

67837-0

67837-0 SD

NO. 67837-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

OCTAVIUS ROSTICK,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Mr. Rostick of trafficking in stolen property in the second degree.

2. The prosecutor committed misconduct by disparaging the defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict Mr. Rostick of trafficking in stolen property in the second degree, the State had to prove he recklessly sold property belonging to another. Specifically, the State was required to prove that Mr. Rostick knew of and disregarded a substantial risk that a wrongful act might occur, and that in this regard, his conduct was not reasonable. Here, Mr. Rostick sold two guitars at pawn shops for a friend, and the guitars bore no obvious indicia that they were stolen. Must Mr. Rostick's conviction be reversed and dismissed where the State failed to prove beyond a reasonable doubt that Mr. Rostick recklessly trafficked in stolen property?

2. A prosecutor, as a quasi-judicial officer, has an obligation to seek a verdict based upon reason, and the duty to see that the accused is given a fair trial before an impartial jury. Here, the prosecutor disparaged the defense during closing argument, improperly commenting on Mr. Rostick's constitutional right to a

defense. Did the prosecutor's closing argument thus deprive Mr. Rostick of a fair trial?

C. STATEMENT OF THE CASE

On April 18, 2011, Octavius Rostick received a call from a friend, who asked him to pawn a G & L Comanche electric guitar for him, and bring him the proceeds. 9/27/11 RP 66-67.¹ Mr. Rostick pawned the guitar at the Pawn X-Change shop on Rainier Avenue South in Seattle, and delivered the \$400 he received to his friend. Id. at 68.

On April 20, 2011, Mr. Rostick received a call from the same friend, asking him to help him pawn a Gibson electric guitar belonging to him, as he did not have time to do it himself. Id. at 68-70. Mr. Rostick picked up the second guitar and pawned it at the Pawn X-Change shop on Aurora Avenue North in Shoreline. Id. at 69-70. Mr. Rostick received \$500 and delivered it to his friend. Id. at 70.²

¹ The verbatim report of proceedings consists of proceedings held from September 20, 2011, through September 29, 2011, as well as sentencing proceedings on October 21, 2011.

² Mr. Rostick initially attempted to pawn the second guitar at the Cash America pawn shop in Shoreline. A clerk from that store would not accept the guitar, doubting both whether it was an authentic Gibson guitar, and whether it belonged to Mr. Rostick. 9/28/11 RP 7-13. The clerk conceded, however, that she was not concerned enough to report the guitar stolen. Id. at 18-19.

Unbeknownst to Mr. Rostick, the two guitars had been reported stolen by their actual owner, following a burglary a few days before in Bellevue. Id. at 6-8, 10-12. Mr. Rostick was not charged with the burglary.

Mr. Rostick was charged with two counts of trafficking in stolen property in the second degree. CP 23-24; 9/20/11 RP 4-5.

Mr. Rostick was convicted of both counts, following a jury trial. CP 50-51; 9/29/11 RP 7-11.

Mr. Rostick timely appeals. CP 63-70.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. ROSTICK OF TRAFFICKING IN STOLEN PROPERTY IN THE SECOND DEGREE.

- a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington

Constitution³ and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a

³ Art. I, section 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 22-23, 28 P.3d 817 (2001).

b. In order to prove that Mr. Rostick was guilty of trafficking in stolen property in the second degree, the State was required to prove beyond a reasonable doubt that he acted recklessly. Specifically, the jury was instructed that, to convict, the following elements had to be proved beyond a reasonable doubt:

- (1) That ... the defendant trafficked^[4] in stolen property;
- (2) That the defendant acted recklessly; and
- (3) That the acts occurred in the State of Washington.

CP 45 (Jury Instruction 13).

The jury was further instructed on the definition of recklessness, as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

⁴ To “traffic” means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person. CP 41 (Jury Instruction 9).

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 42 (Jury Instruction 10).

Here, however, the evidence that Mr. Rostick acted knowingly or intentionally – or that he disregarded a substantial risk that a wrongful act might occur -- was insufficient to convict him of the crime of trafficking in the second degree.

The State provided a witness from the Aurora Avenue pawn shop where Mr. Rostick sold the Gibson guitar that his friend gave him on April 20, 2009. 9/27/11 RP 82-95. This witness testified concerning the store's procedures for accepting pawned items and verifying the authenticity of merchandise, as well as the checking identity of customers. 9/27/11 RP 82-95, 98-99.

The State did not present testimony from the pawn shop employee who had assisted with Mr. Rostick's sale of the G & L Comanche guitar on April 18, 2009. 9/21/11 RP 21; 9/28/11 RP 78-79. Instead, the prosecution introduced testimony from an assistant manager from the Rainier Avenue pawn shop, who acknowledged that he was not involved in the transaction involving Mr. Rostick and the guitar and had no first-hand knowledge.

9/28/11 RP 78-79. The State thus failed to offer any evidence – from this store, or indeed from the other store -- indicating that Mr. Rostick's demeanor indicated that he was behaving nervously, furtively, or in any other manner that would have raised the suspicions of these experienced pawn shop employees.

