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No. 52629-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN SUTLEY RHOADS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

- 1. The State’s explanation of the prosecutor’s misconduct in closing argument is misleading. The State also offers no persuasive argument why the prosecutor’s misrepresentations were not prejudicial to Mr. Sutley Rhoads. Because the prosecutor’s misconduct in closing argument was prejudicial, this Court should reverse.**

The prosecutor committed misconduct when he argued in closing that Mr. Sutley Rhoads eluded police for nine minutes, when the evidence presented at trial showed that the pursuit likely lasted less than a minute. *See* RP 315. This misconduct violated Mr. Sutley Rhoads’ right to a fair trial and impacted the jury verdict, requiring reversal. *See State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *see also In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012).

The State argues the prosecutor in this case did not commit misconduct by misrepresenting facts in closing argument because “the prosecutor properly presented key facts to the jury with the support of witness testimony.” Brief of Respondent at 9. Specifically, the State argues that the prosecutor’s erroneous assertion that Mr. Sutley Rhoads eluded Deputy Brett Campbell for nine minutes, *see* RP 315, was merely a description of the length of the “stop” in its entirety—from the moment Deputy Campbell noticed a speeding car to the time he read Mr. Sutley

Rhoads his *Miranda* rights. *See* Brief of Respondent at 9. The State claims this was consistent with Deputy Campbell's testimony and thus does not misconstrue the evidence. *See id.* The State's argument does not square with the record and is misleading in itself.

The evidence presented at trial indicated that the period of alleged *eluding*—from when Deputy Campbell turned on his emergency lights to when Mr. Sutley Rhoads came to a stop—likely lasted for less than a minute, and certainly lasted significantly less time than nine minutes.¹ *See* RP 321–22. In spite of this, the prosecutor made the following assertions in closing argument:

We know when this stop happened. It started at 9:59 and ended at 10:08. It was nine minutes. We are not talking ten seconds. We are not talking 30 seconds. We are talking *nine minutes of driving* through Thurston County, running stop signs, doubling the speed limit, driving in other lanes, driving off the roadway. That's what we are talking about, actions that don't belong on the streets.

RP 315 (emphasis added).

¹ Deputy Campbell testified that he did not turn his emergency lights on until he turned left onto Leitner Road from 183rd Avenue SW in Rochester in pursuit of Mr. Sutley Rhoads. RP 158–61, 175. Deputy Campbell testified he then followed Mr. Sutley Rhoads by turning right onto Danby. RP 164. Deputy Campbell further testified he drove 70 miles an hour on Leitner, accelerated to 85 miles on Danby, and eventually decelerated to 60 miles per hour and then 25 miles an hour before coming to a stop behind Mr. Sutley Rhoads in the 18200 block of Danby. RP 161, 164–67. Accordingly, Deputy Campbell was traveling in excess of 60 miles per hour for most of period Mr. Sutley Rhoads was allegedly eluding. *See id.* This Court may take judicial notice that, based on Deputy Campbell's testimony, the distance he drove during the period of alleged eluding was approximately 1.2 miles or less. *See* ER 201; *see also* Supp. CP ____ (Exhibit 1, attached to this brief as Appendix A) (map of Rochester).

When the defense counsel pointed out in his closing argument that this statement of the facts was not supported by the evidence presented at trial, *see* RP 321–22, the prosecutor acknowledged in rebuttal:

The defense is pointing to the time frame. The officer never said the pursuit lasted nine minutes. He said he flipped on his radar detector, nine minutes later, he read him his *Miranda* warnings. *A lot of stuff happened in between, made the, turn caught up, chased him down the streets.* Even when he got there he didn't read him his *Miranda* warnings until [Officer] Shoenberg was there, because then he had him come back to him for officer safety reasons.

RP 327 (emphasis added). In doing so, the prosecutor attempted to walk back his invention of a nine-minute pursuit. However, he did not admit that his previous statement was incorrect, but instead implied that the “stuff” that “happened in between” the nine-minute timeframe reported by Deputy Campbell was primarily related to the alleged eluding, *i.e.*, “catching up” to Mr. Sutley Rhoads and “chasing” him down. *See id.* At no point in rebuttal did the prosecutor explicitly correct himself, although he had an ethical obligation to do so. *See* RPC 3.3(a)(1) (“A lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”)

On appeal, the State asserts that the prosecutor’s presentation of the facts “is supported by the witness testimony in the record” because “the prosecutor referred to this time frame as *the stop*, which lasted nine minutes.” Brief of Respondent at 9 (emphasis added). This emphasis on

the prosecutor's use of the word "stop" is misleading, because Deputy Campbell and the prosecutor attached different meanings to the word. In response to the prosecutor's question about the timing of the "beginning of the stop,"² Deputy Campbell testified that the time, as reflected in his narrative report, was 9:59 pm. RP 156. The narrative report, which was not submitted as an exhibit and thus was not available to the jury, indicates that 9:59 pm was when Deputy Campbell first noticed a speeding vehicle on 183rd Avenue SW.³ CP 2; Supp. CP ____ (Sub. No. 31) (exhibit list); *see also* RP 156–57. Deputy Campbell's report and testimony indicate he read Mr. Sutley Rhoads his *Miranda* rights at 10:08 pm, nine minutes later. CP 3; RP 207.

