

No. 45277-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Raul Castro,

Appellant.

Clark County Superior Court Cause No. 12-1-00287-8

The Honorable Judge Daniel Stahnke

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Castro's theft conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
2. Mr. Castro's theft conviction violated his state constitutional right to notice of the charges against him, under Wash. Const. art. I, §§ 3 and 22.
3. The Information was deficient because it failed to allege the essential elements of first-degree theft.

ISSUE 1: A criminal Information must set forth all of the essential elements of an offense. The Information charged Mr. first degree theft, but did not allege that he stole multiple times as part of a common scheme or plan. Did the Information omit an essential element of first-degree theft in violation of Mr. Castro's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. art. I, § 22?

4. The prosecutor committed misconduct that was flagrant and ill-intentioned.
5. The prosecutor improperly "testified" to "facts" outside the record.
6. The prosecutor improperly bolstered the credibility of a witness with reference to "facts" outside the record.
7. The prosecutor improperly argued that Vann would suffer professional repercussions if she allowed an intoxicated person to sign a confession.
8. The prosecutor misstated the law regarding the jury's power to acquit.
9. The prosecutor improperly disparaged the role of defense counsel.

ISSUE 2: A prosecutor commits misconduct by "testifying" to "facts" not in evidence. Here, the prosecutor argued that a witness would suffer professional repercussions if she allowed an intoxicated person to sign a confession. Did the prosecutor improperly bolster Vann's credibility with "facts" outside the record?

ISSUE 3: A prosecutor may not misstate the law during closing argument. Here, the prosecutor misled jurors about their power to acquit in the face of sufficient evidence. Did the prosecutor commit reversible misconduct by misstating the law and misleading the jury during closing arguments?

ISSUE 4: A prosecutor commits misconduct by disparaging the role of defense counsel. Here, the prosecutor told jurors that defense counsel would “get into semantics,” in order to “try to get you to chase them down the rabbit hole.” Did prosecutor’s disparagement of defense counsel violate Mr. Castro’s Fourteenth Amendment right to a fair trial?

10. The sentencing court failed to properly determine Mr. Castro’s offender score.
11. The sentencing court erred by failing to determine whether or not the theft and UIBC convictions comprised the same criminal conduct.
12. The sentencing judge should have scored Mr. Castro’s convictions as the same criminal conduct.
13. The sentencing court erred by adopting Finding of Fact No. 2.1 (Judgment and Sentence)
14. The sentencing court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

ISSUE 2: At sentencing, multiple offenses score as one point if they comprise the same criminal conduct. Here, the theft and the UIBC involved a continuing course of conduct against the same victim, committed with the same criminal intent. Did the trial court erroneously score each charge separately when calculating Mr. Castro’s offender score?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Raul Castro came upon hard times and sought to return to his home in the Philippines. RP 81, 88-89. He was in an accident at his work and suffered from pain and memory loss, among other problems. RP 178-179. He took medications for pain and for depression, but these often left him dizzy, disoriented, and confused. RP 180-181.

In late December of 2011 and early January of 2012, he wrote and deposited two checks for \$5000 each into his account at the TwinStar Credit Union. RP 104, 188-190, 200. He used an ATM to make the deposits, and the entire amount was made available to him for withdrawal. RP 110-112, 127. He withdrew all of the money over the next days. RP 80-82, 108, 144. The checks were not honored. They were written on a closed account. Ex. 1, 2, 4; RP 112-114.

Mr. Castro gave a statement to Detective Chavers, in which he admitted the deposits and withdrawals. He told the officer that he was hoping to get enough money to return home. RP 81.

The state charged Mr. Castro with Theft in the First Degree, alleging that he

[d]id wrongfully obtain or exert unauthorized control over the property or services of another, to-wit: United States currency, having a value exceeding \$5000.00, with intent to deprive Twin

Star Credit Union, the true owner thereof, of such property or services...
CP 8.

The state also charged two counts of Unlawful Issuance of Bank Checks (UIBC), one for each check. CP 8-9.

The state offered Mr. Castro a diversion agreement and he met with Sheila Vann to review the plan. RP 149-151. According to Vann, during that meeting, she asked him to confirm he'd made the statement to the officer. RP 151-152. He signed a confession under oath. RP 156-157, 158.

Mr. Castrol testified in his own defense. He did not deny that he had written the checks and made the withdrawals, but he did describe the medications he took at the time and their impact on him. RP 178-203. He did not recall his meeting with the detective or Ms. Vann. RP 184-185.

