

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

STATE OF WASHINGTON,

Respondent,

v.

DEONTE JAMAR THOMPSON,

Appellant.

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JAN 11 2010
CLERK OF COURT

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

The Honorable John A. McCarthy

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED NUMEROUS INSTANCES OF MISCONDUCT CONSTITUTING CUMULATIVE ERROR WHICH DENIED THOMPSON HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A new trial must be awarded where the evidence of guilt is not overwhelming and where “the prosecutorial misconduct was not slight or confined to a single instance” but “such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.” Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

- a. The prosecutor improperly appealed to the passion and prejudice of the jury by accusing Thompson of attempted murder and asserting that he could have been charged with more crimes.

The State argues that when the prosecutor told the jury that Thompson was “not charged with attempted murder,” he was “not charged for the crime he actually committed,” and he was not charged “for the crime he is actually guilty of,” the prosecutor’s argument “was poorly worded.” The State defends the prosecutor’s statements arguing that she “erred in poorly phrasing her argument” but her “error in word choice or phrasing does not deserve the ‘misconduct’ label.” Brief of Respondent at 21. The State similarly argued in State v. Reed, 102 Wn.2d 140, 684 P.2d

699 (1984), that the prosecutor's comments were not as offensive as alleged, which the Washington Supreme Court characterized as respondent's "novel theory of closing argument." Id. at 146. The Court rejected the State's argument concluding that respondent's "statements reflect, at best, a crude understanding of trial advocacy. At worst, these statements illuminate an inexcusable ignorance of a prosecutor's proper role in our legal system." Id. As the Court held in Reed, the prosecutor's conduct constitutes a "grievous departure" from the responsibilities of a "public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice." Id. at 146-47.

The State argues further that when the prosecutor told the jury that Thompson "could have gotten charged for every single person who sat out there on the porch" and if there were six or eight people, he "could have been charged with every single count for every single person," she was responding to defense counsel's closing remarks that "the State improperly charged three counts of assault despite only finding two spent casings." Brief of Respondent at 22. In an attempt to justify the prosecutor's misconduct, the State misstates the record because defense counsel did not assert that the State "improperly charged" Thompson. The

record reflects that defense counsel appropriately argued the facts of the case:

Bullets, there are two of them. Everybody testified differently about the shots. Some people heard three to four shots. Some people heard three to four shots. Some people heard more shots. There are two found. There are three counts of assault.

10RP 974.

Contrary to the State's argument, defense counsel did not open the door for the prosecutor to repeatedly tell the jury that Thompson could have been charged with more crimes. State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976).

The prosecutor's inflammatory comments made to invoke the passion and prejudice of the jury constitutes misconduct and the trial court erred in overruling defense counsel's objection.

- b. The prosecutor improperly repeatedly expressed her personal belief in Thompson's guilt.

The State argues that it was not improper for the prosecutor to repeatedly tell the jury that Thompson is guilty and that he did it because "it is clear the State's goal was to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence, not express a personal opinion about defendant's guilt." Brief of Respondent at 11-15. To the contrary, the prosecutor's closing was not a summation of the

evidence. The prosecutor's argument escalated from "he is definitely responsible" to "[t]hat man who sat in that chair and testified in the manner that he did this morning, that's who did it" then she repeated four times that he "is guilty." During these remarks, the prosecutor concluded, "someone got shot because he meant to kill someone, and that's why he had come down there." 9RP 949-53. The prosecutor in State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956), similarly argued that "[t]his girl has been raped by own father." Id. at 68. The Washington Supreme Court observed that if the prosecutor had prefaced his remark with at least an implied "the evidence establishes that," such language would be excused if not approved. Id. Pointing out that the prosecutor did not do so, the Court concluded that he attempted to impress upon the jury his personal belief in the defendant's guilt and "it was not only unethical but extremely prejudicial." Id.

The prosecutor's unrelenting "he is guilty" speech constitutes flagrant and ill-intentioned misconduct.

