72450-9

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

NO. 72450-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS FEELY, JR.,

Appellant.

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

The Honorable Charles Snyder, Judge

REPLY BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ARGUMENT IN REPLY

1. THE SENTENCING ENHANCEMENT MUST BE REVERSED, BECAUSE THE PROSECUTOR'S MISSTATEMENT OF THE LAW AND DEFENSE COUNSEL'S FAILURE TO REQUEST A CURATIVE INSTRUCTION DEPRIVED FEELY OF HIF RIGHT TO A FAIR TRIAL.

In his opening brief, appellant Thomas Feely argued the prosecutor committed misconduct when he argued in closing the jury could convict Feely of endangering others as a sentencing enhancement for attempting to elude, based on his endangerment of officers setting up spike or "stop" strips. RP 455. As Feely argued, this was an incorrect statement of the law because the legislature's intent was to enhance the penalty for endangering pedestrians and innocent bystanders, not police officers. Brief of Appellant (BOA) at 13-20.

Despite the legislature's clear expression of intent in its house bill report and senate bill report,[1] the state claims "police officers not in direct pursuit count under the endangerment enhancement. Brief of Respondent (BOR) at 12.

---

[1] House B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008); Final B. Report on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008). These reports were intended to be attached to appellant's brief as appendices C and D, but were filed under separate cover after the brief was filed.

The state's argument is not supported by the legislative history, however. Regardless, the rule of lenity requires any ambiguity be interpreted in favor of Feely. To the extent this issue is not preserved due to counsel's failure to object and request a curative instruction, Feely received ineffective assistance of counsel.

According to the state, officers not in pursuit can qualify as endangered under RCW 9.94A.834:

> The statute excludes defendant and "the pursuing law enforcement officer" from those "threatened with physical injury or harm. RCW 9.94A.834(1). This makes sense, given that every high-speed chase endangers the defendant and officer in pursuit.
>
> Officers by the side of the road are not in pursuit. They may be attempting to stop defendant, like Sergeant Flynn here, but they are not in a police cruiser following defendant at high speeds. As defendant notes in his opening brief, pursuit means "*follow* in order to overtake, capture, kill or defeat". (Opening Brief at 17) (citing Merriam Webster online dictionary definition). Sergeant Flynn was not following when defendant drove recklessly around him. The plain meaning of the statute permits the jury to hold defendant accountable for endangering Sergeant Flynn. "If the statute's meaning is unambiguous, our inquiry ends." State v. France, 176 Wn. App. at 470.[2]

BOR at 13-14 (emphasis in state's brief).

It is true Feely cited the above definition of pursuit and noted the definition may support an argument that the spike strip officers

were not pursuing police officers. BOA at 17. Upon further reflection, however, this concession appears to be in error. As indicated, "to pursue" means "to follow." The dictionary definition of "follow" includes:

> 1 : to go, proceed, or come after <followed the guide>
>
> 2 a: to engage in as a calling or way of life : pursue <wheat-growing is generally followed here>
> b: to walk or proceed along <follow a path>
>
> 3 a: to be or act in accordance with <follow directions>
> b: to accept as authority : obey <followed his conscience>
>
> 4 a: to pursue in an effort to overtake
> b: to seek to attain <follow knowledge>
>
> 5 : to come into existence or take place as a result or consequence of <disaster followed the blunder>
>
> 6 a: to come or take place after in time, sequence, or order
> b: to cause to be followed <followed dinner with a liqueur>
>
> 7 : to copy after : imitate
>
> 8 a: to watch steadily <followed the flight of the ball>
> b: to keep the mind on <follow a speech>
> c: to attend closely to : keep abreast of <followed his career with interest>

---

[2] State v. France, 176 Wn. App. 463, 308 P.3d 812 (2013).

d: to understand the sense or logic of (as a line of thought)

http://www.merriam-webster.com/dictionary/follow.

In a broad sense, the spike strip officers were following Feely in order to capture him. They proceeded or came after him. Also, they were attending closely to him in order to set up the spike strips. Significantly, they only became involved in response to Lipton's call of an "officer in pursuit." RP 70. They were as much as part of the chase and effort to capture Feely as Lipton.

Moreover, there is no logical reason the legislature would want to protect spike strip officers over those officers in direct pursuit. As the state pointed out, both groups of officers may be endangered by a defendant's attempt to flee. BOR at 13-14. Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided. State v. Fjermestad, 114 Wash. 2d 828, 835, 791 P.2d 897, 901 (1990).

Rather, the more logical conclusion – as evidenced by the bill reports – is that the legislature's intent was to target the defendant's endangerment of ordinary citizens or innocent bystanders, not police officers. BOA at 18-19. This is at least a reasonable interpretation of the statute. The rule of lenity therefore

requires the statute to be construed in Feely's favor. State v. Evans, 177 Wn.2d 186, 192-93, 298 P.3d 724 (2013). When a statute is capable of more than on reasonable interpretation, the rule of lenity requires the statute be construed in the defendant's favor. State v. Reeves, 184 Wn. App. 154, 336 P.3d 105, 109 (2014).

