NO. 48095-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH TURNER,

Appellant.

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

The Honorable Erik D. Price, Judge

REPLY BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

A. ARGUMENT IN REPLY

1. TURNER WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

In his opening brief, appellant Kenneth Turner asserts he was denied a fair trial due to serious, repeated, and flagrant prosecutorial misconduct. Brief of Appellant (BOA) at 11-24. In response, the State claims the prosecutor did not do anything improper, or if she did, it was invited by defense counsel's argument and was not prejudicial. Brief of Respondent (BOR) at 8-19. As shown below, the record belies this.

(i) Misstatement of the State's Burden of Proof and Misrepresentation of the Facts

As appellant explained in his opening brief, the record shows the prosecutor flagrantly misstated the law and misrepresented a key fact. BOA at 7-10. The State claims this did not happen and that Turner is misreading the record. BOR at 11-16. The state is mistaken.

Defense counsel correctly argued that it was the State's burden to prove Kylie Thorson's credit card could be used to obtain something of value the night of the incident. RP 752-56. In response, the prosecutor called this argument "ridiculous" and told the jury that this "isn't a burden I have to prove to you." RP 783.

This was a patent misstatement of the law. See, State v. Rose, 175 Wn.2d 10, 12, 282 P.3d 1087 (2014) (establishing that a credit card must be shown to be tied to an active and usable account to qualify as an access device).

On appeal, the State claims that "it seems obvious that the prosecutor was not saying that the State had no burden to prove the credit cards were usable, but that the State had no burden to produce bank statements or copies of the credit cards." BOR at 14. However, this ignores what the prosecutor actually said and instead calls for speculative theorizing about what she might have meant to say. As the record shows, the prosecutor disavowed the State's burden in no uncertain terms. RP 783.

The State cannot brush this off as minor rhetorical misstep. The prosecutor's misstatement of the law regarding the State's burden of proof is "a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213, 1217 (1984). And here, the misstatement was compounded by the prosecutor's serious misrepresentation when engaging in her factual argument.

The prosecutor claimed that she had in fact proved the credit cards were usable through Thorson's testimony. She claimed:

"Kylie specifically told you not only did she have those items [the credit cards] but she used those items to pay for drinks at the club, very specifically." RP 783. Yet, Thorson never testified to using the credit cards to purchase anything, and she instead testified she paid in cash that evening. RP 270, 304.

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, it is improper for a prosecutor to make arguments based on facts not in evidence or to misrepresent the facts. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). On appeal, the State claims that the prosecutor just had a "faulty memory" and that the jury should have known not to rely on her recollection of the facts. RP 14. However, this was more than just a minor memory lapse about an inconsequential fact. This was a misrepresentation of a crucial fact that also implied facts not in evidence. This was an assured statement by an officer of the court telling the jury that Thorson "specifically" had testified that she used the cards. It would have been difficult for the any juror to doubt this statement. This is because the prosecutor is the master of the State's case and is presumably the most informed as to the testimony of the State witnesses. One would expect that of all

people, the prosecutor would know the answer her witness gave to her own questions. Thus, the jury was likely swayed by the prosecutor's "faulty memory" of this important fact.

The State urges that the prosecutor's misstatement should be overlooked because there was other evidence sufficient to support an inference that the credit cards were usable. That misses the point however. Based on the prosecutor's misconduct, the jury never needed to consider that evidence because the jury had been told: (1) it was not the State's burden to prove usability; and (2) Kylie Thorson said she used the cards that night. It never had to weigh whether her cancellation of the account was proof beyond a reasonable doubt that the cards could have been used to obtain something of value that night.

The State suggests the prosecutor's misstatement of her burden and misrepresentation of the facts was not particularly prejudicial. However, this misconduct struck at the heart of the defense and seriously impeded the jury in its function to decide the case based on the correct law and the evidence actually produced during trial.

The defense theory relied heavily on the jury's consideration of whether there was proof beyond a reasonable doubt that the

credit cards were usable. Defense counsel pointed out there was no evidence establishing the cards were active for use. RP 754. He underscored the fact the State had not provided any receipts or bank statements to show the cards were tied to an active account, were not expired, and were not maxed out. RP 753-54. Defense counsel pointed out that mere possession of a credit card is insufficient to prove the card could be used to purchase something of value. RP 755-56.

Given the defense's argument and the minimal evidence regarding usability produced by the State, a juror certainly could have had doubts about whether the State met its burden to prove the cards could be used to access something of value the night of the incident. While Thorson testified she cancelled the cards, she could have been canceling an account with no available funds at the time of the incident. However, given the prosecutor's misconduct, the jury never had to struggle with this question or really fully consider the defense. As such, the misconduct here resulted in a serious irregularity and left an enduring prejudice on Turner's right to a fair and impartial determination of guilt based on the correct law and only the evidence presented at trial.

(ii) Misleading the Jury in its Duty to Independently Determine Credibility

In his opening brief, Turner explains that, contrary to the prosecutor's argument to the jury, the judging of a witness' credibility is not an all-or-nothing proposition. BOA at 14-16; James v. Robeck, 79 Wn.2d 864, 870, 490 P.2d 878 (1971). Specifically, he asserts that the following statement from the prosecutor was improper:

> You cannot have it both ways. Either he is lying about everything or he is telling the truth about everything, but you can't pick and choose the parts that help you and the parts that hurt you, and that's what they want you to do.

