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FILED
March 19, 2015
Court of Appeals
Division I
State of Washington

NO. 72399-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

HAROLD BAIN,

Appellant.

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

The Honorable Anita Farris, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a fair trial when the prosecutor misrepresented the law and diverted the jury's attention away from its duty to render an impartial and independent verdict.

2. Appellant was denied effective assistance of counsel when defense counsel failed to object to the prosecutor's misconduct.

Issues Pertaining to Assignments of Error

1. During closing argument, the prosecutor essentially told the jury the law required it to find that appellant acted knowingly unless it found he was not mentally sound. However, case law establishes that the jury was permitted to find appellant did not have subjective knowledge even if he met the ordinary person standard. Additionally, the prosecutor took on the role of "counseling" the jury as to what verdict to reach, thus unfairly aligning the jury with the State and diverting the jury's attention from its duty to reach an independent verdict. Did this constitute prosecutorial misconduct and reversible error?

2. Defense counsel failed to object to the prosecutor's obvious misstatement of the law and his "counseling" of the jury. Was appellant denied effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On May 1, 2014, the Snohomish County prosecutor charged appellant Harold Bain with three counts of second degree trafficking in stolen property. CP 291-92. On June 23, 2014, the charges were elevated to first degree trafficking on all three counts. CP 281-82. The case proceeded to trial, where the jury was instructed as to both first degree trafficking and the lesser included offense of second degree trafficking. CP 232-56. A jury convicted Bain as charged. CP 227, 229, 231. He appeals. CP 1-14.

2. Substantive Facts

On November 12, 2014, the Lynnwood Food Mart was burglarized at approximately 5:28 a.m. 1RP 72, 77-79.¹ Several scratch-off lottery tickets were taken. 1RP 88, 138-39. Upon arriving at the store that morning at 7:00 a.m., the storeowner assessed the situation and reported the theft to Washington State Lottery officials. RP 98, 100.

Meanwhile, at approximately 5:47 a.m., an individual redeemed some of the stolen lottery tickets at a nearby Circle K store. 1RP 170-73, 207. At approximately 6:13 a.m., the same individual redeemed a stolen ticket at the AVS Gas and Go store in Mill Creek. 1RP 115, 124-26, 132, 174. At approximately 6:30 a.m., the same person redeemed some of the tickets at a nearby 7-11 store. 1RP 175-77; 2RP 5-7. Police later obtained surveillance video for all three locations. 2RP 19.

On November 14, 2014, after analyzing the surveillance videos, Snohomish County Sheriff deputies Stephen Clinko and James Upton located Bain at the Rodeo Inn, where he was residing. 2RP 12, 22, 24. Clinko knocked on the door of Bain's

¹ 1RP refers to Volume I of the Verbatim Report of Proceedings and 2RP refers to Volume II.

room. 2RP 12. Bain answered. 2RP 12, 24. The deputies asked if Bain would answer questions regarding some stolen lottery tickets. 2RP 12, 25. Bain agreed, stepped outside the door, and engaged in conversation. 2RP 13, 25.

At first, Bain did not recall having recently cashed lottery tickets in the last few days. 2RP 25. However, when officers showed him a picture made from the videos, Bain stated it was him in the picture. 2RP 25, 27. When officers asked him about the tickets, Bain said he had purchased them off the street from a guy named "Davies." 2RP 28-29. He said he paid 50 cents on the dollar. 2RP 31. Bain stated several times he did not know the tickets were stolen. 2RP 36. However, he thought the tickets might have "walked through the back door" of a convenience store. RP 32.

C. ARGUMENT

I. BAIN WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTOR'S MISCONDUCT.

Bain was denied his right to a fair trial when the prosecutor misstated the law, lightened the state's own burden, and used the power of his office to misguide the jury as to its duty to independently and impartially render a verdict.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him 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 (citations omitted).

