

No. 44704-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Silverio Santiago,

Appellant.

Kitsap County Superior Court Cause No. 12-1-01165-4

The Honorable Judge Leila Mills

Appellant's Reply Brief

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ARGUMENT

I. THE COURT VIOLATED MR. SANTIAGO’S RIGHT TO EFFECTIVELY CROSS-EXAMINE THE STATE’S WITNESSES.

An accused person has a constitutional right to confront his accuser. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. The most crucial aspect of the confrontation clause is the right to conduct meaningful cross-examination of adverse witnesses. *Darden*, 145 Wn.2d at 620. Here, the court significantly limited Mr. Santiago’s ability to conduct meaningful cross examination of the alleged victim by “test[ing her] the perception, memory, and credibility.” *Id.*

Alleged violations of the right to confront adverse witnesses are reviewed *de novo*. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (Jones I). Such an error requires reversal unless the state can show that it was harmless beyond a reasonable doubt. *Id.* at 724. Nonetheless, the state argues only that the court did not abuse its discretion by excluding evidence Mr. Santiago offered to impeach M.M.’s credibility. Brief of Respondent, p. 8-9. The state misapprehends the standard of review.

The more crucial a witness is to the state's case, the more latitude the court should afford the accused during cross-examination. *Darden*, 145 Wn.2d at 619. Still, Respondent argues that the evidence that M.M. described three alleged sexual encounters identically was not probative because Mr. Santiago admitted that he "got naked" with her. Brief of Respondent, p. 9. But Mr. Santiago consistently denied having intercourse with M.M. The fact that M.M. described three claimed instances of intercourse using duplicate language was directly relevant to whether she fabricated having sex with Mr. Santiago or confused the three instances. The court violated Mr. Santiago's constitutional right to confront adverse witnesses by limiting his ability to impeach the credibility of the state's key witness. *Darden*, 145 Wn.2d at 619.

Meaningful cross-examination permits the accused to "test the perception, memory, and credibility" of the state's witnesses. *Darden*, 145 Wn.2d at 620. Even so, the state argues that the exclusion of the impeachment evidence was proper because the court allowed Mr. Santiago to elicit that M.M. did not say that she'd had sex with Mr. Santiago the first time her mother asked her about it. Brief of Respondent, p. 10. But the court's limitation on Mr. Santiago's cross-examination prohibited him from arguing his theory that M.M. had fabricated or confused her encounter with him with the two other instances that she described

identically. Beyond a mere prior inconsistent statement, the evidence was necessary to explain why the manner in which M.M. described the interaction with Mr. Santiago provided reason to doubt her credibility.

The court denied Mr. Santiago's confrontation right by impermissibly limiting his cross-examination of M.M. *Darden*, 145 Wn.2d at 620. The state cannot show that this constitutional error was harmless beyond a reasonable doubt. *Jones I*, 168 Wn.2d at 724. Mr. Santiago's conviction must be reversed. *Id.*

II. THE PROSECUTOR COMMITTED NUMEROUS INSTANCES OF FLAGRANT, ILL-INTENTIONED, PREJUDICIAL MISCONDUCT.

A. The prosecutor committed misconduct by shifting the burden of proof onto Mr. Santiago.

A prosecutor commits misconduct by misstating the law and shifting the burden of proof onto the accused. *In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). Here, the prosecutor showed a PowerPoint slide in closing argument asking jurors to "Hold the defense to it's [sic] burden." CP 103-08 (slide 4). Mr. Santiago did not present an affirmative defense and had no burden of proof at trial.

Visual media may have a more powerful effect on jurors than spoken words. *Glasmann*, 175 Wn.2d at 707-08. Nonetheless, the state argues that the prosecutor's argument was proper because he also told the

jury that Mr. Santiago had no burden of proof. Brief of Respondent, p. 12. Notably, the prosecutor's lengthy closing slide presentation did not mention that Mr. Santiago had no burden. CP 103-08.

Presumably, the jury in *Glasmann* was properly instructed. Still, Respondent argues that the prosecutor's statement was neither improper nor prejudicial because the jury was properly instructed on the burden of proof. Brief of Respondent, p. 12. But the jury looks to the attorneys to explain the jury instructions and apply them to the facts of the case. The jury in Mr. Santiago's case was instructed regarding an affirmative defense that his brother raised, and for which his brother held the burden. RP (2/28/13) 337.

