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NO. 68937-1-1

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

REC'D
JUL 30 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

SYLVIA KNOPP,

Appellant.

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

The Honorable Sharon S. Armstrong, Judge

2013 JUL 30 PM 4:14
COURT OF APPEALS DIVISION ONE
SEATTLE, WASHINGTON

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE STATE FAILED TO PROVE KNOPP APPROPRIATED HER MOTHER'S FUNDS TO THE USE OF ANYONE OTHER THAN THE TRUE OWNER.

The State failed to prove beyond a reasonable doubt that Knopp did not use the money she withdrew for her mother's benefit as authorized by the durable power of attorney. It also failed to disprove Knopp's claim that even, if her use of the money to pay herself was not actually authorized by the power of attorney, she took the money openly, avowedly, and with a good faith claim of title because she believed the power of attorney authorized her to do so. The State argues it is not required to prove how she spent the money. Brief of Respondent (BoR) at 14, n.8. This is incorrect. An element of theft in the first degree is that the property must be appropriated to the use of someone other than the true owner. RCW 9A.56.030. Thus, how the money was spent is the crucial question, and the State bears the burden of proof. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Knopp's inability to provide an accounting does not negate her defense that that money was taken openly. Knopp never claimed to be particularly adept at dealing with legal or financial matters. RP 719. She also explained that many of the records she tried to keep were taken from her. RP 766-67, 774-75. She never denied taking the money. RP 230, 532-

33, 554-55. When the police first contacted her, she admitted making cash withdrawals from the ATM machine. RP 554-55. As the State points out, she continued to make withdrawals even after a court order forbade her. RP 694-95.

Assuming she breached her fiduciary duty by failing to provide an accounting, or by unreasonable prioritization of paying first for the services she provided and disputing claims by others, the law is clear that breach of fiduciary duty and theft are two different legal concepts. See Brown ex rel. Richards v. Brown, 157 Wn. App. 803, 817, 239 P.3d 602, 609 (2010) (difference between tort of conversion and crime is wrongful intent); Ager, 128 Wn.2d at 92 (difference between conversion and embezzlement is criminal intent) (quoting 2 Wayne R. LaFare & Austin W. Scott, Jr., Substantive Criminal Law § 8.6(a) at 379 (1986)); State v. Mermis, 105 Wn. App. 738, 748, 20 P.3d 1044, 1050 (2001) (“The difference between theft and breach of contract or failure to pay a debt is criminal intent.”). One is a crime, and the other is not. Id. The difference is criminal intent. Id. While the failure to provide an accounting, or an unreasonable prioritization of payments might constitute a breach of the fiduciary duty, it does not establish the crime of theft. Nor does it defeat Knopp’s defense of a good faith claim of title. The State’s brief, and its argument at trial, reflects

wishful thinking about the state of the law and an attempt to blur the lines between breach of fiduciary duty and theft.

The State also argues the defense of good faith claim of title only applies to specific tangible property. BoR at 24. But the cases cited by the State do not support this argument. The State cites to State v. Self, 42 Wn. App. 654, 655-56, 713 P.2d 142 (1986), a robbery case, in which a laborer enlisted a third party to confront his employer over payment he was owed. The third party was charged with first-degree robbery for assaulting the employer and threatening him with a knife and then a firearm. Id. He then took the employer's car keys and wallet containing cash and credit cards. Id.

The court held Self was not entitled to jury instructions on the good faith claim of title defense because he was not entitled to the employer's cash, credit cards, or car keys. Id. at 657. The court held there was no evidence either Self or the laborer had a claim to the specific property taken, and that this defense was unavailable in debt collection cases. Id. The court next explained its decision was supported by the policy of eschewing self help through violence. Id. at 658. Finally, the court rejected the defense because Self was not the party who was owed the money. Id. at 658-59. If anyone had a claim, it was the laborer, not Self. Id. at 659.

The other cases cited by the State also involve violent attempts at debt collection in which something other than the claimed item was taken.

See State v. Brown, 36 Wn. App. 549, 551-52, 559, 676 P.2d 525 (1984) (good faith claim of title instruction not warranted when former wife, along with two armed accomplices, invaded former spouse's home and took stereo in order to secure the return of purse and gun allegedly taken by husband earlier that day); State v. Larsen, 23 Wn. App. 218, 596 P.2d 1089 (1979) (husband whose wife had performed sex acts for money threatened client with firearm and forced him to write new check after client had stopped payment on original check).

