

No. 44208-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL DERRELL MILAM,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-02048-7
The Honorable Linda CJ Lee, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE	1
	A. PROCEDURAL HISTORY	1
	B. SUBSTANTIVE FACTS	3
IV.	ARGUMENT & AUTHORITIES	8
	A. THE STATE FAILED TO PROVE ALL THE ELEMENTS OF TRAFFICKING IN STOLEN PROPERTY AND POSSESSION OF STOLEN PROPERTY BECAUSE THE EVIDENCE DID NOT SUPPORT A CONCLUSION THAT MILAM KNEW THE ITEMS WERE STOLEN	8
	B. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING STATEMENTS BY SHIFTING THE BURDEN OF PROOF TO MILAM	11
V.	CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<u>City of Tacoma v. Luvene</u> , 118 Wn.2d 826, 827 P.2d 1374 (1992)	8
<u>In re Personal Restraint Petition of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1998)	11
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	8, 11
<u>Mullaney v. Wilbur</u> , 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).....	11
<u>State v. Dixon</u> , 150 Wn. App. 46, 207 P.3d 459 (2009)	12, 13
<u>State v. Fleming</u> , 83 Wn. App. 209, 912 P.2d 1076 (1996).....	11, 12, 13
<u>State v. Ford</u> , 33 Wn. App. 788, 658 P.2d 36 (1983)	9, 10
<u>State v. French</u> , 101 Wn. App. 380, 4 P.3d 857 (2000)	12
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	10
<u>State v. Hatch</u> , 4 Wn. App. 691, 483 P.2d 864 (1971)	9
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1988)	10
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	13
<u>State v. Ladely</u> , 82 Wn.2d 172, 509 P.2d 658 (1973)	10
<u>State v. Medley</u> , 11 Wn. App. 491, 524 P.2d 466 (1974)	10
<u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1997)	9
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	8
<u>State v. Toth</u> , 152 Wn. App. 610, 217 P.3d 377 (2009)	12

OTHER AUTHORITIES

Charles Nesson, REASONABLE DOUBT AND PERMISSIVE
INFERENCES: THE VALUE OF COMPLEXITY,
92 Harv. L. Rev. 1187, 1209 (1979)..... 14

RCW 9A.56.140 9

RCW 9A.82.010 9

RCW 9A.82.050 8, 9

I. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt all the elements of trafficking in stolen property.
2. The state failed to prove beyond a reasonable doubt all the elements of possession of stolen property.
3. The prosecutor committed misconduct during closing statements when he shifted the burden of proof to Michael Milam.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State prove all the elements of trafficking in stolen property and possession of stolen property where the evidence did not support a conclusion that Michael Milam knew the property was stolen? (Assignments of Error 1 & 2)
2. Did the prosecutor commit flagrant, ill-intentioned, and prejudicial misconduct when he encouraged the jury to find Michael Milam guilty because he had not denied present testimony to support his claim of innocence? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Michael Derrell Milam by Information with

three counts of second degree identity theft (RCW 9A.35.020), three counts of first degree trafficking in stolen property (RCW 9A.82.050), nine counts of second degree possession of stolen property (RCW 9A.56.140, .160), one count of unlawful possession of a controlled substance, marihuana (RCW 9A.56.010, .4014), and one count of unlawful use of drug paraphernalia (RCW 69.50.102, .412). (CP 137-45) The State also alleged that each of the crimes was aggravated for sentencing purposes because of Milam's high offender score and multiple current offenses (RCW 9.94A.535(2)(c)). (CP 137-45)

Milam requested, and was granted permission, to represent himself pro se at trial. (CP 14; 08/07/12 RP 12-20)¹ Milam moved to suppress the items taken from his pockets during a pre-arrest weapons pat-down and subsequent search incident to arrest. (CP 8-11, 21-25) The court denied the motion. (09/20/12 RP 78; CP 101-06) Milam also made several written and oral motions to dismiss based on prosecutorial misconduct, discovery violations, lack of evidence to support his arrest or conviction, and violations of his Sixth Amendment right to confront witnesses because the

¹ The trial transcripts, labeled Volumes I through VI, will be referred to by volume number. The remaining transcripts will be referred to by the date of the proceeding contained therein.

arresting officer did not testify at the suppression hearing or at trial. (CP 8-11, 12-13, 21-25, 41-42, 130, 131-33, 134, 215-18; 09/26/12 RP 2-5; RP1 71-89, 106; RP3 212-13) These motions were denied as well. (CP 113-15; RP1 83, 111; RP3 221-23)

