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Court of Appeals  
Division III  
State of Washington  
4/9/2020 2:33 PM

NO. 36936-6-III

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

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STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

LISA MUNRO  
Defendant/Appellant

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APPEAL FROM THE SUPERIOR COURT OF  
LINCOLN COUNTY, STATE OF WASHINGTON  
HONORABLE JOHN STROHMAIER

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BRIEF OF RESPONDENT

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STATE OF WASHINGTON,

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Court of Appeals # 36936-6-III  
Lincoln County # 19-1-000013-6  
**RESPONDENT'S BRIEF**

COMES NOW, the Respondent, State of Washington, by and through Adam Walser, Special Deputy Prosecuting Attorney for Lincoln County, and respectfully submits this brief.

**I. STATEMENT OF THE FACTS**

In August of 2018, three foreign exchange students were placed in Appellant's home, as part of a foreign exchange student program. (RP 100). Appellant took in a student from Mexico, a student from Brazil, and KN, a student from Vietnam. (RP 100). During their stay, everyday living expenses, such as room and board, were provided by Appellant. (RP 106).

Incidental expenses, beyond room and board, were to be provided by the student's themselves. (RP 105). In order to cover incidental expenses, KN arrived with two thousand dollars in cash. (RP 119). As KN did not have a bank account in the US, these funds were kept in a cash book, which KN placed in the closet of the room he had been given by Appellant. (RP 119). Wishing to purchase a laptop computer, KN provided Appellant with six hundred dollars from his cash book, leaving one thousand four hundred dollars remaining. (RP 119).

Approximately a month after KN had provided Appellant with the six hundred dollars, Appellant stored several items in the closet where KN was storing his cash book. (RP 121). These items necessitated Appellant repeatedly entering that closet and removing items. (RP 121). Around the same time these items were removed from the closet, KN's cash book disappeared, along with the one thousand four hundred dollars it contained. (RP 122.) What happened to these funds was disputed at trial, however, the missing cash book formed the basis of a charge against Appellant for second degree theft. (RP 99). At trial, Appellant was acquitted of this second degree theft charge. (CP 36).

In January of 2019, KN's parents wired six hundred dollars to

Appellant's bank account, in order that so that it could be given to KN, and thereby replace his lost funds. (RP 123). After receiving the six hundred dollars into her bank account, Appellant provided KN with two hundred dollars in cash. (RP 123). When KN asked about the remaining four hundred dollars, Appellant explained that she was unable to withdraw all the funds from her local bank, and that she had to go into Spokane in order to acquire the remainder of his funds. (RP 124). Despite travelling to Spokane multiple times over the following weeks and months, Appellant never provided KN with the remaining four hundred dollars. (RP 124-5). The four hundred dollars established the basis for a charge against Appellant for third degree theft. (CP 8-9). At trial, the jury convicted Appellant of third degree theft. (CP 37).

At trial, Appellant's Counsel reserved his opening statement until presentation of Appellant's case. (RP 103, 162-163). At the time of his opening statement Appellant's Trial Counsel informed the jury that "[Appellant] never intended to deprive Mr. KN of any money. She's got that three hundred dollars now and she was holding it."<sup>1</sup> (RP 163). During the defense case, Appellant was the sole defense witness to testify. (RP

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<sup>1</sup> The parties disputed the exact amount of funds withheld from KN by Appellant.

164-179). Appellant testified that she was still in possession of KN's money, that she had retained it in her account since it was wired to her, and that the court's no contact order prevented her from providing it to him. (RP 171 - 3).