The prosecutor, on the other hand, used the word "stop" in his closing argument to describe the period of alleged eluding. *See* RP 315. The prosecutor argued that the "stop" was "nine minutes of driving through Thurston County, running stop signs, doubling the speed limit, driving in other lanes, driving off the roadway." *See id.* However, unlike the jury, the prosecutor had access to Deputy Campbell's narrative report. *See* CP 2–3. And, as evidenced by his rebuttal, the prosecutor understood

² It is significant that the prosecutor, not Deputy Campbell, used the phrase "beginning of the stop." RP 156.

³ Deputy Campbell testified that he incorrectly transcribed the time in his report as "219 hours," but that he had intended to write "2159 hours," or 9:59 pm. *See* RP 156–57; CP 2.

there were nine minutes between when Deputy Campbell first noticed a speeding vehicle and when he read Mr. Sutley Rhoads his rights—*not* a nine minute period of eluding. RP 327. Accordingly, the prosecutor’s argument that the alleged eluding included “nine minutes of driving” misrepresented the evidence. *See* RP 315. This was misconduct. *See, e.g., State v. O’Neal*, 126 Wn. App. 395, 421, 109 P.3d 429 (2005) (“A prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence.”).

The State argues on appeal that the prosecutor “clarified” his statement in rebuttal, thus resolving any potential for prejudice. *See* Brief of Respondent at 11. But this was not a clarification. In closing, the prosecutor initially said that there was “nine minutes of driving,” and in rebuttal controverted this statement in a manner so as to not draw attention to the mischaracterization. *Compare* RP 315 *with* RP 327. At no point did the prosecutor acknowledge that he misspoke or misrepresented the evidence. *See* RP 327. Accordingly, this “clarification” did not, as the State suggests, cure the prosecutor’s misstatement of the evidence. *See* Brief of Respondent at 10–11. Further, whether there could be any cure for the prosecutor’s statements is speculative at best, as “[t]his is one of those cases of prosecutorial misconduct in which ‘[t]he bell once rung

cannot be unrun.” See *State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991).

The State does not attempt to explain how the prosecutor’s misstatements are not prejudicial to Mr. Sutley Rhoads. See Brief of Respondent at 10–11. Instead, the State merely argues that defense counsel “incorporated arguments regarding the duration of the stop into his closing argument, clearly informing the jury of the issue and referring them to the facts from the defense perspective.” *Id.* Whether defense counsel can ever obviate prejudicial prosecutorial misconduct through closing argument alone is a dubious proposition. Regardless, the proof is in the pudding: here, the jury submitted several questions to the court indicating their decision turned on how long it took Mr. Sutley Rhoads to stop his vehicle. See CP 26–27. Absent the prosecutor’s unsupported assertions of fact in closing argument, the jury may have acquitted. Accordingly, this Court should reverse.

- 2. The prosecutor misstated the knowledge element by arguing the jury did not have to determine Mr. Sutley Rhoads’ subjective knowledge. This misstatement of the law was prejudicial to Mr. Sutley Rhoads because he based a significant part of his defense around his lack of actual knowledge of the police pursuit.**

For crimes requiring a *mens rea* of knowledge, “the jury must find *actual knowledge* but may make such a finding with circumstantial

evidence.” *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (emphasis added). To convict for the crime of attempting to elude, “the driver must not only know that he is being signaled to stop but must also know that the pursuing vehicle is a police vehicle.” *State v. Flora*, 160 Wn. App. 549, 555, 249 P.3d 188 (2011). Consistent with the subjective knowledge standard required by *Allen* and *Flora*, the defense argued that while Mr. Sutley Rhoads knew there was someone behind him, he did not immediately know he was being pulled over by a police car. RP 323–24. This theory was supported by Mr. Sutley Rhoads’ testimony. RP 229–35. However, in closing argument and rebuttal, the prosecutor repeatedly asserted the jury did not have to determine Mr. Sutley Rhoads’ actual knowledge and could instead convict based on an objective standard. *See* RP 308, 328.

Specifically, the prosecutor argued: “we don’t have to try to climb into someone else’s head and *say what does that person know* The law is not that you have to know his intent.” RP 308, 328 (emphasis added). But binding case law holds otherwise. The supreme court, as well as this Court, have held that the jury is required to find *actual* knowledge—that the jury must determine the defendant’s intent and in effect “say what does that person know.” *See Allen*, 182 Wn.2d at 374;

State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980); *see also Flora*, 160 Wn. App. at 555.

