

FILED  
May 13, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 71448-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JULIANA CRATSENBERG,

Appellant.

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

The Honorable Theresa B. Doyle, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT INACCURATELY INSTRUCTED THE JURY ON THE APPLICABLE LAW.

Seeking refuge from this Court's de novo review of instruction 14, the State argues that whether the instruction correctly states the law for married couples is a factual issue and therefore subject to the more forgiving abuse of discretion standard. See Brief of Respondent, at 17-18. The State merely cites State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002), which indicates a court's decision to refuse a jury instruction for lack of factual support is subject to reversal for abuse of discretion.

Mrs. Cratsenberg's case does not involve such a refusal. Rather, defense counsel argued instruction 14 was misleading and inapplicable to cases involving married couples with joint bank accounts and that it prevented argument on the defense theory of the case. See 20RP 89-94. Whether he was correct is a legal issue, not a factual one. See Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (a jury instruction contains a legal error if it does not allow a party to argue her theory of the case, misleads the jury, or improperly informs the jury of the applicable law); see also State v. Clausung, 147 Wn.2d 620, 625-627, 56 P.3d

550 (2002) (Court reviews instruction that arguably misstated the legal standard and eliminated defendant's only defense under de novo standard).

The State concedes, as it must, that under the express terms of RCW 30.22.090,<sup>1</sup> ownership of funds on deposit in a joint account is subject to community property principles. See Brief of Respondent, at 19. Moreover, the State seems to concede, because it does not contest, that community property funds spent by Mrs. Cratsenberg during her marriage to Mr. Cratsenberg could not result in a theft conviction. See State v. Coria, 146 Wn.2d 631, 638-643, 48 P.3d 980 (2002) (accepting legal principle that one spouse cannot be convicted for theft of community property from the other).

Instead, the State argues that Judge Doyle did not mislead jurors by using only a portion of the statutory language from RCW 30.22.090 in the jury instructions because there was no evidence to support a finding that any of the money spent had become community property. Brief of Respondent, at 19-20. As it did below,

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<sup>1</sup> Effective January 5, 2015, RCW 30.22.090 was recodified as RCW 30A.22.090. See Laws 2014, ch. 37, sec. 4. Because the parties below and briefs already filed in this appeal cite the former statute, this reply brief does the same.

the State relies on the Postnuptial Agreement signed August 24, 2009, which indicates that all property – other than some modest, non-monetary items identified as belonging to Mrs. Cratsenberg – was deemed Mr. Cratsenberg's separate property. Therefore, argues the State, all assets in the joint bank accounts belonged solely to Mr. Cratsenberg in perpetuity. Brief of Respondent, at 19-21.

The State's argument overlooks substantial evidence supporting a contrary finding.

First, as discussed in Mrs. Cratsenberg's opening brief, even if property begins as separate property, the owner spouse may subsequently gift that property to his spouse, thereby converting it to community property or the separate property of his spouse. Dean v. Lehman, 143 Wn.2d 12, 22, 18 P.3d 523 (2001); In re Shea's Estate, 60 Wn.2d 810, 816, 376 P.2d 147 (1963). Mr. Cratsenberg retained the legal right to do this very thing because no guardianship was ever imposed. See 10RP 130-131; 14RP 19-20; 15RP 44-45, 72-74, 87. Following the Postnuptial Agreement and Commencement Bay's attempt to take over his finances, Mr. Cratsenberg retained his wife on both the Key and Heritage accounts, he did not even disclose their joint Heritage account, and

he continued to place significant sums in both accounts (including the Social Security checks everyone agrees he voluntarily signed for deposit). 14RP 32-33; 15RP 39, 60; 19RP 29, 35-43, 71; 20RP 27, 31. This evidence demonstrates Mr. Cratsenberg's intent to make these funds available to his wife for spending (or so a properly instructed jury could have found).

Second, the commingling of assets, including funds in bank accounts, also can convert separate property into community property. Mumm v. Mumm, 63 Wn.2d 349, 252, 387 P.2d 547 (1964); Doyle v. Langdon, 80 Wash. 175, 180, 141 P. 352 (1914). Thus, if some of the funds in the Key and Heritage accounts were indeed gifted to Mrs. Cratsenberg, the fact they were co-mingled with other funds considered Mr. Cratsenberg's separate property further demonstrated the intent to treat all funds as community assets (or so a properly instructed jury could have found).

Third, agreements to treat spousal assets as separate property are not binding where "the separate property agreement was not mutually observed by the parties[.]" Mumm, 63 Wn.2d at 352 (citing Kolmorgan v. Schaller, 51 Wn.2d 94, 98, 316 P.2d 111 (1957)); Dewberry v. George, 115 Wn. App. 351, 359, 62 P.3d 525, review denied, 150 Wn.2d 1006, 77 P.3d 651 (2003). There can be

no doubt that neither Mr. Cratsenberg nor Mrs. Cratsenberg observed the terms of the Postnuptial Agreement or the Trust Agreement designed to control Mr. Cratsenberg's assets. Mr. and Mrs. Cratsenberg refused to provide Commencement Bay with bank records, access to their accounts, or explanations of their spending (14RP 30-32; 15RP 88, 98), they refused to permit an inventory of items in their home (14RP 33-35), they never agreed to the monthly budget designed to rein in their spending (14RP 83-87; 15RP 48-49), and they resorted to credit card purchases to avoid a budget. 14RP 89-98; 15RP 53. The Cratsenbergs' mutual non-observance of the Postnuptial Agreement, including the provision deeming assets Mr. Cratsenberg's separate property, was not binding (or so a properly instructed jury could have found).

