71632-8

NO. 71632-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM SANCOMB,

Appellant.

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

The Honorable Douglass North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of a fair trial.

2. The court erred in refusing to instruct the jury on the lesser-included offense of third-degree theft. RP 153-67.

3. The court erred in finding appellant was convicted of theft by taking in Utah in 1988. CP 61.

4. The court erred in checking the box stating the jury found appellant was armed with a deadly weapon. CP 56.

Issues Pertaining to Assignments of Error

1. Appellant told the arresting police officer he did not hurt anyone or push anyone, but instead "just left the place" and "just walked out the door." Viewed in the light most favorable to the defense, did these facts warrant instructing the jury on the lesser-included offense of third-degree theft?

2. The desk clerk at the hotel testified at length about being an immigrant, working two jobs to send her son to college, spending time watching her younger son's football games, and going to church. The prosecutor reiterated this testimony in closing argument and also urged the jury to consider "what it would feel like to have your life threatened, to have someone threaten you over a bag of candy." The prosecutor further argued the threat is a "violation of your dignity as a person" and "there

was something else stolen, it's a small part of Ms. Lockett's human being." The prosecutor also urged the jury to convict based on the desk clerk's testimony because otherwise, it would be extremely difficult for anyone who was attacked while alone. Did the prosecutor's repeated emotional appeals constitute misconduct that deprived appellant of a fair trial?

3. The references in the judgment and sentence to a special verdict that appellant was armed with a deadly weapon and to a 1988 Utah conviction for theft by taking appear to be scrivener's errors. Should the case be remanded for correction of the judgment and sentence?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant William Sancomb with one count of robbery in the second degree while armed with a deadly weapon. CP 12. The jury found Sancomb guilty, but rejected the deadly weapon finding. CP 51, 52. The court imposed a standard range sentence and 18 months of community custody. CP 56, 58. Notice of appeal was timely filed. CP 53.

2. Substantive Facts

The night desk clerk at the Silver Cloud Hotel in Bellevue testified it was Sancomb who grabbed a large quantity of candy, soda, and other items

from the "sundry store" near the front desk late one night. RP 93-95. When she pursued him, asking whether he wanted the items charged to his room or if he wanted to pay cash, she claimed Sancomb showed her a knife and asked if she wanted to die for some candy. RP 96-97. She claimed the knife police found on the counter at the front desk was the one she put there after Sancomb dropped it as he was leaving. RP 46, 100, 109.

A police dog tracked from the hotel to a nearby parking garage, where police found Sancomb, eating a candy bar and drinking a soda. RP 15-20. The police brought Sancomb back to the hotel, where the clerk identified him. RP 110. En route to jail, Sancomb told Officer Cufley he did not think this case should be a robbery because he did not hurt anyone. RP 75. He told Cufley he "just left the place" and "just walked out the door." RP 75.

C. ARGUMENT

1. SANCOMB WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON THIRD-DEGREE THEFT.

When an element of the offense remains in doubt, but the defendant appears guilty of some wrongdoing, the jury is likely to resolve its doubts in favor of conviction. Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973); see also Kyron Huigens, The Doctrine of Lesser Included Offenses, 16 U. Puget Sound L. Rev. 185,

193 (1992) ("When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction.").

This distortion of the fact-finding process is part of the rationale behind the common law rule, codified in every state and under the Federal Rules of Criminal Procedure, that defendants are entitled to have the jury instructed on lesser-included offenses. Beck v. Alabama, 447 U.S. 625, 633-36, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Providing the jury with a third option of convicting on a lesser-included offense "ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." Id. at 634.

Defendants are entitled to have juries instructed not only on the charged offense, but also on all lesser-included offenses. RCW 10.61.006. A defendant is entitled to a lesser offense instruction when (1) each element of the lesser offense is a necessary element of the charged offense (legal prong) and (2) the evidence supports an inference that the defendant committed only the lesser offense (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

A trial court's refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). When an otherwise discretionary decision is based solely on

application of a court rule or statute to particular facts, the issue is also one of law reviewed de novo. State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994). De novo review is appropriate in this case because the trial court denied the lesser offense instruction based on an error of law, erroneously applied the law to the facts, and violated Sancomb's constitutional rights when it refused to give his requested jury instructions on the lesser-included offense of third-degree theft. CP 19-22, 26-29, 31; RP 163, 167.

