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NO. 64248-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL COREY,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The admission of out-of-court statements of non-testifying witnesses accusing appellant of committing the charged crime violated appellant's constitutional right to confront accusers.

2. Improper opinion testimony of appellant's guilt offered by the lead investigating officer in the case violated appellant's right to a jury trial.

3. To the extent counsel may have contributed to these errors, did appellant receive ineffective assistance of counsel?

Issues Pertaining to Assignments of Error

1. Was appellant deprived of his right to confront accusers where in the state's prosecution against appellant for taking a motor vehicle without permission, a Snohomish County Sheriff's sergeant testified two non-testifying witnesses accused appellant – not only of being at the apartment where the stolen motorcycle was found – but of also being the one who brought it there?

2. Was appellant deprived of his right to a jury trial where the same Snohomish County Sheriff's sergeant testified that appellant – in response to the sergeant's questions – was trying to

come up with an excuse to deflect blame in order to avoid a “full-out admission” regarding his knowledge of the crime?

3. To the extent defense counsel may have contributed to these errors, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

Following a jury trial in Snohomish County Superior Court, appellant Daniel Corey was convicted of taking a motor vehicle without permission, a small motorcycle. CP 34. Corey testified he found the bike abandoned in the bushes and showed his friend, Robert Spillum, where it was. RP 66-68. Spillum then loaded the bike into the trunk of his car, without Corey’s assistance, and took it home. RP 69.

The case began on September 15, 2008, when Snohomish County Sheriff’s sergeant William Geoghagan was patrolling the Everett area and noticed a man riding a motorcycle from the Wal-Mart parking lot on Evergreen Way onto 112<sup>th</sup> Street Southwest. RP 30. Geoghagan testified it was an off-road bike with no lights; its driver was not wearing a helmet, and he was driving westward in the eastbound lane. RP 30.

The driver pulled into an apartment complex when Geoghagan activated his lights. RP 31. The driver, Robert Spillum, lived at the complex. RP 30-31. The motorcycle was registered to Michelle Dunnagan, but had not been reported stolen. RP 31-32. Spillum said he was fixing the bike for his friend, Daniel Corey. RP 32. In Geoghagan's experience, individuals often drive each other's vehicles, and off-road vehicles are not always registered properly. RP 32. Geoghagan chose to give Spillum a warning, since Spillum lived at the apartment complex. RP 32.

Later that day, Geoghagan learned that the bike had been stolen. The husband and wife owners had not reported it, due to a miscommunication between them. RP 24. However, a friend of theirs heard of Geoghagan's traffic stop on a police scanner; he reported to police that the motorcycle had been stolen several days earlier from the Dunnagans. RP 25, 33. Geoghagan confirmed with Jerry Dunnagan his son had a small dirt bike (100-150 pounds) that was stolen from the family's garage sometime during the night and early morning hours of September 11-12. RP 24-26, 33-34.

Geoghagan returned to Spillum's apartment complex. RP 34. Looking through the window of Spillum's apartment, Geoghagan could see the bike parked in the living room. RP 35.

Finding no one at home, however, Geoghagan returned to his car to apply for a search warrant; he also requested another officer to respond. RP 35. Deputy Kosfer arrived and agreed to keep an eye on the apartment while Geoghagan finished his paperwork. RP 35.

Meanwhile, Spillum, his girlfriend Ashley Vermaat, James Howell and another woman arrived at the apartment. RP 35. Koster detained Spillum for Geoghagan, who came and told Spillum he was in possession of a stolen motorcycle. RP 35. Geoghagan obtained Spillum's consent to retrieve the motorcycle, and Spillum agreed to show Geoghagan where Daniel Corey lived. RP 36.