The State argues the prosecutor's argument simply parroted the language of the jury instruction on knowledge. Brief of Respondent at 15; *see also* CP 32 (Instruction No. 6). Further, the State implies that the jury instruction in question is constitutional as recognized in *Allen*. Brief of Respondent at 13. However, the *Allen* Court did not address the constitutionality of the jury instruction because the petitioner did not challenge it on appeal. *See* 182 Wn.2d at 369; *see also State v. Allen*, 178 Wn. App. 893, 899, 317 P.3d 494 (2014) (listing all the grounds for appeal). Appellate courts generally decide cases based only upon the issues raised by the parties. *See* RAP 12.1(a).

Although the *Allen* court acknowledged that the jury instructions reflected the language in the statute, it did not address the constitutionality of the instruction. *See* 182 Wn.2d at 372, 374. Further, the *Allen* court's holding makes clear that, regardless of the jury instruction, a prosecutor's argument that constructive knowledge is sufficient to convict is improper. *Id.* at 374. Additionally, to the extent the State relies on pre-*Allen* case law for the assertion that the jury knowledge instruction is constitutional, *Allen*'s holding calls into question the continued precedential value of those opinions. *See* Brief of Respondent at 14 (citing *State v. Leech*, 114

Wn.2d 700, 710, 790 P.2d 160 (1990), *State v. Johnson*, 61 Wn. App. 235, 240, 809 P.2d 764 (1991), *aff'd*, 119 Wn.2d 167, 829 P.2d 1082 (1992), and *State v. Bryant*, 89 Wn. App. 857, 872, 950 P.2d 1004 (1998)).

The State argues that, even if the prosecutor's statements regarding the element of knowledge were improper, they could have been obviated by a curative instruction. Brief of Respondent at 19. However, a curative instruction would not have assisted the jury, as their written instruction concerning the knowledge element was similarly flawed. *See* CP 32 (Instruction No. 6). As argued in Mr. Sutley Rhoads' opening brief, this instruction was misleading at best and an erroneous statement of law at worst. *See* Brief of Appellant at 14–16. The knowledge instruction permitted the jury to convict based on an objective standard, in violation of *Allen* and *Shipp*, and thus any attempt to verbally instruct the jury as to the actual knowledge standard would have been contradictory to their written instructions and thus not curative.

Finally, the State argues Mr. Sutley Rhoads was not prejudiced by the prosecutor's misstatements of law. Brief of Respondent at 16–20. The State relies on the unpublished decision *State v. Goodwin*, in which similar arguments made by the prosecutor was found to be misconduct but non-prejudicial. 2019 WL 1897667 at *2, 8 Wn. App. 2d 1053 (Apr. 29, 2019)

(unpublished)⁴; *see also* Brief of Respondent at 17. But *Goodwin*, in addition to not being binding on this Court, is also distinguishable. In *Goodwin*, Division One concluded that the prosecutor’s misstatements of the *mens rea* standard were not prejudicial in part because they were not repeated throughout closing. *Id.* at *2–3. Here, however, the prosecutor repeated his misstatement in both closing and rebuttal. *See* RP 308, 328. This case is more akin to *Allen*, in which there were “numerous instances” where the prosecutor misstated the knowledge standard. *See* 182 Wn.2d at 376.

The State maintains there is no prejudice because “the defense has not pointed to anything in the record indicating that the jury was affected by the prosecutor’s statements.” Brief of Respondent at 18. However, Mr. Sutley Rhoads need not show the jury was actually affected by the misconduct in order to prevail. Improper statements are prejudicial if there is “*a substantial likelihood* that the instances of misconduct affected the jury’s verdict.” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citations, alternations, and quotation marks omitted).

Here, a substantial likelihood exists that the prosecutor’s misstatements of the *mens rea* standard affected the verdict. Although the

⁴ Cited pursuant to GR 14.1.

State asserts there is “virtually no chance that the jury convicted Sutley-Rhoads based on only a reasonable person standard,” this is incorrect. Brief of Respondent at 19. Mr. Sutley Rhoads’ defense focused in significant part on his lack of actual knowledge that he was being signaled to stop by a police car. RP 234–35, 238–39, 323–26. The jury was required to focus on Mr. Sutley Rhoads’ actual, subjective knowledge, including his subjective intelligence, mental condition, and level of attentiveness. *See Shipp*, 93 Wn.2d at 514–516. However, the prosecutor repeatedly gave the jury permission to focus instead on whether Mr. Sutley Rhoads’ perception was the same as an objective “reasonable person.” *See* RP 308, 328. This was prejudicial. The Court should reverse.

B. CONCLUSION

This Court should reverse the conviction and remand for a new trial. In the alternative, this Court should accept the State's concession and order the trial court to strike the interest provision in the judgment and sentence. *See* Brief of Respondent at 20–21.

DATED this 11th day of October, 2019.

Respectfully submitted,

/s Jessica Wolfe

Jessica Wolfe – WSBA 52068
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Attorney for Appellant

APPENDIX A



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52629-8-II
v.)	
)	
JONATHAN SUTLEY-RHOADS,)	
)	
Appellant.)	

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