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State of Washington
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No. 36328-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCGOVERN,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The court violated Mr. McGovern's rights to a fair trial and to have the jury decide the facts when it admitted improper and prejudicial expert opinion testimony from two witnesses.**

A witness invades the “inviolable” role of the jury when he or she offers improper opinion testimony and undermines the jury’s independent determination of the facts. U.S. Const. amends. VII, XIV; Const. art. I, §§ 21, 22; ER 701, 702; *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Here, the court erred when it permitted the State to present “expert” testimony from two witnesses that was not based on specialized knowledge, was not helpful to the jury, and invaded the fact-finding province of the jury. The witnesses’ testimony, narrating the surveillance video and offering their opinions of what it displayed, violated Mr. McGovern’s right to a trial by jury.

The State’s response that Mr. McGovern did not preserve this argument is incorrect. As Mr. McGovern demonstrated in his opening brief, he not only preserved the issue with a motion in limine, but also through objections throughout the witnesses’ testimony. Brief of Appellant at 13-16 (discussing motion in limine and multiple objections). Therefore, the issue is properly before this Court.

This Court should reject the State’s argument that the managers’ testimony interpreting the video and identifying the deposit slip being

moved “is more likely a stated fact than a stated opinion.” Brief of Respondent at 20. First, at trial, the prosecutor admitted he could not see this, nor could an untrained eye, and that it was only the “expert” managers who could identify the deposit slip and offer such an interpretation. RP 54. On appeal, the State now attempts to retract this admission while ignoring Mr. McGovern’s citation to the record supporting this claim. Brief of Respondent at 22 n.14; Brief of Appellant at 9 n.1 (citing to RP 54), 14 (citing to RP 54).

This Court should also reject the State’s claim that if the challenged testimony was opinion testimony, it was proper. This case is unlike *State v. Hardy* and *State v. Collins*, on which the State relies. Brief of Respondent at 22-24. First, in those cases, the witnesses, who were permitted to identify the defendant in photographs, were people who had preexisting familiarity with the defendant. *State v. Collins*, 152 Wn. App. 429, 433, 437, 216 P.3d 463 (2009) (family and friends permitted to identify defendant); *State v. Hardy*, 76 Wn. App. 188, 191, 884 P.2d 8 (1994) (permitting person who “had known [defendant] for several years” to identify him from pictures). Here, only Manager Fryer had preexisting familiarity with Mr. McGovern, not Manager Smith.

Second, the State ignores an important difference. In *Collins*, the opinion testimony was necessary because of the poor quality of the

photographs, made from a video, which made it difficult to see the person displayed. 152 Wn. App. at 438. Here, the video was of sufficiently clear quality such that the jurors could view it themselves. Further, the State introduced the opinion testimony not to explain a video of poor quality. Instead, it introduced the opinion testimony so that witnesses could testified to things not actually visible on the video.

The court erred in admitting expert testimony from two witnesses where the witnesses did not qualify under ER 702 and violated Mr. McGovern's constitutional right to have the facts critical to his guilt determined by the jury. The State fails to establish beyond a reasonable doubt that any reasonable jury would have reached the same result, absent the error. *State v. Quale*, 182 Wn.2d 191, 202, 340 P.3d 213 (2014). Therefore, this Court should reverse the conviction and remand for a new trial.

2. The prosecutor engaged in a pattern of improper behavior which pervaded the trial and denied Mr. McGovern his right to a fair trial.

The prosecutor engaged in misconduct by repeatedly eliciting witnesses' opinions of Mr. McGovern's guilt, by expressing his own personal belief that Mr. McGovern was lying, by trivializing the presumption of innocence and burden of proof, and by improperly shifting the burden of proof to Mr. McGovern. Brief of Appellant at 20-40.

Because this pervasive misconduct prejudiced Mr. McGovern and denied him a fair trial, this Court should reverse his conviction and remand for a new trial.