The legal prong of the analysis is satisfied here because second-degree robbery includes every element of third-degree theft. Second degree robbery is proved if a person (1) unlawfully takes; (2) personal property; (3) from the person of another or in his presence; (4) against that person's will by use of or threat of force, violence, or fear of injury. RCW 9A.56.190. Robbery also includes the non-statutory element of intent to steal, which is the equivalent of the intent to deprive the victim of the property. State v. Ralph, 175 Wn. App. 814, 824-25, 308 P.3d 729 (2013) rev. denied, 179 Wn.2d 1017 (2014) (citing State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012)). Third degree theft requires only that the person "wrongfully obtain or exert unauthorized control over the property . . . of another . . . with intent to deprive him or her of such property." RCW 9A.56.020.

The primary difference between theft and robbery is the use or threat of force. State v. Shcherenkov, 146 Wn. App. 619, 630, 191 P.3d 99 (2008). Because all the elements of third-degree theft are also required to prove second-degree robbery, theft is legally a lesser-included offense. See State v. Witherspoon, 171 Wn. App. 271, 292, 286 P.3d 996 (2012) aff'd, ___ Wn.2d ___ (no. 88118-9, filed July 17, 2014) (strong probability in robbery case that jury would have convicted of lesser-included offense of theft if instruction had been given); State v. Roberts, 142 Wn.2d 471, 526, 14 P.3d 713 (2000) ("Clearly the requisite force or threat of force was present to dispel any claim that first degree theft, and not robbery, was committed" when victim was tied to a chair, strangled, and stabbed.).

The factual component of the Workman analysis is satisfied when evidence raises an inference that the lesser-included offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In making this determination, the court must consider all evidence presented at trial by either party. Id. at 455-56. On appellate review, the court views the supporting evidence in the light most favorable to the party seeking the instruction. Id.

Here, Sancomb's own statements, as presented to the jury via the testimony of Officer Cufley, raised an inference that Sancomb committed only third-degree theft and used no force or threat as would be required for

robbery. Cufley's testimony regarding Sancomb's statements was as follows:

> Q Did he tell you that he didn't think this incident should be a robbery because he did not hurt anyone?
>
> A He did, yes.
>
> Q Did he also tell you that he just left the place and he didn't push her?
>
> A Yes.
>
> Q Did he also tell you that he just walked out the door?
>
> A Yes.

RP 75. Based on Sancomb's statements to Cufley that it was not a robbery because he "just left the place," and "just walked out the door," a reasonable juror could have concluded Sancomb merely stole food, without any force or violence, thereby committing only third-degree theft.

Despite this testimony, the trial court refused to give the requested instructions on third-degree theft because Sancomb's statements to police were not made under oath. RP 163. The court stated it might give the instruction if Sancomb were to testify. RP 167. This reasoning was an error of law that distorts the legal standard. Evidence supporting the requested instruction must be viewed in the light most favorable to the party requesting the instruction and may come from either party. Fernandez-Medina, 141 Wn.2d at 455-56. Not only was Sancomb not required to testify, but the

instruction would have been required based on these statements even if they were inconsistent with his sworn testimony. Id. at 448, 453-57.

An accused person has an unqualified right to submit a lesser offense to the jury if there is "'even the slightest evidence'" he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 163 64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wn. 273, 276 77, 60 P. 650 (1900)). Sancomb's statements to Cufley indicated he committed only theft. The court committed reversible error in refusing his proposed jury instructions on that offense.

2. THE PROSECUTOR'S FREQUENT EMOTIONAL APPEALS VIOLATED SANCOMB'S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY.

A prosecutor is a quasi-judicial officer representing the people of the state in the search for justice. State v. Monday, 171 Wn. 2d 667, 676, 257 P.3d 551, 556 (2011). But "defendants are among the people the prosecutor represents." Id. Thus, "the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id. A prosecuting attorney's misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal of the conviction when the prosecutor's argument was

improper misconduct and there is a substantial likelihood the misconduct affected the verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is more on whether the effect of the argument could be cured than on the prosecutor's mindset or intent. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) rev. denied, 175 Wn.2d 1025 (2012) (citing State v. Emery, 174 Wn.2d 741, 759–61, 278 P.3d 653 (2012)).

Here, the prosecutor intentionally elicited irrelevant testimony about the victim's background that was designed to arouse jurors' sympathy and appeal to their emotions. He then emphasized this evidence in closing argument and argued the jury should, in effect, put themselves in the victim's shoes. The prosecutor's conduct was improper and created an emotional effect that could not be cured. Alternatively, counsel was ineffective in failing to object.

a. The Prosecutor Committed Incurable Misconduct By Intentionally Creating an Emotional Effect that Aligned the Jury with the Victim.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Therefore, "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." Glasmann, 175 Wn.2d at 704 (quoting American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980). Moreover, comments that urge jurors to sympathize with the victim and otherwise distract jurors from determining whether the State has proven each element of the crime are improper. People v. Littlejohn, 144 Ill. App. 3d 813, 827, 494 N.E.2d 677 (Ill. App. 1986); see also State v. Mills, 748 A.2d 318, 323-24 (Conn. App. 2000) (improper for prosecutor to tell jury not to victimize the victim again).