The State may argue that Mr. Rostick had been given an indication that one of the guitars he was attempting to sell might be stolen property, due to the Cash America/SuperPawn Store's decision not to take the merchandise. Keanna Garner testified, however, that her decision to send Mr. Rostick to another shop was at least partially based upon her inability to verify the authenticity of the guitar by its serial number and year of manufacture. 9/28/11 RP 8-9. In addition, Ms. Garner conceded that she was not so concerned about the guitar being stolen that she filed a police report. Id. at 18-19.⁵

By failing to offer sufficient evidence that Mr. Rostick acted in a manner that disregarded a substantial risk that a wrongful act might occur, or acted intentionally or knowingly, the State failed to prove all essential elements of the charged offense, and the trier of

⁵ Even if this Court finds this witness sufficient, Mr. Rostick had already sold one guitar by the time he met Ms. Garner; therefore, her comments would only be relevant, if at all, as to the *mens rea* requirement for Count One.

fact erred in finding sufficient evidence to render a verdict of guilt. Where, as here, the State fails to prove all essential elements beyond a reasonable doubt, this Court must reverse a conviction. Green, 94 Wn.2d at 221.

c. The prosecution's failure to prove all essential elements requires reversal. The prosecution failed to sufficiently prove that Mr. Rostick acted recklessly when he sold the two guitars, by failing to prove beyond a reasonable doubt that he was disregarding a substantial risk that wrongful act might occur, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. MR. ROSTICK'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

a. Prosecutors have special duties which limit their advocacy. A prosecutor's misconduct in closing argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article 1, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d

551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d at 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993) (holding that in the absence of a defense objection, reversal for

prosecutorial misconduct in closing argument is required only if the misconduct was so prejudicial that it could not have been cured by an objection and appropriate curative instruction).

During closing argument, Mr. Rostick objected to some of, but not to every particular improper comment by the prosecutor; however, due to the flagrant nature of the remark, this issue may be raised for the first time on appeal. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); RAP 2.5(a).

b. The prosecutor may not denigrate the defense or argue his personal opinion. The prosecutor “has no right to mislead the jury.” State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955). Misleading arguments, when they are made by an attorney with the quasi-judicial authority accorded to the prosecutor’s office, are substantially likely to taint the jury’s verdict. Id.; Fleming, 83 Wn. App. at 215. Arguments that denigrate the defense are highly disfavored. See, e.g., State v. Gonzalez, 111 Wn. App. 276, 282-83, 45 P.3d 205 (2002).

Here, the prosecutor called the defense theory a “red herring.” 9/28/11 RP 113. The prosecutor thus argued to the jury that defense counsel was somehow less than honest, or that the

defense argument was disingenuous. This type of language in closing argument is disfavored, as it seems to accuse defense counsel of conspiring with a defendant to fabricate testimony. See, e.g., United States v. Holmes, 413 F.3d 770, 775 (8th Cir. 2005) (reversing due to prosecutor's remarks in rebuttal, including phrase, "red herring"). As the Holmes Court stated,

These types of statements are highly improper because they improperly encourage the jury to focus on the conduct and role of [the defense] attorney rather than on the evidence of [the defendant's] guilt. Such personal, unsubstantiated attacks on the character and ethics of opposing counsel have no place in the trial of any criminal or civil case.

413 F.3d at 775.

Comments which denigrate the defense, although never proper, are particularly egregious when made, as here, during rebuttal, since defense counsel is unable to respond, and the rebuttal is followed immediately by jury deliberations. Holmes, 413 F.3d at 778.

In addition, it is misconduct for a deputy prosecutor to express a personal opinion as to the credibility of a witness or the strength of a case. Monday, 171 Wn.2d at 677-78 (noting the State "crosses the line" when its own attorney throws the prestige

of his public office ... and the expression of his own belief of guilt onto the scales against the accused); State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003); State v. Price, 126 Wn. App. 617, 653, 109 P.3d 27 (2005). Misconduct occurs when it is clear that the prosecutor is arguing his or her personal opinion rather than making an inference based upon the evidence. Price, 126 Wn. App. at 653.

c. The prosecutor's flagrant misconduct requires reversal. Generally, an objection to prosecutorial misconduct is waived by the failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). However, the issue may be addressed for the first time on appeal when the misconduct was so "flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect." Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). "When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's comments affected the verdict." State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)

(conviction reversed where prosecutor repeatedly called defendant a liar during closing argument).

Here, to a large degree, the State's case hinged on the credibility of the pawn shop employees testifying for the prosecution. It was their testimony that the State relied on to show that Mr. Rostick had a reason to know the property was stolen. Therefore, the prosecutor's disparagement of the defense theory was particularly prejudicial.

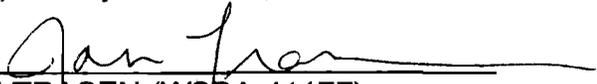
Accordingly, because the prejudice resulting to Mr. Rostick from the prosecutorial misconduct was severe, the convictions must be reversed. See Fleming, 83 Wn. App. at 216 (finding manifest constitutional error and reversing conviction, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense).

E. CONCLUSION.

For the foregoing reasons, Mr. Rostick respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 14th day of February, 2012.

Respectfully submitted,



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)	
Respondent,)	
)	NO. 67837-0-I
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)	
OCTAVIUS ROSTICK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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