The jury convicted Milam of all charges except use of drug paraphernalia. (CP 196-212; RP4 283-85) At sentencing, the court accepted Milam's argument that his possession of stolen property convictions were the same criminal conduct and should be counted as one point in his offender score. (CP 252-54; RP5 297, 328-29) The trial court then reviewed Milam's criminal history and calculated Milam's offender score as 24. (RP6 324-29) The court also found that his high offender score and multiple current offenses warranted an exceptional sentence above the standard range. (CP 219-21) The trial court imposed an exceptional sentence totaling 120 months of confinement. (CP 233; RP6 333) This appeal timely follows. (CP 245)

B. SUBSTANTIVE FACTS

Carol Bautista works at Pacific Lutheran University. (RP3 199) On the morning of May 31, 2012, her wallet was taken from her office on the PLU campus. (RP3 201-02) The wallet contained several of Bautista's bank debit and credit cards, her social security

card and driver's license, her husband's driver's license, and the social security cards of her husband, her son, and her step-son. (RP3, 203, 204-09) Bautista called the police and reported the theft. (RP3 209)

Around 11:30 PM that same day, Lakewood Police Officers Andrew Hall, Shawn Noble and Jeremy James, were engaged in "proactive" patrol on South Tacoma Way, looking for individuals who might be engaged in prostitution, drug transactions, or other criminal behavior. (RP2 126, 128-29, 164-65) Officer Hall was in plainclothes, and driving an unmarked gray Mazda, while Officers Noble and James were in marked patrol units acting as the surveillance team. (RP2 128, 131, 164)

Officer Hall testified that he observed a woman walking along South Tacoma Way, a street known for prostitution activities. (RP2 129) A man later identified as Michael Milam was following the woman, and Officer Hall thought the Milam might be a "john" or a "pimp." (RP2 129) Officer Hall decided to watch the pair, so he pulled into a nearby lot and parked the car. (RP2 130) He testified that he saw Milam looking at passing cars, then Milam walked towards his unmarked Mazda. (RP2 130) Milam was talking and made hand gestures towards Officer Hall, but Hall could not

understand what Milam was trying to say. (RP2 130)

Officer Hall did not want to make contact with Milam yet because he did not know if Officers Noble and James were in place, so he pulled out of the parking lot and drove to another parking lot where he could continue to observe. (RP2 130, 131) Officer Hall watched as Milam continued to walk on South Tacoma Way. (RP2 132) Milam seemed to be trying to catch the attention of passing cars. (RP2 132) Officer Hall was not sure what Milam was doing, but he thought the behavior was suspicious. (RP2 133)

Officer Hall decided to approach Milam, so he pulled into a nearby driveway, rolled the car window down, and nodded hello to Milam. (RP 133) Milam responded by asking Officer Hall, "Hey, can you help me?" (RP2 133) Hall responded, "What's up?" (RP2 133) Milam came closer and said, "I got what you need." (RP2 133) According to Hall, Milam pulled a large stack of credit cards, social security cards, and driver's licenses out of his pocket, and fanned them out to show Hall. (RP2 133) Hall could see that a woman's name was printed on the credit cards, and the photograph on the driver's license did not match Milam. (RP2 134-35) Officer Hall believed Milam might be trying to sell stolen credit and identification cards. (RP2 135)

According to Officer Hall, Milam walked around the front of the car and sat down in the front passenger seat. (RP2 134) Milam showed Hall the cards, and again said, "I got what you need." (RP2 135) Hall asked Milam if he had credit cards that matched the identification cards, and Milam responded, "Fuck yeah. I got what you need." (RP2 136) Hall asked how much money Milam wanted for the cards, and he said 30 to 50 dollars. (RP2 136)

Milam suggested that they drive to a more private location to conduct the transaction. (RP2 136) As Officer Hall pulled out of the parking lot, he gave a predetermined signal to Officers Noble and James, indicating that he had probable cause to arrest Milam. (RP2 137, 167) Officers Noble and James responded by following in their separate patrol cars. (RP2 139, 168) As Hall pulled into another parking lot, Officer Noble activated his lights and pulled behind Hall's car, while Officer James pulled in front of Hall's car. (RP2 139, 168)

Officer Noble contacted Milam, and detained him in handcuffs by the back end of the Mazda. (RP2 139, 140, 170) In order to preserve Officer Hall's identity as an undercover officer, Officer James "detained" him at the front of the car. (RP2 139, 140,

