

No. 40849-0-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JAYCEE FULLER,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 10-1-00480-9  
The Honorable Brian Tollefson, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The prosecutor committed misconduct during closing arguments when he repeatedly stated that the jury could only form a reasonable doubt if it believed Appellant's testimony, thereby shifting the burden of proof to Appellant.
2. The prosecutor committed misconduct during closing arguments when he repeatedly stated that people who do not want to take responsibility for their actions demand a jury trial and then fabricate lies to tell the jury, thereby commenting on Appellant's decision to exercise his constitutional right to a jury trial.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the prosecutor commit misconduct and shift the burden of proof to the defense, when he stated during closing arguments that the jury could only form a reasonable doubt if it believed Appellant's testimony? (Assignment of Error 1)
2. Did the prosecutor commit misconduct and ask the jury to draw a negative inference from Appellant's decision to go to trial, when he stated during closing arguments that people who do not want to take responsibility for their actions demand a trial and then fabricate lies to tell the jury? (Assignment of Error 2)

### III. STATEMENT OF THE CASE

#### A. PROCEDURAL HISTORY

The State charged Jaycee Fuller with one count of unlawful possession of a controlled substance by a prisoner (RCW 9.94.041(2)). (CP 1) A jury convicted Fuller as charged. (CP 27; RP4 228-29) The trial court imposed an eight-month standard range sentence. (CP 35, 38; 06/14/10 RP 6)<sup>1</sup> This appeal timely follows. (CP 45)

#### B. SUBSTANTIVE FACTS

Beginning in April of 2009, Jaycee Fuller was incarcerated in the Pierce County Jail while awaiting trial. (RP1 132) For the majority of that time, Fuller was housed in cell 28 of the Three-West cluster. (RP1 46, 48, 59, 132) The Three-West cluster is comprised of three units, each housing approximately 30 inmates in both single and double cells. (RP1 39, 43-44, 46, 48) Each unit is isolated from the other two, but all three units surround a common staff station from which corrections officers can observe all of the cells in the cluster. (RP1 40)

During his time in Three-West, Fuller acted as a unit worker,

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<sup>1</sup> The transcripts of trial labeled volumes 1 thru 4 will be referred to by the volume number. The transcript of the sentencing hearing on 06/14/10 will be referred to by the date of the proceeding.

which involved assisting the corrections officers and cleaning the unit's common areas and bathrooms. (RP1 46, 134-36) In exchange, Fuller received extra privileges from the corrections officers, but it also made him unpopular with some of the other inmates. (RP1 46, 72-73, 142) Fuller had a physical altercation with another inmate in November of 2009, but the other inmate was the aggressor and Fuller did not receive a negative write-up as a result. (RP1 98, 99, 142)

The corrections officers conducted random searches of the cells on a regular basis. (RP 46-47) On January 15, 2010, corrections officer Ian Ward conducted a random search of Fuller's single cell. (RP1 46) When Ward bent down to inspect the underside of Fuller's desk, he noticed what appeared to be a small shelf under the bed frame that was probably fashioned from paper and toothpaste. (RP 53, 64) On the shelf, Ward found tobacco inside a small plastic container, and marijuana wrapped in plastic wrap. (RP1 53, 55-56, 125-26)

The plastic container holding the tobacco was labeled "City Cow Nacho Cheese Dip with Jalapeños," which is an item that can be purchased from the jail commissary. (RP1 53, 100, 108) Fuller, along with many other inmates, purchased this dip and kept the

containers because they are useful for storing food and other personal items. (RP1 100-04, 143)

During the search, Ward also found hollowed-out pencils attached to string, pencil lead that had been removed from the pencils, and something that looked like a homemade pipe made of toilet paper and toothpaste or soap. (RP1 50, 54) Fuller explained that he was using the string to make a hacky sack (a small bag that can be kicked with the foot), and the wood from the pencil to make a needle for sewing the sack or for repairing personal items. (RP1 145)

