

65725-9

65725-9

NO. 65725-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER FENDICH,

Appellant.

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

OPENING BRIEF OF APPELLANT

2018 FEB 13 11:35 AM
CLERK OF COURT
KING COUNTY

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A. ASSIGNMENTS OF ERROR.

1. The court erred in refusing to instruct the jury concerning the testimony of an accomplice (Requested Defense Instruction WPIC 6.05).

2. The prosecutor committed misconduct by presenting improper closing argument which misstated the law and lowered the burden of proof.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A trial court must give jury instructions that allow the defense to argue its theory of the case. Here, was the court's refusal to instruct the jury on the way it should consider the testimony of an accomplice a violation of due process?

2. A prosecutor, as a quasi-judicial officer, has an obligation to seek a verdict based upon reason, and the duty to see that the accused is given a fair trial before an impartial jury. Here, the prosecutor misstated the law during closing argument, arguing repeatedly that Mr. Fendich was not permitted to be "around guns" or to be "near guns." Did the prosecutor's closing argument thus lower the burden of proof, depriving Mr. Fendich of a fair trial?

C. STATEMENT OF THE CASE.

On October 9, 2009, Alexander Fendich met with his friend, Justin Cunningham, planning to spend time together near the Green River in Auburn. RP 442.¹ Unbeknownst to Mr. Fendich, Cunningham arrived with a gun tucked into his waistband, concealed by his shirt. RP 446-47. Cunningham was not eligible to possess a firearm, due to prior adjudications as a juvenile offender, and neither was Mr. Fendich.²

The two young men walked along the river, hopping fences and crossing footbridges for some time. RP 448-49. A short time later, Cunningham removed the handgun from his waistband and shot five to six rounds into the river. RP 449-50. Cunningham stated that Mr. Fendich just watched him. RP 450. Although Cunningham claimed that Mr. Fendich later took a few shots as

¹ The Verbatim Report of Proceedings consists of seven consecutively paginated volumes from proceedings from June 2, 2010, to July 9, 2010, all of which will be referred to as "RP."

² At trial, Cunningham admitted his adjudications for robbery and statutory rape in 2007, as well as his ineligibility to possess a firearm. RP 440, 447. Cunningham stated that he received no special deals or offers for his testimony against Mr. Fendich. Id.

well, Mr. Fendich denied this when questioned by the police. RP 451-53, 392.³

The two men walked back to where they began their walk, and sat in the back seat of a friend's car, with two other friends. RP 454. Police, responding to a 911 call of shots fired, approached this car and ordered all four of the youths out of the car. RP 456-57, 576, 679-81, 735-37. After receiving consent to search the car from the driver, police recovered the gun from the floor below the driver's seat. RP 576, 738-39. After receiving his Miranda rights at the scene, Mr. Fendich uttered a profanity and was transported to the Auburn Jail, where he was charged with unlawful possession of a firearm in the first degree. RP 684, 741-42; CP 67.

Three days later, detectives interrogated Mr. Fendich again and read his Miranda rights to him at the Auburn Jail. RP 385-88. Mr. Fendich waived his rights and told Detective Hauser about Cunningham's behavior with the gun on October 9, denying any personal involvement. RP 388-91. Detective Hauser lied to Mr. Fendich, twice claiming that witnesses had seen Mr. Fendich

³ Following Mr. Fendich's denial, Mr. Fendich made an inconsistent statement due to police trickery, which will be discussed, infra.

personally fire the gun, although there were no such witnesses. RP 392, 420-21. After denying any personal involvement twice, Mr. Fendich finally broke down crying and confessed to firing the gun. RP 392. Mr. Fendich told the detective it was a stupid mistake, that he had not meant to hurt anyone, and that his parole officer had informed him that he was not allowed to possess a firearm. RP 394.

As for the eye-witnesses located by the officers, the 911-caller stated that he saw only one man who had a gun, and that he was the black man. RP 608-09.⁴ Another witness could not identify Mr. Fendich in court as the white man who had been standing with the black man holding the gun. RP 668.

