

NO. 39119-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MARQUISE EMERY, JR.

Appellant.

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

The Honorable Bryan E. Chushcoff

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT DURING CLOSING ARGUMENT BY MISSTATING THE LAW ON THE PRESUMPTION OF INNOCENCE AND MISREPRESENTING THE ROLE OF THE JURY AND THE BURDEN OF PROOF IN VIOLATION OF EMERY'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The State argues that the prosecutor's argument was not flagrant and ill-intentioned as to be incurable by instruction and the defendant waived the issue on appeal by failing to object at trial. Brief of Respondent at 6-12. The State's argument is entirely without merit in light of this Court's recent decision in State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010).

During closing argument here, the prosecutor improperly made the "fill-in-the-blank" argument that this Court deemed flagrant and ill-intentioned in Venegas. The prosecutor in Venegas told the jury, "In order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is' -- blank." Id. at 821. This Court concluded that the remarks were improper:

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin

with the presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

Id. at 821 (citing State v. Anderson, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009)). Emphasizing that “[t]he presumption of innocence is the bedrock upon which the criminal justice system stands,” this Court held that the prosecutor committed flagrant misconduct. Id.

Similarly, while explaining the meaning of reasonable doubt, the prosecutor here, told the jury that if it had any doubt, it must fill in the blank:

What it means is, in order for you to find the defendant not guilty, you have to ask yourselves or you’d have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in the blank. Ask yourself, what is my reason to doubt? That is what the law inquires, a doubt for which a reason exists.

15RP 830.

As in Venegas, the defense counsel did not object, but the error has not been waived because the remark was “so flagrant and ill-intentioned that it evinces enduring and resulting prejudice incurable by a jury instruction.” Venegas, 155 Wn. App. 507, 228 P.3d at 821 (citing State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)).

To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. In re Detention of Sease, 149 Wn. App. 66, 81, 201 P.3d 1078 (2009). Contrary to the State's assertion that the prosecutor's remarks were harmless error, it is evident from the record that there is a substantial likelihood that the prosecutor's flagrant misconduct affected the jury's verdict. Emery testified that he believed the oral sex was consensual because G.C. "appeared normal; she wasn't crying; she wasn't fighting, anything for me to think that there was any wrongdoing." 13RP 641. G.C.'s testimony supported Emery's defense where she explained that "in the time that I was with them, I didn't cry at all. I didn't even have one tear." 10RP 136.

As Division One of this Court observed in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997), "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Id. at 215. The Court pointed out that misstating the basis on which a jury can acquit may insidiously shift the

burden of the State to prove the defendant's guilt beyond a reasonable doubt. Id. at 214. Reversal is required because the prosecutor committed flagrant misconduct by misstating the law and magnifying his misstatements on PowerPoint slides, consequently denying Emery his constitutional right to a fair trial.

2. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING EMERY'S AND OLSON'S JOINT MOTION TO SEVER THEIR TRIALS.

The State argues that the trial court did not abuse its discretion in denying the motion to sever mistakenly relying on State v. Johnson, 147 Wn. App. 276, 194 P.3d 1009 (2008), which is clearly distinguishable from this case. Brief of Respondent at 16-17. In Johnson, three codefendants argued on appeal that the trial court erred when it denied their motions to sever their trials because their defenses were mutually antagonistic. Id. at 283-84. Johnson tried to exculpate himself by blaming his codefendants, Balaski and Odell. Id. at 287. This Court explained why Johnson, Balaski, and Odell failed to show that their defenses were irreconcilable, i.e., that one defense must be believed if the other defense is disbelieved:

If the jury believed Odell's argument that he was an unwitting participant in the crimes, it need not have disbelieved Johnson's defense that he planned to participate in only the burglary and not the murder. If the jury

believed Johnson's defense of ignorance of the murder plan, it was not required to disbelieve that Odell participated unwittingly. Thus, Johnson and Odell's defenses were not irreconcilable. Similarly, if the jury believed Balaski's alibi defense, it did not need to disbelieve Johnson's claim that he did not plan to participate in a murder. Conversely, it could have believed Johnson without disbelieving that Balaski had an alibi.

Id. at 287.

Accordingly, this Court concluded that because the defenses were not mutually antagonistic, the trial court did not err in refusing to sever the trials. Id.

