

FILED

No. 310655

MAY 20 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**STATE OF WASHINGTON COURT OF APPEALS
DIVISION THREE**

STATE OF WASHINGTON

Respondent,

v.

MICHEAL COX

Appellant

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR

The trial court's conviction of Mr. Cox on one count of theft in the first degree, and one count of theft in the second degree, was improper based on Prosecutorial Misconduct, Abuse of Prosecutorial Discretion, and Ineffective Assistance of Counsel.

II. STATEMENT OF ISSUES

Were the Opening and Closing Arguments of the State's Counsel Inflammatory and Not Curable by Instruction? *Yes.*

Was the Determination to Separate the Theft into Three Charges of Theft Arbitrary and an Abuse of Prosecutorial Discretion? *Yes.*

Did Mr. Cox Receive Ineffective Assistance of Counsel? *Yes.*

III. FACTS

This matter came on regularly for trial on June 18, 2012 before the Honorable David Frazier, Superior Court Judge, County of Whitman. Michael D. Cox appeared by and through his counsel, Mr. Steve Martonick. *Verbatim Report of Proceedings, Vol. 1*, p. 1. The State of Washington appeared by and through the Attorney General's Office, per Mr. Daniel Hillman and Ms. Tienney Milnor. *Id.* at 2. At the conclusion of hearings, on June 21, 2012, Mr. Cox was convicted of one count of

theft in the first degree, and one count of theft in the second degree. *RP* 729-30.

IV. ARGUMENT

A. Prosecutorial Misconduct

This court and the Washington State Court of Appeals has repeatedly stated that errors during the original trial must be timely objected to for them to be preserved on appeal. However, if the cumulative effect of all the errors, preserved and not preserved, rise to a violation of the defendant's constitutional right to a fair trial, the court will exercise its discretion under RAP 2.5(a)(3) to review all of the errors raised on appeal. *State v. Alexander*, 64 Wn.App. 147, 150-151 , 822 p,2d 1250 (Div. I, 1992) (Quoting *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984), *State v. Curry*, 62 Wn.App. 676, 679, 814 P.2d 1252 (1991), and *State v Noel*, 51 Wn. App. 436, 439, 753 P.2d 1017 (1988).

I. The Opening and Closing Remarks of the State were Inflammatory and Not Curable by Instruction.

“A defendant may not assign error to a prosecutor's argument unless he objected to the improper remarks and requested a curative instruction.” *State v. Alexander*, at 155 (Citing *State v. Monk*, 42 Wn. App. 320, 324-325, 711 P.2d 365 (1985) and *State v. Ziegler*, 114 Wn.2d 533, 540, 789

P.2d 79 (1990). “An exception to this rule is warranted, however, when the misconduct is so flagrant and ill intentioned that no instruction could obviate the prejudice engendered by it. *Id.* (citing *Monk*, 42 Wn.App. at 325; *Ziegler*, 114 Wn.2d at 540.)

There are a wide range of examples were a simple closing argument, which would normally be within the allowed scope of prosecutorial discretion, steps over the line. In *State v. Fleming*, the prosecutor’s closing argument was, in part,

Ladies and gentlemen of the jury, for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076, 1078 (1996) (italics in original). Then the prosecutor argued, “that there was no reasonable doubt because there was no evidence that the witness was lying or confused, and if there had been any such evidence, the defendants would have presented it...” *Id.* This line of argument violates the defense’s right to a fair trial by shifting the burden of proof from the State having to prove its case beyond a reasonable doubt to one of more of a preponderance of more likely than not and the State merely needed to

make a prima facie case before the burden shifts to the Defendant, who *must* then present evidence to rebut the State's evidence; and if not then the lack of evidence is an admission. "A defendant has no duty to present evidence; the State bears the *entire* burden of proving each element of its case beyond a reasonable doubt." *State v. Traweek*, 43 Wn.App. 99, 107, 715 P.2d 1148 (1986).

In *State v. Belgarde*, the prosecutor again stepped over the line with his closing argument. *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988). The defendant, Kermit Belgarde, was Native American with a loose association with AIM (American Indian Movement). During the closing argument, the prosecutor equated the defendant's loose association to that of terrorists Sean Finn of the Irish Republican Army and Kadafi. Then the prosecutor elicited the emotion by bringing up a AIM massacre,

Remember Wounded Knee, South Dakota. Do any of you? It is one of the most chilling events of the last decade. You might talk that over once you get in there. That was the American Indian Movement... [they] were militant, that were butchers, that killed in discriminately Whites and their own... Is AIM something to be frightened of when you are an Indian and you live on the reservation? Yes it is.

State v. Belgarde, at 507.

