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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 37495-1-II

BY

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

STATE OF WASHINGTON,

Respondent,

v.

JOEL ANDERSON,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct during closing argument denied appellant a fair trial.

Issue Pertaining to Assignment of Error

For almost two decades, Washington courts have made it clear that prosecutors may not argue to jurors that in order to acquit a defendant, they must find that a particular witness is lying. Yet that is precisely the argument made by the trial deputy in this case. Does this misconduct require reversal?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grays Harbor County Prosecutor's Office charged appellant Joel Anderson with two counts of trafficking in stolen property in the first degree. CP 11-12. A jury convicted Anderson, the court imposed a standard-range sentence, and Anderson timely filed his notice of appeal. CP 18-19, 35, 38, 43-44.

2. Substantive Facts

a. The alleged offenses

Charles Thompson lives in Aberdeen and works as a mechanic at the nearby Ocean Spray Cranberry plant. 2RP¹ 29-30. Thompson owns approximately 10 acres and collects scrap metal, which he has accumulated over the past 40 years. Many of the items were obtained from the Ocean Spray plant, which agreed to give or sell unwanted equipment to Thompson. 2RP 31-32. Thompson's scrap pile measures approximately 50 x 50 feet and stands six feet or more in places. 2RP 54.

On April 2, 2007, Thompson noticed that scrap had been moved around and some stainless steel was missing. 2RP 33, 43. A week later, he noticed additional scrap had been moved and more stainless steel had disappeared. He also found a trail that led from his property, passed through the woods, and ended at Astoria Lane, a gravel road that provided egress from the area. Thompson found various discarded items in the area, including a wheelbarrow, food wrappers, a water jug, a pop can, and a blanket. 2RP 33-35, 44, 53-55. He notified the Grays Harbor County Sheriff's Office, which began an investigation. 2RP 33, 51-52.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP - February 19, 2008; 2RP - March 5, 2008; 3RP - March 6, 2008; 4RP - March 17, 2008.

Two vehicles were spotted parked on Astoria Lane around this same period. On April 17, Thompson saw a blue Chevy S-10 pickup after his wife reported hearing the sound of rattling metal. But Thompson did not see anyone in or around the truck. 2RP 39-40. One of Thompson's neighbors also saw the pickup and on several occasions spotted a blue Subaru wagon parked in the woods off Astoria Lane. 2RP 64-65.

The Sheriff's Office got a break on April 18, when Deputy Robert Wilson found the Chevy pickup parked on Astoria Lane. Wilson did not find anyone near the truck, but he ran the license plate number and determined the registered owner was Christopher Lovell. 2RP 140. Wilson later contacted Lovell, who admitted he had been taking scrap metal from Thompson's property. 2RP 93-94, 143-144.

The Sheriff's Office got a second break on April 28. 2RP 144. At 5:42 a.m., Deputy Wilson responded to a report that the blue Subaru wagon was once again parked on Astoria Lane. 2RP 144-145. Wilson pulled the car over as it attempted to leave the area. 2RP 147. Richard O'Leary was driving and Brandon White was sitting in the front passenger seat. 2RP 147. In the back of the car, Wilson found over 200 lbs. of scrap metal, including a stainless steel sink he had previously seen in Thompson's yard. 2RP 147-149.

Lovell, O'Leary, and White all pled guilty to crimes associated with the theft of Thompson's scrap. 2RP 68, 114, 133. Moreover, as discussed below, all three implicated Anderson in some fashion.

The trafficking charges against Anderson pertained to two dates only: April 2 and April 9, 2007. CP 11. But O'Leary and White were permitted to testify about other dates for the limited purpose of allowing jurors "to determine whether the defendant knew that the property in the crimes charged in this case was in fact stolen or that [Anderson] knew where to dispose of such property." 2RP 91, 105-06.

O'Leary, owner of the blue Subaru wagon, and White testified they had known Anderson for more than a year. 2RP 104, 108, 126. According to O'Leary, about a month prior to O'Leary's April 28 arrest, Anderson took him to the scrap pile on Thompson's property and enlisted his help in moving some scrap metal. 2RP 106-108. On the night of O'Leary's arrest, he and White were also removing scrap at Anderson's request. 2RP 109-110. Anderson had previously segregated the metal he wanted, but was unable to retrieve it himself. 2RP 110. Without Anderson present, O'Leary and White had just loaded the pile into the Subaru when they were caught and arrested. 2RP 111-114, 126-133.

The State used Lovell in its attempt to prove the specific violations on April 2 and 9, 2007. Lovell had known Anderson for years and was staying at his home in March and April of 2007. 2RP 67-68. According to Lovell, Anderson said they could make money selling scrap and Anderson showed him Thompson's scrap pile. 2RP 69.

Lovell was fuzzy on dates. He initially testified he had been to Astoria Lane on "a couple of occasions," the first time in either late March or early April. 2RP 68. A flashlight failed on that first trip so they did not reach the pile. 2RP 69, 77-79. They returned the next night, however, and loaded stainless steel into Lovell's Chevy S-10 pickup. The two took their haul to Tacoma Metals, a recycling center, and split the proceeds. 2RP 69-72, 79-81.

When pressed for the date of this first theft, Lovell testified he did not remember but believed it was April 3rd or 4th. But he conceded it may have been late March 2007. 2RP 81. He testified this theft also resulted in his very first visit to Tacoma Metals. 2RP 81-82. As it turned out, however, Tacoma Metals had issued him a check on March 16 for non-stainless scrap, demonstrating he had in fact been there before. 2RP 82-83.

