

FILED
Apr 28, 2017
Court of Appeals
Division I
State of Washington

No. 74436-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JANET BAUML,

Appellant.

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

The Honorable Monica J. Benton

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The failure to give Ms. Bauml's requested jury instruction violated her right to present a defense.**

The State contends the trial court did not violate Ms. Bauml's right to present a defense when it failed to instruct the jury using her requested instruction because she was still allowed to argue to the jury her theory of defense. Brief of Respondent at 53-57. Using the same argument, the State alternatively contends the error, if any, was harmless. *Id.* at 57-59. The State's argument misses the point; while Ms. Bauml may have been allowed *argue* her theory, the jury was never *instructed* on the defense. This distinction is critical and shows why the error by the trial court violated her right to present a defense.

A defendant has the right to have the jury accurately instructed. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus, as part of the constitutionally protected right to present a defense, the defendant is entitled to instructions embodying her theory of the case if the evidence supports that theory. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993).

Here, the jury was instructed by the trial court in Court's Instruction 1 that:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. *The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*

CP 136, *quoting* WPIC 1.02 (emphasis added).

Thus, whether Ms. Bauml was allowed to argue to the jury her theory of the case was immaterial. The jury was instructed to reject this argument because it was not the law because the jury was never instructed on it by the court. Since the requested jury instruction was a correct statement of the law and the instructions given did not define "aid of deception" consistent with Ms. Bauml's defense, the failure to give her requested instruction denied her the right to present her defense to the jury. Ms. Bauml is entitled to reversal of her convictions and remand for a new trial.

2. The State failed to prove Ms. Cooper relied on Ms. Bauml's representations or that Ms. Bauml did not intend to repay Ms. Cooper.

The State lists *ad nauseum* its proof at trial, but fails to show how any these facts prove that either Ms. Cooper relied on any deception by Ms. Bauml or that Ms. Bauml did not intend to repay Ms. Cooper.

The State must prove that the victim relied on the defendant's deception, which "is established where the deception in some measure operated as inducement." *State v. Casey*, 81 Wn.App. 524, 529, 915 P.2d 587 (1996). Acquiring property by "aid of deception" requires that the victim relied on the deception. *Id.* If the victim would have parted with the property even if the true facts were known, there is no theft. *State v. Renhard*, 71 Wn.2d 670, 672-74, 430 P.2d 557 (1967).

Initially, the State tries to show that Ms. Cooper was suffering from dementia during the time when she loaned Ms. Bauml the sums of money. Brief of Respondent at 46-47. As noted in the Brief of Appellant, Ms. Breitenbucher, the person tasked with conducting an assessment of Ms. Cooper, conducted only an emergent preliminary assessment. 10/25/2015RP 186; 10/27/2015RP 219-20. Further, Ms. Breitenbucher's conclusion was contradicted by everyone else who

came into contact with Ms. Cooper, who testified she showed no signs of confusion or dementia, including her primary care physician.

Finally, it is important to note that at the time of trial, Ms. Cooper was living in the independent wing of a retirement community and not receiving any dementia care. 10/26/2015RP 122.

It is also important to note that, other than the first check which Ms. Cooper testified was a gift, Ms. Bauml never claimed that the money given to her by Ms. Cooper was a gift. Ms. Bauml acknowledged the sums of money were loans which she fully intended to repay.

The State acknowledges the testimony that established Ms. Cooper would have given Ms. Bauml the money if Ms. Bauml asked, and that the reasons for Ms. Bauml's need for the money was essentially immaterial, but claims this testimony was "misconstrued." Brief of Respondent at 45. Unfortunately, there is nothing to misconstrue; Ms. Cooper did so testify and it cuts against the State's arguments that Ms. Cooper relied on anything Ms. Bauml said.

Finally, while there is no requirement the State need prove an intent to permanently deprive, the State was required to prove Ms. Bauml intended to deprive Ms. Cooper of the money and never

intended to repay her. Ms. Bauml repeatedly told Ms. Cooper she would repay her, but was never given the opportunity because Ms. Cooper's granddaughter contacted the police within a week after Ms. Cooper disclosed the loans.

The State failed to prove Ms. Bauml was guilty of either first degree or second degree theft. This Court should reverse the convictions.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Ms. Bauml asks this Court to reverse her convictions with instructions to dismiss or and remand for a new trial. Alternatively, Ms. Bauml asks the Court reverse her sentence and remand for resentencing.

DATED this 28th day of April 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF APRIL, 2017, 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:

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