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4-11-16

Court of Appeals  
Division I  
State of Washington

No. 73720-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN INGALLS,

Appellant.

---

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

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OPENING BRIEF OF APPELLANT

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JAN TRASEN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The deputy prosecutor committed misconduct in closing argument by urging the jury to consider matters stricken from the record.

2. The deputy prosecutor committed misconduct by shifting the burden of proof and commenting on the defendant's right to silence.

3. The trial court erred by failing to properly instruct the jury concerning matters stricken from the record.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State's duty to ensure a fair trial precludes a deputy prosecutor from employing improper argument and tactics during trial. Where the deputy prosecutor flagrantly encouraged jurors to consider evidence stricken from the record and undermined the right to silence and the burden of proof, did this constitute misconduct requiring reversal?

2. A trial court may supply supplemental instructions to a deliberating jury, as long as the result is not misleading, confusing, or prejudicial. On the whole, the court's instructions must make the relevant law manifestly apparent. Here, the jury requested clarification regarding the sole witness's testimony, some of which was stricken – specifically the out-of-court identification of Mr. Ingalls. Should the trial court have re-instructed the jury using the court's previous curative

instruction, as Mr. Ingalls requested, and does the court's refusal to do so require reversal?

C. STATEMENT OF THE CASE

Factual Background

On November 21, 2013, Washington State Trooper James Ramey was on patrol in Snohomish County. RP 40-42. Wearing his standard State Patrol uniform and driving a marked patrol vehicle, Officer Ramey received a radio report that the driver of a gold Ford Taurus was driving erratically on I-5. Id. at 41-42. Officer Ramey drove to the area in which this car had last been seen. Id.

After dispatch received a second call concerning the same driver, Officer Ramey saw the gold Taurus near the Lynnwood/Mill Creek area. RP 43. Officer Ramey took the car's license plate information and began to follow the Taurus in order to observe it. Id. He drove behind the car, observing it without lights or siren, for about a mile. Id. at 44-45. When the Taurus made a quick lane change, causing another car to apply the brakes, Officer Ramey activated his emergency lights and sirens. Id. at 46-47. The Taurus did not stop. Id.

Officer Ramey pursued the Taurus with lights and sirens, but the driver of the Taurus did not pull over. Id. at 47-51. Officer Ramey

stated that as drove alongside the Taurus for several minutes, he could see a white male with a baseball hat, driving and looking straight ahead. RP 50. Officer Ramey said the windows of the car were tinted, but that he could see the man's face. RP 51-52.

With speeds escalating to 100 miles per hour, the driver of the Taurus then reportedly traveled over to the HOV lane, drove onto the shoulder, crossed over the King County line, and almost hit two Department of Transportation (DOT) engineers who were parked on the shoulder. RP 57-58. The Taurus driver caused a minor collision with one vehicle when the back end of his car clipped the front of a Cadillac. RP 57.

The Taurus eventually exited I-5 at 175<sup>th</sup> St. and proceeded through a red light at that intersection at approximately 90 miles per hour. RP 58-60. At that point, Officer Ramey terminated pursuit and radioed to King County deputies to request assistance in locating the vehicle. RP 73.<sup>1</sup>

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<sup>1</sup> Apparently, Kevin Ingalls was located on some other date, at some other location; there is nothing in the trial record concerning his apprehension, nor that a positive identification was made by any of the witnesses, including Officer Ramey.

### Trial Proceedings

Kevin Ingalls was eventually charged with attempting to elude a pursuing police vehicle, although the jury heard nothing about his arrest or apprehension. CP 131-32; RCW 46.61.024(1). The State also charged Mr. Ingalls with an endangering enhancement. CP 131; RP 6-7; RCW 9.9A 834 (one or more persons, other than the defendant or the pursuing officer, were threatened with physical injury or harm by the defendant's actions during the crime).

At trial, the State presented only one witness – Officer Ramey – who offered no admissible testimony concerning the investigation or arrest of Mr. Ingalls. RP 60-67. The State attempted to introduce testimony that the trooper identified Mr. Ingalls as the Taurus driver by using a Department of Licensing (DOL) photograph obtained from police and DOL databases; however, this evidence was stricken from the record, pursuant to Mr. Ingalls's sustained objection and motion to strike. RP 60-61, 67.