169) Officer Noble also conducted a weapons pat-down, and found a small glass pipe in Milam's pocket. (RP2 141-42, 170-71)

After conferring with Officer Hall, Officer Noble officially placed Milam under arrest, and conducted a more thorough search of his pockets. (RP2 141, 142) According to Officer James, Officer Noble removed a stack of credit and debit cards, identification cards, and social security cards belonging to Carol Bautista, Vergel Bautista, Vincent Bautista, and Christopher Ware. (RP2 172, 176-94; CP 135-36) Officer James testified that Officer Noble handed the cards and the pipe to him, and that he transported them to the police station and booked them into the evidence room.² (RP2 172)

Milam was transported to the police station and gave a statement to investigators. (10/02/12 RP 39; Exh. 18) Milam admitted that he was trying to sell the items and he knew that what he was doing was wrong. (10/02/12 RP 39; Exh. 18) After his interview, Milam was transferred to the Pierce County Jail. (10/02/12 RP 56) During the booking process, police found a trace amount of marijuana rolled into one of Milam's socks. (10/02/12 RP 57-58, 70-71, 74)

² The State did not call Officer Noble to testify at trial because he had recently resigned from the police force. (09/26/12 RP 3-5; RP1 77-78; RP2 46-47)

IV. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO PROVE ALL THE ELEMENTS OF TRAFFICKING IN STOLEN PROPERTY AND POSSESSION OF STOLEN PROPERTY BECAUSE THE EVIDENCE DID NOT SUPPORT A CONCLUSION THAT MILAM KNEW THE ITEMS WERE STOLEN

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The State charged Milam with trafficking in stolen property under RCW 9A.82.050(1), which provides in relevant part: “A person . . . who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.” Trafficking is defined as “to sell, transfer, distribute, dispense, or otherwise

dispose of stolen property to another person[.]” RCW 9A.82.010(19). Accordingly, the State had to prove beyond a reasonable doubt that when he attempted to sell the cards to Officer Hall, Milam knew the cards had been stolen. RCW 9A.82.050(1); RCW 9A.82.010(19); State v. Michielli, 132 Wn.2d 229, 236, 937 P.2d 587 (1997).

The State also charged Milam with possession of stolen property, which “means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1). To convict Milam of this crime, the State also had to prove beyond a reasonable doubt that Milam knew the property he possessed was stolen. RCW 9A.56.140; State v. Hatch, 4 Wn. App. 691, 693, 483 P.2d 864 (1971).

Mere possession of stolen property is insufficient to prove that the defendant knew the property was stolen. State v. Ford, 33 Wn. App. 788, 790, 658 P.2d 36 (1983) (citing State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967)). The State must present some additional corroborative evidence to support a conviction. Ford, 33 Wn. App. at 790 (citing Couet, 71 Wn.2d at 775-76).

Examples of such corroborative evidence include the absence of a plausible explanation and flight. See Ford, 33 Wn. App. at 790 (no explanation); State v. Ladely, 82 Wn.2d 172, 175, 509 P.2d 658 (1973) (false or improbable explanation); State v. Medley, 11 Wn. App. 491, 495, 524 P.2d 466 (1974) (attempt to escape capture).

In this case, Milam acknowledged during his interview that he traded marihuana for the cards, and knew he should not have been trying to sell the cards, but this does not establish that he *knew* the cards had been *stolen*, as opposed to being simply fakes or forgeries.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all the elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Because the State's evidence did not establish beyond a reasonable doubt that Milam knew the cards he possessed were stolen, this Court should reverse his convictions for trafficking and possession of stolen property, and dismiss these charges with prejudice.

B. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING STATEMENTS BY SHIFTING THE BURDEN OF PROOF TO MILAM

To prevail on a claim of prosecutorial misconduct, Milam has the burden of showing both improper conduct and its prejudicial effect. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 481, 965 P.2d 593 (1998). During closing arguments in this case, the prosecutor made the following comments:

You should not have any doubt whatsoever that he has all of these cards in his possession. There's been no testimony to the contrary. (RP4 264)

And I would just lastly point out that even in all of his argument, nowhere has he ever denied having all of those things in his possession. He says he was set up, that the officer's not here, all this other stuff. But not once has he said those were not in his pocket and "I did not try to sell them to a police officer." (RP4 279-80)

These statements were both improper and prejudicial.