Here, the prosecutor first elicited testimony that the desk clerk was an immigrant from Uganda who arrived in this country in 2000. RP 77. She was working two jobs to pay tuition for one of her sons who attends Washington State University, and spends her minimal free time attending her other son's football games and going to church. RP 79-80. None of this information was relevant to any issue properly before the jury. Its only purpose was to appeal to the jury's sympathies for the hard-working immigrant mother of two.

The prosecutor's closing argument reinforced this purpose. The first paragraph of the closing argument focused solely on sympathy for Lockett:

> Prossie Lockett is the mother of two children. She works two jobs in order to support her family. She has her one kid who is in high school and her other kid was in college. She came

> all the way from Uganda so she could provide – to the US so she could provide her family with a better life. But on June 6, 2013, all that Prossie has been working hard for, all the struggles that she has gone through were put at risk.

RP 190. The prosecutor's final argument at the end of rebuttal put a final cap on this emotional appeal by arguing to the jury that there was more than just candy and soda stolen that day: "Now there was candy and things stolen, but there was something else stolen, it's a small part of Ms. Lockett's human being." RP 232.

In addition to urging the jury to base its decision on sympathy for Lockett, the prosecutor also repeatedly relied on an improper "golden rule" argument. He argued, "you have to remember Ms. Lockett, and what it would feel like to have your life threatened, to have someone threaten you over a bag of candy, to have someone ask you if you are willing to die over candy." RP 190-91. In rebuttal, he again urged jurors to put themselves in Lockett's shoes: "I don't know if you've ever been threatened, but you can all imagine that that threat is something that sticks with you; it's something that stays with you. That threat is a violation of your dignity as a person." RP 230.

"Urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position," is an improper argument

because it "encourages jurors to depart from neutrality and decide the case on the basis of personal interest rather than on the evidence." Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257 (1988); see also Pierce, 169 Wn. App. at 155 (argument victims would never have expected to be murdered was improper because it was irrelevant and invited jury to place themselves in victims' shoes, thereby increasing the prejudice). The prosecutor's comments in this case encouraged the jury to rely upon their personal interests and sympathies rather than the evidence.

The Supreme Court in State v. Borboa[1] stated in footnoted dictum that it was "not convinced that the prohibition on 'golden rule' arguments applies in the criminal context," suggesting the more appropriate way to frame the argument is by contending the prosecutor improperly appealed to the sympathy and passions of the jury. The golden rule admonition is thus perhaps best viewed as "a subset of the general rule that the prosecutor should not appeal to the jury's emotions and sympathy for the victim of a crime." Tyree v. United States, 942 A.2d 629, 643 (D.C. 2008). In any event, other jurisdictions recognize the impropriety of using golden rule arguments in criminal cases. See, e.g., Johnson v. Bell, 525 F.3d 466, 484 (6th Cir. 2008); Lee v. State, 950 A.2d 125, 138-39 (Md. 2008). Division

[1] 157 Wn.2d 108, 124 n.5, 135 P. 3d 469 (2006).

Two of this Court has done so as well. State v. Thach, 126 Wn. App. 297, 317, 106 P.3d 782 (2005).

> As explained by the Mississippi Supreme Court:
>
> > It is the essence of our system of courts and laws that every party is entitled to a fair and impartial jury. It is a fundamental tenet of our system that a man may not judge his own case, for experience teaches that men are usually not impartial and fair when self interest is involved. Therefore, it is improper to permit an attorney to tell the jury to put themselves in the shoes of one of the parties or to apply the golden rule. Attorneys should not tell a jury, in effect, that the law authorizes it to depart from neutrality and to make its determination from the point of view of bias or personal interest.

Chisholm v. State, 529 So.2d 635, 640 (1988). Whether viewed as a "do unto others as you would have them do unto you" or "golden rule" argument or merely as an emotional appeal to the jury's sympathy, the prosecutor's comments were improper.

