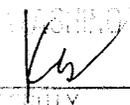


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STATE OF WASHINGTON

BY 
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No. 39644-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Rieken,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00568-5

The Honorable Judge F. Mark McCauley

Appellant's Reply Brief

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ARGUMENT

I. MR. RIEKEN CONCEDES THAT THE COURT'S "TO CONVICT" INSTRUCTION DOES NOT REQUIRE REVERSAL.

Respondent correctly points out that this issue is controlled by *State v. Sibert*, 168 Wn.2d 306, ___ P.3d ___ (2010). Accordingly, Mr. Rieken concedes the issue.

II. PROSECUTORIAL MISCONDUCT VIOLATED MR. RIEKEN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant "must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant's] rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court "previews the merits of the claimed

constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).¹

Prosecutorial misconduct requires reversal whenever the prosecutor’s improper actions prejudice the accused person’s right to a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). Where prosecutorial misconduct infringes on a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009).² To overcome this 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 affected the final outcome of the case. *In re Detention of Pouncy*, ___ Wn.2d ___, ___, ___ P.3d ___ (2010); *State v. Jones*, ___ Wn.2d ___, ___, ___ P.3d ___ (2010). The state must show that any reasonable jury would reach the same result absent the error and that the untainted

¹ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

² In Appellant’s Opening Brief, appellate counsel erroneously cited to a dissenting opinion in support of this proposition. See Appellant’s Opening Brief at p. 8, citing *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038 (2008). In fact, the Supreme Court has expressly reserved ruling on the proper standard to apply when prosecutorial misconduct infringes a constitutional right. See *State v. Warren*, 165 Wn.2d 17, 26 n. 3, 195 P.3d 940 (2008).

evidence is so overwhelming it necessarily leads to a finding of guilt.

Jones, at ___; *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

B. The prosecuting attorney misstated the burden of proof in closing argument and infringed Mr. Rieken's Fourteenth Amendment right to due process.

A prosecutor commits misconduct by misstating the burden of proof in closing. *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008).

This includes arguments that acquittal requires the jury to find that prosecution witnesses are either lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).³

Here, the prosecutor misstated the burden of proof on the affirmative defense of unwitting possession, and implied that the jury would have to find that the trooper was either lying or mistaken in order to acquit under Mr. Rieken's theory of the case. First, the prosecutor argued that acquittal required the jury to "entirely disregard" the trooper's testimony. RP 53. Second, the prosecutor argued that jurors "[had] to be 51 percent sure that the defendant is telling the truth..." RP 53.

These assertions are incorrect.

³ In addition to infringing the accused person's constitutional right to due process, arguments of this sort are *per se* flagrant and ill-intentioned. See *Fleming*, at 214 (Because the prosecutor's "improper argument was made over two years after the opinion" setting forth the rule, the court "therefore deem[s] it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.")

Contrary to the prosecutor's closing argument, jurors could vote to acquit on the affirmative defense if it found the defense established by a preponderance of the evidence—that is, if they believed Mr. Rieken and his girlfriend by any fraction of a percentage above 50 percent. This would not require them to “entirely disregard” the trooper's testimony; instead, they would need only to find it fractionally less persuasive than Mr. Rieken's evidence on the affirmative defense. Given the inherent difficulty in establishing an affirmative defense, the prosecutor's two misstatements unfairly tipped the balance against Mr. Rieken, in violation of his Fourteenth Amendment right to due process.

Without citation to the record or authority, and without further explanation, Respondent asserts that the prosecutor's statements—“fifteen words taken out of context”—were “benign and fleeting because the jury received proper jury instructions.” Brief of Respondent, p. 10. Having made this unsupported argument, Respondent moves on to burden Mr. Rieken with the task of establishing flagrant and ill-intentioned misconduct, ignoring the constitutional dimension of Mr. Rieken's position. Brief of Respondent, p. 11. Respondent claims—again without citation to authority—that the prosecutor's argument “correctly stated” the jury's role in evaluating the affirmative defense. Brief of Respondent, p. 11. Respondent then concludes—once again without citation to

authority—by accusing Mr. Rieken of “specious” argument, because “the use of the phrase ‘51 percent’ is just a colloquially [sic] way of saying ‘more than 50 percent.’” Brief of Respondent, p. 14.

Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007). Neither the record nor the law establishes that the comments were proper, or that the misconduct was “benign” or “fleeting,” especially given the brevity of the transcript. The evidence against Mr. Rieken was not overwhelming, and closing arguments can be presumed to have had a larger impact than they would have in a case that stretched over a longer period of time.

By misstating the burden of proof, the prosecutor committed misconduct that violated Mr. Rieken’s right to a fair trial. This violated his Fourteenth Amendment right to due process. Accordingly, the conviction must be reversed and the case remanded to the trial court for a new trial. *Jones, supra*.

III. MR. RIEKEN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT IN CLOSING.

Mr. Rieken rests on the argument set forth in the Opening Brief, and in the preceding section.

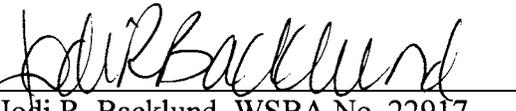
CONCLUSION

Mr. Rieken's conviction must be reversed and his case remanded for a new trial. In light of the Supreme Court's decision in *Sibert, supra*, Mr. Rieken withdraws his request for a new sentencing hearing.

Respectfully submitted on May 5, 2010.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON

BY [Signature]
DEPUTY

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

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

All postage prepaid, on May 5, 2010.

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 May 5, 2010.

[Signature]
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