NO. 47610-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

AUDRA MINIER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

The Honorable Derek Vanderwood, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State's lead witness, Police Officer Ron Stevens, was observed by appellant Audra Minier's fiancé speaking with three other witnesses for the State in the hallway outside the court room after Officer Stevens testified. The trial court erred in declining to dismiss the case with prejudice, or in the alternative, to exclude testimony of the three witnesses who were observed speaking with the officer.

2. The trial court erred in entering Findings of Fact 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, and 15 (Findings of Fact and Conclusions of Law on Bench Trial). Clerks Paper (CP) 31.

3. The trial court erred in entering Conclusions of Law 3, 4, 5, 6, and 7 (Findings of Fact and Conclusions of Law on Bench Trial). CP 36-37.

4. The trial court erred in allowing the defendant to be represented by counsel who provided ineffective assistance in failing to move to exclude witnesses from the courtroom prior to trial pursuant Evidence Rule 615.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a State's witness is observed talking with other witnesses about relevant matters that appear to pertain to the case, albeit in the absence of an order excluding witnesses from the courtroom, does it constitute

government misconduct and is the presumptive remedy dismissal with prejudice? (Assignments of Error 1, 2, and 3)

2. Whether the trial court erred by allowing Ms. Minier to be represented by counsel who provided ineffective assistance by failing to move to exclude witnesses from the courtroom until after each testified? (Assignment of Error 4)

C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sherlyn Eaton is employed as a loss prevention officer for Craft Warehouse, a chain store selling household and art items. Report of Proceedings (RP)(4/27/15) at 73, 74.[1] On January 21, 2014, she was working at the Craft Warehouse located on Mill Plain Boulevard in Vancouver, Clark County, Washington. RP (4/27/15) at 75.

At trial, Ms. Eaton testified that from a "catwalk" located above the cash registers in the store, she saw Ms. Minier enter the store with a toddler and another person, and obtain a shopping cart. RP (4/27/15) at 76. Ms. Eaton saw Ms. Minier place two clear plastic organizers in the cart, and then saw her take off her coat and put it in the cart over the plastic containers. RP (4/27/15) at 77. After approximately 45 minutes, Ms. Minier left the store

[1]The record consists of two volumes. Volume 1 contains hearings dated November 20, 2014, February 24, 2015, April 23, 2015, and April 24, 2015. Volume 2 contains April 27, 2015 (bench trial), and May 4, 2015 (sentencing).

through the front exit with the cart, but did not go through a checkout stand. RP (4/27/15) at 78.

Ms. Eaton left the catwalk and went through a door that leads to the sidewalk at the front of the building. RP (4/17/15) at 79. Ms. Eaton saw Ms. Minier outside the store with the shopping cart looking at tote bags on display near the front entrance of the store. RP (4/27/15) at 78. Ms. Eaton called for another Craft Warehouse employee to come to the store entrance to act as a witness. RP (4/27/15) at 78. An employee named Abby Crawford responded to the request. RP (4/27/15) at 78.

Ms. Minier walked off the sidewalk, through the thoroughfare in front of the store and into the parking lot to a parked vehicle and Ms. Eaton and Ms. Crawford followed. RP (4/27/15) at 79. In the parking lot, Ms. Eaton identified herself to Ms. Minier as store security. RP (4/17/15) at 80. She stated that Ms. Minier said that she had forgotten about the organizers in the cart and handed them to Ms. Eaton. RP (4/27/15) at 81. Ms. Eaton testified that she told her that she needed to accompany her back into the store, and Ms. Minier refused. RP (4/27/15) at 81. Ms. Minier had what Ms. Eaton described as a red duffle bag in the cart. RP (4/27/15) at 81. Ms. Eaton reached for the duffle bag and stated that Ms. Minier grabbed it and said that she had to identify what Ms. Eaton believed was in the bag. RP (4/17/15) at

