

86033-5

NO. 39119-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

AARON OLSON,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
10 JUN 18 PM 12:33
STATE OF WASHINGTON
BY _____
DEPUTY CLERK

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

REPLY BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

 1. THE STATE FAILED TO PROVE EACH ALTERNATIVE
 MEANS PRESENTED TO THE JURY ON THE
 ROBBERY AND RAPE CHARGES, REQUIRING
 REVERSAL AND REMAND FOR A NEW TRIAL ON
 THOSE CHARGES 1

 2. THE PROSECUTOR COMMITTED MISCONDUCT IN
 CLOSING ARGUMENT BY MISSTATING THE BURDEN
 OF PROOF AND BY VOUCHING FOR HIS WITNESS 6

 3. THE TRIAL COURT ABUSED ITS DISCRETION IN
 DENYING MR. OLSON'S REPEATED MOTIONS TO
 SEVER DEFENDANTS, BECAUSE THE TWO
 DEFENDANTS HAD ANTAGONISTIC, MUTUALLY
 EXCLUSIVE DEFENSES WHICH PREJUDICED MR.
 OLSON..... 8

B. CONCLUSION..... 11

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Bright</u> , 129 Wn.2d 257, 916 P.2d 922 (1996).....	5
<u>State v. Tongate</u> , 93 Wn.2d 751, 613 P.2d 121 (1980).....	5

Washington Court of Appeals Decisions

<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	6
<u>State v. Bowman</u> , 36 Wn. App. 798, 678 P.2d 1273 (1984).....	5
<u>State v. Fernandez</u> , 89 Wn. App. 292, 948 P.2d 872 (1997).....	2, 3
<u>State v. Johnson</u> , 147 Wn. App. 276, 194 P.3d 1009 (2008)	9, 10
<u>State v. Lloyd</u> , 36 Wn. App. 374, 674 P.2d 210 (1984)	4
<u>State v. Mathe</u> , 35 Wn. App. 572, 668 P.2d 599 (1983).....	5
<u>State v. Venegas</u> , ___ Wn. App. ___, 228 P.3d 813 (2010).....	7, 8

Statutes

RCW 69.50.402 (1996)	3
RCW 9A.44.040	4

A. ARGUMENT

1. THE STATE FAILED TO PROVE EACH ALTERNATIVE MEANS PRESENTED TO THE JURY ON THE ROBBERY AND RAPE CHARGES, REQUIRING REVERSAL AND REMAND FOR A NEW TRIAL ON THOSE CHARGES.

In his opening brief, Mr. Olson argued that his robbery and rape convictions must be reversed because the State failed to prove the “actual deadly weapon” alternative means of the crimes. Although the complainant testified that her attackers displayed something that looked like a black gun, no gun was ever found and Mr. Olson’s codefendant testified that there was no gun. Thus, insufficient evidence supported the convictions on counts two, three, and four. App. Br. at 13-20.

The State acknowledges that “actual deadly weapon” and “apparent deadly weapon” are alternative means of committing robbery, but argues that they are not alternative means of committing rape. Br. of Resp’t at 21-22. The State claims that they are not alternative means of committing rape because there is no carriage return and no new letter or number between the alternatives in the rape statute, as there are in the robbery statute. Id. But that is not the test. In Fernandez, the statute at issue had

the same structure as the rape statute at issue in this case, and this Court held that the alternatives listed under the same letter and number, without a carriage return, were alternative means of committing the crime. State v. Fernandez, 89 Wn. App. 292, 300, 948 P.2d 872 (1997).

The statute at issue in Fernandez provided:

(a) It is unlawful for any person:

(1) who is subject to Article III to distribute or dispense a controlled substance in violation of RCW 69.50.308;

(2) who is a registrant, to manufacture a controlled substance not authorized by his registration, or to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(3) who is a practitioner, to prescribe, order, dispense, administer, supply, or give to any person:

(i) any amphetamine, including its salts, optical isomers, and salts of optical isomers classified as a schedule II controlled substance by the board of pharmacy pursuant to chapter 34.05 RCW; or

(ii) any nonnarcotic stimulant classified as a schedule II controlled substance and designated as a nonnarcotic stimulant by the board of pharmacy pursuant to chapter 34.05 RCW;

...

