

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 JAMES DEE NEWTON)
 (your name))
)
 Appellant.)

No. 36227-9-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, James Newton, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

4 Grounds, see attached brief.

12-30-07

James Newton

1. The prosecutor committed misconduct by creating an analogy to form a theory intended for the jury to erase reasonable doubt. The prosecutor also committed misconduct by making statements that had the potential to inflame the passions or prejudices of the jury.

ABA Standards for Criminal Justice 3-5.8 (2d ed 1980)

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury (d) The prosecutor should refrain from argument which would divert the jury from it's duty to decide the case on evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making prediction of the consequences of the jury's verdict.

A defendant who alleges improper conduct on the part of a prosecutor must first establish the prosecutor's improper conduct and, second it's prejudicial effect. State v. Pirtle 127 Wn. 2d 628,672, 904 P.2d 245 (1995); State v. Furman, 122 Wn.2d 440,455, 858 P.2d 1092 (1993)

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. State v. Charlton, 90 Wn.2d 657,664, 585 P.2d 142 (1978)

Comments calculated to appeal to the jury's passion and prejudice and to encourage it to render a verdict based on facts not in evidence are improper. State v. Pastrana, 94 Wn. App. 463,478, 972 P.2d 557 (1999)

The U.S. Supreme court counseled prosecutors " to refrain from improper methods calculated to produce a wrongful conviction..." Berger v. United States, 295 U.S. 78,88 (1935)

U.S. v. Young, 470 U.S. 1,105 S.Ct. 1038, 84 L.Ed 2d 1,53 (1985) " Justice Brennan, concurring in part and dissenting in part at II : Although counsel did not object to the prosecutor's arguments, those arguments nevertheless constitute plain error that require reversal of conviction if they may be said either (1) to have created an unacceptable danger of prejudicial influence on the jury's verdict or (2) to have " seriously [affected] the... integrity or public reputation of the judicial proceedings." U.S. v. Atkinson, 297 U.S., at 160.

In Namet v. United States, 373 U.S. 179 (1963), the Court recognized that even in the absence of an objection, trial error may require reversal of a criminal conviction on either of two theories: (1) that it reflected prosecutorial misconduct, or (2) that it was obviously prejudicial to the accused. Id, at 186-187. Justin Stevens dissenting.

In Scurry, the the trial court, in an attempt to explain the concept of reasonable doubt, told the jury that "in order to establish proof beyond a reasonable doubt, the evidence must be such that you would be willing to act upon it in the more important affairs of your own life" and that "if ... you have a abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters in your own affairs, then you have no reasonable doubt."

Scurry v. United States, 347 F.2d 468,469-70 (D.C. Cir. 1965) cert. denied, 389 U.S. 883 (1967). On review, the District of Columbia Circuit found that this statement was an inaccurate statement of the law, explaining:

Being convinced beyond a reasonable doubt cannot be equated with being "willing to act...in the more weighty and important matters in your own affairs." A prudent person called upon to act in an important business or family matter would certainly ~~gravely~~ weigh the often neatly balanced considerations and risks tending in both directions. But, in making and ~~act~~ acting on a judgement after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he made the right judgement.

Human experience, unfortunately, is to the contrary.

The jury, on the other hand, is prohibited from convincing unless it can say that beyond a reasonable doubt the defendant is guilty as charged. Thus there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgement in a matter of personal importance to him. To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt. Scurry, 347 F.2d at 470.

Here, in closing argument the prosecutor makes references to the jury's belief in their marriage and the jury's belief in religion or a higher power. The prosecutor uses an analogy to equate the beliefs that the jury has in everyday life with a belief of finding guilt in the defendant.

" We talked about a belief in your marriage, or I might suggest a belief in your religion. If you have a religion, if you believe in some higher power, I imagine that there's somebody that could suggest to you a reason to doubt. You can't see that entity.

It's possible your husband is cheating on you. Sure, it's possible, and we have all considered those if we have a religion. Sure, I considered that, but I still believe. If you have an abiding belief in the truth of the matter charged." RP 318

The prosecutor's comparison of proof beyond a reasonable doubt to the certainty people use in their belief a of a particular "higher power" was improper and gave the jury the impression to believe the defendant is guilty despite evidence supporting guilt.

The prosecutor's statements during closing regarding marriage and higher power was improper and prejudicial because a majority of individuals have been in relationships and/or believe in a higher power and those statements had the potential to bring out negative emotions within certain members of the jury. There is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.

