

FILED
SEPT. 1, 2016
Court of Appeals
Division III
State of Washington

NO. 34374-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANGELA MENDOZA,

Appellant.

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

The Honorable Michael McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct in closing argument by misstating the law regarding the presumption of innocence.

2. Appellant was deprived of her right to effective assistance of counsel when her attorney failed to object to prosecutorial closing argument that undermined the presumption of innocence.

Issues Pertaining to Assignments of Error

1. The presumption of innocence endures throughout all stages of the trial including jury deliberations unless, during its deliberations, the jury finds the presumption has been overcome by proof of every element of the crime beyond a reasonable doubt. Did the prosecutor commit reversible misconduct by arguing to the jury that the presumption only lasts “until you go into the jury room”?

2. Every accused person is entitled to effective assistance of counsel for his defense. Was appellant’s right to counsel violated when her attorney failed to object to the prosecutor’s argument that undermined the presumption of innocence?

B. STATEMENT OF THE CASE

Appellant Angela Mendoza returned several items to a “Toys R Us” store in Union Gap, Washington. RP 47, 51. She received \$22 in cash and a gift card for \$105 in store credit. RP 52-53. She subsequently

sold the gift card to her brother for \$60 or \$70. RP 58. The returned items turned out to have been stolen a couple of days earlier from Sylvia Pola Martinez' storage unit. RP 34. The lock on the storage unit had been broken. RP 38-39. Pola Martinez testified she did not give anyone permission to return her items to the store. RP 35.

Betty Stevens, an assistant store manager printed out copies of Pola Martinez' layaway receipts for her after the break-in, and recalled the transaction at which the items were returned. RP 44, 47. She testified the woman who returned them said they had been shipped to her for her children. RP 47. Stevens found that odd because the store number on the receipts was the very same store in which they were standing. RP 47. Stevens recognized Mendoza as the woman who, along with two male companions returned the items. RP 47, 50. When the police arrived, Stevens provided them with surveillance video showing the return, which was admitted into evidence and played for the jury. RP 48-49, 73-80.

Mendoza's brother, Kevin King testified that in the fall of 2015, she sold him a Toys R Us gift card with \$105 credit on it. RP 57-58. He offered her \$60 or \$70, and she accepted it. RP 58. Maria King, Kevin's wife, testified she was there when her husband bought the gift card from Mendoza. RP 67. Police also obtained the driver's license number that

had been presented when the items were returned; the number was linked to Mendoza. RP 82.

The Yakima County prosecutor charged Mendoza with one count of trafficking in stolen property in the first degree. CP 1. The defense argued Mendoza would not have presented her own driver's license or sold the gift card to her own brother if she had known the items were stolen. RP 127-28. During closing argument, the prosecutor told the jury the presumption of innocence "remains here until you go into the jury room and deliberate on the case." RP 119. There was no objection. RP 119.

The jury found Mendoza guilty of trafficking in stolen property, as charged. CP 26. The court imposed the low end of the standard range, 43 months, noting that this could easily have been charged as third degree theft, a gross misdemeanor punishable by no more than 364 days. RP 150; CP 28. The court declared, "if I had a choice, I wouldn't do what I'm compelled to do by the SRA." RP 150.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT, MISSTATED THE LAW, AND VIOLATED MENDOZA'S RIGHT TO BE PRESUMED INNOCENT.

The presumption of innocence continues throughout the entire trial and may only be overcome, if at all, during deliberations. State v. Evans, 163 Wn. App. 635, 644, 260 P.3d 934, 939 (2011); State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (2010) (citing 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008)). But the prosecutor here told jurors the presumption only remains until they enter the jury room for deliberations. RP 119. This comment misstated the law and misled the jury about the presumption of innocence, the bedrock of our criminal justice system. By eroding the presumption of innocence, the prosecutor's misconduct deprived Mendoza of a fair trial and requires reversal of her conviction.

The presumption of innocence lies at the heart of our criminal law. Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 403, 39 L. Ed. 481 (1895); State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). It is a fundamental component of a fair trial, deriving from the Due Process guarantees of the Fifth and Fourteenth Amendments. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); Taylor v.

Kentucky, 436 U.S. 478, 485-86 n. 13, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

Juries must be specifically instructed on the presumption of innocence. State v. McHenry, 13 Wn. App. 421, 424, 535 P. 2d 843, 845 (1975) aff'd, 88 Wn. 2d 211 (1977); see also Taylor, 436 U.S. at 485 (refusal to give requested instruction on presumption of innocence violated due process). This instruction performs two separate functions. First, as a corollary to the standard of proof, it reminds the jury that the prosecution bears the burden of persuading the jury of the defendant's guilt beyond a reasonable doubt, and absent such proof, the jury must acquit. United States v. Thaxton, 483 F.2d 1071, 1073 (5th Cir. 1973). Second, it cautions jurors to remove from their minds any suspicion arising from the arrest and charge itself and to reach their conclusion solely from the evidence presented at trial. Id. (quoting 9 Wigmore on Evidence § 2511, at 407 (3d ed. 1940)).

