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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____

NO. 41052-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH B. DUNNING,

Appellant.

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

The Honorable Richard Brosey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove the essential element of intent in the second degree assault charge.
2. The state failed to dis-prove self-defense.
3. The prosecutor committed intentional and inflammatory misconduct by arguing prejudicial facts not in evidence, that the complainant had a broken back.

Issues Presented on Appeal

1. Did the state fail to prove the essential element of intent in the second degree assault charge?
2. Did the state fail to dis-prove self-defense?
3. Did the prosecutor commit intentional and inflammatory misconduct by arguing prejudicial facts not in evidence, that the complainant had a broken back?

B. STATEMENT OF THE CASE

Jeremiah Dunning was charged and convicted of assault in the second degree, domestic violence. CP 1-3, 98-77. This timely appeal follows. CP 80-89

C. ARGUMENTS

1. THE STATE FAILED TO PROVE INTENT IN THE ASSAULT IN THE SECOND DEGREE CHARGE WHERE THE DEFENDANT ACTED IN SELF-DEFENSE.

At trial, the evidence established that the complainant (Antoinette Coverdale) and Mr. Dunning were out all day at a casino and later at several bars consuming alcohol. RP 20-22, 57, 92-93. The complainant was worried that Mr. Dunning was too intoxicated to drive even though he was not stumbling or slurring his words and he did not have watery bloodshot eyes. RP 58. The complainant and Mr. Dunning argued about which one of them should drive home. Both the complainant and Mr. Dunning consumed alcohol, but ultimately the complainant drove home. RP 54, 57, 62. At home, Mr. Dunning and the complainant continued to argue. RP 28-32.

The complainant told Mr. Dunning to “just shut up and drop it” and “leave me the fuck alone”. Angry and frustrated and while yelling at Mr. Dunning, the complainant moved towards Mr. Dunning’s face with her

hands. RP 32. Mr. Dunning in a “knee-jerk” reaction pushed her away. RP 73. The complainant fell backwards and toppled over a low wall and into a small tree. RP 93. The complainant suffered a fractured wrist and had a sore back. RP 98. At the hospital the treating physician noticed a compressed vertebrae of which he could not independently determine the cause. RP 97, 98.

The state failed to provide sufficient evidence to prove the intent element of first degree assault-i.e., intent to inflict serious harm. RCW 9A.36.021. This statute provides in relevant part as follows:

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
 - (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Any challenge to the sufficiency of the evidence admits all inferences that reasonably can be drawn therefrom. State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980).

Viewed in a light most favorable to the State, the evidence was insufficient to prove intent to inflict injury. The complainant was out of control angry and moved toward Mr. Dunning with her hands aiming for his face when he pushed her away. This was an act of self-defense which the state also failed to disprove.

Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). “[E]vidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). Courts must inform the jury that the self-defense standard incorporates both objective and subjective elements: the subjective portion requires the jury to stand in the defendant's shoes and consider all the facts and circumstances known to the defendant, while the objective portion requires the jury to determine what a reasonably prudent person similarly situated would do. *Id.*; Walden, 131 Wash.2d at 474, 932 P.2d 1237.

“A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim.” State v.

LeFaber, 128 Wn.2d at 899, 913 P.2d 369, citing, Janes, 121 Wn.2d at 238-39, 850 P.2d 495). Given this subjective component, the jury need not find *actual* imminent harm. *Id.*, citing, State v. Theroff, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980)).

Once a defendant produces some evidence of self-defense, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. See Acosta, 101 Wn.2d at 615-16 (self-defense rebuts the “unlawful” element of assault); see also State v. Dyson, 90 Wn .App. 433, 438, 952 P.2d 1097 (1997) (“because a person who acts in self-defense is not ‘fail[ing] to be aware of a substantial risk that a wrongful act’ may occur, self-defense negates the requirement of a ‘wrongful act’ ”) (alteration in original) (citation omitted), quoting, RCW 9A.08.010(1)(d)). Where the State is relieved from proving the absence of self-defense, an error of constitutional magnitude results, which may be raised for the first time on appeal. Walden, 131 Wn.2d at 473, 932 P.2d 1237.

RCW 9A.16.020(3) sets out the parameters of self-defense in Washington. The statute states that the use of force is lawful when “used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person.” Mr. Dunning pushed the complainant away to

prevent her from attacking his face. Under both the subjective and objective standards, the force was lawful and designed to protect Mr. Dunning. The state failed to disprove self-defense. For this reason, this Court should reverse and dismiss with prejudice.

2. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN CLOSING AND REBUTTAL ARGUMENTS BY ARGUING FACTS NOT IN EVIDENCE.

During closing argument, the prosecutor misstated the facts by repeatedly informing the jury that Ms. Coverdale suffered a “broken back”, when there was no such evidence in the record. RP 130. Rather, Dr. Charles Anderson the treating physician testified that Ms. Coverdale had some compression of one of her vertebrae. Dr. Anderson could not determine the cause or age of the compression. RP 98. Despite the absence of an objection below, this Court may review this issue because of its constitutional implications. RAP 2.5(a).

The prosecutor misstated the law by arguing facts not in evidence. Prejudicial prosecutorial misconduct denies a defendant his constitutional right to a fair trial. Washington Constitution Article 1 § 22; United States

Constitution, Sixth and Fourteenth Amendments; State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1992).

We realize that attorneys, in the heat of a trial, are apt to become a little over-enthusiastic in their remembrance of the testimony. However, they have *no right to mislead the jury*. This is especially true of a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial.