2. Trial court committed error by allowing hearsay testimony despite objection by defense. Hearsay statements denied defendant constitutional right to confront witnesses.

Detective Berntsen testifies to seeing counter-surveillance by defendant after testimony earlier that he never saw a suspect. He bases his observation on information he had relayed to him over a Nextel walkie-talkie. RP 216-217

The prosecutor during closing refers back to Det. Berntsen's testimony:

" And you remember that Detective Berntsen said that one of the reasons that he kind of stayed out of the area was because the defendant was doing just that, he was looking around at him, and -- not at him, he was looking around himself, the defendant, looking to see what was going on. He was doing counter-surveillance." RP 280

Hearsay is defined as a 'statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' ER 801 (c)

Out of court declarations made to a law enforcement officer may be admitted to demonstrate the officer's or the declarant's state of mind only if their state of mind is relevant to a material issue in the case; otherwise, such declarations are hearsay. *State v. Aaron*, 57 Wash.App. 277,279-81, 787 P.2d 949 (1990); *State v. Stamm*, 16 Wash.App. 603,610-12, 559 P.2d 1 (1976), review denied, 91 Wash. 2d 1013 (1977); *State v. Lowrie*, 14 Wash.App. 408,411-13, P.2d 128 (1975), review denied, 86 Wash. 2d 1010 (1976); *State v. Murphy*, 7 Wash.App. 505,509, 500 P.2d 1276, review denied, 81 Wash. 2d 1008 (1972). In *State v. Lowrie*, supra, a detective testified that that an informant told him the defendant was involved in the crimes that were the subject of the prosecution. Although the trial court indicated that the testimony was not admitted for the truth of the matter asserted, but only to show that the statement was made and that it in turn resulted in police action, the appellate court held the statement was inadmissible hearsay. The court reasoned that neither the making of the statement by the informant nor the resultant police action was relevant to any issue in the case, except to prove the truth of the matter asserted. Likewise, in *State*

v. Aaron, supra, where an officer testified to an out-of-court declaration made by a police dispatcher, this court stated: If the legality of the search and seizure was being challenged,....the information available to the officer as the basis for his action would be relevant and material. However, the officer's state of mind in reacting to the information he learned from the dispatcher is not in issue and does not make "determination of the action more probable or less probable than it would be without the evidence" ER 401. Accordingly, the dispatcher's statement was not relevant for another purpose. Statev. Aaron, 57 Wash. App. at 280.

Detective Berntsen did not testify to the accounts of the confidential informant, but was allowed to testify, based on information relayed over a Nextel, that he knew the defendant was taking counter-surveillance measures.

" if [it is] necessary at trial for the officer to relate historical facts about the case, it would be sufficient for him to report he acted upon 'information recieved.'" Aaron, 57 Wash.App. at 281. As in Aaron, the disputed testimony here went beyond merely establishing that the officer waited for the suspect to be clear because of "information received", and implicated that the defendant exhibited guilty behavior and thus connected the defendant to a crime. It would have been sufficient to explain police presence at the scene for Detective Berntsen to testify that police were conducting surveillance on the defendant. Several cases from other jurisdictions have held that a law enforcement's officer's testimony concerning an informant's or eyewitness's statement is inadmissible hearsay even where the officer does not repeat the contents of the statement, but only testifies that the statement led police to investigate or arrest the defendant. See *State v. Irving*, 114 N.J. 427, 555 A.2d 575,584-86 (1989); *State v. Hardy*, 354 N.W. 2d 21,23 (Minn. 1984); *Postell v. State*, 398 So. 2d 851,854 (Fla. Dist. Ct. App.), review denied, 411 So. 2d 384 (Fla. 1981). In *Postell v. State*, supra, the court stated:

We hold that where , as in the present case, the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated. (Footnotes omitted.) Postell, 398 So. 2d at 854.

Even if the challenged testimony was admitted for a limited purpose, it's admission for that purpose was error because the legality of the officer's surveillance was not at issue.

Since a limiting instruction could not have corrected the trial court's error, appellant's failure to request one does not waive the error. See State v. Barber, 38 Wash.App. 758,771, 689 P.2d 1099 (1984), review denied, 103 Wash. 2d 1013 (1985); accord, State v. Neslund, 50 Wash.App. 531,540, 749 P.2d 725 review denied 110 Wash. 2d 1025 (1988).