First, the prosecutor repeatedly violated the court's in limine order excluding opinions of guilt when he elicited testimony from multiple witnesses that they thought Mr. McGovern was guilty. CP 29; RP 56. Contrary to the State's argument, the court's motion in limine ruling granting Mr. McGovern's motion to prohibit opinion testimony on guilt was not "tentative," as the State claims. Brief of Respondent at 13. No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference. *Quaale*, 182 Wn.2d at 199-200; *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159 (1973). Here, the State elicited opinions from three witnesses that they thought Mr. McGovern took the missing deposit bag. Brief of Appellant at 21-28. A prosecutor commits misconduct when he violates an in limine ruling. *State v. Gregory*, 158 Wn.2d 759, 864-67, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014); *State v. Easter*, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285 (1996); *State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993).

The State also argues the prosecutor did not commit misconduct when he expressed his personal opinion that Mr. McGovern was lying because a prosecutor is entitled to argue the evidence does not support the defense theory. Brief of Respondent at 28. While it is accurate that a prosecutor may argue the evidence does not support the defense theory of the case, that permissible argument does not allow a prosecutor to express to the jury his personal opinion that the defendant is lying. *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985).

As to the prosecutor's theme of Occam's razor, the State misunderstands the argument. Mr. McGovern does not argue the prosecutor committed misconduct because he "employ[ed] a logical argument." Brief of Respondent at 28. Mr. McGovern's claim of error is not to the use of logic but to the State encouraging the jury to use the theory of Occam's Razor, not the presumption of innocence and proof beyond a reasonable doubt, as its principles for deliberations. This theme minimized the State's burden of proof. Where a prosecutor trivializes the State's burden, he commits misconduct. *State v. Lindsay*, 180 Wn.2d 423, 434-36, 326 P.3d 125 (2014); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). As explained in the opening brief, the prosecutor's repeated and consistent use of Occam's Razor throughout the case, from opening statement through closing arguments, supplanted the appropriate

burden and asked the jury to convict Mr. McGovern because, applying Occam's Razor, it must find Mr. McGovern guilty. *See, e.g.*, RP 182, 185, 390, 397.

The State does not separately address the fourth grounds for prosecutorial misconduct -- that the prosecutor's improper questions and argument shifted the burden of proof to Mr. McGovern. Therefore, Mr. McGovern relies on the argument in his opening brief with respect to this issue. Brief of Appellant at 35-37.

As explained in the opening brief, the prosecutor's pattern of misconduct pervaded the trial and prejudiced Mr. McGovern. Contrary to the State's response, the appropriate prejudice analysis is not to consider each single act of misconduct in isolation. Brief of Respondent at 26-30. Instead, a defendant establishes prejudice and reversal is required if the "cumulative effect" of multiple instances of misconduct renders a trial unfair. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012); *accord State v. Pierce*, 169 Wn. App. 533, 556, 280 P.3d 1158 (2012) ("Taken together, there is more than a substantial likelihood that the above three improper arguments affected the verdict."). Considered as a whole, the multiple instances of misconduct throughout the case prejudiced Mr. McGovern.

The State also claims Mr. McGovern was not prejudiced by any potential misconduct because the court instructed the jury that arguments of counsel are not evidence. Brief of Respondent at 30, 30 n.4. This contention is meritless. The instruction the State cites was given in all of the cases in which this Court or the Supreme Court reversed convictions for prosecutorial misconduct. *Compare* WPIC 1.02 (standard instruction given in all cases and given here at RP 172; CP 32) *with, e.g., State v. Walker*, 182 Wn.2d 463, 478-81, 341 P.3d 976 (2015); *Lindsay*, 180 Wn.2d at 442-44; *Glasmann*, 175 Wn.2d at 707; *Pierce*, 169 Wn. App. at 556 (all reversing for prosecutorial misconduct notwithstanding that courts presumably gave standard instruction). As these cases demonstrate, the State may not rely on a single sentence contained within 14 jury instructions to excuse its misconduct.

The prosecutor engaged in a pattern of misconduct that pervaded the case – from opening statement, through direct examination of the State’s witnesses and cross-examination of Mr. McGovern, through closing arguments. The cumulative impact of this misconduct prejudiced Mr. McGovern and denied him his right to a fair trial. This Court should reverse and remand for a new trial.

