Case # 318478

Statement of Additional Grounds for Review

State of Washington
v.
Anatoliy Melnik

31847-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ANATOLIY MELNIK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

STATEMENT OF ADDITIONAL GROUNDS

Anatoliy Melnik
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

A. ASSIGNMENTS OF ERROR

1. The Appellant was given exceptional sentences above the standard range without submitting aggravating factors to a jury violating his Sixth Amendment Rights to the United States Constitution.

2. The Prosecutor engaged in misconduct through her improper remarks during her closing argument.

3. Attorney, Ryan Swinburnson, provided ineffective assistance of counsel by failing to object to the Prosecutor's many improper remarks during her closing argument.

B. ISSUES

1. Is the court required to submit aggravating factors to a jury in order to be allowed to sentence the Appellant to an exceptional sentence above the standard range?

2. Did the Prosecutor engage in misconduct through her many improper remarks during her closing argument?

3. Did Attorney, Ryan Swinburnson, provide ineffective assistance of counsel by failing to object to the Prosecutor's many improper remarks during her closing argument?

C. STATEMENT OF THE CASE

On Sunday, January 13th, Tiffany Glassick came home from church to find her home had been burglarized. (RP 82) She called the police. (RP 92) She reported that numerous small items of gold jewelry had been stolen, including an engagement ring with a very large diamond. (RP 89-92)

About 24 hours later, Anatoliy Melnik entered Money Tree and asked what he would be given in payment for numerous small gold items of jewelry, one of which was an engagement ring containing what appeared to be a large diamond. (RP 171) The Money Tree lender told Mr. Melnik he would not be paid for the diamond, be ultimately paid him for the weight of gold. (RP 172, 188-93)

On the evening of January 16, Mr. Melnik approached an employee at Ace Pawn and offered to sell him the alleged diamond. (RP 143) The clerk became suspicious and notified the police of his suspicion. (RP 146) The pawnshop staff retained possession of the diamond. (RP 149)

The State charged Mr. Melnik with two counts of trafficking in stolen

property. (CP 1-2) Police detective John Davis testified that while Mr. Melnik was in jail he placed telephone calls to a female named Brooke. (RP 250) Officer Davis listened to the conversations, and told the jury that he heard Mr. Melnik describe in detail his finding a bag of jewelry in a park in Pasco. (RP 251) Mr. Melnik did not testify.

During closing argument, the prosecutor made several improper comments that include the following:

> It's about the fact that the State has proven that the defendant knew that property was stolen within the 24 hours after it was taken and he still chose to sell some of it to Money Tree and then try to pass off that loose diamond to Ace Jewelry and Loan. (RP 285)
>
> If you believe statements the defendant made on the jail phone call that, "Oh, I just, you know, found this lost property down by the bridge and sold it," that is a theft of property. You don't get to pick up and grab other people's property that doesn't belong to you. (RP 292)
>
> So, if you believe his jail phone calls and just thought it was lost property, he knew by his very actions he had stolen property when he went to sell it at Money Tree and at Ace Pawn. That's the state of the law. That property is stolen by his actions of not reporting it or turning it over. So, that is trafficking of stolen property if you believe that he found that by the bridge, and it was trafficking when he sold it to Money Tree, and it was trafficking again when he tried to sell it to Ace. (RP 301)
>
> Now, why would someone want to dump property super quickly at a discounted rate? It's because they know it's stolen, and they want to get rid of it as fast as possible because the longer you possess stolen property the more likely it is that someone's gonna find out you have it and you're gonna get in trouble, and that's what his actions demonstrate. If you don't know property's stolen, why would you make up a story about where you found it if you didn't really find it? Why would you just be making something up about being innocent? Why would you be asking about what was taken from my house? You know, did they get a search warrant? What did they find? Those aren't the kind of comments of a person who hasn't done anything wrong, who doesn't know that property was stolen from someone. (RP 303-304)
>
> Any sort of suggestion that he's just down there to have them look at it and doesn't really intend to sell it doesn't sit well with the evidence that's before you today. (RP 304)
>
> I think with the time line, the testimony that you heard and with the distinct jewelry that's in evidence, it's very clear the defendant knew this property was stolen. You're not allowed to just go sell other people's property no matter, you know, if you found it or if you know it's stolen. You cannot do that, and that makes him guilty

of two counts of trafficking in the first degree, both for the Money Tree incident on the 14th of January and for the Ace incident on the 16th. (RP 305)

And again in rebuttal the prosecutor, Ms. McRoberts stated:

That's way more than a coincidence. You know, the defendant's actions, his phone calls, the entire thing just, you know, it's a web of deceit. (RP 324)

The jury found Mr. Melnik guilty on both counts. (CP 60-61) The court imposed exceptional concurrent sentences of 100 months for each count based on Mr. Melnik's offender score of ten. The top of the standard range for each offense was 63-84 months. (RP 64, 67)

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. MELNIK'S SIXTH AMENDMENT RIGHTS WHEN THEY SENTENCED HIM TO AN EXCEPTIONAL SENTENCE WITHOUT SUBMITTING AGGRAVATING FACTORS TO A JURY AND PROVING THEM BEYOND A REASONABLE DOUBT.

The trial court sentenced Mr. Melnik to an exceptional sentence of 100 months without submitting aggravating factors to a jury. The Sixth Amendment to the United States Constitution requires that a jury must unanimously find beyond a reasonable doubt **any aggavating circumstances** that increase a defendant's sentence. State v. Nunez, 174 Wash.2d 707 (2012) En Banc (emphasis added) The top of the standard range for each offense was 63-84 months. The court based the exceptional sentences on Mr. Melnik's offender score of ten. (RP 64, 67) Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 404 (2004)(quoting Gore, 143 Wash.2d, at 315-316, 21 P.3d, at 277) "Regardless of the statutory source of the aggravator, the jury must unanimously find beyond a reasonable doubt any aggravating circumstance that increases the penalty for a crime." State v. Nunez, 174 Wash.2d 707 (2012) En Banc (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 313-14, 124 S.Ct. 2531, 159 L.Ed. 403 (2004).

Because the trial court never submitted any aggravating factors to the jury, Mr. Melnik should have been sentenced within the statutory maximum.

As the Honorable Bruce Spanner, Superior Court Judge stated at sentencing on July 8, 2013, "I tend to agree with Mr. Swinburnson that a single crime -- well, committing two offenses and getting sentenced for both of those where it pushes the offender score above nine would not typically be a situation where under RCW 9.94A.535, that the high offender score results in some crimes going unpunished. But here with your criminal history and your pattern of behavior as described by counsel, I believe it does." (sentencing page 19) When Judge Spanner considered Mr. Melnik's "pattern of behavior" he considered factors outside of the jury verdict.

This situation is almost exactly the same as in Blakely. That court explained, "In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no Apprendi violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in §9A.20.021 (1)(b). It observes that no exceptional sentence may exceed that limit. See §9.94A.420. Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the verdict." Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 404 (2004).

2. THE PROSECUTOR'S IMPROPER REMARKS AMOUNT TO PROSECUTORIAL MISCONDUCT IN VIOLATION OF MR. MELNIK'S SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 22 OF THE WASHINGTON STATE CONSTITUTION.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 Section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wash.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wash.2d 757, 762, 675 P.2d 1213 (1984). "A'"[f]air trial "certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office...and the expression of his own belief of quilt into the scales against the accused.'" State v. Monday, 171 Wash.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting State v. Case, 49 Wash.2d 66, 71, 298 P.2d 500 (1956); see State v. Reed, 102 Wash.2d

140, 145-47, 684 P.2d 699 (1984)).

It's clear from the record that the prosecutor, Ms. McRoberts, conveyed her own beliefs when she stated:

> I think with the time line, the testimony that you heard and with the distinct jewelry that's in evidence, it's very clear the defendant knew this property was stolen. You're not allowed to just go sell other people's property no matter, you know, if you found it or if you know it's stolen. You cannot do that, and that makes him guilty of two counts of trafficking in the first degree, both for the Money Tree incident on the 14th of January and for the Ace incident on the 16th. (RP 305)
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> It's about the fact that the State has proven that the defendant knew that the property was stolen within the 24 hours after it was taken and he still chose to sell some of it to Money Tree and then try to pass off that loose diamond to Ace Jewelry and Loan. (RP 285)

The prosecutor then misrepresented the law and made highly prejudicial statements when she stated:

> If you believe statements the defendant made on the jail phone call that, "Oh, I just, you know, found this lost property down by the bridge and sold it," that is a theft of property. You don't get to pick up and grab other people's property that doesn't belong to you. (RP 292)
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> So, if you believe his jail phone calls and just thought it was lost property, he knew by his very actions he had stolen property when he went to sell it at Money Tree and at Ace Pawn. That's the state of the law. That property is stolen by his action of not reporting it or turning it over. So, that is trafficking of stolen property if you believe that he found that by the bridge, and it was trafficking when he sold it to Money Tree, and it was trafficking again when he tried to sell it to Ace. (RP 301)
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>
> Any sort of suggestion that he's just down there to have them look at it and doesn't really intend to sell it doesn't sit well with the evidence that's before you today. (RP 304)