The court provided an oral curative instruction, directing the jury that any testimony suggesting that Officer Ramey received or saw information from the DOL that was specific to Mr. Ingalls was stricken and must be disregarded. RP 73.



Despite the trial court's clear ruling, the deputy prosecutor proceeded to insert precisely this stricken material into his closing argument three separate times, flagrantly ignoring the court's instruction. RP 130 ("he looked at a photo" ... "identified him twice"), 142.

During jury deliberations, the jury sent out exactly one question: the jury asked which specific part of Officer Ramey's "procedure" they were permitted to consider. CP 117; RP 145. Mr. Ingalls requested the jury be provided the curative instruction once again, to clarify that all references to the DOL photograph had been stricken and could not be considered. RP 147-49. The court refused this request and merely instructed the jury to apply the instructions previously given, both oral and written. CP 117; RP 150-52.

Mr. Ingalls was found guilty as charged. CP 115-16.

#### D. ARGUMENT

##### 1. MR. INGALLS'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT.

###### a. Mr. Ingalls has the right to due process.

The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425

U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The Fourteenth Amendment also “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial – has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

b. Prosecutors have special duties which limit their advocacy.

A prosecutor’s improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558

P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

- c. The prosecutor engaged in misconduct, urging the jury to consider matters stricken from the record, thus denying Mr. Ingalls his right to a fair trial.

The trial court had earlier sustained Mr. Ingalls’s objection to the testimony concerning Officer Ramey’s use of the DOL database in his patrol car computer, in order to identify the suspect. RP 67. Importantly,

the trial court instructed the members of the jury that they could not consider any testimony concerning the out-of court identification of Mr. Ingalls by Officer Ramey. RP 67-73.<sup>2</sup>

Despite this curative instruction, the deputy prosecutor emphasized the stricken material during his closing argument -- not once, but three times -- in flagrant violation of the court's instruction. RP 130, 142. First, the prosecutor argued:

[Ramey] told you that after he terminated the pursuit, he looked at a photo, called the troopers down in Seattle to try to find him.

RP 129-30 (emphasis added).

This was precisely the testimony that had been stricken by the trial court in the court's curative instruction, stated below:

The testimony about the trooper's procedural steps shall stand. But to the extent that any testimony suggested that the trooper received or saw information from the department of licensing specific to this defendant, that testimony and information is stricken and the jury shall disregard.

RP 73 (emphasis added).

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<sup>2</sup> The State elected not to call any witnesses other than Officer Ramey. RP 65-66. Mr. Ingalls objected to the testimony as hearsay and because it lacked proper foundation. RP 66.

Moments later, the prosecutor again emphasized the forbidden evidence, by arguing: “The person who had the opportunity to observe him identified him twice. He says yes.” RP 130.

This second argument, once again, refers to Officer Ramey’s use of the DOL photograph; the trial court unequivocally found the use of this evidence inadmissible and struck all references to “information from the department of licensing specific to this defendant” from the record. RP 73.

Again, during rebuttal, the deputy prosecutor argued the following:

I challenge you to remember what the testimony actually was about gathering of evidence, about what the trooper did. Remember what he did on the side of the road at 175th, what he testified to. Prior to calling up other troopers in King County to try to talk to the defendant, he was there looking at things. And that he's certain the defendant's the one.

RP 142 (emphasis added).

The prosecutor’s argument in rebuttal clearly referred to Officer Ramey’s stricken testimony about looking at the DOL photograph and other information from the database. RP 142 (“gathering of evidence ...looking at things”).

Such arguments indicate an intentional and flagrant disregard for the trial court's prior rulings. This misconduct cannot be condoned. Due to the flagrant and ill-intentioned nature of the prosecutor's remarks, Mr. Ingalls may raise this misconduct for the first time on appeal. See State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citing State v. Stenson, 132 Wn.2d 668, 726-27, 940 P.2d 1239 (1997)) (error not deemed waived where prosecutorial misconduct is so flagrant and ill intentioned that it could not have been neutralized by a curative instruction); see also State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); RAP 2.5(a).

