

No. 61759-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARRIN BOWMAN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

 1. MR. BOWMAN'S CONSTITUTIONAL RIGHT TO BE INFORMED OF THE CHARGES AGAINST HIM WAS VIOLATED WHEN THE COURT GRANTED THE STATE'S MOTION TO AMEND A CHARGE OF THIRD DEGREE THEFT TO THE HIGHER OFFENSE OF SECOND DEGREE THEFT AFTER ALL WITNESSES CONCERNING THE COURT HAD BEEN EXCUSED 1

 2. MR. BOWMAN'S CUSTODIAL STATEMENTS TO DEPUTY PALMER WERE NOT ADMISSIBLE BECAUSE THE STATE DID NOT PROVE MR. BOWMAN KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS MIRANDA RIGHTS..... 5

 3. THE PROSECUTOR'S MISCONDUCT IN OPENING STATEMENT REQUIRES A NEW TRIAL..... 11

B. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Bellevue v. Acrey</u> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	9
<u>State v. Aiken</u> , 72 Wn.2d 306, 434 P.2d 10 (1967), <u>vacated on other grounds</u> , <u>Wheat v. Washington</u> , 392 U.S. 652 (1968).....	12
<u>State v. James</u> , 108 Wn.2d 483, 739 P.2d 699 (1987).....	4
<u>State v. Kroll</u> , 87 Wn.2d 829, 558 P.2d 173 (1976).....	11
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987).....	1, 2
<u>State v. Schaffer</u> , 120 Wn.2d 616, 845 P.2d 281 (1993).....	4
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	7
<u>State v. Terrovona</u> , 105 Wn.2d 632, 716 P.2d 295 (1986).....	6, 7

Washington Court of Appeals Decisions

<u>State v. Echevarria</u> , 71 Wn.App. 595, 860 P.2d 420 (1993).....	14
<u>State v. Gross</u> , 23 Wn.App. 319, 597 P.2d 894, <u>rev. denied</u> , 92 Wn.2d 1033 (1979)	8
<u>State v. Haack</u> , 88 Wn.App. 423, 958 P.2d 1001 (1997), <u>rev. denied</u> , 134 Wn.2d 1016 (1998)	8
<u>State v. Hakimi</u> , 124 Wn.App. 15, 98 P.3d 809 (2004), <u>rev. denied</u> , 154 Wn.2d 1004 (2005)	4
<u>State v. Murbach</u> , 68 Wn.App. 509, 843 P.2d 551 (1993).....	4
<u>State v. Ziegler</u> , 138 Wn.App. 804, 158 P.3d 647 (2007).....	2, 3, 5

United States Supreme Court Decisions

<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).....	9
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	6, 10

Washington Constitution

Const. art. I, § 22.....	1
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Washington Statutes

RCW 9A.56.010(18).....	3
RCW 9A.56.040(1)(a) (2006)	3

Court Rules

CrR 2.1(a).....	2
RPC 3.8(a)	2

Other Authorities

Royce Ferguson, 13 <u>Washington Practice: Criminal Practice and Procedure</u> (2004).....	11
Thomas A. Mauet, <u>Fundamentals of Trial Techniques</u> (Boston 1980)	13

A. ARGUMENT IN REPLY

1. MR. BOWMAN'S CONSTITUTIONAL RIGHT TO BE INFORMED OF THE CHARGES AGAINST HIM WAS VIOLATED WHEN THE COURT GRANTED THE STATE'S MOTION TO AMEND A CHARGE OF THIRD DEGREE THEFT TO THE HIGHER OFFENSE OF SECOND DEGREE THEFT AFTER ALL WITNESSES CONCERNING THE COUNT HAD BEEN EXCUSED

Just before the State rested its case and after all relevant witnesses had been excused, the court permitted the State to amend count 3, a charge of third degree theft, to the higher charge of second degree theft. 4/1/08RP 143-45; 4/2/08RP 2, 9; CP 70, 82. Mr. Bowman was therefore unable to cross-examine the witnesses about the value of the stolen property or investigate that issue prior to trial. Mr. Bowman argues the late amendment violated his constitutional right to be provided with notice of the charges against him. Brief of Appellant at 7-14; State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); Const. art. I, § 22. In response, the State argues Mr. Bowman was not prejudiced by the last-minute amendment. Brief of Respondent at 33-40.