"Mere appeals to jury passion and prejudice, as well as prejudicial allusions to matters outside the evidence, are inappropriate." *Id.*

A “trained and experienced prosecutor presumably [would] not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” *Fleming* at 1079. In this case, the prosecutor fell victim to both of the above mistakes.

First, during the State’s closing and rebuttal closing argument, the State develops the idea that there are medical doctors on both sides. The jury must decide whom they are to believe more: Drs. Monlux, Schneider and Shearer or Dr. French. This idea subtly changes the burden of review from the state being required to prove the facts of the charges beyond a reasonable doubt, to one of merely setting the medical testimony on the scales to see which is heavier, or a more probable than not argument. The defense sets forth Dr. French to create a reasonable doubt about the abilities of Mr. Cox in an effort to rebut the testimony of the state’s medical witnesses and the video. The prosecutor throws that out, not with the idea of what a reasonable doubt is and how Dr. French did not create one, but by furthering this idea of more probable than not. *See RP 711-15.*

Secondly, in the State’s closing, counsel states, “the defendant didn’t kill anyone. He didn’t assault anyone. He didn’t do a lot of serious crimes, but this is still an important case...” *RP 718.* This allusion to murder appears to be a mere appeal to jury passion and prejudice. This sentence

serves no other purpose. The jury knows there is not assault or murder. There is no testimony or evidence as to any assault. There is no testimony or evidence to a murder. The jury instructions, which the jury was just read did not include any direct or inferential allusion to murder or assault.

These three sentences, which equate the seriousness of these white-collar charges to the murdering of a human, effectively ring the proverbial bell. There is no instruction, which can unring that bell.

The combined effect of the above amount of prosecutorial misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. “[T]he question to be asked is whether there was a “substantial likelihood” the prosecutor’s comments affected the verdict.” *State v. Reed*, 102 Wn.2d 140, 147-148, 684 P.2d 699 (1984) and *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). This is clearly true here.

II. The Determination to Separate the Theft into Three Charges of Theft was Arbitrary and an Abuse of Prosecutorial Discretion.

The Defense filed and noted a motion to dismiss the additional charges of the theft of the Department of Labor and industries. CP 36-40. It was inexplicably stricken, but may rise to the level of ineffective assistance of counsel. The sum of the motion and memorandum which is a part of the record in CP 36-40 explains that the charging of Mr. Cox with three

charges was a violation of Double Jeopardy. Defense cites *State v. Kinneman*, which states “where the successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny **regardless** of the time which may elapse between each taking.” *State v. Kinneman*, 120 Wn. App. 327, 340 (2003) (bolding added). The court focuses on the unity of the scheme.

This case starts with the defendant getting injured on 12/13/06. The State admits the legitimacy of that claim. All payments until the 12/24/07 payment, are admitted by the State as legitimate. Starting with that payment, the State charges that the defendant stole from the Department by color or deception. According to the state’s evidence, the defendant filed regular worker verification forms from 11/19/2007 through 12/2/2008. After 12/2/2008, the defendant makes no affirmative act to the Department to contend timeloss. As such all checks (warrants) issued pursuant to that general larcenous scheme should be charged together **regardless** of when the Department chose to pay (time elapsed) the timeloss.

Additionally, with the charges of (1) Theft 1 for December 24, 2007 through December 31st, 2008, (2) Theft 1 for January 1, 2009 through December 31, 2009, and (3) Theft 2 for January 1, 2010 through March

10, 2010 all originating on November 19, 2007 (a time which the Department states the timeloss was legitimate), there is question as to if these three charges can be leveled upon the defendant at all. *CP 1-4*

The way the State has charged the defendant and the way in which the Department has acted; the Department and by way of its criminal arm, the State, is using the required forms from the adjudication of its insurance benefits to determine whether or not the injured worker is able to work. Once they determine that, they can then use any attempt to appeal that decision as the underlying basis of a or many theft charges. This is the definition of double jeopardy, and should be thrown out.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. *In re Brett*, 16 P.3d 601, 604, 142 Wash.2d 868 (2001) (citing, inter alia, *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "Prejudice is established when 'there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" *Id.* (citing *State v. Hendrickson*, 129 Wash.2d 61, 78, 917 P.2d 563 (1996)).

“The inquiry in determining whether counsel’s performance was constitutionally deficient is whether counsel’s assistance was not reasonable considering **all of the circumstances.**” *Id.* (citing *Strickland*) (*emphasis added*). Although *Brett* dealt with counsel’s failure to conduct a reasonable investigation into the defendant’s mental health, the summary of the legal standards at issue readily lends itself to the facts in the instant case. Mr. Cox’s counsel failed to provide records to his one and only medical witness, failed to object to the admission of altered evidence, allowed the State to poison the jury by introducing witness testimony of unrelated prior acts and personal attacks, among other errors to be detailed below. On review of the record it is clear that but for counsel’s errors, the result of the trial would have been different.

