

69649-1

69649-1

NO. 69649-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

FELIPE ZEFERINO-LOPEZ,

Appellant.

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

The Honorable Susan Cook, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a fair trial when the prosecutor flagrantly misrepresented the law and intentionally diverted the jury's away from its duties.

2. Appellant was denied effective assistance of counsel when defense counsel failed to object to the prosecutor's misconduct.

Issues Pertaining to Assignments of Error

1. Appellant was charged with second degree identity theft. This offense requires the State prove a knowing use of the financial information of another with the intent to commit a crime.<sup>1</sup> The defense argued that the State had not met its burden because there was not sufficient evidence establishing appellant knew the social security number he used was assigned to another person. In response, the prosecutor claimed the State was not required to prove appellant knew the means of identification belonged to another, and she urged the jury to undertake its own interpretation of what the law requires. Did this constitute flagrant and reversible prosecutorial misconduct?

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<sup>1</sup> RCW 9.35.020.

2. Defense counsel failed to object to the prosecutor's misconduct as set forth above. Was appellant denied effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On August 13, 2012, the King County prosecutor charged appellant Felipe Zeferino-Lopez with one count of second degree identity theft under RCW 9.35.020(3). CP 1. A jury found Zeferino-Lopez guilty and he was sentenced to 55 days incarceration. CP 25-36.

2. Substantive Facts.

Zeferino-Lopez was born in Mexico and came to the United States in 1995 when he was just 9 years old. RP 51-52. Within a month of his arrival in the U.S., Zeferino-Lopez purchased a social security card for \$100 with the help of a friend. RP 53. Zeferino-Lopez did not know the social security number on the card belonged to someone else. RP 60. He quickly used the card to get a job picking strawberries. RP 53-54. In the years following, Zeferino-Lopez also showed the card when he obtained various restaurant jobs and eventually at his last job with Poulsbo RV. RP 55-60. He still did not know the social security number belonged to

another person. RP 60.

On March 9, 2010, Zeferino-Lopez used the card to open a bank account at a Mount Vernon branch of Key Bank. RP 24, 45. He used the account for normal banking purposes, engaging in no suspicious activities. RP 32.

On April 30, 2012, Burlington police received information from a California police department that the person to whom the social security number belonged<sup>2</sup> had tried to open up her first bank account and learned that someone had used her social security number to open a Key Bank account in Washington State. CP 3; RP 39. The Burlington officers were directed to speak with Vicki Gall, an investigator for Key Bank. CP 3; RP 15. Gall flagged the account and pulled up relevant bank documents showing that Zeferino-Lopez had opened it. CP 19-26.

Detective Bob Wischhusen received the information from Gall and called Zeferino-Lopez. RP 39, 41-42. Zeferino-Lopez was cooperative and voluntarily agreed to come into the police station and speak with Wischhusen. RP 46. After advising Zeferino-Lopez

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<sup>2</sup> At trial, the State established the social security number was assigned to another person via the testimony of Debra Wolfsachs, District Manager of the Mount Vernon Social Security Administration office. RP 34-38.

of his constitutional rights, Wischhusen informed Zeferino-Lopez that the social security number he had used to open the bank account was assigned to another person. RP 42-43. This was the first time Zeferino-Lopez learned this. RP 65. He then told Wischhusen that he was in the country illegally and had purchased the social security number for \$100 dollars. RP 43.

Zeferino-Lopez did not have the card with him at the time of the interview, so Wischhusen asked him to bring it to him later. RP 44. Zeferino-Lopez did so shortly after the interview. RP 44, 62.

After Zeferino-Lopez learned that the social security number was assigned to another person, he ripped up the card, left his job at Poulsbo RV, and did not use the social security number again. RP 63-65.

### 3. To-Convict Instruction and Closing Arguments

The trial court instructed the jury that in order to convict Zeferino-Lopez of the charged crime, the State must prove beyond a reasonable doubt that "the defendant knowingly possessed or used a means of identification of another person, living or dead." CP17.

Based on this instruction, the defense argued the State could not meet its burden because there was not sufficient proof

Zeferino-Lopez knew he was using another person's social security number. RP 105.