“It is fundamental that that an accused must be informed of the charge he is to meet at trial and cannot be tried for an offense no charged.” State v. Ziegler, 138 Wn.App. 804, 808, 158 P.3d 647 (2007). The purpose of a written information is to place the defendant on notice of the charges against him. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); CrR 2.1(a).

The State first claims Mr. Bowman was on notice that the State wanted to amend the information to second degree theft because the prosecutor had discussed charging second degree theft before the charges were added by amended information. Brief of Respondent at 32 (citing 2/8/08RP 2-3, 8, 12, 15-17). The prosecutor had apparently sent defense counsel a proposed amended information adding charges of theft in the second degree and possessing stolen property in the third degree. 2/8/08RP 2-3. When the amended information was actually filed, however, it charged theft in the third degree for this incident, presumably based upon the prosecutor’s review of the evidence it was likely to be able to produce at trial. CP 70 (Count 3); RPC 3.8(a). The amended information here put Mr. Bowman on notice that he was to meet the charge of third degree theft. He was thus not required to prepare for a charge that the prosecutor thought about filing but did not.

The value of the stolen property was not critical for a third degree theft charge but was essential to prove an element of second degree theft – that the value of the stolen property exceeded \$250. RCW 9A.56.040(1)(a) (2006). The late amendment of the information precluded Mr. Bowman from cross-examining the prosecution’s witness about the value of the gasoline in question. It also precluded defense counsel from researching the market value of the gasoline at the time and place of the offense. See RCW 9A.56.010(18). The State claims that Mr. Bowman cannot argue the amendment precluded his attorney from pretrial investigation into the value of gasoline because defense counsel did not articulate that argument when arguing against the late amendment. Appellant’s argument, however, is logical and properly based upon the facts and the statute at issue. In Ziegler, the State added two charges not included in the original information after its key witnesses testified. Ziegler, 138 Wn.App. at 807. The appellate court found the defendant’ constitutional rights were violated because the late amendment precluded him from preparing his defense and also impacted his trial strategy and pretrial plea

negotiations without explaining that this particular argument was made by his attorney at trial. Id. at 811.

None of the cases cited by the State support the argument that the midtrial amendment to a higher charge was constitutional. State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993) (mid-trial amendment to same charge but based upon different facts); State v. James, 108 Wn.2d 483, 739 P.2d 699 (1987) (pre-trial amendment to higher charge); State v. Hakimi, 124 Wn.App. 15, 98 P.3d 809 (2004) (midtrial amendment to reduced charge; no objection by defense), rev. denied, 154 Wn.2d 1004 (2005); State v. Murbach, 68 Wn.App. 509, 843 P.2d 551 (1993) (amendment on first day of trial from second degree burglary to residential burglary).

The accused's constitutional right to be informed of the charges against him precludes the State from filing an information alleging a specific crime in hopes of proving a different and more serious offense at trial. Mr. Bowman's constitutional right to be informed of the charges against him were violated when the State was permitted to amend to a higher crime just before resting its case and after all witnesses concerning the count were excused. Mr. Bowman's second degree theft conviction must be reversed

and the case remanded for resentencing. Ziegler, 138 Wn.App. at 811.

2. MR. BOWMAN'S CUSTODIAL STATEMENTS TO DEPUTY PALMER WERE NOT ADMISSIBLE BECAUSE THE STATE DID NOT PROVE MR. BOWMAN KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS MIRANDA RIGHTS

Mr. Bowman was advised of his Miranda rights before the police questioned him about the Eager trailer (Count 1), but the State failed to produce any evidence that he was asked if he was willing to waive his constitutional rights before he was interrogated. The State argues that this Court may infer Mr. Bowman knowingly, intelligently and voluntarily waived his constitutional rights based only upon the facts that he was advised of his constitutional rights and talked to the police. Brief of Respondent at 11-20. The cases relied upon by the State, however, do not support their argument, as they address situations with independent evidence the defendant understood his rights and voluntarily waived them. The State's argument must therefore be rejected.

When the government seeks to introduce evidence of a defendant's custodial statement against him at trial, it must first demonstrate the defendant was informed of his constitutional rights to remain silent and to consult with an attorney and that the

defendant knowingly, intelligent, and voluntarily waived those rights. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

This Court has always set high standards of proof for the waiver of constitutional rights, and we reassert them now. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

Miranda, 384 U.S. at 436 (internal citations omitted). A valid waiver may not be presumed from the giving of warnings and the fact that the defendant made a statement.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was eventually obtained.