According to Lovell, he and Anderson made as many as four trips together to Tacoma Metals. 2RP 71. Tacoma Metals had issued additional

checks to Lovell on April 2, April 6, April 9, and April 23, 2007. 2RP 72, 89, exhibits 7-10. Records showed that the April 2 and April 9 transactions involved significant amounts of stainless steel. 2RP 84-85. By contrast, the April 6 transaction involved cast aluminum sheet and only 8 lbs of stainless steel, which made Lovell believe the load was probably not from Thompson's property. 2RP 84-85. Similarly, the April 23 transaction involved cast aluminum sheet and relatively little stainless steel. Lovell believed he was with his father, and not Anderson, on that date, but he was not certain. 2RP 85-86, 91-92.

Lovell testified that when he and Anderson sold scrap to Tacoma Metals, the checks were issued to Lovell because he had valid identification, a requirement. 2RP 86, 96. In fact, however, Tacoma Metals had a copy of Anderson's valid identification on file from January 2007. 2RP 96-97; exhibit 1.

Lovell admitted that he and Anderson had a falling out in April 2007, resulting in some hard feelings and anger at the time. 2RP 88. Anderson claimed Lovell owed him money, forced him to leave Anderson's home, and refused to let Lovell take his furniture (worth \$1,800.00) until the debt was paid. 2RP 73-74, 87-88. But Lovell denied the dispute caused him to implicate Anderson in the thefts. 2RP 88.

In the end, no one was asked to go to Tacoma Metals and attempt to identify scrap from Charles Thompson's property. 2RP 102. Police were unable to lift any prints from the pop can found on Thompson's property and they did not attempt DNA testing on any of the discarded items found at the location. 2RP 55-56, 58-59.

During closing argument, defense counsel emphasized that the charges pertained only to April 2 and April 9. Anderson's name was not on the checks issued on those dates, there was no physical evidence Anderson was on Thompson's property or at Tacoma Metals on those dates, and the only evidence linking Anderson to the transactions came from Lovell, who should not be believed because he was angry. Moreover, Lovell was sketchy on dates and details. 3RP 18-27.

b. Misconduct during closing argument

During the State's closing argument, the deputy prosecuting attorney made the following comments during the rebuttal portion of his argument:

You need to decide this case on the facts. You need to decide who you believe. This is not about whether Chris Lovell, Richard O'Leary and Brandon White are simply mistaken about some fact. To find this defendant not guilty you have to believe Christopher Lovell is not telling the truth, that he made this up, and that he implicated Joel Anderson. . . .

3RP 29 (emphasis added).

To further underscore this point, the prosecutor closed his remarks with, "this isn't about a mistake or forgetting one single fact, it's they made up this whole thing, they're lying. And they didn't, they told the truth. In the end the verdict is guilty in this trial." 3RP 31.

Anderson was convicted and now appeals to this Court.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT COMPELS REVERSAL.

For almost two decades this Court has warned prosecutors not to tell jurors their verdict turns on whether the State's witnesses are lying. See State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the [State's witnesses] are lying"), review denied, 118 Wn.2d 1007 (1991); State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209 (misconduct for prosecutor to argue that "in order for you to find the defendant not guilty . . . you have to believe his testimony and completely disbelieve the officers' testimony."), review denied, 118 Wn.2d 1007 (1991).

The reason for this prohibition is obvious; it misstates the law, the jury's role, and the State's burden of proof. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018

(1997). Jurors do not have to find that a witness is lying to acquit. Instead, jurors are required to acquit unless they have an "abiding conviction" in the truth of the State's witnesses' testimony. Fleming, 83 Wn. App. at 213.

The jury's true inquiry does not necessarily turn on "disbelieving" a particular witness since a witness could simply be mistaken on a salient point. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). For example, even if jurors believed Anderson and Lovell had some dealings in stolen scrap metal, they could have found that Lovell was mistaken about the relevant dates or, at the very least, not sufficiently clear about those dates to find the offenses committed on or about April 2 or April 9. Alternatively, jurors could have found some other element of the charges not sufficiently proved without necessarily finding that Lovell was lying.

The prohibition against arguments of the type used by the prosecutor in Anderson's case is so firmly established that in Fleming, this Court "deem[ed] it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial." Fleming, 83 Wn. App. at 214. Indeed, it is so flagrant and ill-intentioned that the Fleming court reversed despite the absence of a defense objection and despite lengthy, legitimate

arguments focusing the jury on the proper inquiry. Fleming, 83 Wn. App. at 210-11, 216.

The same outcome is appropriate here. The prosecutor told jurors: "To find this defendant not guilty you have to believe Christopher Lovell is not telling the truth, that he made this up, and that he implicated Joel Anderson. . . ." 3RP 29. This is incorrect. It misstated the State's burden and denied Anderson a fair trial because it misled jurors into believing they could not acquit unless and until they concluded Lovell was lying.

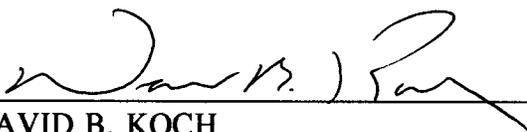
D. CONCLUSION

Anderson respectfully asks this Court to reverse his convictions and remand for a new trial.

DATED this 29th day of August, 2008.

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 29TH DAY OF AUGUST 2008, 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.

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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF AUGUST 2008.

x Patrick Mayovsky