The hearsay statements erroneously admitted by the trial court violated appellant's right to be confronted

with the witnesses against him, which right is guaranteed by the sixth amendment to the United States Constitution and Const. art. 1, § 22 (amend.10). Under these provisions, hearsay implicating the accused is admissable in a criminal trial only if the declarant is unavailable and the statement bears adequate indicia of reliability. See Ohio v. Roberts, 448 U.S. 56,66, 65 L.Ed. 2d 597,100 S.Ct. 2531 (1980); State v. Whelchel, 115 Wash. 2d 708,715, 801 P. 2d 948 (1990). " A witness may not be deemed unavailable unless the prosecution has made a good faith effort to obtain the witness' presence at trial." State v. Ryan, 103 Wash. 2d 165,170, 691 P.2d 197 (1984).

The record is devoid of any efforts by the prosecution to bring to court the unnamed officer/s who were relaying this information over the Nextels. Defendant was denied the oppurtunity to cross-examine.... and the jury was deprived of any basis for evaluating the truth of the declarations. Appellant's right of confrontation was therefore violated.

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3. Defense counsel provided ineffective assistance because she failed to object to the prosecutor's improper statements. RP 318

Defense counsel provided ineffective assistance of counsel by misstating facts during closing regarding defendant's testimony.

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), cert. denied 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

In order to show that he received ineffective assistance of counsel, an appellant must show (1) that trial counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130 101 P.3d 80 (2005).

There is a strong presumption that defense counsel's conduct is not deficient, however, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, 153 Wn.2d at 130, 101 P.3d 80 (2005).

During closing defense counsel states:

" Mr. Newton told you that his mother, her boyfriend, they all smoke crack, they all do drugs. "

RP 292

Without explanation on the record as to why defense counsel made these statements they were prejudicial to the defendant and denied him right to effective assistance of counsel.

4. The prosecutor committed misconduct in closing by arguing that the jury would have to choose between the defendant or the police witnesses and confidential informant, and come to a verdict based solely on who they believe.

At RP 287 during State's closing argument the prosecutor argues:

" Ladies and gentlemen, this comes down to who do you believe, who has the motive or a stake in the outcome of the case, and the last person we need to consider is the defendant. Does he have a motive or stake in the outcome of the case? I want you to also consider who was the only witness that sat through the whole trial and got to hear all of the testimony, and testified last. Ladies and gentlemen, when you consider all of the evidence, whether it came through the state's witnesses on direct, or on the defense's cross examination, or even the defendant himself, when you consider everything, ask yourself, who do you believe? Do you believe that a person who has no other job, no other source of income, except from what he might get from one of his girlfriends at the time, is not going to sell what's he is using? Do you believe that? "

" This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are lying or mistaken." State v. Fleming 83 Wash.App. at 213, 921 P.2d 1076.

" it is misleading and unfair to make it appear that an acquittal requires the Conclusion that the police officers are lying.", State v. Casteneda-Perez, 61 Wash.App. 354,362-63, 810 P.2d 74, review denied, 118 Wash. 2.d 1007 (1991).

The prosecutor's arguments during closing clearly are the equivalent to giving the jurors " a false choice. " State v. Miles, 139 Wn.App. 879, 26 162 P.3d 1169 (2007). The " false choice " that is condemned in Miles and like cases is telling the jury that it had to believe the defendant's testimony to acquit him. The choice is false because the jury does not need to believe the defendant to acquit, or believe the State's witnesses are lying, it need only have a reasonable doubt as to the defendant's guilt. Id.

The prosecutor's arguments inquiring the jury of who they believe shifted the burden of proof and gave the jurors a " false choice ". Such argument was improper, misrepresented the role of the jury, and deprived the defendant the right to a fair trial.

For the reasons stated in this brief, the court should vacate the defendant's conviction and remand the case for a new trial.

DATED this 30 day of December, 2007.

Respectfully submitted,

James Newton

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
AT DIVISION II

JAMES DEE NEWTON

Appellant,
vs.

State of Washington

Respondent.

PROOF OF SERVICE

I, JAMES DEE NEWTON, pro se, do declare that on
the 30 day of December, 2007. I have served the
enclosed Statement of Additional Grounds Brief

on ever other person required to be served, by presenting an envelope to
state prison officials at the Clallam Bay Corrections Center, containing the
above documents for U.S. mailing properly addressed to each of them
and with first-class postage prepaid.

The names and addresses of those served are as follows:

David C. Ponzoha
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I declare under penalty of perjury under the laws of the State of
Washington, pursuant to RCW 9A.72.085, and the laws of the United
States, pursuant to Title 28 U.S.C. § 1746, that the forgoing is true and
correct.

Executed on this 30 day of December, 2007.

James Newton

, Pro se

Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723