

NO. 38500-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIFFANY NICOLE HARRISON,

Appellant.

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION TWO

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

The Honorable Bryan Chushcoff, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. TRIAL COUNSEL'S INEXCUSABLE FAILURE TO OBJECT TO IMPROPER OPINION TESTIMONY CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

Harrison was charged with possession of marijuana with intent to deliver based on evidence seized from her apartment during the execution of a search warrant. Deputies found packaging containing marijuana residue in the apartment, as well as some bags with small amounts of marijuana. 4RP 516. The State's theory was that Harrison was bringing large quantities of marijuana into her apartment and repackaging it for sale. Harrison explained, however, that she brought large quantities of marijuana into her apartment for her personal use, testifying that she smoked upwards of 20 grams a day. 6RP 869.

The case officer testified that Ziploc bags and vacuum seal bags like the ones found in Harrison's apartment are used to package narcotics. 5RP 685. On cross examination, the defense attempted to show that the presence of used, empty packaging was consistent with Harrison buying the marijuana, rather than selling it, and the deputy admitted that generally the buyer would take the marijuana in the seller's packaging. 5RP 709.

On redirect, the deputy testified that the various baggies with marijuana residue found in the apartment were consistent with

repackaging for distribution and sale. 5RP 712-13. Not content to state merely whether the physical evidence was consistent with marijuana sales, the deputy gave his opinion about what Harrison was doing with the marijuana in her apartment, stating, “[t]he presence of baggies shows that there is narcotics coming in, being repackaged, and being sold.” 5RP 714. Defense counsel failed to object to this improper opinion testimony, depriving Harrison of effective representation.

Improper opinion testimony violates the defendant's constitutional right to a jury trial by invading the fact-finding province of the jury. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) ; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Opinions regarding the intent of the accused are clearly inappropriate. Montgomery, 163 Wn.2d at 591, 593. In Montgomery, a detective described observing the defendant and his companion purchase several items which could be used in the production of methamphetamine. He then testified he believed they were buying the items to manufacture methamphetamine. Montgomery, 163 Wn.2d at 587-88. The Supreme Court held that because the testimony went to the core issue and the only disputed element, the defendant's intent, it amounted to improper opinion on the defendant's guilt. Montgomery, 163 Wn.2d at 593.

Here, as in Montgomery, the deputy gave his personal opinion as to the core issue and only disputed element, Harrison's intent to deliver the marijuana found in her apartment. He explicitly stated that marijuana was being sold from the apartment. 5RP 714. Under Montgomery, this constituted improper opinion testimony.

In its brief, the State argues that the deputy's opinion testimony was not improper because he was qualified as an expert in drug investigations. Br. of Resp. at 23. While the deputy may have been qualified to testify whether the physical evidence was or was not consistent with narcotics distribution, he was not an expert on what was actually going on within Harrison's apartment, or her intent. See State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (officer not qualified to testify as to defendant's state of mind while driving). The deputy's opinion amounted to testimony that Harrison was guilty of possessing marijuana with intent to deliver. Defense counsel's failure to object to this improper testimony constituted deficient performance.

There is a reasonable likelihood counsel's error prejudiced the defense. It is well recognized that testimony from police officers carries an "aura of reliability" likely to influence the jury. See Montgomery, 163 Wn.2d at 595 (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). Thus, although there was a significant amount of evidence that

the marijuana in the apartment was for Harrison's personal use, it is likely that the jury was swayed by the deputy's improper opinion that Harrison was selling marijuana. Counsel's failure to object to that testimony constituted ineffective assistance of counsel.

2. COUNSEL'S FAILURE TO MOVE THAT THE DEPUTY'S SPECULATIVE TESTIMONY BE STRICKEN CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Harrison was charged with possession of stolen property, identity theft, and unlawful possession of payment instruments, based on stolen debits cards, an expired passport, and a checkbook found in her closet. 5RP 614. On cross examination of the case officer, defense counsel established that there was no evidence Harrison had used or attempted to use any of the stolen documents. 5RP 641-43.

Although co-defendant Lance Alexander, not Harrison, had been the focus of the drug investigation leading to the search warrant, the case officer testified that the subject's boyfriend or girlfriend will commonly facilitate the sales of narcotics by committing other crimes such as "[f]raud, forgery, computer theft, identity theft." 5RP 654-55, 656. When defense counsel objected to further questions along this line, the court excused the jury and asked whether there was any evidence connecting Harrison's possession of the stolen documents to drugs sales. 5RP 657-

59. Finding none, the court noted that the deputy's testimony was speculation, and it sustained defense counsel's objection to further such testimony. 5RP 659, 661-62. Defense counsel did not move to strike the testimony already before the jury, however.

Counsel's failure amounts to deficient performance. In order to convict Harrison of identity theft, the State had to prove she possessed the stolen passport with the intent to commit a crime. See RCW 9.35.020(1). The existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). As the trial court pointed out, there was no evidence linking Harrison's possession of the passport to drug transactions, and the deputy's testimony that co-conspirators often commit crimes such as identity theft to facilitate drug sales invited the jury to speculate as to Harrison's intent.

The State argues that the deputy's testimony was not objectionable, completely disregarding the trial court's finding that it was improper. Br. of Resp. at 26; 5RP 659, 661. The trial court has broad discretion in determining whether evidence is admitted or excluded. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). In this case, the court found that because there was no evidence tying Harrison's possession of the stolen items to drug transactions, the deputy's testimony regarding the actions of

co-conspirators in general was speculative and thus improper. 5RP 661. The State does not and cannot show this was an abuse of discretion.

Again disregarding the court's explicit opinion on the matter, the State contends Harrison was not prejudiced because the court would have overruled a motion to strike the evidence had counsel made one. Br. of Resp. at 27. This suggestion is ridiculous. The court called the deputy's testimony speculation, finding it unsupported by any evidence before the jury, and it sustained counsel's objection to further such testimony. 5RP 659, 661-61. Given these rulings, the court undoubtedly would have granted a motion to strike.

As discussed in Appellant's Opening Brief, counsel's deficient performance prejudiced the defense. Although there was no evidence Harrison had used or attempted to use any of the stolen documents, the jury was invited to speculate that Harrison intended to use the passport to facilitate drug transactions, thus making her guilty of identity theft. In this case, it is reasonably likely the jury was swayed by the deputy's speculative testimony, and counsel's failure to have it stricken amounted to ineffective assistance of counsel.

B. CONCLUSION

For the reasons discussed above and in Appellant's Opening Brief, the Court should reverse Harrison's convictions and remand for a new trial.

DATED this 7th day of January, 2010.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,
properly stamped and addressed envelopes containing copies of the Reply Brief of
Appellant in *State v. Tiffany N. Harrison*, Cause No. 38500-7, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 7, 2010

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