

NO. 38244-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

EUGENE MICHAEL RANCIPHER,

Appellant.

09 SEP 14 11 51 AM '15
STATE OF WASHINGTON
BY JS
DEPUTY

COURT OF APPEALS
DIVISION II

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

The Honorable Katherine M. Stolz, Judge

09 SEP 14 11 43 AM '15
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. RANCIPHER'S TRIAL WAS INCURABLY TAINTED BY IMPROPER COMMENTS ON THE RIGHT TO COUNSEL, EVIDENCE OF PRIOR BAD ACTS, LEADING QUESTIONS, AND THE IMPLICATION HIS LIBERTY WAS NOT AT STAKE.

a. The Prosecutor Improperly Commented on the Right to Counsel When She Implied Defense Counsel Was Unethical or Deceptive and Implied Guilt Based on the Defendant's Exercise of His Right to Counsel.

The State argues State v. Nemitz, 105 Wn. App. 205, 19 P.3d 480 (2001), and United States v. Friedman, 909 F.2d 705 (2d Cir. 1990), are distinguishable from this case. Brief of Respondent at 16. While the facts of Nemitz and Friedman are indeed different, the principle remains the same. Prosecutors may not suggest defense counsel is unethical. Friedman, 909 F.2d at 709-10. Nor may they raise the inference that only the guilty look to a lawyer for help. Nemitz, 105 Wn. App. at 215.

On three different occasions, the prosecutor stated, loudly enough for at least some jurors to hear, that she did not have copies of certain defense exhibits. 14 RP 1203; 15RP 1372, 1392. These comments implied defense counsel was either unethical or deceptive and thus were a comment on the right to counsel. Friedman, 909 F.2d at 709-10. The question (or comment) "She's not giving you the answer, is she?" was a negative comment implying guilt on the basis of counsel's assistance, or

lack thereof. 15RP 1494-95; Nemitz, 105 Wn. App. at 215. The prosecutor's tone, and whether it was meant as a rhetorical comment or a true question, is irrelevant. See Brief of Respondent at 19. Improper reference to counsel's preparation with Rancipher before trial raised the same impermissible inference. 15RP 1517.

These multiple instances were not a mere reference to a constitutional right. See State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1 (2008) (discussing improper comment on the right to silence). Mere reference to a constitutional right is permissible, but to infer guilt on that basis is an improper comment. Id. Courts also consider whether the prosecutor manifestly intended to comment on a constitutional right. Id. at 216 (citing State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). In Burke, the prosecutor argued in opening that Burke's father advised his son to end his interview with police, "sensing that it wasn't necessarily okay to have sex with [J.S.]." Id. at 222. In the same breath, the State noted "[the father's comments] pretty much did end the interview." Id. The court held this argument invited the jury to infer Burke ended the interview because he adopted his father's advice, "based on the idea that the guilty should keep quiet and talk to a lawyer." Id.

Here, the accusatory nature of the comments discussed above similarly suggests guilt based on the right to counsel, rendering them

improper comments. While it could perhaps be argued that the first in this string of comments was not intended as a comment on the right to counsel, that argument weakens with every additional comment. The trial court referred to the prosecutor's subsequent conduct as "passive aggressive" and a deliberate violation of the court's orders. 15RP 1393, 1398-99. Such deliberate behavior after admonition appears an intentional comment.

The State attempts to portray each incident complained of in the opening brief as an isolated instance that alone could not have had any effect. But courts do not consider prosecutorial misconduct in isolation. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). In determining whether misconduct warrants reversal, the courts examine the prejudice and the cumulative effect. Id.; see also United States v. Young, 470 U.S. 1, 11-12, 105 S. Ct. 1038, 1044, 84 L. Ed. 2d 1 (1985) (such remarks "must be examined within the context of the trial"). In Rancipher's trial, repeated negative comments created an unfairly accusatory environment toward defense counsel

The State also argues there is no evidence the jury heard the prosecutor's requests for copies of the exhibits. This argument should be rejected based on the record. The first request was out loud and on the record. 14RP 1203. The second time, the prosecutor whispered, but the

court acknowledged the jury could have heard. 15RP 1375. The third time, Rancipher heard, and the court specifically acknowledged jurors 1, 2, and 3 may have also heard. 15RP 1396. The prosecutor's questions about counsel giving answers and preparing for trial were also out loud on the record. 15RP 1494-95, 1517.

