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OCT 07 2013
King County Prosecutor
Appellate Unit

COA NO. 61853-9-I

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

IN RE PERSONAL RESTRAINT PETITION OF RAYMOND MCCOY;

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND MCCOY,

Petitioner.

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

The Honorable Paris K. Kallas, Judge
The Honorable Jim Rogers, Judge

REPLY BRIEF OF PETITIONER

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A. ARGUMENT IN REPLY

THE BRADY VIOLATION VIOLATED MCCOY'S RIGHT TO DUE PROCESS AND REQUIRES REVERSAL OF THE CONVICTIONS.

The State appropriately concedes two of the three convictions must be vacated as a result of the Brady[1] violation related to Olsen's testimony. Brief of Respondent (BOR) at 18-21. The State, however, claims the conviction for the Key Bank robbery was unaffected by the Brady violation. BOR at 22-24.

The State's attempt to artificially isolate the Key Bank conviction from the taint of Olsen's testimony is not well taken. All three robberies were closely related and the jury could be expected to treat them as such, especially in light of Olsen's testimony covering all three charges. The jury naturally viewed the case as a whole involving related offenses. That is why the Brady error infects the entire trial and the jury's verdicts on each of the three counts. The three offenses are tied to one another. Pull the string on one conviction and the others unravel as well.

In this regard, it is telling that the State moved to join the Sterling Bank and Key Bank charges for trial because the "crimes are of the same or similar character and clearly are a series of acts connected together or

[1] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

formed in a single scheme or plan. The crimes all occurred in very close proximity to each other (banks in downtown Seattle) and are literally only separated by a [sic] two months. Because the counts are all closely related as part of the same overarching scheme, joinder of the offenses would be proper." CP 36; see also RP (9/15/06) 23-24. The State's decision to join the offenses was sound trial strategy. An experienced trial prosecutor knows jurors are more likely to convict if presented with multiple offenses connected together by a single scheme or plan.

In an effort to save the Key Bank conviction, the State now contends evidence in the Key Bank robbery is actually quite distinct from the other two robberies. It now asserts that evidence in the Key Bank robbery overwhelmingly showed McCoy was the robber, in contrast to the other two robberies. BOR at 22.

The State took a different position at the trial level. In arguing the Sterling Bank and Key Bank robbery counts should remain joined, the State maintained this was not a situation where one case was very weak and the other very strong, but rather both were backed up by credible evidence. RP (9/15/06) 24-25. In later amending the information to include the US Bank count, the State again argued joinder was proper and severance unwarranted because the offenses were of the same character and the State's evidence on each count was strong. CP 54-55. The State's

argument below regarding the relative strength of the evidence on each count stands in stark contrast to the argument it now presents on appeal — an argument belatedly presented to salvage one of the convictions.

In determining the materiality of Brady evidence, sufficiency of evidence is not the test for whether a conviction warrants reversal. In re Pers. Restraint of Stenson, 174 Wn.2d 474, 487, 276 P.3d 286 (2012). The relevant question is not even "whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Stenson, 174 Wn.2d at 487 (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). Under that standard, the Key Bank conviction must be thrown out along with the other two tainted convictions.

The State cannot dispute that Olsen's testimony covered all three counts. See RP (5/9/07) 55 ("The defendant confessed to these three robberies to Mr. Olsen."). The State also acknowledges the eyewitness identifications of McCoy as the Key Bank robber suffer from the same kind of flaws as the identifications in the other two robbery convictions that it concedes must be reversed. BOR at 22 n.7.

When a Brady violation is shown, "there is no need for further harmless-error review." Kyles, 514 U.S. at 435. The State nevertheless

argues the evidence is so overwhelming on the Key Bank charge that the Brady error does not affect it. BOR at 22-24. The State points to evidence that McCoy's print was lifted from the teller's station. RP (5/2/07) 135-37. McCoy, however, testified that he went to Key Bank in the morning on the same day as the afternoon robbery, probably around 10:00 or 11:00, to exchange coins he panhandled for paper currency, which accounted for his print being left in the bank. RP (5/8/07) 96-99, 110; RP (5/9/07) 42. There is a non-criminal explanation for why McCoy's print was there. That is the stuff from which reasonable doubt is made.

