

NO. 40229-7-II

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

APPELLANT'S  
DEPARTMENT  
10/15/12 11:14:28  
STATE OF WASHINGTON  
BY  DEPUTY

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STATE OF WASHINGTON,

Respondent,

vs.

CHRISTEN KATHLEEN LEE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR GRAYS HARBOR COUNTY  
The Honorable F. Mark McCauley, Judge  
Cause Number 08-1-00372-1

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to declare a mistrial due to the prosecutor's improper and impermissible questioning of witness Rogers in eliciting testimony that he was obligated to "be truthful" in his work with the Drug Task Force, which testimony was improper "vouching" for the credibility of witness Rogers.
2. The trial court erred in failing to find that the Defendant did not receive effective assistance of counsel due to his counsel's failure to object to the improper questioning and "vouching" for the credibility of witness Rogers by the prosecutor during his re-direct examination of Rogers.
3. The trial court erred in admitting the recorded conversations between Rogers and Tyler as statements by a co-conspirator.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the prosecutor's questioning of witness Rogers as to his obligation, pursuant to his deal with law enforcement, to "be truthful" constitute improper vouching for the credibility of witness Rogers and prosecutorial misconduct? (Assignment of Error No. 1)
2. Did the Defendant receive effective assistance of counsel when his counsel failed to object to the prosecutor's improper questioning of and vouching for the credibility of witness Rogers? (Assignment of Error No. 2)
3. Was there evidence of a conspiracy between Lee, Tyler, and Rogers, so as to allow the introduction of the recorded conversations between Tyler and Rogers as statements of co-conspirators? (Assignment of Error No. 3).

**C. STATEMENT OF THE CASE**

By Amended Information filed on August 13, 2009, in Grays Harbor County

Superior Court cause number 08-1-00372-1, the Defendant, CHRISTEN K. LEE, was

charged with two counts of Use of Proceeds of Criminal Profiteering. CP 27-28.

The matter came before the court for jury trial on October 27, 2009, the Honorable Judge F. Mark McCauley presiding. RP 1-583. After some preliminary matters and jury selection, the State called Detective Tasha Townsend of the Everett Police Department as its first witness. RP 10 et seq. She described her role with the Snohomish Regional Drug Task Force in general terms. RP 10-17. She described the relevant investigation, and stated that in 2004, the Task Force arrested an individual named Darrin Rogers on charges of money laundering. RP 19. Rogers ultimately became an informant for the Task Force and the federal government, and Rogers provided information, in exchange for favorable treatment on pending federal charges, as to other individuals whom he thought might be of interest to law enforcement. RP: 20.

One of the individuals mentioned by Rogers was Don Tyler. RP 21. Tyler was one of the less significant individuals mentioned by Rogers, so the investigation regarding Tyler was somewhat delayed until the larger targets were investigated. RP 21. She then described in detail some of the aspects of the financial investigations she undertakes in drug task force cases. RP 22- 41. She then began discussing the details of her financial investigation of Don Tyler and Defendant Lee. RP 42 et seq. Her investigation revealed a home, bank accounts, a vehicle, etc., in Lee's name, but none in Tyler's name. RP 48.

A search warrant was served at the Tyler/Lee house in Ocean Shores in December, 2006, and Townsend was present at the time of the execution of the search warrant. RP 48. She described her observations at the property, which included the discovery of a room set up with equipment to grow marijuana, but no actually growing

marijuana. RP 49. Various financial records were also located and taken into evidence during the search. RP 55-56.

On cross examination, Townsend admitted that her belief that Tyler was growing marijuana in Ocean Shores as early as 2001 was based on the statements of Rogers, and that her belief that Tyler ended his grow operation in the spring of 2006 was based on conversations between Rogers and Tyler. RP 60.

Darrin Rogers testified concerning his criminal history, and the circumstances under which he came to work as an informer for the Drug Task Force. RP 115-122. He indicated he was arrested in 2004, and began cooperating with law enforcement shortly after his arrest. RP 122. He did so in order to avoid the harshness of federal prosecution, and to lessen the impact on him of his arrest and charges. RP 123-24. He provided 10 to 15 "targets" to investigators, and began working with the Task Force to make cases against those targets. RP 124-25. He described his knowledge of and dealings with Don Tyler. RP 125-130. While he was working for the Task Force, in 2006, Rogers went to Tyler's residence in Ocean Shores and observed that one of the bedrooms was set up for a marijuana grow operation, though there was no actual growing marijuana at that time. RP 131-32. He stated that Defendant Lee was present at the Ocean Shores house at that time as well. RP 135. He does not recall Lee taking part in any conversations he had with Tyler about growing marijuana. RP 136. He described a second trip to the house in Ocean Shores, again seeing the set-up for a grow operation, but no actual marijuana, and again stating that Defendant Lee did not participate in discussions about growing marijuana. RP 140-141.

