

NO. 43549-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHNNY D. DUNHAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Thomas McPhee, Judge
Cause No. 11-1-01614-9

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 638-2106

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Dunham of his constitutional due process right to a fair trial.
02. The trial court erred in not taking count II, trafficking in stolen property in the first degree, from the jury for lack of sufficiency of the information.
03. RCW 9A.08.020, the accomplice liability statute, is unconstitutionally overbroad.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Denham was denied his constitutional due process right to a fair trial where the prosecutor engaged in prejudicial misconduct by misrepresenting the law in arguing to the jury that Dunham could be convicted of burglary if he or one of the other defendants entered an area only partially enclosed by a fence? [Assignment of Error No. 1].
02. Whether the information charging count II is defective in failing to allege the essential element of knowingly trafficked in stolen property for the crime of trafficking in stolen property in the first degree? [Assignment of Error No. 2].
03. Whether RCW 9A.08.020, the accomplice liability statute, is overbroad by criminalizing constitutionally protected speech in violation of the first and fourteenth amendments? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Johnny E. Dunham (Dunham) was charged by first-amended information filed in Thurston County Superior Court on January 27, 2012, with burglary in the second degree, count I, trafficking in stolen property in the first degree, count II, and theft in the third degree, count III, contrary to RCWs 9A.52.030(1), 9A.82.050(1), 9A.82.010(19) and 9A.56.050. [CP 6-7].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 11]. Trial to a jury commenced the following May 15th, the Honorable Thomas McPhee presiding.¹ Dunham took neither objections nor exceptions to the jury instructions. [RP 635].²

Dunham was found guilty as charged, sentenced within his standard range and timely notice of this appeal followed. [CP 71-73, 77, 89-99].

02. Substantive Facts

On Saturday, October 15, 2011, at approximately 2:00 p.m., Deputy Jason Casebolt was dispatched to “an in-progress burglary” at a house in Thurston County, which was vacant due to the

¹ Dunham was tried with three co-defendants: Kimberly Cole, Lynita Garcia and Michael

² All references to the Report of Proceedings are to transcripts Volumes I-V.

owner's recent death. [RP 79-83, 291]. The house was located on 4.76 acres and had an attached "20-by-24" roofed carport that was used to store tools and a motorcycle and which was enclosed all around except for where you pull in with your car. [RP 95, 306-07, 315-16, 357, 377]. "(T)he property had been burglarized numerous previous times...." [RP 84]. Earlier that day, William White, the reporting party, who was keeping an eye on the property at the request of the deceased's family [RP 299, 303, 424, 428], had observed Horner walking toward a pickup truck parked near the house while Dunham was exiting a latched storage container on the property. [RP 325, 329-330, 427]. "(T)hey were in a great deal of a hurry to get to the truck, so I knew they had seen me." [RP 326-27]. Garcia and Cole also came out of the storage container and headed toward the truck. [RP 332, 336, 391-92, 452-53].

Cole told Casebolt that she had a business cleaning foreclosed properties and had received a call from a friend, whose name she did not provide, saying the property was in foreclosure and needed to be cleaned. [RP 193-94, 210]. Dunham told Casebolt that he was just along for the ride and was there to help his friends clean the property. [RP 195-96]. Horner said he was there to assist Cole. [RP 208].

The pickup's license plate belonged to another vehicle. [RP 98]. During the execution of a subsequent warrant, tools, steel and metal items in the bed of the truck were identified as coming from the property, and receipts were found in the glove box for the sale of scrap metal to recycling companies in the area. [RP 98-101, 111, 120-23]. The receipts from Valley Recycling listed the four defendants as customers. [RP 126, 152].

All of the defendants testified except Cole. Dunham said he was there because he thought the others were going to bid on a job, that he never entered the storage container and that on one occasion he had gone to the recycling center with Horner because he (Horner) needed another ID. [RP 541, 543, 546-47]. Similarly, Garcia asserted she was on the property believing Cole was going to bid on a job and, like Dunham, never entered the storage container. [RP 559, 566, 559-560]. Horner, the driver of the pickup, was on the property because he and Cole were going to bid on a job. [RP 584]. "The other two—Garcia and Dunham—were riding along with us..." [RP 592]. He claimed that the items in the bed of his pickup belonged to him: "It was my jack, my come-along, my hitch, all that." [RP 587]. Two witness for defense, said they had seen similar tools in Horner's truck prior to the incident. [460-63, 491-92].

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D. ARGUMENT

01. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT BY MISREPRESENTING THE LAW IN ARGUING TO THE JURY THAT DUNHAM COULD BE CONVICTED OF BURGLARY IF HE OR ONE OF THE OTHER DEFENDANTS ENTERED AN AREA ONLY PARTIALLY ENCLOSED BY A FENCE.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A criminal defendant's right to a fair trial is denied where there is an unsuccessful objection to the prosecutor's improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill

intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990).