- (4) to refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice, or information required under this chapter;
- (5) to refuse an entry into any premises for any inspection authorized by this chapter; or
- (6) knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, **which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.**

RCW 69.50.402 (1996) (emphasis added). This Court held that the highlighted clause above created two alternative means of committing the crime (presumably because of the word “or”), even though they were not separated by letters, numbers, or carriage returns like the other alternative means in the statute. Fernandez, 89 Wn. App. 300. Similarly here, the rape statute provides “deadly weapon” and “appears to be a deadly weapon” alternative means of committing the crime:

- (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:
 - (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon ...**

RCW 9A.44.040 (emphasis added). Thus, contrary to the State's argument, both the robbery and rape statute provide "deadly weapon" and "what appears to be a deadly weapon" alternative means of committing the crimes.

The State then contends that it presented sufficient evidence to prove the "actual deadly weapon" means beyond a reasonable doubt. Br. of Resp't at 22-23. The State's argument is unconvincing. As explained in Mr. Olson's opening brief, the State was required to prove Mr. Olson used an operable firearm, because that was the definition of "deadly weapon" supplied to the jury. App. Br. at 17. "A gun-like object incapable of being fired is not a 'firearm'." State v. Lloyd, 36 Wn. App. 374, 376, 674 P.2d 210 (1984).

While G.C. testified that she "saw two guys point a gun" at her stomach and thought it looked like a black, semi-automatic weapon, no gun was ever found or introduced into evidence, and the co-defendant testified that there was no gun. 1/8/09 RP 95, 101, 1/15/09 RP 634-35. Plenty of toy guns look like real guns; indeed, toy manufacturers purposely design the fake guns to look realistic. See Appendix A (Airsoft black toy handgun, with "realistic, semi automatic loading action"). Thus, "a jury could believe that a

robber used a toy gun or other object that merely resembled a deadly weapon in the commission of the crime.” State v. Tongate, 93 Wn.2d 751, 755, 613 P.2d 121 (1980) (holding that while sufficient evidence was presented to convict defendant of robbery based on displaying what appeared to be a firearm or other deadly weapon, “the State did not prove the presence of a deadly weapon beyond a reasonable doubt”).

The cases the State cites are inapposite. Br. of Resp’t at 21. In Bowman, the complainant described the gun in detail and stated that “there was no question in my mind whatsoever” that it was a real gun. State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984). Here, C.G. understandably merely stated that it “looked” real. 1/8/09 RP 102. In Mathe, two different victims “described in detail the guns used by Mathe during the robberies.” State v. Mathe, 35 Wn. App. 572, 581, 668 P.2d 599 (1983). In Bright, the issue was whether an implied threat satisfied the “threatens to use” element. State v. Bright, 129 Wn.2d 257, 264, 916 P.2d 922 (1996). Unlike in Mr. Olson’s case, there was no question that Bright, who was a police officer, was armed with a real handgun and also had a rifle within reaching distance. Id. at 264.

Because the State failed to prove beyond a reasonable doubt that the appellants were armed with an actual deadly weapon, and the State did not elect the “appears to be” alternative means, the robbery and rape convictions must be reversed.

2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY MISSTATING THE BURDEN OF PROOF AND BY VOUCHING FOR HIS WITNESS.

In his opening brief, Mr. Olson argued that his convictions must be reversed because the prosecutor committed flagrant misconduct in closing argument. The prosecutor told the jury it was required to convict unless it could “fill in the blank” stating its reason for having a doubt, and also told the jury its job was to “speak the truth” and that the truth was that Mr. Olson was guilty. The prosecutor displayed PowerPoint slides with the same messages. Under this Court’s decision in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), the argument improperly shifted the burden of proof and constituted flagrant and ill-intentioned misconduct.¹ App. Br. at 20-29.