The majority of the prosecutor's slides had either Mr. Santiago's or his brother's name at the top to clarify which accused person the information referred to. The slide admonishing the jury to "hold the defense to it's [sic] burden" was listed under the title "conclusion" and did not limit itself only to Mr. Santiago's brother's case. CP 103-08. The prosecutor's failure to differentiate which brother bore the burden in his slide show improperly shifted the burden of proof onto Mr. Santiago.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by telling the jury to hold Mr. Santiago to a burden of proof

that he did not have. *Glasmann*, 175 Wn.2d at 713. Mr. Santiago's conviction must be reversed. *Id.*

B. The prosecutor committed misconduct by undermining the presumption of Mr. Santiago's innocence.

The presumption of innocence requires acquittal unless the jury is satisfied, after hearing all of the evidence and the instructions, that the state has proved a charge beyond a reasonable doubt. *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011). Here, the prosecutor argued that the presumption of innocence did not require the jury to presume that Mr. Santiago was honest or credible. RP (2/28/13) 324.

Logically, when the accused maintains his/her innocence, the presumption of innocence requires the jury to presume that claim is true unless the state is able to overcome it with admissible evidence. Still, Respondent claims that the presumption of innocence does not require the jury to presume that the accused is being honest. Brief of Respondent, pp 14-15. The state relies on the legal rule that the jury is the sole judge of credibility. Brief of Respondent, pp. 14-15.

But Mr. Santiago does not claim that someone other than the jury should have decided whether he was being credible. Rather, he argues that due process prohibits a prosecutor from arguing that the jury should

not presume him to be credible. The state's argument that the jury is the judge of credibility is inapposite.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by mischaracterizing the law in a manner undermining the presumption of Mr. Santiago's innocence. *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010). Mr. Santiago's conviction must be reversed. *Id.*

C. The prosecutor committed misconduct by arguing that the jury should convict Mr. Santiago based on the evidence against his codefendant brother.

It is misconduct for a prosecutor to encourage the jury to make legally impermissible inferences or to improperly bolster the credibility of the state's witnesses. *State v. Boehning*, 127 Wn. App. 511, 514, 521, 111 P.3d 899 (2005). Here, the state argued that M.M. was telling the truth about having sex with Mr. Santiago's brother so she must have been telling the truth about having sex with Mr. Santiago. RP (2/28/13) 373.

A prosecutor commits misconduct by arguing that evidence that is not admissible to prove a charge is reason to convict for that charge. *Boehning*, 127 Wn. App. at 521-22. Even so, Respondent attempts to differentiate *Boehning* because the prosecutor in that case argued that evidence related to charges that were dismissed at the close of the state's case supported conviction for the remaining charge. Brief of Respondent,

p. 16. But Mr. Santiago's case is analogous to *Boehning*. Just as the evidence in support of the dismissed charges in that case was not admissible to prove the remaining charge, the evidence in support of Mr. Santiago's brother's charge was not admissible to prove the charge against Mr. Santiago. ER 404. The prosecutor committed misconduct by encouraging the jury to convict Mr. Santiago based on the evidence in his brother's case. *Id.*

An accused person cannot invite or open the door to prosecutorial misconduct. *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008) (Jones II). Nonetheless, the state argues that the prosecutor's argument was proper because Mr. Silverio argued that the evidence against his brother *didn't* make the charge against him more believable. Brief of Respondent, p. 17. But Mr. Silverio's argument was a correct statement of the law. The jury was required to consider only the evidence against Mr. Santiago in deciding his guilt. CP 54. Even so, if the prosecutor had a problem with Mr. Santiago's argument, the remedy was to object, not to misstate the law and improperly bolster M.M.'s credibility. Mr. Silverio did not have the power to "open the door" to the prosecutor's improper bolstering of witness credibility with the evidence against his brother. *Jones II*, 144 Wn. App. at 295.

The jury was permitted to convict Mr. Santiago based only on the admissible evidence against him. CP 54. Even so, the state argues that the prosecutor's argument was proper because Mr. Silverio did not request an instruction informing the jury that it could not use the evidence in his brother's case against him. Brief of Respondent, p. 18. Likewise, Respondent points out that Mr. Silverio requested that his case be joined with his brother's. Brief of Respondent, p. 18. First, the jury was instructed that it must decide each count against each defendant separately. CP 54. Second, it is not Mr. Santiago's duty to hold the prosecutor to the due process standard prohibiting him from encouraging the jury to convict Mr. Santiago based on the evidence against his brother. Third, agreement to a joint trial does not constitute waiver of Mr. Santiago's right to be convicted based only on the evidence against him. CP 54. Respondent's argument that Mr. Santiago is to blame for the prosecutor's improper argument is misdirected.