- c. The prosecutor improperly vouched for the credibility of the State's key witness, Marquita Jackson.

The State argues that the prosecutor's "comments do not constitute improper vouching with regards to Marquita's testimony," mistakenly relying on State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (2009).

Brief of Respondent at 15-16. In Jackson, the prosecutor referred to the jury instruction and reminded the jury that it is the sole judge of credibility then argued that the four officers' testimonies were consistent and accurate and at one point, referred to an officer's testimony as "accurate and true." Id. at 884-85. In contrast, the prosecutor here made no reference to the jury instruction which would have been permissible argument. Instead, the prosecutor repeatedly emphasized that Marquita testified that Thompson was the shooter because it was the truth. The prosecutor used the word "true" or "truth" six times and concluded, "It's the truth because he did it, and we know he did it because he said he was there." 10RP 1000-01. The prosecutor's repeated pronouncement to the jury that Marquita was telling the truth constitutes improper vouching. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Furthermore, the jury is not required to determine who is telling the truth and who is lying in order to perform its duty. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995).

The prosecutor's constant emphasis on the credibility of its key witness reflecting a deliberate effort to influence the jury constitutes flagrant and ill-intentioned misconduct.

d. The prosecutor misstated the law.

The State claims that the prosecutor was properly responding to defense counsel's argument and was making a "factual argument" rather than a "legal argument." Brief of Respondent at 16-20. The record belies the State's argument because defense counsel specifically referred to the jury instruction and properly argued the law:

So I would ask you to turn to Instruction Number 25, recklessness. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. Recklessness also is established if a person acts intentionally or knowingly.

So discharging a firearm in a crowd of people can also be a reckless act. And without any other proof that it was more than that in this particular case, then you've got a reckless act.

10RP 981.

The prosecutor attacked defense counsel's argument as unreasonable, "Because you know what? If he didn't do it, if he wasn't the shooter, he is guilty of nothing. You don't have it both ways, I wasn't the shooter, but if you believe I was, I didn't really intend to hurt anybody." 10RP 993. The prosecutor clearly misstated the law because Thompson's denial of the shooting did not preclude him from arguing for a lesser included offense.

The prosecutor's misstatement of the law which misled the jury constitutes misconduct and the trial court erred in overruling defense counsel's objection. State v. Venegas, 155 Wn. App. 507, 228 P.3d 813, 821-22 (2010).

- e. Thompson was denied his constitutional right to a fair trial because the prosecutor committed numerous instances of misconduct constituting cumulative error.

The State argues that "none of the errors alleged by defendant have merit" and the "defendant can show no prejudice from the alleged errors, nor can he show that they would combine so that together they deprived the defendant of a fair trial." Brief of the Respondent at 25-29. Much to the contrary, the multitude of improper comments in the guise of argument constitute cumulative error which requires reversal because the State's case was not overwhelming.

The record substantiates that the State's witnesses were not necessarily credible or reliable. Brittany Jackson testified that Thompson cussed at her and "mushed her face." 8RP 719-22. She warned Thompson that she was going to call her "older male cousins to come over here and protect me or to fight." 8RP 722-23. She proceeded to call her cousin, Michael Jackson, who came to pick her up and they went to Marquita Jackson's house where she told her cousins what happened. 8RP

725-26. Michael Jackson admitted that he could only partially see the shooter's face but claimed that it was Thompson. 8RP 487-489. Marquita Jackson admitted that she was nearsighted and was not wearing her glasses but claimed that she could see Thompson's face. 8RP 403-05. Christiana Williamson admitted that she would not recognize Thompson if she passed him on the street but claimed that she recognized him the night of the shooting. 6RP 424, 431-32. Danielle Green claimed that she recognized Thompson even in the dark. 7RP 599. Courtney Moore admitted that she could only see part of the shooter's face but claimed that it was Thompson. 7RP 645.

