

FILED
March 17, 2015
Court of Appeals
Division I
State of Washington

NO. 71844-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HARUN OSMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY E. ROBERTS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the prosecutor committed misconduct by arguing reasonable inferences based on the evidence produced at trial.

2. Whether the trial court abused its discretion by sustaining the State's objection to defense counsel's attempt to quantify the reasonable doubt standard.

B. STATEMENT OF THE CASE

The defendant was charged with unlawful imprisonment, felony harassment and assault in the fourth degree. CP 4.

Tammy Maxwell met the defendant at the Castaway Tavern on Ladies Night. 3/25/14RP at 74-76. At some point, the two left the bar and sat in Osman's vehicle. Once in the car, Osman sped out of the parking lot against Maxwell's wishes. After a struggle in the car, they ended up in a parking lot behind a McDonald's. 3/25/14RP at 81-86. Maxwell testified that during the struggle, she broke her acrylic fingernails and lost a hoop earring trying to defend herself. 3/25/14RP at 91-93, 95-96.

There, Maxwell testified that her bra strap was broken, that her clothes were torn up, that she was bleeding, and that Osman punched her in the face. 3/25/14RP at 86-87. Officer Martin testified that when he arrived at the area, he observed Osman standing over Maxwell and that Osman

punched her three times in the face. 3/25/14RP at 18-19. Officer Martin overheard Maxwell say, "help, me please; God help me." 3/25/14RP at 20. The State presented photographs of her injuries. State's exhibit 12, 13.

During closing argument, counsel for Osman attempted to further define abiding belief. "It means that if you find Harun guilty the minute you walk out of this courthouse that's your decision you can't change your mind and look back and say I wonder if I made a mistake. A month from now when maybe you're talking to people about your experience you can't go back and say maybe I made a mistake. A year from now —" 3/26/14RP at 60-61. The prosecutor then objected and the trial court sustained the objection.

Osman was found guilty of assault in the fourth degree and not guilty of unlawful imprisonment and felony harassment. CP 94-96.

C. ARGUMENT

1. IT IS NOT MISCONDUCT FOR THE PROSECUTOR TO ARGUE REASONABLE INFERENCES FROM THE EVIDENCE

Osman argues that prosecutorial misconduct denied him a fair trial. Specifically, he argues the State improperly shifted the burden of proof in closing argument by questioning how Ms. Maxwell broke her acrylic

fingernails and lost her hoop earring if a struggle did not occur inside the vehicle. The prosecutor's argument clearly expressed a reasonable inference from the evidence that a struggle ensued within the vehicle and thus, the statements were not improper and the prosecutor did not commit misconduct.

A defendant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). A defendant can establish prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *Id.* In determining whether the misconduct warrants reversal, courts consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). The court reviews a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A prosecutor has wide latitude to argue reasonable inferences from the evidence; but it is improper for the prosecutor to argue that the burden of proof rests with the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). However, "[t]he mere mention that defense

evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.’ A prosecutor is entitled to point out a lack of evidentiary support for the defendant’s theory of the case.”

State v. Sells, 166 Wn. App. 918, 930, 271 P.3d 952 (2012).

Here, the prosecutor pointed out a very straight-forward inference based on the evidence presented - that the physical evidence supported an altercation occurred within the vehicle. The prosecutor initially pointed out two very important pieces of evidence for the jury to consider. That is, her hoop earring was found on the car floor and Maxwell’s acrylic fingernails were broken. 3/26/14RP at 39. The prosecutor then posed a question that stated the obvious answer based on reasonable inferences from the physical evidence – a struggle ensued. Such statement did not shift the burden but simply pointed out a reasonable inference that a struggle within the vehicle must have occurred.

Further, the cumulative error doctrine is inappropriate in this case. The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Id.* Any such error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Osman’s single claim of prosecutorial misconduct cannot be grounds

under the cumulative error doctrine. Further, as outlined above, Osman cannot demonstrate error in the prosecutor's statements.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PROPERLY SUSTAINING THE STATE'S OBJECTION TO THE DEFENDANT'S MISSTATEMENT OF THE REASONABLE DOUBT STANDARD ON ABIDING BELIEF

Defense counsel's attempt to define abiding belief was an overstatement of the reasonable doubt standard and an attempt to improperly quantify the standard into perpetuity. It is improper to quantify the burden of proof in closing argument. *State v. Fuller*, 169 Wn. App. 797, 825-28, 282 P.3d 126, 141-42 (2012).

The court reviews a trial court's action limiting the scope of closing argument for abuse of discretion. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). The court will find an abuse of discretion " 'only if *no reasonable person* would take the view adopted by the trial court.' " *Id.* (quoting *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)).

Fuller identifies why the reasonable doubt standard cannot be quantified. *Fuller* relied on two prior decisions that held that the State committed prejudicial misconduct by minimizing the State's burden of proof, *State v. Anderson* 153 Wn. App. 417, 220 P.3d 1273 (2009) and

State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011). In *Anderson*, the court held that the State committed prejudicial misconduct by analogizing its beyond a reasonable doubt burden of proof to everyday decisions the jurors made, including deciding whether to have elective surgery, dental surgery, to leave their children with a babysitter, and changing lanes on the freeway. 153 Wn. App. at 425, 431, 220 P.3d 1273. Even though the trial court correctly instructed the jury on the State's burden of proof and also that the lawyers' statements were not evidence, the court held that the challenged statements were improper because they trivialized the beyond a reasonable doubt standard by minimizing "the importance of the beyond a reasonable doubt standard and of the jury's role in determining whether the State ha[d] met its burden." *Anderson*, 153 Wn. App. at 431, 220 P.3d 1273.