Mr. Fendich timely appeals. CP 149-59.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY ON HOW IT SHOULD CONSIDER THE TESTIMONY OF AN ACCOMPLICE.

a. A trial court must give instructions that permit the defense to argue its side of the case. A trial court's refusal to give a proposed instruction is reviewed for abuse of discretion. State v.

Castle, 86 Wn. App. 48, 62, 935 P.2d 656 (1997). Jury instructions are sufficient only if they properly inform the jury of the applicable law without misleading the jury, and if they permit each party to argue its theory of the case. Id. (citing State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996)). It is error for a trial court to refuse to give a specific requested instruction unless a more general instruction adequately explains the law and allows each party to argue its theory of the case. Castle, 86 Wn. App. at 62 (citing State v. Schulze, 116 Wn.2d 154, 168, 804 P.2d 566 (1991)).

b. Mr. Fendich was entitled to his requested instruction on the way in which the jury should consider the testimony of an accomplice. Here, trial counsel specifically requested WPIC 6.05 on the testimony of an accomplice, as well as the definition of an accomplice, WPIC 10.51. RP 783-85; CP 45 Specifically, trial counsel requested that the instruction read as follows:

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find

⁴ The 911 caller had made this report, although his testimony differed somewhat at trial. RP 590-91, 608-09. The record reflects that Mr. Fendich is white and Mr. Cunningham is black. RP 376.

the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

CP 45.

The conviction here largely rested on the testimony of Justin Cunningham, the alleged accomplice who testified at trial that although the gun belonged to him and he began shooting into the river, he handed it to Mr. Fendich, who allegedly shot the gun as well. RP 451-53. However, Cunningham had made prior inconsistent statements to defense investigators that Mr. Fendich had never fired the gun. RP 463-64. It was essential, therefore, that the jury be instructed that Cunningham's testimony should be scrutinized and be acted upon with great caution. WPIC 6.05; State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

In Harris, the Supreme Court held:

(1) [I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the

accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

State v. Harris, 102 Wn.2d at 155.

Other eyewitnesses' accounts could not corroborate Cunningham's testimony, and even the one who did was impeached at trial. William Newman testified that he saw a couple of guys shooting into the river; however, he was impeached with the transcript of his own 911 call, in which he had reported that only one man had a gun, and he was the black man. RP 608-09. Rebecca Cabrales described the incident involving Cunningham's gun, but failed to identify Mr. Fendich in court. RP 668. John Cook testified for the State and saw Cunningham take several shots into the river, but never saw Mr. Fendich touch the gun. RP 631-40.

The failure to give this instruction deprived Mr. Fendich of his opportunity to argue his theory of the case – here, to fully attack the credibility of his accomplice -- and was thus error requiring reversal.

c. It was error for the trial court to find that Cunningham was not Mr. Fendich's accomplice. The State objected to defense counsel's request that the jury be instructed as

to the testimony and definition of an accomplice, arguing that Cunningham did not meet the statutory definition of an accomplice. RP 785-86. The trial court held that in the absence of evidence that Cunningham knew that Mr. Fendich had prior convictions which made him ineligible to possess a firearm, the evidence was insufficient to prove that Cunningham facilitated the specific crime of possession of a firearm in the first degree. RP 788-90.

This reasoning, however, is inapposite. Although knowledge of a specific crime is required for accomplice liability, a defendant “need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of that specific crime.” State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000); see State v. Cronin 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); WPIC 10.51. The accomplice must know that he or she was facilitating the generic crime, but need not know that the principal had the culpability required for any particular degree of that crime. Roberts, 142 Wn.2d at 512; State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); State v. Davis, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984).

Clearly Cunningham functioned as Mr. Fendich’s accomplice in possessing the firearm, and the jury should have been instructed

to treat his testimony with the careful examination appropriate under such circumstances. Regardless of whether Cunningham had specific knowledge of Mr. Fendich's criminal history, Cunningham allegedly brought a firearm to Mr. Fendich and, according to his own testimony, handed it to him. RP 451-53. Even if Cunningham knew nothing about Mr. Fendich's ineligibility to possess a firearm, Cunningham admitted his accomplice liability on the stand – that he knowingly placed a gun into Mr. Fendich's hands – and thus it was error for the trial court to deny the defense request for the accomplice instructions. Roberts, 142 Wn.2d at 512; Cronin 142 Wn.2d at 578-79.

