

No. 67017-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

GILBERTO MARTINEZ-VAZQUEZ

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE STATE HAS NOT REFUTED THE AUTHORITY SHOWING THAT THE PROSECUTOR REPEATEDLY COMMITTED MISCONDUCT, IRREPARABLY PREJUDICING MR. MARTINEZ-VAZQUEZ'S TRIAL.

This case is about whether cumulative misconduct denied Mr. Martinez-Vazquez a fair trial. AOB 18–21; see State v. Case, 49 Wn.2d 66, 73–74, 298 P.2d 500 (1956); State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); State v. Evans, 163 Wn. App. 635, 647–48, 260 P.3d 934 (2011). Here, the prosecutor 1) repeatedly told the jury that Mr. Martinez-Vazquez “just wanted the State to prove its case,” and “just wanted to make me do my job,” 2) told the jury that there were lots of cases where they would need to carefully deliberate on the evidence, but that this was not one of those cases, and 3) stated that it was the jury’s “job” to convict Mr. Martinez-Vazquez. 3RP 7, 10; 5RP 84. The State makes several attempts to distinguish the prosecutor’s remarks from those previously held improper by this Court. These attempts are unavailing.

a. The prosecutor urged the jury to draw a negative inference from Mr. Martinez-Vazquez's decision to exercise a constitutional right, and the constitutional harmless error standard should apply. In opening, the prosecutor stated: "This is really just a case of the defendant wanting the state to prove the case and that is what I intend to do for you today." 5RP 84. During closing, she reiterated: "So, again, undisputed facts, simple law, this is a situation of the defendant just wanting to make me do my job." 3RP 10.

These arguments are improper because they encourage the jury to view Mr. Martinez-Vazquez in a negative light because he chose to go to trial. The implication of the remarks is that the trial was not worth anyone's time; rather, it was just Mr. Martinez-Vazquez burdening the State with the "job" of proving him guilty. Thus, the prosecutor impermissibly urged the jury to convict Mr. Martinez-Vazquez because he elected to challenge the State by going to trial.

Respondent attempts to distinguish the caselaw holding these types of comments improper by stating that here the prosecutor did not "directly" comment on Mr. Martinez-Vazquez's constitutional right to a jury. SRB 9–10. But this is not a distinction

that this Court has recognized. And in State v. Rupe, which the State inexplicably argues is a “direct” comment on a constitutional right, the prosecutor argued that the defendant owned guns for only one purpose, “killing others in combat,” and argued that the defendant was dangerous because he owned “an assault weapon to gun groups of people down in combat situations.” 101 Wn.2d 664, 703–04, 683 P.2d 571 (1984). Nowhere did the prosecutor mention the defendant’s “Second Amendment right” or “constitutional right to bear arms.” See id. The same was true in State v. Burke, which the State also cites as an example of a “direct” comment. 163 Wn.2d 204, 221, 181 P.3d 1 (2008). In that case, the prosecutor never mentioned a “Fifth Amendment right” or the “constitutional right to silence.” See id. Rather, the State’s attorney just emphasized that the defendant chose to stop talking to the police. Id. It is thus clear that not even the Respondent can make a meaningful distinction between a “direct” and “indirect” comment on a constitutional right.

Like the prosecutor in Rupe, the State’s attorney here urged the jury to infer that Mr. Martinez-Vazquez was a bad person, and should be penalized, for exercising a constitutional right. 101 Wn.2d at 707. And just as the prosecutor in Burke “invited the jury to

consider the invocation of [a constitutional right] to be evidence of guilt,” the prosecutor here invited the jury to infer that Mr. Martinez-Vazquez was so guilty that his only chance was making the State go to trial. 163 Wn.2d at 221–22. This Court should hold that these remarks were improper commentary on Mr. Martinez-Vazquez’s constitutional right to a jury trial. AOB 5–10.