The State bears the burden of proving every element of its case beyond a reasonable doubt, and it may not shift any part of that burden to the defendant. Winship, 397 U.S. at 361; State v. Fleming, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996); Mullaney v. Wilbur, 421 U.S. 684, 701-02, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). As a result, the defendant has no burden to present any evidence at all. See Fleming, 83 Wn. App. at 215. A prosecutor

therefore commits misconduct if he attempts to shift the burden of proof to the defendant. State v. French, 101 Wn. App. 380, 4 P.3d 857 (2000); Fleming, 83 Wn. App. at 215.

Where, as here, the defendant does not testify, the prosecutor may not comment on the “failure” to present evidence to rebut the state’s case, because such a comment amounts to an improper shifting of the burden of proof, which is flagrant, prejudicial misconduct. See State v. Toth, 152 Wn. App. 610, 217 P.3d 377 (2009). For example, in Toth, the court found that the prosecutor had impermissibly shifted the burden of proof to the defendant, even though the prosecutor acknowledged to the jury that the defendant did not have any burden to present anything, where the prosecutor also said that the defendant had given a story without presenting “anything at all to corroborate” it and had not “back[ed] his story up.” 152 Wn. App. at 613.

This Court reached a similar conclusion in State v. Dixon, 150 Wn. App. 46, 207 P.3d 459 (2009). In Dixon, the prosecutor argued that there was no evidence that a passenger in the car with the defendant had put drugs in the defendant’s purse, and asked the jury why the defense had not called the passenger as a witness. 150 Wn. App. at 52. This Court noted that the defendant

has no duty to present evidence, and held that the prosecutor improperly shifted the burden of proof to the defendant by suggesting that she should have presented evidence to support her defense. 150 Wn. App. at 55.

Similarly here, it was not Milam's duty to present evidence that he did not possess the cards or did not attempt to sell the cards to Officer Hall. It was the State's duty to prove these facts. It was not Milam's duty to present evidence to support his defense. It was the State's duty to prove, beyond a reasonable doubt, the elements of the charged offenses. It was therefore improper for the prosecutor to suggest that Milam somehow failed to rebut the State's case.

This misconduct requires reversal. Absent a proper objection, Milam is required to show the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where, as here, a prosecutor makes an improper argument after that argument has been repeatedly condemned as misconduct in caselaw, the very fact that the prosecutor makes the argument indicates a flagrant and ill intentioned intent. See Fleming, 83 Wn. App. at 214. The argument in this case was made

well after the Court's decisions in Toth and Dixon had again reiterated its impropriety.

In addition, this misconduct was extremely unlikely to be "cured" by a corrective instruction. The legal concept of the defendant's right not to defend himself does not change the impact of the prosecutor pointing to the defendant's "failure" to do so, given that the average citizen might feel that exculpatory evidence should be presented if it existed. Even if reminded that a defendant had no burden of proof, the average juror would likely be unable to erase from their minds the prejudicial seeds of the idea planted by the prosecutor's improper comments. See *e.g.*, Charles Nesson, REASONABLE DOUBT AND PERMISSIVE INFERENCES: THE VALUE OF COMPLEXITY, 92 Harv. L. Rev. 1187, 1209 (1979) (noting that "the conclusion that there is no innocent explanation becomes more logical when [the defendant] fails to offer one," and pointing out the potential pressure on a defendant to rebut the prosecution's case). The misconduct in this case was flagrant and ill intentioned and could not have been cured by an instruction, and this court should therefore reverse Milam's convictions and remand for a new trial.

V. CONCLUSION

The state failed to prove beyond a reasonable doubt that

Milam knew the items he tried to sell Officer Hall were stolen, so Milam's trafficking in stolen property and possession of stolen property convictions should be reversed and dismissed. Alternatively, Milam should be granted a new trial because the prosecutor committed misconduct during closing statements when he shifted the burden of proof to the defense.

DATED: May 31, 2013



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Michael Derrell Milam

CERTIFICATE OF MAILING

I certify that on 05/31/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael D. Milam, DOC#286036, Monroe Correctional Complex – TRU, P.O. Box 888, Monroe, WA 98272-0888.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

May 31, 2013 - 1:51 PM

Transmittal Letter

Document Uploaded: 442086-Appellant's Brief.pdf

Case Name: State v. Michael Derrell Milam

Court of Appeals Case Number: 44208-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com

A copy of this document has been emailed to the following addresses:
pcpatcecf@co.pierce.wa.us