

68508-2

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NO. 68508-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH MAYFIELD, III

Appellant.

REC'D

DEC 20 2012

King County Prosecutor
Appellate Unit

STATE COURT
CLERK
11/13/12

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

The Honorable Christopher Washington, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE INFLAMMATORY VICTIM IMPACT EVIDENCE AND CORRESPONDING ARGUMENT WAS INAPPOSITE TO THE DEFENSE THEORY.

The State argues, “where the defense strategy is an equitable one, the State should be allowed to develop some evidence to demonstrate the significance of the defendant’s crimes.” Brief of Respondent at 14. First, the State cites no authority for this proposition; and second, even assuming it to be true, the evidence of great damage to stores from organized retail theft is irrelevant to Mayfield’s theory of the case. Mayfield emphasized facts showing he was no more culpable than Ostheller, who was the brains behind the entire operation. 2RP 184-85. Mayfield did not argue that organized retail theft was insignificant or did not damage stores. He merely emphasized that his role was that of peon, not criminal mastermind. The impact on Safeway and other stores was utterly irrelevant to the State’s attempt to rebut the defense’s case.

This error was sufficiently preserved by counsel’s repeated objections. ER 103 requires a specific objection “if the specific ground was not apparent from the context.” In this case, when it became clear the references to harm to Safeway were amounting to more than a brief, passing mention, counsel objected that this was irrelevant. 2RP 161. Given this

initial objection, the basis for the subsequent objections to the same line of questioning was clear from the context.

While counsel did not specifically cite ER 403's prohibition on evidence presenting a danger of unfair prejudice that substantially outweighs any probative value, that objection was evident from the context, as contemplated in ER 103. Moreover, to preserve an issue for appeal, "it is not necessary to point out the precise defect." State v. Gallo, 20 Wn. App. 717, 724, 582 P.2d 558 (1978). A general challenge to the evidence is sufficient. Id.

The State argues this error was not preserved because counsel did not object until after the question was answered. Brief of Respondent at 14 (citing Gallo, 20 Wn. App. at 728). This argument should be rejected because it was only over time that the damage from these irrelevant questions, and specifically from the graphic and extensive scope of the answers, became evident. When the far-ranging and entirely irrelevant scope of the Blahato's answers to questions about damage to Safeway became apparent, counsel objected. 2RP 161-62. This was sufficient to preserve the issue for appeal.

2. THE PROSECUTOR INTENTIONALLY FANNED THE FLAMES OF THE VICTIM IMPACT TESTIMONY DURING CLOSING ARGUMENT.

Some of counsel's objections to testimony regarding the impact of trafficking on Safeway were sustained. 2RP 162. Despite the evident impropriety of this argument, the prosecutor made it the theme of his closing and rebuttal. 2RP 267, 270-71, 281-82.

Regardless of who was more culpable, Mayfield or Ostheller, the prosecutor's argument sought to improperly inject emotion into the case. He focused on the damage, not just to Safeway, but to other stores as well. 2RP 281-82. He focused on the damage from the mere anticipation of such crimes. 2RP 267. He focused on the harm to employees and to the general public. 2RP 162. And he encouraged the jury to be angry about it. 2RP 271.

The State argues the jury is presumed to have followed the instruction to decide the case on the evidence, rather than on passion or prejudice. Brief of Respondent at 23 (citing State v. Costello, 59 Wn.2d 325, 332, 367 P.2d 816 (1962)). This argument should be rejected because, in Costello, the jury received a specific direction from the judge to disregard questions and answers about whether a witness had ever seen the defendant drunk. 59 Wn.2d at 331-32. In this case, no such instruction was given and

none would have been effective, given the pervasive nature of the evidence and argument on this point.

3. COUNSEL SPECIFICALLY OBJECTED TO BLAHATO'S IDENTIFICATION OF MAYFIELD BECAUSE IT WAS NOT GROUNDED IN ANY SPECIAL KNOWLEDGE.

The State argues Mayfield did not object to the testimony identifying him in the surveillance video. Brief of Respondent at 25. This argument should be rejected because Mayfield did object. He objected to Blahato narrating the video as it was shown to the jury and identifying Mayfield. 2RP 156-58. Defense counsel objected on the grounds that the video could speak for itself. 2RP 157. The trial court overruled this objection. 2RP 158. Counsel's specific objection, which implicitly referred to the precise error complained of here, invasion of the jury's role, was sufficient to preserve this issue for appeal. See State v. Suarez-Bravo, 72 Wn. App. 359, 365, 864 P.2d 426 (1994) (error preserved where objection adequately informed court of the basis for the claim of error).

Regarding Blahato's identification of Mayfield in the fourth surveillance video that was destroyed, counsel moved pre-trial to exclude it because Blahato had no basis for his identification beyond hearsay. 2RP 69. This pre-trial objection was sufficient to preserve this error for review. See

In re Detention of Coe, 175 Wn.2d 482, 500 n.4, 286 P.3d 29, 37 (2012) (error preserved where issue raised during motions hearing).

Proceeding to the merits of this issue, merely seeing photographs in the past is not the type of special knowledge required to make Blahato's identification helpful to, rather than invasive of, the jury's role. The State cites State v. Jamison, 93 Wn.2d 794, 800, 613 P.2d 776, 778 (1980). But that case bears little resemblance to this one. In Jamison, the school counselor who was permitted to identify the defendant had known him for six months as his counselor at a residential school. Id. at 797.

Here, by contrast, Blahato had never even met Mayfield, but had only been shown photographs of him. 2RP 69. Jamison does not support the State's argument. As counsel pointed out, the only basis for Blahato's identification was hearsay; someone had told him the photographs he was shown were of Mayfield. 2RP 69. A fleeting acquaintance with photographs and hearsay is not the type of special knowledge described in Jamison or State v. George, 150 Wn. App. 110, 118, 206 P.3d 697 (2009). Blahato's identification of Mayfield should have been excluded.

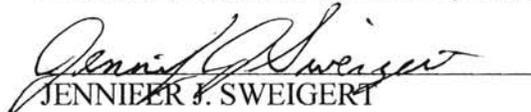
B. CONCLUSION

For the foregoing reasons and for the reasons cited in the opening Brief of Appellant, Mayfield requests this Court reverse his convictions.

DATED this 20th day of December, 2012.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68508-2-1
)	
ELIJAH MAYFIELD,)	
)	
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 20TH DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ELIJAH MAYFIELD
DOC NO. 721980
CEDAR CREEK CORRECTIONS CENTER
P.O. BOX 37
LITTLEROCK, WA 98556

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF DECEMBER 2012.

X *Patrick Mayovsky*