On cross examination, Rogers agreed that he was acting at the exclusive behest of the Task Force, and that part of the deal was that if he did not do everything they wanted, the deal was off and he would spend a lot of time in prison. RP 146. He stated that he never saw any marijuana plants at the Ocean Shores house. RP 146. He agreed that even though he met with the Task Force in December, 2003, he did not actually provide them with information about Tyler until a couple years later. RP 151. He stated he never saw Tyler growing marijuana. RP 153.

On redirect, the State and Rogers engaged in the following colloquy at RP 169-171:

Q: Let's talk about your motivation then, your incentive. You've already explained why it was that you made the decision to cooperate with law enforcement and participate in the investigation, it was the threat of a long prison sentence, right?

A: (Witness nods head.)

Q: Is that the same incentive at least - well, is that same incentive your motivation to be here and testify today?

A: Correct.

Q: Are you still on probation?

A: Yes.

Q: Does that require you to continue to participate?

A: Part of my proffer deal was until this is done.

Q: And if you reneged at this point, if you refused to testify in this proceeding, what could happen?

A: You know, I don't want to find out.

Q: Is there anything about your proffer deal that addresses whether or not the information you provide is accurate?

A: Yes.

Q: Tell me what you think about this possibility. Let's- let's turn the clock back to the time of the proffer. You've been faced with this tough decision, do I cooperate and hopefully gain the benefit of a reduced sentence or do I take my chances and go to trial and maybe go to prison for a long time. You go through the proffer. They ask you, tell us everything you know. If at that point you had talked, if you had exaggerated the level of involvement of some people, if you had given them information that was exaggerated just to try to impress them, do you think that would have negatively impacted your bargain, your deal?

A: Yes.

Q: Were you told that would be the case?

A: Yeah, I was told by my attorney that to be 100 percent truthful.

Q: If it turned out down the road that once detectives started looking into your information it wasn't accurate or wasn't true, do you think your bargain would have been in jeopardy?

A: Yes.

Q: And the same question today, are you concerned about the accuracy or truthfulness of the information that you provide in this proceeding for the same reason?

A: Yes, I am.

Detective Duane Wantland of the Everett Police Department then testified. RP 173 et seq. He described his contacts with Darrin Rogers and the investigation concerning Don Tyler. RP 173 et seq. He described Rogers first calling Tyler and going to his house in Ocean Shores in 2006. RP 183. He then described a meeting between Rogers and Tyler in Marysville, where Tyler gave Rogers two marijuana plants which he (Tyler) had gotten from another house in Marysville. RP 184-187. He also described a second trip by Rogers to the Ocean Shores house where Rogers was equipped with a recording device on his person. RP 187. He finally described his review of power records for the Ocean Shores

property the execution of a search warrant at that property in December, 2006. RP 188 et seq.

On cross examination Wantland agreed with defense counsel that power records, standing on their own, are inconclusive as to the existence of a marijuana grow operation. RP 207-08. He stated that during the search in December, 2006, no marijuana was found in the residence, but that a small amount of “shake”, which is the residue left after removing the buds from the marijuana plant, was located in the residence. RP 217. Several ounces of marijuana were located in a refrigerator in a detached shop on the property. RP 218. Wantland stated he had no idea where that marijuana had come from. RP 220.

Dan Rucker, also with the Everett Police Department, testified concerning his involvement and participation in the execution of the search warrant at the Ocean Shores property in December, 2006. During his testimony, a videotape that was made of the premises during the execution of the search warrant was played for the jury. RP 248.

Jose Vargas of the Drug Task Force testified concerning his involvement in the execution of a search warrant at the home of Tyler’s son in Marysville. RP 293 et seq. He stated that this search occurred in December, 2006, as well, and revealed a fully functional marijuana grow operation at that house. RP 295-97.

