

NO. 43848-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

VADIM UVAROV

Appellant.

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

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to the effective assistance of counsel and a fair trial when his attorney failed to object to improper and prejudicial evidence.

Issue Pertaining to Assignment of Error

Appellant was charged with several crimes in connection with the theft of jewelry and cash from the victim's home. During examination of the victim, the prosecutor asked about the sentimental value of the stolen jewelry. Defense counsel did not object. During closing argument, the trial deputy highlighted this evidence when she focused on how "devastated" the victim was as a result of the crimes. In light of counsel's failure to keep this improper and prejudicial evidence from jurors, was appellant denied his Sixth Amendment right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Lewis County Prosecutor's Office charged Vadim Uvarov with one count each of Theft in the First Degree, Trafficking in Stolen Property in the First Degree, and Resisting Arrest. CP 13-15. A jury convicted Uvarov on all three counts, the court

imposed standard range sentences totaling 17 months, and Uvarov timely filed his Notice of Appeal. CP 39-41, 47-48, 55.

2. Substantive Facts

Kathy Cook has known Vadim Uvarov for 17 years, since Uvarov was 13 years old. RP¹ 7. Uvarov did not have a good home life when he was younger and stayed with Cook and her husband off and on over the years. Cook's husband died in 2005. Uvarov was like a son to Cook and had a key to Cook's apartment. RP 7-8.

On April 2, 2012, Uvarov drove Cook to the hospital for medical treatment, where she stayed through April 6. RP 8-9. Upon admission, Cook took off the necklace, earrings, and engagement ring she was wearing, placed them in her purse, and handed her purse to Uvarov. RP 9. Uvarov was to take the purse and its contents back to Cook's home for safekeeping. RP 10-11.

Uvarov visited Cook in the hospital on April 4 but did not return thereafter. RP 11. When Cook returned home on April 6 and looked in her purse, she noticed that the engagement ring was

¹ "RP" refers to the verbatim report of proceedings for July 24, 2012.

missing. RP 12. A bracelet that had belonged to her husband, which she also kept in her purse, also was missing. RP 13.

Further investigation revealed that her jewelry box, which Cook kept in a bedroom dresser, had been emptied. RP 12. Missing were her mother's gold and diamond wedding ring, a ruby and diamond wedding set she inherited from a friend, and several pair of gold earrings, most of which had been gifts from her deceased husband. RP 12-18. Her mother's ring had been appraised at \$6,000.00. RP 14. The other items varied in value from several hundred to several thousand dollars each. RP 14-19. There also was \$3,700.00 in cash missing from Cook's home. According to Cook, Uvarov knew where she kept this money. RP 19-20, 22.

Cook repeatedly called Uvarov and asked him to return the missing items, but he never responded to the phone calls. RP 22-23. Cook's son, who considered Uvarov a best friend and like a brother, made similar efforts without success. RP 28, 30. Cook eventually contacted law enforcement. RP 23.

Sometime between April 2 and April 6, Uvarov took several rings to Donita Hope to have them cleaned. RP 52. Hope likes to collect and fix up old jewelry. RP 51-52. Uvarov told Hope that

Cook had been keeping the jewelry for him, but that it belonged to him. RP 55-56. Uvarov was wearing a gold men's bracelet at the time and carrying a large wad of cash, which he also said Cook had been keeping for him. RP 54-56. Uvarov gave Hope a pair of gold hoop earrings in exchange for her work. RP 57. Hope later learned the earrings had been stolen from Cook's jewelry box and returned them to her. RP 23-24, 33-34, 58-59.

According to Sara Saxby – Uvarov's former girlfriend – around this same time, Uvarov tried to give her several rings. RP 60-62. She recognized one of the rings as belonging to Cook, but Uvarov denied it. RP 63.

Other than the one pair of earrings, no other jewelry or cash was ever recovered. RP 33, 46. On May 9, 2012, officers located and arrested Uvarov. RP 37. Uvarov refused to obey officers' commands that he turn around and place his hands behind his back. Officers forced him to the ground, where they were able to gain control and take him into custody. RP 39-45.

