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NO. 66438-7-I

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

REC'D
MAY 04 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

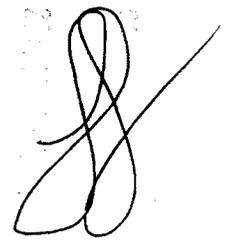
v.

DERRICK THOMPSON,

Appellant.

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

The Honorable Jim Rogers, Judge



BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorneys for Appellant

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

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The first officer to testify was Officer Sonya Fry. 1RP 33-70. According to Fry, on the afternoon of March 9, 2010, she was perched on the third floor of a building overlooking the Lazarus Day Center and a park near Pioneer Square in downtown Seattle. 1RP 36-38. Without defense objection, Fry explained she saw Thompson enter the park and contact three people she "had observed smoking crack cocaine" only moments before. When asked to explain the basis for concluding the three had been smoking crack cocaine, she replied, "Well, normally right in front of Lazarus Day Center, there's a lot of people outside dealing crack cocaine." 1RP 38. Although there was no defense objection, the trial court reminded the prosecutor to "ask some leading questions." 1RP 39. Thereafter, the following exchange occurred:

[Prosecutor:] Did you see them with a pipe?

[Fry:] Yes.

[Prosecutor:] And is it something that you knew to be a crack pipe?

[Fry:] Yes.

1RP 39. There was no defense objection.

Fry then explained she saw Thompson approach the three individuals, remove a baggie from his waistband, and distribute "suspected" crack cocaine to each of them. 1RP 40-41. As Thompson left

the area, Fry provided other officers with his description and direction of travel. 1RP 42. Thompson was subsequently arrested. 1RP 42.

The next officer to testify was Officer Frank Poblocki. 1RP 86-94. Poblocki explained he helped another officer arrest Thompson. 1RP 91-92. Poblocki also testified that in Seattle, 0.2 grams of crack cocaine sells for approximately \$20. 1RP 92.

The last officer to testify, and the trial's final witness, was Officer Jonard Legaspi. 1RP 100-134. According to Legaspi, a crowd of people gathered around Thompson when he entered the park, which Legaspi claimed was consistent prior narcotics transactions he had observe in the past. 1RP 104. When the prosecutor asked Legaspi how Thompson responded, he replied:

Basically he was exchanging drugs for money. I couldn't tell from that far away what type of drugs it was, but it was current -- it looked like U.S. currency and drugs.

...

He would hand one of the subjects -- or, you know, depending on who it was, who was in line first, depending, an unknown type of narcotics in exchange for money, he would take -- and I don't know where he would put it.

1RP 105. There was no defense objection.

Legaspi subsequently arrested Thompson. 1RP 108. In a search incident to arrest Legaspi recovered \$526 and a baggie containing a substance that forensic scientist Janice Wu determined weighed 0.2 grams

and contained cocaine. 1RP 74-75, 79, 109, 111-12. Thereafter, the following exchange occurred:

[Prosecutor:] Now, two -- .2 grams of crack cocaine, how much would that generally go for on the streets?

[Legaspi:] Usually \$20.

...

[Prosecutor:] And is that a marketable amount? Is that an amount you can usually buy and sell on the streets of Seattle?

[Legaspi:] Oh, yes. It's easy to carry, and it's not too bulky. It's not like you are selling kilos out on the streets of Seattle.

[Prosecutor:] What does the average street deal go for?

[Legaspi:] Depending on --

[Defense counsel:] I'd object. It's not relevant to this case.

THE COURT: What's the relevance?

[Prosecutor:] Should we have a sidebar, your Honor?

...

THE COURT: No, you can just tell me. What are you trying to establish, the fact?

[Prosecutor:] This is a marketable amount of crack cocaine on the Streets of Seattle that's bought and sold every day.

THE COURT: You have already established that with this witness. Why don't you move on to the next question.

1RP 113-14 (emphasis added).