Outside the presence of the jury and over the objection of defense counsel, the trial judge ruled that the State would be allowed to play for the jury portions of several of the secretly recorded conversations between Rogers and Tyler, under ER 801(d)(2)(v), as statements by a co-conspirator. RP 313-319. The specific portions which the State

intended to introduce into evidence were set forth as Attachments A and B to the State's Pretrial Motions, filed on August 6, 2009. CP 171-208.

Detective Townsend was then recalled to the stand. RP 325 et seq. She presented further testimony concerning the execution of the search warrant at the Ocean Shores property, and concerning the recording of various conversations between Tyler and Rogers. RP 326-348. During that portion of Townsend's testimony, the audiotapes were played for the jury. RP 346.

Townsend also presented more detailed testimony concerning her "financial investigation" of Lee and Tyler. RP 349-417. After the testimony of Townsend and two other relatively minor witnesses (Kim Gordon, at RP 446-452, and Kelly Gann, at RP 452-459), the State rested. RP 482. The defense presented no witnesses.

Neither side took exception to jury instructions either given or not given. RP 498. After the giving of jury instructions and closing arguments of counsel, the jury convicted the Defendant as charged of both counts. CP 103-104. The Defendant was sentenced on December 14, 2009, to a total term of 90 days, as a first Time Offender. RP 584-598; CP 137-146.

Timely Notice of Appeal was filed in the case on January 13, 2010. CP 147-158.

**D. ARGUMENT**

**I.**

**The trial court erred in failing to declare a mistrial due to the prosecutor's improper and impermissible questioning of witness Rogers in eliciting testimony that he was obligated to "be truthful" in his work with the Drug Task Force, which testimony was improper "vouching" for the credibility of witness Rogers.**

The essence of the argument on this point is that the State's questioning of Rogers constituted impermissible "vouching" for his credibility. One of the leading cases on this point is *State v. Green*, 119 Wn. App. 15, 79 P. 3d 460 (2003), *rev. denied*, 151 Wn. 2d 1035, *cert. denied*, 543 U.S. 1023 (2004). In that case, over defense objection, the State was allowed to introduce a letter which memorialized an immunity agreement between the State and an informant (Cole) who had testified against Green. The defense specifically objected to that portion of the letter which stated that "[t]he intent of this agreement is to secure the true and accurate testimony of your client concerning his knowledge of the events surrounding the shooting and robbery of Rio Cole." Green argued that this provision impermissibly vouched for Cole's credibility and improperly bolstered his testimony. In holding that the challenged language should not have been presented to the jury, the Court stated at page 24 as follows:

While the immunity agreement was admissible after Cole's credibility was attacked, we agree that the language that the intent of the agreement was to 'secure the true and accurate testimony' and the provision that Cole 'testify truthfully' should have been redacted if such a request had

been made. **These provisions were prejudicial and improperly vouched for Cole's veracity.** (Emphasis added).

The error in the *Green* case was ultimately ruled harmless, as there were at least two other witnesses who identified the Defendant as the shooter. However, that does not in any way minimize the holding of the case that such evidence constitutes impermissible vouching by the State.

The holding in *Green, supra.*, was essentially confirmed by the Washington Supreme Court's recent decision in *State v. Ish* (Case No. 83308-7, decided October 7, 2010). In that case, the Defendant's cellmate, Otterson, entered into an agreement with the State to testify against Ish in exchange for favorable treatment on his case. Over defense objection, the State was allowed to inquire of Otterson as to the provisions of the agreement which required him to testify truthfully. The opinion contained the following statement of the questioning by the State of Otterson:

During the State's case in chief, the following exchange between the prosecutor and Otterson took place:

Q: With regard to exchanging testimony in this case, what type of testimony?

A: Truthful testimony. VRP (5/9/07) at 1104.

The defendant did not object to this questioning.

Later, after Ish attacked Otterson's credibility on cross-examination, the follow exchange took place between the prosecutor and Otterson on re-direct:

Q: . . . as you sit here today, do you know if in fact that agreement is going to be revoked or not?

A: No, I don't.

Q: One of the terms of your plea agreement, which [the defense attorney] has gone over with you, is that you testified truthfully?

A: Yes.

Q: Have you testified truthfully?

A: Yes, I have. VRP (5/10/07) at 1153.

Nothing further was said with regard to Otterson's agreement to tell the truth during his testimony.