In light of the glaring fact that the eye witnesses were all family members and friends and the fact that they had a motive to accuse Thompson as the shooter because of the way he treated Brittany, the State's evidence was not as "clear" and "extensive" as the State claims. "[T]rained 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." State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076, review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

The prosecutor committed numerous instances of misconduct during closing argument by: 1) improperly telling the jury that Thompson

committed attempted murder and could have been charged with more crimes under the law; 2) improperly appealing to the passion and prejudice to the jury; 3) improperly repeatedly expressing her personal belief as to Thompson's guilt; 4) improperly vouching for the credibility of the State's key witness, Marquita Jackson; and 5) improperly misleading the jury by misstating the law.¹

A prosecuting attorney's duty is to see that an accused receives a fair trial. State v. Belgrade, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). "Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, that is, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause. Smith v. Phillips, 455 U.S. 209, 210, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); State v. Webber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). Accordingly, the ultimate inquiry is not whether the misconduct was harmless or not harmless but rather did the impropriety violate the defendant's due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

¹ It should be noted that the prosecutor here is the same prosecutor who this Court concluded committed flagrant misconduct in State v. Venegas, 155 Wn. App. 507, 228 P. 3d 813 (2010), which reflects a potential pattern of misconduct.

As in State v. Henderson, 100 Wn. App. 794, 998 P.2d 907 (2000), reversal is required because the cumulative effect of the numerous instances of misconduct materially affected the outcome of the trial and denied Thompson his constitutional right to a fair trial.

2. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THOMPSON WAS ARMED WITH A FIREARM WHILE UNLAWFULLY POSSESSING A CONTROLLED SUBSTANCE.

The State argues that it “adduced sufficient evidence to prove defendant was armed with a firearm while unlawfully possessing a controlled substance” because it “need not prove a nexus between the defendant, the weapon, and the crime when the defendant actually possesses the firearm.” Brief of Respondent at 4-9, citing State v. Easterlin, 126 Wn. App. 170, 174, 107 P.3d 773 (2005). The State’s reliance on Easterlin is misguided because the Washington Supreme Court accepted review in Easterlin and held that actual possession does not necessarily relieve the State of proving a connection between the weapon and the crime in all cases. The Court concluded that “[d]epending on the evidence, it would not be error and would perhaps be appropriate for the court to instruct the jury there be a connection between the weapon and the crime to allow the parties to argue their theory of the case.” State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006). In fact, that is

precisely what the trial court did in this case. The court instructed the jury that, “The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime.” CP 184.

In Easterlin, police received a call at 2:40 a.m. reporting a suspicious car. Officers responded and found Easterlin asleep in the driver’s seat with a pistol in his lap. An officer seized the gun through an open window and subsequently found cocaine in Easterlin’s sock. Id. at 207. The Supreme Court concluded that a jury could reasonably infer that Easterlin had the gun to protect his drugs. Id. at 210. Here, the State’s witnesses testified that Thompson fired several shots at Marquita Jackson’s house and when he was apprehended shortly thereafter, an officer found cocaine in his pocket during a search incident to arrest. RP 384, 411, 432, 470, 603, 643. Unlike in Easterlin, there was no basis for the jury to reasonably infer that Thompson had the gun to protect his drugs because according to the State’s evidence, he had the gun to commit the shooting which was unrelated to his possession of the cocaine. Consequently, the State failed to prove beyond a reasonable doubt that a connection existed between the weapon and the crime.

Reversal is required because there was insufficient evidence to prove beyond a reasonable doubt that Thompson was armed with a firearm while unlawfully possessing a controlled substance as charged in Count VI. State v. Gurske, 155 Wn.2d 1134, 138, 118 P.3d 333 (2005); State v. Schelin, 147 Wn.2d 562, 567, 55 P.3d 632 (2002)(citing State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Thompson's convictions and remand for a new and fair trial or in the alternative, reverse and dismiss the firearm enhancement as charged in Count VI.

DATED this 12th day of November, 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 Melody Crick, 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 12th day of November, 2010 in Kent, Washington.


VALERIE MARUSHIGE
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