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February 21, 2012
Court of Appeals
Division III
State of Washington

NO. 30312-8-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOHN ANTHONY TUETKEN,

Defendant/Appellant.

APPELLANT'S BRIEF,

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CONSTITUTIONAL PROVISIONS

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RULES AND REGULATIONS

CrR 3.5 3

ASSIGNMENT OF ERROR

1. John Anthony Tuetken did not receive a fair and constitutional trial due to multiple instances of ineffective assistance of counsel.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Was defense counsel ineffective when:
 - a.) He failed to request a voluntary intoxication instruction;
 - b.) He failed to request a duress instruction;
 - c.) During cross-examination of a police officer witness he elicited a comment upon Mr. Tuetken's credibility.
 - d.) He conducted an ineffective cross-examination of a witness; and
 - e.) He failed to object to prosecutorial misconduct in closing argument?

STATEMENT OF THE CASE

Chuck Cox owns a travel trailer located in the Rimrock Meadows Community. He does not lock the door on his trailer when he leaves. The trailer is permanently located on his lot. He installed solar panels as a permanent fixture. (RP 29, l. 23 to RP 30, l. 19; RP 36, l. 8 to RP 37, l. 9).

On May 8, 2011 a burglary occurred in Mr. Cox's trailer. Pots and pans, catalytic heaters, food, clothing, tools, various odds and ends and the solar system were removed. (RP 38, l. 3 to RP 40, l. 6).

After that burglary Mr. Cox installed wildlife cameras. The cameras imprint a date and time stamp on a photograph when they are activated. (RP 40, ll. 20-25; RP 44, ll. 13-17).

The wildlife cameras were activated three times on May 19, 2011 starting at 5:41 a.m. Another burglary was in progress. The photos showed Mr. Cox's trailer, a pickup (PU) truck from the rear, and a person who was removing items from the trailer and putting them into the PU. (RP 47, l. 25 to RP 48, l. 1; RP 48, ll. 5-6; ll. 20-24; RP 49, ll. 9-24; RP 51, ll. 4-8).

One of the items that was carried to the PU was a 12 volt box which Mr. Cox stored inside his trailer. (RP 54, ll. 1-21).

It was later determined that Mr. Tuetken was the person in the photos. He stipulated to that fact at trial. (RP 57, l. 24 to RP 58, l. 10).

Jose Ortiz is a caretaker at Rimrock Meadows. He had a discussions with Mr. Tuetken on May 8, 2011. Mr. Tuetken was advised when visiting anyone in the community that he had to check in at the office. (RP 33, ll. 2-5; RP 95, ll. 13-19; RP 99, ll. 1-21).

The PU in the photo had been stolen from Colleen Gibbins the day prior to the Cox break-in. It was later recovered by the Grant County Sheriff's Office. (RP 82, l. 8 to RP 83, l. 13; RP 85, ll. 5-15).

Mr. Tuetken did not have permission to enter the Cox trailer or to have the Gibbins PU. (RP 50, ll. 8-9; RP 84, ll. 4-12).

Detective Groseclose of the Douglas County Sheriff's Office arrested Mr. Tuetken. Following Miranda¹ warnings he interviewed him. Mr. Tuetken advised the detective that he was under the influence of methamphetamine and duress when he took the PU. He described receiving a telephone call to retrieve the PU in Soap Lake. He had to start it with a knife due to a "goobered up" ignition. (RP 106, l. 18; RP 108, l. 19 to RP 109, l. 4).

Mr. Tuetken told the detective that his daughter by an ex-girlfriend was being threatened by an individual named "Will" in Spokane. This was the reason that he went to get the PU. (RP 110, l. 20 to RP 111, l. 20).

Mr. Tuetken also advised the detective he had no recollection of the Cox burglary. (RP 113, ll. 1-12).

An Information was filed on June 2, 2011 charging Mr. Tuetken with residential burglary and possession of a stolen vehicle. (CP 1).

Mr. Tuetken waived a CrR 3.5 hearing on August 22, 2011. (CP 5).