According to Geoghagan, Spillum showed him the wrong house. RP 36, 39. On his own, however, Geoghagan managed to find Corey's house and went there to interview him. RP 39. Corey denied knowing anything about the motorcycle or being at Spillum's apartment. RP 40. When asked what he did next, Geoghagan responded:

Well, I had information from my interview of Mr. Spillum, my interview of Ashley, as well as the interview of Mr. Howell when I was originally at Spillum's residence recovering the motorcycle; they gave a physical description of Daniel Corey. The physical description that they gave me matched that of Mr. Corey, even down to the clothes that he was

wearing at that time. I let him know about this information. I told him, Hey, look, there's people that said that you were at this apartment, that you were wearing these clothes, that they know who you are, and that you brought a motorcycle there.

RP 40.

According to Geoghagan, Corey admitted he was at Corey's apartment, but denied knowing anything about the motorcycle.

When asked if he again confronted Corey, Geoghagan answered:

He told me that the motorcycle wasn't there; and then it's just reiterating what I had already known, is the motorcycle was there, people are saying that you were there with it and that you were the one that brought it there, and then he gave me another admission.

RP 41. Corey reportedly told Geoghagan the bike was in fact at Spillum's apartment, but Corey did not bring it. RP 41.

Geoghagan testified Corey said he found the bike in the bushes by Honey's Strip Club on Highway 99, when he went into the bushes to smoke some marijuana. RP 41. Corey later told Spillum about the bike, and accompanied Spillum in his car to the bike's location. Corey told Geoghagan he merely showed Spillum where it was; he did not help Spillum load it into his trunk. RP 42.

At this point, Geoghagan testified he used a "ruse, telling [Corey] that there was video surveillance of him taking the

motorcycle.” RP 46. According to Geoghagan, “[o]ne of his replies was that he gets extremely intoxicated and doesn’t remember things, and then he denied taking the motorcycle and maintained he found it in the bushes.” RP 46.

Geoghagan returned once more to Spillum’s apartment. Spillum reportedly told Geoghagan that the day before he obtained the motorcycle, Corey asked him for help retrieving some stolen BMX bicycles that were in the woods. RP 52.<sup>1</sup> When they got there, however, the bicycles were gone. RP 52. Spillum claimed that the next day, he allowed Corey to borrow his car. He claimed that Corey returned later that day with the motorcycle in the trunk of his car. RP 53. However, Spillum also said that Corey would not have been able to lift the motorcycle by himself. RP 53. Geoghagan testified Spillum gave “a few different versions” of what happened. When asked if Spillum denied “going down there,” Geoghagan answered: “I believe initially he did.” RP 55 (emphasis added).

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<sup>1</sup> Defense counsel agreed these statements were admissible under the co-conspirator rule (ER 801(d)(2)) and that they could be elicited carefully through officer with leading questions by the prosecutor. RP 50.

I think that question allows a full answer. So go ahead; he can go ahead and talk about his experience. So your objection is overruled.

THE WITNESS [Geoghagan]: Well, when I told him about the ruse, he answered that he gets extremely intoxicated. And it's been my experience in the past that when people won't make a full-out admission to their knowledge of a particular event or of a crime, that they somehow try to come up with an alibi or some type of an excuse of not knowing, or it wasn't their fault because of something.

In this case, because he was extremely intoxicated, he couldn't remember what his actions were.

RP 59.

Corey appeals his conviction. CP 2-15.

C. ARGUMENT

1. GEOGHAGAN'S TESTIMONY INCORPORATING THE ACCUSATIONS OF NON-TESTIFYING WITNESSES VIOLATED COREY'S RIGHT TO CONFRONT ACCUSERS.

The trial court violated Corey's constitutional right to confront witnesses when it admitted the testimonial hearsay statements of Ashley Vermaat and James Howell through Geoghagan's testimony. Vermaat and Howell were with Spillum when he returned to his apartment to find Geoghagan, who had since discovered the bike Spillum was riding earlier was stolen. Neither Vermaat nor Howell were called as witnesses. Yet, Geoghagan –

when recounting his interview of Corey – testified he interviewed Vermaat and Howell, and they said not only was Corey at Spillum’s apartment, but that he was the one who brought the bike there. RP 40, 41. Because these out-of-court accusations undercut Corey’s defense that it was Spillum who took the bike and brought it home, the erroneous admission of these statements was not harmless beyond a reasonable doubt. Reversal is required.