Finally, the deputy prosecutor also shifted the burden of proof and impermissibly commented on the defendant's constitutional right to remain silent. RP 130. The prosecutor argued that the issue before the jury was the following: "It's whether the defendant did it. And the unrefuted testimony is, yes, of course he did." RP 130. By this argument, the prosecutor undermined a fundamental constitutional right and the cornerstone of the American legal tradition. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (defendant has no obligation to present evidence or to bear witness against himself). This flagrant violation of Mr. Ingalls's due process rights is raised for the

first time on appeal. Emery, 174 Wn.2d at 760-61; Fleming, 83 Wn. App. at 213; RAP 2.5(a).

d. Reversal is required.

The cumulative effect of these various instances of prosecutorial misconduct violated Mr. Ingalls's right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). There is a substantial likelihood the cumulative effect of the prosecutor's misconduct in the closing argument affected the jury's verdict. We know this, due to the lack of evidence presented by the State (one witness); the length of time between the arrest and the in-court identification; and because the jury's question related directly to the misconduct. Accordingly, this Court should reverse. Reed, 102 Wn.2d at 146-47; Fleming, 83 Wn. App. at 214.

2. THE TRIAL COURT ERRED IN FAILING TO GIVE AN APPROPRIATE SUPPLEMENTAL INSTRUCTION TO THE DELIBERATING JURY.

Shortly following the deputy prosecutor's comments concerning the DOL photograph on rebuttal, the then-deliberating jury sent out a question. CP 117; CP \_\_\_, sub. no. 58 at 7.<sup>3</sup> The jury asked the following: "What specific part of Officer Ramey's testimony regarding

his procedure are we allowed to consider?” CP 117; RP 145. The jury was understandably confused. Although the court had indicated during the evidentiary phase that the testimony regarding the officer’s use of the DOL database was stricken and not to be considered, the prosecutor drew on it heavily in closing argument.

Rather than respond to the jury’s question as Mr. Ingalls requested -- to re-offer the curative instruction that the DOL evidence could not be considered -- the court issued a generic instruction that the jury was bound by the court’s previous instructions. CP 117.

- a. The trial court must clearly and accurately instruct the jury.

The purpose of jury instructions is to “furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict.” State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). Jury instructions must be “manifestly clear” because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996) (abrogated by State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)). Jurors should not have

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<sup>3</sup> The clerk’s minutes indicate that the jury left the courtroom to begin deliberating at 10:16 a.m. CP \_\_\_\_, sub. no. 58 at 7. The time on the jury’s question is 10:45 a.m. CP 117.



to speculate about what the law is. State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707 (1995).

The trial court may give further jury instructions after deliberations have begun, if the meaning of an original instruction is unclear and potentially misleading under the facts of a given case. State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990); State v. Young, 48 Wn. App. 406, 415-17, 739 P.2d 1170 (1987). The adequacy of a challenged jury instruction is reviewed de novo. State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002).

b. The trial court failed to accurately respond to the jury's request for clarification.

Here, the jury's confusion was undoubtedly due to the misconduct in the prosecutor's closing argument, which included three separate references to the stricken DOL evidence. RP 147-49, 130, 142. Mr. Ingalls requested the trial court instruct the jury that the DOL evidence – particularly the photograph of Mr. Ingalls – had been stricken from the record, and that the court provide its previous curative instruction. Id.

Although the trial court considered this request, the court ultimately failed to do so, instead giving a general supplemental instruction. CP 117 (“apply the instructions previously given, both oral and written”); RP 150-52. This generic instruction did not refresh the

recollection of the jurors as to the content of the court's prior oral ruling. Nor did it clarify the conflict between the court's ruling striking the evidence and the State's closing argument, which repeatedly drew on the same evidence.

This Court has held that a trial court errs when its supplemental instructions fail to accurately and clearly address a deliberating jury's inquiry. Young, 48 Wn. App. at 417. In Young, the jury asked the court to define a legal term. Id. at 414-17. The court declined, responding that the jury must refer to the original instructions. Id. at 414. This Court reversed, noting that "implicit in the request is the fact the jury was confused," and that the court's refusal to answer the jury's question allowed them to "speculate" as to the answer. Id. at 417.

The trial court "has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue." United States v. Southwell, 432 F.3d 1050, 1053 (9th Cir. 2005). In Southwell, the Ninth Circuit discussed why referring jurors back to the original instructions is inadequate, when jurors express confusion:

[T]he instructions did not provide a clear answer-or any answer-to the question the jury asked; thus referring the jury back to the instructions did nothing to clear up the ambiguity. Failure to provide the jury with a clarifying instruction when it has identified a legitimate ambiguity in the original instructions is an abuse of discretion.

