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Court of Appeals
Division II
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No. 52841-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN O'GRADY FRALEY,

Appellant.

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

The Honorable John Skinder
Cause No. 17-1-01679-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court's instructions to the jury adequately required the jury to consider all elements of unlawful possession of payment instruments.

2. Whether Fraley waived his claim of prosecutorial misconduct by failing to object to the State's questions and failing to request a limiting instruction, where the questions at issue were based in good faith, were neither flagrant nor ill-intentioned and did not prejudice the outcome of the proceeding.

3. Whether Fraley's statement of additional grounds regarding speedy trial has merit where the trial court stated that July 11, 2018, was the last day for speedy trial following specific findings of good cause for a continuance.

B. STATEMENT OF THE CASE.

1. Procedural History.

Brian O'Grady Fraley was charged with theft of a motor vehicle and unlawful possession of payment instruments. CP 1. By the time the matter proceeded to trial, the State filed an amended information which added two counts of bail jumping. CP 2.

There were many continuances before the commencement of trial. On March 21, 2018, both parties agreed to a continuance to enable Fraley to consider pursuing a resolution to the case in Drug Court. CP 21. Prior to trial, Fraley filed a motion to dismiss, alleging a violation of the defendant's right to a speedy trial. CP 8-19. The

State responded, noting the procedural history of the case to that point, and specifically noting that the last date for trial had been calculated as July 11, 2018. CP 20-27. The trial court heard the motion on June 7, 2018. RP 4.[1] The trial court engaged in an analysis applying CrR 3.3 and found that a different judicial officer had not abused her discretion in granting a continuance on April 18, 2018. RP 11-12. The trial court also found that a continuance granted on May 10, 2018, was proper due to the unavailability of the deputy prosecutor who was involved in another proceeding was based on good cause. RP 12-13. Based on the trial court's application of CrR 3.3, it was determined that the last date for trial was July 11, 2018. RP 13. The trial court entered findings of fact and conclusions of law memorializing its conclusion. CP 66-67.

Trial commenced in the case on June 12, 2018. RP 14. The State filed proposed jury instructions. CP 31-57. Included in the proposed instructions was a proposed instruction based on RCW

[1] The Verbatim Report of Proceedings in this matter appears in three volumes. Volume 1, transcribed by Ralph H. Beswick, contains the Jury Trial and selected proceedings held on June 7, 12, and 18, 2018. Volume 2, transcribed by Ralph H. Beswick, contains the Jury Trial and selected proceedings that took place on June 13-14, 2018, August 1, 2018, and October 10, 2018. As volumes 1 and 2 are sequentially numbered, they are collectively referred to as RP. The Verbatim Report of Proceedings in this matter appears in two volumes. Volume 3, transcribed by Ralph H. Beswick, contains the Jury Trial and selected proceedings held on June 12-14, 2018, and is not referenced in this brief as it appears duplicitous of Volumes 1 and 2.

9A.56.320, in the form of a "to convict" instruction. CP 48. The trial court discussed the jury instructions with the parties, and the prosecutor addressed the fact that the proposed instructions for unlawful possession of a payment instrument were based on statute, not the Washington Pattern Jury Instructions-Criminal. RP 161.

The trial court noted that the proposed instructions pursuant to RCW 9A.56.320 contained "some grammatical errors," and that the trial court attempted to fix them. RP 163. Neither the State nor the defense objected to the changes that the trial court made. 2 RP 234. The jury found Fraley guilty of counts two and four but were unable to reach a verdict on counts one and three. CP 138-139; RP 321.

Prior to sentencing, Fraley filed a motion to dismiss or motion for a new trial, alleging prosecutorial misconduct during the cross examination of Mr. Fraley. CP 140-144. In the motion, Fraley's counsel acknowledged, "the defense did not object to the questions but argues now they encompassed prosecutorial misconduct." CP 143. In considering the motion, the trial court found that there had not been a discovery violation, and if there had been one, dismissal would not have been the appropriate remedy.

