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Division II
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No. 50888-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

YVETTE YAMAUCHI,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

In a burglary and theft prosecution based upon circumstantial evidence where identity was the only contested issue, the prosecutor in closing argument, over the defendant's objections and in the absence of any evidence, stated as fact that the defendant was five feet tall. This was prejudicial, as one of the only ways to determine the identity of the perpetrator was to compare the person's height with a security stanchion observed on a surveillance video that was approximately five feet tall.

Ms. Yamauchi is entitled to reversal of her convictions for prosecutorial misconduct.

B. ASSIGNMENT OF ERROR

The prosecutor's arguing facts that were not admitted into evidence violated Ms. Yamauchi's constitutionally protected rights to due process and a fair trial.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under the Due Process Clauses of the Washington and United States Constitutions, a defendant is guaranteed the right to a fair trial. Prosecutorial misconduct in closing argument, which prejudices the defendant, violates that right to a fair trial and requires reversal of the

convictions. Over Ms. Yamauchi's objection, the prosecutor argued facts not admitted into evidence. Was there a substantial likelihood that this misconduct affected the jury's verdict, thus requiring reversal of Ms. Yamauchi's convictions?

D. STATEMENT OF THE CASE

On September 20, 2015, at approximately 2:00 am, a person clad all in black entered the closed Burlington Coat Factory in Vancouver, turned off the alarm, and turned on the lights. RP 181-82, 274. The individual went into the room housing the safe containing the previous night's proceeds and took approximately \$20,000. RP 155-56, 162-64. The night this event occurred, a Sunday, is the day with the largest amount of cash in the safe. RP 165. Video cameras inside the store captured the event but the video failed to disclose the identity of the person who took the money. RP 166. One of the investigating police officers noted the security stanchions at the entry door shown in the video were approximately five feet tall. RP 333.

Due to the nature of the entry to the store including the use of codes to turn off the alarm, the police investigation narrowed to current and previous employees who possessed keys to the store and knowledge of the alarm codes: the store manager and assistant

managers. RP 139, 249-50, 333-34. One of these people was Yvette Yamauchi. RP 160-61. Ms. Yamauchi had been hired as an assistant manager in May 2015. RP 158. Ms. Yamauchi worked at the store for approximately three to four weeks when she left on medical leave. RP 159. When she was hired, Ms. Yamauchi was given a universal key to the store as well as the alarm access codes. RP 160-61, 336.

Ms. Yamauchi never returned to her employment and was terminated in August 2015. RP 328. Unsuccessful attempts were made by store management to obtain return of the store keys from Ms. Yamauchi. RP 160.

Based upon circumstantial evidence, Ms. Yamauchi was charged with one count of second degree burglary and one count of first degree theft. CP 3. During the trial there was no evidence presented or testimony given regarding Ms. Yamauchi's height. Nevertheless, over Ms. Yamauchi's objections, the prosecutor argued during his closing:

It was an inside job and that left a very, very small group of potential suspects. And only one of those suspects kicks [sic] all those boxes. The Defendant. Same height – only five feet. Same as the burglar.

...

We have one of very few people – a handful of people with a manager's code – the Defendant. One person in the store is exactly five feet tall – The Defendant.

RP 476, 485. The initial objection was sustained by the trial court; the second objection was overruled. RP 476-77, 485.

Ms. Yamauchi was subsequently found guilty as charged by the jury. CP 34-35.¹

E. ARGUMENT

The prosecutor's misconduct during closing argument was prejudicial thus, reversal of Ms. Yamauchi's convictions is required.

1. *Prosecutorial misconduct violates a defendant's constitutionally protected right to a fair trial.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a “duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). A “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his

¹ The Information also alleged the aggravating factor that the offense was a major economic offense, which the jury also found. CP 3, 36. The trial court refused to impose an exceptional sentence, opting instead for a standard range sentence. CP 44; RP 547.

public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011), *citing State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor’s duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence,” appellate courts must exercise care to insure that prosecutorial comments have not unfairly “exploited the Government’s prestige in the eyes of the jury.” *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or

her special obligations as the representative of a sovereign whose interest “is not that it shall win a case, but that justice shall be done,” his or her improper suggestions “are apt to carry much weight against the accused when they should properly carry none.” *Berger*, 295 U.S. at 88.

To establish that a new trial is required for prosecutorial misconduct during closing argument, the defendant must prove the prosecutor’s remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Since she timely objected to the misconduct, Ms. Yamauchi was not required to request a curative instruction. *Allen*, 182 Wn.2d at 375; *State v. Classen*, 143 Wn.App. 45, 64, 176 P.3d 582 (2008).

2. *The prosecutor improperly argued facts that were not admitted into evidence.*

It is improper for a prosecutor to argue to the jury facts that were not admitted as evidence during the trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704-05, 286 P.3d 673 (2012); *Thorgerson*, 172 Wn.2d at 443. The “long-standing rule” is that “consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant

may have been prejudiced.” *State v. Pete*, 152 Wn.2d 546, 555 n. 4, 98 P.3d 803 (2004), quoting *State v. Rinkes*, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted).

The prosecutor’s argument that Ms. Yamauchi was five feet tall, the precise height of the security stanchion in the surveillance video, was improper in light of the absence of any evidence regarding her height. This constituted misconduct by the prosecutor.

It may be argued that the jury could observe Ms. Yamauchi’s height in court. This is improper and is not evidence presented to the jury that it can consider. *See e.g., United States v. Schuler*, 813 F.2d 978, 980-81 (9th Cir., 1987) (prosecutor commenting during closing argument about defendant’s demeanor in courtroom during trial constituted misconduct as violative of the right to due process and the right to a fair trial). *Accord State v. Barry*, 183 Wn.2d 297, 305 n.4, 352 P.3d 161 (2015).

3. *There is a substantial likelihood that the misconduct affected the jury’s verdict.*

Since Ms. Yamauchi objected to the misconduct here, she need only show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict. *Allen*, 182 Wn.2d at 375; *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

“[D]eciding whether a prosecuting attorney commit[ed] prejudicial misconduct ‘is not a matter of whether there is sufficient evidence to justify upholding the verdicts.’” *Allen*, 182 Wn.2d at 376, quoting *Glasmann*, 175 Wn.2d at 711. “Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury’s verdict.” *Glasmann*, 175 Wn.2d at 711. “The focus must be on the misconduct and its impact, not on the evidence that was properly admitted.” *Id.*

Here, there was a substantial likelihood the misconduct affected the jury’s verdict. The State lacked any physical evidence to support the prosecutor’s argument. The video failed to disclose the identity of the person and was even vague as to the gender of the person. By claiming Ms. Yamauchi was the same height as the security stanchion in the surveillance video, the prosecutor was claiming the video proved Ms. Yamauchi was the person in the video, *ergo* Ms. Yamauchi was guilty of the charged offenses. Thus, there was a substantial likelihood the misconduct affected the jury’s verdict.

The prosecutor’s misconduct rendered Ms. Yamauchi’s trial unfair. In light of the nature of the prosecutor’s argument, there was a substantial likelihood the misconduct affected the jury’s verdict. This

Court should reverse Ms. Yamauchi's convictions and remand for a new trial.

F. CONCLUSION

For the reasons stated, Ms. Yamauchi asks this Court to reverse her convictions and remand for a new trial.

DATED this 14th day of March 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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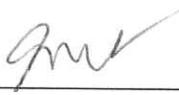
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