In response, the prosecutor claimed the State had no such burden. Instead she urged the jury to consider whether it would make sense for the law to place such a heavy burden on the State, arguing:

The final thing I want to address is counsel's argument that the State needs to prove beyond a reasonable doubt that the defendant knew that the number belonged to someone else. What I would submit to you is that this is an inaccurate reading of the instruction. First of all, it's just common sense. We would never be able to prove a case like this if we had to prove the defendant knew the number belonged to someone else. Simply because of the very example [defense counsel] gave, we'd have to prove he broke into someone's house and stole their Social Security Card.<sup>3</sup> We're not going to have that case. Does it make sense that the law would require that? And it doesn't.

CP 116-17.

Next, the prosecutor urged the jury to undertake its own grammatical analysis of the instruction when

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<sup>3</sup> Specifically, defense counsel had argued, because the person reporting the misuse of her social security number is located in California, the jury could reasonably infer that Zeferino-Lopez did not break into the person's house or car to obtain the social security number. This inference, defense counsel argued, supported the defense's theory that Zeferino-Lopez did not know the card belonged to another. RP 105-06.

deciphering what the law requires:

So my next argument focuses on grammar, if there's any English majors in here you'll understand what I am talking about. The requirement is that the defendant knowingly possessed identification of another person. Knowingly is an adverb. It applies to the verb that follows, which is possession or use. Knowing applies and refers to possession or use. The phrase that comes after it is the object. And knowingly does not apply to that grammatically speaking. If you read the instruction, as it's meant to be read there is a common sense fashion and grammatically correction fashion. What the State needs to prove to the defendant [sic] is that he knowingly possessed or used. That's what he had to know. That's what the mental state of knowing applies to. The rest of it describes the thing he possessed. He didn't have to know that number was specifically assigned to another individual. He didn't. He had to know that he was in possession of it and the number. He had to know he was using the number and clearly he did. The mental state we need to prove is that he intended by using that number to commit a crime.

RP 117. Defense counsel failed to object to these arguments. RP 116-17.

C. ARGUMENT

- I. ZEFERINO-LOPEZ WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTOR'S FLAGRANT MISSTATEMENT OF THE LAW AND DIVERSION OF THE JURY'S ATTENTION AWAY FROM ITS DUTY TO APPLY THE LAW AS GIVEN BY THE COURT.

Zeferino-Lopez was denied his right to a fair trial when the prosecutor flagrantly misstated what the State was required to

prove under RCW 9.35.020 and when she urged the jury to step out of its role as fact-finder and step into the judge's role of deciphering the law.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676 (citing Case, 49 Wn.2d 66, 70-71)).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted). Prejudice is

established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578. Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be flagrant and ill-intentioned. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). If it is, the petitioner has not waived his right to review of the conduct. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

The prosecutor may not misstate the law to the jury. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Here, the prosecutor told the jury that it was not the State's burden under RCW 9.35.020 to prove that the Zeferino-Lopez knew the social security number he used belonged to another person. This was a misstatement of the law.

RCW 9.35.020 provides in relevant part:

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.<sup>[4]</sup>

Common sense and a basic application of the rules of grammar demonstrate that the plain language of the law indicates the Legislature intended "knowingly" to modify both the transitive verbs

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<sup>4</sup> The to-convict instruction tracked this language. CP 17.

and the objects of those verbs. In other words, the plain language of the state (and the to-convict instruction) required the State prove not only that Zeferino-Lopez knew he was possessing or using a means of identification but also that he knew this means of identification belonged to another.

The prosecutor should have been well aware of the law's requirement because this reading of RCW 9.35.020's language not only conforms to basic rules of grammar, but it is also well-supported by case law.

For example in Flores-Figueroa v. United States, 556 U.S. 646, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009), the United States Supreme Court similarly interpreted a federal statute that included the same language. At issue in Flores-Figueroa was 18 U.S.C. § 1028A(a)(1), which makes it a crime to “knowingly transfer[ ], possess[ ], or use[ ], without lawful authority, a means of identification of another person” during the commission of certain predicate offenses. Id. at 649. Both the language of the law and the facts of the case were remarkably similar to those here.