RP 349. With regard to the alleged prosecutorial misconduct, the trial court stated:

> I was pleased to hear [the prosecutor] acknowledge that the state did not follow what the court had said would be the procedure at trial if the state wanted to get into this information. The court understands that the attorneys when they're working through trial there are so many issues they're trying to deal with, and I take [the prosecutor] at his word that he was of the mindset that he was thinking about rebuttal.

RP 349-350. The trial court continued,

> Now, the court in ruling on this stated I wasn't going to require an offer of proof at that time because it was potentially information that depending on how Mr. Fraley testified the state might have a good faith basis to go into this information. And in fact the state did have a good-faith basis to go into this information. The issue, though, is [the prosecutor] did not follow the court's procedure when the court stated if the state wants to question your client - - meaning Mr. Fraley - - about some other potential criminal conduct that an offer of proof would need to be made outside the presence of the jury before any such question would be allowed.

RP 350-351 (internal quotations omitted).

The trial court then went through the specific questions that the State had asked of Mr. Fraley at issue and noted that there was no objection on the part of defense, and that "any objection by the defense could have served to highlight this information," finding that

defense counsel acted strategically by not objecting. RP 351. The trial court stated defense counsel

> was strategic about the fact that he was not going to object and bring further notice to what in the context of the cross-examination was in this court's view insignificant compared to other topics that were discussed in the cross examination.

RP 351-352. The trial court concluded

> Looking in the context of this trial, looking at the extremely strong evidence that was present on the possession of payment instruments that was charged in count two, which is what this is all dealing with, of course, the court does not find that this was a situation of incurable prejudice, and the fact that the defense did not object did not give the court an opportunity to grant that objection and to, if requested, the court would have stricken the answer from the record and in that way had done away with this issue entirely.

RP 353-354.

Noting, "I don't see anything about what was done that was ill-intentioned or flagrant," the trial court denied Fraley's motion. RP 354. At sentencing the trial court granted Fraley's request for a Drug Offender Sentencing Alternative (DOSA) and sentenced Fraley to a prison based DOSA with 25 months of incarceration and 25 months of community custody. RP 365, CP 378-387. This appeal follows.

2. Substantive Facts.

Gary Chamberlain met the appellant, Brian O'Grady Fraley, when Fraley showed up on Chamberlain's property in a motorhome. RP 35. A person who Chamberlain had let move in apparently told Fraley that he could stay there for a while. RP 35. Chamberlain allowed Fraley to stay at his property rent free. RP 35-36. At some point during August of 2017, Chamberlain noticed that his checkbook for his Washington State Employees Credit Union was stolen. RP 48.

On September 19, 2017, Fraley took Chamberlain's car from the property and Chamberlain reported the vehicle as stolen. RP 42-44. Tumwater Police located Fraley and the vehicle near the Tumwater Walmart. RP 53-54. Chamberlain had obtained temporary checks which were located in the trunk of his car. RP 50. Chamberlain testified that Fraley did not have permission to have his checkbook, temporary checks, or car. RP 44, 51.

Tumwater Police Officer Charles Lett was one of the officers involved in the investigation that occurred on September 19, 2017. RP 66. Officer Lett took Chamberlain to the Wal-Mart where the vehicle was recovered. RP 68. Tumwater Officer Rosco Rollman located Chamberlain's vehicle parked in the Wal-Mart parking lot.

RP 78, 87. Officer Rollman made contact with the person in the vehicle, who was identified as Fraley. RP 91. Fraley was detained. RP 92. During a search incident to arrest, Rollman located a checkbook and some blank temporary checks in Fraley's left rear shorts pocket. RP 94-95. The checkbook was in the name of Gary R. Chamberlain. RP 97. There was also a check made out to Rebecca Matthews in the amount of $300. RP 97-98. Officer Rollman also located Chamberlain's temporary checks on Fraley. RP 99-100.