An accused person has both state and federal constitutional right to confront witnesses. Article I, section 22 guarantees an accused shall have the right . . . to meet the witnesses against him face to face. Wash. Const. art. I, § 22 (Amend. 10); State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The essence of the right to confrontation is the right to meaningfully cross-examine one’s accusers. Id. at 50, 59.

Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. Id. at 68. This Court reviews alleged confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

"Hearsay" is any out-of-court statement offered as "evidence to prove the truth of the matter asserted." ER 801(c); ER 802; State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). A statement includes nonverbal conduct intended as an assertion. ER 801(a)(2).

The "core class" of testimonial statements includes those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52.

In Davis, the Court elaborated on what constitutes a testimonial versus a non-testimonial statement. Non-testimonial statements may occur in the course of police interrogation when, objectively viewed, the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Davis, 547 U.S. at 822. In contrast, statements are testimonial when, objectively viewed, there is no such ongoing emergency, and the

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id., 547 U.S. at 822; accord, State v. Ohlson, 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007).

Generally speaking, a police officer's testimony may not incorporate the out-of-court statements by an informant or dispatcher. State v. Johnson, 61 Wn. App. 539, 549, 811 P.2d 687 (1991); State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). A police officer may describe the context and background of a criminal investigation, but such explanation must not include out-of-court statements. State v. O'Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), reversed on other grounds, 167 Wn.2d 91, 217 Wn.3d 756 (2009).

Sergeant Geoghagan's testimony recounting Vermaat and Howell's statements placing Corey at the scene of the stolen motorcycle and asserting he was the one that brought it there violated Corey's right to confront of witnesses. The statements were hearsay and, under the test set forth in Davis, they were testimonial.

To determine whether statements elicited through police questioning trigger the confrontation clause, the question is

whether, objectively considered, the interrogation that took place . . . produced testimonial statements. Davis, 547 U.S. at 826. Under the primary purpose test, courts must objectively appraise the interrogation to determine whether its primary purpose is to enable police to meet an ongoing emergency. Id. at 822.

In applying the test to the cases of two defendants, Davis and Hammon, the Davis Court discussed four pertinent factors to be considered in making such a determination: (1) the timing relative to the events discussed; (2) the threat of harm posed by the situation; (3) the need for information to resolve a present emergency; and (4) the formality of the interrogation. Id. at 827-30; Ohlson, 162 Wn.2d at 12.

Here, it is clear Geoghagan was attempting to determine what happened, not what was happening. He interviewed Vermaat and Howell long after the motorcycle taking. Corey was no longer Spillum's apartment. There was no threat of harm, nor any need for information to resolve a present emergency. Geoghagan's questions concerned property he knew to be stolen. Although the record does not expressly address the conditions during the interrogations of Vermaat and Howell, Geoghagan testified he was in full uniform (RP 30), and Spillum had been handcuffed initially.

RP 35. This was not a casual conversation. Based on the pertinent Davis factors, Vermaat and Howell's statements were testimonial and prohibited by the confrontation clause.

In response, the state may point out there was no objection to Geoghagan's testimony. Regardless, confrontation clause violations may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Kronich, 160 Wn.2d 893, 90001, 161 P.3d 982 (2007) (confrontation clause challenges may be raised for the first time on appeal).

The state may also attempt to argue that Corey somehow waived the error. Any such argument should be rejected, as waivers of constitutional rights must be knowing, voluntary and intelligent. See e.g. In re James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). To the extent counsel's failure to object could be construed as waiver, however, Corey received ineffective assistance of counsel. See e.g. State v. Sosa, 59 Wn. App. 678, 800 P.2d 839 (1990) (under circumstances of case, failure of counsel to demand production of expert who prepared lab report did not constitute ineffective assistance of counsel).