(Emphasis added in Davenport) Davenport, 100 Wn.2d at 763, quoting, State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955)

In Washington State prosecutors have a special duty in trial to act impartially in the interests of justice and not as a "heated partisan". State v. Stith, 71 Wn. App. 14, 18, 856 415 (1993), citing, State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984), quoting, People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899).

To establish prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's closing remarks were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), cert. denied, 77 U.S. 3575, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). In analyzing prejudice, the reviewing court looks at the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d

546 (1997). Where the defendant shows that there is a substantial likelihood that the prosecutor's statements affected the jury's verdict, prejudice will be found. Brown, 132 Wn.2d at 561.

A new trial is required when misconduct is prejudicial. Misconduct is viewed against the backdrop of the entire argument. Stith, 71 Wn. App. at 19, citing, State v. Graham, 59 Wn. App. 418, 426, 428, 798 P.2d 314 (1990). Arguments that are designed to inflame the passions and prejudice are improper and prejudicial. State v. Torres, 16 Wn. App. 254, 264-65, 554 P.2d 1069 (1976). Arguments that are based on facts not in evidence and that mislead the jury are equally as improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); Davenport, 100 Wn.2d at 760; State v. Rose, 62 Wn.2d 309, 312 382 P.2d 513 (1963). In closing argument, the State may only draw reasonable inferences from the evidence. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). The state may not argue facts not in evidence under the guise of a “reasonable inference”. Belgarde, 110 Wn.2d at 509.

Prejudicial error occurs when it is “clear and unmistakable” that counsel is expressing a personal opinion, and not arguing an inference from

the evidence. Brett, 126 Wn.2d at 175, quoting, State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

This Court may review prosecutorial misconduct without an objection at trial when the misconduct was so flagrant and ill-intentioned that no instruction could erase the prejudice engendered by it. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237, 749 P.2d 160 (1987). Reversal is required if unchallenged misconduct was so inflammatory that an instruction would not have cured the misconduct and if there is a substantial likelihood that the misconduct affected the jury's decision. Belgarde, 110 Wn.2d at 509-10; Barrow, 60 Wn. App. at 876.

The prosecutor repeatedly told the jury that the complainant suffered a “broken back” to strengthen a weak a case and inflame the passion and prejudice of the jury against Mr. Dunning. There was no evidence that the complainant broke her back, rather she had a compressed vertebrae. The prosecutor’s argument was designed to convince the jury that Mr. Dunning was a brutal man based on the prosecutor’s creation of evidence rather than on the actual evidence presented.

In Rose, the prosecutor committed reversible error by arguing

prejudicial facts not in evidence when he referred to the defendant as a “drunken homosexual”. Rose, 62 Wn.2d at 316. The immediate purpose was to inflame the passion and prejudice of the jury so that they would find guilt based on thin evidence. The Supreme Court reversed Rose’s conviction and remand for a new trial without an objection because the misconduct was intentional and designed to appeal to the passions and prejudices of the jury. Id.

In Mr. Dunning’s case, the prosecutor made up and argued that Mr. Dunning broke a woman’s back. This was an intentional fabrication and as prejudicial as calling a person a drunken homosexual. Rose, 62 Wn.2d at 316. In Rose, the prosecutor wanted the jury to dislike the defendant. Similarly in Mr. Dunning’s case, the prosecutor had a weak case against Mr. Dunning, so she made up facts and misrepresented the evidence so the jury would not like him. Under Rose, reversal and remand for a new trial is required because the intentional misconduct was designed to appeal to the passions and prejudice of the jury.

In Belgarde, the State Supreme Court reversed a defendant’s first-degree murder convictions because of prosecutorial misconduct in closing argument. Five witnesses testified that the defendant had confessed to the

crimes, but all of these people were in some way related to another suspect, and two of them did not tell the police their stories until approximately three weeks after the crimes. Belgarde, 110 Wn.2d at 175. The two latter witnesses testified that they delayed coming forward because the defendant threatened to use the American Indian Movement (AIM) against them. *Id.* In summation, the prosecutor argued that the defendant said he was “strong in AIM”, that AIM was analogous to Sean Finn of the Irish Republican Army and Kadafi, and that AIM is a “deadly group of madmen” whom people feared. The prosecutor argued that AIM was something to be frightened of. Belgarde, 110 Wn.2d at 175.

The Court in Belgarde held that the remarks were grounds for reversal even though there was no objection because the remarks were ill-intentioned and highly prejudicial. Belgarde, 110 Wn.2d at 176. In Belgarde, the prosecutor’s argument that Belgarde was strong in AIM was not a fact in evidence; the argument that AIM was analogous to Sean Finn and Kadafi were not facts in evidence. The argument that AIM was to be feared was not a fact in evidence.

In Mr. Dunning’s case, as in Belgarde, the complainant did not have a broken back, the prosecutor argued facts not in evidence to sway the jury

into believing that Mr. Dunning was a dangerous man. As in Rose and Belgarde, there was no evidence to support the prosecutor's outrageous arguments; rather, the prosecutor relied on her own fabrications to make a case against Mr. Dunning. This was ill-intentioned and prejudicial requiring reversal and remand for a new trial.

D. CONCLUSION

Mr. Dunning respectfully requests this Court reverse his conviction for insufficient evidence and in the alternative remand for a new trial.

DATED this 6th day of November 2010

Respectfully submitted,

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

I, Lise Ellner, a person over the age of 18 years of age, served Lewis & Clark County Prosecutor's Office Appeals Department, Lori Smith Law & Justice Center, 4th Floor 345 West Main Street, Second Floor Chehalis, WA 98532 and Jeremiah Dunning 683 Shanklin Road Onalaska, WA 98570 Service was made on November 10, 2010 by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Davidson and electronically to the prosecutor.
