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Court of Appeals
Division II
State of Washington
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No. 52659-8-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

BRIEF OF APPELLANT

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A. INTRODUCTION

Jonathan Sutley Rhoads was arrested for attempting to elude a police officer after a brief pursuit down a rural road with limited safe places to pull over. The pursuit lasted less than a minute and Mr. Sutley Rhoads did not initially know he was being tailed by a police car.

At trial, the prosecutor erroneously stated in closing argument that the pursuit lasted “nine minutes long” and also misstated the law on the *mens rea* element. During deliberations, the jury expressed confusion about how quickly Mr. Sutley Rhoads was required to stop by law.

The prosecutor’s misconduct during closing argument violated Mr. Sutley Rhoads’ right to a fair trial. Because there is a substantial likelihood the misconduct affected the verdict, Mr. Sutley Rhoads is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

1. The prosecutor’s reference to facts not in evidence during closing argument violated Mr. Sutley Rhoads’ right to a fair trial pursuant to the Sixth and Fourteenth Amendments and article I, section 22.

2. The prosecutor’s misstatement of the *mens rea* element during closing argument violated Mr. Sutley Rhoads’ right to a fair trial pursuant to the Sixth and Fourteenth Amendments and article I, section 22.

3. The court below improperly imposed interest on Mr. Sutley Rhoads' legal financial obligations.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Improper and prejudicial remarks made during closing argument constitute prosecutorial misconduct in violation of a defendant's right to a fair trial. It is improper for a prosecutor to refer to facts not in evidence. It is also improper for a prosecutor to misstate the law. Here, the prosecutor erroneously described the pursuit as "nine minutes long" and also misstated the law on the *mens rea* standard for attempting to elude. The jury instructions did not cure the misstatement of law, and there was a substantial likelihood these remarks affected the verdict. Did the prosecutor's closing argument violate Mr. Sutley Rhoads' constitutional right to a fair trial?

2. Legal financial obligations excluding restitution do not accrue interest. The court below imposed interest on Mr. Sutley Rhoads' legal financial obligations "at the rate applicable to civil judgments." Was interest improperly imposed on Mr. Sutley Rhoads' legal financial obligations?

D. STATEMENT OF THE CASE

1. Mr. Sutley Rhoads is signaled to stop by a police vehicle and pulls over to the first safe location he sees.

Jonathan Sutley Rhoads was driving in southwest Thurston County on a rural country road in the late evening. RP 225, 228. It was pitch dark outside. RP 226. Mr. Sutley Rhoads, who was a volunteer firefighter, was driving a recently purchased car with some mechanical issues that made it difficult for him to stop suddenly. RP 226, 241, 248. His rear-view mirror had a device that prevented approaching headlights from reflecting too brightly. RP 226.

Mr. Sutley Rhoads sped up to pass a car that was driving under the speed limit. RP 225–26. That car sped up as he was trying to pass it. RP 228. After passing, Mr. Sutley Rhoads noticed another vehicle behind him approaching “at an outrageous speed.” RP 229. Mr. Sutley Rhoads sped up slightly as he needed to turn left, and was concerned that if the person behind him attempted to pass as he was turning, it would cause an accident. RP 229–30.

Mr. Sutley Rhoads turned left onto Leitner Road, which was approximately a half-mile long. RP 230, 320. About halfway down the road, he noticed that the speeding car had followed him. RP 230–31. Concerned that the car might rear-end him, Mr. Sutley Rhoads slowed

down enough to ensure the next intersection was clear, but did not stop at the stop sign. RP 233. He then turned right onto Danby Drive. RP 234.

As he was driving on Danby Drive, Mr. Sutley Rhoads noticed the car behind him had turned on emergency blue and red lights. RP 234. He was startled by this, as he was not sure the pursuing car was a police vehicle, and was worried it was someone impersonating an officer. RP 234. When the car turned on its siren, it surprised Mr. Sutley Rhoads and he temporarily hit the accelerator. RP 234.

Mr. Sutley Rhoads quickly realized he was being followed by a police car and looked for a safe place to pull over. RP 237. Danby Drive is marked by ditches and does not have a paved shoulder. RP 236. Although there were driveways along Danby, Mr. Sutley Rhoads did not want to pull onto anyone's private property, as there had been recent shootings in the area and he didn't feel it was safe. RP 237. He eventually pulled over onto the first safe location he saw, which was wide enough for his car and the police car to park without blocking the main road. RP 237–38.