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by improperly bolstering M.M.'s credibility and arguing that the jury should convict based on evidence against Mr. Santiago's brother. *Boehning*, 127 Wn. App. at 514. Mr. Santiago's conviction must be reversed. *Id.*

D. The prosecutor committed misconduct by arguing that the jury had to think M.M. had “made it up” in order to acquit Mr. Santiago.

It is misconduct for a prosecutor to argue that the jury must find that the state’s witnesses are lying in order to acquit. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *Glasmann*, 175 Wn.2d at 713. At Mr. Santiago’s trial, the prosecutor argued that the jury should weigh M.M.’s version of events against Mr. Santiago’s and convict unless it found that M.M. had “made it up.” RP (2/28/13) 374; CP 103-08 (slide 43).

Rather than being able to acquit only if it finds the accused more credible than the accuser, the jury is *required* to acquit *unless* it has an abiding belief in the accusations. *Fleming*, 83 Wn. App. at 213. Respondent attempts to distinguish *Fleming* and *Glasmann*, but merely points out a distinction without a meaningful difference. Brief of Respondent, pp. 21-22. The state quotes a passage from *Fleming* in which the prosecutor argued that the jury would have to find that the alleged victim as either lying, confused, or had fantasized the events in order to acquit the accused. Brief of Respondent, p. 21 (*quoting Fleming*, 83 Wn. App. at 213). Likewise, Respondent points out that in *Glasmann*, the prosecutor improperly argued that the jury would have to believe the

accused's version of events in order to acquit him. Brief of Respondent, p. 22 (citing *Glasmann*, 175 Wn.2d at 713).

Without explanation, the state claims that the arguments the prosecutor made at Mr. Santiago's trial were different from those in *Fleming* and *Glassman*. Brief of Respondent, pp. 21-22. But the arguments had identical effect. Like in *Fleming*, the prosecutor's argument in Mr. Santiago's case improperly informed the jury that it would have to find that M.M. was lying, mistaken, or had fabricated having sex with Mr. Santiago in order to acquit him. *Fleming*, 83 Wn. App. at 213. Similarly, as in *Glassman*, the upshot of the argument was that the jury had to convict Mr. Santiago unless it believed his version of events. *Glasmann*, 175 Wn.2d at 713. The prosecutor's argument misstated the law. *Id.*

As noted above, the accused cannot open the door to prosecutorial misconduct. *Jones II*, 144 Wn. App. at 295. Nonetheless, the state again argues that the prosecutor's arguments were proper because Mr. Santiago attacked the credibility of the state's witness. Brief of Respondent, pp. 22-23. While the prosecutor was free to argue evidence-based reasons why the jury should find M.M.'s testimony credible, due process prohibited him from arguing that the jury had to convict unless it believed that M.M.

was lying and Mr. Santiago was telling the truth. *Fleming*, 83 Wn. App. at 213; *Glasmann*, 175 Wn.2d at 713.

The prosecutor at Mr. Santiago's trial chose not to argue evidence-based reasons why M.M.'s testimony was credible. Instead, he asked the jury whether they believed that she had "made it up" and insinuated that acquittal was only permissible if the answer was yes. CP 103-08.

Nevertheless, Respondent relies on cases holding that a prosecutor may properly argue inferences from the evidence and that the evidence does not support the defense theory. Brief of Respondent, p. 23 (*citing State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996); *State v. Russell* 125 Wn.2d 24, 87, 882 P.2d 747 (1994)). The state's argument is misplaced.

Respondent argues that this case is like those in which the prosecutor properly asked the jury to consider which witnesses it found more credible. Brief of Respondent, pp. 23-25 (*citing State v. Wright*, 76 Wn. App. 811, 888 P.2d 1214 (1995); *State v. Lewis*, 156 Wn. App. 230, 233 P.3d 891 (2010)). If the prosecutor had stopped at asking which version of events the jury believed, the state may be correct. But the prosecutor did not stop there. CP 103-08. Instead, he asked the jury whether they thought that M.M. had "made it up," suggesting that conviction was required unless she had. CP 103-08 (slide 43). The

prosecutor's argument mischaracterized the presumption of innocence.

Fleming, 83 Wn. App. at 213; *Glasmann*, 175 Wn.2d at 713.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by arguing that the jury was required to convict Mr. Santiago unless it found that M.M. was lying or had "made it up." *Fleming*, 83 Wn. App. at 213. Mr. Santiago's conviction must be reversed. *Id.*

E. The cumulative effect of the prosecutor's misconduct was so prejudicial that no instruction would have cured it.

The cumulative effect of pervasive prosecutorial misconduct can require reversal even if each individual instance would not. *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

The prosecutor at Mr. Santiago's trial made numerous improper arguments, the cumulative effect of which was to undermine Mr. Santiago's presumption of innocence and lower the state's burden of proof. The state does not meaningfully address this argument. Brief of Respondent, p. 26 n. 10.