This case bears little, if any, resemblance to Self or the other cases cited by the State. BoR at 24. Knopp was the party who claimed she was owed payment. There was not even a suggestion of violence. There was no dispute that Knopp was legally authorized to access her mother's funds in order to pay her mother's expenses. The fact that this defense was not available to a third party who used violence to collect on a debt by seizing unrelated property has no bearing on whether Knopp had a good faith belief that she was entitled to pay herself, under the power of attorney, for expenses her mother would otherwise have had to pay someone else to do.

This case is akin to State v. Ager, 128 Wn.2d 85, 95, 904 P.2d 715, 720 (1995), in which an officer of a failing insurance company took money from the company paid assets to himself as an advance. The court discussed the fact that, if there were evidence such advances had, in the past, been

approved by the board, a good faith claim of title may have been established. Id. at 97. Knopp took the money openly. She did not use violence. Evidence was presented, in the form of the durable power of attorney, that she was authorized to use the money. The State failed to disprove her claim she had a good faith belief that the money she paid to herself was authorized.

2. THE PROSECUTOR'S CLOSING ARGUMENT ATTEMPTED TO EXTEND THE SCOPE OF THE CRIMINAL LAW THEREBY NEGATING KNOPP'S DEFENSE EVEN IF THE JURY BELIEVED HER.

The State concedes that a breach of fiduciary duty is insufficient to establish theft. BoR at 20; Brown, 157 Wn. App. 803. But the prosecutor in this case argued that a breach of fiduciary duty is criminal, akin to abandoning a child. RP 1014-16. The prosecutor also argued the good faith claim of title defense cannot apply to money used under the authority of a durable power of attorney. RP 1036-37. The thrust of the State's closing argument was that, even if Knopp were believed, the law did not support her defense. These misstatements of the law prejudiced Knopp by depriving her of the benefit of the law supporting her defense. Because this was the theme of the entire closing argument, no instruction would have resolved the conundrum.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Walker, 164 Wn. App. 724,

736, 265 P.3d 191 (2011). The jury instructions defined the defense of good faith claim of title and fiduciary duty. CP 57, 61. The State argues the law is undeveloped regarding the intersection of this defense and fiduciary duty. BoR at 2. That may be the case. But the prosecutor was not entitled to extend the reach of the criminal law during closing argument. Walker, 164 Wn. App. at 736.

This case essentially came down to a question of credibility. Knopp argued she believed she was entitled to pay herself, and that the documentation was stolen from her, making her unable to provide a full accounting. The State argued this was not believable. Viewed in context, the essence of the prosecutor's argument was that, even if Knopp believed she was owed the money, was entitled to reimburse herself under the power of attorney, and therefore had no criminal intent, she was still guilty. RP 1015, 1038. This was not a correct statement of the law. It was prosecutorial misconduct that deprived Knopp of the benefit of the law supporting her defense.

3. IF THIS ISSUE COULD HAVE BEEN RESOLVED BY INSTRUCTION, COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT AND REQUEST THAT INSTRUCTION.

It is well established that a criminal defendant is entitled to jury instructions on the law supporting the defense, and counsel is ineffective in

failing to request such instructions. State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987); State v. Powell, 150 Wn. App. 139, 155, 206 P.3d 703 (2009); State v. Kruger, 116 Wn. App. 685, 688, 67 P.3d 1147, 1148 (2003). It is no less ineffective to fail to object and request a curative instruction when the prosecutor misstates the law in a way that essentially nullifies the defense. See Thomas, 109 Wn.2d at 228 (“Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is.”).

Prejudice is established when there is a reasonable probability counsel’s failings affected the result of the trial. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The State argues there can be no prejudice because Knopp’s failure to provide the required accounting negates the possibility that she took the money openly. BoR at 31. The court should reject this argument. There was substantial evidence from which the jury could have found Knopp took the money openly. When approached by the investigator, she did not deny taking the money. Instead she told him, as she said again at trial, that she only paid herself money she was entitled to under the power of attorney. RP 554-55. She continued to do so, even in the face of a court order. RP 297-300. If the jury had not been misled by the prosecutor’s argument that good faith claim of title did not apply, there is a reasonable

probability the jury would have found there was at least a reasonable doubt as to whether Knopp had a good faith claim and therefore lacked the criminal intent required to prove theft.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Knopp requests this Court reverse her conviction.

DATED this 30th day of July, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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DIVISION ONE

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)	
Respondent,)	
)	
v.)	COA NO. 68937-1-I
)	
SYLVIA KNOPP,)	
)	
Appellant.)	

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 30TH DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SYLVIA KNOPP
4511 MAYVOLT SE
PORT ORCHARD, WA 98366

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY, 2013.

X *Patrick Mayovsky*