In closing arguments both the prosecution and defense identified as the only contested issue, whether Thompson had the intent to deliver the cocaine he possessed. 1RP 144, 151. In his initial closing remarks, the prosecutor anticipated the defense would argue 0.2 grams was too small to be "marketable" in Seattle. 1RP 147. To counter this claim, however, the prosecutor reviewed the testimony of the testifying officer that virtually any amount of crack cocaine, no matter how small, could be purchased on the streets of Seattle, particularly when selling to the homeless, who tend not to have the money to purchase large quantities. 1RP 147-49. The prosecutor reiterated this claim in rebuttal. 1RP 162.

During deliberations, the jury submitted the following inquiry to the court:

Do we need to determine that the defendant intended to deliver ONLY the sample of cocaine found on him when taken into custody? Or is it enough to determine that he was delivering a controlled substance at some point while he was being observed?

CP 8 (emphasis in original). In response, the court directed the jury to refer to the to-convict instruction (Instruction 8, CP 21). CP 9.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT SAID THE STATE HAD ESTABLISHED THOMPSON POSSESSED A MARKETABLE AMOUNT OF COCAINE.

Article 4, § 16 of the Washington Constitution provides,

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The purpose of this constitutional prohibition is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

A violation of article 4, § 16 may be raised for the first time on appeal. The failure to object at the trial is not a prohibition to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

Here, Thompson conceded possessing 0.2 grams of cocaine, but argued the prosecution failed to establish he had the intent deliver, as required to convict him of the charged crime. In anticipation the defense would make this argument based on the weigh of the substance possessed,

the prosecution elicited testimony from Officer Legaspi that street-level crack cocaine sales can often involve the sale of very small amounts, and that even 0.2 grams was a "marketable amount". 1RP 113. Unfortunately, the trial court did not leave resolution of this factual issue to the jury, but instead informed the jury that the prosecution had "established" that fact though Officer Legaspi's testimony. 1RP 114. This was an improper judicial comment on the evidence.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted from the comment. Levy, 156 Wn.2d at 723-25. [R]eversal is required even where the evidence is undisputed or overwhelming unless it is apparent the remark could not have influenced the jury. State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974). Moreover, that jurors were instructed to disregard such remarks is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice).

In Becker, the Supreme Court reversed because the improper comment affected an important and disputed issue at trial. Becker, 132 Wn.2d at 65. In Levy, however, the improper comment was deemed

harmless because it went to an undisputable matter (i.e., whether the structure in question was a "building"). Levy, 156 Wn.2d at 726.

Here, the improper comment went to a central disputed issue at trial; whether the amount of cocaine Thompson possessed was of a sufficient quantity to deliver. The jury inquiry asking whether it could convict Thompson if it merely found he delivered a "controlled substance" of some kind at some point while he was being observed, implies the jury harbored some doubt that the small amount of cocaine actually found on Thompson was intended for delivery rather than personal use. CP 8. As such, there can be no assurances the trial court's improper comment was not the basis for the jury's decision to convicted Thompson. This Court should therefore reverse.

2. THE PROSECUTION DENIED THOMPSON A FAIR TRIAL BY ELICITING EVIDENCE EXCLUDED BY PRETRIAL MOTION.

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10). State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant is deprived of a fair trial when there is a "substantial likelihood" that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). Where there is

no objection to the prosecutor's misconduct -- as here -- reversal is still required when the misconduct is so flagrant and ill-intentioned that it could not have been cured by instruction. Belgarde, 110 Wn.2d at 507; State v. Echevarria, 71 Wn. App. 595, 597-98, 860 P.2d 420 (1993).

The purpose of orders in limine is to clear up questions of admissibility before trial to prevent the admission of highly prejudicial evidence. See State v. Evans, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981); State v. Austin, 34 Wn. App. 625, 633, 662 P.2d 872 (1983), affd sub nom., State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984); see also ER 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements . . . in the hearing of the jury").