The State argues the teller's station where the robbery took place was closed until noon and McCoy was unable to specifically identify himself in the surveillance video during the morning hours when he claimed to have been in the bank. BOR at 22-23. McCoy did testify, however, that he was in the video at some time between 10 and 10:30. RP (5/9/07) 42.

Moreover, the State acknowledges it is possible McCoy could have been in the bank during the morning without being captured on the surveillance camera because the video switched from camera to camera in different areas of the bank. BOR at 23 n.9. The State asserts this was "unlikely," but it is the State's burden to prove its case beyond a

reasonable doubt. BOR at 23 n.9. Possibilities, even unlikely ones, are the grounds from which reasonable doubt springs. The possibility that the surveillance camera did not show McCoy despite his testimony that he was in the bank to make change provides a reasonable basis for a rational juror to conclude the video may not have captured McCoy's presence. A trier of fact could have inferred McCoy may have left his print at the teller's station while in the process of conducting his change activity. It is not hard to leave a stray print in any particular area of the bank open to the public, including an unmanned teller's station.

Further, McCoy testified that he had been to Key Bank on prior occasions to make change. RP (5/8/07) 96, 99. He used Key Bank for this purpose because he picked up his mail nearby. RP (5/8/07) 96, 99. The State points out an employee from the bank's contracted janitorial service testified that he cleaned the teller counters on Sunday, February 12, which was the day before the robbery. BOR at 22; RP (5/7/07) 19-23, 25. The State claims such evidence eliminates any possibility that McCoy's print could have been made on any day other than the day of the robbery. BOR at 22-23. Accepting the testimony at face value does not defeat the possibility that McCoy left the print on the morning of the bank robbery.

That being said, a rational juror could question the veracity of the cleaning worker's testimony and assign it little to no weight. It is common

knowledge that many workers do not always do their assigned tasks to exact job specifications, especially when left to their own devices with no supervision. See RP (5/7/07) 28-29 (worker was unsupervised when he cleaned on weekends). An employee seeking to protect his job will testify that he performed his assigned job. To testify otherwise would cause trouble with his employer and the potential loss of his job. The janitorial worker had a motive to stretch the truth regarding whether he thoroughly and completely wiped down the teller counters on that particular day. A rational juror could reach that conclusion and discount his testimony accordingly.

Alternatively, a juror could also reasonably conclude that a person cleaning surfaces at a bank may not actually wipe down 100 percent of a given surface despite an effort to do so, which again accords with common sense. Furthermore, it is clear the cleaning worker's testimony about *how* he cleaned the teller stations on February 12 was based more on his general practice as opposed to specific memory. RP (5/7/07) 18-29. More than a year had passed by the time he testified and there was nothing remarkable about February 12 in relation to any other cleaning day. Again, a juror could discount his testimony accordingly.

The most powerful evidence against McCoy was his "confession" to Olsen, as relayed by Olsen at trial. See Gonzalez v. Wong, 667 F.3d

965, 985-86 (9th Cir. 2011) (confidential informant testimony amounted to defendant's confession, which is "probably the most probative and damaging evidence that can be admitted against him."). That is why the Brady error infects all three convictions. The prosecutor urged the jury to convict McCoy of all three robberies, including the Key Bank robbery, based on this confession to Olsen. See RP (5/9) 55 ("The defendant confessed to these three robberies to Mr. Olsen."). As the State acknowledges, McCoy, and the jury, was deprived of crucial evidence that would have undermined the persuasive force of Olsen's otherwise damaging testimony. Reversal of all three convictions is required because the Brady violation undermines confidence in the outcome.

B. CONCLUSION

For the reasons set forth, McCoy requests that this Court grant his personal restraint petition and reverse the three convictions.

DATED this 7th day of October 2013

Respectfully Submitted,

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DIVISION ONE

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STATE OF WASHINGTON	)	
Respondent,	)	
v.	)	COA NO. 61853-9-I
RAYMOND McCOY,	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RAYMOND McCOY
DOC NO. 270764
CEDAR CREEK CORRECTIONS CENTER
P.O. BOX 37
LITTLEROCK, WA 98556

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF OCTOBER 2013.

x Patrick Mayovsky