81. Ms. Eaton stated that she positioned herself between Ms. Minier and the vehicle, and that she was "was getting really aggressive," using profanity, and then shoved her out of the way. RP (4/27/15) at 82, 83. Ms. Eaton testified that she produced a pair of handcuffs, at which point Ms. Minier opened the red bag and withdrew a baby quilt kit and a quarter of a yard of material and tossed it at Ms. Eaton and then continued to try to leave. RP (4/27/15) at 84, 85. Ms. Eaton grabbed Ms. Minier's arm, braced her against the side of the vehicle and handcuffed her right wrist. RP (4/27/15) at 86. She said that Ms. Minier was swearing and Ms. Eaton continued to try to subdue Ms. Minier, who was considerably larger than Ms. Eaton, by "wrapping her chest" to bring her to the ground in order to put the handcuff on her left wrist, which were dangling from her right wrist. RP (4/27/15) at 62-63, 87.

Ms. Eaton said that as she tried to pull her back, Ms. Minier bit her right arm. RP (4/27/15) at 89. After that, Ms. Eaton said that Ms. Minier dropped to the ground and screamed that her back was hurt. RP (4/27/15) at 90.

Ms. Eaton said that the bite broke the skin and was extremely painful, and that she still has a scar from the bite. RP (4/27/15) at 92. Exhibits 1 and 2.

During the altercation, Ms. Minier used her to cell phone to record the

incident. RP (4/27/15) at 104, 133, 134. In the video, which is riddled with profanity by both persons, Ms. Minier tells Ms. Eaton that she is "being videotaped right now" and that Ms. Eaton had "no right to touch [her]." RP (4/27/15) at 134. Ms. Minier is heard to refer to her leg, and Ms. Eaton angrily asks if Ms. Minier bit her. RP (4/27/15) at 124. Last, while both are on the ground, Ms. Minier swears and then demands that Ms. Eaton get off her. RP (4/27/15) at 134-35.

Ms. Eaton remained on top of Ms. Minier until police arrived at the scene. RP (4/27/15) at 90-92.

Vancouver Police Officer Ron Stevens arrived at the store and saw Ms. Eaton standing over a woman on the ground. RP (4/17/15) at 35. He stated that Ms. Minier said that she had a medical issue and noticed that Ms. Eaton was injured. RP (4/27/15) at 39. He photographed Ms. Eaton's arm. Exhibits 1 and 2. Ms. Minier was taken to the hospital. Officer Stevens said that he also spoke briefly with Ms. Minier's husband on a cell phone handed to her by Ms. Minier, but told him that he was not a witness to the incident and ended the conversation. RP (4/27/15) at 40.

The value of the items obtained by Ms. Eaton from the cart was approximately $32.00. CP 32.

Ms. Minier testified that she went to Craft Warehouse on January 21,

2014 with her friend Jennifer and her daughter, who was 23 months old at the time. RP (4/27/15) at 114, 115. She put two clear plastic containers in the cart, and said that the duffle bag in the cart to which Ms. Eaton referred was actually her child's diaper bag. RP (4/27/15) at 125. She said that it was hot in the store and she put her jacket on top of the diaper bag while it was in the cart. RP (4/27/15) at 125. She testified that her son needed a band uniform and her daughter was getting anxious and grabby, so she left the store to go to Walmart to look for a band uniform for her son. She said that she had picked up a quilting kit and other things that were in the front of the cart. RP (4/27/15) at 126. She testified that they left in a "mad rush" and did not realize that the items were still in the cart. RP (4/27/15) at 126. She denied that she put items in the diaper bag, and that it contained only diapers and baby wipes. RP (4/27/15) at 126, 127. She said the diaper bag was large and that the plastic containers and quilting kit were under the bag. RP (4/27/15) at 127.

Ms. Minier said that she had back surgery on December 6, 2014, for a bulging disc. RP (4/27/15) at 128. She stated that her lip was swollen from getting hit by Ms. Eaton's arm during the altercation. RP (4/27/15) at 137. She stated that her lip was swollen from the inside because her mouth was closed when Ms. Eaton's arm hit it. RP (4/27/15) at 138.

