

NO. 70255-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

MELONI TERRY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Donald E. Eaton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct during closing argument violated appellant's right to a fair trial.
2. The evidence is insufficient to support appellant's conviction for third-degree possession of stolen property.

Issues Pertaining to Assignments of Error

1. Inflammatory appeals to passion and prejudice during closing argument constitute prosecutorial misconduct that cause incurable prejudice and require reversal. Should appellant's convictions for burglary and possession of stolen property be reversed because the prosecutor, without evidence of any violent confrontation, focused the jury on unnamed dangers that might have arisen had the homeowners confronted the burglars?

2. The State charged appellant with possessing stolen property. The "to convict" instruction required the State to prove appellant "received, retained, possessed, concealed, disposed of" stolen property. Where the State offered evidence of some, but not all, of these acts, should his conviction be reversed and dismissed?

B. STATEMENT OF THE CASE

1. Procedural Facts

The San Juan County prosecutor charged appellant Meloni Terry with one count of second-degree burglary and one count of third-degree possession of stolen property. CP 1-2. The jury found Terry guilty and the court imposed a standard-range sentence. CP 40-41, 45-46. Notice of appeal was timely filed. CP 58.

2. Substantive Facts

The day they returned from being off-island for several weeks, Orcas Island homeowners George and Emilie Rankin heard unusual noises and found items missing from their guesthouse and studio. 1RP 176-77, 181-83, 223. At first, they assumed the mess and the noise were the result of raccoons. 1RP 184-85. A back window was open that they were certain they had closed. 1RP 186-87. A black polar fleece belonging to Emilie was on the floor by the door, damp. 1RP 190.

As they left their property to drive to the post office, they saw a car parked in their driveway up against the gate. 1RP 193-94. In the back of the car, they noticed what appeared to be three of their coats, one green polar fleece, one red plaid coat, and one blue work jacket. 1RP¹ 195-96.

¹ There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 25, 2013; 2RP – Mar. 26, 2013; 3RP – Mar. 27, 2013; 4RP – Apr. 5, 2013; 5RP – Apr. 19, 2013.

Fearing they were being robbed, they tried to let the air out of the tires to prevent the car from leaving. 1RP 195-96, 201-02. Just then, an unfamiliar red car drove down the private road into their small community. 1RP 135-36, 201-02. They flagged down the driver to ask for help and were surprised not to recognize him. 1RP 203-06; 2RP 77. They asked where he was going, and he mentioned a woman at the end of the road but could not further identify who he was trying to visit. 1RP 205-06.

While Emilie Rankin was talking to the driver of the red car, Terry approached and told the Rankins it was okay; the car was hers and had broken down. 1RP 207-08. She explained she had called her brother to come help her. 1RP 207-08. The red car then quickly drove away. 1RP 210. The couple confronted Terry about the jackets, but Terry insisted they were hers. 1RP 210-11. As Terry turned to unlock her car, Emilie Rankin noticed one of their garden knives in the back of Terry's pants. 2RP 82. Terry quickly got in the car and drove away. 1RP 214-15.

The Rankins noted Terry's license plate number and called the police, who went to the registered address and found Terry in the driver's seat of the car. 1RP 216-17; 2RP 111-13. Another officer brought the Rankins to the house. 2RP 89. They recognized Terry and the car. 1RP 228-30. In the back of the car, they saw the blue work jacket and a red plaid

blanket that did not really look like their red plaid jacket they had seen earlier. 1RP 238-39; 2RP 91-92.

One of the officers approached the house to ask for permission to search. 2RP 117. In the entrance, while talking to Terry's mother, he saw a green polar fleece and red plaid jacket matching the Rankins' descriptions. 2RP 119. Terry's mother said she had never seen the jackets before. 2RP 122. The Rankins and Terry each claimed the jackets belonged to them. 2RP 114, 122-23, 159-60, 162. George Rankin identified a tear in the blue work jacket, and, at trial, the State presented photographs of the Rankins wearing coats resembling those found in Terry's car. 2RP 96-97.

Terry admitted she had been in the area and talked to the Rankins. 2RP 113. She could not name the woman at the end of the road she had been trying to visit. 2RP 113-14. She said she wanted to ask a question about a plant of the woman who owned a local nursery. 2RP 93. The Rankins testified they know the woman who owns the nursery and she does not live on their road. 2RP 93.

The Rankins also testified numerous other items were missing from their studio and guesthouse including chain saws and weed eaters. 1RP 223-25. None of the missing items were ever found. 2RP 129-30. The Rankins also testified that, twice in the months before they left the island, they had found a note taped to their door. 2RP 48-49. The notes were from "David

and Leesha,” who left a phone number and offered to clean the moss from the roof. 2RP 48-49. Emilie Rankin looked in the reverse directory and found the phone number connected to the same address where Terry’s car was registered and where they found her after the incident. 2RP 49-51. The officer testified “David” is the name of Terry’s brother and Leesha is his girlfriend. 2RP 148, 164.

