

69949-1

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NO. 69949-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

OLLIE RICHARD,

Appellant.

REC'D
JUN 26 2013
King County Prosecutor
Appellate Unit

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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

The Honorable Bill Bowen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct deprived appellant of a fair trial.

Issue Presented

Appellant was charged with drug possession after members of a mountain bike proactive police squad claimed they found drugs during a search incident to appellant's arrest on a warrant. Appellant denied possessing the drugs and claimed one of the officers must have brought them to the scene. Did the prosecutor commit misconduct by arguing the police should be believed over appellant because the jurors depend on police for safety and because mountain bike squads must work even in the rain, thereby improperly encouraging the jury to decide the case on sympathy and fear instead of the evidence from trial?

B. STATEMENT OF THE CASE

The State charged appellant Ollie Richard with possession of methamphetamine. CP 1. The State alleged that on November 11, 2011, following his arrest on an outstanding warrant, Richard was found in possession of 0.6 grams of methamphetamine. CP 3-4.

At trial, the State presented the testimony of the arresting police officers and a forensic scientist who tested the substance upon which the charge was based. RP 25-55. Richard testified in his defense. RP 60-67.

Seattle Police Officer Brian Sutphin is part of a "mountain bike squad which is a proactive unit" that is more interactive in the communities they patrol than regular patrol officers. RP 26-28. Sutphin works with officers Scott Hatzenbuehler and Benjamin Archer. RP 28.

Sutphin claimed that on November 11, 2011, he, Hatzenbuehler and Archer had just left their precinct on mountain bikes when they saw Richard walking nearby. RP 28-31. Sutphin used his Blackberry to discover Richard had any outstanding warrant. RP 32. Archer confirmed the validity of the warrant using a patrol car computer. RP 46-47.

Hatzenbuehler detained Richard in handcuffs after Sutphin discovered the warrant, and waited for confirmation. RP 37-38. Once it was confirmed, Hatzenbuehler searched Richard and claimed he found a baggy containing suspected methamphetamine in his right front pant pocket. RP 40-41. Hatzenbuehler said Richard showed no surprise when the baggy was removed from his pocket. RP 42. The Washington State Patrol Crime Laboratory determined the substance in the baggy weighed 0.24 grams and contained methamphetamine. RP 48, 50-52.

Contrary to Hatzenbuehler, Richard denied possessing any drugs, and claimed the only things removed from his right front pant pocket were keys, change and a bus transfer. RP 63-64, 66. Richard recalled that after he was handcuffed and searched, the officers huddled together briefly and

then Hatzenbuehler showed him a baggy containing the substance eventually used to charge him with drug possession. RP 64, 66-67.

In closing, the prosecutor described as a "very disturbing twist" Richard's accusation that the police were framing him for drug possession, and asserted such an accusation constitute "a far worse crime than what Mr. Richard is accused of today." RP 86-87. The prosecutor urged the jury to reject the claim, arguing there was no logical reason for police to plant drugs on Richard. RP 87-88.

In response, defense counsel noted Richard testified "with conviction, with verve, with certainty" and was therefore credible. Counsel also noted the involved officers were part of a "proactive unit . . . looking for something to do." RP 89.

The following exchange occurred during rebuttal;

[PROSECUTOR]; Just because Mr. Richard said that on the stand does not mean you have to accept it because you are the sole judges of credibility of witnesses.

It's not just Officer Hatzenbuehler being accused here, it is all three officers, and I submit to you, using common sense, your reason, your life experience, you depend upon these people every day. Every time it rains those patrol officers are on their bicycles --

[DEFENSE COUNSEL]: Objection, that is improper at this point, Your Honor.

THE COURT: [Prosecutor], if you could move on?

[PROSECUTOR]: We ask you to reject that testimony. He had drugs, he was caught, and it is drugs. It was tested by the lab and it was confirmed. Thank you.

RP 90-91.

Richard was convicted and sentenced to a prison-based DOSA. CP 26, 30-37; RP 93-96, 115. He now appeals. CP 40-48.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DEPRIVED RICHARD OF A FAIR TRIAL.

