

FILED

NOVEMBER 14, 2011

Court of Appeals
Division III
State of Washington

29765-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL RICE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

A.	ASSIGNMENTS OF ERROR	1
B.	ISSUES	1
C.	STATEMENT OF THE CASE.....	2
D.	ARGUMENT	7
1.	THE STATE’S EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS	7
2.	THE PROSECUTOR IMPROPERLY COMMENTED ON MR. RICE’S RIGHT TO A JURY TRIAL AND TO CONFRONT WITNESSES.....	10
3.	THE PROSECUTOR’S OPENING STATEMENT, CONTAINING MULTIPLE DETAILS HE COULD NOT PROVE, CONSTITUTES PROSECUTORIAL MISCONDUCT	12
4.	THE CUMULATIVE EFFECT OF REPETITIVE ERROR WAS SO FLAGRANT THAT NO INSTRUCTION CAN ERASE THAT ERROR.....	14
E.	CONCLUSION.....	15

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BELGARDE, 110 Wn.2d 504,
755 P.2d 174 (1988)..... 12

STATE V. CASE, 49 Wn.2d 66,
298 P.2d 500, (1956)..... 14, 15

STATE V. CONTRERAS, 57 Wn. App. 471,
788 P.2d 1114, *review denied*,
115 Wn.2d 1014, 797 P.2d 514 (1990)..... 12

STATE V. FIALLO-LOPEZ, 78 Wn. App. 717,
899 P.2d 1294 (1995)..... 10

STATE V. GREEN, 94 Wn.2d 216,
616 P.2d 628 (1980)..... 8

STATE V. HENDERSON, 100 Wn. App. 794,
998 P.2d 907 (2000)..... 14

STATE V. HOFFMAN, 116 Wn.2d 51,
804 P.2d 577 (1991)..... 12

STATE V. JOHNSON, 80 Wn. App. 337,
908 P.2d 900 (1996)..... 12

STATE V. KROLL, 87 Wn.2d 829,
558 P.2d 173 (1976)..... 12

STATE V. PARTIN, 88 Wn.2d 899,
567 P.2d 1136 (1977)..... 8

STATE V. RUPE, 101 Wn.2d 664,
683 P.2d 571 (1984)..... 10

STATE V. SALINAS, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 8

STATE V. THEROFF, 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	8
STATE V. TORRES, 16 Wn. App. 254, 554 P.2d 1069 (1976).....	12, 13, 14

SUPREME COURT CASES

GRIFFIN V. CALIFORNIA, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).....	11
IN RE WINSHIP, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	7
ZANT V. STEPHENS, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).....	10

CONSTITUTIONAL PROVISIONS

CONST. ART. 1, § 22	11
SIXTH AMENDMENT.....	11

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the convictions.
2. The prosecutor improperly commented on Mr. Rice's decision to exercise his sixth amendment right to a jury trial and confront witnesses.
3. The prosecutor failed to restrict his opening remarks to a statement of the evidence the State intended to present at trial.
4. The cumulative effect of prosecutorial error deprived Mr. Rice of a fair trial.

B. ISSUES

1. The State failed to present any credible evidence that the defendant was present at or participated in the offenses with which he was charged. Did his convictions violate due process?
2. The prosecutor's statements to the jury, before and after the presentation of evidence, suggested that the jury's duty to convict the defendant was necessitated by the defendant's failure to confess. Did these statements violate the defendant's right to a jury trial?

3. The prosecutor's opening statement asserted numerous facts for which the State could not, or failed to, present any supporting evidence at trial. Did these statements constitute flagrant, ill-intentioned misconduct that violated the defendant's right to a fair trial?
4. The prosecutor improperly commented on the defendant's assertion of his right to a jury trial, made factual assertions during opening statement for which there was no supporting evidence, and failed to introduce available evidence to support other factual assertions. Did the cumulative effect of these numerous errors violate the defendant's right to a fair trial?

C. STATEMENT OF THE CASE

In the early morning hours of April 7, 2010, two masked men wearing dark hooded jackets kicked in the door of Debra Vargas's apartment. (RP 124, 126, 215-16) Ms. Vargas's 38-year-old son, Jim Stethem, was asleep on the couch. (RP 124) When awakened, he saw the men removing items from the residence. (RP 124) One of the men had what appeared to be a gun. (RP 126)

Ms. Vargas called 9-1-1 and told the dispatcher that she had been robbed by men with a gun and metal rod. (RP 125, Supp RP 1) The men had taken a laptop computer and Mr. Strethem's DVD player. (RP 126) Ms. Vargas's green minivan was also missing. (RP 127)

Officers investigating the robbery found a metal pipe lying on the floor in Ms. Vargas's apartment, and a Chucky doll under the landing outside her door. (RP 219, 227-28) Police recovered Ms. Vargas's van in Portland two weeks later. (RP 157-59) Inside it they found a computer and two Chucky dolls. (RP 160)