Prior to closing arguments, Trial Defense Counsel asked the court whether Appellant could return the disputed funds to KN; again stating that the court's no contact order prevented Appellant from doing so previously. (RP 182-3). During his closing argument, the Trial Defense Counsel argued to the jury that "she still has [the money] ... Ms. Munro has always had the three hundred dollars for KN." (RP 212). Additionally, the Trial Defense Counsel argued that the State had presented no evidence of Appellant's bank activity, no evidence of received money, wire transfers or otherwise. (RP 218-9). The absence of documentary evidence presented by the state, according to the defense trial theory, was itself evidence that no theft had occurred, and therefore a basis to acquit. (RP 218-9). During Appellant's sentencing, the trial judge informed Appellant that he would consider her continued possession of these funds during sentencing. (RP 259). However, the trial judge acknowledged that Appellant's bank records may not have been presented as "perhaps that

information may be – information she doesn't want to divulge.” (RP 259).

During the State's closing argument, the prosecuting attorney argued the following:

“[Appellant] testified that she still had that three hundred dollars and that she's completely prepared to give it to him, but she had the money in January, kept it through February, kept through the beginning of March or the first part of March when he was removed from her home. And now, we have this court case and she says that she's not allowed to give it to him even though she wants to. Well, she could have given it to him in January, February, March and then the court case started and she said she's not allowed. That's not exactly true. There are ways. If she really wanted to give him that money, she could have found a way. She could have given the money to her attorney to give to him. She could have asked the Court. (RP 202-203).

Defense counsel objected to this argument, but did not state an evidentiary basis for this objection, instead stating that the rules prohibited utilizing a third party to effectuate a transfer of the funds. (RP 203). In

response, the court stated that “[a]lthough evidence not (sic) presented but asking the Court would be an option.” (RP 203). Following this statement from the judge, the prosecuting attorney continued with the following:

Okay, so she could have asked the Court. She could have asked the Court for permission. She could have given the money to the Court to give to K.N. There are ways. She could have found a way if she really wanted to, but instead she withheld that money and it’s now June and she’s had that money since January. She admitted that she has the money. She admitted that she received that money from his parents and that money was supposed to be for K.N., but she held onto it. She withheld that from him. She exerted unauthorized control over that, because that’s not her money to control. So, that element, that portion of the element has been met.” (RP 203-4).

## **II. ARGUMENT AND AUTHORITY**

### **Ineffective Assistance of Counsel**

The right to effective assistance of counsel in criminal proceedings is guaranteed to a defendant by the sixth amendment to the United States

Constitution and article I, section 22 of the Washington State Constitution. US Const Art VI; Wash St. Const. Art I § 22. In order to show ineffective assistance of counsel, an appellant must show:

"(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."

*In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672-673 (2004) (Citing *State v. McFarland*, 127 Wn.2d 322, 334-35 (1995)). An appellant's "failure to establish either element of the test defeats the ineffective assistance of counsel claim." *Strickland v Washington*, 466 U.S. 668, 700 (1984).

In order to prevent "the distorting effects of hindsight" the Supreme Court has directed that ineffective assistance of counsel claims be approached "with a strong presumption that counsel's representation was effective." *Id* at 673 & 689. Because of this presumption "the burden

rests on the accused to demonstrate a constitutional violation.” *United States v. Cronin*, 466 U.S. 648, 658 (1984). In order to rebut this presumption, an appellant must prove that the assistance received by counsel was “unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *In re Pers. Restraint of Davis*, 152 Wn.2d at 673. Any assertion of unreasonableness on a counsel’s part must be “evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” *Id.*

#### ***Defense Counsel’s Duty to Investigate***

Appellant’s brief alleges Appellant’s Defense counsel failed to engage in the levels of investigation necessary to provide competent and effective assistance of counsel. (App Br 6-12). The Washington Supreme Court has held “[t]he degree and extent of investigation required will vary depending upon the issues and facts of each case...” *State v A.N.J.*, 168 Wn.2d 91, 111; 225 P.3d 956 (2010). “It is impossible to ‘exhaustively define the obligations of counsel [ ] or form a checklist for judicial evaluation of attorney performance.’” *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 99-100 (citing *Strickland v. Washington*, 466 U.S.