Flores-Figueroa was a citizen of Mexico. In order to obtain work in the United States, he used an illegitimate social security card. At trial, Flores-Figueroa's claimed the Government could not

prove he knew the social security number he used was assigned to another person. As here, the Government there argued that “knowingly” did not modify “another person” and, therefore, it was not required to prove Flores-Figueroa knew the social security number belonged to another. Id. at 649-50.

The Supreme Court disagreed with the Government, holding that “the statute requires the Government to show that the defendant knew that the ‘means of identification’ he or she unlawfully transferred, possessed, or used, in fact, belonged to ‘another person.’” Id. at 647. It reasoned that, “[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.” Id. at 650. To illustrate, the Court explained:

if a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy and that the toy belongs to his sibling. If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese.

Id. at 651. The Court went on to explain that “the manner in which

the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage.” Id. at 652 (citations omitted).

Even though the Supreme Court was interpreting a federal statute and not Washington’s identity theft statute, its interpretation was based on basic rules of grammar, common sense, and the ordinary interpretation given criminal statutes. As such, its reasoning is equally applicable to other statutes that similarly use the term “knowingly” to modify a transitory verb phrase. See, e.g. U.S. v. Shim, 584 F.3d 39, (2<sup>nd</sup> Cir. 2009) (applying same reasoning when interpreting a statute making it a crime for a person to knowingly transport women in interstate commerce and holding that the Government must show both the defendant knew he was transporting a woman and knew he was transporting in interstate commerce). Hence, the reasoning applied in Flores-Figueroa strongly supports Zeferino-Lopez’s position that the prosecutor’s interpretation of the law was patently unreasonable.

This Court’s decision in State v. Killingsworth, 166 Wn. App. 283, 269 P.3d 1064 (2012), also supports this conclusion. There, this Court reviewed a to-convict instruction under RCW 9A.82.050, which required the jury to find that the defendant “knowingly trafficked in stolen property.” Id. at 289. Killingsworth claimed the

instruction relieved the jury of its burden to prove that he knew the property in question was stolen because the term “knowingly” only modified the verb, not its object. Id. Applying an analysis remarkably similar to that used by the Supreme Court in Flores-Figueroa, this Court held “knowingly” modified both “trafficked” and “stolen,” explaining the “most natural reading of the adverb ‘knowingly,’ ... is that that it modifies the verb phrase ‘trafficked in stolen property.’” Id. (citing State v. J.M., 144 Wn.2d 472, 480-81, 28 P.3d 720 (2001)). This Court reasoned that any other reading of the language was unreasonable.

Applying the same reasoning and common sense approach as was applied by this Court in Killingsworth and the U.S. Supreme Court in Flores-Figueroa, the prosecutor’s argument to the jury that the State had no burden to prove that Zeferino-Lopez knew the social security number belonged to another was patently unreasonable and a clear misstatement of the law.

Also improper was the prosecutor’s attempt to get the jury to interpret the law rather than apply the law given by the trial court. It is improper for the prosecutor to make an argument which diverts the jury from its duty to decide the case on the evidence.” ABA

Standards for Criminal Justice 3–5.8 (3d ed.1993).<sup>5</sup> When discussing the evidence, the prosecutor “has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” Case, 49 Wn.2d at 71. To do so constitutes misconduct. Evans, 163 Wn. App. at 644-46.

It is axiomatic that judges declare the law, while juries apply the law given to decide the facts of the case. Washington Constitution article 4, section 16. Here, the prosecutor did not respect the role of the judge or jury when she urged the jurors to interpret the law in a manner which ultimately relieved the State of its burden to prove an essential element of the charged offense. If anything, the prosecutor should have directed her textual analysis and her arguments about legislative intent to the court so it could interpret the law. This type of argument should never have been directed at the jury and shows a flagrant disregard for appellant’s right to a fair trial.

In sum, the jury should have been left to read the instruction itself using a commonsense approach – an approach which, as discussed above, would have led the jury to conclude it was the

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<sup>5</sup> ABA Standards for Criminal Justice serve as “useful guidelines” when considering claim of prosecutorial misconduct. United States v. Young, 470 U.S. 1, 8, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

State's burden to prove Zeferino-Lopez knew the social security number belonged to another. Instead, the prosecutor confused the issue by misstating the law and diverting the jury away from its role to apply the law as given. In so doing, she also lessened the State's burden. This constituted flagrant misconduct that denied Zeferino-Lopez his right to a fair jury trial. Consequently, this Court should reverse his conviction.