Finally, Ms. McRoberts improperly added:

> That's way more than a coincidence. You know, the defendant's actions, his phone calls, the entire thing just, you know, it's a web of deceit. (RP 324)

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, State v. Thorgerson, 172 Wash.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," State v. Casteneda - Perez, 61 Wash.App. 354, 363, 810 P.2d 74 (1971); State v. Hudson, 73 Wash.2d 660, 663, 440 P.2d 192 (1968). "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." American Bar Association, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980); State v. Brett, 126 Wash.2d 136, 179, 892 P.2d 29 (1995); State v. Belgarde, 110 Wash.2d 504, 755 P.2d 174 (1988).

The prosecutor used the prestige of her public office and the expression of her own belief of guilt into the scales against the accused in a display that easily shocks the conscience.

3. ATTORNEY, RYAN SWINBURNSON, PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE PROSECUTOR'S MANY IMPROPER REMARKS DURING HER CLOSING ARGUMENT.

A criminal defendant has the right to assistance of counsel under the Sixth Amendment to the United States Constitution. We consider this right to be "'the right to the effective assistance of counsel.'" Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). To show that counsel provided ineffective assistance, a defendant must show:

(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and

(2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987)). Reversal of a lower court decision is required where the defendant demonstrates both deficient performance and resulting prejudice. State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (Wash. 2006) (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052).

If not for defense counsel's complete lack of even one objection during the prosecutor's closing argument and rebuttal, even through her stating:

> That's way more than a coincidence. You know, the defendant's actions, his phone calls, the entire thing just, you know, it's a web of deceit. (RP 324)

How would you define that statement? The Blacks Law Dictionary, Fourth Pocket Edition 2011 defines deceit:

> deceit, n. (14c) 1. The act of intentionally giving a false impression. 2. A false statement of fact made by a person knowingly or recklessly (i.e., not caring whether it is true or false) with the intent that someone else will act upon it. 3. A tort arising from a false representation made knowingly or recklessly with the intent that another person should detrimentally rely on it.

The Washington State Court Rules provide the following:

APPENDIX
GUIDELINES FOR APPLYING RULE OF PROFESSIONAL CONDUCT 3.6

I. Criminal

A. The kind of statement referred to in Rule 3.6 which may potentially prejudice criminal proceedings is a statement which relates to:

(1) The character, credibility, reputation or criminal record of a suspect or defendant;

(2) The possibility of a plea of guilty to the offense or the existence or contents of a confession, admission or statement given by a suspect or defendant or that persons refusal or failure to make a statement;

(3) The performance or results of any investigative examination or test such as a polygraph examination or a laboratory test or the failure of a person to submit to an examination or test;

(4) Any opinion as to the guilt or innocence of any suspect or defendant;

(5) The credibility or anticipated testimony of a prospective witness; and

(6) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial.

RPC 3.8 specifically states:

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with a prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.

RPC 8.4 states:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(d) engage in conduct that is prejudicial to the administration of justice;

E. CONCLUSION

The prosecutor in this case violated the Rules of Professional Conduct through her many improper comments during closing arguments and defense counsel failed to raise these issues as required by the same rules. Because of the obvious prejudice that have been suffered by the defendant, the charges should be dismissed. The prosecutor committed misconduct and through that misconduct, defense counsel provided ineffective assistance.

Error should also be assigned to the Blakley violation at sentencing. No aggravating factors were submitted to a jury, nor were they admitted. Mr. Melnik should be sentenced within the standard range.

DATED this 28th day of May, 2014.

Signed: A. Melnik
Anatoliy Melnik

GR 3.1

DECLARATION OF MAILING

I, Anatoliy Melnik, declare that, on 5-28-14, I deposited the foregoing STATEMENT OF ADDITIONAL GROUNDS, or a copy thereof, in the internal mail system of Coyote Ridge Corrections Center and made arrangement for postage, addressed to:

Renee Townsley, Clerk
Washington State Court of Appeals
Division III
500 N. Cedar St.
Spokane, WA 99201-1905

Janet Gemberling, P.S.
Attorney at Law
P.O. Box 9166
Spokane, WA 99209

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Connell, Washington on May 28th, 2014. A. Melnik
Anatoliy Melnik