668, 688 (1984)). “[A]t the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial.” *A.N.J.*, 168 Wn.2d 91, 111. Effective assistance of counsel requires that the investigation by a defense counsel be “reasonable” under the circumstances. *Strickland*, 466 U.S. at 688. However, that presumption can be overcome if “there is no conceivable legitimate tactic explain[ing] counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130; 101 P.3d 80 (2004).

During Appellant’s sentencing hearing, the judge indicated that he would reduce the Appellant’s sentence should she be able to show that she had continuously maintained K.N.’s funds in her bank account from the time they had been wired in to it. (RP 253.) Presumptively, this statement by the judge was in response to Defense counsel’s several claims, during the trial, that Appellant had done precisely that. (RP 182-3, 212.) (App. Br. 6.) The basis for Appellant’s claim of deficiency seems is that Defense counsel did not submit these records at trial. (App. Br. 6.) However, Defense counsel was *clearly* aware that these records existed, as he repeatedly argued that Appellant had retained these funds in her account, during the trial. (RP 182-3, 212.) Had Defense counsel not investigated

Appellant's bank records, he would have never had a basis of knowledge to assert that Appellant had continuously retained the funds in her account. The fact that Defense counsel failed to admit the records is not evidence that he had not engaged in adequate investigation; Defense counsel's arguments clearly contradict that assertion. Instead, Defense counsel's failure to admit these records is merely evidence that he chose not to do so.

In order to rebut the presumption that her counsel's behavior was effective, Appellant must show that there was no conceivable strategic reason for Defense counsel's failure to admit copies of her bank records. See *Reichenbach*, 153 Wn.2d at 130. During sentencing, the judge stated just such a strategic basis for the Defense counsel to refrain from admitting these records; specifically, that they might have contained information damaging to Appellant's case. (RP 259.) This damaging information could have pertained to either of the charges that had been leveled against Appellant. This justification is not only conceivable, but imminently reasonable.

When considering the Defense counsel's actions, under the circumstances at the time, it is entirely reasonable to presume that the

Defense Counsel's actions were based on a conscious and strategic decision. Therefore, Appellant's claim of ineffective assistance of counsel should be denied.

### **Improper Judicial Comments**

"A judge is prohibited by article IV, section 16 [of the Washington State Constitution] from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing the jury that 'matters of fact have been established as a matter of law.'" *State v Levy*, 156 Wn.2d 709 at 721; 132 P.3d 1076 (2006). (Quoting *State v Becker*, 132 Wn.2d at 64). "[T]he court's personal feelings on an element of the offense need not be expressly conveyed to a jury; it is sufficient if they are merely implied." *Levy*, 156 Wn.2d at 721. "Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial." *State v Lane*, 125 Wn.2d 825 at 838, 889 P.2d 929 (1995). "The burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment." *State v Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972).

The crux of the matter commented on by the court related to whether Appellant was blocked from returning KN's funds once the no contact order had been put in to place. (RP 203). At the time the comment was made, the State was in the middle of its closing argument. (RP 203). The State's argument was not an attempt to interject new facts into the case. Instead it was simply an argument that it didn't actually matter whether Appellant had retained KN's funds in her bank account or not. Whether the court could act as the intermediary for the return of KN's funds, once the no contact order had gone into place, had no bearing on if Appellant was guilty of conduct which allegedly took place two months prior. It was thus irrelevant to the charge and could not have prejudiced Appellant.

The charged conduct was alleged to have taken place between 1 January and 31 January, 2019. (CP 8-9). The no contact order did not go into effect until March of 2019, after the charge against Appellant had been filed. (RP 203). Whether Appellant had attempted to return the funds after March of 2019, or had been blocked by the no contact order, was entirely irrelevant to whether she committed 3<sup>rd</sup> degree theft two months earlier. Even if judge's comments were deemed to be improper, these

comments could not have prejudiced Appellant, as they had no bearing on whether the conduct charged had taken place in the time period charged. For the judge's comment to prejudice Appellant, the jury would must have considered Appellant's conduct two months after the charged time period in order to determine her guilt; which would mean that the jury had entirely disregarded one element of the charge. There is no evidence that the jury had taken such an act. Thus, regardless of whether the judge's comments were improper, they could not have been prejudicial to Appellant, as they were entirely irrelevant to the charged conduct.