Officer Rollman testified that, when asked about the checks, Fraley stated that Chamberlain had told him to get them so that nobody else could. RP 101. Fraley testified at trial that Chamberlain gave him permission to use his car. RP 172-173. He further indicated that he had permission to use the car on September 19, 2017. RP 176.

While the case was pending, Fraley did not appear for scheduled court hearings on December 14, 2017, and January 24, 2018. RP 128; 150.

Fraley admitted that he had the checkbook and the temporary checks, including the check that was made out to Rebecca Matthews. RP 184. Fraley indicated that he grabbed the

checks off the coffee table earlier in the day so that a female guest would not grab them. RP 185-186. Fraley testified that he did not read the date on the document he signed that stated he needed to be in court on December 14, 2017. RP 186. He testified that he missed his court date on January 24, 2018, because his dad was admitted to the emergency room on January 22, and his mother had a stroke-like event caused by Lou Gehrig's disease, causing him to forget his court date. RP 186-187.

C. ARGUMENT.

1. The trial court properly instructed the jury as to each element of unlawful possession of payment instruments and, if any error occurred, it did not rise to the level of a manifest constitutional error and was clearly harmless.

The Court of Appeals generally does not consider issues raised for the first time on appeal. However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Where an instructional error may be construed as relieving the State of the burden of proving an element of its case, the error is manifest and of constitutional magnitude and may therefore be raised for the first time on appeal. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

A manifest error of constitutional magnitude requires a showing of actual prejudice. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. at 99 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

a. The instructions given by the trial court adequately required the jury to consider all elements of the offense in Count 2.

"Jury instructions are read as a whole." In re R.A.W., 104 Wn. App. 215, 222, 15 P.3d 705, 708 (2001), *See* State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Under the prong charged the crime of unlawful possession of a payment instrument requires that State to prove that the defendant possessed "two of more checks or other payment instruments, alone or in combination," in the name of a person or entity, or with the routing numbers of a person or entity, without the permission of the person or entity and "with intent to deprive the person of or entity of possession of such payment instrument or to commit theft, forgery, or identity theft." RCW 9A.56.320(2)(a)(i).

In the charging document, the State included, "did knowingly possess two or more checks or payment instruments, in the name of a person or entity." CP 2. Fraley argues that the State added an additional element by adding the word knowledge in the charging document and that the trial court erred in not adding the word to the jury instructions. The addition of the word knowledge did not add an additional element to the charge. As Fraley points out, there are very few cases addressing RCW 9A.56.320, and there does not appear to be any cases which discuss whether the defendant must knowingly possess the instruments. Brief of Appellant, at 9. There are simple and logical reasons why the issue would not be included in many cases. The statute requires that the possession be with "intent to deprive the person of or entity of possession of such payment instrument or to commit theft, forgery, or identity theft." RCW 9A.56.320. It is not possible to possess a payment instrument with the required intent and not have knowledge that the instrument was possessed.

Acting knowingly or with knowledge is also established if a person acts intentionally. State v. Sibert, 168 Wn.2d 306, 315-316, 230 P.3d 142 (2010). Here, the trial court's instruction included the requirement that the possession be with the specific intent that is

required by the statute. CP 87. The trial court also instructed the jury as to the definition of knowledge, and the definition of intent. CP 89, 83. The provided instructions were adequate.

The State does not herein argue that knowledge is not required under RCW 9A.56.320, simply because it is impossible to possess a payment instrument with the required intent without knowingly possessing the instrument. The law of the case doctrine "requires the State to prove every element in the to-convict instruction." State v. Johnson, 188 Wn.2d 742, 762, 399 P.3d 507 (2017). The lack of the word knowledge in the "to-convict" instruction, in this instance, had no effect on the State's burden of proof because knowledge was required to meet the other elements listed in the "to-convict" instruction.

b. Even if the to-convict instruction was improper, the defendant did not make a showing of actual prejudice.