Defense counsel, during cross-examination of Detective Groseclose, engaged in the following exchange:

Q: ...Now, during the interview process, Mr. Tuetken admitted to you that he was a methamphetamine user?

¹ *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974 (1996)

A: Yes, he did.

Q: And he also told you that he didn't – he did a lot of things that he didn't remember when he was high?

A: Yes, he did.

Q: He also told you that he had used methamphetamine earlier that day, didn't he?

A: Yes, he did.

Q: And, then, subsequent to that he also told you, as Mr. Edgar has discussed with you, a story about how he was directed to Rimrock Meadows to take property?

A: Yes.

Q: Now, in, in that story he indicated that he was directed to a truck in Soap Lake, and that that truck contained instructions for him?

A: Yes.

Q: And that if he didn't go and accomplish the tasks that were assigned to him that some threat of harm would be carried out against his child or his child's mother or something along those lines?

A: Yes.

Q: Now, he specifically told you that there was some gentlemen on the other end of this threat named Will and that he was located in Spokane?

A: Yes.

Q: Now, when you heard that story, did that story seem farfetched to you?

A: It was a little farfetched, and if he could've provided me with more details I would've been more believing in it, but he just wasn't able to provide me anything that would - - I could corroborate to make him - - me believe what he was telling me.

(RP 117, l. 2 to RP 118, l. 15).

Later in the cross-examination of Detective Groschlose, defense counsel asked additional questions:

Q: Is it your experience as a law enforcement officer that suspects of crimes tend to be 100% honest regarding their goings on?

A: No.

Q: And, and I sure in the course of your eight years, or even in your 17 years you've had experience with individuals that are, that are acting under the influence of controlled substances, is that fair to say?

A: Yes.

Q: And have you interviewed those individuals that have been under the influence of controlled substances?

A: Yes.

Q: And is your experience that, that those individuals, especially as it relates to methamphetamine, can tend to be paranoid?

A: I think it depends on the individual, but that would generally be accurate.

Q: Ok. You've been lied to before?

A: Yes.

Q: People lie for many reasons.

A: ...

Q: Do you agree?

A: Yes.

Q: Lie to protect themselves?

A: Yes.

Q: Lie to protect others?

A: Yes.

Q: Have you ever seen someone lie to their own detriment?

A: Yes.

(RP 119, l. 12 to RP 120, l. 21).

Defense counsel did not propose either a voluntary intoxication instruction or a duress instruction.

The prosecuting attorney, during his closing and rebuttal arguments, made the following statements which were not objected to by defense counsel:

...And we have him telling you a story that is beyond Pluto. It's just out there. It is worse than one of the worst Hollywood scripts you can imagine. It suggests to you that he has knowledge and that he is trying to craft a story that is untrue.

(RP 152, ll. 13-15).

Who is the only one who's told you a fantastic story? Who is the only one who has told you a story of some nebulous person who can't be seen? Mr. Tuetken has. Will from Spokane. "Will texts me. Will tells me where to go. Will tells me what to do." Mr. Tuetken is the only one asking you to believe in a tooth fairy. I am not. He's told you incredible almost ridiculous stories.

(RP 171, ll. 3-11).

...Again, the only one who's told you a fantastic and farce of a story that he wants you to believe in is Mr. Tuetken and not me.

(RP 171, l. 25 to RP 172, l. 2).

A jury determined that Mr. Tuetken was guilty of both residential burglary and possession of a stolen vehicle. (CP 64; CP 65).

The trial court denied Mr. Tuetken's request for a DOSA sentence. Judgment and Sentence was entered on September 26, 2011. (CP 67; CP 72; RP 177, ll. 10-25).

Mr. Tuetken filed his Notice of Appeal on October 17, 2011. (CP 82).

SUMMARY OF ARGUMENT

Defense counsel's performance at trial was below the standards required of a reasonable criminal defense attorney in Washington.