Fuller went on to discuss the reasonable doubt standard by addressing puzzle analogies. *State v. Fuller*, 169 Wn. App. 797, 825-28, 282 P.3d 126, 141-42 (2012), citing *State v. Curtiss*, 161 Wn. App. 673, 700-01, 250 P.3d 496; *State v. Johnson*, 158 Wn. App. at 682-86, 243 P.3d 936. For example, in *Johnson*, the court reversed the conviction and remanded for a new trial because the State's puzzle argument trivialized the State's burden of proof by analogizing the abiding belief necessary to

be convinced of the defendant's guilt beyond a reasonable doubt to the abiding belief necessary to determine the image depicted in a partially completed puzzle. Importantly, in analogizing its burden of proof to a partially completed puzzle and only being able to see half the puzzle but know beyond a reasonable doubt the picture. But, in another case, the court held that the puzzle analogy was not improper. *Curtiss*, 161 Wn. App. at 700-01, 250 P.3d 496. In *Curtiss*, the court held that the State's puzzle analogy did not minimize the State's burden of proof because it did not purport to quantify the level of certainty required to satisfy the beyond a reasonable doubt standard nor did it minimize or shift the burden of proof to the defendant in the context of the argument as a whole and the trial court's correct jury instructions. *Id.* at 700-01.

Thus, the court found it is improper to argue that the burden of proof is akin to making an everyday choice and additionally it is improper to quantify the level of certainty necessary to satisfy the beyond a reasonable doubt standard. *State v. Fuller*, at 825-28.

Abiding belief, or enduring, is not defined as an everlasting standard that is carried in perpetuity. Just as everyday decisions minimize the standard, asking a juror to carry a decision in perpetuity overemphasizes and quantifies the standard. Asking a juror to carry their

decision into perpetuity places the standard at a percentage nearing 100% that the WPICs do not address.

It would be improper for either party to quantify the burden of proof. It would be improper for a prosecutor to argue beyond a reasonable doubt meant 85% certainty or analogize circumstances (everyday decisions) that minimize the standard. So too would it be improper for the defense to argue reasonable doubt meant 98% certainty or analogize circumstances (a decision must live in perpetuity) that overstated the burden. A defendant's attempt to argue abiding belief means a belief years from now is an attempt to quantify the amount of time with which a juror is certain in their decision.

Placing abiding belief as a surety into perpetuity attempts to improperly quantify the beyond a reasonable doubt standard. As such, the trial court did not abuse its discretion in sustaining the State's objection to defense counsel's attempt to quantify reasonable doubt.

Defendant's reliance on the unpublished portion of *State v. Fisher*, ___ Wn. App. ___, 338 P.3d 897 (2014)¹ is misplaced. In *Fisher*, the prosecutor used a similar argument to instruct jurors that abiding belief means you are satisfied tomorrow, two years later, or three years later. The court found that the prosecutor did not trivialize the State's burden

¹ Defense counsel cited the unpublished portion of *State v. Fisher*, ___ Wn. App. ___, 338 P. 2d 897 (2014) contrary to GR 14.1.

comparing the certainty required to convict with the certainty people use when making everyday decisions. The court did not address whether this argument inappropriately quantified the reasonable doubt standard when given by the defense. Any overstatement of the burden of proof by the prosecutor can never be prejudicial to the defendant. What's important is that the reasonable doubt standard should not be quantified to a degree of certainty. *Fuller*, at 826-27.

3. EVEN ASSUMING ERROR, THE OUTCOME OF THE TRIAL WAS NOT MATERIALLY AFFECTED

Error requires reversal only if there is a reasonable probability that the error materially affected the outcome of the trial. *State v. Kindell*, 181 Wn. App. 844, 853-54, 326 P.3d 876, 881-82 (2014); *State v. Gower*, 179 Wn.2d 851, 854-55, 321 P.3d 1178 (2014). Here, the assault was actually witnessed by a police officer at the scene. 3/25/14RP at 14, 18. Officer Martin observed marks on Maxwell's face. 3/25/14RP at 22. The physical evidence, including a photograph of injuries, supported the assault. Further, the defense did not allege or request self-defense instructions. Any possible error would not have materially affected the outcome of the trial.

D. CONCLUSION

Based on the forgoing reasons, this Court should affirm Osman's conviction for assault in the fourth degree.

DATED this 17th day of March, 2015.

Respectfully submitted,

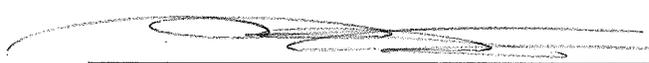
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Oliver R. Davis (Washington Appellate Project), containing a copy of the Brief of Respondent, in STATE V. Harun Osman, Cause No. 71844-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

Date

03/17/15