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 is both improper and prejudicial. Monday, 171 Wn.2d at 675, (citations omitted). Even if a defendant does not object, he does not waive his right to review of flagrant misconduct by a prosecutor. State v. Belgarde, 110 Wn.2d 504, 507,

755 P.2d 174 (1988); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

(i) Misstatement of the Law

The prosecutor may not misstate the law to the jury. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). This constitutes misconduct. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). A prosecutor's misstatement of the law that lessens its burden of proof is "particularly grievous" because "[t]he jury knows that the prosecutor is an officer of the State." Warren, 165 Wn.2d at 27. Thus, "[t]he prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Here, the prosecutor misstated the law as it pertained to the knowledge element under RCW 9A.82.050.² In order to convict Bain of first degree trafficking of stolen property, the State was required to prove Bain knew the property was stolen. CP 242-44. When defining knowledge, the Court gave the following instruction, which corresponds to WPIC 10.02:

A person knows or acts knowingly with respect to a fact or circumstance when he or she is aware of that fact or circumstance.

If a person has information that would lead a reasonable person in the same situation to believe that a fact or circumstance exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact or circumstance.

CP 249.

² RCW 9A.82.050 provides:

- (1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.
- (2) Trafficking in stolen property in the first degree is a class B felony.

During closing argument, the prosecutor reviewed the second paragraph of the knowledge instruction, stating:

This is called a permissible inference. A reasonable person permissible inference. Ladies and gentlemen, there's no evidence before you that the Defendant suffers from some mental defect or is otherwise not a person you should hold up to the normal, average, reasonable person inference. I think in this case to do that would not be to employ the law as you have been charged as jurors.

2RP 92. In other words, the prosecutor informed the jury that, unless it found Bain suffered a mental defect or was in some other way not an ordinary individual, the law required the jury to infer Bain was a reasonable person who acted knowingly. This is a patent misstatement of the law.

For the last quarter of a century, Washington law has unambiguously held constructive knowledge supports only a permissive inference under the reasonable person standard, and the jury must be still permitted to reject that inference if it so chooses based on the specific circumstances of the case. State v. Shipp, 93 Wn.2d 514-16, 610 P.2d 1322 (1980). This is because the reasonable person standard only establishes objective knowledge, but not necessarily subjective knowledge.

In Shipp, the Washington Supreme Court concluded that if the jury finds that the defendant had information which would lead a reasonable person in the same situation to believe that the relevant facts exist, the jury is permitted -- but not required -- to find knowledge, and the instructions must reflect this. Shipp, 93 Wn.2d at 516. Anything less is unconstitutional. Id.

Shipp held the jury may only be permitted, not directed, to find knowledge if the jury finds that an ordinary person would have knowledge under the circumstances of the case. Id. at 516. This is because the ordinary person creates only an inference as to the objective knowledge of the defendant, but the jury may still find the defendant lacked subjective knowledge based on circumstances, such as inattention or lack of experience. Id. at 517.

Here, the prosecutor essentially told the jury that if it agreed Bain had no mental defect and was otherwise an ordinary person, it had to find Bain acted knowingly. However, under Shipp, the jury could have properly found Bain -- although a reasonable and ordinary person -- was less attentive and did not subjectively know the tickets were stolen. The law as interpreted by the prosecutor took this option away from the jury and replaced it with a mandatory

presumption. Under Shipp, this was an unconstitutional interpretation of the law.

The constitutional bar against a mandatory presumption, as examined in Shipp, is not an obscure point of law that the prosecutor might have justifiably missed. Indeed, it is expressly explained in the notes accompanying WPIC 10.02, which state:

[T]he instruction's second paragraph expressly states that jurors may, but are not required to, infer knowledge from circumstantial evidence. Language to this effect was added for the 1986 revisions to the first edition in order to address State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980), which held that the statutory definition of knowledge violated due process because jurors could interpret it as creating an impermissible mandatory presumption. This language has been slightly revised for the 2008 edition.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.02 (3d Ed). Given that the State offered this instruction, the prosecutor should have been fully aware his argument was a misstatement the law.