The State contends Mr. Olson waived the issue on appeal by failing to object below. Br. of Resp’t at 6-12. The State is wrong.

¹ The prosecutor also committed misconduct by stating his opinion as to guilt, and by telling the jury that his witness had no reason to lie. App. Br. at 27-29.

In Venegas, the prosecutor made precisely the same improper arguments made in Mr. Olson's case, and the trial attorney did not object. State v. Venegas, ___ Wn. App. ___, 228 P.3d 813, 821 (2010). This Court held, "Although the defense failed to object to the prosecutor's statement, we find that the defense did not waive this error because the remark was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction." Id. at 821 n.16. The State simply refuses to acknowledge this portion of Venegas. Its argument should therefore be rejected.

Furthermore, contrary to the State's argument, the error was not harmless. Br. of Resp't at 13-14. As the State acknowledges, the complainant chose only Emery in a photo montage and identified only Emery as her assailant in court. Br. of Resp't at 14. And although the crime lab reported that Mr. Olson's DNA was found on the complainant's clothing, Mr. Olson testified that the lab made a mistake and that he was not present. 1/6/09 RP 47. This statement is supported by the complainant's reports that the caucasian attacker had blond hair and was about 5'9". 1/12/09 RP 139, 173. Aaron Olson is a towering 6'6" and has red hair. 1/12/09 RP 144-45; 1/13/09 RP 348; 1/20/09 RP 710. Yet the complainant,

who is herself 5'9", described the white assailant as 5'9". 1/8/09
RP 100.

Given the above, there is a substantial likelihood that absent the prosecutor's flagrant misconduct, the jury would have concluded Mr. Olson did not commit the crimes. And even if the flagrant and ill-intentioned misconduct committed during closing were not enough on its own to require reversal, Mr. Olson's convictions should be reversed because cumulative error – including the failure to sever defendants – denied Mr. Olson his right to a fair trial. See Venegas, 228 P.3d at 819.

**3. THE TRIAL COURT ABUSED ITS DISCRETION
IN DENYING MR. OLSON'S REPEATED
MOTIONS TO SEVER DEFENDANTS, BECAUSE
THE TWO DEFENDANTS HAD ANTAGONISTIC,
MUTUALLY EXCLUSIVE DEFENSES WHICH
PREJUDICED MR. OLSON.**

In his opening brief, Mr. Olson argued that the trial court erred in denying his repeated motions to sever defendants, because Mr. Olson's theory of the case was that he was not involved in the incident at all, while Mr. Emery's theory – to which he testified – was that he and Mr. Olson did commit the acts in question but there was no gun and the complainant consented.

Such mutual antagonistic defenses rendered the trial unfair absent severance. App. Br. at 29-33.

The State acknowledges that a defendant demonstrates he is prejudiced by joinder if a co-defendant's statement inculpatates him or antagonistic defenses conflict to the point of being irreconcilable and mutually exclusive. Br. of Resp't at 15. The State's insistence that this is not such a case is not credible. Contrary to the State's implications, Emery did not testify that he was with a generic "white male;" he testified that the white male was Mr. Olson. 1/15/09 RP 652. The prosecutor seized on this testimony in closing: "Make no mistake, the white guy is Aaron Olson. ... We know that because Tony Emery told you so" 1/22/09 RP 897. In other words, Mr. Emery inculpated Mr. Olson, and Mr. Olson's mistaken identity defense was irreconcilable with Mr. Emery's consent defense.