This climate of negativity toward defense counsel was not harmless beyond a reasonable doubt. Misconduct that directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996); see also State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (comment on right to silence not harmless beyond a reasonable doubt). The fact that an objection was sustained is not sufficient to render such a comment harmless beyond a reasonable doubt. See Friedman, 909 F.2d at 709-10. In Friedman, the court reversed based on prosecutorial misconduct although the objection was sustained and the trial court stated, "I don't think that is appropriate." Id. The court described the trial court's reaction as "modest." Id.

Here, the court offered a stronger reaction by giving a written instruction. CP 204. But this was too late. The repeated misconduct cast a pall over the entire proceeding in this case. By the time the written

instructions were read to the jury at the close of the evidence, the negative tone of repeated comments on the right to counsel had likely colored the jury's attitude.

Even if the jury was only tangentially aware of some of the comments, such pervasive negative commentary can operate on a subconscious level. Subliminal communication conveys a message in such a way that it is "received below the level of consciousness." Nicole Grattan Pearson, Subliminal Speech: Is It Worthy Of First Amendment Protection?, 4 S. Cal. Interdisc. L.J. 775 (1995). The recipient is unaware of the message, yet "make[s] a selective response." Id. at 780. One case discussing subliminal advertising described the danger of subliminal messages exists because the impact, "may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968). Given the pervasive nature of the comments on counsel, and the written instruction that occurred only after the close of all the testimony, it is far from certain that the result would have been the same without these improper comments.

b. The Reason for Rancipher's Firing Was Not Inseparable Res Gestae Evidence.

Under the res gestae or “same transaction” exception to ER 404(b), evidence of other bad acts is admissible only if it is so connected in time, place, circumstances, or means employed that proof of the other misconduct is necessary for a complete description of the crime. State v. Schaffer, 63 Wn. App. 761, 769, 822 P.2d 292 (1991) (citing 5 K. Tegland, Wash. Prac. § 115, at 398 (3d ed. 1989)), affirmed, 120 Wn.2d 616, 845 P.2d 281 (1993). The justification for admitting res gestae evidence is so the State will not be prejudiced by being forced “to present a truncated or fragmentary version of the transaction.” State v. Bockman, 37 Wn. App. 474, 490-91, 692 P.2d 925 (1984). Put another way, evidence of another offense is admissible if it “constitutes a ‘link in the chain’ of an unbroken sequence of events surrounding the charged offense.” State v. Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003). Each act must be “a piece in the mosaic necessary to depict a complete picture for the jury.” State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999) (quoting State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995)).

The res gestae exception should be narrowly applied to avoid abusive misuse. United States v. Hill, 953 F.2d 452, 457 n.1 (9th Cir. 1991). The “inseparable crimes” doctrine “became completely perverted when courts

began to use the infamous Latin tag ‘res gestae’ to describe the rule.” Id. (quoting 22 C. Wright and K. Graham, Federal Practice and Procedure § 5329 at 447, 449-50). The very ‘looseness and obscurity’ of the phrase res gestae ‘lend too many opportunities for its abuse.’” Hill, 953 F.2d at 457 n.1 (quoting 1 Wigmore, Evidence § 218 at 320-21 (3d Ed. 1940)).

The narrow res gestae exception is inapplicable here. A complete story may have depended on the jury knowing when Rancipher left Fred Meyer’s employ. It may also have depended on them knowing that he took liberties with his schedule while there. But it did not depend on them knowing that he was fired for failing to work his required hours, indelibly described during closing argument as “time fraud.” Additionally, this Court should reject the State’s argument that being fired for failing to work somehow shows Rancipher was competent at completing his paperwork. See Brief of Respondent at 26.

c. The Prosecutor’s Argument Implying Rancipher’s Liberty Was Not at Stake Was Not an Excusable Response to Defense Counsel’s Argument.

The State argues the prosecutor is entitled to imply to the jury that a person accused of 90 counts of theft may not go to jail if convicted. Brief of Respondent at 33. The reason for this claim is that defense counsel started it by arguing Rancipher’s liberty was at stake. This argument should be rejected for two reasons. First, defense counsel’s

argument was, in turn, a direct response to the prosecutor's attempt to downplay the seriousness of this case during voir dire by comparing the burden of proof to stealing cookies from a cookie jar. 19RP 1840-41. Second, defense counsel's argument tracked precisely the written instructions given to the jury in virtually every case, "the fact that the punishment may follow conviction, you shouldn't consider it, except insofar as it may tend to make you careful; and that's what I'm asking you to do when you go into the jury room is be careful." 19RP 1840-41. Defense counsel's entirely proper argument emphasized the seriousness of the case and asked the jury to be careful. The prosecutor's argument that there was no evidence Rancipher could go to prison was improper.

d. A Substantial Likelihood Exists that Prosecutorial Misconduct Influenced the Jury's Verdict.