The failure to request appropriate instructions, ineffective cross-examination resulting in a comment on Mr. Tuetken's credibility, and failure to object to prosecutorial misconduct in closing argument combined to deny him a fair and constitutional trial.

ARGUMENT

"...[A]n accumulation of matters of dubious propriety" may deny a criminal defendant a fair trial. *State v. Bromley*, 72 Wn. 2d 150, 151, 432 P. 2d 568 (1967).

Mr. Tuetken asserts that cumulative error occasioned by ineffective assistance of defense counsel denied him a fair trial under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Initially, defense counsel's failure to request either a voluntary intoxication instruction or a duress instruction precluded Mr. Tuetken from presenting potentially viable defenses to the respective offenses.

The record reflects that sufficient evidence was presented concerning the use of methamphetamine and duress in conjunction with the possession of a stolen vehicle charge.

Insofar as the residential burglary charge is concerned, again, sufficient evidence was presented that voluntary intoxication by ingestion of methamphetamine may have substantially impaired Mr. Tuetken's mental state.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn. 2d 322, 334-35, 899 P. 2d 1251 (1995).

Mr. Tuetken recognizes that trial strategy or tactics by defense counsel cannot be urged as a basis for ineffective assistance of counsel. Nevertheless, it is his position that defense counsel was not using any particular strategy or tactic in connection with the deficiencies exhibited in the record.

Strategy constitutes operations in planning. Tactics involves operations in action.

It appears from the record that defense counsel's strategy was planned around the potential defenses of voluntary intoxication and duress. However, when defense counsel began his tactical portion of the defense he failed to put the plan into operation.

Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.

Personal Restraint of Hubert, 138 Wn. App. 924, 932, 158 P.3d 1282 (2007).

The information that Mr. Tuetken provided to Detective Groseclose was sufficient to meet his burden as to either or both potential defenses.

“An intoxication defense allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant’s ability to form the requisite mental state.” *State v. Tilton*, 149 Wn. 2d 775, 784, 72 P. 3d 735 (2003).

Query: Did Mr. Tuetken’s methamphetamine intoxication impair his ability to recognize that the PU had been stolen?

Query: Did the combination of methamphetamine intoxication and duress negate and/or impact Mr. Tuetken’s judgment insofar as the break-in at the Cox trailer?

Defense counsel’s failure to request an instruction on voluntary intoxication is obvious error. This failure prevented the jury from even looking at the issue. *See: State v. Kruger*, 116 Wn. App. 685, 693-95, 67 P. 3d 1147 (2003).

Insofar as the defense of duress is concerned, it is a jury question. ... “[T]he question of whether a threat of *immediate* death or *immediate* grievous bodily injury... is generally a question of fact for the jury.” *State v. Turner*, 42 Wn. App. 242, 245, 711 P. 2d 353 (1985).

Defense counsel introduced evidence as to both of the potential defenses. Defense counsel then dropped the ball.

The photographs, along with the stipulation that Mr. Tuetken was the person in the photographs, in conjunction with the testimony by Mr. Cox, clearly established all elements of residential burglary.

Defense counsel’s attempt to obtain a lesser included offense instruction on second degree criminal trespass was obviously not going to succeed. Why defense counsel abandoned the potential defenses cannot be considered a valid tactic.

“Ineffective assistance may be found...if the tactics used would be considered incompetent by lawyers of ordinary training and skill in the criminal law. *State v. Woo Won Choi*, 55 Wn. App. 895, 905, 781 P. 2d 505 (1989).

Defense counsel may have had a viable strategy. Unfortunately for Mr. Tuetken, defense counsel’s implementation of that strategy through his trial tactics was abysmal.

Defense counsel’s failure was further compounded by portions of his cross-examination of Detective Groseclose.

Counts “generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. In assessing [a] claim that...counsel did not effectively cross-examine a witness, we need not determine why trial counsel did not cross-examine if that approach falls within the range of reasonable representation. “In retrospect we might speculate as to whether another attorney could have more efficiently attacked the credibility of ... witnesses The extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict. This... is a matter of judgment and strategy.”

