

72399-5

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FILED  
May 21, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 72399-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

HAROLD BAIN,

Appellant.

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

The Honorable Anita Farris, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

APPELLANT WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL

In his opening brief, appellant Harold Bain asserts he was denied a fair trial when the prosecutor misstated the law as to the knowledge element of the crime (the core element at issue) and when defense counsel failed to object. Brief of Appellant (BOA) at 4-18. In response, the State first claims the prosecutor did not misstate the law but, instead, the prosecutor's argument merely "mirrored the [court's] instruction." Brief of Respondent (BOR) at 8-9. This is incorrect.

The core issue in this case is whether appellant "knowingly" trafficked in stolen property. 2RP 105. When arguing to the jury, the prosecutor effectively told the jury that unless it found Bain suffered from a mental defect or was not a "normal, average reasonable person," then the law required that it find Bain acted knowingly. 2RP 92; see also, BOA at 8. However, this is not a correct statement of the law as it has been interpreted by the Washington Supreme Court in State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980).

In Shipp, the Supreme Court held that the jury may not be directed to find the defendant acted knowingly even if it finds that an ordinary person would have knowledge under the circumstances. Id. at 516-17. Instead, this only creates an inference that the defendant had actual knowledge, and the jury must still be permitted to independently determine whether he in fact had subjective knowledge. Id. Hence, the State misstated the law.

On appeal, the State suggests the prosecutor's misstatement of the law should be overlooked because the prosecutor also argued that the facts established: (1) that a reasonable person in Bain's position would have believed that he was redeeming stolen tickets, and (2) Bain admitted he had suspicions that the tickets could have been stolen. BOR at 8-10. Just because the prosecutor arguably made a proper factual argument, however, this does not remedy the fact that there was a misstatement of the law. The State's factual argument became irrelevant when the prosecutor essentially told the jury the law required it to find Bain acted knowingly if it found he was a reasonable, ordinary person. This State's argument essentially left the jury with just one question to answer: was Bain an ordinary

person? If it answered yes, under the prosecutor's statement of the law, the jury was required to find he acted knowingly.

The State points out that the defense never argued Bain was of less-than-average intelligence. BOR at 10. However, this fact cuts against the State's argument on appeal because it makes it more likely the jury would have followed the prosecutor's misstatement of the law and concluded that, because Bain was an ordinary person, the law required it to find he acted knowingly.

Next, the State claims that any prejudice arising from the prosecutor's erroneous statements could have been cured by an instruction. RP 12. Assuming arguendo the State is correct; this makes appellant's ineffective assistance argument all the stronger. Had defense counsel timely objected to the misstatement, the trial court could have corrected the State's misstatement and clarified for the jury the difference between a proper permissible inference and an improper mandatory inference. By not objecting and getting such an instruction, however, defense counsel left the misstatement of the law uncorrected.

Contrary to the State's argument (BOR at 15-16), there was no legitimate tactic in permitting the jury to deliberate without first correcting the misstatement of law. While the failure to object

during closing argument is generally within the range of acceptable professional legal conduct, this is not so when there is “egregious misstatement” of law or facts. In re Davis, 152 Wn. 2d 647, 717, 101 P.3d 1, 39 (2004) (citing United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir.1993)).

Here, the prosecutor’s misstatement of the law effectively lessened the State’s burden as to the core element in dispute. A prosecutor’s misstatement of the law that lessens its burden of proof is “particularly grievous” because “[t]he jury knows that the prosecutor is an officer of the State.” State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). As such, the prosecutor’s misstatement was “egregious,” and there was no legitimate tactical strategy for defense counsel to sit silent and let the jury deliberate without a curative instruction.

Finally, the State incorrectly claims that appellant cannot show prejudice because there was “overwhelming evidence” showing Bain knowingly trafficked in stolen property. BOR at 16. As explained in detail in appellant’s opening brief, the line between “knowingly” and “recklessly” trafficking (the deciding factor between whether Bain was convicted of first degree or second degree

trafficking) was particularly thin under the facts of this case.<sup>1</sup> See, BOA at 10-12, 18 (arguing the point in detail). Thus, based on this record, there is a sufficient probability that the outcome would have been different (i.e. Bain would have been convicted of the lesser-included offense) had defense counsel objected to the prosecutor's misstatement of the law and requested a curative instruction. Id. As such, Bain was denied effective assistance of counsel and his conviction should be reversed.

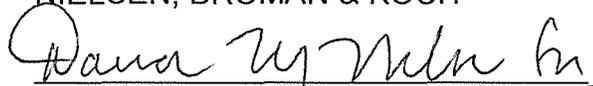
B. CONCLUSION

For the reasons stated above and in appellant's opening brief, this Court should reverse Bain's conviction.

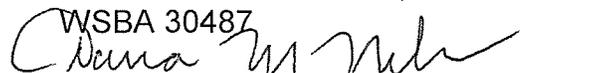
Dated this 21<sup>st</sup> day of May, 2015.

Respectfully submitted

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<sup>1</sup> The State completely ignores this fact in its brief. BOR at 16-18.

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COA NO. 72399-5-I

**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 21<sup>ST</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 EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HAROLD BAIN  
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15314 NE DOLE VALLEY ROAD  
YACOLT, WA 98675

SIGNED IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF MAY 2015.

x Patrick Mayovsky