64407-6

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No. 64407-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RANDALL KNOWLES,

Appellant.

FILED
COURT OF APPEALS DIV #1
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Michael T. Downes

REPLY BRIEF

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A. REPLY ARGUMENT

Appellant agrees with Respondent that It is understood that the jury was correctly instructed on all elements of the offense of possession of a stolen vehicle (PSV). In the circumstances of this case, it was nonetheless prosecutorial misconduct in closing argument to tell the jury that the defendant could be convicted of PSV merely for the act of sitting inside or driving a car that was .

This Court may of course properly consider the jury inquiry (asking if knowledge is required to convict) demonstrating the reversible impact of this misstatement. The Respondent has cited no case that precludes this Court from reviewing every phase of the trial and instead merely waives around the words "inheres in the verdict" in attempting to avoid the obvious implications of the jury's confusion on whether knowledge is required to convict.

Further error occurred when the defendant's right to be present with counsel at the court's response to the jury's inquiry was violated, which requires reversal as the defendant was precluded from exercising his last chance to cure the prior disabling of the constitutional structure of the proofs' presentment, or at a minimum, exacerbated the prejudice of the misconduct in closing.

The State routinely casts about with claims of harmlessness

throughout its responsive briefing in this case. But there was little evidence below that the defendant actually knew he was in possession of a stolen vehicle as opposed to one he believed he had permission to drive. The State cannot in this context secure affirmance by pointing to other parts of closing that were non-violative of the requirement of accurate representations of the state of the law, because in closing argument, the prosecutor specifically stated it was not necessary to find that the defendant acted with "knowledge." 7/27/09RP at 232-34.

THE STATE IGNORES THE FACTUAL CONTEXT OF THE ENTIRE CASE INCLUDING MR. KNOWLES' DEFENSE OF INNOCENT USE OF THE CAR, WHEN IT DISMISSES THE DEPUTY'S CRUCIAL MISSTATEMENT OF THE LAW AS AN UNIMPORTANT MIS-UTTERANCE, AND ATTEMPTS TO DISTRACT THE COURT FROM THE INTERTWINED GRAVE HARM OF NOT CONSULTING THE DEFENDANT ON THE JURY QUESTION THAT WENT DIRECTLY TO THE VERY JURY CONFUSION CAUSED BY THE PROSECUTOR'S MISCONDUCT.

Again viewing the State's closing argument in context as appellant did so originally, the State's effort to dismiss the prosecutor's misconduct as a mere collateral remark is not persuasive. The misstatement of law went to the core of the case.

The Respondent State of Washington concedes that the DPA misstated the law in closing argument, but contends that the remark

had no bearing on the outcome of the case. This assertion is meritless, and many of the State's claims were anticipated in the Appellant's Opening Brief.

At no point in the Brief of Respondent does the State respond with any substance to the accurate and thorough description of the State's proofs and the concordant gravamen of the improper urging by the DPA to convict this defendant without proof of knowledge. Such proof was lacking in a case where there was little indicia showing an innocent observer or driver of the car that the Mustang was stolen, including no entry damage to the vehicle or damage to the ignition. 7/27/09RP at 179, 187.

In closing argument, defense counsel argued that the State had not proved knowing possession or proofs compatible with Mr. Knowles' taking the car with the belief he had permission. 7/27/09RP at 187; 7/28/09RP at 216-232. The key to the car that the defendant possessed was indeed not "shaved," and would have not indicated to a person that the car was stolen. 2/28/09RP at 217.

The State, in rebuttal closing, in fact committed misconduct by telling the jury two things that were legally and constitutionally false, and bolstered his incorrect pronouncement of what was "not required" to convict Mr. Knowles by then mischaracterizing the defense closing argument.

This was a panoply of misconduct, and the notation by the Respondent of other points in closing where the prosecutor described the offense's elements while foregoing incorrect statements, does not persuade a reasonable person that the comment was stray and ineffectual.

