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NO. 68136-2-1

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

REC'D

JUL 17 2012

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

GENE FULTON,

Appellant.

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

The Honorable J. Wesley Saint Clair, Judge

BRIEF OF APPELLANT

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KING COUNTY
APPELLATE UNIT
JENNIFER L. DOBSON
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A. ASSIGNMENT OF ERROR

Appellant was denied due process when the jury was permitted (over defense objection) to hear an officer's opinion on guilt.

Issue Pertaining to Assignment of Error

Appellant was charged with second degree burglary for purportedly stealing a washer and dryer from a new house that was still under construction. The truck appellant was driving, which had the washer and dryer in the back, was pulled over by police shortly after the burglary. Appellant testified that minutes before, however, he had purchased the washer and dryer from two men in a parking lot. As a practical matter, the only question for the jury to decide was whether appellant was the person who committed the burglary. During direct examination, a police officer testified that, based on the information dispatched and what he saw when he responded to the detention location, it was his opinion that police had found the perpetrator. Did this constitute an improper comment on guilt denying appellant his constitutional right to a fair jury trial?

B. STATEMENT OF THE CASE

1. Procedural History

On July 15, 2010, the Pierce County prosecutor charged appellant Gene Fulton with one count of second degree residential burglary. CP 1-7. The information was later amended and the charge was changed to burglary in the second degree. CP 16. Fulton was convicted following a jury trial and sentenced to 12 months plus one day. CP 42-49. He timely appeals. CP 50.

2. Substantive Facts

At approximately, 1:00 a.m. on June 13, 2010, Barbara Mae Solari was standing on her porch smoking when she noticed a truck pull into the driveway of a neighboring house that was still under construction. RP 6-21, 6-25-26, 6-32, 6-86. Aware of recent burglaries in the area, she called 911 and reported the incident. RP 6-26, 6-31. While talking to the 911 operator, Solari observed two men get out of the truck and go into the house. RP 6-36. They came out with a washer and dryer and loaded them into the truck. RP 6-37, 6-38. Solari relayed to the operator a description of the truck -- an older white Ford pick-up with a bad muffler. RP 6-28. Solari described the suspects as white men of average height and weight. RP 6-38, 6-55. After Solari watched the truck drive off,

officers made efforts to secure the main routes upon which the truck might drive away. RP 5-39; 7-62.

Meanwhile, Fulton drove to pick up his friend (and co-defendant) Cory Stobie at a nearby sports bar. RP 8-83, 8-97. While in the parking lot, Fulton saw two men in a white or tan Ford truck who were trying to sell a washer and dryer. RP 8-83, 8-98, 102. Fulton knew of friends who needed a new washer and dryer, so he agreed to purchase the items for the bargain price of \$240. RP 8-84, 8-105. The men quickly moved the washer and dryer from their truck to Fulton's truck. RP 8-116. Within minutes, Fulton found Stobie and the two left. RP 8-85. Fulton was driving the truck and Stobie was riding in the passenger seat. RP 5-48; 8-124.

Shortly after this, Officer Tillman Atkins saw Fulton's truck, which was similar to the description given of the suspect truck. RP 5-40. Atkins noted Fulton was not speeding. RP 5-78. Atkins pulled the truck over anyway and detained Fulton and Stobie. RP 5-43. After hearing of the detention, Officer Jamie Douglas arrived to assist. RP 7-59. When he arrived, he observed Fulton's Ford truck with a washer and dryer in the back and concluded they had the right suspects. RP 7-57, 7-66.

During trial, the core issue being litigated was whether Fulton was the person who committed the burglary or whether someone else did so. RP 9-43. While Officer Douglas was testifying, the following exchange occurred:

Q: What were you thinking when you came upon the scene and saw what you described to us?

A: Based on the totality of everything I'd been given¹ and what I saw, this was the suspect vehicle and [inaudible 3:31:01].

[Defense Counsel]: Objection, your Honor. I think that calls for something the Jury needs to decide and not this officer. Apparently the question is along the line of did we get the right people. I think that's a question that other people have to answer, not this officer.

[Prosecutor]: Obviously, the ultimate, the Jury will ultimately decide...whether or not the law enforcement obtained the correct individuals, but nevertheless, his thinking during the course of the investigation is extremely relevant to the facts of the case.

Court: I'm going to allow it overruled.

Q: Pardon me, officer, so you indicated based on the totality of what you knew about the situation?

A: That the, this was the suspect vehicle and these were the suspects.

¹ The State had already submitted a considerable amount of testimony establishing what information had been relayed to officers about the incident, the suspect vehicle, and the suspects. RP 5-38 to 5-41, 6-36 to 6-46, 6-78, 7-57 to 7-64.

Q: Did you have any reason to doubt that?

A: No.

RP 7-66 and 7-67. The jury convicted Fulton and Stobie as charged.

C. ARGUMENT

APPELLANT WAS DENIED A FAIR TRIAL WHEN THE JURY HEARD A POLICE OFFICER TESTIFY APPELLANT WAS GUILTY.

Fulton's right to a fair trial was violated when the State presented Officer Douglas' opinion that he believed Fulton and Stobie were the persons who broke into the house and stole the washer and dryer. This was an impermissible comment on guilt for which there was a timely objection. As such, the trial court committed constitutional error when it overruled the objection and permitted the opinion to be admitted to the jury as substantive evidence.

