

NO. 39860-5-II

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BY *[Signature]*

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

STATE OF WASHINGTON,

Respondent,

v.

JOJO HAMILTON EVANS, SR.

Appellant.

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

The Honorable James R. Orlando

REPLY BRIEF OF APPELLANT

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pm 12-30-10

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT EVANS OF ROBBERY IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT UNDER ACCOMPLICE LIABILITY.

The State argues that Evans' conviction of first degree robbery should be affirmed because when viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Brief of Respondent at 11-20. Fatal to the State's argument is its failure to point to any evidence that proves beyond a reasonable doubt that Evans and Reedy were accomplices.

The State claims that Reedy aided Evans in completing the robbery "by first allowing him into the room and then taking possession of Patterson's property after Evans displayed and used force." Brief of Respondent at 16. Contrary to the State's assertion, the mere fact that Reedy opened the door for Evans the second time that he returned to the room fails to establish complicity. As the Washington Supreme Court emphasized in State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981), "one's presence at the commission of a crime, even coupled with a knowledge that one's presence would aid in the commission of the crime," does not implicate accomplice liability. Consequently, evidence that

Reedy and Evans were present in the room together is insufficient to prove that they were acting as accomplices, particularly so in this case when there was no evidence that they knew each other.

Furthermore, the State's assertion that Reedy took Travis Patterson's property is unsubstantiated by the record. Officer Crommes testified that when he stopped Patterson and questioned him outside the motel, Patterson did not tell him that anything was taken from his room. RP 269, 277-78. According to Officer Martin, Evans and Reedy did not come out of the room together. He saw Evans run out of the room and after "a delay," Reedy came running out of the room. RP 147-48. Shalamar Erickson testified that Reedy left "pretty quickly" after Patterson was hit and Amber Sawyer-Jones said that Reedy was the first one out the door. RP 26, 63. Although Officer Martin claimed that he saw Reedy discard something in the trash can and then recovered a package of methamphetamine from the trash can, there was insufficient evidence that Reedy took the methamphetamine from Patterson and that Evans aided him in taking it based on the testimonies of the witnesses.

Importantly, during direct examination, Erickson explained that the other male did not participate in the incident where Patterson was hit over the head and reiterated during cross-examination that he had nothing to do with the incident. RP 26-27, 35-36. Consistent with Erickson's

recollection, Officer Darcy testified that at the show-up, Erickson identified two individuals and said “both of them were participants in different -- in different ways. They were both there, but one did not commit the robbery or the assault; the other one did.” RP 100-01, 111. Erickson and Darcy’s testimonies substantiate that Evans and Reedy were not acting as accomplices, given the absence of any evidence of their association before, during, or after the alleged robbery.

Reversal and dismissal is required because contrary to the State’s argument, even when admitting the State’s evidence and all inferences that reasonably can be drawn therefrom, the evidence was insufficient to prove beyond a reasonable doubt that Evans committed robbery in the first degree under accomplice liability. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

2. 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.

The State asserts that the prosecutor’s use of the fill-in-the-blank argument does not constitute flagrant and ill-intentioned misconduct because the comments were “materially different” from the argument made in State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010). Brief

of Respondent at 22-25. To the contrary, there was no significant difference between the comments because they had the same prejudicial effect of misleading the jury to believe that it had to find the defendant guilty unless it could come up with a reason not to convict him. In Venegas, the prosecutor 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.” 155 Wn. App. at 523. Here, while describing the standard of reasonable doubt, the prosecutor told the jury that if it had any doubt, it must fill in the blank:

If you are -- if you decide to decide, what you should be able to say, “I have a doubt about, okay element X, and it’s because of this reason,” fill in the blank, okay? And it should be a reason that comes from evidence or lack of evidence. And I suggest to you your instruction doesn’t tell you to say, “Well, I wish I had more.” Because let me tell you what, you are always going to wish you had more. Always going [to] be questions. Okay?

RP 391. (Emphasis added.)

There is no meaningful difference between telling the jury that it had to fill in the blank with a reason to find the defendant not guilty and telling the jury that it had to fill in the blank with a reason to have reasonable doubt. Consequently, the prosecutor committed flagrant and ill-intentioned misconduct that evinces an enduring and resulting prejudice incurable by a jury instruction. Venegas, 155 Wn. App. at 523-24.

The State's further arguments, including its assertion that this Court's conclusion that use of the fill-in-the-blank argument constitutes flagrant and ill-intentioned misconduct "was *obiter dictum*," are dispelled by this Court's recent decision in State v. Johnson, 2010 WL 4793307 (Wash.App. Div. 2, 11/24/10). When discussing the reasonable doubt standard during closing argument, the prosecutor stated, "To be able to find a reason to doubt, you have to fill in the blank, that's your job." Johnson at 3. This Court adhered to its holding in Venegas, that such comments are flagrant and ill-intentioned despite the trial court's instructions on the presumption of innocence and assuming that the jury followed the instructions. This Court reasoned that "a misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." Johnson at 5 (citing State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)).

Noting that in State v. Warren, 165 Wn.2d 17, 26 n. 3, 195 P.3d 940 (2008), the Washington Supreme Court declined to apply a constitutional harmless error analysis to improper prosecutorial arguments involving the application and undermining of the presumption of innocence, this Court reversed Johnson's conviction. Johnson at 5.

Importantly, the Supreme Court emphasized in Warren that “[t]he presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.” 165 Wn.2d at 26.

Accordingly, reversal is required because the prosecutor’s flagrant and ill-intentioned misconduct shifted the State’s burden of proof and denied Evans his right to due process.

3. REMAND FOR RESENTENCING IS REQUIRED
BECAUSE THE TRIAL COURT ERRED IN
FAILING TO VACATE EVANS’ ASSAULT IN
THE SECOND DEGREE CONVICTION
THEREBY VIOLATING HIS
CONSTITUTIONAL RIGHT AGAINST DOUBLE
JEOPARDY.

As recognized by the State, the trial court erred in reducing to judgment both the first degree robbery conviction and the second degree assault conviction in violation of double jeopardy. State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). In accordance with the Supreme Court’s holding in Turner, in the event that this Court affirms Evan’s conviction of first degree robbery, remand is required for the trial court to vacate the second degree assault conviction and enter a corrected judgment and sentence. 169 Wn.2d at 465-66 (citing State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2006)).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Evans' conviction of first degree robbery, or in the alternative, remand for resentencing.

DATED this 30th day of December, 2010.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Jojo Hamilton Evans, Sr.

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 Brian Wasankari, 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 30th day of December, 2010 in Kent, Washington.



VALERIE MARUSHIGE
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STATE OF WASHINGTON
BY _____
DEPUTY