C. ARGUMENT

1. THE STATE’S CLOSING ARGUMENT WAS PREJUDICIAL MISCONDUCT THAT ENCOURAGED THE JURY TO CONVICT BASED ON THE FEAR OF CONFRONTING AN ARMED BURGLAR IN ONE’S HOME RATHER THAN THE EVIDENCE.

The prosecutor began closing argument with an emotional argument that was entirely irrelevant to any question properly before the jury. The opening salvo did not discuss evidence of a burglary, or evidence tying Terry to that burglary, but threw out vague suggestions of the unnamed danger that awaited the Rankins if they had confronted a burglar in their home. 2RP 205-06. The prosecutor argued, with no supporting evidence, that the Rankins’ being “naïve” was what “saved them” from something far worse than a burglary. 2RP 205.

Your Honor, Counsel, Members of the Jury, this was a very – potentially a dangerous situation. I sometimes think that God protects the innocent and the naïve. In this particular case I would suggest that the Rankins were naïve, and that’s probably what saved them in this situation.

I'm not going to go over the photographs. They're there. You've seen them, but I ask you, what would have happened if George Rankin were a little more skeptical initially and had gone down into the small room towards the back where that little bathroom is and if that's where one of the burglars was hiding? There's George blocking the person's way out in the back of that room? What would have happened?

I ask you what would have happened if George had climbed that ladder to go up to the loft to see what was going on there and if that is where the person or persons were hiding? And there's George on a ladder blocking the path of the burglars. What would have happened? Luckily, they're naïve. They live in this wonderful place. No one had ever burglarized them before. They've had some strange things happen, but nothing really significant. They feel safe. And when they looked at the situation luckily they said, doggone raccoons. Got to be raccoons. Thank God they were willing to say that at that time.

2RP 205-06. This argument was prosecutorial misconduct that deprived Terry of a fair trial.

A prosecutor is an officer of the court with a duty not to seek a verdict on improper grounds. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Inflammatory appeals to the passion and prejudice of the jury are improper, as are arguments based on facts not in the record. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting American Bar Association, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980)). A prosecutor's latitude in

closing argument is limited to arguments “based on probative evidence and sound reason.” Id. (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

Prosecutorial misconduct violates the defendant’s right to a fair trial and requires reversal of the conviction when the prosecutor’s argument was improper misconduct and there is a substantial likelihood the misconduct affected the verdict. Glasmann, 175 Wn.2d at 703-04. Even when there was no objection to the argument at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is more on whether the effect of the argument could be cured than on the prosecutor’s mindset or intent. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) rev. denied, 175 Wn.2d 1025 (2012) (citing State v. Emery, 174 Wn.2d 741, 759–61, 278 P.3d 653 (2012)). In general, arguments that have an inflammatory effect on the jury are not curable by instruction. Id.

It is misconduct for the State to play on the jury’s fear based on hypothetical scenarios. State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994). In Russell, the prosecutor argued the defendant would go to California, would find more “naïve, trusting, foolish young people,” and would kill them. Id. The court described the prosecutor’s remarks as

“egregious.”² The Russell court declined to reverse because the comment was not likely to inspire revulsion under the circumstances, and defense counsel utilized the comment in his own closing argument, thereby weakening the contention that it denied him a fair trial. 125 Wn.2d at 89.

This case involves a similar appeal to the jury’s fear based on a purely hypothetical scenario. But the circumstances that mitigated the prejudice in Russell do not exist in this case. The comments about the danger to the Rankins were calculated to inspire revulsion by ensuring the jury viewed this incident as a dangerous, violent crime instead of a petty theft. There was no way for defense counsel to counter the inflammatory image of what might have happened.

This case is analogous to State v. Pierce, where the court held the inflammatory appeal to the jury’s emotions could not be overcome by instruction. 169 Wn. App. at 555-56. In Pierce, the prosecutor’s argument presented fictitious first-person narratives of what the defendant and the victims had been thinking before and during the murders. Id. at 553. A third improper argument, about whether the victims would ever have expected the

² Other jurisdictions have also concluded that appeals to a jury’s fear of “what would have happened” are improper. See United States v. Nobari, 574 F.3d 1065, 1077 (9th Cir. 2009) (court erred in not instructing jury to disregard prosecutor’s reference to what would have happened if little boy had come out of McDonalds as defendants were being arrested); State v. Storey, 901 S.W.2d 886, 901-02 (Mo. 1995) (improper to refer to what brother might have done had he witnessed his sister being murdered); State v. Tyler, 346 N.C. 187, 206, 485 S.E.2d 599 (1997) (improper to refer to what defendant might have done to victim’s child if child had caused a scene).

murders, was not objected to: “[n]ever in their wildest dreams . . . or in their wildest nightmare’ would the Yarrs have expected to be murdered on the day of the crime.” Id. at 555 (quoting report of proceedings). Despite the lack of objection below, the court found this last argument improper and, incurable by instruction in light of the other highly inflammatory arguments. Id. at 555-56. Specifically, the court concluded the argument was not relevant to Pierce’s guilt and invited the jury to place themselves in the victims’ shoes, which increased the prejudice. Id. at 555.