Two Washington cases make clear that the prosecutor's comments in this case were misconduct that undermined the presumption of innocence. In Venegas, the prosecutor stated that the presumption of innocence erodes every time the jury hears evidence of the defendant's guilt. 155 Wn. App. at 524. This Court held that the prosecutor committed flagrant misconduct by making an improper argument with no basis in law. Id. at 525.

A similar comment was condemned in Evans, 163 Wn. App. at 644. There, the prosecutor told jurors the presumption of innocence, “kind of stops once you start deliberating.” Id. at 643. Finding this comment just as troubling as the one in Venegas, the court concluded the prosecutor’s comment “invited the jury to disregard the presumption once it began deliberating.” Id. The court further noted that this idea “seriously dilutes the State’s burden of proof.” Id. at 643-44. Particularly given the prosecutor’s quasi-judicial role of ensuring that all defendants receive a fair trial, the court concluded this comment, “overstepped the bounds of ethical advocacy.” Id. at 646.

Even in the absence of an objection below, prosecutorial misconduct requires reversal when it is so flagrant and ill-intentioned as to be incurable by jury instruction. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). This analysis focuses on the prejudice to the defendant and whether it could have been cured. Id. at 762. In State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010), the court found “great prejudice” from a misstatement about the presumption of innocence, despite correct written jury instructions. The court declared,

Although the trial court’s instructions regarding the presumption of innocence may have minimized the negative impact on the jury, and we assume the jury followed these instructions, a misstatement about the law and the presumption of innocence due a defendant, the

“bedrock upon which [our] criminal justice system stands,” constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights.

Id. (citing Bennett, 161 Wn.2d at 315; State v. Anderson, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009)). In both Evans and Venegas, the court reversed where the prosecutor engaged in multiple unfair attacks on the presumption of innocence, including comments very similar to those made in this case. Evans, 163 Wn. App. at 648; Venegas, 155 Wn. App. at 525. Mendoza asks this Court to reverse.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT WHEN THE PROSECUTOR DILUTED THE BURDEN OF PROOF AND THE PRESUMPTION OF INNOCENCE.

The failure to object during closing argument can constitute ineffective assistance of counsel when the prosecutor’s conduct was both improper and prejudicial. In re Pers. Restraint of Cross, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (citing State v. Gentry, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995)). That is the case here. In the event this Court should find the prosecutorial misconduct issue was waived due to failure to object, this Court should nonetheless reverse due to counsel’s ineffective assistance in failing to ensure his client received the full benefit of the presumption of innocence.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v.

Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The constitutional right to effective assistance of counsel is violated when the attorney's performance is unreasonably deficient and it is reasonably probable that deficiency affected the outcome of the trial. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Counsel was ineffective in failing to object or move for mistrial based on arguments that misstated the law and improperly deprived Mendoza of the full benefit of the presumption of innocence. Without that

argument, the jury would have been far more likely to find reasonable doubt. The jury was likely left with an impression of the law akin to the prosecutor's argument in Venegas, that the presumption of innocence had already eroded, and the jury need not evaluate the evidence in light of this presumption. 155 Wn. App. at 524. The primary disputed issue in this case was whether Mendoza knew the items were stolen. With no direct evidence of her state of mind, incorrect application of the presumption of innocence was likely to play a decisive role in the outcome.

Because there was a reasonable likelihood the jury misapplied the presumption of innocence, the bedrock principle of the criminal justice system, this Court should reverse Mendoza's conviction. See United States v. Doyle, 130 F.3d 523, 539 (2d Cir. 1997) (presumption of innocence continues during deliberations; jury charge suggesting otherwise "creates a serious risk of undermining that vital protection"). Mendoza was prejudiced by her attorney's failure to object to argument misstating the presumption of innocence. Her conviction should, therefore, be reversed.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Mendoza indigent and entitled to appointment of appellate counsel at public expense. CP 34-35. If Mendoza does not prevail on appeal, she asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) states the "court of appeals . . . may require an

adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Mendoza’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived the filing fee and imposed no incarceration costs, imposing instead only the mandatory legal financial obligations and \$127.44 in restitution. RP 151. Mendoza has no assets; her only income is social security disability; and she already owes legal financial obligations of approximately \$10,000.¹ The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

¹ Mendoza’s financial situation is further addressed in her motion for order of indigency, which was designated as part of the record for appeal on August 30, 2016.

Without a basis to determine that Mendoza has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

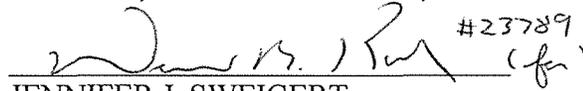
D. CONCLUSION

For the foregoing reasons, Mendoza requests this Court reverse her conviction.

DATED this 1st day of September, 2016.

Respectfully submitted,

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Certificate of Service

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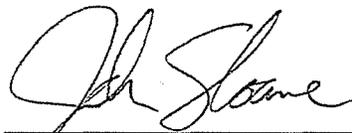
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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09-01-2016

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Done in Seattle, Washington