The cumulative effect of the prosecutor's improper arguments requires reversal of Mr. Santiago's conviction. *Id.*

III. THE STATE PRESENTED INSUFFICIENT EVIDENCE FOR A RATIONAL JURY TO FIND THAT MR. SANTIAGO HAD SEXUAL CONTACT WITH M.M. SHORT OF INTERCOURSE.

A conviction for child molestation in the third degree requires reversal if no rational jury could find beyond a reasonable doubt that the accused had “sexual contact” with the alleged victim. RCW 9A.44.089(1); *State v. R.P.*, 122 Wn.2d 735, 736, 862 P.2d 127 (1993).

The jury was unable to agree that the state had proved beyond a reasonable doubt that Mr. Santiago had sexual intercourse with M.M. Even so, the state argues that there was sufficient evidence of sexual contact because there was evidence of sexual intercourse. Brief of Respondent, p. 28. Respondent does not point to any evidence of sexual contact short of intercourse. Brief of Respondent, pp. 28-30.

The state argues that the jury’s inconsistent verdicts should have no bearing on this court’s assessment of whether the evidence was sufficient to convict Mr. Santiago. Brief of Respondent, p. 29 (*citing State v. Goins*, 151 Wn.2d 728, 733, 54 P.3d 723 (2002)). *Goins* held that inconsistency between a general and a special verdict did not require reversal of a conviction. *Goins*, 151 Wn.2d at 737. But the *Goins* court explains at length that the general and special verdicts arose from completely different statutory schemes and served different functions. *Id.* at 735-36. Here, on the other hand, Mr. Santiago was charged with two

alternative offenses. CP 1-3. The effect of the jury's inability to reach a verdict on the rape charge was to demonstrate that it was unable to agree beyond a reasonable doubt that Mr. Santiago had intercourse with M.M. The state presented no other evidence of sexual contact. The evidence was insufficient to support the child molestation charge. *R.P.*, 122 Wn.2d at 736.

No rational jury could have found beyond a reasonable doubt that Mr. Santiago engaged in sexual contact with M.M. short of intercourse. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013). Mr. Santiago's conviction must be reversed. *Id.*

IV. THE COURT VIOLATED MR. SANTIAGO'S RIGHT TO COUNSEL BY ORDERING HIM TO PAY ATTORNEY'S FEES WITHOUT FIRST ASSESSING WHETHER HE COULD AFFORD TO DO SO.

A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); U.S. Const. Amends. VI, XIV.

Under *Fuller*, the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.* Respondent relies on cases decided contrary to *Fuller* to argue, without explanation, that Mr. Santiago's claim fails. Brief of Respondent, p. 31. As argued in Mr.

Santiago's Opening Brief, this court's prior interpretation of the issue turns *Fuller* on its head by permitting a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. This scheme impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Manifest error affecting a constitutional right may be raised at any time. RAP 2.5(a)(3). Still, the state argues that the court should not address this issue for the first time on appeal. Brief of Respondent, p. 31 (citing *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013)). But *Blazina* did not argue that the court had violated the right to counsel. *Blazina*, 174 Wn. App. at 911-12. That case addressed only whether the record supported the finding that the accused had the ability to pay LFOs. *Id.* Respondent's reliance on *Blazina* is inappropriate.

The court violated Mr. Santiago's right to counsel by ordering him to pay the cost of his court-appointed attorney without conducting inquiry into his present or future ability to pay. *Fuller*, 417 U.S. at 53. The order requiring Mr. Santiago to pay \$1,135 in attorney fees must be vacated. *Id.*

CONCLUSION

The trial court violated Mr. Santiago's constitutional right to confront adverse witnesses by limiting his cross-examination of the alleged victim. The prosecutor committed numerous instances of flagrant, ill-intentioned, prejudicial misconduct. There was insufficient evidence for a rational trier of fact to find Mr. Santiago guilty of child molestation. Mr. Santiago's conviction must be reversed.

The court violated Mr. Santiago's right to counsel by ordering him to pay the cost of his court-appointed in a manner that impermissibly chills the exercise of the right to counsel. The order that Mr. Santiago pay attorney's fees must be vacated.

Respectfully submitted on March 25, 2014,

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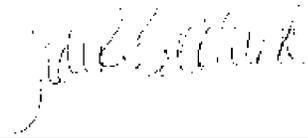
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 25, 2014.



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