Christina Morales lived in an apartment complex next door to Ms. Vargas, who was her aunt. (RP 109, 133-34, 138) On the night prior to the robbery, Jerami Wilson was staying in Ms. Morales apartment while she was in jail in Seattle. (RP 133-34) Several people visited Ms. Morales's apartment that evening, including Nicholas Campbell, Michael Rice, and Cecilia Circo. (RP 135-36) Around midnight the other guests started getting loud and Mr. Wilson wanted to go to sleep, so he asked them to go into the other room, and he went to sleep on the couch. (RP 144)

When Ms. Morales returned home she found that her Chucky dolls were missing. (RP 114-15)

Police interviewed Ms. Circo, who recalled that Mr. Wilson had called her, and Mr. Campbell and Mr. Rice showed up. (RP 172, 175) She told the officer that “they were looking to take stuff.” (RP 178) She talked about a silver gun, that Mr. Campbell had a Chucky doll, and that she returned directly to the Tri-Cities from Portland on a bus. (RP 177-80) She also recalled that they had talked about a robbery they had done. (RP 180)

The State charged Mr. Campbell and Mr. Rice with robbery, car theft and burglary. (CP 1-2, 16-18) The cases were joined for trial. (CP 9)

Ms. Morales told the jury that her aunt’s van would ordinarily start by turning the key in the usual way, but if you turned the key too far the van wouldn’t start unless you pressed a button under the steering column. (RP 110-11) She thought Mr. Rice had driven the van since he had helped out her aunt a few times. (RP 112, 116)

Mr. Wilson told the jury he saw something in Mr. Campbell’s pants waistband, which he thought was a gun, but Mr. Campbell refused to let him examine it. (RP 136, 146) Mr. Wilson said he also saw a pipe in Mr. Rice’s back pocket. (RP 137)

Ms. Vargas’s and Ms. Morales’s landlord, Roy Cochlin, testified that he spoke with Ms. Morales on the evening prior to the incident. (RP

200, 203) Mr. Cochlin said he had seen Mr. Rice and Mr. Campbell in dark hooded jackets going back and forth between Ms. Morales's and Ms. Vargas's residences. (RP 204)

Mr. Rice testified that while he was with Mr. Campbell on the evening preceding the charged events, he left the apartment at dusk and went to the home of another friend, who drove him to Umatilla the next day. (RP 291) From there, he traveled to Arizona, where he turned himself in to police upon learning of a warrant for his arrest. (RP 292) He denied any part in the charged events. (RP 289)

During opening argument, the prosecuting attorney told the jury:

There's not going to be an issue before you about the fact of the crime.

Two people broke into an apartment rented by Debra Vargas early morning hours on the 7th of April, 2010. One of them had a pipe; one of them had what looked like a gun. The person with the gun came up to Mrs. Vargas, who was in her bed, told her to, you know, put her head next to the pillow so she couldn't see anybody and held it while the other person went through the apartment.

...

What happens? Well, they make Ms. Vargas put a pillow over her head so she can't see; can't identify them.

...

- - the guys came in. One person puts a gun to Ms. Vargas's head.

(RP 100-01)

After providing more details about the robbery and the evidence, the prosecutor assured the jury that a key witness, Stacy Felkel, would testify that the defendants showed up at her home in the van and talked about “doing a home invasion robbery.” (RP 103-04)

The prosecutor concluded his opening remarks by pointing out that the reason for the trial was the defendants’ refusal to confess:

Campbell will admit that, yeah, he was there. He was there with Mr. Rice, with Ms. Circo. He saw Mr. Wilson then, but *he denies doing the robbery*. That’s where you come in, and that’s why we are going to ask you, you know, to hold them accountable for their actions.

They won’t admit their crimes, their actions. That’s why we’re asking you to hold them accountable, and we are asking you to hold them accountable for robbery. Find that was done with a deadly weapon. Hold them accountable. Find them guilty of theft of a motor vehicle and hold them accountable. Find them guilty of burglary with a deadly weapon.

(RP 107)

During closing, the prosecutor again noted the defendants’ failure to confess and the resulting necessity of a trial:

Now, the reason that you’re here is not because this is a close case or because there’s a real hard factual issue. You’re here because the defendants do not want to be held accountable for their own actions. You know, *they are never going to admit* -- they are never going to come up and say, “Yeah. We did this. Please, I’ll take my punishment for it.” That’s where you come in. That’s why you have to hold them accountable, and the way to do that

is to find them guilty as charged of robbery in the first degree.

