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DIVISION TWO

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NO. 40643-8-II

STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT CHARLES MAYO,

Appellant.

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

The Honorable Kitty-Ann van Doorninck

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE JURY'S FINDING OF SEXUAL MOTIVATION ON THE FIRST DEGREE BURGLARY CHARGE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST UNANIMOUSLY AGREE ON AN ANSWER TO THE SPECIAL VERDICT.

The State argues that Mayo is barred from appealing the jury's finding of sexual motivation because he failed to object to the special verdict instruction and no additional time was added to his sentence for the finding of sexual motivation.¹ Brief of Respondent at 18-23. To the contrary, reversal of the sexual motivation enhancement is required under State v. Bashaw, 169 Wn.2d 133, 234 P. 3d 195 (2010). The State asserts that "it must be presumed that Bashaw objected to the jury instruction at trial, thereby preserving this issue for appellate review." Brief of Respondent at 19-20. The State is mistaken because Bashaw did not object to the jury instruction given in her case. State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008). In any event, Mayo had no reason to object because the jury instruction followed WPIC 160 and Bashaw, which concluded that the instruction was an incorrect statement of the law, was decided on July 1, 2010, after Mayo's trial.

¹ The sexual motivation enhancement did not affect Mayo's sentence but the Judgment and Sentence reflects that he was convicted of Burglary in the First Degree with Sexual Motivation. CP 111-13.

Importantly, even though the Washington Supreme Court noted in dictum that the jury unanimity rule is not compelled by constitutional protections against double jeopardy, the Court applied the constitutional harmless error test to determine whether the trial court's error was harmless. The Court determined that in order to hold that the jury instruction was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" Bashaw, 169 Wn. 2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), which quoted Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). The Court reversed the sentence enhancements, concluding that the error was not harmless:

[W]hen 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. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48.

The jury's finding of sexual motivation must be reversed because as the Washington Supreme Court concluded, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law and the error was not harmless. Godefroy v. Reilly, 146 Wn. 257, 259, 262 P. 539 (1928)(when the court has once

decided a question of law, that decision, when the question arises again, is binding on all lower courts).

2. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED MISCONDUCT DENYING MAYO HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Despite this Court's decisions in State v. Anderson, 157 Wn. App. 417, 220 P.2d 1273 (2009) and State v. Johnson, 158 Wn. App. 677, 243 P. 3d 936 (2010), the State insists that the puzzle analogy used by the prosecutor did not trivialize the State's burden of proof. Brief of Respondent at 7-17. The State argues that the analogy "is consistent with" and is "a fair extrapolation of the language used" in Jury Instruction 2. Brief of Respondent at 10, 16. Jury Instruction 2 states in relevant part:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 63.

The State's argument is clearly misplaced because it is evident that the jury instruction in no way suggests that the concept of reasonable doubt is as trivial and simple as putting together a puzzle with family members. As this Court held in Anderson, discussing reasonable doubt in

the context of everyday activities is improper because such arguments trivialize and ultimately fail to convey the gravity of the State's burden and the jury's role in assessing the State's case against the defendant. Anderson, 157 Wn. App. at 431.

Significantly, the jury instruction followed WPIC 4.01, which was approved by the Washington Supreme Court in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). The Supreme Court instructed Washington trial courts to use only WPIC 4.01 to instruct juries that the State has the burden of proving every element of the crime beyond a reasonable doubt. Id. at 318. The Court emphasized that "the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction." Id. at 317-18. By telling the jury to "[t]hink of reasonable doubt like a puzzle. A puzzle that you get at Christmas or for your birthday," the prosecutor improperly tampered with the jury instruction which in and of itself amply explained reasonable doubt.

Reversal is required because the prosecutor's needless use of the puzzle analogy, which trivialized and minimized the State's burden of proof, constitutes flagrant and ill-intentioned misconduct, particularly in light of the fact that this Court and the Supreme Court has gone to great

lengths to underscore the importance of the presumption of innocence. “The presumption of innocence is the bedrock upon which the criminal justice system stands.” Bennett, 161 Wn.2d at 315-16.

C. CONCLUSION

For the reasons stated here and in appellant’s opening brief, this Court should reverse Mr. Mayo’s convictions, or in the alternative, reverse the sexual motivation enhancement for the first degree burglary conviction.

DATED this 30th day of March, 2011.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

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 Karen Platt, 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 March 2011, in Kent, Washington.


VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

STATE OF WASHINGTON
BY: 
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COUNTY OF PIERCE