According to corrections officer Anthony Ferrell, it is common knowledge among the inmates that they can create fire by placing pencil lead and other metal items such as staples into an electrical outlet, which creates a spark. (RP1 93-94) If paper is held next to the spark, it will catch fire and can be used to light a cigarette or smoking pipe. (RP1 93-94)

Ferrell testified that controlled substances like marijuana are sometimes smuggled in by other inmates during the booking process, or passed to inmates during visits. (RP1 105) But Fuller had no unsupervised contact with outsiders, and was only allowed one visitor per week. (RP1 74, 79) There was no physical contact

during those visits because of a plate-glass window between Fuller and his visitor. (RP1 74)

There are always inmates coming and going within the various units at the jail. (RP1 112) And inmates have access to other inmates' cells. (RP1 81) The shelf and its contents were not visible unless a person bent down to look under the bed. (RP1 64)

Fuller denied any knowledge of the tobacco and marijuana in his cell. (RP1 147, 155) He believes that another inmate put the contraband into his cell out of spite because he obeys the rules, helps the COs, and does not help the other inmates break the rules. (RP1 151)

#### **IV. ARGUMENT & AUTHORITIES**

To prevail on a claim of prosecutorial misconduct, Fuller has the burden of showing both improper conduct and its prejudicial effect. In re PRP of Pirtle, 136 Wn.2d 467, 481, 965 P.2d 593 (1998). In this case, the prosecutor committed misconduct during closing statements when he repeatedly argued to the jury that they could only have a reasonable doubt if they believed Fuller's testimony, and that Fuller only demanded a trial because he did not want to take responsibility for his actions.

The State bears the burden of proving every element of its

case beyond a reasonable doubt, and it may not shift any part of that burden to the defendant. In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Fleming, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996). A defendant has no duty to present evidence. Fleming, 83 Wn. App. at 215.

A prosecutor therefore commits misconduct if he attempts to shift the burden of proof to the defendant. State v. French, 101 Wn. App. 380, 4 P.3d 857 (2000); Fleming, 83 Wn. App. at 215. It is also improper for a prosecutor to ask the jury to draw a negative or adverse inference from the defendant's exercise of a constitutional right. State v. Gregory, 158 Wn.2d 759, 807, 147 P.3d 1201 (2006); State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

For example, during closing arguments in State v. Moreno, the prosecutor stated: "The [pro se] defendant is a picture perfect example of a domestic violence abuser. He has got to be in control. He is still trying to call the shots. So much so that he *has exercised his constitutional rights to defend himself, because power is that important to him.*" 132 Wn. App. 663, 672, 132 P.3d 1137 (2006) (emphasis in original). On appeal Moreno argued, and the State conceded, that the prosecutor's argument was improper because it asked the jury to draw a negative inference from

Moreno's exercise of his constitutional right to self-representation.  
132 Wn. App. at 672.

In State v. Jones, the prosecutor, in cross-examination and closing statements, commented that the defendant insisted upon staring at the seven-year-old victim as she testified. 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993). The prosecutor's arguments also suggested that the victim's courtroom contact with Jones was so traumatic that she could not return to court. 71 Wn. App. at 811-12. While the State in Jones asserted that these arguments were offered to rebut Jones' contention that he loved the victim, the appellate court concluded that the prosecutor's argument invited the jury to draw a negative inference from the defendant's exercise of his right of confrontation. 71 Wn. App. at 811-12

And in State v. Fiallo-Lopez, the appellate court found that the prosecutor's statements in closing argument that there was no evidence to explain why the defendant was present at two controlled drug buys were an improper comment on the defendant's decision not to testify and improperly shifted the burden of proof to the defense. 78 Wn. App. 717, 729, 899 P.2d 1294 (1995).

