

NO. 40643-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT CHARLES MAYO,

Appellant.

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

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

The Honorable Kitty-Ann van Doorninck

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a statutory sexual motivation enhancement where the statute took effect after the date of the crime.

2. The trial court erred in instructing the jury that it must unanimously agree on an answer to the special verdict.

3. The prosecutor committed misconduct during closing argument.

Issues Pertaining to Assignments of Error

1. Is reversal of the sexual motivation enhancement required where the trial court erred in imposing the enhancement under a statute that took effect after the date of the crime and erred in instructing the jury that it must unanimously agree on an answer to the special verdict?

2. Is reversal required where the prosecutor committed flagrant and ill-intentioned misconduct which denied appellant his constitutional right to a fair trial?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

On September 11, 2008, the State charged appellant, Robert Charles Mayo, with one count of rape in the first degree by forcible

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<sup>1</sup> There are four volumes of verbatim report of proceedings: 1RP - 03/04/10, 03/09/10; 2RP - 03/10/10; 3RP - 03/11/10; 4RP - 03/15/10.

compulsion and one count of felony harassment. CP 1-2. The State amended the information on April 14, 2009, charging Mayo with one count of rape in the first degree by forcible compulsion by either entering into a building or vehicle wherein the victim is situated or inflicting serious physical injury; one count of felony harassment; one count of burglary in the first degree with sexual motivation; and one count of robbery in the first degree. CP 3-5. On March 11, 2010, the State filed a second amended information deleting the alternative means of committing rape in the first degree by forcible compulsion by inflicting serious physical injury under count one. CP 56-58.

Following a trial before the Honorable Kitty-Ann van Doorninck, on March 15, 2010, a jury found Mayo guilty of rape in the first degree, felony harassment, burglary in the first degree with sexual motivation, and the lesser included offense of robbery in the second degree. CP 99-104; 4RP 428-30. On April 23, 2010, the court sentenced Mayo to 318 months with a maximum term of life and community custody for life. CP 116-18; 4RP 446-47.

Mayo filed a timely notice of appeal. CP 130-47.

2. Substantive Facts

Shortly after 10 a.m. on November 1, 2005, Lakewood police officers were dispatched to the Budget Inn to investigate a reported rape.

2RP 129-30. When Officer Thomas Arnold arrived at the motel, he saw Allison Cleaveland sitting outside of a room wrapped in a sheet. Cleaveland was crying and Martina White was sitting next to her with her arm around her. Arnold calmly moved Cleaveland into White's motel room to talk to her. 2RP 130-32. Cleaveland told him that she was staying at the motel with a friend, Tate Massey, who went to work during the night so she was alone when someone came into the room and forcefully raped her. Cleaveland did whatever the suspect wanted because he threatened to kill her. 2RP 133-34. In an attempt to get away from him, Cleaveland told him that she owned a truck that was parked outside and offered to let him take it. As they walked out toward the truck, Cleaveland saw White sitting outside her motel room and managed to walk over to White while the suspect was trying to open the door of the truck. 2RP 134-35. As the suspect turned around and faced them, White grabbed Cleaveland and pulled her inside the room. 2RP 135. They locked the door and called 911. 2RP 136. Cleaveland gave Arnold a description of the suspect and Arnold took photographs of injuries to her neck and chest. 2RP 136-38. An ambulance transported Cleaveland to Tacoma General Hospital where she was examined by a forensic nurse. 2RP 140, 157-60, 166, 171-90.

Detective Chris Westby interviewed Cleaveland in the emergency room at the hospital. 2RP 79-80. Cleaveland told Westby that the assailant was wearing a black hooded sweatshirt and blue jeans and described him as half white and half African, six feet tall, heavy, with black curly hair, a goatee, and freckles. She specifically remembered a tattoo on his left upper chest that said "Lisa" written in cursive and a blue and red tattoo on his arm. 2RP 80-81. Cleaveland also disclosed that she had unprotected sex with her boyfriend, Shaun Whitesell, at around 3 a.m. 2RP 94-95, 107-08.

The next day, Westby went to the Budget Inn known for criminal activity and contacted the manager to review the motel's surveillance video. Westby could not burn the video onto a CD so he created still photos as evidence. 2RP 82-85, 102-03. Following an investigation, on November 8, 2006 Westby sent a rape kit obtained from the hospital to the Washington State Patrol crime lab for DNA testing. 2RP 90-93. In January 2009, Westby received test results connecting Robert Mayo to the crime. Westby obtained a court order which authorized taking a DNA sample from Mayo and photographing him for evidence. Westby took photographs depicting a tattoo on Mayo's upper left chest that said "Lisa" and several other tattoos. 2RP 97, 110.

