

63337-6

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ORIGINAL

NO. 63337-6-I

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

STATE OF WASHINGTON,
Respondent,

v.

MELISSA JOSLIN (AKA MELISSA FRENICK),
Appellant.

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

The Honorable Jim Rogers, Judge

OPENING BRIEF OF APPELLANT

2011 MAR 10 AM 9:51
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A. ASSIGNMENTS OF ERROR

(1) The trial court committed reversible error by failing to instruct the jury on Ms. Frenick's good faith claim of title defense.

(2) Ms. Frenick's trial counsel did not request the good faith claim of title instruction, which was crucial to her defense. Ms. Frenick should be granted a new trial due to ineffective assistance of counsel.

(3) Ms. Frenick should be granted a new trial due to prosecutorial misconduct in her cross examination.

(4) The trial court erred by denying new counsel's post-trial motion to substitute in as Ms. Frenick's counsel, so that he could litigate Ms. Frenick's motion for a new trial, which raised the three issues above.

B. STATEMENT OF THE CASE

1. Summary of Proceedings Below

Melissa Joslin/Frenick (hereinafter "Melissa Frenick" or "Ms. Frenick") was charged by information with the offenses of theft in the first and second degree (20 counts). CP 5-12. Trial of the case resulted in a guilty verdict. CP 124-143. Undersigned counsel filed a motion to substitute in and argue post-trial motions. CP 154-163. The motion was denied. CP 164.

Ms. Frenick was sentenced to four years in prison. CP 324-335. This appeal followed. CP 321-324.

2. Summary of Testimony

The State's witnesses contended, inter alia, that Ms Frenick exerted unauthorized control over her employer's funds by writing and/or forging a series of checks and depositing them. Ms Frenick testified that she was entitled to the funds.

C. A New Trial Should Be Granted Because the Jury Was Not Instructed on the Good Faith Claim of Title Defense.

RCW 9A.56.020(2)(a) provides:

In any prosecution for theft, it shall be a sufficient defense that: (a) the property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; ...

Under this statute, a defendant cannot be guilty of theft if she takes property under a good faith subjective belief that she has the right of ownership or believes she is entitled to possession of the property. *State v. Ager*, 128 Wn.2d 85, 92, 904 P.2d 715 (1995). On a showing of a subjective good faith belief of ownership supported by evidence of some legal or factual basis for the belief, a defendant is entitled to a jury instruction on the defense. *State v. Ager*, 128 Wn.2d at 96-97. Because the defense negates the intent element of the offense of theft, the state must prove the absence of the defense beyond a reasonable doubt. *State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984); see 11 *Washington Pattern Jury Instructions: Criminal* 19.08, at 252 (1994).

There was ample testimony at trial to support the giving of the instruction. Ms. Frenick testified that she did not take any money from the Seven Seas Company that she was not entitled to. Some of the checks that she wrote to her husband, Zachary Frenick, represented her overtime pay for working on the boat. She explained the accounting system used by the Peter Pan and Seven Seas Companies, and explained why some of her compensation was represented in checks written out to her husband. RP (12/11/08) 23-26.¹ She pointed out instances where attorneys were paid for through the Seven Seas account. RP (12/11/08) 28. Ms. Frenick testified that she received bonus checks from the Peter Pan Company. RP (12/11/08) 39-40. She reiterated that checks that were written to Zachary Frenick by Stellar Seafoods represented compensation for work that Ms. Frenick had done. RP (12/11/08) 56.

Ms. Frenick was shown 23 checks, one of which was made out to her. She testified that all of the checks represented compensation for overtime that she was owed by Stellar Seafoods. She testified that she asked that the checks be made out to her husband and that was done. RP (12/12/08) 7-9.² She testified that several checks represented legal payments made on her

¹ The transcript of Ms. Frenick's December 11, 2008 testimony was attached as Exhibit B to the post-trial motions. CP 165-289.

² The transcript of Ms. Frenick's December 12, 2008 testimony was attached as Exhibit C to new counsel's post-trial motions.

behalf to Kevin Scudder, and that the checks could have represented reimbursements for expenses, as well as overtime. RP (12/12/08) 9-11, 32.

In short, under Ms. Frenick's testimony, she asked the company to issue checks in compensation for her work, particularly overtime work, in the name of her husband, Zachary Frenick. She testified that all funds she received were funds she was entitled to. The jury could find from the testimony that she openly and avowedly requested, and received, checks compensating her which were made out to her husband as payee. There was sufficient evidence to give the instruction. The instruction went directly to her defense. Her defense was good faith claim of title—that she was entitled to receive the funds.³

D. *Ms. Frenick Received Ineffective Assistance of Counsel.*

Ms. Frenick had a right, under the Sixth Amendment, to effective assistance of counsel *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2053, 80 L.Ed.2d 624 (1984). Ms. Frenick's defense at trial was good faith claim of title. Defense counsel failed to ask for the instruction. There was no tactical reason not to request the instruction. Trial counsel's performance was deficient, and prejudicial. Relief should be granted.