Courts need not "wink" at repeated prosecutorial misconduct under the rubric of harmless error. State v. Neidigh, 78 Wn. App. 71, 79-80, 895 P.2d 423 (1995). The State argues, however, that the jury's verdicts show it was careful and not improperly influenced by the prosecutor's comments on defense counsel and presentation of improper evidence and argument. Brief of Respondent at 35-36. However, a detailed examination of the verdict forms and to-convict instructions reveals a different story. The jury found Rancipher guilty on 84 of 90 counts of

theft. CP 302-92. On four counts, it found Rancipher not guilty, and on two more, the jury was unable to reach a verdict. Id. While this does indicate the jury considered these counts separately, it does not mean the jury was not influenced by the prosecutor's misconduct.

In Count 38, the "to-convict" instruction erroneously stated that the state had to prove theft of over \$250 for a charge of third degree theft. CP 246. Thus, the jury did not need to believe Rancipher's version of events to acquit him. On the contrary, the error in the instruction virtually required acquittal on that count. A similar glitch likely led to the not-guilty verdicts on counts 6, 16, and 90. The amount of the refund slips pertaining to those charges was over the defined upper limit of \$250 for third degree theft. CP 214, 224, 299; 7RP 376; 8RP 496, 537, 556. The jury hung on counts 63 and 64, where Rancipher presented an alibi. His girlfriend testified he was likely with her when she shopped, and presented a receipt showing the time and date. 14RP 1194-95, 1210. On each of these six counts where the jury did not find Rancipher guilty, there was either a technical glitch or a documented alibi.

On the other 84 counts, the jury had to decide whether to believe Rancipher's version of events. When the jury had to make an actual credibility call, it did so against Rancipher every time. There is a substantial likelihood the prosecutorial misconduct in this case influenced

the jury's perception of Rancipher and the subsequent decisions on his credibility.

2. RANCIPHER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

a. Soliciting the Handwriting Expert's Report Was Not Legitimate Strategy.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Presenting evidence that undermines the defense theory of the case is not legitimate strategy. See State v. Saunders, 91 Wn. App. 575 958, P.2d 364 (1998). Saunders was charged with possession of methamphetamine and heroin. Id. at 577. The defense was unwitting possession. Id. During direct examination, defense counsel asked if Saunders had any prior convictions for similar conduct, and Saunders replied that he had. Id. at 578. Finding evidence of a prior drug conviction was inherently prejudicial and would not have been admissible, the court reversed Saunders' conviction for ineffective assistance of counsel. Id. at 580-81. While Rancipher's counsel did not present incriminating and unfair evidence on direct examination, by soliciting and disclosing Floberg's report, she similarly helped the State make its case against Rancipher, undermining his defense.

The State argues Rancipher's first counsel, Glasoe-Grant, made a legitimate tactical decision to elicit a report from the handwriting expert,

Robert Floberg, thereby triggering a duty to disclose this incriminating testimony to the State. This was not legitimate trial strategy because Floberg's testimony could only serve to incriminate Rancipher based on dubious science. Floberg testified six of the refund slips were conclusively Rancipher's handwriting. The others he found inconclusive, but pointed out several similarities. 11RP 1129-37; 12RP 12-22. He could not rule out Rancipher as the author of any of the slips. 12RP 23. Rancipher had nothing to gain and everything to lose from this testimony.

The State further argues Glasoe-Grant's strategy may simply have been different from that of Rancipher's subsequent attorney because the change from 14 counts of first-degree theft to 90 counts of second- and third-degree theft changed everything. But this is not the sort of change that would require a dramatically different strategy. Moreover, Rancipher's defense remained the same throughout – a general denial that he was the author of the fraudulent refund slips. Floberg's testimony that Rancipher was conclusively the author of six of them and could not be ruled out on any of the others could only serve to undermine this defense.

To show prejudice, Streitler need only show a reasonable probability the outcome would have been different without counsel's mistake. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984)). Without Floberg's incriminating testimony, there is a reasonable probability the jury would have believed Rancipher and concluded he did not write the fraudulent refund slips.

b. The Conflict That Arises When an Attorney Argues a Member of Her Own Firm Was Ineffective Should Be Imputed to That Firm.