The prosecutor's misstatement went to the core element in dispute – whether Bain acted knowingly or recklessly. It was a significant misstatement of the law that encouraged the jury to undertake a mandatory presumption that is well established as being unconstitutional. Moreover, it had the effect of lightening the State's burden and, thus, constituted flagrant misconduct.

The prosecutor's misconduct was prejudicial. Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Monday, 171 Wn.2d at 578. As stated above, when the prosecutor misstates the law it is "particularly grievous" because "[t]he jury knows that the prosecutor is an officer of the State." Warren, 165 Wn.2d at 27. In this case, the misstatement allowed the State the benefit of a mandatory presumption that went to the one essential element in dispute.

Notably, the knowledge element was key to determining whether Bain would be convicted of trafficking in the first degree or would be convicted of the lesser degree offense. Under the facts of this case, the line between trafficking knowingly and trafficking recklessly was particularly thin. There was only circumstantial evidence that Bain knew the tickets were stolen. This consisted merely of Bain's alleged speculation that the tickets "may have walked out the back door" and the fact that Bain paid a discounted amount for the tickets. However, these facts do not overwhelmingly establish Bain did in fact subjectively know the tickets were stolen. Indeed, Bain told the police he did not know. The jury could have just as likely found that Bain merely disregarded a substantial risk that the

tickets were stolen. This would have supported only a verdict on the lesser included offense, changing the outcome in the case.

In sum, given the thin line between proof of the greater and lesser offense and the fact that the prosecutor's misconduct went to the core element in dispute, there is a substantial likelihood that the prosecutor's misstatement of the law regarding knowledge affected the jury's verdict. Hence, reversal is required.

(ii) Misuse of Prestige of Public Office to Divert the Jury Away from Its Duty to Render an Independent Verdict

The prosecutor used the prestige of his public office to sway the jury, diverting jurors from their duty to render an independent and impartial verdict and unfairly aligning them with the prosecution.

Although prosecutors have wide latitude in closing to draw reasonable inferences from the evidence, they are prohibited from using the power of their public office to sway the jury. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). Such misconduct poses a serious risk of prejudice because a "prosecutor's argument is likely to have significant persuasive force with the jury due in part to the prestige associated with the

prosecutor's office.” In re Glasmann, 175 Wn.2d at 706 (citing Am. Bar Ass'n Standards for Criminal Justice: Prosecution & Defense Function, std. 3–5.8, cmt. at 107 (3d ed.1993)). Prosecutors must, therefore, refrain from making comments that are reasonably calculated to align the jury with the prosecutor and against the accused. Reed, 102 Wn.2d at 147–48. Such arguments improperly divert the jury’s attention from its duty to independently decide the case on the evidence. ABA Standards for Criminal Justice 3–5.8.

In this case, the prosecutor concluded his closing argument by stating:

You have listened to all the facts and now you, as jurors, have to do your job. All that I would counsel you, as I counseled you at the beginning, please be guided by the instructions...I would counsel you and request you, based on the evidence, to return verdicts of guilt in this matter to the charges as charged.

2RP 103-104 (emphasis added). This argument puts the prosecutor in the role as counsellor to the jury. As such, it was highly irregular.

The term counsel means: “advice; opinion or instruction given in directing the judgment or conduct of another.”³ To counsel another means: “to give advice to; advise.”⁴ In the context of legal proceedings, counseling generally invokes a special relationship, with an attorney providing formal legal advice to his client. See, Black’s Law Dictionary 348 (6th ed.1991) (defining “counsellor” as a lawyer “who gives legal advice and handles the legal affairs of clients....”)