During his closing, the prosecutor made these arguments, all without defense objection:

Defense is going to get into semantics. They're going to try to get you to chase them down the rabbit hole. I would ask that you remain focused on the fact that that bank is out \$10,000.00, and that man is responsible for it. RP 252.

Sheila Vann is -- works for the county. Her job is on the line. She had someone write a confession; they better know what's going on, they better understand it, or she can be in trouble if she has an

intoxicated person or someone who doesn't understand signing a written confession under penalty of perjury. RP 254.

If he's out of it, if he's on drugs, she can't let him sign this. She's a probation officer. She probably had a lot of clients try to tell her they weren't intoxicated, and she could tell if they were. RP 262.

You cannot say "not guilty" because you feel bad for him. That's not in our system of justice, and that's not in these instructions you all agreed to -- to follow. RP 257.

The jury convicted Mr. Castro on all three counts. RP 280-282.

At sentencing, Mr. Castro argued that the UIBC counts constituted the same criminal conduct as the theft count. He also argued that one of the UIBC counts merged with the theft. RP 294-315. The trial judge ruled that the offenses did not merge. RP 315. The judge did not address the same criminal conduct issue. RP 315.

After sentencing, Mr. Castro timely appealed. CP 56.

ARGUMENT

I. MR. CASTRO'S THEFT CONVICTION WAS ENTERED IN VIOLATION OF HIS RIGHT TO ADEQUATE NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND ART. I, §§ 3 AND 22.

A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such a challenge

may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 888. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.* at 188. If the Information is deficient, prejudice is presumed and reversal is required. *Id.* at 188.

B. The Amended Information was insufficient because it omitted the essential element that Mr. Castro had committed multiple thefts as part of a common scheme or plan.

A criminal defendant has a constitutional right to be fully informed of the charge s/he faces. This right stems from the Fifth, Sixth, and Fourteenth Amendments to the federal constitution, as well as art. I, §§ 3 and 22 of the Washington State Constitution. The right to constitutionally-sufficient Information is one that must be “zealously guarded.” *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

All of the essential elements of a crime must be alleged in the charging document. *Rivas*, 168 Wn. App. at 887. An Information that omits an essential element fails to charge a crime. *Id.*

To convict for first-degree theft, the state must prove theft of property or services exceeding \$5,000 in value. RCW 9A.56.030(a)(1). The value of property stolen on multiple occasions can be aggregated in

order to reach the \$5,000 amount, but only if the acts are all part of a common scheme or plan:

...whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

RCW 9A.56.010(21)(c); *see also* WPIC 79.20 Notes on Use.

When the state seeks to aggregate multiple transactions to reach the minimum dollar amount for an offense, it must allege the essential element of a common scheme or plan in the Information. *Rivas*, 168 Wn. App. at 890-91.

The state did not charge Mr. Castro with committing multiple acts pursuant to a common scheme or plan. CP 8. No fair construction of the charging document reveals an allegation of a common scheme or plan. CP 8.

Nonetheless, the state sought to convict Mr. Castro of first-degree theft based on the aggregation of numerous transactions, each of which resulted in a loss far less than \$5,000. Ex. 4. The court instructed the jury that it could aggregate the amounts if it found that the acts were part of a common scheme or plan. CP 29.

The Information charging Mr. Castro with theft was insufficient because it did not allege multiple acts making up a common scheme or plan. *Rivas*, 168 Wn. App. at 890-91. His theft conviction must be reversed. *Id.*

II. PROSECUTORIAL MISCONDUCT DENIED MR. CASTRO A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). If not objected to, prosecutorial misconduct requires reversal if it is flagrant and ill-intentioned. *Id.*

Furthermore, an appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

B. The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct during closing argument.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct

warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

1. The prosecutor committed misconduct by bolstering the credibility of a state witness with “facts” not in evidence.

A prosecutor commits misconduct by “testifying” during closing argument to “facts” not in evidence. *Glasmann*, 175 Wn.2d at 705. A prosecutor may not make arguments bolstering the credibility of a witness even if the evidence supports such an argument. *Jones*, 144 Wn. App. at 293; U.S. Const. Amends. VI, XIV; art. I, § 22.

Accordingly, a prosecutor commits misconduct by attempting to bolster a witness's credibility with prejudicial “facts” not in evidence.

