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NO. 69336-1-I

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

REC'D
APR 29 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ANGEL DAVIS,

Appellant.

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

The Honorable Mariane C. Spearman, Judge

BRIEF OF APPELLANT

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STATE OF WASHINGTON
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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct during closing argument and rebuttal deprived Angel Davis of a fair trial.

Issue Pertaining to Assignment of Error

By arguing facts not in evidence and effectively testifying as an expert on the behavior of persons who commit fraud, did the prosecutor commit misconduct that, under the circumstances of the case, was substantially likely to affect the jury's verdict?

B. STATEMENT OF THE CASE

Angel Davis came into the Overlake branch of Key Bank and asked to open a checking account. 1RP 26-27. During the application process, Davis provided biographical data such as her date of birth, social security number, driver's license and debit card. She said she worked at Whole Foods as an assistant manager. 1RP 28-30. A bank representative typed the data into a system, which produced a document called a signature card that Davis reviewed and signed. Davis was approved for an account. 1RP 31-32. After the account was created, Davis made a cash deposit of the mandatory minimum \$50. 1RP 36-38, 140-43.

During the process, Davis said she was in a hurry because she was on her lunch break. Later, however, she said it was her day off from work.

1RP 38-40. This prompted assistant branch manager Brandon Hamblin to contact Whole Foods to see if Davis worked there. Hamblin was not able to verify Davis' employment. 1RP 144-45.

The bank employee went back into Davis' account to make sure she properly input the data and opened the account. The employee then noticed that Davis made a large deposit at the nearby Crossroads Key Bank branch 18 minutes after opening the account. 1RP 40-42, 60, 132-33. The employee immediately pointed this out to Hamblin, who called the Crossroads branch. 1RP 42-43, 146.

Tina Responde was the Crossroads teller who assisted Davis. She said Davis came into the bank and requested to cash a check. Because the account was new, there was a "hold" that prevented her from cashing the check. 1RP 56-57, 69-70. Davis was upset, but deposited the check into her account and left. 1RP 55, 70. Just then, Responde received a phone call from Hamblin at the Overlake branch, and explained the transaction she had with Davis. 1RP 58-59.

Davis returned two days later to make a withdrawal and Responde informed her the account was still on hold. Davis then asked if she could have the check back, but Responde said it had already been processed. 1RP 56-57, 145-46. Several weeks later, Key Bank closed the account and

gave Davis a cashier's check for the amount of funds in the account. 1RP 149-50. Only thereafter did Key Bank learn the check was not good. 1RP 150.

The check was a business check from an account belonging to the Teriyaki Wok, a restaurant in Renton. 1RP 60-61, 93-94, 97. It was written out to Davis in the amount of \$2,567.34. 1RP 97. The owner of the Teriyaki Wok, Keuk Phong, did not realize checks had been stolen until he reviewed his business account online and saw the entry for Davis' check. 1RP 96-97. Phong did not know Davis and gave no one permission to take the check. 1RP 97-99. He immediately notified his bank and called the police. 1RP 98-99.

Renton police officer Kristen Knott was assigned the case about one week after Davis opened the account. 1RP 105-06. Nearly two months later, Knott arrested Davis when she returned home. 1RP 109. Davis told Knott she had never been at the Teriyaki Wok. She said the check was given to her. 1RP 110.

Based on this information, the State charged Davis with forgery, CP 8. Davis testified a woman called Rita Wynn gave her the check as payment for some bookkeeping work Davis did for her. 1RP 165-68. Wynn told Davis she owned a restaurant. 1RP 174. She assured Davis the

check would clear. 1RP 176. After Wynne gave her the check, Davis never saw her again. 1RP 174.

Davis opened the account at Key Bank because she was having trouble with her ex-husband, who in turn was having problems with the Internal Revenue Service. Davis did not want the IRS to take her money to cover debts incurred by her ex-husband during their marriage. 1RP 172. Her plan was to deposit the check into a new account at the Overlake branch, but she lost the check in her car. 1RP 169-70, 172. She said she worked at Whole Foods during the application process because it was the last place she had worked before leaving to care for her elderly father and grandmother. 1RP 170-71.

After opening the account and leaving the Overlake branch, Davis found the check in her car. On her way home, she stopped at the Crossroads branch and deposited the check. She did not ask to cash the check. 1RP 173, 177. Davis had been told her account would be on hold from two to five days. She went back two days later to withdraw \$25, but Responde then told her the hold was for seven to ten days. 1RP 173. She did not realize there was anything wrong with the check until she was arrested. 1RP 174.

A jury found Davis guilty of forgery as charged. CP 44. The trial court entered a standard range sentence of 30 days Electronic Home Detention and ordered Davis to pay restitution to Phong's bank. CP 52-58.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DENIED DAVIS A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A trial prosecutor has a special duty to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment and article 1, section 22. Reed, 102 Wn.2d at 145. A defendant is denied a fair trial where there is a substantial likelihood misconduct affected the jury's verdict. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). There is a substantial likelihood here.

