RP 60.

Finally, under the rubric set forth in Wright, the prosecutor committed misconduct because he argued in order to acquit (not simply believe) Hart, the jury would have to find Officer Peterson was lying (not merely mistaken or confused). Wright, 76 Wn. App. at 826. This argument shifted the burden of proof and undermined the presumption of innocence, denying Hart a fair trial.

2. The Misstatement of the Burden of Proof Was Flagrant, Ill Intentioned, and Incurable by Instruction.

A prosecutor's disregard of a well-established rule of law is flagrant and ill-intentioned misconduct. Fleming, 83 Wn. App. at 214. It is well established that a prosecutor may not misstate the law or undermine the presumption of innocence by diminishing the burden of proof beyond a reasonable doubt. Davenport, 100 Wn.2d at 760; Warren, 134 Wn. App. at 59-61; Cleveland, 58 Wn. App. at 647. It is also well established that a prosecutor commits misconduct and misleads the jury by arguing that to acquit the defendant, the jury must find the State's witness is lying. Fleming, 83 Wn. App. at 214. More than ten years ago, the court held in Fleming that this argument was flagrant and ill intentioned because at that time over two years had passed since it was held improper in Castaneda-Perez. Fleming, 83 Wn. App. at 214; Castaneda-Perez, 61 Wn. App. at 363 (“[W]e find the practice improper and condemn it. It is contrary to the duty of prosecutors.”).

This scenario is similar to the flagrant and ill-intentioned misconduct in Fleming. In that case, the prosecutor argued, “to find the defendants. . . not guilty. . . you would either have to find that [D.S.] has lied about what occurred in that bedroom or that she was confused.” Fleming, 83 Wn. App. at 213. The court held this argument misstated both the role of the jury and the burden of proof. Id. The court explained:

The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury was unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.

Id. The court went on to conclude this argument was flagrant and ill intentioned and reversed Fleming's conviction. Id. at 214, 216.

The closing argument in Hart's case was flagrant and ill intentioned because the only direct evidence linking Hart to the shotgun was the thin thread of his statement to Peterson. The prosecutor presented the jury with a false choice because it did not need to necessarily find Peterson was lying to acquit Hart. Peterson admitted he "discussed" with Hart the possibility of his mother being charged with harboring a fugitive. 2RP 42-43. He told Hart, "he had put his mother in a hard position." 2RP 44. Even if the jury believed Peterson was not intentionally lying, it could reasonably have concluded that Peterson confused information he received from his informant with information he received from Hart himself and that Hart perceived Peterson's discussion of his mother as a veiled threat.

A misstatement of the law pertaining to the burden of proof cannot be easily dismissed despite proper instruction that jurors are to disregard

any argument not supported by the court's instructions.² Fleming, 83 Wn. App. at 213-14. "[T]he presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system." Bennett, 161 Wn.2d at 317-18. Here, the jury instructions also encouraged jurors to consider the lawyers' remarks when applying the law. See CP 19 ("The attorneys' remarks, statements, and arguments are intended to help you understand the evidence and apply the law."). Given this instruction, the jury was unlikely to be able to disregard the prosecutor's argument that seemingly required it to convict Hart unless it found Peterson guilty of perjury.

The prosecutor misstated the jury's role and the burden of proof argument when he argued the jury could only acquit if it found Officer Peterson was lying. See Fleming, 83 Wn. App. at 213. Despite the lack of objection below, this was reversible error because it was a flagrant and ill-intentioned violation of the prosecutor's duty that could not be cured by instruction. See Fleming, 83 Wn. App. at 214; Castaneda-Perez, 61 Wn. App. at 363.

D. CONCLUSION

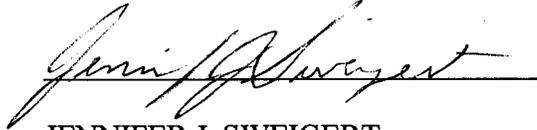
For the foregoing reasons, Hart respectfully requests this court reverse his conviction and remand for a new trial.

² See CP 19 ("Disregard any remark, statement, or argument that is not supported by . . . the law as stated by the court.").

DATED this 27th day of January 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

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BY *[Signature]*
DEPUTY

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JANUARY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

RONALD HART
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WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JANUARY 2009.

x *Patrick Mayovsky*