I. Failure to Deliver Medical Records to the One and Only Medical Witness Presented.

In *Brett* the Court opines that failure to deliver the defendant’s medical records to an examining physician until two days before the trial compromised that physician’s testimony. *See Brett* at 608 (citing *Bloom v. Calderon* 132 F.3d 1267 (9th Cir. 1997), holding that failure to gather or deliver relevant records to an examining physician was ineffective assistance of counsel). Here, upon cross examination, counsel’s only medical witness, Dr. H. Graeme French, is unable to comment on several

questions asked of him by the State due to his lack of medical notes from other physicians. All of these records were available, easily obtainable, and should have been given to Dr. French by counsel to prepare for testimony.

Q: (By Assistant Attorney General Ms. Tienney Milnor on Cross Examination) Okay, so you don't know whether or not you have [State's medical witness Dr. Monlux's] medical records from the time that he saw him in December of 2008 until early 2011?

A: (Dr. French) I think I only have two copies of Dr. - - two visits with Dr. Monlux. So I don't have most of his notes.

Q: So you are unaware of what Dr. Monlux found on all those other days?

A: No. Not that I can remember.

Q: And you're unaware of what Dr. Shearer (another State medical witness) found between January 30 of '08 and November of 2008, correct?

A: That would be correct.

Q: Likewise you don't know what the defendant reported he could or couldn't do on those dates, correct?

A: I - - that's correct.

Q: Now did you speak with Dr. Shearer?

A: No.

Q: Did you speak with Dr. Monlux?

A: No.

Q: Did you speak with Dr. Schneider (State's 3rd medical witness)?

A: No.

Q: Did you read a report from a private investigator by the name Mr. Byrnes (State's private investigator)?

A: I don't remember reading that report.

RP 510.

This also paves the way for the State to discredit the defense in its closing argument.

... Dr. French when he testified he admitted he had almost - - he hadn't even received or reviewed almost two years of medical records. And it's the same two years the same time period that we're talking about here, 2008 and 2009 he had some of Dr. Shearer's stuff. He had a couple of Dr. Monlux's reports, but you had to sit here for hours listening to them go over all the times that they saw the defendant. Dr. French didn't even have any of that stuff and he's come in here telling you that he knows what was going on with the defendant back during this time period ...

RP 712.

Without the review of the medical records of these other doctors and witnesses, the prosecution was able to effectively undermine Dr. French's testimony by making him look unprepared and uninformed,

thereby prejudicing the jury and discrediting the defense. This was especially damaging given the fact that this was the only medical witness called by the defense.

II. Failure to Object to the Admittance of Altered Evidence

Counsel for Mr. Cox also failed to make several key objections with regard to the evidence presented by the State, none more palpable than the failure to object to the entirety of the video evidence taken by Mr. Armstrong. At *RP* 239-40, the prosecution asks Mr. Armstrong to testify as to the video surveillance he took of Mr. Cox. Mr. Armstrong replies “I took minis and then you guys apparently transferred them to the disk, but what I gave the Department of Labor was mini discs so I would have to see them to say if they were mine. I don’t know what was on here so.” *Id.* This interaction demanded questions on best evidence and chain of custody issues, and a hearing outside the presence of the jury should have been requested before any of this evidence was admitted and shown to the jury. Mr. Cox’s counsel made no such request, and as with nearly every other opportunity to object to evidence when asked by the court, counsel stated “I will stipulate that the video is admissible.” *Id.*

Certainly Mr. Cox does not mean to suggest that anything and everything offered or said by opposing counsel should be nitpicked, undermining judicial efficiency. However, it can hardly be argued that Mr.

Cox's constitutionally-guaranteed counsel was zealously advocating for his client when he heard that the medium by which substantial video graphic evidence was to be shown to a jury had been altered by the state, and made absolutely no objection. In no way should this lack of attention to the proceedings be considered reasonable. Even if this altered evidence were to pass muster after a hearing, the jury should have been made aware that there was a question as to the validity and completeness of its contents.