As the prosecutor herself identified, the only issues in Davis' case were whether she knew the check was forged and whether she passed it intending to injure or defraud. 1RP 203. The prosecutor therefore sought to portray Davis as someone who acted as a fraudster would. In that vein, the prosecutor asked Hamblin about any "specialized training or education [he had] with regard to fraud." 1RP 150. As Hamblin began detailing his training, Davis objected, contending the State had not disclosed Hamblin as an expert witness. 1RP 150-51.

After the court excused the jury, the prosecutor explained she wanted to question Hamblin about his experience with "bank hopping" and whether fraudsters "tend to go from bank to bank." 1RP 152. The trial court sustained Davis' objection. 1RP 155-56. Hamblin ultimately testified the quick deposit at another branch was a "red flag." 1RP 156-57.

During closing argument, the prosecutor stated:

She goes to the one bank, she opens the . . . account . . . says nothing about the check. Not one word. And then minutes later she's at the next bank with a new teller, somebody who hasn't seen her, trying to get the money. The bank is a couple minutes away. Who does this? Who does this? Well, Brandon Hamblin, the bank manager, told you people who are trying to defraud the bank do that.

1RP 207.

Davis immediately objected, stating the prosecutor was arguing facts not in evidence. 1RP 208. Rather than sustaining the objection, the court stated, "The jury is going to have to rely on their memory of the evidence to see if it supports the argument." 1RP 208.

Undaunted, the prosecutor then declared, "I would submit to you that people who are trying to defraud the bank and avoid detection do this all the time." 1RP 208.

During defense closing argument, counsel noted Responte told Officer Knott in a telephone interview that Davis came into the bank and deposited the Teriyaki Wok check. Counsel said Responte's testimony that Davis asked to withdraw the entire amount of the check two days after depositing it, from the same teller who had already told Davis the account was on hold, made no sense. 1RP 212-13.

On rebuttal, the prosecutor argued Davis wanted jurors to discredit Responte's testimony because in her phone statement, Responte "didn't include every single detail in that, that she has included in three other interviews that have taken place over nine months—" Davis objected at that point, contending the prosecutor again argued facts not in evidence. 1RP 216. The court did not rule on the objection. 1RP 216.

The attorney's role in closing argument is to help the jury evaluate the evidence and apply it to the law, not to testify as an expert. United States v. Garza, 608 F.2d 659, 662 (5th Cir. 1979). A prosecutor may not argue that evidence not presented at trial provides additional reasons for finding a defendant guilty. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Additionally, misstating the evidence is a form of prosecutorial misconduct. United States v. Atcheson, 94 F.3d 1237, 1244 (9th Cir. 1996), cert. denied, 519 U.S. 1156 (1997).

During closing argument at Davis' trial, the prosecutor misstated Hamblin's testimony, then "testified" herself as an expert by stating people trying to commit fraud go to different banks "all the time." Then on rebuttal, she inferred Responde made additional statements during other interviews, but the contents of those interviews were not presented to the jury during examination.

By arguing facts not in evidence and by essentially testifying as an expert witness, the prosecutor exceeded the permissible bounds of argument. This was misconduct.

There is a substantial likelihood the misconduct affected the verdict. The misconduct went to Davis' knowledge the check was forged

and her intent to defraud – identified by the prosecutor as the key elements in the case. By failing to sustain the defense objections, the trial court added to the likelihood the misconduct affected the verdict by lending official legitimacy to the prosecutor's arguments regarding fraudster-type behavior and Responde's credibility. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (by overruling defense objection to improper argument, trial court "lent an aura of legitimacy to what was otherwise improper argument."); State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (overruling defense objection to improper argument "increases the likelihood that the misconduct affected the jury's verdict.").

Davis testified she did not know the check was bad and did not intend to defraud. Instead, she received the check as payment for a completed task from a woman who said she owned a restaurant. She went to the second bank branch shortly after the first one because she found the check in her car after leaving the first branch. This is a plausible defense and a reasonable explanation for why Davis gave correct, detailed biographical information to bank employees. Under the circumstances, it is thus substantially likely the prosecutor's misconduct affected the verdict.

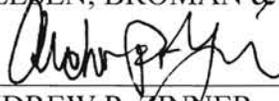
D. CONCLUSION

For the above reasons, this Court should reverse the conviction and remand for a new trial.

DATED this 29 day of April, 2013.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 69336-1-I
)	
ANGEL DAVIS,)	
)	
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 29TH DAY OF APRIL 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] ANGEL DAVIS
 1570 134TH AVE SE
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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL 2013.

X *Patrick Mayovsky*

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