A manifest error of constitutional magnitude requires a showing of actual prejudice. State v. O'Hara, 167 Wn.2d at 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. at 99 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125

(2007)). Fraley cannot demonstrate actual prejudice for the reasons stated in the section above. It is simply not possible for the jury to have found that he acted with the requisite intent without finding that he knowingly possessed the instruments.

Even if the trial court had included the word knowingly in the "to-convict" instruction, the result would have been the same. Fraley testified at trial that he "grabbed the checkbook and the temporary checks that were . . . on the coffee table." RP 184. There is not even a scintilla of prejudice caused by the lack of the word "knowingly" in the "to-convict" instruction. "Even manifest constitutional error may be harmless." State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010); *citing*, State v. O'Hara, 167 Wn.2d at 99. An omission of an element from the jury instructions may be harmless when it is clear that the omission did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 340-341, 58 P.3d 889 (2002). Even if Fraley were correct that the "to-convict" instruction was erroneous, it is absolutely clear that any error in that regard caused no actual prejudice and did not contribute to the verdict.

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2. Fraley waived his claim of prosecutorial misconduct by not objecting and allowing the trial court an opportunity to issue a curative instruction because the questions from the prosecutor were not flagrant or ill-intentioned; moreover, Fraley has not demonstrated that the particular questions asked by the prosecutor prejudice him in any way.

Claims of prosecutorial misconduct are reviewed for abuse of discretion. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). To prevail on a claim of prosecutorial misconduct, Fraley must establish that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

When the defense fails to object or to request a curative instruction, the error is waived unless the conduct is so flagrant or ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Fisher, 165 Wn.2d at 747. Here, Fraley argues that the questions asked during cross examination by the prosecutor were inappropriate because they introduced extrinsic evidence and, thereby, violated the right to confrontation. Brief of Appellant, at 13.

In State v. Lopez, 95 Wn. App. 842, 855, 980 P.2d 224 (1999), Division III of this Court noted that a prosecutor's reference to extrinsic evidence that is not introduced at trial may rise to a violation of the right to confrontation. In that case, the deputy prosecutor repeatedly asked a witness about the contents of a telephone conversation which the witness denied and then implied that the witness forgot during closing argument. Id. at 854. The State conceded that the questions were improper, and Division III concluded that the questions had no effect on the outcome of the trial and were, therefore, harmless. Id. at 855-856.

In this case, the trial court specifically noted that the prosecutor had a good faith basis for asking the questions. RP 350. The error noted by the Court was the failure to provide an offer of proof prior to asking the questions. Where a good faith basis existed, the error in not providing the offer of proof prior to cross-examination is harmless. United States v. Rushton, 963 F.2d 272 (9th Cir. 1992).

The allegedly improper questioned consisted of only the following:

Q. Had you used any of those checks?
A. No, I had not.

Q. Did you ever remove any of those checks from the checkbook?
A. No, I did not.
Q. So if a check was attempted to be cashed in Lacey, that would have nothing to do with you?
A. That is correct.
Q. Do you know Vaughn Krueger?
A. No, I do not.
Q. Would Vaughn Krueger know you?
A. I couldn't say.

RP 221. The only portion of the questioning that arguably was based on extrinsic evidence was the questioning regarding Vaughn Krueger, which effectively amounted to nothing substantive.

During the cross examination of Mr. Chamberlain, defense counsel asked whether he had received word from his bank that fraudulent checks had come through his account, to which he said, "I don't believe so." RP 62. In response, on redirect, the State asked, "Have you been alerted by another police department of somebody attempting to cash one of your checks?" to which he responded, "Lacey Police Department." RP 63. There was no objection to that question.

