

71546-1

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NO. 71546-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

HUD BERLIN,

Appellant.

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

The Honorable George N. Bowden, Judge

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 misrepresented the law and diverted the jury's focus 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. During closing argument, the prosecutor told the jury that if it found the State had sufficiently proved certain elements of the charged crime (attempting to elude a police vehicle), it must convict. However, the State left out the element of knowledge despite the fact that settled case law has long established this to be an element that must be proved beyond a reasonable doubt. Did this constitute prosecutorial misconduct and reversible error?

2. Defense counsel failed to object to the State's obvious misstatement of the law. Was appellant denied effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On May 20, 2013, the Snohomish County prosecutor charged appellant Hud Berlin with one count of attempting to elude a pursuing police vehicle. CP 62-63. He was also charged with the aggravated circumstance of threatening physical harm or injury to one or more persons besides himself and the pursuing officers. CP 62-63. A jury found Berlin guilty as charged. CP 36-37. This appeal timely follows. CP 24.

2. Substantive Facts

On the afternoon of November 28, 2012, Snohomish County Sheriff's deputy Dixon Poole was driving his marked patrol car on State Route 92 near Granite Falls when he spotted a silver Hyundai Accent pulling out of a residential driveway and onto the highway heading in the opposite direction. RP 36-40. Poole knew the car to be associated with Hud Berlin who was the subject of an outstanding arrest warrant. RP 40. Poole turned around to stop the car, but it was no longer in sight. RP 39, 41.

Shortly thereafter, Poole saw the silver car at the Lochsloy Store – a local convenience store and gas station. RP 41. The car was parked at a gas pump and unoccupied. RP 42. Poole drove

around and parked on the side of the building, out of view, where he waited for backup. RP 45-46.

Meanwhile, Poole received information over the radio that the car had returned to the residence. RP 46. Thereafter, however, Poole saw the car heading up the highway past him. RP 47. Poole pulled behind the car and activated his lights and siren but the driver failed to yield. RP 47-48.

Deputy Jason Tift joined the pursuit, activating his emergency lights and siren. RP 174. Despite heavy traffic, a high speed chase ensued. RP 49-51, 177-80. At a round-about in the road, Lake Stevens Police Officer Dennis Taylor moved in between the silver car and Poole, so that he was the lead police car with Poole and Tift following. RP 52, 182. They continued to chase the silver car through traffic. RP 53-57, 187-191, 255-65.

The car ended up in a ditch after taking a turn at too high a speed. RP 192, 265-66. Taylor pulled up close to the driver's door, but the driver escaped out the passenger door. RP 194, 266. Despite a foot chase and tracking police dog, police were unable to apprehend the driver. RP 267-69, 276.

At trial, the State introduced the Lochsloy Store surveillance video, arguing it showed Berlin getting behind the wheel just a few

minutes prior to the chase. RP 95-98, 200-220, 375. Officer Taylor also testified he saw Berlin in the silver car after it crashed. RP 266-67. He said he knew Berlin from multiple prior contacts. RP 254.

Berlin disputed having multiple prior contacts with Taylor.¹ RP331. He also explained that the silver car belonged to his girlfriend and he had not driven it that day. RP 324-27, 329. Berlin's girlfriend confirmed she had driven the car earlier that day, but it had been stolen from in front of the residence just before the chase. RP 284, 288.

Berlin also testified that he had been given a ride to a friend's house just before the car was stolen. RP 324-26. Berlin's friend, Danny Bremnes, confirmed that he gave Berlin a ride at the time of the incident. RP 316-17.

¹ The State offered rebuttal testimony from Taylor establishing that Taylor had spoken to Berlin only a couple of times prior, and the last time was in 2004. RP 355, 357.

C. ARGUMENT

I. BERLIN WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTOR'S MISSTATEMENT OF THE LAW.

Berlin was denied his right to a fair trial when the prosecutor flagrantly misstated what the State was required to prove under RCW 46.61.024.

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 State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)).

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 flagrant, however, 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). In this case, the prosecutor misstated the law by essentially telling the jury it could convict without first finding the State had met its burden of proving all the statutory elements.