d. The instructional error was not harmless beyond a reasonable doubt; therefore, reversal is required. When a jury instruction is deficient in a manner that relieves the State of its burden to prove each essential element of a charged crime, a reviewing court must reverse the conviction, unless the State can show that the instructional error was harmless beyond a reasonable doubt. State v. Williams, 158 Wn.2d 904, 917, 148 P.3d 993 (2006) (citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). Our Supreme Court has held that instructional error of this type is subject to harmless error

analysis, to determine “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder, 527 U.S. at 15). The Brown Court concluded, “[i]n order to hold the error harmless, we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” Brown, 147 Wn.2d at 341 (quoting Neder, 527 U.S. at 19).

The trial court’s failure to give the accomplice instruction deprived Mr. Fendich of his opportunity to argue his theory of the case and to fully attack the credibility of his accomplice. This resulted in the jury being uncertain how to evaluate Cunningham’s testimony. The trial court’s refusal to give the specified accomplice instruction as requested by counsel deprived the jury of an adequate explanation of the law, and deprived Mr. Fendich of a fair opportunity to argue his theory of the case. Castle, 86 Wn. App. at 62.

Because the trial court’s failure to give the accomplice instruction requested by the defense was not harmless beyond a reasonable doubt, reversal is required. Brown, 147 Wn.2d at 341.

2. MR. FENDICH'S CONSTITUTIONAL
RIGHT TO A FAIR TRIAL WAS
VIOLATED BY PROSECUTORIAL
MISCONDUCT DURING CLOSING
ARGUMENT.

The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Wash. Const. art. I §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The Fourteenth Amendment also “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” Winship, 397 U.S. at 364. The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial -- has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

a. Prosecutors have special duties which limit their advocacy. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also Reed, 102 Wn.2d at 147.

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993) (holding that in the absence of a defense objection, reversal for

prosecutorial misconduct in closing argument is required only if the misconduct was so prejudicial that it could not have been cured by an objection and appropriate curative instruction) .

b. The prosecutor misstated the law during closing argument, requiring a new trial. During closing argument, the prosecutor repeatedly misstated the terms of Mr. Fendich's ineligibility to possess a firearm, pursuant to his prior adjudications as a juvenile offender. RP 823-35.

During the trial, two notices of ineligibility to possess a firearm were admitted into evidence – both without defense objection. RP 768; Ex. 49, Ex. 50. These notices provide, among other conditions, that Mr. Fendich may “neither use nor possess any weapons.” Ex. 49, Ex. 50; CP 115, 124 (emphasis added).

Possession was defined for the jury as “having a firearm within one's custody or control. It may be either actual or constructive.” (Jury Instruction 10). CP 93. The jury was further instructed on the definitions of both actual and constructive possession. CP 93; RP 813-23. The jury was thus instructed concerning Mr. Fendich's legal prohibition against possession of a firearm. Despite this clear definition of possession, however, the

prosecutor's closing argument repeatedly deviated from the actual conditions to which Mr. Fendich was actually subject by law.

The prosecutor instead argued:

Alex Fendich admitted that he knew he was not supposed to be near firearms and it wasn't just that he couldn't hold them or fire one he explained it himself to Detective Hauser he couldn't be around firearms. That demonstrates that he understood what possessing meant. His parole officer as he explained to Detective Hauser had explained to him you can't be around guns. He also admitted that he knew the reason he couldn't be around guns. Obviously his parole officer told him, two separate court orders that you saw yesterday that will go back with you to the jury room told him you can't.

RP 823-24 (emphasis added).

The prosecutor thus misstated the terms of the admitted notices of ineligibility to possess a firearm. The implication that the prohibition was broader than actually stated in the notices misstated the law, lowering the State's burden of proof.

The prosecutor later returned to this theme in her closing argument, comparing Mr. Fendich's alleged non-compliance with a court order regarding ineligibility to possess a firearm with the jurors' own summons to jury service:

The law says we have to be jurors to our peers and when a court ordered you to show up to do that you did. Same kind of court order that prohibits this defendant from owning a firearm, can't be near them,

can't possess them, told twice in two different court orders you cannot be near firearms. It's claimed further by a human, a parole officer who says you can't be near firearms and for whatever reason does it matter whether or not he decided to ignore willfully or unlawfully that court order because he didn't care, because he just made a bad choice, it doesn't matter.