The police car was driven by Deputy Brett Campbell and was not equipped with video or audio recording devices. RP 170. After pulling Mr. Sutley Rhoads over, Deputy Campbell waited for backup to arrive. RP 170. Several other deputies arrived, and Deputy Campbell arrested

Mr. Sutley Rhoads and read him his *Miranda* rights. RP 170–71, 216–19.

Mr. Sutley Rhoads informed Deputy Campbell he had received some traffic tickets in the past, and explained he did not stop right away as he was not sure it was a police car that was following him. RP 244–46. Mr. Sutley Rhoads was taken into custody and charged with one count of attempting to elude a pursuing police vehicle. CP 4.

2. The prosecutor mentions facts not in evidence and misstates the *mens rea* element in closing argument, and Mr. Sutley Rhoads is convicted of attempting to elude.

At trial, Deputy Campbell, other responding deputies, and Mr. Sutley Rhoads all testified. RP 149–282. During closing argument, the prosecutor stated that Mr. Sutley Rhoads had attempted to elude police for nine minutes. RP 315. The prosecution was apparently relying on Deputy Campbell’s incident report, which indicated a nine-minute time frame from the time he observed Mr. Sutley Rhoads allegedly speeding to when he read Mr. Sutley Rhoads his *Miranda* rights. *See* CP 2–3. However, this report was never entered into evidence, and, regardless, did not state that the alleged chase itself was nine minutes in duration. *See* CP 2–3; Supp. CP __ (Sub. No. 31). Further, none of the deputies testified the chase was nine minutes long.

Specifically, the prosecutor argued: “It was nine minutes. We are not talking about 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.” RP 315. Defense counsel countered that, given the distance of the alleged chase and Mr. Sutley Rhoads’ alleged speed, the entire pursuit took less than a minute. RP 321–22.

The jury received instructions that described the “knowledge” *mens rea* element in part as follows: “If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.” CP 32. During closing argument, the prosecutor described the *mens rea* element of knowledge to the jury as follows:

So willful is that knowing portion, and in this one, it tells you you are allowed to consider what would lead a reasonable person in a same situation to know. So we don’t have to try and climb into someone else’s head and say what does that person know. That would be impossible. What it does is says, hey, would a reasonable person know this?

RP 308. In rebuttal, the prosecutor again referred to the knowledge element:

The defense just talked about we have to know the intent of Mr. – the defendant, and I ask you to read this instruction, because it’s not in there. The law is not that you have to know his intent.

That's not the law. This is the law. We can't get inside of his mind.

RP 328.

After the jury began deliberations, it submitted a question to the court that read as follows: "What is the RCW interpretation of 'immediately stopping after being signaled by a police officer?'" RP 337; CP 26. The court responded, "The jury has been provided all the law that it will be given in the Court's instructions. Please reread the instructions and continue to deliberate." RP 339; CP 26. The jury subsequently submitted two additional questions to the court, one noting that Instruction No. 7, defining the crime of attempting to elude, did not include the word "immediately," whereas Instruction No. 9, the "to convict" instruction, did. The jury also asked "Does 'immediately' also mean safely?" RP 340; CP 27; *see also* CP 33–34. The court provided the same answer it had previously given. RP 341–42; CP 27.

The jury subsequently found Mr. Sutley Rhoads guilty of attempting to elude, and the court sentenced him to twenty days. RP 343; CP 36, 41. The court also imposed a \$500 victim assessment, with a provision that "[t]he financial obligations imposed in this judgment shall

bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 43, 45.

E. ARGUMENT

1. The prosecutor misrepresented key facts and the applicable legal standard in its closing argument, denying Mr. Sutley Rhoads his constitutional right to a fair trial.

The Sixth and Fourteenth Amendments and article I, section 22 guarantee the right to a fair trial. *See In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Improper and prejudicial remarks made during closing argument constitute prosecutorial misconduct that violate this right. *See State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

It is improper for a prosecutor to refer to facts not in evidence. *See State v. Russell*, 125 Wn.2d 24, 88, 882 P.2d 747 (1994). It is also improper for a prosecutor to misstate the law. *See Warren*, 165 Wn.2d at 28. 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, alterations, and quotation marks omitted).

Even if the defense does not object to the improper remarks at trial, the issue of misconduct is not waived if the remarks “could not have been neutralized by an admonition to the jury.” *Id.* (quoting *Russell*, 124

Wn.2d at 86). This Court does “not focus on the prosecutor’s subjective intent in committing misconduct, but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection.” *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015). “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a defendant from having a fair trial?” *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (citations, quotation marks, and alterations omitted).