(RP 324)

Ladies and gentlemen, I'm asking you to do your job; hold them accountable for what they did. Come back, look them in the eye and tell them, "I don't care what you said. *Just because you deny it doesn't make it so.* Just because you say you didn't do it doesn't make it true." Look them in the eye and you can say, "Mr. Campbell, Mr. Rice, it doesn't matter what you say. What matters is the evidence, and the evidence says you're guilty."

(RP 325)

The jury found Mr. Rice guilty and the court sentenced him to 144 months total confinement. (CP 75)

D. ARGUMENT

1. THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS.

In every criminal prosecution, due process requires that the State prove beyond a reasonable doubt the essential elements of the crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992) (*citing State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (*citing State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (*citing State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

The State presented substantial evidence that two men, armed with a gun and a metal pipe, broke into an apartment occupied by Debra Vargas and Jim Strethem, and stole some electronic equipment. Ms. Vargas’s van disappeared at or shortly after the time of the robbery. The men who took the van had access to the neighboring apartment, belonging to Ms. Vargas’s niece, since dolls that had been taken from the niece’s apartment were found in the her aunt’s van, when it was recovered in Portland.

Evidence purportedly connecting Mr. Rice with these events consisted of testimony showing that about a week earlier he had asked a friend to help him “get back” at Ms. Vargas on behalf of the niece and a laptop was mentioned; that he was in the niece’s apartment the evening before the robbery, with a metal pipe in his back pocket; and the landlord saw Mr. Rice and another man going between the two apartments around

the time he was having a conversation with the niece about problems with the porch lights. It is undisputed that on the night of the robbery, the niece was in jail in Seattle.

No rational trier of fact could find Mr. Rice guilty of the alleged crimes beyond a reasonable doubt based on a prior conversation about some kind of revenge against the victim, possibly involving a laptop, and his presence in a friend's apartment adjacent to the scene of the robbery, while carrying a metal pipe. Neither Ms. Vargas nor her son ever identified Mr. Rice as one of the perpetrators. No evidence established that Mr. Rice was in Ms. Vargas's apartment near the time of the robbery. No evidence showed Mr. Rice was seen in or near the stolen car on the night of the robbery, or at any time between and the time the van was found in Portland.

The State may have relied on the testimony of Cecilia Circo to provide some connection between Mr. Rice and the events of April 7. Ms. Circo identified Mr. Rice and Mr. Campbell as acquaintances. (RP 171) She was unable to remember the events of April 7. (RP 171) She identified a recording of statements she had made to a police officer at some prior time. (RP 171)

The State sought to play a recording for the jury. (RP 174) But because the court indicated the recording was somewhat inaudible, the

prosecutor chose to play selected portions of the recording for Ms. Circo, and then ask her whether she remembered particular statements made on the tape. (RP 175) As a result her testimony was limited to stating that she remembered hanging out with the defendants at an unspecified location on an unspecified date; there was a mention of “looking to take stuff;” someone had a silver gun and Mr. Campbell had a Chucky doll; on an unspecified date she traveled from Portland to the Tri-Cities by bus; and the defendants had talked about a robbery they had done but she did not remember what they said. (RP 178-180)

In short, Ms. Circo’s testimony did not establish any connection between Mr. Rice and the April 7 robbery, burglary, or theft of the van.

2. THE PROSECUTOR IMPROPERLY COMMENTED ON MR. RICE’S RIGHT TO A JURY TRIAL AND TO CONFRONT WITNESSES.

A prosecutor is prohibited from arguing unfavorable inferences from the exercise of a constitutional right and may not argue a case in a manner that would chill a defendant’s exercise of such a right. *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (comment on possession of legal weapons); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995) (comment on the defendant’s failure to testify).

Such arguments amount to a “penalty imposed . . . for exercising a constitutional privilege.” *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

Under the Sixth Amendment and Const. art. 1, § 22, an accused has the right to be tried by a jury. But the prosecutor improperly commented on Mr. Rice’s right to trial in both his opening statement and closing argument by telling the jury that the trial was necessitated by Mr. Rice’s refusal to “admit” and be “held accountable” for his actions. (RP 106-07, 324)

The prosecutor’s argument improperly invited the jury to draw negative inferences from his exercise of his Sixth Amendment right to confront witnesses and to have a jury trial. It implied that Mr. Rice’s choice to exercise his right to trial, as opposed to confessing to the crime, was dishonorable and that Mr. Rice could avoid being “held accountable” by exercising his right to a trial by jury. The prosecutor’s exhortation that the reason for the trial was Mr. Rice’s refusal to be “held accountable” naturally and necessarily focused on Mr. Rice’s right to a jury trial and to confront witnesses.