Id. Accord, State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986) (Supreme Court has forbidden presumption of valid waiver from fact that accused gave statement after being informed of rights).

In the cases cited by the State, the appellate courts upheld the admission of statements made after the defendant was advised

of his Miranda rights despite the absence of an express waiver of those rights. In each case, however, there was an additional fact that demonstrated the defendant understood his rights and knew he could remain silent and/or request an attorney. In State v. Rupe, 101 Wn.2d 664, 676, 683 P.2d 571 (1984), the defendant signed a form waiving his constitutional rights and another consenting to a polygraph examination; he confessed after the polygraph examination. While Rupe claimed the rights form was inaccurate because the results of polygraph examinations are not generally admissible in Washington absent stipulation, the court held the waiver adequately explained Rupe's constitutional rights and was not required to address the intricacies of state evidentiary rules. Rupe, 101 Wn.2d at 676-77.

In Terrovona, the defendant was advised of his rights and talked to the officers, but later asked for an attorney, thus displaying knowledge of his constitutional rights by exercising them. Terrovona, 105 Wn.2d at 647. And in Gross, the defendant refused to sign the waiver form but nonetheless answered interrogators' questions on four separate times. After answering some of the questions the last time, he requested an attorney. State v. Gross, 23 Wn.App. 319, 321, 597 P.2d 894, rev. denied, 92 Wn.2d 1033

(1979). Mr. Bowman, in contrast, did not sign a waiver as in Rupe or demonstrate his understanding of his constitutional rights by stopping the interview like the defendants in Terrovona and Gross. Nor was there evidence Mr. Bowman was even shown the waiver form until after he gave a full oral statement and the officer had prepared a written statement for Mr. Bowman's signature.

Also illustrative of the circumstances in which this Court has upheld the finding of an implied waiver of the defendant's constitutional rights is State v. Haack, 88 Wn.App. 423, 958 P.2d 1001 (1997), rev. denied, 134 Wn.2d 1016 (1998). In that case the defendant told the investigating officer that he would answer some questions but not others. Haack, 88 Wn.App. at 435. The officer then informed the defendant of his Miranda rights and asked if he wished to talk. Id. The defendant said he would think about it, answered a few questions, and stated when he wanted the questioning to cease. Id. This Court concluded the defendant's statements and conduct at the interview demonstrated a "knowing and intelligent initial waiver, followed by an exercise of the right to remain silent when he did not wish to answer any more questions." Id. at 436.

Here, one police officer advised Mr. Bowman of his Miranda rights but did not question him. 3/27/08RP 25-26, 28-29; CP 164 (Finding of Fact a). Another officer then questioned Mr. Bowman and could not remember if Mr. Bowman waived his rights prior to the interrogation. 3/27/08RP 18, 20. Afterwards, the officer prepared a written statement which Mr. Bowman signed, along with the waiver of his constitutional rights. 3/27/08RP 18-20; Ex. 5. Thus, there is no evidence Mr. Bowman knowingly, intelligently and voluntarily waived his Miranda rights prior to making the statement.

A waiver of an important constitutional right must be knowing, intelligent and voluntary. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Bellevue v. Acrey, 103 Wn.2d 203, 207, 208-09, 691 P.2d 957 (1984). This Court will not presume a valid waiver of the constitutional right to counsel simply because a defendant went to trial without a lawyer, nor may a valid waiver of the constitutional right to a jury trial be presumed simply because a defendant had a bench trial. Acrey, 103 Wn.2d at 208, 211-12. In the absence of an express waiver of his Miranda rights or any other evidence demonstrating that Mr. Bowman understood he was not required to speak to the interrogating officer, this Court may not presume a valid waiver of his constitutional rights to

remain silent and to consult with an attorney. Miranda, 384 U.S. at 436.

The State also responds that any error in admitting Mr. Bowman's written statement was harmless beyond a reasonable doubt because the statement was largely exculpatory. Brief of Respondent at 20-24. As the State points out, however, Mr. Bowman had exculpatory explanations for other charged counts, one of which the State describes as "incredible." Id. at 23-24. The State does not dispute Mr. Bowman's argument that the prosecutor intentionally joined the various counts in order to discount his defenses. Brief of Appellant at 20-21 (citing 2/8/08RP 4-12; 3/13/08(opening)RP 2-3; 4/24/08RP 11). Looking at the evidence before the trial court, Mr. Bowman's exculpatory statement helped the State convict him of all four charges. In light of the usefulness to the State cannot demonstrate beyond a reasonable doubt its admission was harmless, and Mr. Bowman's convictions must be reversed.