When a trial court makes an in limine ruling excluding evidence, the attorneys must abide by the ruling. Washington courts often have found prejudicial misconduct where a prosecutor's actions violate an in limine ruling. See, e.g., State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (prosecutor's violation of motion in limine excluding evidence of defendant's prior drug-related offense was "flagrantly improper"); State v.

Ransom, 56 Wn. App. 712, 713 n.1, 785 P.2d 469 (1990) (citing State v. Stephans, 47 Wn. App. 600, 736 P.2d 302 (1987)).

Moreover, prosecutors have a duty to inform the state's witnesses of the court's earlier rulings so that they will not bring up the excluded evidence during their testimony. State v. Underwood, 281 N.W.2d 337, 342 (Minn. 1979) ("state has a duty to properly prepare its own witnesses prior to trial"); Tegland, 5 Wash. Pract., Evidence, § 13 (3d ed. 1989); see also State v. Alexander, 64 Wn. App. 147, 154-55, 822 P.2d 1250 (1992) (improper for prosecutor to attempt to elicit otherwise inadmissible evidence); Ransom, 56 Wn. App. at 713 n.1.

Here, the prosecutor elicited testimony from Officer Fry that "normally right in front of Lazarus Day Center, there's a lot of people outside dealing crack cocaine." 1RP 38. Whether the prosecutor intentionally elicited this answer or failed to inform Officer Fry of the court's ruling, the testimony was a clear violation of the court's pre-trial order and constituted prosecutorial misconduct. Ransom, 56 Wn. App. at 713 n.1; State v. Stephans, 47 Wn. App. 600, 736 P. 2d 302 (1987).

There is a substantial likelihood the prosecutor's misconduct affected the verdict. Allowing the jury to consider evidence that Thompson possessed crack cocaine in an area known by police as a place where crack cocaine dealing routinely occurs made it more likely the jury would infer he

possessed it for purposes of delivering it, which is precisely the inference the pretrial ruling was meant to avoid. 1RP 16-17.

Once Fry revealed Thompson was in a location known for crack cocaine deliveries, no curative instruction could have alleviated the resulting prejudice because it struck at the heart of the defense, which was that Thompson merely possessed cocaine for personal use rather than for delivery to another. See, e.g., State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991), rev. denied, 118 Wn.2d 1013 (1992) (Where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell"). This Court should reverse Thompson's conviction.

3. DEFENSE COUNSEL'S FAILURE TO OBJECT TO SPECULATIVE TESTIMONY AND A VIOLATION OF A PRETRIAL RULING DEPRIVED THOMPSON OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The state and federal constitutions guarantee the accused reasonably effective representation by counsel. U.S. Const. amend. 6; Const. Art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Deficient performance by counsel that prejudices the accused fails to secure this constitutional right and thus denies the accused a fair proceeding. See Strickland, 466 U.S. at 687.

The first prong of the Strickland test requires a showing that defense counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound trial strategy for counsel's actions. Strickland, 466 U.S. at 689.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). While the decision of whether to object may qualify as a legitimate trial tactic in situations where prejudice is slight, such failure constitutes ineffective assistance where proper objection is not lodged against testimony central to the State's case. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The second prong of the Strickland test requires showing counsel's deficient performance prejudiced the defendant. 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.

a. Defense Counsel's Performance was Deficient for Failing to Object to Speculative Testimony, and Prejudiced Thompson's Defense.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

ER 602. In other words, evidence relating to the existence of any fact cannot rest on guess, speculation, or conjecture. State v. Prestegard, 108 Wn. App. 14, 23, 28 P.3d 817 (2001).

In State v. Smith, 87 Wn. App. 345, 346, 941 P.2d 725 (1997), the issue was whether a Washington State Patrol pilot's assertion in an affidavit that "aerial surveillance traffic marks (ASTMs) painted on the highway" were a half mile apart was properly admitted at Smith's trial for a speeding infraction. Finding the State failed to establish whether "the pilot assumed, rather than knew, that the ASTMs were" a half mile apart, this Court held the assertion was admitted in direct violation of ER 602, and reversed and dismissed. Id. at 351-52.