During closing arguments in this case, the prosecutor made the following statements to the jury:

- The question for you now when you go back into that jury room is to decide whether the defendant's testimony created a reasonable doubt in your mind. Is there a reasonable doubt based on what he told you that that wasn't his marijuana? It's not enough for him to simply tell you it's not his marijuana. It's not enough for you to go back and say, well, that's plausible, therefore I must have a reasonable doubt. (RP4 192)
- The test for you all is to decide do you believe him, do you think there's a real possibility of what he's telling you? So when you look at the defendant's testimony ask yourself: Is there a real possibility that he's telling you the truth? If there is then you have a reasonable doubt. (RP4 193)
- You have to look at his testimony and ask: Do you believe him? RP4 194)
- What the defense can't explain to you is why all the implements for a lighter were sitting on his desk. Simply can't explain it. (RP4 219)
- As long as there are people who don't want to accept responsibility for their actions they will demand their trials and put together a story that they hope you will sign off on. (RP4 194)
- [A]nd don't allow a defendant who simply doesn't want to accept responsibility to create a reasonable doubt in your mind. (RP4 200)

The prosecutor unequivocally and repeatedly told the jury that it could only entertain a reasonable doubt as to Fuller's guilt if it believed Fuller's testimony. But that is not the standard. A defendant is innocent until proven guilty, and the State bears the burden of overcoming this presumption. It is the State's responsibility to prove the elements of the charge beyond a reasonable doubt. The defense is not required to disprove the State's evidence. These comments were clearly and blatantly

improper.

The prosecutor also made repeated comments directly implying that the only people who “demand” a trial are those who are guilty but do not want to “accept responsibility” for their actions and instead fabricate lies to tell the jury. These comments encouraged the jury to draw negative inferences about Fuller, and to believe he must be guilty simply because he chose to exercise his constitutional right to a jury trial, and chose to exercise his constitutional right to have the State prove the charges against him beyond a reasonable doubt.

Absent a proper objection, Fuller is required to show the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). However, the cumulative effect of repeated instances of misconduct may be so flagrant that no instruction can erase the error. State v. Henderson, 100 Wn. App. 794, 805, 998 P.2d 907 (2000).

But when, as here, the comments refer to a constitutional right, then the reviewing court applies the stricter standard of constitutional harmless error. Moreno, 132 Wn. App. at 671-72 (citing State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114

(1990)). Under this standard, the court must reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Two of the most fundamental principles of our legal system are that every citizen is guaranteed the right to a trial by an impartial jury, and that a defendant is not required to prove his innocence. The obviously improper nature of the prosecutor's statements to the jury that they could only find reasonable doubt if they believed Fuller's testimony, and that people who do not want to take responsibility for their actions demand a trial, can only be viewed as flagrant and ill intentioned.

The prosecutor's argument likely affected the outcome of trial because the evidence of guilt in this case was not overwhelming. Other than the fact that the marijuana was located in Fuller's cell, the State did not connect the marijuana to Fuller. Although Fuller had purchased the dip and therefore had plastic containers, so did many of the other inmates. Nevertheless, the marijuana was not found in the container but instead was wrapped in plastic. So even if the State can connect Fuller to the dip container, this does not connect Fuller to the marijuana.

Furthermore, Fuller had little or no access to anyone from outside the jail, but other inmates had access to his cell.

The State's evidence established Fuller's proximity to the marijuana, but did not overwhelmingly establish that he knowingly possessed the marijuana.<sup>2</sup> The State's improper comments to the jury likely tainted the outcome of trial, and require reversal of Fuller's conviction.

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<sup>2</sup> Possession of a controlled substance by a prisoner requires proof that the defendant "knowingly possesse[d] or ha[d] under his or her control" a controlled substance while confined in a correctional institution. RCW 9.94.041(2).

**V. CONCLUSION**

The prosecutor's statements to the jury that they could only form a reasonable doubt if they believed Fuller's testimony improperly shifted the burden of proof to the defense, and implied that Fuller must prove his innocence. The prosecutor's statements that Fuller demanded a trial only because he did not want to take responsibility for his actions encouraged the jury to draw an adverse inference from Fuller's exercise of his constitutional right to a jury trial. These statements were highly improper and prejudicial, and require the reversal of Fuller's conviction.

DATED: October 29, 2010



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**CERTIFICATE OF MAILING**

I certify that on 10/29/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Jaycee Fuller, DOC# 341205, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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