Southwell, 432 F.3d at 1053.

The error in this case was particularly serious, because it concerned an essential element of the sole charged crime – the identity of the driver. In Mr. Ingalls’s case, since the driver absconded, there was no admissible evidence presented from the date of the incident that Mr. Ingalls was the driver of the Ford Taurus. The DOL evidence and the prior photo-identification by Officer Ramey had all been excluded and stricken from the record. RP 67; cf. State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990) (testimony that is stricken does not remain in the court record).

When the jury inquired which portions of Officer Ramey’s testimony it could consider, this could have easily been clarified by providing the curative instruction, as requested by Mr. Ingalls. RP 147-48. The jury’s clear confusion over which evidence from Officer Ramey’s “procedure” it could consider would have been allayed, had the jurors been reminded of the curative instruction -- “to the extent that any testimony suggested that the trooper received or saw any information from the department of licensing specific to this defendant, that testimony is stricken and the jury shall disregard.” RP 73 (original curative instruction; emphasis added).

The State may argue that the jury was able to adequately remember the curative instruction, and thus, which portions of Officer Ramey's testimony were admissible, without further instruction. However, the record reveals that not even the deputy prosecutor or the trial court were able to accurately recall which questions had been answered by Officer Ramey, and whether they had been answered before or after Mr. Ingalls's objection to the DOL evidence had been sustained.<sup>4</sup> If the legal professionals in the courtroom were unable to recall the testimony and the rulings, only moments after they had occurred, it is not surprising that the jurors were confused. CP 117.

Moreover, any confusion during the evidentiary phase of the trial was only heightened by the prosecutor's repeated reference to the excluded evidence in closing. The jury question indicates the panel was confused by the DOL ruling, and that the original instructions were inadequate. See Young, 48 Wn. App. at 417 (implicit in a jury question

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<sup>4</sup> For example, following Mr. Ingalls's objection to the DOL evidence, the trial court mistakenly stated several times that the testimony concerning the photo identification was not yet before the jury, although it was. RP 69-71. The court later realized its mistake and struck the identification. RP 73. The prosecutor claimed to have no recollection of the question he had asked moments earlier. RP 66 ("I don't even remember what the question was in this area that was originally objected to."). The question regarded the verification of the identity of Mr. Ingalls. RP 61.

is the indication that the original instructions caused confusion and were insufficient).

c. This Court should reverse.

An instructional error requires reversal unless the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (2001). Constitutional error is presumed to be prejudicial and the State bears the burden of proving the error is harmless. State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980).

Here, without the jury’s consideration of the stricken testimony regarding the DOL database search and the stricken photo identification, a reasonable jury would not have reached the same result, as there was insufficient evidence of identity. Therefore, the error cannot be considered harmless. Guloy, 104 Wn.2d at 425; Young, 48 Wn. App. at 418. A proper supplemental instruction could have prevented this outcome; instead, the court’s generic instruction was “misleading, confusing, [and] prejudicial.” United States v. Tines, 70 F.3d 891, 896 (6<sup>th</sup> Cir. 1995). This Court should reverse.

E. CONCLUSION

For the above reasons, Mr. Ingalls's conviction should be reversed and the matter remanded for a new trial.

Respectfully submitted this 11<sup>th</sup> day of April, 2016.

s/ Jan Trasen

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JAN TRASEN (WSBA 41177)  
Washington Appellate Project - 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73720-1-I
	)	
KEVIN INGALLS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |  |                          |  |
|-----|--|--------------------------|--|
| [X] | SETH FINE, DPA<br>[sfine@snoco.org]<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | ( )<br>( )<br>(X)<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>AGREED E-SERVICE<br>VIA COA PORTAL |
| [X] | KEVIN INGALLS<br>905170<br>AIRWAY HEIGHTS CORRECTIONS CENTER<br>PO BOX 2049<br>AIRWAY HEIGHTS, WA 99001              | (X)<br>( )<br>( )        | U.S. MAIL<br>HAND DELIVERY<br>_____                              |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 11<sup>TH</sup> DAY OF APRIL, 2016.



X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711