The State's citation to Johnson is unavailing. Br. of Resp't at 16 (citing State v. Johnson, 147 Wn. App. 276, 194 P.3d 1009 (2008)). There, three of four co-defendants were tried together on multiple counts. Defendant Johnson's theory was that he participated in the burglary but did not know about the murder plan. Id. at 287. Defendant Odell's theory was that he was an unwitting

participant in the crimes. Id. Defendant Balaski had an alibi defense. Id. This court held that the trial court did not err in refusing to sever the trials because the defenses were not mutually antagonistic:

If the jury believed Odell's argument that he was an unwitting participant in the crimes, it need not have disbelieved Johnson's defense that he planned to participate in only a burglary and not a murder. If the jury believed Johnson's defense of ignorance of the murder plan, it was not required to disbelieve that Odell participated unwittingly. Thus, Johnson and Odell's defenses were not irreconcilable.

Similarly, if the jury believed Balaski's alibi defense, it did not need to disbelieve Johnson's claim that he did not plan to participate in a murder. Conversely, it could have believed Johnson without disbelieving that Balaski had an alibi. Because the defenses were not mutually antagonistic, the trial court did not err in refusing to sever the trials.

Id.

In contrast, if the jury believed Mr. Olson's claim that he was not there, it had to disbelieve Mr. Emery's theory that he and Mr. Olson had oral sex with G.C. but it was consensual and there was no gun. And conversely, if the jury believed Mr. Emery's claim that he and Mr. Olson committed the acts in question (but with consent and without a gun), it had to disbelieve Mr. Olson's defense that he was not involved at all. Thus, Johnson support's Mr. Olson's

argument that the trial court abused its discretion in denying his repeated motions to sever. For this reason, too, this Court should reverse and remand for a new trial.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Olson respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 17th day of June, 2010.

Respectfully submitted,


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

APPENDIX A

Airsoft Toy Pistol, UKARMS 1:1 Scale Pistol Replica **\$6.99**
[No.305/UKARM]

*7" 1:1 Scale Airsoft Toy Handgun, Colt Pistol
 Replica*



[Click to enlarge](#)

Check out this nice toy pistol. This item is made of plastic, and features a removable clip, front mounted tactical light, laser targeting system, and realistic, semi automatic, loading action. This item is 7 inches in length and is said to be a 1:1 scale replica of a Colt. This item fires 6mm airsoft BBs at high velocity up to 25 meters. This item is recommended for children 18 years and older.

- 7" Colt Style 1:1 Scale Toy Pistol Replica
- Working, Removable Clip
- Laser Pointer & Tactical Light
- Shoots 6mm BBs up to 25 Meters
- 6mm BBs Included
- Recommended for Children 18 Years or Olders

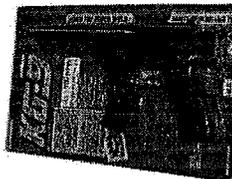
Don't forget to check out our other items!

[Add to Cart](#)

Customers who bought this product also purchased



Airsoft Toy Guns, CYMA Electronic Pro Target System



Toy Guns, 11" KG-9 Style Toy Cap Gun

Toy Guns is what [BuyToyGuns.Com](#) specializes in. We sell **Toy Guns** at great prices and have a huge **Toy Guns** selection. [BuyToyGuns.Com](#) also carries **Toy Rifles, Toy Hand Guns, Toy Machine Guns, Toy Pistols, Police Toy Guns, Western Toy Guns, Toy Army Guns, Parris Gun Replicas, Realistic Toy Guns, Airsoft Toy Guns** and much more!

1

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 39119-8-II
v.)	
)	
AARON OLSON,)	
)	
APPELLANT.)	

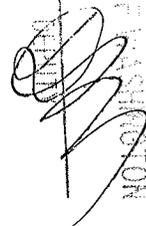
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] THOMAS ROBERTS PIERCE COUNTY PROSECUTING ATTORNEY 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] RAYMOND THOENIG ATTORNEY AT LAW 6925 FORD DR NW GIG HARBOR, WA 98335	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] AARON OLSON 327076 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF JUNE, 2010.

X _____ 

FILED
COURT OF APPEALS
DIVISION TWO
10 JUN 18 PM 12:33
STATE OF WASHINGTON
BY 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711