The State argues McCall v. District Court, 783 P.2d 1223 (Colo. 1989), has been superseded by court rule, as recognized in People v. Shari, 204 P.3d 453, 459 (Colo. 2009). This argument is technically correct, but ignores the facts and the reasoning of those two cases. Neither the Shari case, nor the Colorado Rules of Professional Conduct (RPCs) on which it relies, undermines the reasoning of McCall as it pertains to a public defender forced to argue her own agency has been ineffective.

Shari involved a public defense agency's prior representation of the State's witnesses. 204 P.3d at 455. It discussed the fact that reasonable screening procedures would be sufficient to protect the clients' confidentiality. Id. at 459. It noted that conflicts among public defenders are no longer "automatically" imputed. Id. at 459 n.7.

But the facts of both McCall and this case are quite different, and the conflict should be imputed. See Opening Brief of Appellant at 34 (discussing McCall, 783 P.2d at 1228). The conflict here does not arise from the duty of confidentiality, and thus screening is not an effective protection.

Arguing a member of her own agency was ineffective essentially placed Rancipher's attorney in the position of arguing against her own and the agency's interest. This sort of conflict cannot be resolved through screening procedures, and thus Shari and the RPCs permitting screening for government agencies should not apply.

The State also appears to misunderstand the need for Rancipher's attorney Linda King to testify regarding the handwriting expert. No generic expert could testify as to King's and Glasoe-Grant's reasons for listing and then deciding not to call the expert. To properly impeach Floberg, King needed to bring out that he testified for the State the vast majority of the time. But that would have opened the door to the fact that defense counsel initially hired him, and she would have been a necessary witness to why he was not called by the defense. 11RP 1099.

3. DEFENSE COUNSEL MADE CLEAR THE NEED FOR A FRYE¹ HEARING.

Rancipher's attorney argued to the trial court that the handwriting analysis did not meet the Frye standard. CP 83. The Frye standard applies to novel scientific evidence. State v. Gregory, 158 Wn.2d 759, 820, 148 P.3d 1201 (2006). Yet the State argues Rancipher did not argue handwriting analysis was novel scientific evidence. The Court should reject this argument.

¹ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Trial counsel also presented a recent law review article marshalling evidence handwriting analysis was not generally accepted within the scientific community. RP 1089. Yet the State argues no Frye hearing was necessary because Rancipher presented no experts or witnesses. This argument should be rejected because the purpose of a Frye hearing would be to marshal such evidence.

Moreover, the case the State, and the trial court, relied on, State v. Haislip, 77 Wn.2d 838, 467 P.2d 284 (1970), makes no mention of general acceptance in the relevant scientific community. It merely mentions the admission of expert testimony on handwriting analysis in that case. The admissibility of the handwriting analysis, under Frye or any other evidentiary standard, was not at issue. Trial counsel made clear there was a dispute over whether handwriting analysis meets the Frye standard. When such a dispute is clear, a hearing must be held. State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999). Thus, the court erred in failing to hold a Frye hearing.

4. CUMULATIVE ERROR REQUIRES REVERSAL.

Even if this Court finds the errors described above do not individually require reversal of Rancipher's conviction, when taken cumulatively, they deprived him of a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The State argues correctly that Rancipher is not entitled to a perfect trial. But the pervasive errors in this case were not

just a few minor imperfections. The errors described above created a disparaging environment toward defense counsel, presented propensity evidence based on the reason for Rancipher's firing, presented expert testimony of dubious scientific value, and hamstrung Rancipher's counsel in her attempts to challenge the expert testimony. It is unreasonable to expect jurors to be able to ignore this quantity of improper evidence and argument.

5. RANCIPHER'S MULTIPLE CONVICTIONS VIOLATE DOUBLE JEOPARDY.

a. Rancipher Did Not Invite the Double Jeopardy Error by Insisting the Prosecutor Adhere to the Court's Ruling.

A party invites an error when that party "sets up" the error or misleads the court, such as by requesting an erroneous jury instruction. State v. Henderson, 114 Wn.2d 867, 868, 870, 792 P.2d 514 (1990) (citing State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). A party may even invite an error if the party "materially contribute[s]" to the error. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). This court should reject the State's invited error argument because Rancipher never requested that he be charged with 90 counts of theft. Instead, he argued first that the entire series of events in this case was one unit of prosecution, and when that failed, he insisted that the prosecutor adhere to the court's ruling. That is not invited error.