Following the incident, she was taken to the hospital where the injury was photographed. RP (4/27/15) at 137. Exhibit 7.

Ms. Minier denied that she purposely dropped to the ground, as alleged by Ms. Eaton, Cassidy Lucas, and Jennifer Hill in their testimony. RP (4/27/15) at 89, 114, 121, 135. She said that when they were struggling, Ms. Eaton got behind her and had her arm across her neck and that she was having a hard time breathing. RP (4/27/15) at 135. She said that they both stumbled and that they both fell. RP (4/27/15) at 135. After they both landed on the ground, Ms. Eaton got on top of her and put her knee in her chest and then put the handcuff on her right wrist. RP (4/27/15) at 135. She said that when she fell, she landed on the incision area where she had had surgery. RP (4/27/15) at 135. She denied that she bit Ms. Eaton, and said that she was unable to physically put anyone's arm in her mouth because she can not open her mouth very wide due to TMJ disorder. RP (4/27/15) at 136. She stated, "my jaw locks. It doesn't open wide enough." RP (4/27/15) at 136. She testified that she can open her mouth "[b]arely enough to eat a hot dog, just the dog itself, no bun." RP (4/27/15) at 137.

Ms. Minier stated that Ms. Eaton's injury may have occurred when her arm went across her mouth when they fell, and was "shoved in and got bit." RP (4/27/15) at 137.

Ms. Minier was charged by the Clark County Prosecutor's Office by second amended information with assault in the third degree and theft in the third degree. RCW 9A.36.031(1)(a), RCW 9A.56.050(1)(a), 9A.56.0202(1)(a). CP 21.

Ms. Minier waived jury trial. RP (4/23/15) at 20, 21, CP 22.

Neither counsel moved for exclusion of witnesses pursuant to ER 615 at the beginning of trial. RP (4/27/15) at 32.

At trial, after Ms. Crawford testified, defense counsel moved for mistrial, stating that Ms. Minier's fiancé—James Henline—while in the hallway outside the courtroom, overhead an officer discussing the case with witnesses. RP (4/27/15) at 65. The court brought Officer Stevens and several unidentified persons into the courtroom. RP (4/27/15) at 66. When notified by the judge that there was concern that the officer was discussing the case in the hallway, Officer Stevens shook his head, indicating that he had not talked about the case with witnesses. RP (4/27/15) at 66. Three unidentified parties also said "no" when asked if there was any discussion of the case. RP (4/27/15) at 66. The witnesses, including Ms. Eaton and Officer Stevens, were placed under oath and again responded that they had not discussed the case. RP (4/27/15) at 67. The court then directed the witnesses to step outside and refrain from discussing the case. RP (4/27/15)

at 67.

James Henline, who identified himself as Ms. Minier's fiancé, stated that during the trial he left the courtroom and went into the hallway and overheard three female witnesses sitting on a bench with an officer standing facing them. RP (4/27/15) at 69. He stated that he heard him refer to "bite" and "speaking about locations in the parking lot, where people were." RP (4/27/15) at 69. Three women testified after Officer Stevens: Ms. Eaton, Cassidy Lucas, and Jennifer Hill. RP (4/27/15) at 73-108, 110-117, 119.

After Mr. Henline's testimony, defense counsel moved for dismissal of the case. The State responded that "it's not consistent with the portion of Officer Stevens' investigation of testimony that he would be discussing anything about the parking lot." RP (4/27/15) at 71. The court then denied the motion for mistrial. RP (4/27/15) at 71. The court found:

> I don't believe there's an adequate showing of prejudice that would be involved here, not only from the testimony that was provided—I don't believe there's an adequate basis for that. But also, there wasn't a request from the parties to even exclude witnesses from the courtroom prior to starting the trial necessarily either.
>
> The witnesses have been outside, but there wouldn't necessarily be a basis for precluding from even hearing the testimony that's been presented today, unless you have a different position on that, Mr. McAleer, than what I'm aware of.