³ No good faith claim of title instruction was requested. Since the Court denied undersigned counsel's motion to substitute in as counsel, undersigned counsel was precluded at that time from litigating a hearing on ineffective assistance of counsel.

E. *Melissa Frenick Should Be Granted a New Trial Based Upon Prosecutorial Misconduct.*

“[I]t is improper to invite a witness to comment on another witness’ accuracy or credibility by asking whether the witness was mistaken or lying.” *State v. Walden*, 69 Wn. App. 183, 187, 847 P.2d 956 (Div. I, 1993). This rule applies whether the prosecutor seeks comment from a defense witness on the testimony of a police officer or the testimony of a civilian. *State v. Stover*, 67 Wn. App. 228, 231, 834 P.2d 671 (Div. I, 1992) (holding that prosecutor’s questioning designed to compel defense witnesses to state whether other witnesses had lied was improper).

Such misconduct occurred in this case. There were three instances.

(1) First, the prosecutor made reference to prosecution witness Jenny Wigner’s (now Jenny Franks’) testimony that she gave Ms. Frenick copies of the pay stubs. The prosecutor cross-examined Ms. Frenick, asking her if she was saying that Ms. Wigner’s testimony about giving copies of the pay stubs was inaccurate; Ms. Frenick replied, “Yes”. RP (12/11/08) 50.

(2) Second, the prosecutor then embarked on a series of questions designed to elicit Ms. Frenick’s opinion about whether Ms. Franks’ testimony about the handling of petty cash on the boat was inaccurate:

Q. (By Ms. Petersen) She gave you petty cash slips?

A. (Ms. Frenick): Yes.

Q. And she gave you the leftover petty cash that was on the boat?

A. No.

Q. She didn't show – did not give you the petty cash?

A. No, she did not. It goes in the safe. That's where the money always stays for the boat is in the safe.

Q. So your testimony is that there's cash left on the boat when the boat is in port?

A. Absolutely.

Q. Okay. So Ms. Franks' testimony about that is inaccurate?

A. I don't recall her testifying to that.

Q. Okay. If she had testified to that, you're saying that that testimony would be inaccurate?

MR. STODDARD: Your Honor, I will object to that question.

THE COURT: Overruled.

THE WITNESS: The petty cash stays on the boat in the safe. That's why it's petty cash. It doesn't leave the boat.

Q. (By Ms. Petersen) Okay. My question is if Ms. Franks had testified that she gave you or anybody else, Mark Weed, the petty cash that was on the boat when they came back into port my question is if she had testified to that would that testimony be inaccurate?

A. Yes, I brought the cash to the boat if we needed more, but I never removed cash from the boat.

Q. That wasn't my question, Ms. Joslin. My question is whether or not that testimony would be inaccurate?

A. Yes, it would.

RP (12/11/08) 50-52.

(3) Third, on the second day of Ms. Frenick's testimony, the prosecutor pursued the same pattern of improper questioning, this time asking Ms. Frenick to opine as to the accuracy of Ms. Wigner's testimony about which employees were paid from the Stellar account:

Q. (By Ms. Petersen) You never worked on the actual physical vessel when the vessel was out in Alaska; is that correct?

A. (By Ms. Frenick) Correct.

Q. And this Stellar account was only used to pay employees that were actually physically on the boat; isn't that correct?

A. No.

Q. Those were the only employees that were paid off that account; is that correct?

A. No. Absolutely not.

Q. So if Ms. Wigner had testified that those were the only employees that were paid off this account as part of payroll that would have been incorrect?

- A. That's correct.
- Q. Wasn't that just your testimony that the only employees that were paid off this account were the hourly employees who work on the boat?
- A. You asked if there was just Stellar employees, and there was more than Stellar employees paid out of that account.
- Q. Was your testimony just a couple minutes ago that only hourly employees on the boat were – were paid out of this account?
- A. For that particular question, yes.
- Q. Okay. And you're saying that there are other employees that you – that were being paid?
- A. Yes.
- Q. But regarding the – but they were being paid as hourly employees off of this account; is that what your testimony was?
- A. Yes. Yes. Yes, it is.
- Q. And you are maintaining that those are Peter Pan employees, correct?
- A. Yes. I can show you.
- Q. Are you saying that that was your responsibility to pay those employees?
- A. Yes. You can look on your accounts. They were right on there.
- Q. So you were writing checks in the office on the boat account to Peter Pan employees?
- A. Yes, I did.