Michael Dorman, a forensic scientist with the Washington State Patrol Crime Lab, tested vaginal swabs and anal swabs from a rape kit that was submitted to the lab as evidence. 2RP 203-04. Dorman testified that the swabs tested positive for semen presence and after generating a report containing the results, he returned the swabs to the evidence vault. 2RP 205. Dorman acknowledged that the DNA section of the lab was understaffed and that he was involved in six instances of contamination that occurred at the lab over a span of four years. 2RP 208-15, 218-19. He explained that all the lab analysts underwent DNA proficiency testing twice a year and he maintained his proficiency. 2RP 215-16.

Jeremy Sanderson, a forensic scientist in the DNA section of the crime lab, examined evidence submitted to the lab for testing. 3RP 252. Sanderson testified that he tested the semen extractions initially prepared by Dorman and the test results excluded Whitesell as a source of semen and revealed one unknown source. 3RP 253-55, 279-80. He entered the profile of the unknown source into their CODIS (combined DNA index system) and the search “hit on a profile determined to be from Robert Mayo.” 3RP 255. Sanderson informed the police that “there was a match” and requested a reference sample from Mayo for confirmation. 3RP 255. After he received the reference sample, he found that Mayo’s DNA profile matched the profile of the DNA from the swabs taken from

Cleaveland. Sanderson explained that the “random match profile” was “one in 48 quintillion.” 3RP 256.

Sanderson acknowledged that the crime lab maintains a quality variance log which contained a record of an incident involving the reference sample taken from Mayo. The extract tube developed a crack and a good portion of the liquid leaked out but there was enough DNA remaining to obtain a profile. 3RP 257-60. It was unusual for a tube to crack during the centrifuge process but Sanderson did not retest the DNA. 3RP 285-87. Sanderson also acknowledged his involvement in four incidents of contamination that occurred during DNA testing unrelated to Cleaveland’s case. 3RP 261-63. Under cross-examination, Sanderson confirmed that the lab’s evidence custodian mistakenly removed Cleaveland’s rape kit from the evidence vault and then returned it without any explanation. 3RP 265-66. Sanderson admitted that although all the lab analysts agreed that the best policy was to have another analyst review a DNA profile before searching the CODIS data base, he did not do so in Cleaveland’s case. 3RP 267-69. There are “probably hundreds and thousands of different locations” on a DNA strand but CODIS only tests the core 13 locations to ascertain a match. 3RP 276-78. Sanderson revealed that the Washington State Patrol Crime Lab does not have an

independent lab conduct a second test on its DNA samples and the lab does not publish its error rate. 3RP 271-72.

Martina White was staying at the Budget Inn with her boyfriend and a couple of friends on the night of October 31 and morning of November 1, 2005. 1RP 32. White testified that she woke up early and went outside to sit in the sunshine and get some fresh air. While outside her motel room, she saw a man wearing a hoodie and a girl looking very distraught walking behind him coming out of a room. The girl kept looking at her and mouthing the words, “help me,” and then “ran over very quickly, grabbed my hand and hid behind me and said he just raped me.” 1RP 33. White noticed that she had two huge green and yellow bruises on her chest with “dental marks still there on her skin.” 1RP 33. When the girl ran to her, the man walked toward them, “[h]e seemed kind of menacing to me.” 1RP 37. White grabbed the doorknob to her room which woke up her boyfriend and he let them in. White pulled the girl inside and slammed the door shut. 1RP 38. They immediately called the police and the girl, identified as Cleaveland, remained in White’s room until the police arrived. 1RP 41-42. Under cross-examination, White admitted that she gave conflicting descriptions of the man’s skin color because the hood created a shadow over his face. 1RP 49-50. While

acknowledging that she only saw the man for a matter of seconds, White identified Mayo in court as the man outside the motel. 1RP 44-48.

Allison Cleaveland and her friend Samantha drove down to Lakewood from Anacortes to see their boyfriends. 3RP 304-05. Cleaveland testified that everyone met at Denny's restaurant for dinner and then she and her boyfriend, Shaun Whitesell, left to find a motel for her to stay overnight. 3RP 307-10. They checked into the Budget Inn and had unprotected sex at around 3 a.m. Sometime between 5:00 and 5:30 a.m., Whitesell had to leave to go to work. Cleaveland recalled getting up and walking him to the door and locking it. 3RP 311-12. Whitesell called her about 8:30 a.m. and they talked for about five minutes. While Cleaveland was lying down on the bed after the call, she heard some "rustling" and then a man suddenly pushed his way through the door. 3RP 313-14. He said he had to use the phone to call two girls so she directed him to the phone and started walking toward the door because she felt uncomfortable. Then the man slammed the door and pushed her down on the bed and said he would kill her if she did not listen to him. 3RP 315. The man forced her to have sex "about ten different times" for an hour. 3RP 316-17.