Jones, 144 Wn. App. at 292-94. In *Jones*, the prosecutor argued that the law enforcement witnesses were credible because they would suffer professional repercussions if they relied on an untrustworthy informant. *Id.* That argument required reversal because it impermissibly bolstered witness credibility with “facts” not in evidence. *Id.*

Similarly, at Mr. Castro’s trial, the prosecutor argued that the county employee who took Mr. Castro’s statement would suffer professional repercussions if she allowed him to sign it while he was intoxicated:

Sheila Vann is -- works for the county. Her job is on the line. She had someone write a confession; they better know what’s going on, they better understand it, or she can be in trouble if she has an intoxicated person or someone who doesn’t understand signing a written confession under penalty of perjury.
RP 254.

If he’s out of it, if he’s on drugs, she can’t let him sign this. She’s a probation officer. She probably had a lot of clients try to tell her they weren’t intoxicated, and she could tell if they were.
RP 262.

The prosecutor’s argument encouraged the jury to find Vann more credible than Mr. Castro because of her status as a county probation officer. There was no testimony regarding the consequences Vann would face if she allowed an intoxicated client to sign a confession. The prosecutor committed misconduct by improperly bolstering the credibility of state witness with “facts” not in evidence. *State v. Johnson*, 158 Wn.

App. 677, 686, 243 P.3d 936 (2010).

The prosecutor's improper argument prejudiced Mr. Castro. Mr. Castro and Vann's relative credibility was vital to the defense. The insertion of prejudicial "facts" not in evidence invited the jury to find Vann more credible based on her status as a county employee. There is a substantial likelihood that the prosecutor's misconduct affected the jury. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by attempting to bolster the credibility of the state's witnesses with "facts" not in evidence. *Johnson*, 158 Wn. App. at 686. Mr. Castro's convictions must be reversed. *Id.*

2. The prosecutor committed misconduct by misstating the law regarding the jury's power to acquit even when the evidence supports conviction.

A prosecutor commits misconduct by misstating the law in argument. *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal even if it is against the evidence:

...the jury's right to acquit for conscience's sake lives on. And jury discretion—the ability to make the law make sense, to temper the law's iron logic with fairness, moderation, and mercy—endures and thrives.

State v. Elmore, 155 Wn.2d 758, 770, 123 P.3d 72 (2005) (quoting William L. Dwyer, *In the Hands of the People* 62-63 (2002)); *See also*, *Hartigan v. Washington Territory*, 1 Wash.Terr. 447, 449 (1874) (“[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy”)¹; *State v. Salazar*, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (a trial court may consider the prospects for jury nullification when deciding whether to admit evidence)

Here, the prosecutor argued that the jury did not have the option of acquitting Mr. Castro based on moderation or mercy:

You cannot say “not guilty” because you feel bad for him. That’s not in our system of justice, and that’s not in these instructions you all agreed to follow.
RP 257.

The prosecutor’s argument misstated the law. In fact, the justice system does allow for a jury to acquit based on sympathy. *Elmore*, 155 Wn.2d at 770.

Mr. Castro was prejudiced by the prosecutor’s misstatement of the law. Mr. Castro signed a confession to the charged offenses. A substantial part of the defense theory was that the jury should acquit him anyway because of the circumstances of the confession and of his life at

¹ This is true in the federal system as well. *See, e.g., United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969).

the time of the transactions. There is a substantial likelihood that the prosecutor's improper argument affected the jury. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by misstating the law in closing argument. *Evans*, 163 Wn. App. at 643. Mr. Castro's convictions must be reversed. *Id.*

3. The prosecutor committed misconduct by disparaging the role of defense counsel.

A prosecutor commits misconduct by disparaging the role of defense counsel. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002). Such an argument improperly attempts to "draw a cloak of righteousness" around the state's case. *Id.*

The prosecutor at Mr. Castro's trial disparaged the role of defense counsel in closing by arguing that defense counsel's role is to distract the jury:

Now, Defense is going to get up here, they're going to try to point out insufficiencies or problems with the state's case, and that's what they do...
Defense is going to get into semantics. They're going to try to get you to chase them down the rabbit hole.
RP 251-52.

Rather than focusing on the facts of the case, the prosecutor's argument attempted to "draw the cloak of righteousness" around the state's case by dismissing Mr. Castro's arguments as "semantics."

Gonzales, 111 Wn. App. at 282. There is a substantial likelihood that the prosecutor’s improper argument affected the jury. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by disparaging the role of defense counsel in closing.