In holding that the questioning by the State constituted improper vouching by the State for the witness' credibility, the Supreme Court stated as follows:

Here, Ish argues that the State should not have been allowed to ask Otterson about his promise to testify truthfully during direct examination. We agree. On direct review, where the credibility of the witness had not previously been attacked, referencing Otterson's out-of-court promise to testify truthfully was irrelevant and had the potential to prejudice the defendant by placing the prestige of the State behind Otterson's testimony. We hold that the trial court abused its discretion by denying Ish's pretrial motion to preclude the State from referencing the portions of Otterson's plea agreement requiring him to testify truthfully before his credibility was attacked by the defense.

In *Ish*, as in *Green*, the error was ultimately found to be harmless, due to the fact that there were a number of other witnesses who offered testimony as to Ish's state of mind at the time of the incident, and as to the other matters which were also testified to by Otterson.

In order to prevail on a claim of prosecutorial misconduct, a defendant must show both improper conduct by the prosecutor and prejudicial effect. *State v. Munguia*, 107 Wn. App. 328, 336, 26 P. 3d 1017 (2001); *State v. O'Donnell*, 142 Wn. App. 314, 328,

not raise an issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered. *Munguia, supra.*, at 336 (citing *State v. Hoffman*, 116 Wn. 2d 51, 93, 804 P. 2d 577 (1991)). The “flagrant and ill-intentioned” standard for misconduct requires the same “strong showing of prejudice” as the test for manifest constitutional error under RAP 2.5(a). *State v. Neidigh*, 78 Wn. App. 71, 78, 895 P. 2d 423 (1995).

Lees’ counsel did not object to the clearly improper questioning and vouching by the State in its examination of witness Rogers. However, even despite the lack of objection, as previously argued, it is submitted that the State’s improper questioning was nothing short of flagrant and so ill-intentioned so as to rise to the level of “strong prejudice”, requiring relief. This went far beyond the mere submission of a document which contained, among many other terms, a mention of truthful testimony. Indeed, this was a give and take, question and answer, in front of the jury, where a prosecutor was eliciting clearly objectionable and improper testimony from a State witness, all with the clear intention of vouching for the critical witness’ credibility directly in front of the jury. There can be few examples of instances where the only rational conclusion is that the State knew exactly what it was doing in examining Rogers as it did., and that such examination was improper, impermissible, and so flagrant and ill-intentioned that relief is required, even in the absence of objection.

Another way to view this issue, however, is clear. It is submitted that, had defense counsel made proper objection at trial, and had the State been able to proceed with its questioning over defense objection, the more “relaxed” standard would, under the

resulted in a finding of error and the granting of a new trial. Counsel's failure to make proper objection clearly fell below a reasonable standard of professional conduct, since the inquiry by the State was clearly improper. The prejudice to the Defendant Lee is clear: In the absence of such objection, her claim of prosecutorial misconduct is arguably subject to the stricter standard of "flagrant and ill-intentioned".

However, it is submitted that, for purposes of the analysis of her ineffective assistance of counsel claim, the Court should apply the lesser standard and determine whether, had proper objection been made, the admission of such testimony would have been reversible error. As stated above, it is clear that such questioning and testimony by Rogers was error and would have resulted in a new trial had proper objection been made. That is the essence of prejudice to Ms. Lee and ineffective assistance of counsel.

### III.

#### **The trial court erred in admitting the recorded conversations between Rogers and Tyler as statements by a co-conspirator.**

The trial court, over defense objection, allowed the State to play to the jury certain portions of secretly recorded conversations between Tyler and Rogers. RP 317-319. It allowed these to be played pursuant to the provisions of ER 801(d)(2)(v), which reads as follows:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if --

...

(2) Admission by Party-Opponent. The statement is offered against a party and is... (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

In order for such evidence to be admitted under ER 801, the State must establish the

existence of a conspiracy, defined as “an agreement...made by two or more persons confederating to do an unlawful act...” *State v. Halley*, 77 Wn. App. 149, 154,, 890 P. 2d 511 (1995).

RCW 9A.28.040(1) defines the crime of Criminal Conspiracy as follows:

A person is guilty of criminal conspiracy when, with intent that **conduct constituting a crime** be performed, he or she **agrees with one or more persons** to engage in or cause the performance **of such conduct**, and any one of them **takes a substantial step in performance of such agreement**. (Emphasis added).