As a ploy to escape, Cleaveland told the man that her truck was parked out front with some money and the keys in it. She told him he

could take the truck. 3RP 318-19. The man took her cell phone and directed her to go with him. When she walked out she saw a woman sitting outside her motel room. Cleaveland softly mouthed “help me” and then ran to the woman while the man was trying to get into the truck. 3RP 319-22. When she ran away, the man walked toward them and “looked at me with a blank stare and asked me what was wrong, like nothing had just happened.” 3RP 320.

Cleaveland called 911 from the woman’s room and an ambulance arrived and took her to Tacoma General Hospital. 3RP 323-24. At the hospital, she gave Detective Westby a description of the man who was six to six foot two, “a bit bigger build,” with black curly hair, a goatee, and “lots of freckles” on his face. 3RP 324-27, 338. He had a tattoo across his chest that said “Lisa” in cursive writing and a blue and red tattoo on his bicep, but she did not remember any other tattoos. 3RP 325-26. Cleaveland identified Mayo in court as the assailant. 3RP 329. She acknowledged that the police never asked her to identify Mayo in a lineup and they told her that DNA evidence linked him to the crime. 3RP 342-43.

Robert Mayo testified that on October 31, 2005, he moved in with his friend, Tony Manzanarous, who lived in an apartment in Federal Way. 3RP 356. On Halloween night, he went to Redondo Bar and Grill in Federal Way with his friends to drink and play pool. When the bar closed

at 2 a.m., some friends came over to the apartment to party. After they left, he ended up falling asleep on the couch. 3RP 362-67. Mayo could not recall when he got up but believed that he slept until 10 a.m. 3RP 368.

Mayo identified a family photograph taken of him on December 16, 2005, approximately six weeks after the crime. He recognized the photograph because it was taken on his son's birthday. In the photograph, there were no freckles or acne on his face. 3RP 361, 384. Mayo explained that he has several tattoos on his body and had the tattoos on November 1, 2005. He described tattoos on both sides of his neck, both of his arms, a tattoo on his right chest that said "Lisa" written in Old English, and a tattoo on his back. None of the tattoos were in red ink. 3RP 357-60, 372. Mayo never went to the Budget Inn and never saw Allison Cleaveland. 3RP 368-69.

C. ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING THE SEXUAL MOTIVATION ENHANCEMENT AND INSTRUCTING THE JURY THAT IT MUST UNANIMOUSLY AGREE ON AN ANSWER TO THE SPECIAL VERDICT.

Reversal is required because the trial court erred in imposing the statutory sexual motivation enhancement where the statute took effect after the date of the crime and the court erred in instructing the jury that it must unanimously agree on an answer to the special verdict.

The trial court imposed a sexual motivation enhancement to Mayo's conviction for burglary in the first degree under RCW 9.94A.533 which provides for adjustments to standard sentences. RCW 9.94A.553(8)(a) provides in relevant part:

The following additional times shall be added to the standard range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement.

The record reflects that Mayo was convicted of committing the burglary on November 1, 2005. CP 111. Consequently, the sexual motivation enhancement does not apply to Mayo because the statute took effect on July 1, 2006.

Furthermore, in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the defendant was charged with three counts of delivery of a controlled substance and the State sought a sentence enhancement alleging that the sales took place within 1000 feet of a school bus route stop 169 Wn. 2d at 137. The trial court provided special verdict forms and instructed the jury that, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at 139. The Washington Supreme Court concluded that the jury instruction on the

special verdict was an “incorrect statement of the law” because although “unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding.” *Id.* at 147 (citation omitted). The Court reversed the sentence enhancements, holding that because the jury instruction stated that unanimity was required for either determination, it was erroneous and the error was not harmless. *Id.* at 147-48.

The trial court here provided a jury instruction all but identical to the erroneous instruction given in Bashaw. The court instructed the jury that, “Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.” CP 97. The jury found that Mayo committed burglary in the first degree with sexual motivation. CP 102. As the Supreme Court concluded in Bashaw, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result and it therefore could not say with any confidence what might have occurred had the jury been properly instructed. 169 Wn.2d at 147-48.