Next, the state appears to argue there was either no error or no prejudice because the "jury was free to disregard the deputy prosecutor's argument and could find defendant guilty of endangerment based solely on the two cars he nearly hit on Kickerville Road." BOR at 15. First, Feely disputes he nearly hit anyone on Kickerville Road. RP 69; see also BOA at 20. But the bigger problem with the state's argument is that there is no way to determine what the jury relied on to convict. The prosecutor invited jurors to find the enhancement based on Feely's endangerment of Sergeant Flynn. In the absence of a special interrogatory or more specific special verdict, there is no guarantee the jury did not do as directed by the prosecutor. An ambiguous verdict must be interpreted in favor of the accused. State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002) (principles of lenity require the court to interpret an ambiguous verdict in favor of the accused).

Finally, the state argues the prosecutor's comments were not so flagrant or ill-intentioned, or prejudicial, that they could not have been cured by an instruction. BOR at 15. The state is incorrect.

The prosecutor may not misstate the law to the jury. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Although defense counsel did not object to the prosecutor's misstatement, the error is preserved because the prosecutor's misstatement was flagrant and ill intentioned. See e.g. State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011). In Walker, the prosecutor misstated the law of defense of others by telling the jury that the defense of others standard would be met if the jury would have taken the same action in defense of another. Walker, 164 Wn. App. at 734-35. Defense counsel *eventually* objected to this line of argument during the prosecutor's rebuttal closing, but the objection was overruled. Walker, 164 Wn. App. at 735.

Division Two of this Court held that because defense counsel objected, the error was properly reviewed under the less exacting prejudice standard. Walker, 164 Wn. App. at 736, n. 7. Nonetheless, the court noted that "prejudice exists even when we use the more demanding standard of whether the conduct creates

an enduring and resulting prejudice incurable by a curative instruction." Walker, at 736, no. 7.

The same is true here. As Division Two in Walker noted:

> When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious trial irregularity having the grave potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 764 P.2d 1213 (1984).

Walker, 164 Wn. App. at 736.

As in Walker, the prosecutor's misstatement of the law here could not have been cured by an instruction. Because the jury likely relied on it in convicting Feely of the sentencing enhancement, prosecutorial misconduct denied him a fair trial.

Assuming arguendo this Court finds the misconduct could have been obviated by a curative instruction, defense counsel was ineffective in failing to request one. BOA at 32-34; State v. Olson, 185 Wn. App. 1036, __ P.3d __ (2015), 2015 WL 422864, *6 (failure to object to prosecutor's misstatement of the law in closing argument constituted ineffective assistance of counsel).[3]

[3] Only the Westlaw citation is currently available.

Counsel's deficient performance prejudiced Feely. The prosecutor's closing argument focused on Feely's endangerment of the spike strip or stop stick officers and the video which showed the first officer who deployed sticks on North Star Road, as well as sergeant Flynn's testimony about the car skidding towards him and the fact that officers "have lost their lives in deploying . . . those stop sticks[.]" RP 455. In the absence of an objection and curative instruction, it is likely the jury convicted Feely of the endangerment enhancement, based on his endangerment of pursuing police officers – which the legislature did not intend. Counsel's deficient performance undermines confidence in the outcome of the proceeding and requires reversal of the sentencing enhancement.

2. THE UNDERLYING CONVICTIONS MUST BE REVERSED, BECAUSE PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED FEELY OF HIS RIGHT TO A FAIR TRIAL.

As argued in the opening appellate brief, the underlying convictions should also be reversed because the prosecutor misstated and trivialized the state's burden of proof in closing argument. BOA at 21-25. Again, defense counsel's failure to object constituted ineffective assistance of counsel. BOA at 34-35; Olson, 185 Wn. App. 1036, 2015 WL 422864, *6.

The underlying convictions should also be reversed because the prosecutor committed misconduct in exceeding "the limited purpose" for which Feely's priors were admitted – "determining whether Mr. Feely has the requisite prior convictions to make this case a felony DUI." CP 35; BOA at 26-31. In its response, the state completely ignores this part of the court's instruction. BOR at 18-19. By arguing Feely's priors provided him with a motive to flee, the prosecutor unfairly used Feely's stipulation to the prior DUI offenses to the state's advantage. Id.

Defense counsel should not have allowed this to happen. BOA at 35-36; Olson, 185 Wn. App. 1036, 2015 WL 422864, *6. Whether the jury "was free to disregard the deputy prosecutor's argument[,]"[4] the prosecutor unfairly bolstered the state's case. Because no one saw Feely driving, and because the first dog's track suggested another suspect, jurors may have had a reasonable doubt absent the state's improper use of Feely's priors.

[4] See BOR at 19.

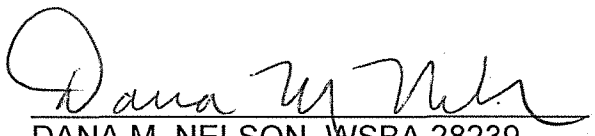
B. CONCLUSION

For the reasons stated herein, this Court should reverse Feely's underlying convictions and/or the sentencing enhancement. Alternatively, for the reasons stated in the opening brief, this Court should remand for resentencing.

Dated this 17th day of September, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72450-9-I
	)	
THOMAS FEELY, 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 17TH DAY OF SEPTMEBER 2015, 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] THOMAS FEELY, JR
DOC NO. 788137
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF SEPTEMBER 2015.

X Patrick Mayovsky