Gonzales, 111 Wn. App. at 282. Mr. Castro’s convictions must be reversed. *Glasmann*, 175 Wn.2d at 704.

C. The cumulative effect of the prosecutor’s misconduct requires reversal of Mr. Castro’s convictions.

The cumulative effect of repeated instances prosecutorial misconduct can be “so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

At Mr. Castro’s trial, the prosecutor committed numerous acts of misconduct by attempting to bolster the credibility of state witnesses with “facts” not in evidence, misstating the law, and disparaging the role of defense counsel.

Each of these improper arguments – whether taken individually or in the aggregate – requires reversal of Mr. Castro’s convictions. *Id.*

**III. THE COURT ERRED BY SCORING EACH OF MR. CASTRO’S
CONVICTIONS SEPARATELY FOR SENTENCING PURPOSES.**

A. Standard of Review.

Sentencing decisions are reviewed for abuse of discretion. *State v. Williams*, 176 Wn. App. 138, 141, 307 P.3d 819 (2013) (Williams I). A court abuses its discretion if a decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.* A court’s failure to exercise discretion is itself an abuse of discretion. *Brunson v. Pierce Cnty.*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009).

B. Mr. Castro’s convictions for theft and unlawful issuance of a bank check comprised the same criminal conduct and should have been scored as one point.

A sentencing court must determine the defendant’s offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

In determining whether multiple offenses require the same criminal intent, the sentencing court ““should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next....”” *State v. Garza-Villarreal*, 123 Wn.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (Williams II); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

The sentencing court scored each of Mr. Castro’s offenses separately. CP 45.

Each of Mr. Castro’s convictions involved the same intent and victim. RCW 9.94A.589(1)(a). The prosecution’s theory was that Mr. Castro wrote the checks with the intent to steal the money. RP 264. A single bank was the victim of each of the transactions. Ex. 4.

The withdrawals of the money from the bank did not all occur at the same time and place the checks were written, but the transactions formed a continuing course of conduct with a single, overarching objective. *Williams II*, 135 Wn.2d at 368. The theft could not have occurred absent the deposit of the checks. This continuing course of

conduct required a finding that the crimes comprised the same criminal conduct. *Id.*

Additionally, the state's theory for the theft charge was that the withdrawals made up a "common scheme or plan" in order to aggregate the amounts to exceed \$5,000. Though each of the transactions did not occur at the same time and place, they nonetheless comprised the same criminal conduct. *Williams II*, 135 Wn.2d at 368.

Mr. Castro brought up the same criminal conduct issue at sentencing. However, the court did not consider whether the convictions constituted the same criminal conduct before calculating his offender score. RP 292-321.² This failure to exercise discretion was, itself, an abuse of discretion. *Brunson*, 149 Wn. App. at 861.

The court abused its discretion by scoring Mr. Castro's theft and unlawful issuance of a bank check convictions separately. RCW 9.94A.589(1)(a); *Brunson*, 149 Wn. App. at 861. Mr. Castro's sentence must be vacated and the case remanded for resentencing. *Brunson*, 149 Wn. App. at 861.

² The court found that the unlawful issuance of a bank check convictions did not "merge" with the theft conviction for double jeopardy purposes. However, it but does not appear that the court ruled on the issue of whether the convictions constituted the same criminal conduct. RP 315.

CONCLUSION

The court denied Mr. Castro’s constitutional right to notice by entering a theft conviction based on a common scheme or plan when that element was not charged in the Information. The prosecutor committed flagrant and ill-intentioned misconduct by bolstering the credibility of state witnesses with “facts” not in evidence, misstating the law, and disparaging the role of defense counsel. Mr. Castro’s convictions must be reversed.

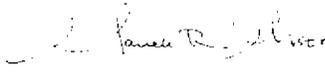
In the alternative, the court abused its discretion by scoring each of Mr. Castro’s convictions separately for sentencing purposes. Mr. Castro’s case must be remanded for resentencing.

Respectfully submitted on January 29, 2014,

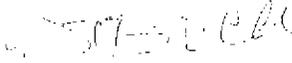
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CERTIFICATE OF SERVICE

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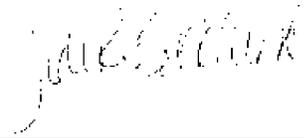
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 29, 2014.



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BACKLUND & MISTRY

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