By “counseling” the jury to reach a guilty verdict, the prosecutor took on the role of a formal advisor to the jury, unfairly aligning the jurors to his view of the case. The prosecutor’s argument conveyed the notion that it is part of the prosecutor’s official job to “counsel” the jury as to the legal matters before it. By taking on the role of the jury’s counsellor, the prosecutor evoked the prestige associated with the prosecutor’s office in a way that unfairly expanded the role of his job from that of an advocate for the State’s case into that of an advisor to the jury. This, in turn,

³ counsel. Dictionary.com. Dictionary.com Unabridged. Random House, Inc. <http://dictionary.reference.com/browse/counsel> (accessed: March 11, 2015).

⁴ Id.

diverted the jury away from its duty to render an independent verdict, free from the guidance or counsel of State officials. As such, the prosecutor committed flagrant misconduct when he took on the role of counsellor to the jury and counseled the jury to reach a guilty verdict.

The prosecutor's misconduct was prejudicial. As explained above, this was a case where the line between the greater offense and the lesser was thin. Based on the actual evidence, the jury might have gone either way as to whether Bain acted recklessly or knowingly. As such there is a substantial likelihood the prosecutor's "counseling" of the jury tipped the scales of justice in the State's favor and affected the verdict. Reversal is required.

II. BAIN WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Even if this Court decides the prosecutor's misconduct was not flagrant, this Court should still reverse on ineffective assistance of counsel grounds.

The Sixth Amendment guarantees the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "This right exists, and is needed, in order to protect the fundamental right to a fair trial." Id. at 684.

Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting two-prong test from Strickland, 466 U.S. at 687). As shown below, both prongs are satisfied here.

“Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688. Counsel fails to render constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981). Thus, deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

Counsel's performance was objectively unreasonable. Competent defense counsel must be aware of the law and should make timely objections when the prosecutor crosses the line during closing argument and jeopardizes the defendant's right to a fair trial. State v. Neidigh, 78 Wn. App. 71, 79-80, 895 P.2d 423 (1995). Here, counsel's performance was deficient because she failed to object to

the prosecutor's obvious misstatement of the law regarding mandatory and permissible presumptions as to the core element in dispute.

Likewise, her performance was deficient when she failed to object to the prosecutor's "counseling" of the jury, which amounted to an improper use of the prosecutor's prestige of the office and diverted the jury's attention from its duty to render an independent verdict free from any unfair alignment with the State. Without objection, no potentially clarifying instruction was given and the jury was left confused by the prosecutor's misdirection. Competent counsel would have objected.

Counsel's deficient performance prejudiced the outcome of the case. Prejudice occurs if there is a reasonable probability that the result of the proceeding would have been different, had the deficient performance not occurred. Thomas, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. That is the case here.

As the Washington Supreme Court has recognized, "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury."

State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). As explained above, the prosecutor's misstatement of the law went to the core issue in dispute – whether Bain acted knowingly or recklessly. Without counsel's objection, the jury was left with the incorrect notion that the law required it to find Bain acted knowingly unless he had some kind of mental defect. Yet, the evidence standing alone supports a finding that Bain merely disregarded a substantial risk that the tickets were stolen. Given this, there is a reasonable probability that the outcome would have been different had counsel objected and asked for the Court to clarify the law. Hence, Bain was denied effective assistance of counsel and his conviction should be reversed.

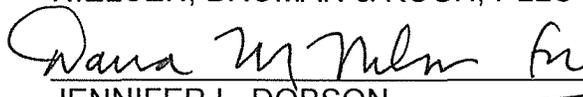
D. CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions.

DATED this 19th day of March, 2015.

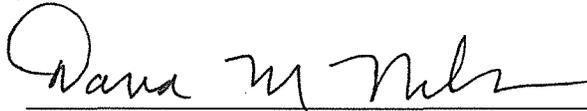
Respectfully submitted,

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STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 72399-5-I
)	
HAROLD BAIN,)	
)	
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 19TH DAY OF MARCH 2015, 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] HAROLD BAIN
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LARCH CORRECTIONS CENTER
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YACOLT, WA 98675

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF MARCH 2015.

x *Patrick Mayovsky*