3. Improper Evidence

During the State's examination of Kathy Cook, the prosecutor asked Cook to discuss the sentimental value of the jewelry that had been taken:

Q: Okay. Did any of these items have sentimental value?

A: Extremely.

Q: Like some of the items that were gifted to you?

A: My husband's deceased. It's the only thing I have left. My mother's gone.

Q: Tell us a little bit about your mother's ring, the sentimental value of that?

A: Well, there's kind of a little story about it. My father won the diamonds in a gambling game. My grandfather had the ring designed, and my mother wore it up until her death. So it had a lot of sentimental value.

RP 20-21. Defense counsel did not object to this line of questioning.

During closing argument, the prosecutor again focused on Cook's testimony about the sentimental value of what she had lost:

So we know this property belonged to Ms. Cook. She testified that this property belonged to her. There's no question about that. You also have to find that it exceeds \$5,000 in value. We talked about that. You also have to find that the defendant intended to deprive the person of the property. She testified it's been taken from her. She's devastated over this. These things were valuable to her. They were sentimental to her. She's been deprived of this property. And you have to find that these things occurred in the State of Washington, and I think that was well established.

RP 101 (emphasis added). Again, there was no defense objection.

C. ARGUMENT

COUNSEL'S FAILURE TO OBJECT TO EVIDENCE REGARDING THE SENTIMENTAL VALUE OF THE STOLEN JEWELRY DENIED UVAROV EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

More specifically, a defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met.

1. There was no legitimate tactic

Defense counsel's failure to object to evidence of Cook's sentimental losses was not the product of a legitimate tactic. The "extreme" emotional toll exacted by the theft was not relevant to any element of the charged offenses. It has long been the rule that jurors may not base their verdicts on emotion or passion; indeed, it is prosecutorial misconduct to rely on such evidence in seeking a conviction. See, e.g., State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011, 790 P.2d 169 (1990).

2. An objection would have been sustained

As just discussed, the sentimental value of Cook's jewelry was not relevant to any element of the three charged offenses. The only relevant value was the monetary value of the stolen items, which had to exceed \$5,000.00. CP 22-23.

Had there been an objection, the court would have recognized the fact Cook had suffered a severe emotional, sentimental loss was inadmissible under ER 402 and 403 (irrelevant evidence inadmissible; even relevant evidence can be excluded "if its probative value is substantially outweighed by the

danger of unfair prejudice”). “Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial.” State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

3. Uvarov suffered prejudice

To show prejudice, Uvarov need not show that counsel’s performance more likely than not altered the outcome of the proceeding. State v. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for counsel’s mistakes, i.e., “a probability sufficient to undermine confidence in the reliability of the outcome.” Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The prosecution had no witness who observed Uvarov take any jewelry or money from Cook’s home. While there was evidence Uvarov possessed her property thereafter, such evidence did not necessarily establish that Uvarov was the thief. Thus, Uvarov’s conviction on the Theft charge was not assured.

Moreover, based on the jurors’ questions regarding the Resisting Arrest charge, they clearly struggled with whether

Uvarov's relatively minor resistance satisfied the minimum legal standard for that crime. See CP 11-12.

Unfortunately for Uvarov, however, jurors were more likely to convict of him of the charged offenses once they learned of the extreme sentimental value of the lost items, which included gifts from Cook's now-deceased mother and husband. This evidence encouraged jurors to convict Uvarov based on emotion rather than evidence. And the impact of this evidence was magnified when the prosecutor used it during closing argument to remind jurors that Cook had been "devastated" by her sentimental loss. RP 101.

Uvarov has demonstrated a reasonable probability counsel's failure to act impacted the outcome at his trial.

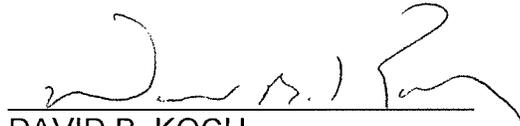
D. CONCLUSION

Counsel's failure to prevent the introduction of improper and damaging testimony denied Uvarov his right to effective representation and a fair trial. His convictions should be reversed.

DATED this 15th day of January, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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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 16TH DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VADIM UVAROV
DOC NO. 866668
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JANUARY 2013.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

January 15, 2013 - 6:18 PM

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