Unlike in Johnson, the testimony substantiates that Emery's and Olson's defenses were mutually antagonistic. Emery's defense was that Olson told him "there was going to be mutual sex" so he believed the oral sex was consensual. 13RP 634-38. Olson's defense was that he was not there that night with Emery. 14RP 725-33. It is evident that the jury must disbelieve one defense in order to believe the other because obviously it could not believe that Emery and Olson were together and believe that Olson was not there at all.

Reversal is required because the trial court abused its discretion in denying the motions to sever where the defenses were irreconcilable and mutually exclusive. See Brief of Appellant at 11-14.

- a. Emery did not waive his right to appeal the trial court's denial of his motion to sever.

The State asserts that Emery did not move to sever the trial before or during trial and therefore waived this issue on appeal. Brief of Respondent at 17. To the contrary, the record reflects that Emery filed a motion before trial joining Olson's motion to sever their trials. CP 21-29. After the State rested, Olson's counsel renewed her motion to sever and Emery's counsel supported her motion by informing the court that if the motion is granted, Emery's case should proceed. 13RP 622-23. Furthermore, Emery included as a basis for a new trial, the court's error in "refusing to grant a severance of his trial from co-defendant, AARON OLSON." CP 207-08. In presenting his motion for a new trial, defense counsel argued that "there was a motion to sever, which should have been granted." 18RP 8. Neither the State nor the court disputed that he moved to sever the trials. 18RP 10-12.

- b. Should this Court determine that Emery waived any severance claim, Emery was denied his constitutional right to effective assistance of counsel which requires reversal.

The State asserts that Emery was not denied effective assistance of counsel because defense counsel's decision not to move for severance "was trial strategy." While acknowledging that Emery's defense was consent, the State claims that he "may well have benefited from a joint

trial.” Brief of Respondent at 19. The State’s argument defies logic. Emery had absolutely nothing to gain from Olson’s testimony that he was not involved at all, which undermined Emery’s testimony that he and Olson had consensual sex with G.C. No strategy justifies a joint trial where the defenses were irreconcilable thus mutually exclusive and Olson’s prejudicial testimony denied Emery a fair trial. Consequently, defense counsel’s representation fell below an objective standard of reasonableness and Emery was prejudiced by the deficient performance because there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the trial would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING EMERY’S MOTIONS FOR A MISTRIAL AND A NEW TRIAL.

The State argues that the court did not abuse its discretion in denying Emery’s motion to sever because there is no basis to conclude that the jury held Olson’s outbursts against Emery and the court “repeatedly” instructed the jury to disregard the outbursts. Brief of Respondent at 24. The State’s argument fails when considering the seriousness of the irregularity, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it.

State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). It is indisputable that Olson's inflammatory accusations during Emery's testimony constitute a serious irregularity because ordinarily witnesses are not verbally abused while testifying. Olson's accusations were not cumulative because no other witness attempted to discredit Emery's defense. Furthermore, although the court instructed the jury to disregard Olson's remarks after the first outburst, the court failed to instruct the jury when Olson accused Emery of lying again. 14RP 693-94, 708-09. The record substantiates that the trial court abused its discretion in denying Emery's motion for a mistrial and subsequent motion for a new trial. See Brief of Appellant at 15-20.

4. REVERSAL IS REQUIRED BECAUSE
CUMULATIVE ERROR DEPRIVED
EMERY OF HIS CONSTITUTIONAL
RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The doctrine applies to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, the accumulation of errors rendered Emery's trial fundamentally unfair: 1) the prosecutor committed flagrant misconduct during closing argument by misstating the law on the presumption of innocence and misrepresenting the role of the jury and the burden of proof; 2) the trial court erred in failing to sever the trials where the defenses were irreconcilable and mutually exclusive; 3) if defense counsel failed to renew his motion for severance, Emery was denied his constitutional right to effective assistance of counsel because the joint trial prejudiced Emery's defense; 4) the trial court erred in failing to instruct the jury to disregard Olson's second outburst accusing Emery of lying on the witness stand.

Reversal and remand is required because cumulative error denied Emery a fair trial. "Only a fair trial is a constitutional trial." State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981)(citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)).

B. CONCLUSION

“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which each defendant stands equal before the law.” Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

Mr. Emery did not stand equal before the trial court. For the reasons stated here and in appellant’s opening brief, this Court should reverse his convictions and remand for a new trial.

DATED this 8th day of July, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of July, 2010 in Kent, Washington.

Valerie Marushige

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Attorney at Law
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