RCW 46.61.024 provides:

Any driver of a motor vehicle who **willfully** fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the

vehicle shall be equipped with lights and sirens.

Emphasis added. This Court has on several occasions interpreted RCW 46.61.24 as requiring knowledge by the driver that there is a pursuing police vehicle. State v. Flora, 160 Wn. App. 549, 554-55, 249 P.3d 188 (2011) (citations omitted). This is an element of the crime that must be proven by the State in every case. Id.

Here, the prosecutor told the jury it must convict Berlin if it believed the State had sufficiently proven:

... the defendant was the driver, that the police were in police uniforms, that they were driving marked patrol cars, and that their patrol cars had lights and sirens that were activated, and they were signaling the defendant to stop, and he didn't do so....

RP 386-87. This is a misstatement of the law because the prosecutor in essence told the jury it could return a guilty verdict without finding that the State met its burden to prove the knowledge element beyond a reasonable doubt.

There was no excuse for the prosecutor's misstatement. As far back as 1981, this Court has made clear that knowledge is an element that must be proven by State to secure a conviction under RCW 46.61.024. State v. Mather, 28 Wn. App. 700, 702, 626 P.2d 44 (1981).

Moreover, by misstating the law when summing up the elements the jury had to find in order to convict and omitting one of the elements so as to lighten the State's burden – the prosecutor diverted the jury's attention away from its duty to find that all statutory elements were proved beyond a reasonable doubt.² This is patently improper conduct. ABA Standards for Criminal Justice 3–5.8 (3d ed.1993) (explaining it is improper for the prosecutor to make an argument which diverts the jury from its duty to decide the case on the evidence.)

Given that there is well-established case law establishing knowledge as an element of the charged offense and given that fundamental due process requires the jury to find this element has been proven, any argument by the prosecutor that suggests to the jury that knowledge is not an element the State must prove beyond a reasonable doubt constitutes flagrant misconduct. Hence, this Court should reverse Berlin's conviction.

² Due process requires a criminal defendant be convicted only when the jury finds that every element of the charged crime is proved beyond a reasonable doubt. U.S. CONST. amend. XIV; see WASH. CONST. art I, § 22; Jackson v. Virginia, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

II. BERLIN WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Even if this Court decides the prosecutor's misconduct was not flagrant, this Court should still reverse on ineffective assistance of counsel grounds.

The Sixth Amendment guarantees the right to effective assistance of 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).

Counsel's performance was objectively unreasonable here. Competent defense counsel must be aware of the law and should make timely objections 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 he failed to object to the prosecutor's misstatement of the law and her diversion of the jury's attention from its duty to hold the State accountable for proving each element beyond a reasonable doubt.

As discussed above, the prosecutor's statement of the law was patently incorrect. Competent counsel would not have sat by and quietly watched as the prosecutor misrepresented the law to the jury, reading out an essential element of the crime. 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. In the absence of an objection, however, no clarifying instruction was given and the jury was left confused by the prosecutor's misdirection.

Prejudice occurs if there is a reasonable probability that the result of the proceeding would have been different, had the deficient performance not occurred. Thomas, 109 Wn.2d at 226. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. 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 prosecutor’s statement here, which misstated what elements the jury had to find in order to convict Berlin, there is a reasonable probability such a serious and prejudicial irregularity occurred here. Hence, this Court should reverse.

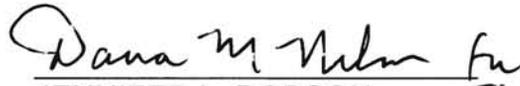
D. CONCLUSION

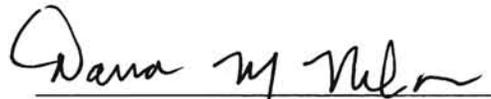
For the foregoing reasons, this Court should reverse Berlin's conviction.

DATED this 16th day of June, 2014.

Respectfully submitted,

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DIVISION ONE

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)	
Respondent,)	
)	
vs.)	COA NO. 71546-1-1
)	
HUD BERLIN,)	
)	
Appellant.)	

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 16TH DAY OF JUNE, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JUNE, 2014.

X *Patrick Mayovsky*