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NO. 66907-9-I

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY PINES, JR.,

Appellant.

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

The Honorable David A. Kurtz, Judge

REPLY BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

PROSECUTORIAL MISCONDUCT VIOLATED PINES' RIGHT TO A FAIR TRIAL

1. The Prosecutor's Comments Trivialized The Burden Of Proof.

A prosecutor may not attempt to diminish the burden of proof in closing argument. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Pines argues the prosecutor's closing argument comparison of the burden of proof standard to the "everyday example" of driving, improperly diminished the beyond a reasonable doubt standard. He relies on State v. Anderson,[1] and State v. Walker.[2] Brief of Appellant (BOA) at 22-30. Walker found reversible prosecutorial misconduct when a prosecutor's compared the certainty required for conviction with the certainty required for everyday decisions because such a comparison "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case[.]" Walker, 164 Wn. App. at 732 (citing Anderson, 153 Wn. App. at 431.)

The State argues the prosecutor's comments were not improper. Brief of Respondent (BOR) at 20. The State relies on State v. Curtiss, 161

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[1] 153 Wn. App. 417, 220 P.3d 1273 (2009), rev. denied, 170 Wn.2d 1002 (2010).

[2] 164 Wn. App. 724, 265 P.3d 191 (2011).

Wn. App. 673, 250 P.3d 496 (2011), rev. denied, 172 Wn.2d 1012 (2011). BOR at 23-24. But, Curtiss is factually distinguishable, whereas Anderson and Walker apply.

Curtiss challenged the State's analogizing its beyond a reasonable doubt burden of proof to putting a puzzle together. Curtiss, 161 Wn. App. at 698. The prosecutor stated:

> [R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.

Curtiss, 161 Wn. App. at 700.

The Court of Appeals concluded the comments were not improper because they were an analogy describing the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof. Curtiss, 161 Wn. App. at 700. The Court distinguished the prosecutor's puzzle comments with those in made in Anderson where the prosecutor compared the reasonable doubt standard to the choice of getting elective dental surgery where, "'[i]f you go ahead and do it, you were convinced beyond a reasonable doubt.'" The Court concluded, "here, the State's comments about *identifying* the puzzle with certainty before it is complete are not analogous to the weighing of

competing interests inherent in a *choice* that individuals make in their everyday lives." Curtiss, 161 Wn. App. at 701. (emphasis in original).

Unlike Curtiss, here the prosecutor did not simply use an "everyday example" of driving to "identify" it with "certainty." Rather, like Anderson and Walker, here the prosecutor compared the certainty required to convict Pines with the certainty people require when deciding whether to drive. Here the prosecutor stated:

> There's always a chance when you get in your car and get on the road and drive somewhere, say to the courthouse here, that you could get in a serious accident and be seriously injured or killed, that's the facts of life. That's a possibility. But we still every day get up, get in our cars, and go places. We come to the courthouse, we live our lives because although there's a possibility of that happening, there's not a reason to think that would happen.

The prosecutor then used other examples of a "sniper" and inclement weather to suggest when a driver might have a "reason to doubt" they would reach their destination safely. 5RP 105-06. In so doing, the prosecutor compared what conditions would convince a person beyond a reasonable to doubt to drive knowing they would likely reach their destination safely, with those that would not. BOA at 23-25. This is exactly they type of burden of proof trivialization Walker found flagrant and ill intentioned: "By comparing the certainty required to convict with the certainty people often require when they make everyday decisions—

both important decisions and relatively minor ones—the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case[.]" Walker, 164 Wn. App. at 732 (citing Anderson, 153 Wn. App. at 431).

2. The Misconduct was Not Harmless.

The State claims the prosecutor's statements were not prejudicial because the jury was properly instructed by the court regarding "the burden of proof and role of counsel's arguments." BOR at 27.

Walker rejected a similar argument regarding prejudice. Nothing in that case suggests the jury was not also properly instructed by the court regarding the burden of proof. But, Walker recognized the prosecutor's improper comments "could easily serve as the deciding factor," in a case that was a credibility contest involving disputed facts. Walker, 164 Wn. App. at 738. As discussed in Pines' opening brief, this case also largely involved disputed facts, including whether Pines was the shooter. BOA at 27-28. Accordingly, as in Walker, the State cannot show that the misconduct was harmless beyond a reasonable doubt.

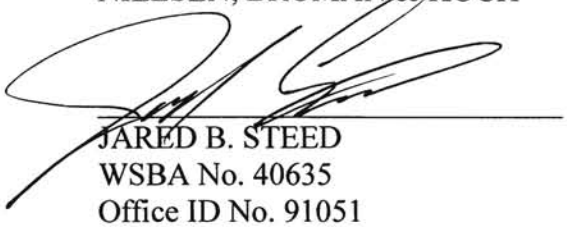
B. CONCLUSION

For the reasons discussed above and in the opening brief, this Court should reverse Pines' convictions and remand for a new trial.

DATED this 2nd day of April, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051

Attorneys for Appellant

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ANTHONY PINES, JR.,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

[X] ANTHONY PINES, JR.
DOC NO. 808342
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF APRIL 2012.

x Patrick Mayovsky