The prosecutor appealed to the jurors' sympathies and fears when he encouraged them to believe the police instead of Richard because they rely on police everyday and because the officers involved patrol on their mountain bikes even when it is raining. These arguments constituted prejudicial misconduct that violated Richard's right to a fair trial.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676 (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted). Prejudice is established where there is a substantial likelihood the misconduct affected the jury's verdict. Id. at 578.

It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Appeals to the passion, prejudice, fears or sympathy of jurors are improper. Viereck v. United States, 318 U.S. 236, 247, 63 S.Ct. 561, 87 L.Ed. 734 (1943). A prosecutor has a duty to ensure a verdict is free from prejudice and based on reason, not passion. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

The prosecutor may not encourage the jury to speculate about facts not in evidence. State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008). ABA Standards for Criminal Justice 3–5.8 (3d ed.1993) provides: "The prosecutor should refrain from argument which would divert the jury from

its duty to decide the case on the evidence.”¹ Hence, when discussing the evidence, the prosecutor “has no right to call to the attention of the jury to matters or considerations which the jurors have no right to consider.” Case, 49 Wn.2d at 71. To do so constitutes misconduct. Evans, 163 Wn. App. at 644-46.

Here, the prosecutor appealed to the jurors’ sympathies and fears when arguing the arresting officers should be found more credible than Richard, which was the central issue at trial. The prosecutor urged the jurors to find the officers more credible, not on the evidence presented, but instead on a veiled insinuation that a contrary finding would jeopardize the jurors’ ability to rely on police in the future and an unveiled plea for sympathy for the officers on the basis they must ride on mountain bike patrol even in inclement weather. RP 91. There was no evidence to support either contention.

To the contrary, defense counsel’s objection to the prosecution’s attempt to introduce evidence about whether mountain bike patrols operate in the rain, was sustained by the trial court. RP 37. And there was nothing in the record to support the insinuation that finding Richard more

¹ ABA Standards for Criminal Justice serve as “useful guidelines” when considering claim of prosecutorial misconduct. United States v. Young, 470 U.S. 1, 8, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

credible than the officers would jeopardize the level of police protection the jurors could expect in the future. There was no factual basis to support the prosecutor's highly charged argument in rebuttal.

Moreover, this argument was without any legitimate purpose given the issue before the jury. The jury's job was to determine who was telling the truth, Richard or Hatzenbuehler. The focus was on their respective veracity. Whether the officers had to ride their bikes in the rain had no bearing on this, nor did the jurors' future ability to rely on police protection. Thus, the only purpose for the prosecutor's arguments was to arouse the sympathies and fears of the jurors and take their attention away from rendering a verdict based in reason instead of emotion and fear.

Although defense counsel objected to the prosecutor's improper argument, the court never issued a ruling. Instead, it merely requested whether the prosecutor could "move on." RP 91. As such, the jury was left to assume the arguments were worthy of consideration. The improper argument was patently prejudicial because it struck at the heart of the case; credibility. There is a substantial likelihood the misconduct affected the jury's deliberation on credibility, and that affected the verdict.

In sum, the prosecutor committed misconduct by appealing to the jurors' sympathies and fears and asking them to speculate regarding facts not in evidence. This highly charged argument served no legitimate

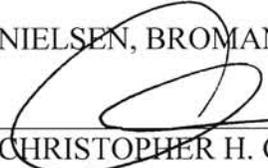
purpose and invited the jury to render a judgment based on sympathy and fear rather than reason, thus, prejudicing the outcome of the hearing. Consequently, reversal is required.

D. CONCLUSION

For the reason stated, this Court should reverse Richard's judgment and sentence.

Respectfully submitted this 26th of June 2013

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DIVISION ONE

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)	
Respondent,)	
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vs.)	COA NO. 69949-1-I
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OLLIE RICHARSON,)	
)	
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 26TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] OLLIE RICHARSON
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SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JUNE, 2013.

X Patrick Mayovsky