3. Cumulative error denied Mr. McGovern a fair trial in violation of his due process rights.

For the reasons in his opening brief, if the Court agrees that two or more of the multiple prosecutorial or court errors occurred, but finds each individual error harmless in isolation, it should nonetheless reverse Mr. McGovern's conviction because the errors are prejudicial in the aggregate. *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); U.S. Const. amend. XIV; Const. art. I, § 3. Brief of Appellant at 40-42. The cumulative harm generated by errors in this case had an overarching prejudicial effect, and these errors, taken together, undermined the fairness of Mr. McGovern's trial. This Court should reverse and remand for a new trial.

4. The court imposed prohibited legal financial obligations, requiring this Court to strike the costs or remand for an indigency hearing.

At sentencing, the trial court imposed multiple discretionary legal financial obligations (LFOs), including a \$200 criminal filing fee, \$50 jail booking fee, and \$250 court appointed attorney's fee. CP 59. The court did not conduct any indigency inquiry before doing so. RP 435. The court also imposed interest on all LFOs, both restitution and nonrestitution. CP 60.

The State concedes that the interest accrual on nonrestitution LFOs is unlawful because such interest is expressly prohibited by RCW 10.82.090(1). Brief of Respondent at 32. This Court should accept the State's proper concession and order the prohibited interest stricken. *State v. Catling*, 193 Wn.2d 252, 259 n.5, 438 P.3d 1174 (2019) (remanding and directing court to revise judgment and sentence to eliminate prohibited nonrestitution interest on LFOs); *State v. Ramirez*, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018) (reversing and remanding for trial court to amend judgment and sentence to strike criminal filing fee, DNA fee, and discretionary LFOs from judgment and sentence).

The State does not concede the discretionary LFOs are improper but instead argues the matter should be remanded "to resolve McGovern's discretionary costs." Brief of Respondent at 32. The State argues that the fact that Mr. McGovern had been employed for over two years at the time of sentencing "establishes that he was not indigent at the time of sentencing." Brief of Respondent at 31. This Court should reject the State's claim, unsupported by citation to any legal authority and contrary to Supreme Court precedent, that a defendant is not indigent at the time of sentencing if he is employed or that employment excuses a court's obligation to conduct an individualized indigency inquiry.

Employment is but one factor among many that a sentencing court must consider before making an individualized indigency determination. *Ramirez*, 191 Wn.2d at 743-44; *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). RCW 10.01.160(3) categorically prohibits courts from imposing discretionary costs on indigent defendants, employed or not. The State entirely fails to address the relevant statute and case law. Brief of Respondent at 31-32.

Where a court considers only a defendant's work history, it conducts an inadequate indigency inquiry. *State v. Glover*, 4 Wn. App. 2d 690, 695-96, 423 P.3d 290 (2018). Here, the court did not conduct an adequate individualized indigency inquiry before imposing discretionary LFOs. The record does not affirmatively establish that Mr. McGovern was not indigent. Therefore, the court lacked the statutory authority to impose discretionary LFOs.

A resentencing hearing is unnecessary, and this Court may remand with a directive that the discretionary LFOs be stricken from the judgment and sentence. *Catling*, 193 Wn.2d at 259; *Ramirez*, 191 Wn.2d at 749-50. If this Court is not inclined to order the discretionary LFOs stricken, it should find the sentencing court conducted an inadequate individualized inquiry as required by RCW 10.01.160 and remand for a hearing. *Glover*, 4 Wn. App. 2d at 694-96.

B. CONCLUSION

The evidentiary errors and prosecutorial misconduct, whether considered in isolation or cumulatively, denied Mr. McGovern his right to a fair trial. This Court should reverse Mr. McGovern's conviction and remand for a new trial. At minimum, the discretionary LFOs and nonrestitution LFOs must be stricken from the judgment and sentence, or the matter must be remanded for a hearing.

DATED this 31st day of December, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long, sweeping underline.

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36328-7-III
)	
DAVID MCGOVERN,)	
)	
APPELLANT.)	

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