Instruction 14 is an incorrect statement of the law where one spouse is accused of stealing funds from a bank account jointly held with the other. The instruction was incomplete and misleading because it erroneously established, as a matter of law, that Mrs. Cratsenberg had no right to spend funds in the joint accounts and made it impossible for the defense to succeed on its theory of the case. Because defense counsel's objection was overruled, Mrs.

Cratsenberg was unable to convince jurors she was legally entitled to use funds in the accounts she shared with her husband.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A NECESSARY JURY INSTRUCTION ON COMMUNITY PROPERTY.

Although the giving of instruction 14 certainly magnified the need for an instruction on community property principles, whether jurors received instruction 14 or not, they should have been instructed on those principles when deciding whether Mrs. Cratsenberg stole from her husband. Yet defense counsel failed to request such an instruction.

The State argues that defense counsel should not be faulted for this failure because the request would have been a waste of time. Brief of Respondent, at 23. Specifically, the State maintains that, given the court's rejection of defense counsel's arguments against instruction 14, Mrs. Cratsenberg cannot demonstrate that Judge Doyle would have provided a separate instruction on community property. Brief of Respondent, at 23.

One does not follow from the other, however. Defense counsel properly recognized instruction 14 was problematic when aimed at a married couple commingling funds in joint bank accounts and objected on that basis. See 20RP 89-92. Judge

Doyle disagreed with counsel's interpretation of the instruction, believing it left intact the ability to argue joint ownership of the funds. 20RP 94-95. Regardless, it was imperative that defense counsel ensure jurors understood the circumstances under which they could find Mrs. Cratsenberg's use of the bank account funds and credit card account authorized.

The instruction counsel should have demanded on community property principles would have been a correct statement of the law where, as here, the alleged victim and the defendant are married and jurors are required to determine their ownership interests. And because there was substantial evidence supporting a finding that the spent funds were community property, Judge Doyle would have been required to give it. See State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003) (a party is entitled to an instruction that properly instructs on the applicable law, is not misleading, and allows the parties to argue their theories of the case); Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 135, 606 P.2d 1214 (1980) (a party is entitled to an instruction supported by substantial evidence regardless of inconsistency of the parties' theories).

Because Mrs. Cratsenberg has shown both deficient performance and prejudice, she is entitled to relief.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL.

None of defense counsel's questions to Butch called for his revelation that a lawsuit had determined Mrs. Cratsenberg financially exploited and physically abused her husband. The precise question triggering that disclosure merely asked what lawsuit was filed by Commencement Bay. See 10RP 105-106. The correct answer was "none." 11RP 38, 112-113; 15RP 13-14. And while defense counsel did ask Butch about "the civil court decision" once Butch mentioned it, defense counsel correctly observed that his questions had not opened the door to evidence of financial and physical abuse. 11RP 39, 46. Judge Doyle agreed, calling this "blurted out" portion of his answer "gratuitous" and "prejudicial to the defense." 11RP 46, 104.

The issue is not whether defense counsel is at fault for Butch's prejudicial testimony (although he was not). The issue is whether counsel was ineffective for doing nothing about it. And for the reasons discussed in the opening brief, counsel was ineffective for failing to move for a mistrial. See Brief of Appellant, at 43-44.

In a case where jurors were asked to decide whether Mrs. Cratsenberg had permission to use her husband's assets (as the defense contended) or improperly took advantage of her husband (as the State contended), the defense simply could not recover once jurors heard of a prior legal determination that Mrs. Cratsenberg had exploited her husband financially and abused him physically. Even in a multi-week trial, by its nature this evidence would have stuck prominently in jurors' minds. Because it ensured conviction and nothing short of a mistrial sufficed, reversal is required on this alternative ground.

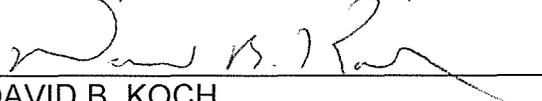
B. CONCLUSION

For all of the reasons discussed in Mrs. Cratsenberg's opening brief and above, this Court should reverse her conviction and remand for a new trial.

DATED this 13<sup>th</sup> day of May, 2015.

Respectfully Submitted,

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Respondent,	)	
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v.	)	COA NO. 71448-1-I
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JULIANA CRATSENBERG,	)	
	)	
Appellant.	)	

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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 13<sup>TH</sup> DAY OF MAY 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] JULIANA CRATSENBERG  
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SIGNED IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF MAY 2015.

X *Patrick Mayovsky*