Corey had the right to effective assistance of counsel at trial. U. S. Const. amend. 6; Const. art. 1, § 22. To prevail on an

ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). There was nothing tactical to be gained by allowing the jury to consider the out-of-court accusations of Vermaat and Howell. Their statements undermined Corey's defense that he was not the one who took the bike.

The state may attempt to argue that counsel's failure to object was tactical, because an objection might have highlighted the improper evidence. Any such argument should be rejected, as jurors are presumed to follow the court's instructions. State v. Costello, 59 Wash.2d 325, 332, 367 P.2d 816 (1962) (a jury is presumed to follow the instructions of the court). Had counsel timely objected, the court could have obviated the prejudice by instructing the jurors to disregard the hearsay statements. Counsel's failure to object constituted ineffective assistance of counsel.

Confrontation clause errors are subject to harmless error analysis. Shafer, 156 Wn.2d at 395. A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the

same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is presumed prejudicial and the state bears the burden of proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

The state cannot meet its burden to demonstrate beyond a reasonable doubt the jury would have reached the same result absent the evidence. Corey's defense was twofold: he thought the motorcycle was abandoned; and regardless, he merely showed Spillum the location of the motorcycle, because he was curious if it was still there (RP 67-68); he did not assist Spillum in taking it. The testimonial hearsay of Vermaat and Howell undercut this defense, as they claimed Corey was the one who brought the bike to Spillum's apartment. The state, therefore, cannot show the jury would have reached the same result absent the error. Because there error was not harmless, reversal and remand for a new trial is the proper remedy.

2. GEOGHAGAN'S IMPROPER OPINION TESTIMONY VIOLATED COREY'S RIGHT TO A JURY TRIAL.

The trial court erred in allowing Geoghagan to testify about "his experience" over defense counsel's non-responsive objection. Counsel was correct that Geoghagan was no longer answering his

question regarding whether Corey maintained his version of events following the “ruse.” See e.g. State v. Warren, 55 Wn. App. 645, 651-52, 779 P.2d 1159 (1989) (example of non-responsive answer); State v. Pottorff, 138 Wn. App. 343, 345-46, 156 P.3d 955 (2007) (same). Geoghagan already gave a “full” answer in that he clarified Corey also answered that he gets extremely intoxicated and doesn’t remember everything. Defense counsel had not yet posed another question when Geoghagan began rattling off about his experience.

As a result of the court’s ruling allowing Geoghagan to continue, Geoghagan was allowed to express his opinion on Corey’s guilt; namely, that instead of confessing his full knowledge of the crime, Corey was trying to wiggle out of it by coming up with an excuse, i.e. his potential intoxication. This was an issue for the jury to decide, not Geoghagan. Because Geoghagan’s improper opinion likely affected the jury’s weighing of the evidence in this case, this Court should reverse.

Generally, no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt. State v. Black, 109 Wash.2d 336, 348, 745 P.2d 12 (1987). Such opinions are unfairly prejudicial because they invade the fact

finder's exclusive province. Black, 109 Wash.2d at 348, 745 P.2d 12; see also State v. Kirkman, 159 Wash.2d 918, 927-28, 155 P.3d 125 (2007) (opinion on defendant's guilt violates article I, section 21 of the Washington Constitution). However, if the testimony does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony. See State v. Farr-Lenzini, 93 Wash.App. 453, 465, 970 P.2d 313 (1999) (improper opinion on defendant's guilt invades jury's province); City of Seattle v. Heatley, 70 Wash.App. 573, 579, 854 P.2d 658 (1993) (officer could give his opinion that defendant was intoxicated because it was based on the defendant's physical characteristics); State v. Alexander, 64 Wash.App. 147, 154, 822 P.2d 1250 (1992) (by stating his belief that the child was not lying about sexual abuse, the expert "effectively testified" that the defendant was guilty as charged); State v. Carlin, 40 Wash.App. 698, 700, 700 P.2d 323 (1985) (the police officer testified that the tracking dog followed the defendant's "fresh guilt scent"); see also Black, 109 Wash.2d at 349, 745 P.2d 12 (in a rape case, expert testimony that the victim suffered from rape trauma syndrome constituted "in essence" a statement that the defendant was guilty where defense was consent).

Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including: (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. State v. Hudson, 150 Wash.App. 646, 653, 208 P.3d 1236 (2009) (citing State v. Montgomery, 163 Wash.2d 577, 591, 183 P.3d 267 (2008)) (quoting State v. Demery, 144 Wash.2d 753, 759, 30 P.3d 1278 (2001)).

An analysis of these criteria demonstrate Geoghagan's testimony constituted an impermissible opinion about Corey's guilt. First, Geoghagan is a sergeant with the Snohomish County Sheriff's Office and was the lead investigating officer in the case. This is significant because a police officer's testimony may particularly affect a jury due to its special aura of reliability. Demery, 144 Wn.2d at 765.

Second, the nature of Geoghagan's testimony was that he thought Corey was just making excuses, in an effort to deflect culpability:

Well, when I told him about the ruse, he answered that he gets extremely intoxicated. And it's been my experience in the past that when people

won't make a full-out admission to their knowledge of a particular event or of a crime, that they somehow try to come up with an alibi or some type of an excuse of not knowing, or it wasn't their fault because of something.

In this case, because he was extremely intoxicated, he couldn't remember what his actions were.

RP 59.

Third, Geoghagan's testimony had a particularly strong potential to influence the jury, considering the nature of the charges. Although Corey was accused of taking the motorcycle without permission, no one ever saw him ride it. The only person linking him to the crime was his supposed co-conspirator Spillum, who had a strong motive to inculcate Corey, i.e. to deflect blame off himself.

Fourth, Geoghagan's testimony undermined Corey's defense that he believed the motorcycle had been abandoned. Geoghagan's testimony, in essence, was that he did not believe Corey. On the contrary, he thought Corey was making excuses instead of admitting his knowledge of the crime.

Finally, the other evidence before the trier of fact was not overwhelming. Corey testified he thought the bike was abandoned and merely went with Spillum to see if it was still there. It was

Spillum who took the bike. Circumstantial evidence supporting Corey's lack of involvement was also present in the fact no one ever saw Corey riding the bike and the fact that Spillum was the one with possession. Although Spillum claimed Corey was the one who brought the bike to his apartment, he also acknowledged Corey would not have been able to lift it alone, suggesting he was there, as well. In closing, even the prosecutor acknowledged Spillum likely went to the bushes with Corey. RP 103. Considering these circumstances, jurors may have had a reasonable doubt about Corey's involvement had the officer not testified he believed Corey had full knowledge of the crime. For all these reasons, Geoghagan's testimony constituted an improper opinion on guilt. For the same reasons, Geoghagan's testimony also prejudiced Corey.

In response, the state may argue the error is waived on grounds defense counsel did not object that Geoghagan's testimony constituted an improper opinion. Any such argument should be rejected for three reasons. First, counsel's non-responsive objection should be sufficient to preserve the error. Counsel did not ask the sergeant any question concerning his experience. Second, a direct statement on guilt constitutes an error

of constitutional magnitude that may be raised for the first time on appeal. See State v. Kirkman, 159 Wn.2d 918, 950, 155 P.3d 125 (2007).

Finally, to the extent counsel should have objected on improper opinion grounds, Corey received ineffective assistance of counsel. To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Strickland v. Washington, 466 U.S. at 687. Because Geoghagan's testimony constituted an improper opinion on Corey's guilt, defense counsel's failure to object was deficient. Because Geoghagan's improper opinion undercut the defense theory of the case, counsel's deficiency prejudiced Corey. This Court should reverse.

D. CONCLUSION

Because improper opinion testimony and the admission of testimonial hearsay deprived Corey of his right to a fair trial, he should receive a new one. This Court should reverse and remand.

Dated this 12<sup>th</sup> day of April, 2010.

Respectfully submitted

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