Accordingly, reversal of the sexual motivation enhancement is required because RCW 9.94A.533(8) is inapplicable and the trial court improperly instructed the jury on the special verdict.

2. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT DENYING MAYO HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Reversal is required because the prosecutor committed flagrant and ill-intentioned misconduct denying Mayo his constitutional right to a fair trial.

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).

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. State v. Fisher, 165 Wn.2d 727,

747, 202 P.3d 937 (2009). Improper prosecutorial arguments are flagrant and ill-intentioned where an appellate court has previously recognized those arguments as improper in a published opinion. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996).

In State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), the prosecutor discussed reasonable doubt in the context of everyday decision making, such as choosing to have elective surgery, leaving children with a babysitter, and changing lanes on a freeway. 153 Wn. App. at 425, 431. This Court held that such arguments were improper because “they trivialized and ultimately failed to convey the gravity of the State’s burden and the jury’s role in assessing” the State’s case against the defendant and by “focusing on the degree of certainty the jurors would need to have to be *willing* to act, rather than that which would cause them to *hesitate* to act,” the arguments implied that the jury should convict the defendant unless it found a reason not to do so. 153 Wn. App. at 431-32.

Similarly, recently in State v. Johnson, No. 39418-9-II (Wash. Nov. 24, 2010), the prosecutor discussed the “abiding belief” aspect of the standard of reasonable doubt:

I like to look at abiding belief and use a puzzle to analogize that. You start putting together a puzzle and putting together a few pieces, and you get one part solved. So with this one piece, you probably recognize there’s a freeway sign. You can see I-5. You can see the word

“Portland” from looking in the background. You may or may not be able to see which city that is, but it is probably near one that is on the I-5 corridor.

You add another piece of the puzzle, and suddenly you have a narrower view. It has to be a city that has Mount Rainier in the background. You can see it. It can still be Seattle or Tacoma, or it if you weren’t familiar, you might think that mountain might be Mt. Hood, and it could be Portland.

You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt this is going to be picture of Tacoma.

This Court held that as in Anderson, the prosecutor’s argument discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle was improper because it “trivialized the State’s burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so.”

The prosecutor here made a similar argument, misleading the jury on the State’s burden of proof beyond a reasonable doubt:

Starting with reasonable doubt. Think of reasonable doubt like a puzzle. A puzzle that you get at Christmas or for your birthday. As you get this puzzle, one family member tells you, hey, it’s a puzzle of Portland. Another family member says, no, it’s a puzzle of Tacoma and another family member says, no, it’s a puzzle of Seattle. As you slowly fill in those puzzle pieces, you say, well, I think it’s Tacoma, I guess it could be Portland, maybe it’s Seattle but let’s continue putting the pieces together.

So you see Mount Rainier and you think to yourself, well, it’s definitely not Portland. Still, I think it’s probably Tacoma, maybe Seattle. So you put in a little more, and

you see part of the Tacoma Dome. It's at that point that you have an abiding belief. You know that you're putting together a puzzle of Tacoma, there's no doubt in your mind that you're putting together a puzzle of Tacoma, even though you're still missing some of those pieces. And that's reasonable doubt, Ladies and Gentlemen.

4RP 419-20.

This Court published Anderson on December 8, 2009, three months before the prosecutor made her closing argument on March 15, 2010. Consequently, the prosecutor committed flagrant and ill-intentioned misconduct because this Court previously held that trivializing and misstating the State's burden of proof was improper. Fleming, 83 Wn. App. at 213-14.

Reversal is required because the prosecutor's conduct was improper and Mayo was prejudiced as a result of the misconduct because the prosecutor's argument confused the jury's duty to find Mayo not guilty unless the State proved its case against him beyond a reasonable doubt with the notion that it should convict him unless it found a reason not to do so, allowing the jury to render a decision based on a standard much less than what due process requires. Anderson, 153 Wn. App. at 431-32.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Mayo's convictions, or in the alternative, reverse the sexual motivation enhancement and remand for resentencing.

DATED this 30<sup>th</sup> day of November, 2010.

Respectfully submitted,

  
VALERIE MARUSHIGE

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Attorney for Appellant, Robert Charles Mayo

**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 Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Robert Charles Mayo, DOC # 875142, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, Washington 98326.

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

DATED this 30<sup>th</sup> day of November, 2010 in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

COURT OF APPEALS  
DIVISION II  
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BY  DEPUTY