Causing immediate and specific harm, the State told the jury that "[m]aybe [the defendant] didn't know [the car] was stolen at the time until the police came" and began questioning him, when he had left the car and was sitting in a patio area of a restaurant. 2/27/09RP at 234. But the applicable law provides that the defendant must both have "knowledge" and be in possession of the vehicle. RCW 9A.56.068(1). And this was no offhand comment. The State then mis-listed the elements of the crime it was telling the jury were needed to convict

> The facts are this. On June 5, somehow the Defendant got the key. He was driving the vehicle based on what you saw of the evidence and the Defense argument that I am submitting to you now. He possessed the vehicle and he did not have permission to drive it.

7/27/09RP at 234. The State therefore asked that the jury find the defendant guilty. 7/27/09RP at 234.

The Respondent suggests that correct jury instructions in a criminal case necessarily cure the harm of prosecutorial misstating of the law in closing argument. Yet it has been decided that a

prosecutor may not argue to the jury in a manner that misstates the law or eliminates the burden of proof of every element of the offense as properly stated in the instructions. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1983) (misconduct for prosecutor to argue accomplice liability in absence of accomplice liability instructions); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (misconduct in conflict with jury instructions for prosecutor to argue jury could only acquit if found complainant was lying), review denied,131 Wn.2d 1018 (1997).

The prosecutor improperly, for some reason, emphatically and specifically misstated the basic law of this case. During deliberations, the jury was plainly confused by the prosecutor's improper closing argument. The jurors sent out an inquiry asking as follows:

> Instruction No. 8. Question # 1. Does the defendant have to knowingly know the vehicle was stolen or just be in possession of the vehicle to prove or not approve question # 1.

CP 81. This jury was plainly confused about whether knowledge was required. Furthermore, Mr. Knowles had no opportunity to correct the jury's misimpression. The minutes and record and the jury inquiry form fail to show that the defendant and counsel were consulted by the court during this critical stage of trial, as required by due process and the 6th and 14th Amendments. Rogers v. United States, 422

U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); Supp. CP ___, Sub # 43 (trial minutes, minutes of July 28, 2009). Washington's CrR 6.15(f)(1) embodies this rule when it provides that the trial court shall respond to jury inquiries "in the presence of, or after notice to the parties or their counsel."

Notably, the Respondent preposterously attempts to use the absence of a showing that the defendant was properly consulted as the basis for a contention that the "facts necessary to adjudicate the claimed error are not of record on appeal." Brief of Respondent, at p. 19. In fact, the manifest and reversible nature of the error depends on the fact of the central disputed issue of knowledge, and the prosecutor's misrepresentation of the law.

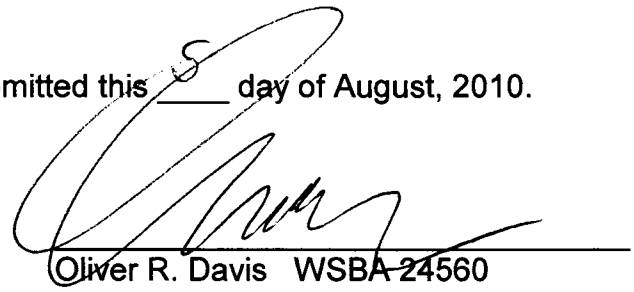
The Respondent's briefing never disputes the rule that violation of the bar against ex parte judicial communications to a jury, as occurred in this case, will require reversal only if the State proves to the appellate court that the error was harmless beyond a reasonable doubt. State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980). Here, the State's purposeful crafting of its incorrect argument in the heat of proper argument by the defense, and the prosecutor's emphatic delivery of legal misstatements central to the case,

exacerbated the gravamen of the misconduct to a level where that standard for affirmance in the face of such error cannot be met.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Knowles respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 5 day of August, 2010.



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Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	CHARLES BLACKMAN, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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