It was also misconduct for the prosecutor to urge the jury to convict based on what might happen in other cases. The prosecutor argued the jury should convict because, "If you believe the defense's theory of the case, it makes it extremely difficult for all those cases where a person is alone in their attack . . . ." RP 230-31. This argument is akin to the improper "send a message" arguments. The State may not urge a jury to convict in order to send a message to criminals that crime will not be tolerated or to victims that they will be protected and believed. See, e.g., United States v. Nobari, 574

F.3d 1065, 1076 (9th Cir. 2009) (Prosecutors may not urge jurors to convict in order to protect community values, preserve civil order, or deter future lawbreaking because such reasons are wholly irrelevant to the defendant's own guilt or innocence); State v. Mejia-Perez, 134 Wn. App. 907, 915-16,143 P.3d 838 (2006) (misconduct to urge jurors to base a guilty verdict on a goal of sending a message to gangs or taking part in a mission to end violence); State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (prosecutor improperly argued acquittal would send a message that children reporting sexual abuse are not going to be believed, thereby "'declaring open season on children'"); State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116 (1989) (holding prosecutor committed misconduct by arguing, "[D]o not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf" because the argument "in effect exhorts the jury to send a message to society about the general problem of child sexual abuse).

Sancomb was denied a fair trial when the prosecutor engaged in improper emotional appeals to the jury's passions and sympathies. The misconduct here was incurable by instruction because it began with eliciting the victim's testimony, formed the major thrust of closing argument beginning with the opening salvo, and continued through the end of the

rebuttal argument. In general, arguments that have an inflammatory effect on the jury are not curable by instruction. Emery, 174 Wn.2d at 762-63; Pierce, 169 Wn. App. at 552. The prosecutor's flagrant appeal to the jury's emotions violated Sancomb's right to a fair trial and his conviction should be reversed.

b. Sancomb's Attorney Was Ineffective In Failing To Object To Prosecutorial Argument That Aligned the Jury Against Him and Deprived Him of a Neutral Fact-Finder.

Alternatively, if this Court concludes this issue was not preserved, Sancomb was denied his right to effective assistance of counsel when counsel failed to object to the misconduct. The federal and state constitutions guarantee all defendants the right to effective representation at trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (citing U.S. Const. amend. 6; Const. art. 1, § 22). Ineffective assistance of counsel is a constitutional error that may be considered for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The two-part test set forth in Strickland is used to determine ineffective assistance of counsel. Thomas, 109 Wn.2d at 225-26. Under the first prong, the court must determine if counsel's performance was deficient. Id. Representation is deficient when, taking into account all the

circumstances, it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Under the second prong, the court must reverse if it finds a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694).

Here, defense counsel's performance was unreasonably deficient when he failed to object to evidence and argument that strove to create an emotional bond between the jury and the victim, thereby depriving Sancomb of his constitutional right to a neutral, dispassionate fact-finder. If this Court finds the error could have been cured by instruction to the jury, counsel was ineffective in failing to request such an instruction to ensure the jury remained impartial. Additionally, counsel was ineffective in failing to preserve the error for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel's performance, the outcome of

the trial would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice requires reversal whenever the attorney's error undermines confidence in the outcome. Id. That confidence is undermined here. Whether Sancomb used force to retain the items from the store came down to whether the jury believed Lockett's testimony or Sancomb's statements. Argument that emotionally aligned the jury with Lockett was likely to tip the scales in favor of a guilty verdict.

3. REMAND IS APPROPRIATE TO CORRECT TWO SCRIVENER'S ERRORS IN THE JUDGMENT AND SENTENCE.

In calculating Sancomb's offender score, the court relied on a conviction for "Theft by Taking" from Utah in 1988. CP 61. The year, state, and cause number listed in the judgment and sentence relate to a Utah conviction for possession of a stolen vehicle that the Court expressly found not comparable to a Washington felony. CP 61; RP 259-51, 259. It appears the court intended to rely on a 1989 conviction for theft by taking from Georgia. RP 259. Second, the judgment and sentence has a box checked indicating a special verdict for being armed with a deadly weapon. CP 56. But the jury answered "No" on the special verdict. CP 52.

Both of these issues appear to be scrivener's errors. Remand is appropriate so that the errors on the judgment and sentence may be

corrected and prevent any future confusion regarding the verdict in this case and Sancomb's criminal history. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand to correct scrivener's error referring to wrong statute on judgment and sentence form).

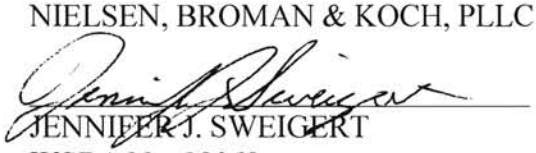
D. CONCLUSION

Sancomb's conviction should be reversed because he was denied the right to present jury instructions on a lesser-included offense and the trial was tainted by prosecutorial misconduct. At a minimum, the case should be remanded for correction of the scrivener's errors.

DATED this 28th day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorney for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 71632-8-I
	)	
WILLIAM SANDCOMB,	)	
	)	
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 28TH DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM SANDCOMB
DOC NO. 339753
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JULY 2014.

X Patrick Mayovsky