Rancipher made two different arguments related to the aggregation of the theft counts in this case. First, when charged with 14 counts of first-degree theft, Rancipher argued all the thefts constituted one continuing unit of prosecution. CP 9-18. On that basis, he requested that 13 of the 14 counts be dismissed as violations of double jeopardy. Id. In this motion, Rancipher did not argue that every single refund slip should be a separate crime.

The trial court agreed the partial aggregation of counts based on the 28-day fiscal cycle of the Fred Meyer store was arbitrary. 2RP 24. However, instead of granting Rancipher's requested relief of dismissing 13 of the 14 counts, the court required the State to charge every refund slip amounting to a second-degree theft separately, and permitted it to aggregate all the third-degree thefts into one or charge them all separately as well. CP 48-49.

The State then amended the information to charge 45 counts of second-degree theft by combining the two slips for each date into one count per date. CP 50. Rancipher objected, not because he wanted the charges split up, but because this was in violation of the court's ruling. 3RP 5, 8-9. Counsel argued, "Your honor, with all due respect, it's not whether I'm happy with the way it's outlined. I think that regardless of whether – the position of either party, we need to follow the court's ruling." 3RP 8. Rancipher did not "set up" the double jeopardy error. Having lost the double

jeopardy motion, Rancipher merely insisted the State abide by the court's ruling.

b. Double Jeopardy Violations Cannot Be Invited Error.

The constitutional protections against double jeopardy are not easily waived. For example, Washington's Supreme Court recently held that even when the defendant has knowingly, intelligently, and voluntarily pled guilty by agreement to certain offenses, an appeal based on double jeopardy is not waived. State v. Knight, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008). The State is correct that the invited error doctrine has been applied even when erroneous jury instructions implicate a constitutional right. But double jeopardy is not a trial error like jury instructions. As the court noted in Knight, double jeopardy goes to the State's power to hale the defendant into court. Id. at 811. The Knight court held that, absent an explicit waiver of double jeopardy written into the plea agreement, the protections of double jeopardy were not waived by a guilty plea to the multiple offenses. Id. at 813. Similarly, here there was no explicit waiver of the right to argue the multiple offenses violated double jeopardy, and this Court should not find invited error.

c. Neither the Jury Instructions Nor the Prosecutor's Argument Sufficiently Protected Rancipher from Being Convicted Twice for the Same Offense.

First, the State argues this Court should follow State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993), rather than State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008), and State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007). But even under Ellis, these instructions were insufficient. The written instructions in Ellis contained a unanimity instruction requiring unanimity as to the act underlying each count that was absent in this case. Ellis, 71 Wn. App. at 402. The Ellis court did not hold that the “a separate crime is charged in each count” instruction was alone sufficient to protect against double jeopardy. It found the instructions were sufficient when viewed as a whole. Id. at 406. Without even the “marginal” unanimity instruction given in Ellis, it is far from clear that the jury understood the need to find a separate act underlying each charge when identical to-convict instructions were given. Id. at 407.

The State also argues the prosecutor's closing argument was sufficient to protect against a double jeopardy violation. While that may be true in the unanimity context, as the Ellis court pointed out, the double jeopardy violation Rancipher asserts in this case is distinct from a unanimity problem. Id. at 404. More importantly, the prosecutor's closing argument does not accompany the jury into the jury room. During

its deliberations, the jury had to sort through the exhibit evidence, jury instructions, and verdict forms for 90 counts of theft. As it sifted and compared, it is too much to expect that the jury would specifically recall the prosecutor's argument and rely on it in interpreting the written jury instructions, which failed to adequately protect against double jeopardy.

B. CONCLUSION

For the foregoing reasons and the reasons contained in the Opening Brief of Appellant, Rancipher respectfully requests this Court reverse his convictions.

DATED this 8th day of September, 2009.

Respectfully submitted,

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State V. Eugene Rancipher

No. 38244-0-II

Certificate of Service by Mail

On September 08, 2009, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Kathleen Proctor
Pierce County Prosecuting Atty Ofc
930 Tacoma Ave S Rm 946
Tacoma WA 98402-2171

Eugene Michael Rancipher 322319
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PO Box 37
Littlerock, WA 98556

Containing a copy of the reply brief of appellant, re Eugene Rancipher
Cause No. 38244-0-II, in the Court of Appeals, Division II, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch
Done in Seattle, Washington

9-8-09
Date

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