Prosecutorial misconduct requires reversal even where there was no defense objection if the prosecutor’s remarks were so flagrant and ill-intentioned that they produced an enduring prejudice which could not have

been neutralized by a curative instruction to the jury. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Prosecutorial misconduct that also affects a separate constitutional right is subject to analysis under the stricter standard of constitutional harmless error. *State v. Johnson*, 80 Wn. App. 337, 342, 908 P.2d 900 (1996), citing *State v. Contreras*, 57 Wn. App. 471, 473, 788 P.2d 1114, review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990). Under the constitutional harmless error analysis, error is harmless only if the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. 80 Wn. App. at 341.

3. THE PROSECUTOR'S OPENING STATEMENT,
CONTAINING MULTIPLE DETAILS HE
COULD NOT PROVE, CONSTITUTES
PROSECUTORIAL MISCONDUCT.

The purpose of an opening statement is to outline the evidence the State intends to introduce. *State v. Kroll*, 87 Wn.2d 829, 834-35, 558 P.2d 173 (1976). Attorneys are afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). But an opening statement should not misstate the evidence to be presented at trial. *State v. Torres*, 16 Wn. App. 254, 258, 554 P.2d 1069 (1976).

The prosecutor offered no evidence to support this claim that the defendants put a pillow over Ms. Vargas to prevent her from identifying

them, and that one of the defendants pointed a gun at Ms. Vargas's head. At the time he made these remarks, the prosecutor knew that Ms. Vargas was not available to testify. There was no other witness who could describe the events that took place in Ms. Vargas's bedroom, where the prosecutor told the jury that these events occurred; her son, the only other person present, was in the living room.

The phrasing of the prosecutor's opening statement is objectionable in and of itself. In court, noted *Torres*, "The prosecutor so phrased the opening statement that much of what was said was stated in the form of testimony and not in the form of an outline of the facts that would be proved." This is improper because "[a]n opening statement should not be argumentative, inflammatory, misstate what will be contained in the evidence, or contain expressions of the personal belief of the prosecutor." *Id.* Here, as in *Torres*, the opening statement became an improper narrative recounting a story of the alleged crime.

The State also failed to present testimony from Stacy Felkel supporting the allegation that Mr. Rice admitted to and boasted of the crime. The prosecutor knew that Ms. Felkel was a reluctant witness. (RP 154) Yet when she failed to respond to her subpoena on the first day of trial, he did not seek a material witness warrant for her appearance until the next day. (RP 154-55)

4. THE CUMULATIVE EFFECT OF REPETITIVE ERROR WAS SO FLAGRANT THAT NO INSTRUCTION CAN ERASE THE ERROR.

The cumulative effect of instances of prosecutorial misconduct can materially affect the outcome of the trial. *State v. Henderson*, 100 Wn. App. 794, 998 P.2d 907 (2000) (citing *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500, (1956)). That is the case here.

In *Torres*, 16 Wn. App. at 262, the court concluded that prosecutorial misconduct that permeated the entire trial required reversal. There, the prosecutor improperly suggested that the defendant, charged with rape, could also have been charged with burglary; referred to the defendants disparagingly; phrased his opening statement in the form of testimony and not as an outline of the facts that would be proved; favored the victim with repeated leading questions; commented on the marital testimonial privilege; and persisted in pursuing matters that were not properly before the jury. *Id.* at 256-262.

Here, as in *Torres*:

[s]ome of th[e] errors, standing alone, would require a retrial of this cause. Others standing alone would not amount to prejudicial error requiring a retrial. However, the incidents of misconduct throughout this trial were so numerous as to irreparably taint the proceedings.

....

“There comes a time, however, when the cumulative effect of repetitive prejudicial error becomes so flagrant that no

instruction or series of instructions can erase it and cure the error.”

16 Wn. App. at 263 (*quoting Case*, 49 Wn.2d at 73).

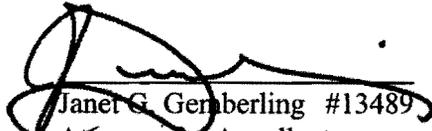
E. CONCLUSION

The State failed to present evidence to support its claims and sought to buttress the shortcomings of its case with improper argument.

The convictions should be reversed and dismissed.

Dated this 14th day of November, 2011.

JANET GEMBERLING, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29765-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
MICHAEL RICE,)	
)	
Appellant.)	

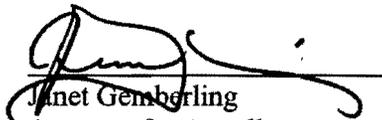
I certify under penalty of perjury under the laws of the State of Washington that on November 14, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Andrew K. Miller
prosecuting@co.benton.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on November 14, 2011, I mailed a copy of the Appellant's Brief in this matter to:

Michael Rice
#347795
PO Box 2049
Airway Heights WA 99001

Signed at Spokane, Washington on November 14, 2011.


Janet Gemberling
Attorney for Appellant