3. THE PROSECUTOR'S MISCONDUCT IN OPENING STATEMENT REQUIRES A NEW TRIAL

In her opening statement to the jury, the prosecutor discussed several maxims that constituted her theme of the case, such as "lightning doesn't strike twice," and argued that lightning struck three times in this case. 3/13/08(opening)RP 2-3. The opening statement is an opportunity for counsel to acquaint the jury with the anticipated facts of the case, and argument is not permitted. State v. Kroll, 87 Wn.2d 829, 834-35, 558 P.2d 173 (1976). In response to Mr. Bowman's argument that the prosecutor committed misconduct in opening statement, the State claims that the prosecutor's argument was proper and that it did not prejudice Mr. Bowman. Brief of Respondent at 24-33. Both arguments should be rejected.

First, the prosecutor's references to catch phrases were not proper. An opening statement is limited to the facts the party anticipates will be proven at trial and the reasonable inferences that may be drawn from those facts. Kroll, 87 Wn.2d at 834; Royce Ferguson, 13 Washington Practice: Criminal Practice and Procedure, §§ 4201, 4202 (2004). An example of the facts and reasonable inferences that may be made in opening argument is

found in the prosecutor's opening statement in a death penalty case, State v. Aiken, 72 Wn.2d 306, 351, 434 P.2d 10 (1967), vacated on other grounds, Wheat v. Washington, 392 U.S. 652 (1968). The defendant objected to the portion of the prosecutor's opening statement detailing how shots were fired when one of the victims was attempting to rise from the floor. Id. The court held the argument was proper because it was based upon reasonable inferences from the evidence produced at trial and because the viciousness of the attack was relevant to the jury's death penalty determination. Id.

The prosecutor here did not intend to produce evidence to prove that lightning does not strike twice or that "if it seems too good to be true it probably is." 2/8/08(opening)RP 2-3. Nor is the adage phrase utilized by the prosecutor, "fool me once, shame on you; fool me twice, shame on me," a fact or inference capable of proof. Id. at 2. The prosecutor's opening statement thus began with improper argument.

The State's argument that Mr. Bowman was not prejudiced by the argument must also be rejected. Opening statement is a critical point in a trial, and studies have shown that the majority of jury verdicts are consistent with the jurors' initial impressions of the

case after opening statements. Thomas A. Mauet, Fundamentals of Trial Techniques at 49 (Boston 1980). It was thus both improper and unfair for the prosecutor to argue the theme of her case in opening argument. While the State claims the prosecutor's opening statement did not invite the jury to convict the jury based upon anything other than evidence and reason, in fact it suggested the jury convict based upon sayings rather than reason.

The State claims that the jury is presumed to follow the court's instruction to decide the case based upon the evidence introduced at trial, not the parties' arguments. Brief of Respondent at 31-32. The State even points out that defense counsel made this point in her opening statement. Id. at 32. It was the prosecutor's improper opening the court's decision to overrule defense counsel's objection, however, that forced Mr. Bowman's attorney to make this point in her opening argument.

Finally, the State claims it is telling that defense counsel did not request a mistrial based upon the opening statement. Brief of Respondent at 32. Defense counsel's objection to the prosecutor's opening statement, however, was overruled. 3/31/08RP 43-44; 3/31/08(opening)RP 2. Defense counsel thus had no basis to

move to strike the offending argument or to request a mistrial on that basis.

The prosecutor's opening statement included improper argument that set forth prosecutor's theme and set the tone for the trial. Mr. Bowman's convictions should be reversed and his case remanded for a new trial. State v. Echevarria, 71 Wn.App. 595, 598, 860 P.2d 420 (1993).

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Darrin Bowman respectfully requests this Court (1) reverse his conviction for theft in the second degree because the late amendment violated his constitutional right to notice, and (2) reverse and remand all of his convictions for a new trial because the court admitted his statement to a police officer in the absence of evidence he validly waived his Miranda rights and due to the prosecutor's improper argument in opening statement.

DATED this 26th day of May 2009.

Respectfully submitted,



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