In response to the authority cited by Appellant showing that the constitutional harmless error standard should apply to commentary about the right to a jury trial (AOB 10–12), the State offers two misstatements of the law. First, Respondent argues that State v. Monday stands for the proposition that “[the] constitutional harmless error standard applies to prosecutorial misconduct only if race-based arguments are made.” SRB 11, (citing State v. Monday, 171 Wn.2d 667, 680–81, 257 P.3d 551 (2011)).¹ But Monday does not say this. Monday states that the constitutional harmless error standard applies if race-based arguments are made; not only if

¹ This assertion is also strange because the State immediately proceeds to cite State v. Moreno, in which this Court applied the constitutional harmless error standard to a different type of prosecutorial misconduct—commenting on a defendant’s constitutional right to self-representation. 132 Wn. App. 663, 671–72; 132 P.3d 1137 (2006). Respondent also makes this assertion immediately after discussing State v. Burke, in which the Supreme Court applied the constitutional harmless error standard to improper commentary on the right to silence. 163 Wn.2d 204, 222, 181 P.3d 1 (2008). It is clear from the cases cited in the State’s own brief that the constitutional harmless error standard applies more broadly than “only” to “race-based arguments.” See SRB 10–12.

race-based arguments are made. 171 Wn.2d at 680–81. Moreover, the Monday Court applied the constitutional harmless error standard in that case because the prosecutor’s offensive commentary burdened the defendant’s constitutional right to an impartial jury. Id. at 680 (“The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor’s intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless.”). Monday in no way precludes this Court from properly applying the constitutional harmless error standard to comments that burden a defendant’s fundamental right to a trial by jury.

Second, the State argues that the State v. Moreno Court “did not apply the constitutional harmless error analysis” to the prosecutor’s improper commentary on the defendant’s right to self-representation. 132 Wn. App. 663, 132 P.3d 1137 (2006); SRB 11. This is simply not true. The Moreno Court stated plainly that

When a comment refers to a separate constitutional right, it is subject to constitutional harmless error. Under this standard, the court must reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt.

Id. at 671–72. After applying that standard, the Court held that the prosecutor's improper remarks were “harmless beyond a reasonable doubt.” Id. at 674. There is no merit to Respondent's mischaracterization of the law. This Court should apply the constitutional harmless error standard to the prosecutor's improper arguments. AOB 10–12.

b. The prosecutor's improper arguments disparaged defense counsel. The prosecutor's statements that Mr. Martinez-Vazquez was just making her “do her job” were also improper because they disparaged defense counsel. AOB 13–15; State v. Thorgerson, 172 Wn.2d 438, 451–52, 258 P.3d 43 (2011); State v. Warren, 165 Wn.2d 17, 29–30, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); State v. Negrete, 72 Wn. App. 62, 66–67, 863 P.2d 137 (1993). Respondent attempts to distinguish these cases by arguing that the prosecutors in there “clearly communicated to the jury that the defense was doing something inappropriate,” whereas in Mr. Martinez-Vazquez's case, the prosecutor “did not suggest or imply that the defense strategy requiring her to prove the case was underhanded.” SRB 13.

It is not clear what other suggestion the remarks could have had. By stating that Mr. Martinez-Vazquez was only at trial to make

the State prove its case was suggesting that he had no case—or no strategy whatsoever. Contrary to Respondent’s assertion, it is not only misconduct to blatantly insult defense counsel, it is also improper to “disparagingly comment on defense counsel’s role.” Thorgerson, 172 Wn.2d at 451. This is what occurred in Warren, when the prosecutor argued that there were a “number of mischaracterizations” in the defense’s argument, and that that was “an example of what people go through in a criminal justice system when they deal with defense attorneys.” 165 Wn.2d at 29. The implication was that in the course of doing their job, defense attorneys waste time and manipulate the truth. See id. Likewise, here the direct implication from the prosecutor’s arguments was that the defense attorney was going to trial for improper reasons: rather than trying to present a meritorious case, he or she was just trying to make the State do its “job.” See 5RP 84; 3RP 10. This type of argument has no place in a fair trial. See Thorgerson, 172 Wn.2d at 451–52; Warren, 165 Wn.2d at 29–30; see also State v. Reed, 102 Wn.2d 140, 145–46, 684 P.2d 699 (1984).

c. The prosecutor’s insertion of her personal opinion into closing argument was improper misconduct. In addition to urging the jury to draw negative inferences from Mr. Martinez-

Vazquez's decision to go to trial and disparaging defense counsel's role, the prosecutor also told the jury her personal opinion about Mr. Martinez-Vazquez's guilt. She relied on facts outside the record and used this extraneous knowledge to encourage the jury to convict. AOB 15–17. During closing she argued:

You know, there are a lot of different trials you could get assigned to as jurors . . . that can take weeks and weeks with very complicated testimony and expert witnesses. This is not one of those cases. There are trials that you can get assigned to where you deliberate for multiple days and agonize over your decision. This should not be one of those cases.