RP 782.

In response, the State once again asks this Court to ignore what the prosecutor actually said and undertake a strained interpretation of the prosecutor's argument. BOR at 19. It claims that the prosecutor was merely saying that no one can claim that all good information about him or her is true and all bad information is false. BOR at 19. But the record shows the prosecutor did not say this. Instead, she explicitly told the jury that it cannot choose to believe only part of a witness' testimony and not another part – rather it had to determine whether the witness was "lying about

everything or telling the truth about everything." RP 782. Hence, this Court should reject the State's attempt to avoid the actual statement made by the prosecutor to the jury.

As explained in detail in appellant's opening brief, the prosecutor's claim that credibility is an all-or-nothing proposition is not supported by law and diverted the jury away from its duty to independently assess witness credibility and weigh the evidence as it saw fit. BOA at 14-15. Furthermore, when combined with the other misconduct, this serious misdirection of the jury in its duty resulted in enduring prejudice to Turner's right to a fair trial.

(iii) Impugning the Role and Integrity of Defense Counsel and Giving a Personal Opinion about the Defendants' Veracity

In his opening brief, Turner asserted that the prosecutor impugned the role and integrity of defense counsel and gave a personal opinion about a witness' veracity when she accused the defendants of engaging in a smear campaign and told the jury that defense counsel's attempt to hold the State to its burden was offensive and insulting. BOA at 16-19.

Citing State v. Russel, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), the State claims in response that the remarks were not objectionable because "a prosecutor is an advocate and entitled to

make a fair response to a defense counsel's argument." BOR at 22. However, in Russel, the Court also recognized the prosecutor's responsive remarks must be "a pertinent reply." Calling a defense counsel's robust but fair argument about the State's lack of evidence "insulting" and "offensive" – as was the case here – was neither "pertinent" nor a substantive "reply" to the defense's arguments.

Attempting to justify the prosecutor's misconduct, the State claims that defense counsel's extensive argument about the lack of evidence "appeared to have been an attempt to goad the prosecutor into a response." BOR 23. The record shows no support for this. And even if it did, that is no excuse for the prosecutor's disparagement of defense counsel's role in the adversarial process.

Defense counsel did not call the prosecutor names and did not take personal offense at her argument. While he anticipated that she might suggest to the jury his argument pertaining to the usability factor was a "red herring," there is nothing inherently offensive in this or in trying to anticipate the State's rebuttal arguments (especially since the defense has no opportunity to respond). The fact that defense counsel chose to focus on the

usability factor and strongly argue that point does not establish that he "goaded" the prosecutor; instead, it demonstrates that this particular argument was a central and important aspect of the defense.

More importantly, defense counsel's vigorous argument about the lack of evidence is not a green light for the State to disparage defense counsel's role in the adversarial process. Prosecutors must act in manner worthy of their office and seek justice through a fair trial. Our judicial system has no room for prosecutors who take personal offense to defense counsel's robust argument who then decide to air these hard feelings out in front of the jury by making disparaging remarks about defense counsel.

It is utterly unfair to a defendant to allow personality conflicts or the unpredictable sensitivities of trial lawyers to impact a jury's verdict. See, Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir.1983) (recognizing that prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his case). This is why prosecutors must steer wide from unfair trial tactics and personal pettiness. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); (citing State v. Case, 49 Wn.2d 66, 70–71, 298 P.2d 500 (1956)). This did not happen here.

Given the record, the prosecutor's disparaging comments were not justified and were not a pertinent reply to defense counsel's legitimate arguments about the evidence, or the lack thereof.

(iv) Prejudice

In his opening brief, Turner explains in detail that curative instructions could not have effectively addressed the relentless misconduct of the prosecutor which struck at the heart of his defense. BOA 20-25. The State responds that the prosecutor's misconduct was not prejudicial because any error could have been obviated by curative instructions. BOR at 16, 20, 24. However, curative instructions can only go so far before the jury's ability to effectively compartmentalize is stretched beyond its capacity. See e.g. State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993).

The cumulative effect of repetitive prejudicial prosecutorial misconduct in this case was so flagrant that no instruction or series of instructions could erase their combined prejudicial effect. See, State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); In re Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673(2012).

As the State itself recognizes, the prosecutor appears to have felt goaded by defense counsel's legitimate but vigorous

argument of his theory. BOR at 23. However, rather than objecting to defense counsel's alleged hostility or responding by zealously arguing the merits of the State's case within the proper bounds worthy of her office, the prosecutor took personal offense and responded by disparaging defense counsel and by making factually and legally inaccurate claims to the jury. Given the personal insult the State suggests the prosecutor experienced and given her inability to restrain her response in rebuttal argument, it is doubtful that objections would have helped matters.