Here, the prosecutor inaccurately described the alleged pursuit as “nine minutes long” and also misstated the law on the *mens rea* standard for attempting to elude. These remarks were both improper and prejudicial, as there is a substantial likelihood they affected the verdict. *See Thorgeron*, 172 Wn.2d at 443. Further, the remarks could not have been neutralized by a jury admonishment, and the prosecutor’s misstatement of the law was in fact exacerbated by a misleading jury instruction. *See id.* Because Mr. Sutley Rhoads was denied his right to a fair trial, this Court should reverse the judgment and remand for a new trial. *See State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 899 (2005).

a. The prosecutor improperly referred to facts not in evidence.

To prove that a defendant is guilty of attempting to elude, the State must prove they willfully failed or refused to immediately stop their car when signaled to do so. *See* RCW 46.61.024(1); *see also* CP 34 (“to convict” instruction). Here, the issue of whether Mr. Sutley Rhoads willfully failed to *immediately* stop was, as the prosecutor described it, one of the “few disputed facts” at trial. RP 309–310. To bolster his argument, the prosecutor injected facts during closing that were not supported by any of the evidence presented at trial.

Specifically, the prosecutor claimed the alleged pursuit lasted nine minutes long, arguing that “We are not talking about ten seconds. We are not talking about 30 seconds. We are talking about *nine minutes of driving through Thurston County.*” RP 315. The prosecutor further argued this was evidence Mr. Sutley Rhoads did not “immediately stop.” RP 315–16.

This claim was not supported by the testimony of any witness, nor was it supported by any of the exhibits admitted. As defense counsel pointed out, given the alleged distance traveled during the pursuit and the alleged speeds involved, the pursuit could not have lasted more than a minute. RP 321–22. Although the prosecutor appeared to try to walk back his wildly exaggerated statement during rebuttal, he did not explicitly

correct himself. *See* RP 327. Regardless, the damage was already done. *See* RP 327; *see also State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (“The bell once rung cannot be unring.”) (internal citations, quotation marks, and alterations omitted).

The speed at which Mr. Sutley Rhoads stopped his vehicle was central to the resolution of the case, and his testimony that he stopped as soon as it was safe was key to his defense. *See* RP 238–39, 322. It was also evidently a contested issue during the jury’s deliberations, as the jury submitted several questions to the court concerning the meaning and significance of the word “immediately” in their instructions. *See* CP 26–27. The prosecutor’s unsupported statements were made during closing, shortly before the jury began deliberations, and doubtless colored the jury’s view of the facts. *See Powell*, 62 Wn. App. at 919 (noting that remarks made in closing are inherently more prejudicial). Accordingly, this Court should conclude that the prosecutor’s invention of a nine minute pursuit in closing argument was both improper and prejudicial, and thus constituted reversible misconduct.

- b. The prosecutor misstated the standard upon which the jury could convict Mr. Sutley Rhoads.

“Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable

doubt.” *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); *see also* U.S. Const. amend. XIV; Const. art. I, § 22. In order to convict a defendant of attempting to elude a police vehicle, the State must prove beyond a reasonable doubt that the defendant “willfully fail[ed] or refuse[d] to immediately bring his or her vehicle to a stop and who [drove] his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop.” RCW 46.61.024(1) (defining the crime of attempting to elude a police vehicle). “Willfulness in this context is identical with knowledge.” *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011) (quoting *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981)).

To satisfy the elements of 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.” *Id.* at 555 (emphasis added). For crimes requiring a *mens rea* of knowledge, the supreme court has recognized that “to pass constitutional muster, 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) (citing *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980)) (emphasis added). Constructive knowledge, or what “an ordinary person

in the defendant's situation would have known," is not constitutionally sufficient to convict. *Id.* (quoting *Shipp*, 93 Wn.2d at 514).

"Although subtle, the distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant 'should have known' is critical." *Id.* Thus, the State has the burden of proving, through direct or circumstantial evidence, that the defendant had *actual knowledge* they were being signaled to stop and also had *actual knowledge* the pursuing vehicle was a police vehicle. *Flora*, 160 Wn. App. at 555; *Allen*, 182 Wn.2d at 374.