3RP 7. The State cites literally no authority in arguing that this was a proper comment, and does not respond to the authority that Appellant cited showing that this argument was improper. See SRB 14–15. Rather, Respondent argues, “The prosecutor's statements were supported by the evidence.” SRB 14. What evidence was presented about other long, complex trials that required deliberation? Nothing in the record supports this contention.

Respondent also argues that this commentary was proper because it was common knowledge to the jurors that there were longer trials, and that one juror had mentioned in voir dire that some trials were longer. SRB 14–15. The fact that a juror may have

some knowledge about extraneous facts does not give the prosecutor the authority to argue them in closing. Here, the prosecutor was telling the jury to convict Mr. Martinez-Vazquez because based on her personal experience, there were lots of complex cases and this was not one of them. She was also using this personal knowledge to effectively tell the jury that the only correct way to deliberate was swiftly and conclusively for guilt; that they should not spend a lot of time deliberating. 3RP 7. This was prejudicial, extraneous information and the argument was improper. AOB 15–17.

d. The prosecutor improperly misstated the jury's role. At the end of closing argument, the prosecutor told the jury, "I did my job, and now you do your job. I ask that you find Mr. Martinez guilty of these crimes." 3RP 10. This was improper because instead of encouraging the jury to find that the State had met its burden, the prosecutor told the jury that it was their "job" to convict and that it was not a "complex mental task." 3RP 10; AOB 17–18. This Court has taken a firm stance on arguments that misstate the jury's role, holding improper any comment that leads the jury to believe that they should do something other than consider whether the evidence meets the beyond-a-reasonable-

doubt standard. See, e.g., Evans, 163 Wn. App. at 644 (“find the truth” argument improper because the jury’s role was to consider whether the State met its burden, not to “solve the case”); State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009) (same); State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995) (explaining that telling the jury that in order to acquit the defendant the jurors must find that the State’s witnesses were lying or mistaken was misconduct because it was misleading about the proper role of the jury), rev. denied, 127 Wn.2d 1010 (1995), superceded by statute on other grounds, RCW § 9.94A.360(6); AOB 17–18.

Respondent counters this authority by stating, “There is nothing about this argument that suggests it is the jury’s ‘job’ to convict even if she failed to meet [her] burden.” SRB 16. On the contrary. The only suggestion in her statement that the jury should “do their job” and “find Mr. Martinez guilty” was that their role was to convict no matter what. See 3RP 10. Respondent acknowledges the authority cited above, but asserts that “these arguments do not resemble the remarks in the present case.” SRB 17. Respondent can offer no reason why. See id. This is no response.

Just as it is not the jury's role to "find the truth," it is not the jury's "job" to convict. The jury's role is to fairly consider the evidence and determine whether the State has met its burden. See, e.g., Anderson, 153 Wn. App. at 429. To state otherwise was misleading, and it was improper. See Wright, 76 Wn. App. at 826.

e. Cumulative misconduct denied Mr. Martinez-Vazquez a fair trial. This Court has repeatedly held that the cumulative effect of multiple instances of misconduct may deny a defendant a fair trial. Walker, 164 Wn. App. at 737; Evans, 163 Wn. App. at 647–48; see also Case, 49 Wn.2d at 73–74; AOB 18–20. The State makes no attempt to respond to this argument. In this case, the prosecutor 1) impermissibly commented on Mr. Martinez-Vazquez's constitutional right to a trial by jury; 2) repeatedly disparaged defense counsel; 3) inserted her personal opinion about Mr. Martinez-Vazquez's guilt; and 4) improperly misstated the jury's role. This repeated conduct denied Mr. Martinez-Vazquez a fair trial. This Court should reverse. See, e.g., Walker, 164 Wn. App. at 739.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in his Opening Brief, Mr. Martinez-Vazquez respectfully requests that this Court reverse his convictions for burglary in the second degree and theft in the second degree.

DATED this 2nd day of March, 2012.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67017-4-I
v.)	
)	
GILBERTO MARTINEZ-VAZQUEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JEFFREY DERNBACH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MARCH, 2012.

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