The prosecutor knew the law and her burden to prove the access device could be used obtain something of value, but she misrepresented that she did not have the burden to prove usability. The prosecutor was in the courtroom when Thorson said she used cash on the night of the incident, yet she misrepresented that fact. The prosecutor knew the role of defense counsel is to challenge the sufficiency of the State's evidence, yet she claimed defense counsel's efforts to do so were insulting and offensive. Presumably, the prosecutor knew credibility is not an all-or-nothing proposition, but she misled the jury as to this too. If all this knowledge did not prevent the prosecutor from engaging in emotional and improper arguments that derailed the fairness of the

trial process, it is doubtful that curative instructions would have done so either.

As argued in Turner's opening brief – given the evidence before the jury and the nature of Turner's defense – the prosecutor's multiple acts of misconduct during rebuttal argument resulted in an enduring prejudice to the outcome of this case and to Turner's right to a fair and impartial verdict. BOA 20-25. As such, the record shows Turner was denied the fair trial guaranteed him under the state and federal constitutions. Monday, 171 Wn.2d at 676-77.

II. TURNER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In his opening brief, appellant asserts that even if this Court decides the prosecutor's misconduct could have been cured with instructions to the jury, it should still reverse on ineffective assistance of counsel grounds. He explains that defense counsel should have objected, and his failure to do so prejudiced the outcome. BOA at 26-30. In response, the State claims that (1) the prosecutor's conduct was not objectionable and (2) because counsel was effective in some aspects of the trial, it was sufficient

to satisfy the constitutional guarantee of effective assistance of counsel. BOR at 28. Both claims should be rejected.

First, as explained above and in appellant's opening brief, the prosecutor's statements were highly objectionable. Second, the constitutional does not overlook defense counsel's deficient performance in one aspect of the case just because counsel may have provided effective assistance in other aspects of the trial.

As argued in appellant's opening brief, defense counsel's failure to object constituted deficient performance and was prejudicial to the outcome. BOA at 26-30. As such, reversal is required.

III. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY LFOS.

Appellant argues that the statutes authorizing the mandatory DNA-collection fee and Victim's Penalty Assessment (VPA) are unconstitutional as applied to those who have not been shown to have the ability or likely future ability to pay. BOA at 30-41. In response, the State claims that the statutes do not implicate due process. BOR at 36. The state is wrong.

The State's argument seems to encourage this Court to consider this case as the same type of facial constitutional challenge put forth in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). First, this is not a facial challenge – it is an as-applied challenge. It is important to clarify that when Mr. Turner stated in his opening brief that the statute "ostensibly" serves a legitimate interest (RP 2), he in no way concedes that the statute serves that interest as applied to himself.

An as-applied challenge is one "under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's unique circumstances." Alex Kreit, Making Sense of Facial and As-Applied Challenges, 18 Wm. & Mary Bill Rts. J. 657, 657 (2010) (citations omitted). The term ostensible means: "seeming or said to be true or real but very possibly not true or real."[1] Hence, Turner's position is that, while on its face the DNA collection-fee statue seemingly serves a legitimate state interest, this apparent facial validity is not real when applied to defendants who do not have the ability to pay LFOs. When the appellant's

[1] "Ostensible." Merriam-Webster.com. Accessed July 12, 2016. http://www.merriam-webster.com/dictionary/ostensible.

argument is looked at fairly in its entirety, it is untenable to contend that by using the word "ostensibly," appellant has conceded that the statute is constitutional as applied to him.

Second, this case raises a completely different due process issue then that in Blank and Curry. Those cases were determining whether the statute violated due process because the possible future effect of enforcement could cause poor people to be jailed simply because they cannot pay an LFO. By contrast, this case does not deal with possible future enforcement effects. This case challenges whether State has misused its regulatory power in issuing laws that do not rationally serve a legitimate government interest. As detailed in appellant's opening brief, there is no rational basis for the Legislature to mandatorily require courts to impose LFOs on persons who do not have the ability or likely future ability to pay these fees. BOA at 31-34. As such, this Court should find the statutes violate substantive due process and vacate the LFO orders.

IV. THE "COURT COSTS" FEE IS NOT THE SAME AS A FILING FEE.

In his opening brief, appellant asserts the trial court erred when it failed to recognize and exercise its discretion to decline the

prosecution's request that Turner be ordered to pay $200 for "court costs." BOA at 41-45. In response, the State claims that this is merely a "filing fee." However, if it were a filing fee, the prosecutor and court should have designated it as such below.

Court costs could have referred to a number of fees, such as witness costs, sheriff service fees, jury demand fees, extradition costs, or criminal filing fees. The State conveniently decides on appeal to designate the one mandatory fee from this list. Yet, there is nothing that directly supports this.

The State suggests that this Court should infer the court costs fee was a filing fee because it is mandatory. Based on this record, "court costs" cannot be fairly construed as a mandatory filing fee, and this Court should find the trial court erred in imposing such costs.

B. CONCLUSION

For the reasons stated above and those set forth in appellant's opening brief, this Court should reverse appellant's conviction. Alternatively, it should vacate the LFO order.

DATED this 18th day of July, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER L. DOBSON,
WSBA 30487

DANA M. NELSON,
WSBA 28239

Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

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paoappeals@co.thurston.wa.us
nelsond@nwattorney.net