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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 28185-0-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Anthony D. Koss,
Appellant

Appeal from the Superior Court of Spokane County

REPLY BRIEF OF APPELLANT

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I. ISSUES ON REPLY

1. The prosecutions arguments in closing constitute a due process violation which misstated the law, misrepresented the role of the jury, and the burden of proof requiring a new trial.
2. The language of RCW 9A.52.020(1) creates an issue of statutory interpretation which must be strictly construed in favor of the criminal defendant.
3. The trial court violated the Defendant's constitutional rights by not conducting proceedings in open court including jury instructions, arguments, and questions received from the jurors during deliberations.

II. ARGUMENT ON REPLY

- 1. The prosecutions arguments in closing constitute a due process violation which misstated the law, misrepresented the role of the jury, and the burden of proof requiring a new trial.**

The comments made by the prosecutor taken together and by cumulative effect, rose to the error of manifest constitutional error, which cannot be found harmless beyond a reasonable doubt. Therefore, the failure of the defense to object during trial does not preclude review. *State v. Fleming*, 83 Wn.App. 209, 216, 921 P.2d 1076 (1996) The prosecutions comments decreased the burden of proof that the government was held to below that of beyond a reasonable doubt. The prosecutor's misstatement of the law was an error of constitutional significance. Here, as in *State v.*

Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996), the prosecutor not only misstated the burden of proof but also misrepresented the role of the jury. (*Id.* 213) In *Fleming* Division I of the Court of Appeals held these errors could not be found harmless beyond a reasonable doubt.

In the case before this court the prosecutor misstated the burden of proof. (RP 319 lines 8-12) Then the prosecutor encouraged the jury to abandon their role of applying the reasonable doubt standard to “determine whether or not the defendant violated Katy Jones’ right to be secure in her home and free of bodily injury.” (RP 317 lines 15-25) This is very similar factually to what led Division I in *State v. Fleming* 83 Wn. App. 209, 213 & 216, 921 P.2d 1076 (1996) to find “that the misconduct, taken together and by cumulative effect, rose to the level of manifest constitutional error”. Additionally, the prosecutor argued that the defense witnesses were not credible because they could not identify the victims’ ethnic background, an effort to appeal to the juror’s passion. (RP 323 lines 23-25 to 324) This court given the prosecutions misconduct and the egregious nature of these errors should find a manifest constitutional error and remand for a new trial.

- 2. The language of RCW 9A.52.020(1) creates an issue of statutory interpretation which must be strictly construed in favor of the criminal defendant.**

The State argues that “facts in *Gilbert* are not even slightly similar to this case.” But the prosecution ignores significant testimony from defense witnesses. Jonathan Boltz, who testified that he was across the street with Mr. Pleasant when he heard a female yelling across the street. (RP 213) He observed Mr. Drake and Anthony Koss pull up in a car. (RP 213-214) Mr. Boltz observed the female step out onto the porch yelling and throwing her arms around. Mr. Drake stepped back and then swung at the female. (RP 215 lines 13-25) Mr. Boltz stated the female was out on the porch when she was struck. (RP 216 lines 1-13) After the struggle occurred, both men ran away from the scene. (RP 227 lines 17-23)

These facts create a fact pattern very much like that which occurred in the *Gilbert* case. The jury very well may have found the striking occurred “in immediate flight from the building.” (RP 311) (CP 48 and 49) These facts and the courts instructions create a question of jury unanimity requiring reversal consistent with the Washington Supreme Courts’ ruling in *State v. Kitchen*, 110 Wn2d 403, 409, 756 P.2d 105 (1988); *State v. Rivas*, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999). This court should remand this case for a new trial based upon the failure of the trial courts instructions to require jury unanimity.

3. The trial court violated the Defendant’s constitutional rights by not conducting proceedings in open court

including jury instructions, arguments, and questions received from the jurors during deliberations.

It is undisputed that the trial court conducted proceedings outside of the open courtroom and outside of the presence of even the defendant. (Respondent's Brief p.9) The State also concedes that the court failed to conduct the required *Bone-Club* analysis prior to conducting closed hearings or proceedings as part of his trial. (Respondent's Brief p.11)

Additionally, in the present case the trial court made no record of any reasons for conducting portions of the trial i.e. jury instructions or jury questions outside of the open court. In *State v. Bone-Club*, 128 Wn.2d 254, 261, 906 P.2d 325 (1995) the Washington Supreme Court made it very clear:

“Lacking a trial court record showing any consideration of Defendant's public trial right, we cannot determine whether the closure was warranted. We hold the trial court's failure to follow the five-step closure test enunciated in this court's section 10 cases violated Defendant's right to public trial under section 22.”

The Washington Supreme Court held that the “prejudice is presumed” the analysis encouraged by the State, regarding prejudice is unnecessary.

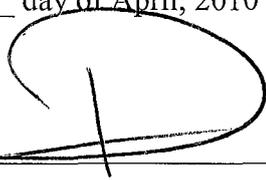
It should be clear, however, that the issues of jury instructions and decisions regarding charging of the defendant by alternative methods, is a critical portion of the proceedings. In the defendant's case the removal of the accomplice language from the instructions involved defenses including self-defense arguments as well as other critical defense issues.

Nevertheless, trial courts need to understand that before conducting any trial or suppression activities outside of the open court, there must be the *Bone-Club* analysis conducted on the record. Failing to conduct the *Bone-Club* analysis requires the defendant be given a new trial.

V. CONCLUSION

The State's response admits that proceedings were not conducted in the open court and that the court failed to conduct the *Bone-Club* analysis on the record. The failure to conduct that analysis on the record requires that the defendant be given a new trial. The protection of the defendant's rights under Article I Section 10 and Section 22 mandates a new trial.

Respectfully submitted this 14 day of April, 2010



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