

No. 31719-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
June 13, 2014
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

TERRY MICHAEL HOEFLER,
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Bruce A. Spanner, Judge

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT OF APPELLANT'S ISSUES

1. Whether the State committed prosecutorial misconduct during closing argument by submitting evidence that had not been admitted at trial, to wit: Mr. Hoefler's guilty plea?
2. Whether defense counsel rendered ineffective assistance by submitting evidence not admitted at trial, to wit: Mr. Hoefler's guilty plea, and by failing to object when the State submitted the same evidence during closing argument?

B. RESPONDENT'S ANSWER TO APPELLANT'S ISSUES

1. The State did not commit prosecutorial misconduct by commenting on burglary facts that were undisputed and admitted into evidence.
2. Defense counsel had strategic reasons for allowing Mr. Hoefler to plead guilty to residential burglary and for not objecting when the State mentioned the guilty plea.

C. RESTATEMENT OF FACTS PERTINENT TO ISSUES

The State charged Terry Hoefler with two offenses. Clerk's Papers (CP) 128-29. Mr. Hoefler pleaded guilty to one of the offenses – residential burglary – outside the jury's presence. Report of Proceedings (RP) 15-20.

The jury was charged with finding whether or not Terry Hoefler committed attempted rape of a child in the first degree. CP 62-68. It was instructed that a person commits that offense when, with intent to commit the crime, he does an act that is a substantial step toward the commission of that crime. CP 62-68.

During closing arguments, the State argued Mr. Hoefler was not on trial for the burglary because he had admitted to it:

Let's look at the evidence we went over, and I don't think we can overstate this. The defendant admits to the burglary, okay? We're not on trial today for burglary. The defendant in his statement to Detective Nunez and Deputy Conner said very clearly, 'I burglarized that house.'

RP 484. Defense counsel did not object to these statements. RP 484.

Instead, she argued Mr. Hoefler had taken responsibility for his actions by admitting to the residential burglary:

Mr. Hoefler admits to the residential burglary. He admits to it. He's admitted to it. Taken responsibility.

RP 504.

D. ARGUMENT IN REPLY TO STATE'S RESPONSE

Primarily Mr. Hoefler relies upon his Brief of Appellant to address all issues raised by the State. Additionally he states as follows in direct Reply.

1. The State committed prosecutorial misconduct during closing argument by submitting evidence to the jury that had not been admitted at trial.

The State claims it did not commit prosecutorial misconduct during closing argument by introducing Mr. Hoefler's guilty plea to the jury because, "[i]n order to prove [Mr. Hoefler] committed the crime of

Attempted Rape of a Child in the [First] Degree, the State needed to prove that on the night in question, the Appellant entered the house and took a substantial step toward raping L.S.” Br. of Resp’t 23. The State’s claim fails, however, because the crime of Attempted Rape of a Child does not require proof that the defendant entered a house. *See* CP 68 (to-convict instruction).

The State next asserts that mentioning evidence of the burglary was proper because it was relevant to whether the attempted rape occurred. Br. of Resp’t 23-24. Relevant evidence is admissible. ER 402. The State concedes evidence of Mr. Hoefler’s guilty plea is not relevant. *See* Br. of Resp’t 26 (“The fact of the actual burglary conviction itself is not relevant when the underlying conduct is admissible and has already been put before the jury”); *see also* Br. of Resp’t 27 (“[The burglary] was not important as an underlying conviction because a burglary does not automatically associate a person with a sexual assault offense”). Even assuming Mr. Hoefler’s guilty plea to the burglary charge was relevant to the charge before the jury, his guilty plea was not admitted as evidence at trial. It was error for the State to submit evidence to the jury that had not been admitted at trial. *In re Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012).

The State further argues it did not commit prosecutorial misconduct because it argued about burglary evidence that had been admitted at trial. Br. of Resp't 28. The fact the State based its argument regarding burglary partly on admitted evidence does not absolve the State of improperly basing its argument partly on the unadmitted evidence of Mr. Hoefler's guilty plea. The State could have relied solely upon admitted evidence to argue that Mr. Hoefler entered L.S.'s house. Instead, it relied upon Mr. Hoefler's guilty plea as the headline for its burglary argument. Unnecessarily introducing the guilty plea emphasizes that doing so was futile but for the flagrant and ill-intentioned purpose of inviting the jurors to disregard Mr. Hoefler's right to the presumption of innocence and the State's duty to prove the charged crime beyond a reasonable doubt.

The State admits it introduced Mr. Hoefler's guilty plea to the jury. Br. of Resp't 33. Introduction of unadmitted evidence is error. The question for this Court is whether that error was so flagrant and ill-intentioned that it could not have been cured by instruction. Mr. Hoefler contends this question should be answered affirmatively for the reasons set forth in his opening brief and asks the court to reverse his conviction.

2. Defense counsel rendered ineffective assistance by introducing evidence not admitted at trial and by failing to object to the prosecutor's introduction of the same evidence.

The State responds that defense counsel had a strategic reason for allowing Mr. Hoefler to plead guilty to the burglary charge: counsel “sought to turn the admissions to the burglary into a positive instead of a negative.” Br. of Resp’t 33. First, Mr. Hoefler is not claiming that defense counsel was ineffective for allowing him to plead guilty to residential burglary. Defense counsel rendered ineffective assistance by submitting and allowing the State to submit unadmitted evidence of Mr. Hoefler’s guilty plea to the jury. Second, defense counsel could have put a positive spin on the burglary evidence without submitting and failing to object to the submission of Mr. Hoefler’s guilty plea to the jury. Indeed, the guilty plea was taken outside the presence of the jury, so introducing the guilty plea during closing argument was inconsistent with counsel’s pursuit of the alleged defense strategy. Defense counsel’s action and omission during closing arguments regarding Mr. Hoefler’s guilty plea did not further counsel’s defense strategy.

The State next contends that defense counsel did not object when the State mentioned Mr. Hoefler’s guilty plea because it would have been

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 13, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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