“The State’s burden to prove harmless error is heavier the more egregious the conduct is.” State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor’s obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant’s due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

It is manifest constitutional error for a prosecutor to misstate the governing law. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997). This is a serious irregularity for it has the grave potential to mislead the jury. State v. Davenport, 100 Wn.2d at 763. Bad faith is not required. Where a jury may have relied upon an

incorrect understanding of the law resulting from a prosecutor's argument, the court cannot be certain that the resulting verdict rests on a legally valid theory. State v. Allen, 127 Wn. App. 125, 137, 116 P.3d 849 (2005).

In Allen, the prosecutor misrepresented the law by improperly arguing to the jury that it could find the defendant guilty of burglary if it determined that he had entered a publically accessible building and intended to commit a crime therein, Allen, 127 Wn. App. at 136, which was incorrect given that burglary requires that the perpetrator is unlawfully in a building: in a place he is not allowed to be. Id. at 136-37. And while there was evidence that the defendant had unlawfully remained in a restricted portion of the building, the court declined to presume the jury's verdict rested on an accurate understanding of the law and ordered a new trial because it could not "be certain that the jury relied solely" on a correct application of the law. Id.

The prosecutor argued to the jury that it could convict Dunham of burglary if it determined that he or one of the other defendants entered an area only partially enclosed by a fence:

And so I'm going to ask you to convict, after all of these days, I'm going to ask you to convict all four of these defendants with burglary in the second degree. There is no question that they entered a building, any of them. The carport constitutes a building, the storage container constitutes a building, and the fenced area, the yard, it does constitute a building by definition. There's nothing in your

instructions that says the fencing must touch all the way around, it says fenced area and that's it, and I submit to you that's exactly what occurred here. (emphasis added).

[RP 808-09].

This argument misrepresents the law, for a private yard that is only partially enclosed by a fence and partially bordered by sloping terrain is not a “fenced area,” as required to support a conviction for burglary in the second degree. State v. Engel, 166 Wn.2d 572, 580-81, 210 P.3d 1007 (2009). No evidence was presented, as impliedly acknowledged by the prosecutor in the above quoted statement, that the property was fully enclosed by a fence.

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d at 94-95, the prosecutor “has no right to mislead the jury.” (emphasis in the original). State v. Davenport, 100 Wn.2d at 763 (quoting State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1995)). Here, the prosecutor’s argument was wrong and not in harmony with the law. It misrepresented what the State was required to prove, which undermines the verdict obtained. See State v. Allen, 127 Wn. App. at 137.

Based on this record, reversal is required, for there is a substantial likelihood that the prosecutor’s comments affected the jury’s verdict.

Moreover, the comments were nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, for they were “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ incurable by a jury instruction.” See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). The prosecutor’s misconduct ensured that Dunham did not receive a fair trial.

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury’s verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient....

In re Glassman, ___ Wn.2d ___, 286 P.3d 673, 681 (2012).

02. DUNHAM ADOPTS HORNER’S ARGUMENT THAT A CONVICTION FOR TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE THE ESSENTIAL ELEMENT OF KNOWINGLY TRAFFICKED IN STOLEN PROPERTY MUST BE REVERSED.

The Rules of Appellate Procedure allow parties to adopt the arguments of another party in a consolidated case. RAP 10.1(g). Dunham adopts the argument set forth in Horner’s Opening Brief at 14-16 that the information failed to allege the essential element of knowingly

trafficked in stolen property. Dunham supplements that argument with the following additional points.

The information did not allege that Dunham or an accomplice knowingly trafficked in stolen property [CP 6], though the prosecutor acknowledged during closing argument that whether the defendant or an accomplice knowingly trafficked in stolen property was an element of the offense, which it thus had to charge and the burden to prove. [RP 683]. Moreover, although this language did appear in the court's to-convict instruction as element of the offense [Court's Instruction 28; CP 62], proper jury instructions cannot cure a defective information. State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). "(S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury instructions](,)" State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000), the information is defective, and the conviction obtained on this charge must be reversed and the charge dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Dunham need not show prejudice, since Kjorsvik calls for a review of prejudice only if the "liberal interpretation" upholds the validity of the information. See State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

03. DUNHAM ADOPTS HORNER'S ARGUMENT THAT RCW 9A.08.020, THE ACCOMPLICE LIABILITY STATUTE, IS OVERBROAD IN THAT IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

Dunham adopts Horner's argument set forth in Horner's Opening Brief at 5-14 that the accomplice liability statute is overbroad in that it criminalizes constitutionally protected speech in violation of the first and fourteenth amendments. RAP 10.1(g).

E. CONCLUSION

Based on the above, Dunham respectfully requests this court to reverse his convictions consistent with the arguments presented herein.

DATED this 25th day of January 2013.


THOMAS E. DOYLE
WSBA NO. 10634

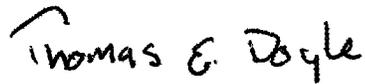
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne
paoappeals@co.thurston.wa.us

John Dunham #983093
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

DATED this 25th day of January 2013.



THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

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