II. ZEFERINO-LOPEZ WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Even if this Court decides the prosecutor's misconduct was not flagrant and could have been cured with an instruction to the jury, this Court should reverse on ineffective assistance of counsel grounds.

The Sixth Amendment guarantees the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "This right exists, and is needed, in order to protect the fundamental right to a fair trial." Id. at 684. Ineffective assistance of counsel is established if: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26,

743 P.2d 816 (1987) (adopting two-prong test from Strickland, 466 U.S. at 687). As shown below, both prongs are satisfied here.

“Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688. Counsel fails to render constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981). Thus, deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

Competent defense counsel must be aware of the law and should make timely objection when the prosecutor crosses the line during closing argument and jeopardizes the defendant's right to a fair trial. State v. Neidigh, 78 Wn. App. 71, 79-80, 895 P.2d 423 (1995).

Here, counsel's performance was deficient because she failed to object to the prosecutor's misstatement of the law and diversion of the jury's attention from its duties. As discussed above, the prosecutor's statement of the law was patently incorrect. Competent

counsel would not have sat by and quietly watched the prosecutor so vigorously misrepresent the law -- especially when the misstatement struck at the heart of the defense and emasculated its strongest line of argument. An objection and instruction might have redirected the jury by clarifying the law's requirement and, thereby, cured the prejudice resulting from the improper line of argument. Without objection, however, no instruction was given and the jury was left confused by the prosecutor's misdirection.

Counsel's deficient performance prejudiced the outcome of the case. As the Washington Supreme Court has recognized, "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Given the record here, there is a reasonable probability such a serious and prejudicial irregularity occurred here.

The State's proof as to the knowledge element at issue was notably thin. The State presented no direct evidence suggesting Zeferino-Lopez obtained the social security number in such a manner that would indicate the number was assigned to another. It also failed to present evidence that Zeferino-Lopez had subsequently been alerted that the number belonged to another. And it proved no

set of circumstances that strongly supported any inference to this effect. Meanwhile, Zeferino-Lopez testified he had obtained the number through another person when he was just nine years old and only in this country for one year (RP 51-54), suggesting he knew very little about the social security process or had any indication that the number could be assigned to another person. Given this record, the jury could have reasonably believed that Zeferino-Lopez did not know the number belonged to another, but rather, that he understood only that the card merely contained a random, bogus number.

The weakness of the State's evidence as to this element rendered Zeferino-Lopez's trial particularly vulnerable to the likelihood that the prosecutor's misstatement of law unfairly tipped the jury in favor of the State. The law as conveyed to the jury through the to-convict instruction required the jury to hold the State to its burden of proving Zeferino-Lopez knew the social security number belonged to another, but the State confused this statement of law and invited the jury to undertake its own contrary interpretation. Given the confusing nature of the prosecutor's comments and the State's weak evidence as to this element, it is reasonably probable there would have been a different outcome at Zeferino-Lopez's trial if defense counsel had objected to the State's improper closing and procured a curative

instruction. Consequently, the Court should find appellant was denied effective assistance of counsel and should reverse his conviction.

D. CONCLUSION

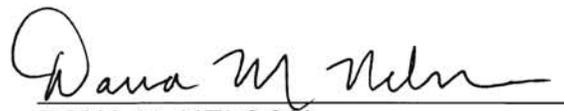
For the reasons stated above, this Court should reverse Zeferino-Lopez' conviction.

DATED this 8<sup>th</sup> day of May, 2013.

Respectfully submitted,

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STATE OF WASHINGTON	)	
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Respondent,	)	
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v.	)	COA NO. 69649-1-I
	)	
FELIPE ZEFERINO-LOPEZ,	)	
	)	
Appellant.	)	

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**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 9<sup>TH</sup> DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 9<sup>TH</sup> DAY OF MAY 2013.

X *Patrick Mayovsky*