“The essential elements of [conspiracy] are an agreement to commit a crime and taking a ‘substantial step’ toward the completion of that agreement.” *State v. Moavenzadeh*, 135 Wn. 2d 359, 364, 956 P. 2d 1097 (1998). Utilizing nothing more than mere common sense and basic English grammatical concepts, it cannot be clearer that the “agreement” must precede the “substantial step”. Put another way, is it logically and temporally impossible for an individual to “take a substantial step in performance of an agreement” unless the “agreement” pre-exists the alleged substantial step.

The critical question which must be asked regarding the ruling of the Court in allowing this evidence in is this: What was the nature of the conspiracy, and what was the evidence that Defendant Lee was a member of any conspiracy at all? Where was there any evidence at all of her “agreement” with Tyler to engage in any criminal activity? It is anticipated that the State will argue that her conspiracy was to sell marijuana and hide the proceeds of that activity. Indeed, that was what a majority of the State’s evidence, particularly the exhaustive testimony of Detective Townsend, was offered to ostensibly prove. However, it must be kept in mind that any such activity, by the admission of the

States' own witnesses, had only occurred in the past, and was not ongoing at all at the time of Rogers' visit to Ocean Shores while wired for sound.

It is in this regard that the phrase "during the course and in furtherance of the conspiracy" in the Evidence Rule is critical. Unless the State could point to an ongoing conspiracy, and unless the State could show that the proffered statements were made "during the course of [a] conspiracy" involving Lee and "in furtherance of [a] conspiracy" involving Lee, then the statements cannot come in as evidence against Lee under ER 801(d)(2)(v).

At best, there was some evidence of a conspiracy between Tyler and Rogers to perhaps sell some marijuana, though even that conspiracy is not supported by any hard and credible evidence. The State argues that Defendant Lee was present for these conversations, though her participation in them, with regard to any criminal activity, is noticeably absent. Again, where is there any evidence of agreement on the part of Ms. Lee to engage in any criminal conduct as a co-conspirator? There is none.

The fact that Lee may have been present for some of these conversations is of no consequence at all. Even Rogers testified that he had little or no recollection as to whether she was there or not, and he certainly offered no testimony at all of her active participation in any substantive discussions concerning criminal activity. Indeed, the transcripts themselves, set forth at CP 171-208, are the best evidence of Ms. Lee's complete lack of involvement in any sort of conspiracy. That is without regard to the obvious argument that the conspiracy had to pre-exist these conversations in order for the conversations to be admissible as statements of co-conspirators, and there is absolutely no

conversations to be admissible as statements of co-conspirators, and there is absolutely no evidence of any sort of pre-existing conspiracy involving Ms. Lee **relating to what was discussed between Tyler and Rogers at Ocean Shores.**

Liability as a co-conspirator in Washington rests on the same principles as accomplice liability under Washington law. *State v. Stein*, 144 Wn. 2d 236, 241, 27 P. 3d 184 (2001). The law in Washington as to accomplice liability is well stated in Washington Pattern Criminal Jury Instruction 10.51, which reads as follows:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. a person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. **However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.** (Emphasis added).

Countless cases have affirmed the principle that mere presence, coupled with knowledge of criminal activity, is insufficient to create accomplice liability. See, e.g., *In re Wilson*, 91 Wn. 2d 487, 491-92, 588 P. 2d 1161 (1979); *State v. Landon*, 69 Wn. App. 83, 848 P. 2d 724 (1993); and *State v. Ferreira*, 69 Wn. App. 465, 850 P. 2d 541 (1993).

Thus, the fact that Ms. Lee may have been present during these conversations, and

to cast her as a co-conspirator so as to authorize the admission of these conversations against her pursuant to ER 801(d)(2)(v). The trial judge's ruling in that regard was clear error.

**E. CONCLUSION**

For the reasons stated herein, this court should reverse the Defendant's convictions in this matter and remand for a new trial.

DATED: November 1, 2010.

Respectfully submitted,

  
\_\_\_\_\_  
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**CERTIFICATE**

I certify that I mailed a copy of the Brief of Appellant by depositing same in the United States Mail, first class postage prepaid, to the following people at the addresses indicated:

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DATED this 1st day of November, 2010.

  
\_\_\_\_\_  
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