#### **Prosecutorial Misconduct**

“A defendant who alleges improper conduct on the part of a prosecutor must first establish the prosecutor's improper conduct and, second, its prejudicial effect.” *State v. Dhaliwal*, 150 Wn. App. 559, 578. (2005). If an appellant is able to establish that the prosecutor's conduct was improper, “prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict.” *State v. Pirtle*, 127 Wn.2d 628 (citing *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981)).

The Washington State Supreme Court has held that a prosecutor's comments should be reviewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *State v. Ziegler*, 114 Wn.2d 533, 540 (1990). The burden of establishing that the comments were improper is upon Appellant. *State v. Watkins*, 53 Wn. App. 264, 275 (1989).

*The Prosecutor's Comments Were Not Improper*

In the context of the issues of the case, the evidence addressed and the case as a whole, the allegedly offensive comment by the prosecutor was an entirely fair argument. Appellant's relevant testimony was, in effect, that she had constantly retained KN's funds in her bank account from the time they were wired to her account until that very day of trial. (RP 171.) This testimony had nothing to do with whether Appellant had committed the charged misconduct during the charged time period. This evidence was not proper for the jury to consider on the matter of guilt; this was instead evidence in mitigation, more appropriate for sentencing. However, since the evidence of her retaining the funds was admitted, it was *entirely* proper for the State to make an argument regarding that evidence. Given that the State's comments were a valid argument in

response to Appellant's testimony, they were not improper.

*The Comments of the Prosecutor Were Not Prejudicial*

"If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict" *State v Emery*, 174 Wn.2d 741, 760; 278 P.3d 653 (2012). "If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Id* 760-1.

Even if the comments were deemed to be improper, they were not prejudicial. Appellant did object at trial, and thus she must show that the prosecutor's statements had a "substantial likelihood of effecting the Jury's verdict." *Id*. Appellant cannot meet this burden.

As explained above, the time period of the charged conduct was 1 January to 31 January, 2019. (CP 8-9). The relevant testimony by Appellant, and argument by the State, related to actions Appellant may or may not have taken *after* the charged time period had already expired. (RP 171, 203). Whether Appellant was barred from taking a specific action after the charged time period was entirely irrelevant as to her guilt on that

charge. Thus, even if the prosecutor's arguments were improper, they pertained to matters entirely irrelevant to the facts being considered by the jury. Since the matters being discussed were irrelevant to the facts before the jury, there was no likelihood they effected the jury's verdict. Therefore, Appellant's claim of prosecutorial misconduct fails to show prejudice.

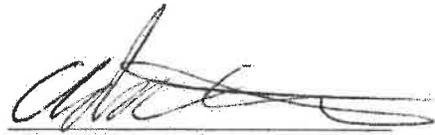
#### **Cumulative Effect of the Alleged Errors**

The errors alleged by Appellant in her brief were either de minimis or not improper. The assistance of her counsel was effective, the comments by the judge were neither improper nor prejudicial, and the comments of the prosecutor were both proper and not prejudicial. As such, the cumulative effect of these alleged errors cannot have deprived Appellant of her right to a fair trial.

**III. CONCLUSION**

For the reasons above, the State respectfully requests that the court deny Appellant's request for reversal of her conviction.

RESPECTFULLY SUBMITTED this 9th day of April, 2020



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I, do hereby certify and declare under penalty of perjury of the laws of the State of Washington that on this date a true and correct copy of Brief of Respondent was delivered to the Appellant through her Attorney, Skylar Brett, in the manner indicated below:

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# LINCOLN COUNTY PROSECUTOR'S

April 09, 2020 - 2:33 PM

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