A defendant's right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007); State v. Johnson, 152 Wn. App. 924, 931-35, 219 P.3d 958 (2009).

The evil sought to be avoided by prohibiting a witness from expressing an opinion as to the defendant's guilt or innocence is having that witness tell the jury what result to reach rather than allowing the jury to make an independent evaluation of the facts. 5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989).

Consequently, no witness may express an opinion as to the guilt of a defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). As the Washington Supreme Court has held, it is “clearly inappropriate” for the State to offer opinion testimony in criminal trials that amounts to an expression of personal belief as to the guilt of the defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citation omitted). Such an opinion is not helpful to the jury and is highly prejudicial; thus it offends both constitutional principals and the rules of evidence. Id. at 591, n. 5.

To determine whether a statement constitutes improper opinion testimony, a court considers the nature of the charges, the type of defense, the type of witness, the specific nature of the testimony, and the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591. The improper testimony of a police officer raises additional concerns because “an officer's

testimony often carries a special aura of reliability.” Kirkman, 159 Wn.2d at 928.

Applying these factors here, Douglas’ opinion that Fulton was the person who stole the washer and dryer constituted an improper comment on Fulton’s guilt. As indicated, the charge was burglary. The defense theory was that someone else stole the washer and dryer and, consequently, the officers arrested the wrong man. Given this defense, the “core element” in determining Fulton’s guilt was whether he was indeed the person who stole the washer and dryer.² See, State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (focusing on the “core element” of the charges when concluding a witness offered an impermissible opinion as to guilt).

Importantly, the opining witness was an officer who offered his opinion that when officers stopped Fulton they had caught the perpetrator. Because the only element at issue in this case was identity, Officer Douglas’ opinion amounted to an expression of his personal belief as to Fulton’s guilt. Because the opining witness was an officer, the opinion is particularly damaging because it

² The State recognized this, stating: “The only thing in question is who did it.” RP 9-43.

carried with it an aura of reliability which the jury could not easily ignore. And with the court overruling the objection, they had no reason to ignore Douglas' opinion.

Finally, given the other evidence before the trier of fact, Officer Douglas' opinion was entirely unnecessary. See, Montgomery, 163 Wn.2d at 592 (explaining "It is unnecessary for a witness to express belief that certain facts or findings lead to a conclusion of guilt."). The State had already established what information was known to officers at the time of the stop. RP 5-38 to 5-41; 6-36 to 6-46, 6-78, 7-57 to 7-64. The jury also heard Officer Douglas describe what he personally observed when he arrived to assist in Fulton's arrest. RP 7-63 to 7-65. Hence, the jury was in just as good of a position as Officer Douglas to draw inferences as to whether the police had the right suspect in custody, and the defense's objection to the testimony should have been sustained. See, Montgomery, 163 Wn.2d at 591 (explaining witnesses may not tell the jury what result to reach and opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions).

This error was not harmless. Because the error is of constitutional magnitude, prejudice is presumed and the State

bears the burden of proving the error was harmless beyond a reasonable doubt. Olmedo, 112 Wn. App. at 533. It cannot meet this burden here.

On the one hand, Fulton testified that he obtained the washer and dryer from two men while at a sports bar just a few minutes before he was stopped. RP 8-79 to 8-132. On the other hand, the State argued there was not enough time for that to have happened. RP 9-58 to 9-60. According the State, the suspects fled at 1:07 a.m. and were spotted at 1:14. RP 5-40; RP 7-36. The State argued that seven minutes was not enough time for Fulton to have purchased the goods and driven to where he was spotted. RP 9-58 to 9-60. Thus, the State's case hinged on the jury believing its proffered time line. However, the State's own witness cast serious doubt as to the validity of the state's theory.

Officer Douglas testified that he drove the route from the burglarized home to the point where the truck was stopped and it took approximately 11 minutes. RP 7-72. More significantly, he explained that for Fulton to have left the scene at 1:07 and been where he was at 1:14, Fulton would have had to be driving at "an impossible rate of speed" and the load would not have remained secure given the road conditions. RP 8-37- 8-40. Given this

testimony, the validity of the seven-minute timeline upon which the State built its case was highly questionable.

With no valid timeline, the State's case against Fulton is not particularly strong. There was no eye-witness identification, no fingerprints or footprint evidence, no burglar tools found on Fulton or in his truck, no physical evidence from the scene suggesting Fulton's presence there. RP 6-113, 6-114, 6-119, 6-120-128. Although the washer and dryer were found in the back of Fulton's truck, given the defense's testimony, the jury still had to decide whether it was Fulton who illegally entered the home, took the washer and dryer, and loaded them onto his truck or whether someone else did it. Unfortunately, this is exactly the issue upon which the Officer Douglas opined.

Given this record, it cannot be said beyond a reasonable doubt that the jury would have reached the same result without that impermissible opinion. Reversal is, therefore, required. See, Black, 109 Wn.2d at 349, 745 P.2d 12 (reversing where witness testified that the victim suffered from rape trauma syndrome which constituted "in essence" a statement that the defendant was guilty); State v. Farr-Lenzini, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (reversing where improper officer opinion on defendant's guilt

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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 17TH DAY OF JULY, 2012, 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] GENE FULTON
DOC NO. 723227
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JULY, 2012.

x Patrick Mayovsky

2012 JUL 17 PM 4:33
COURT OF APPEALS DIVISION
STATE OF WASHINGTON