The reference to Vaughn Krueger added nothing to the overall facts of the case and the prosecutor never asked questions regarding what Krueger might have done in relation to Fraley. Even if the questions were improper, they had no effect on the outcome

of the proceedings. As noted by the trial court, the prosecutor had a good faith basis for asking the questions. Clearly, an error could have been cured had an objection been made. The questions were not flagrant or ill intentioned. By not objecting at the time of the questions, Fraley waived the issue.

Even if this Court were to find that an objection was unnecessary, as Fraley argues, the questioning at issue was of little import to the outcome of the case. Fraley's argument regarding the preservation of issues for appeal does not contain any cases regarding allegations of prosecutorial misconduct. This is especially true where Mr. Chamberlain testified that his checkbook was missing a few weeks before the car was taken and that the temporary checks were in the trunk, which was clearly contrary to Fraley's testimony that he took them from the coffee table. RP 48, 185-186. The verdict in Fraley's case would have been no different without the alleged improper questions having been asked.

3. The issues raised in Fraley's Statement of Additional Grounds are without merit.

In his Statement of Additional Grounds (SAG), filed on June 28, 2018, Fraley first argues that the Honorable Judge Eric Price found that the last day for trial was on June 11, 2018, during a

hearing held on June 7, 2018, therefore it was error for his trial to begin on June 12, 2018. This assertion is both factually and legally incorrect. Though a response to his SAG claims is not required, in the interest of complete briefing, the State responds here.

During the hearing held on June 7, 2018, the trial court found that a continuance granted on May 10, 2018 was proper due to the unavailability of the deputy prosecutor who was involved in another proceeding was based on good cause. RP 12-13. Based on the trial court's application of CrR 3.3, it was determined that the last date for trial was July 11, 2018. RP 13. The findings of fact and conclusions of law entered in relation to that hearing confirm the ruling. CP 66-67. Likewise, the order of trial continuance from the May 10, 2018 hearing noted that the last day for trial was July 11, 2018. CP 14. A previous trial continuance order had indicated that June 13, 2018, was the last day for speedy trial. CP 13. For both continuances, the trial court found good cause, findings which Fraley does not now assign error to. With a finding of good cause for a continuance, the delay granted by the trial court is an excluded period, and the last day for trial does not expire until 30 days after the end of the excluded period. CrR 3.3(b)(5); CrR 3.3(e)(3); CrR 3.3(f)(2).

Fraley's argument is factually incorrect. Moreover, the trial's occurrence on June 12, 2018, was well within the properly calculated speedy trial date.

Fraley's second ground in his SAG is addressed in the Brief of Appellant and above. The State notes that the deputy prosecutor never elicited testimony regarding Vaughn Krueger's arrest in a WSECU bank during the trial. Fraley does not add to the claim in his opening brief and has not demonstrated that any irregularity affected the verdict in his case.

D. CONCLUSION.

The trial court's instructions to the jury adequately required the jury to consider all elements of the offenses charged. Even if the omission of the word knowingly from the "to-convict" instruction for count two was erroneous, it does not constitute a manifest constitutional error because it is impossible to demonstrate actual prejudice. Similarly, any error would be harmless as it could have no effect on the verdict. The prosecutor has a good faith reason for asking certain questions of Fraley. The only error was a failure to make an offer of proof prior to the questioning as directed by the trial court. The questions asked added little, if anything, to the trial, and did not affect the outcome in any way. Fraley's claim that his

trial should have commenced on June 11, 2018, is both factually and legally incorrect. The State respectfully requests that this Court affirm Fraley's convictions and sentence.

Respectfully submitted this 29th day of July, 2019.

Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

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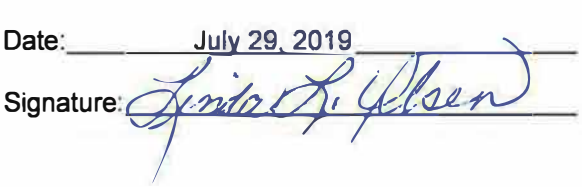
Signature: 

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