Personal Restraint of Davis, 152 Wn. 2d 647, 720, 101 P. 3d 1 (2004) quoting *State v. Stockman*, 70 Wn. 2d 941, 945, 425 P. 2d 898 (1967).

Even though cross-examination may be a matter of judgment and strategy, the judgment and strategy must be aimed at providing a reasonable defense. Under the facts and circumstances of Mr. Tuetken’s case defense counsel’s cross-examination of Detective Groseclose adversely impacted him. The cross-examination was more akin to a direct examination by a prosecuting attorney.

Defense counsel also elicited a comment upon Mr. Tuetken’s credibility. This comment gave the prosecuting attorney an opening in his closing and rebuttal arguments which exacerbated the unfairness of the trial.

...[The] statement about ...failing to always give truthful answers was improper opinion testimony, and ...the admission of this evidence was constitutional error. ... [E]ven a constitutional error does not require reversal

if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of error. [Citation omitted].

State v. Saunders, 120 Wn. App. 800, 813, 86 P. 3d 1194 (2004).

As previously noted, the untainted evidence indicates that Mr. Tuetken was in possession of Ms. Gibbins' PU. The untainted evidence also establishes that Mr. Tuetken entered the Cox trailer.

Nevertheless, the comment on credibility, when coupled with the failure to request defense oriented instructions, along with the prosecutorial misconduct clearly denied Mr. Tuetken his right to a constitutionally fair trial under both the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

The defendant bears the burden of showing that the prosecuting attorney's conduct was both improper and prejudicial. [Citations omitted.] Where...defense counsel does not object to the alleged misconduct, we deem the defendant to have waived the issue on appeal unless the misconduct is "so flagrant and ill-intentioned that it evinces and enduring and resulting prejudice" incurable by a jury instruction.

State v. Larios-Lopez, 156 Wn. App. 257, 260, 233 P. 3d 899 (2010), quoting *State v. Gregory*, 158 Wn. 2d 759, 841, 147 P. 3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn. 2d 668, 719, 940 P. 2d 1239 (1997) *cert. denied*, 523 U.S. 1008 (1998)).

Mr. Tuetken asserts that the characterizations used by the prosecuting attorney in his closing and rebuttal arguments constitutes flagrant and ill-intentioned conduct. The comments were to denigrate the potential defenses of voluntary intoxication and duress which defense counsel failed to argue. There was no need for the prosecuting attorney to humiliate either Mr. Tuetken or his attorney.

In order to establish prosecutorial misconduct, [a defendant] must prove that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn. 2d 559, 578, 79 P. 3d 432 (2003). Prejudice is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *Dhaliwal*, 150 Wn. 2d at 578 (quoting *State v. Pirtle*, 127 Wn. 2d 628, 672, 904 P. 2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996)). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wn. 2d at 578; *State v. Brown*, 132 Wn. 2d 529, 561, 940 P. 2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). In addition, prosecutorial remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are a pertinent reply to his or her arguments, and are not so prejudicial that a curative instruction would be ineffective. *State v. Russell*, 125 Wn. 2d 24, 86, 882 P. 2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

State v. Carver, 122 Wn. App. 300, 306, 93 P. 3d 947 (2004).

Defense counsel did not invite or provoke the prosecuting attorney's closing or rebuttal arguments. The arguments were not a pertinent reply to defense counsel's argument.

CONCLUSION

Mr. Tuetken asserts that the only fair trial under the facts and circumstances of his case would have been a trial that included the defenses of duress and voluntary intoxication. Instructions should have been requested and given to the jury.

Ineffective assistance of counsel, combined with the prosecutorial misconduct and the absence of defense jury instructions, worked prejudice upon Mr. Tuetken. He is entitled to have his convictions reversed and the case remanded for a new trial.

DATED this 21st day of February, 2012.

Respectfully submitted,

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
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)	
JOHN ANTHONY TUETKEN,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 21st day of February, 2012, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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