A prosecutor's misstatement of the law during closing argument has "the grave potential to mislead the jury" and is thus "particularly egregious." *Allen*, 182 Wn.2d at 380. Here, the prosecutor argued in closing that "we don't have to try to climb into someone else's head and say what does that person know. That would be impossible. What it does is says, hey, would a reasonable person know this? . . . The law is not that you have to know his intent. That's not the law. This is the law. We can't get inside his mind." RP 308, 328. This argument misstated the applicable law because it implied the jury could convict Mr. Sutley Rhoads on the basis of objective knowledge alone, as opposed to his actual knowledge. *See Allen*, 182 Wn.2d at 374. Additionally, the

misstatement was repeated in both the prosecutor’s opening and rebuttal arguments, creating a “cumulative effect.” *Id.* at 376.

This repeated misstatement of the knowledge element is similar to the prosecutor’s argument found improper in *Allen*. In that case, the prosecutor argued that evidence the defendant “should have known” was sufficient to convict, and that “under the law, *even if he doesn’t actually know*, if a reasonable person would have known, he’s guilty.” 182 Wn.2d at 375–76 (italics in the original). The supreme court concluded this was an incorrect statement of the law, and also that the statement was prejudicial as it pertained to a “key issue of the case” that “was critically important.” *Id.* at 375.

Here, Mr. Sutley Rhoads testified he did not realize he was being followed by a police car and did not see the car signal him to stop until shortly before he pulled over—that he lacked actual, subjective knowledge. RP 234–35, 238–39. His subjective knowledge was key to the disposition of the case, but based on the prosecutor’s repeated misstatements of the requisite *mens rea*, the jury may have focused instead on what a reasonable person would have known. *See* RP 308, 328.

The prosecutor’s misstatement of the applicable *mens rea* was not cured by the jury instructions. Although “[j]uries are presumed to follow the instructions given by the court,” the “knowledge” instruction here was

misleading at best and an erroneous statement of law at worst. *See Allen*, 182 Wn.2d at 380 (citation and quotation marks omitted); *see also* CP 32. “To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.” *O’Hara*, 167 Wn.2d at 105.

Instruction No. 6 informed the jury it could find the element of knowledge was satisfied if Mr. Sutley Rhoads had “information that would lead a reasonable person in the same situation to believe that a fact exists.” CP 32. The instruction’s reference to a “reasonable person” did not require the jury “to consider the subjective intelligence or mental condition of the defendant.” *Shipp*, 93 Wn.2d at 515. Further, the knowledge instruction “redefine[d] knowledge with an objective standard which is the equivalent of negligent ignorance,” a less culpable mental state. *Id.* “Such a redefinition is inconsistent with the statutory scheme which creates a hierarchy of mental states for crimes of increasing culpability.” *Id.* (citing RCW 9A.04.020(1)(d), RCW 9A.08.010(2)). The instruction’s redefinition also contradicted the “ordinary and accepted meaning” of the word “knowledge” by conflating it with “negligent ignorance.” *See Shipp*, 93 Wn.2d at 515.

By contradicting the ordinary and accepted meaning of knowledge, the instruction was confusing and misleading to “[t]he ordinary person.” *See id.* The knowledge instruction was an incorrect statement of law that was confusing to the common juror, and thus did not rectify the prosecutor’s misstatement of the requisite standard or satisfy the constitutional demands of a fair trial. *O’Hara*, 167 Wn.2d at 105.

The prosecutor’s invention of a “nine minute long” pursuit was both improper and prejudicial. *Thorgerson*, 172 Wn.2d at 443. The prosecutor’s misstatements of the law constituted additional prejudicial misconduct that the jury instructions did not cure. *See Allen*, 182 Wn.2d at 387. Accordingly, this Court should reverse the conviction and remand for a new trial. *See id.*

2. Interest was improperly imposed on the legal financial obligations.

The judgement and sentence, entered on October 31, 2018, includes a provision that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 45, 47. However, as of a year ago, financial obligations excluding restitution no longer accrue interest. RCW 3.50.100(4)(b); *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Accordingly, if this Court does not reverse the

conviction, it should order the trial court to strike the interest accrual provision. *See id.* at 749–50.

F. CONCLUSION

This Court should reverse the conviction and remand for a new trial. In the alternative, this Court should order the trial court to strike the interest provision in the judgment and sentence.

DATED this 16 day of July, 2019.

Respectfully submitted,

/s Jessica Wolfe

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JONATHAN SUTLEY-RHOADS,)	
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Appellant.)	

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