Here, Officer Fry testified on direct examination, without objection, that the three people she saw Thompson approach in the park had

just been smoking crack cocaine. 1RP 38. Although Fry may have seen the three engage in behavior that was consistent with smoking crack cocaine, she could only speculate whether that was actually what they were doing, as the record fails to show she had personal knowledge supporting this assertion.

Similarly, when asked to explain the basis for her assumption they were smoking crack cocaine, Fry stated, without objection, that she saw them with what she "knew to be a crack pipe[.]" 1RP 39. Once again, the record fails to show how Fry "knew" the three had a crack pipe rather than some other type of pipe, and therefore Fry's claim was necessarily based on an assumption rather than actual knowledge.

Like Fry, Officer Legaspi was allowed to speculate at trial about what he observed Thompson do prior to his arrest. Specifically, Legaspi testified that he saw Thompson to provide others with "an unknown type of narcotic in exchange for money[.]" 1RP 105. Like Fry, Legaspi lacked personal knowledge as to the nature of the substance he claims Thompson gave to others in exchange for money. He could only assume it was some type of narcotic.

The testimony of Fry assumed the three people she eventually saw Thompson approach were smoking was cocaine, and the testimony of Legaspi assuming Thompson was selling narcotics were both based on mere guess, speculation, or conjecture. Therefore, but for the lack of an

objection, this testimony should have been excluded as direct violations of ER 602. Smith, supra. Therefore, the failure of Thompson's counsel to object constitutes deficient performance.

Thompson was prejudiced by counsel's deficient performance. Evidence that Thompson interacted with actual crack cocaine smokers shortly before his arrest could have been used by the jury to reject Thompson's claim that the small amount of drugs he did possess were only for his personal use, and instead to accept the State's claim that he intended all along to deliver it instead. The same is true for Legaspi's claim he saw Thompson actually deliver narcotics. Under the circumstances, there is a reasonable probability the outcome of the case would have been different but for counsel's failure to object to this testimony. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

b. Defense Counsel's Performance was Deficient for Failing to Object to Testimony in Violation of a Pretrial Ruling and this Prejudiced Thompson's Defense.

As previously discussed, this Court should reverse Thompson's conviction based on the prosecutor's failure to ensure his witnesses testimony complied with the trial court pretrial ruling excluding mention of the fact that police consider the location of Thompson's alleged offense a "high narcotics area." If, however, this Court determines reversal for

prosecutorial misconduct is not warranted because Thompson's counsel failed to object, then this Court should instead reverse based on ineffective assistance of counsel.

There was no conceivable strategic basis not to object when the prosecutor elicited testimony from Officer Fry that "normally right in front of Lazarus Day Center, there's a lot of people outside dealing crack cocaine." 1RP 38. This is a direct violation of the pretrial ruling. Having successfully obtained exclusion of this evidence on grounds it was unfairly prejudicial, failure to object constitutes deficient performance that prejudiced Thompson, particular when, as here, it was critical to the prosecution's case to establish Thompson intended to deliver the cocaine he admittedly possessed. Madison, 53 Wn. App. at 763. Allowing the jury to consider that Thompson possessed crack cocaine in an area known as a place where crack cocaine dealing routinely occurs made it more likely the jury would infer he possessed it for purposes of delivering it, which is precisely the inference the pretrial ruling was meant to avoid. 1RP 16-17. Therefore, reversal is warranted.

D. CONCLUSION

For the reasons stated this Court should reverse Thompson's conviction.

DATED this 4th day of May, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66438-7-1
)	
DERRICK THOMPSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF MAY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DERRICK THOMPSON
DOC NO. 960940
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF MAY, 2011.

x *Patrick Mayovsky*