III. Prejudicial Testimony

Continuing through the record, it becomes evident that Mr. Cox's counsel failed to take objection to the introduction of testimony that has clear prejudicial effect, and painted Mr. Cox as a person who was unsavory, reckless, and irresponsible. At *RP* 244, the State's witness Mr. Armstrong testified that Mr. Cox intentionally used a noisy wood chipper near Mr. Armstrong's house. In response to the State's question about how long this went on, Mr. Armstrong testified that "it was like three days, I ended up, we both ended up in jail." *Id.* Mr. Cox's counsel should have objected to this testimony based on relevancy, prejudicial effect, or non-responsive answer, but instead did nothing, which meant no instruction was given to the jury to disregard such irrelevant and prejudicial testimony.

Almost directly thereafter, when responding to the State's question about his distance from Mr. Cox during part of the video footage, Mr. Armstrong describes what Mr. Cox is doing and states "... he is intimidating me." *RP* 245. Again this irrelevant, prejudicial, and attack on Mr. Cox's character was allowed to fall upon the jury's ears unfettered, without a peep from Mr. Cox's counsel.

Ultimately, after more accusations from Mr. Armstrong about Mr. Cox's citation for fire hazards, walking his dogs off-leash, and apparently dumping rocks in a "preserve area," Mr. Cox's counsel finally objects and the Judge tells Mr. Armstrong not to elaborate, but not until testimony of irrelevant prior acts and argumentative character attacks had been presented to the jury. *See RP* 243-47.

Mr. Armstrong later testifies about Mr. Cox's "phony claim." Mr. Cox's counsel does object, but only as to the fact that the testimony happened to be hearsay. The court's only comment on the matter was "well it's admissible only for the purpose of explaining how Mr. Armstrong knew about the claim. I'll allow that purpose and that purpose only." *RP* 276. While Mr. Cox's did in fact object to this testimony, nothing was said about the prejudicial effect of the characterization of Mr. Cox's industrial insurance claim as being "phony." Again, the jury was subjected to accusatory and prejudicial testimony. Reasonable counsel

would have requested the court give an instruction on disregarding that testimony. After all of the accusatory, inflammatory, and irrelevant comments made by Mr. Armstrong (whom the record establishes has a long-standing, contentious relationship with Mr. Cox), most of which was not objected to by Mr. Cox's counsel, the jury was unjustly swayed.

IV. Failure to Investigate Defendant's Capacity to Stand Trial

In re Brett, as previously mentioned, outlines the Court's position on whether counsel is considered to be ineffective for failing to conduct a reasonable investigation, given significant medical and mental conditions of the defendant. In short, the Court found that counsel was indeed ineffective since there was "substantial medical and psychiatric opinion available at the time of Brett's trial to support a defense theory...[and]... counsel failed to conduct a reasonable investigation into these medical and mental conditions." *Brett* at 603.

Here, *CP 204-15* establishes that at or about the time of charging in this case, Mr. Cox had been prescribed and was taking five separate medications. Even a simple "Google" search reveals that the medications Mr. Cox was taking – Citalopram, Divalproex, Ambien, Buspar, and Neurontin – are used for the treatment depression, anxiety, manic bipolar disorder, seizures, and insomnia. The evidence of these medications, and the underlying medical and mental health conditions was readily apparent

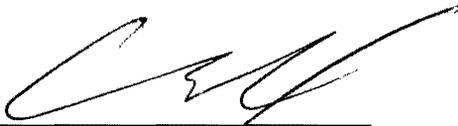
and warranted an investigation into Mr. Cox's capacity to stand trial. Mr. Cox's counsel failed to do so, and as the Court ruled in *Brett*, the assistance of Mr. Cox's counsel should be found to have been ineffective.

V. CONCLUSION

Mr. Cox respectfully requests the court overturn the convictions of one count of theft in the first degree, and one count of theft in the second degree, (charge 2 and 3) based on the foregoing argument and legal precedent.

Originally submitted the 15th day of April, 2013.

Respectfully re-submitted this 17th day of May, 2013.



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VI. APPENDICES



RULE 2.5
CIRCUMSTANCES WHICH MAY AFFECT
SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) Generally. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) Security. If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) Conflict With Statutes. In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served,

decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

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COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

State of Washington)	COA No. 310655
)	
Plaintiff/Respondent)	
v.)	Whitman Cty. Sup. Ct. No.
)	111001959
Michael D. Cox)	
)	
Defendant/Appellant)	Declaration of Service
)	

I DECLARE, that my name is Christopher S Carlisle, attorney with Stiley and Cikutovich, PLLC, I am and at all times hereinafter mentioned, a citizen of the United States and a resident of Spokane County, Washington, over the age of eighteen years, and that on 5-17-13, I caused the Appellant's Opening Brief, corrected, to be mailed, by way of US Mail, to

John Christopher Hillman,
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Micheal David Cox
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Albion, WA 99102

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 17th day of May, 2013



Christopher S Carlisle

DECLARATION OF SERVICE

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