

NO. 69649-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

FELIPE ZEFERINO-LOPEZ,

Appellant.

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

The Honorable Susan Cook, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. REVIEW OF APPELLANT'S PROSECUTORIAL MISCONDUCT CHALLENGE IS PROPER.

In his opening brief, appellant Felipe Zeferino-Lopez challenged the prosecutor's misconduct in closing argument. Brief of Appellant (BOA) at 6-14. In response, the State claims Zeferino-Lopez failed to preserve the issue via an objection and, thus, review is precluded under RAP 2.5(a)(3). Brief of Respondent (BOR). Because prosecutorial misconduct may deprive the defendant of his constitutional right to a fair trial, however, it can be raised for the first time on appeal and is even reversible if the misconduct is found to be flagrant or ill-intentioned. E.g., State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). As argued in detail in appellant's opening brief, Zeferino-Lopez's challenge to the prosecutor's misconduct is not only reviewable, it is reversible error due to the flagrancy of the misconduct. BOA at 8-14.

II. THE PROSECUTOR MISSTATED THE LAW AND MISREPRESENTED THE STATE'S BURDEN.

In his opening brief, appellant cited both Flores-Figueroa v. United States, 556 U.S. 646, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009), and State v. Killingsworth, 166 Wn. App. 283, 269 P.3d 1064 (2012), to demonstrate that no prosecutor could fairly interpret

Washington's identity theft law as relieving the State from the burden of proving Zeferino-Lopez knew the social security number at issue belonged to another person. BOA at 9-12. In response, the State attempts to distinguish these cases. BOR 17-18. Its argument is unpersuasive.

First, it should be noted that the State acknowledges that in Flores-Figueroa, the U.S. Supreme Court analyzed language almost identical to that in RCW 9.35.020 and concluded basic rules of grammar and common sense demonstrated Congress intended to place the burden on the government to prove the defendant knew the identification he was using belonged to another. BOR at 17-18. The State argues, however, because Flores-Figueroa was interpreting a federal statute, it is not binding authority. BOR at 18. The State misses the point. Zeferino-Lopez does not contend the holding in Flores-Figueroa is binding on this Court. Instead, he cites Flores-Figueroa to demonstrate that, given the ordinary rules of grammar and basic common sense, there was no legitimate grounds for the prosecutor's argument to the jury that the State was not required to prove Zeferino-Lopez knew the social security number at issue belonged to another. BOA at 10-11.

The State also claims Flores-Figueroa is distinguishable because, unlike RCW 9.35.020, it does not require “the additional element that the possession or use of the card be with intent to commit a crime.” BOR at 18. However, the fact of this additional element has nothing to do with whether the statutory language requires the State to prove Zeferino-Lopez knew the identification belonged to another. One can intend to commit a crime of fraud by passing off an entirely bogus social security number without having any knowledge as to whether the number belongs to another person. Thus, when it comes to analyzing the issue raised herein, the federal statute at issue in Flores-Figueroa cannot be logically distinguished from Washington’s identity theft statute. For this same reason, the State’s attempt to distinguish the reasoning in Killingsworth on similar grounds (BOR at 19) also fails.

As explained more fully in appellant’s opening brief, this Court should find the prosecutor flagrantly misstated the law regarding its burden and reverse. BOA at 6-18.

III. IF THIS COURT FINDS THE PROSECUTOR'S MISREPRESENTATION OF THE LAW WAS NOT FLAGRANT, REVERSAL IS STILL REQUIRED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

As explained in appellant's opening brief, Zeferino-Lopez's defense included argument that the State could not meet its burden of showing he knew the social security number he was using belonged to a real person; therefore, it was objectively unreasonable for defense counsel not to object to the State's misrepresentation of this burden. BOA at 15-16. In its response, the State chose not to address this claim directly. BOR at 15, n.2. However, in its argument regarding reviewability, the State claims Zeferino-Lopez was not prejudiced by the State's misrepresentation of the law. As explained above, reviewability is not at issue here. However, because prejudice is a prong in Zeferino-Lopez's ineffective assistance of counsel challenge, he will respond to the State's argument in that context.

Zeferino-Lopez was prejudiced by his attorney's deficient performance. The State does not refute Zeferino-Lopez's assertions that the State's evidence regarding any knowledge by Zeferino-Lopez that the social security number belonged to another person was exceptionally weak (BOA at 16-17). Instead, the State

claims that because the jury necessarily found Zeferino-Lopez intended to commit a crime of fraud, then it had to have found that Zeferino-Lopez knew that the social security number belonged to another. BOR at 22. The one does not necessary follow the other, however.

To convict, the jury had to have found that Zeferino-Lopez used the social security number either to execute a scheme to defraud a financial institution or to falsely represent himself to be a United States citizen. CP 21-22. Yet, Zeferino-Lopez could have formed the intent to commit either of these offenses without knowing he was using a social security number that belonged to a real person. Instead, he could have thought he was using a bogus, random set of numbers as his own social security number in an attempt to establish citizenship or a bank account. Indeed, this is essentially what the State argued below. As such, the State's argument regarding prejudice is not persuasive. This Court should find Zeferino-Lopez was denied effective assistance of counsel.

B. CONCLUSION

For reasons stated herein and those stated in appellant's opening brief, this Court should reverse Zeferino-Lopez's conviction.

DATED this 20th day of September, 2013

Respectfully submitted,

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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 20TH DAY OF SEPTEMBER 2013, 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 AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF SEPTEMBER 2013.

x *Patrick Mayovsky*