

No. 61851-2-I

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

STATE OF WASHINGTON,
Respondent,

v.

JOHNNY A. SHEARS,
Appellant.

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

The Honorable Richard Eadie

REPLY BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUN 29 PM 4:51

TABLE OF CONTENTS

A. **ARGUMENT** 1

 1. THE PROSECUTOR COMMITTED MISCONDUCT BY VOUCHING FOR THE CREDIBILITY OF THE WITNESSES AND BY IMPLYING A “NOT GUILTY” VERDICT WOULD “PUNISH” THE VICTIMS 1

 2. THE STATE CONCEDED CUMULATIVE ERROR DEPRIVED MR. SHEARS OF A FAIR TRIAL BY FAILING TO RESPOND TO THE ISSUE 3

B. **CONCLUSION** 5

TABLE OF AUTHORITIES

United States Constitution

Amend. XIV 1

Washington Constitution

Art. I, § 3 1

Art. I, § 22 1

United States Supreme Court Decisions

Shannon v. United States, 512 U.S. 573, 114 S.Ct. 2419, 129
L.Ed.2d 459 (1994) 1, 2

Washington Supreme Court Decisions

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1993) 1

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) 1

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009) 1

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) 4

Washington Court of Appeals Decisions

State v. Alexander, 64 Wn. App. 147, 822 P.2d 150 (1992) 4

State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005) 4

A. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT BY VOUCHING FOR THE CREDIBILITY OF THE WITNESSES AND BY IMPLYING A “NOT GUILTY” VERDICT WOULD “PUNISH” THE VICTIMS.

A prosecutor commits misconduct when he or she appeals to the passions and prejudices of the jury, shifts the burden of punishment from the judge to the jury, or vouches for the credibility of the State’s witnesses. Shannon v. United States, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994); State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1993). Reversal is required where there is a substantial likelihood the misconduct affected the jury, in violation of a defendant’s constitutional right to a fair trial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); U.S. Const. amend. XIV; Wash. Const., art. I, §§ 3, 22.

Here, in closing and rebuttal arguments, the prosecutor improperly appealed the jury’s passions and prejudices and shifted the burden of punishment to the jury by repeatedly suggesting a “not guilty” verdict based on insufficient evidence would “punish” the victims or make them “suffer.” 3/18/08-RP-97, 121. The prosecutor also improperly vouched for the credibility of her

witnesses by stating they were credible and had no incentive to lie, and, as to the vice president of the fraternity, the prosecutor contended his credibility was bolstered because he admitted to underage drinking while under oath. 3/18/08-RP-120.

The State incorrectly contends the comments regarding punishing the victims were in response to argument that the boots should have been tested. Br. of Resp. at 18. Rather, the State first presented this argument in its closing, which preceded Mr. Shears' closing argument.

The State condones the arguments on the grounds "[t]he prosecutor never specifically explained to the jury what would happen to the victims if a not guilty verdict occurred." Br. of Resp. at 18. This argument ignores that fact that the prosecutor immediately prefaced these remarks with an admonition not to consider the impact of a guilty verdict on the defendant. 3/18/08-RP-121. This argument ignores the prohibition against informing the jury of any potential consequences of a verdict. "Information regarding the consequences of a verdict is ... irrelevant to the jury's task." Shannon, 512 U.S. at 579.

The prosecutor repeated her theme of further victimizing the witnesses both in closing and rebuttal arguments. The State's

argument on appeal that the comments were “isolated comments” is belied by the record. Br. of Resp. at 22.

The prosecutor’s improper comments, especially those in which she admonished the jury not to further victimize the witnesses by returning a not guilty verdict, were clearly intended to inflame the jury; the comments had nothing to do with the evidence or reasonable inferences that could be drawn from the evidence. Also, the improper comments went to the heart of the defense theories that the witnesses were not credible, the courtroom identifications were unreliable, and the police did not conduct a thorough investigation. Accordingly, the prosecutor committed misconduct and the improper comments, alone and cumulatively, likely affected the outcome of the trial.

The prosecutorial misconduct requires reversal.

2. THE STATE CONCEDED CUMULATIVE ERROR DEPRIVED MR. SHEARS OF A FAIR TRIAL BY FAILING TO RESPOND TO THE ISSUE.

In the Brief of Appellant, Mr. Shears assigned error to the cumulative effect of the various trial errors identified in the brief. The cumulative error doctrine requires reversal of a conviction where the cumulative effect of otherwise nonreversible errors

materially affected the outcome of the trial, even where those errors were not properly preserved for appeal. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 150 (1992).

The State did not respond to the issue of cumulative error and, thus, conceded the point. See State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (“The State does not respond and thus, concedes the point.”).

The concession is well-taken. The trial court erroneously excluded evidence that one of the alleged victims identified a former boyfriend as her assailant and the prosecutor repeatedly committed misconduct in closing and rebuttal argument. Even if the errors set forth in the Brief of Appellant, viewed alone, do not merit reversal, the errors, taken together, created a cumulative and enduring prejudice that deprived Mr. Shears of a fair trial.

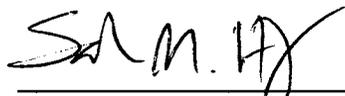
The impact of the cumulative errors requires reversal.

B. CONCLUSION

The trial court erroneously excluded the statement of one of the alleged victims that her assailant was a former boyfriend. Also, the prosecutor repeatedly committed misconduct in closing and rebuttal argument to the jury. The errors, alone and cumulatively, deprived Mr. Shears his constitutional right to a fair trial. Based on the foregoing arguments and the arguments set forth in the Brief of Appellant, Mr. Shears respectfully requests this Court reverse his convictions for assault in the second degree.

DATED this 29th day of June 2009.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