RP 835 (emphasis added).

The prosecutor thus undermined the actual language of the notice of ineligibility, replacing it with language of her own creation – “can't be near them ... cannot be near firearms.” RP 835.

Nowhere in the notices of ineligibility, arising as collateral consequences of Mr. Fendich's adjudications as a juvenile offender, was there included a prohibition against being “near” or “around” firearms. Clearly such a prohibition would be challenged as being vague and overly broad.

Moreover, the prosecutor's dramatic lowering of the State's burden of proof must be soundly rejected as a clear violation of Mr. Fendich's right to a fair trial and due process of law. State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930) (holding that a prosecutor is a quasi-judicial officer, whose duty it is to assure a defendant a fair and impartial trial, “in the character of fair play”).

In State v. Warren, this Court held that where a prosecutor gave a “remarkable misstatement of the law” during closing

argument, that trial court's curative instruction was deemed sufficient to cure the error. 165 W.2d 17, 28, 195 P.3d 940 (2008). Here, the trial court gave no such curative instruction, and thus the prejudice created by the prosecutor's misstatement of the law and lowering of the burden of proof remained uncorrected. RP 823-24, 835. The court in Warren specifically referred the jury to the court's jury instructions on reasonable doubt, actually reading the instruction to the jury. 165 Wn.2d at 25. In contrast, in Mr. Fendich's case, the error remained uncorrected.

c. The deputy prosecutor's flagrant misconduct requires reversal. Generally, an objection to prosecutorial misconduct is waived by the failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). However, the issue may be addressed for the first time on appeal when the misconduct was so "flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect." Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). "When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's

comments affected the verdict.” State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (conviction reversed where prosecutor repeatedly called defendant a liar during closing argument).

Although the misconduct quoted above was not objected to by defense counsel when made, the issue is nonetheless properly presented for the first time on appeal, since the prosecutor’s repeated remarks concerning Mr. Fendich’s prohibition against being “near” and “around” firearms were so “flagrant and ill-intentioned” as to irrevocably prejudice the jury, lowering the burden of proof and impacting the verdict in this case – thus affecting Mr. Fendich’s constitutional right to due process. RAP 2.5(a)(3).

Moreover, this Court should infer that the State’s remarks during closing were flagrant and ill-intentioned, due to the fact that defense counsel raised this specific issue prior to the trial’s commencement. Noting that the prosecutor appeared to be characterizing the juvenile court firearm ineligibility orders in an overbroad manner, defense counsel argued:

It doesn’t say... you can’t be around it, you can’t be anywhere near it. That’s not what it says. And in fact that’s not what the law is requiring this ... but I do want the jury to be informed based on the actual language of the notification not sort of an expansion or an elaboration, I guess.

RP 171-72.

Accordingly, because Mr. Fendich's conviction resulted from prejudicial prosecutorial misconduct, it must be reversed. See also State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (finding manifest constitutional error and reversing conviction, despite failure of defense counsel to object at trial, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense in closing argument).

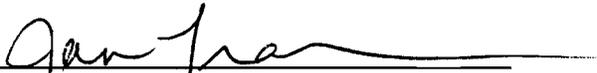
The cumulative effect of various instances of prosecutorial misconduct may violate a defendant's right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the several instances of misconduct in the closing argument during Mr. Fendich's trial, there is a substantial likelihood the cumulative effect affected the jury's verdict; thus, this Court should reverse his conviction. Reed, 102 Wn.2d at 146-47; see also United States v. Holmes, 413 F.3d 770, 778 (8th Cir. 2005) (reversing due to prosecutor's denigration of defense in closing argument, which court finds particularly egregious due to comments made during rebuttal).

E. CONCLUSION

For the foregoing reasons, Mr. Fendich respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 9th day of February, 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65725-9-I
)	
ALEXANDER FENDICH,)	
)	
Appellant.)	

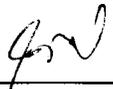
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **OPENING 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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COURT OF APPEALS
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