RP (4/27/15) at 71.

The court convicted Ms. Minier of both counts. RP (4/27/15) at 163. CP 40. The court entered findings of fact and conclusion of law on May 4, 2015. RP (5/4/15) at 169, CP 31-37.

At sentencing, the court imposed a standard range sentence of 40 days in custody, with 10 days to be converted to partial confinement in the form of work crew. RP (5/4/15) at 176, CP 42.

Timely notice of appeal was filed May 11 and May 20, 2015. CP 61, 91. This appeal follows.

D. ARGUMENT

1. THE COURT ERRED WHEN IT DECLINED TO DISMISS THE CASE.

Due process guarantees accused persons a fair trial. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. Consistent with due process, a new trial is properly granted for egregious government misconduct, even absent a showing of prejudice. *State v. Cory,* 62 Wn.2d 371, 377, 382 P.2d 1019 (1962) (reversing where sheriff eavesdropped on conversation between defendant and his counsel); *State v. Granacki,* 90 Wn. App. 598, 604, 90 P.2d 667 (1997). "It is morally incongruous for the State to flout constitutional rights and at the same time demand that its citizens observe the law...." *Cory,* 62 Wn.2d at 378.

In *Granacki,* the prosecutor designated a police officer as lead detective to remain in the courtroom and assist the prosecution during trial. *Granacki,* 90 Wn. App. at 600. During a court recess, the officer covertly read some of defense counsel's notes that were sitting on counsel table. The officer was later seen talking to a juror, despite the court's order that the parties have no contact with the jurors. *Id.* The trial court dismissed the charges with prejudice, and the Court of Appeals affirmed. *Id.* at 601. The Court of Appeals found that the detective had abused the trust placed in him by the trial court in permitting him to remain in the courtroom to assist the prosecutor. *Id.* at 603. It held that the detective's egregious misconduct warranted dismissal with prejudice. *Id.* at 604.

In this case, neither counsel moved to exclude witnesses from the courtroom pursuant to ER 615. However, Officer Stevens was well aware that the case involved several contested issues of fact.

As in *Granacki,* the trial court was presumably confident in Officer Stevens' integrity and ability to adhere to commonsense, albeit unordered courtroom decorum by not discussing testimony with persons waiting to testify. The rule is sufficiently well known that discussing testimony with a witness could constitute witness tampering. The officer's conduct as described by Mr. Henline is even more egregious given Officer Stevens

testified that he has eighteen years of experience. At a minimum, he should have been aware that his contact with the three upcoming witnesses could have reasonably been construed as witness tampering. *See* RCW 9A.72.120. Thus, his out of court contact with the witnesses constitutes egregious misconduct.

In cases where the there has been a violation of an exclusion order, the trial court has discretion to determine what sanction to impose for violation of the order. *State v. Dixon*, 37 Wn. App. 867, 877, 684 P.2d 725 (1984). Generally, there are three possible sanctions: (1) holding the witness in contempt; (2) allowing cross examination regarding the violation and/or comments about the violation in closing argument; and (3) excluding the witness's testimony. *State v. Skuza,* 156 Wn.App. 866, 896, 235 P.3d 842 (2010) (citing Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 615.5, at 627-30 (5th ed.2007)).

Here, although there was no violation of an exclusion order, the State's witness appears to have engaged in misconduct. Despite this, the court denied defense counsel's motion for dismissal and found no prejudice to the defendant. RP (4/27/15) at 71.

The appellant submits that the prejudice is evident by virtue of the alleged contact with witnesses itself. In this case the court's ultimate ruling

depended almost exclusively on witness credibility. The judge could have been convinced that Ms. Minier unintentionally left the store with the items contained in the cart and that the bite was unintentionally inflicted while Ms. Eaton attempted to handcuff Ms. Minier. However, the questioned witness contact created a potential for tailoring the testimony of the three witnesses following Officer Stevens. The actions of an officer with an 18 year career—even in the absence of a specific order precluding discussion of testimony with other witnesses and excluding witnesses from the courtroom—constitute prejudicial governmental misconduct meriting dismissal of the charges, or in the alternative, the remedies promulgated in *Skuza*.

2. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO EXCLUDE WITNESSES PURSUANT TO ER 615.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn,* 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland v. Washington,* 466 U.S. 668, 687-88, 80 L. Ed. 2d 674,

104 S. Ct. 2052 (1984)), *cert. denied*, 510 U.S. 944 (1993). The right to counsel means the right to the effective assistance of counsel. *Riley,* 122 Wn.2d 772, 780, 863 P.2d 554 (1993) citing *Strickland v. Washington,* 466 U.S. at 686. A defendant has not had effective assistance of counsel when the performance of counsel was deficient and the deficient performance prejudiced the defendant. *Riley,* 122 Wn.2d at 780.

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas,* 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas,* 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland,* 466 U.S. at 693; *Thomas,* 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland,* 466 U.S. at 694; *Thomas,* 109 Wn.2d at 226.

Counsel's legitimate strategy or tactics do not constitute ineffective assistance unless, those tactics would be considered incompetent by lawyers of ordinary training and skill in the criminal law." *State v. Osborne*, 102 Wn.2d

87, 99, 684 P.2d 683 (1984).

In this case, defense counsel's inexplicably failed to move to exclude witnesses pursuant to ER 615 at the beginning of trial.

Washington's ER 615 provides:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

"The intent of ER 615 is 'to discourage or expose inconsistencies, fabrication, or collusion.'" *Skuza*, supra. ER 615 allows a party to seek to exclude witnesses, without limitation on the reason for the motion. Therefore, had counsel moved to exclude witnesses, the court would have undoubtedly granted the motion.

Allowing a State's witness to be present in courtroom during the entire case risks many dangers, including, but not limited to, the danger that the witness will be able to tailor his or her testimony to the testimony of witnesses appearing beforehand, by focusing on factual matters and inadequacies in the eyes of the fact-finder. See *State v. Skuza*; *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 138, 606 P.2d 1214 (1980).

The prejudice suffered by Ms. Minier due to counsel's failure to move to exclude witnesses is clear: Officer Stevens was able to talk with the State's witnesses immediately prior to their own testimony without sanction or recourse by the defense. The court correctly noted that counsel did not request exclusion of witnesses pursuant to ER 615, therefore defense counsel was unable to argue that a ruling of the court had been violated. Clearly, the failure to request exclusion of witnesses was not tactical because defense noted its objection in its request for dismissal.

The case was extremely fact-specific. The key issues involved the injury to Ms. Eaton during the altercation in the parking lot and the presence of items in the cart and bag. Officer Stevens testified that he saw and photographed an injury to Ms. Eaton's arm. The word "bite," presumably the injury sustained by Ms. Eaton, was one of the words that Mr. Henline stated that he overheard when Officer Stevens was talking with the witnesses in the hallway. The failure to request exclusion of witnesses left the door open for the type of mischief alleged by Mr. Henline, and left Ms. Minier without recourse in seeking sanctions had the court found a violation of ER 615.

The trial court has discretion to determine what sanction to impose for violation of an order excluding witnesses. *State v. Dixon,* 37 Wn.

App. 867, 877, 684 P.2d 725 (1984). The sanctions that would have been available to counsel would include (1) holding the witness in contempt; (2) allowing cross examination regarding the violation and/or comments about the violation in closing argument; and (3) excluding the witness's testimony. *State v. Skuza, supra.* Had the court excluded Ms. Eaton's testimony, it is likely that there would have been insufficient evidence to support a conviction.

Based on the foregoing, defense counsel's representation fell below an objective standard of reasonableness, and here, the attorney's deficient performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

E. CONCLUSION

Based on the foregoing, Ms. Minier respectfully requests that her convictions be reversed and dismissed.

DATED: November 30, 2015.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

The undersigned certifies that on November 30, 2015, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 30, 2015.

PETER B. TILLER

TILLER LAW OFFICE

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