- Q. And Ms. Wigner was not?
- A. No. There's – it's in your –
- Q. My question is your testimony is Ms. Wigner was not?
- A. Was not what?
- Q. Was not writing those checks to those employees?
- A. The particular ones? No. That was my job.

RP (12/12/08) 15-17.

The record demonstrates that not once, not twice, but thrice, the prosecutor directly violated the rule of *State v. Walden* and the other Division One cases cited therein. Here, the prosecutor repeatedly cross-examined Frenick in an effort to get her to testify that another witness' testimony was "incorrect" or "inaccurate". Such lines of questioning have long constituted prosecution misconduct:

The State argues that it is not improper for a prosecutor to cross-examine a witness as to whether another witness is merely mistaken, as opposed to lying, citing case law from other jurisdictions. [Citations omitted.]

However, the rationale underlying the holdings in *Padilla*⁴, *Casteneda-Perez*⁵, and *Barrow*⁶ is that

⁴ *State v. Padilla*, 846 P.2d 564 (1993).

⁵ *State v. Casteneda-Perez*, 61 Wn. App. 354, 360, 810 P.2d 74 (Div. I, 1991), *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991).

⁶ *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (Div. I, 1991).

such questioning is irrelevant and argumentative [citations omitted], and invades the province of the jury [citations omitted].

This rationale does not support the distinction the State urges this Court to make. Asking a witness whether another witness is lying is certainly more prejudicial than asking whether another witness is merely mistaken. In both situations, however, the questioning is designed to elicit testimony in the form of one witness' opinion as to the credibility or veracity of another witness, a determination which lies solely within the province of the jury.

... [I]t is improper to invite a witness to comment on another witness' accuracy or credibility by asking whether the witness was mistaken or lying. Accordingly, the defense attorney's objections to the above quoted cross-examination should have been sustained.

State v. Walden, 69 Wn. App. at 186-187. Ms. Frenick should be granted a new trial based on prosecutorial misconduct during her cross-examination.⁷

⁷ The transcript indicates that one objection was made by trial defense counsel, but the grounds were not stated, which under ordinary circumstances would require the need to brief and argue the issue of ineffective assistance of counsel. However, since the trial court denied appellate counsel's motion to substitute in as Ms. Frenick's counsel, the Court's ruling effectively precluded Ms. Frenick from timely raising ineffective assistance of counsel arguments in the trial court prior to sentencing in this matter.

F. *The Trial Court Erred By Denying the Motion to Substitute Counsel.*

Undersigned counsel moved to substitute in. The motion presented issues to be raised before sentencing. The trial court erred by denying the motion, thus precluding new counsel from raising the new trial issues before Ms. Frenick was sentenced to prison.

The trial court's actions deprived Ms. Frenick of her Sixth Amendment right to counsel of her choice.

G. *CONCLUSION*

The record in this case demonstrates instructional error at Ms. Frenick's trial. No proper good faith claim of title instruction was requested by defense counsel. We urge the Court to review the issues set forth herein on appeal because there is manifest error affecting Ms. Frenick's constitutional rights, under the Sixth and Fourteenth Amendments to the United States Constitution, to a fair trial before properly instructed jury. See RAP 2.5(a)(3).

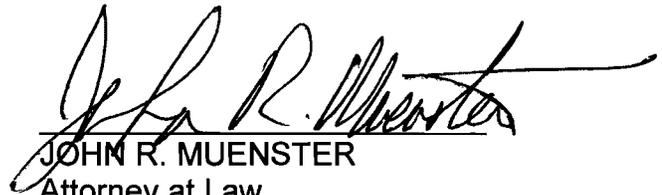
For the reasons stated, we urge the Court to reverse the judgment,
and remand this cause to the King County Superior Court for a new trial.

DATED this the 10th day of March, 2011.

Respectfully submitted,

MUENSTER & KOENIG

By:



JOHN R. MUENSTER

Attorney at Law

WSBA No. 6237

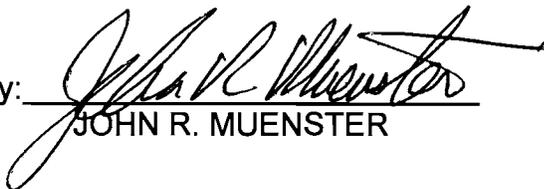
Of Attorneys for Appellant Melissa
Joslin/Frenick

CERTIFICATE OF SERVICE

I certify that on March 10^{JRM}, 2011, I served opposing counsel in this case via fax, to be followed by first class mail.

DATED this the ~~10~~ day of March, 2011.

MUENSTER & KOENIG

By: 
JOHN R. MUENSTER