Here, as in Pierce, the State focused on the Rankins’ unsuspecting state of mind. The prosecutor discussed the fact that they had never been burglarized before and declared, “Thank God,” they were so naïve as to initially blame the raccoons instead of investigating further. 2RP 205-06. Like the argument that the family in Pierce would “never in their wildest dreams” have expected to be murdered, this argument invited the jury to place themselves in the Rankins’ shoes.

By focusing on what might have happened, the prosecutor invited the jury to make its decision based on facts not in evidence. Three times, the prosecutor asked, “What would have happened?” if the Rankins had confronted the burglars while they were in the house. 2RP 205-06. Like the argument in Pierce about what might go through the defendant’s or the victim’s minds, the argument in this case about what might have happened

had the Rankins confronted the burglars was pure speculation. 169 Wn. App. at 555. Despite the knife in her back pocket, there was no evidence that Terry or anyone else involved was prepared to respond to a confrontation with physical violence. The evidence shows that, when confronted, both she and the man in the red car fled. 1RP 210, 214-15.

The State's closing argument unfairly raised the specter of a violent confrontation that did not occur and played on the jury's fears. This argument was not a response to any defense argument; on the contrary, it was the opening thrust of the prosecutor's closing argument. The argument about "what would have happened" was designed to inspire a verdict based on fear, rather than the evidence. The outcome in this case should follow Pierce; the convictions should be reversed. 169 Wn. App. at 553-56.

2. THE STATE FAILED TO PRESENT EVIDENCE TERRY DISPOSED OF STOLEN PROPERTY.

The jury instructions in this case stated that, in order to convict, the jury must find Terry "received, retained, possessed, concealed, disposed of stolen property." CP 37. The evidence is insufficient because the State failed to prove Terry committed each of these acts.

In every criminal prosecution, due process requires the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368

(1970). On appeal, the court views the evidence in the light most favorable to the State and inquires whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) overruled on other grounds by Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

a. Alternate Definitions Included in the “To-Convict” Instruction Must Be Supported by Substantial Evidence.

It is “well-settled Washington law” that any allegation included in the “to convict” instruction becomes the law of the case and must be proved by the State beyond a reasonable doubt like any other element. State v. Kirwin, 166 Wn. App. 659, 671, 271 P.3d 310 (2012) (citing State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998)). In reviewing the sufficiency of the evidence on appeal, any allegation included in the “to convict” instruction, even if not listed in the statute, is an element of the offense that must be supported by sufficient evidence:

It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain

the verdict is to be determined by the application of the instructions and rules of law laid down in the charge. . . .

Tonkovich v. Dept. of Labor and Industries, 31 Wn.2d 220, 225, 195 P.2d 638 (1948); see also State v. Barringer, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982) (addressing sufficiency claim based on elements included in jury instructions, not statutory elements); State v. Worland, 20 Wn. App. 559, 567-69, 582 P.2d 539 (1978) (same).

The Washington Supreme Court's decision in Hickman illustrates these principles. Hickman was charged with insurance fraud. Hickman, 135 Wn.2d at 100. Although the statute did not require proof of the county in which the crime occurred, the "to convict" instruction listed as a required element, "(3) That the act occurred in Snohomish County Washington." Id. at 101. On appeal, Hickman challenged the sufficiency of the evidence of this third element because he had been in Hawaii when he phoned in the insurance claim and the insurer was located in King County. Id. at 105-06. Based on the lack of evidence that the crime occurred in Snohomish County, the court reversed and dismissed the conviction. Id. at 105.

The court applied Hickman to reverse a conviction for possession of a stolen vehicle in State v. Hayes, 164 Wn. App. 459, 476, 262 P.3d 538

(2011).³ The various acts constituting possession of stolen property are generally viewed as definitional, rather than alternative means of committing the offense. Id. at 476. However, when the various definitions of possession are listed in the jury’s “to-convict” instruction, there must be substantial evidence to support each alternative. Id. at 481 (citing Lillard, 122 Wn. App. at 434-35).

Hickman and Hayes stand for the proposition that, when a definition is included in the to-convict instruction, it becomes part of the State’s burden of proof. When the State fails to present substantial evidence of each alternative definition, the conviction must be reversed for insufficient evidence. Hayes, 164 Wn. App. at 481.

b. Terry’s Conviction for Possession of Stolen Property Must Be Reversed Because the State Failed to Present Any Evidence She Disposed of Stolen Property.

Terry was charged with third-degree possession of stolen property. Possession of stolen property means to “receive, retain, possess, conceal, or dispose of” stolen property. RCW 9A.56.140. The statute includes the conjunction “or” that is missing from the jury instruction. CP 37. Under the unchallenged instructions in this case, the jury was required to find all of the described conduct before it could convict. CP 37. Because there is no

³ See also State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004) (requiring substantial evidence of each alternative definition listed in the to-convict instruction but finding the State had presented sufficient evidence).

evidence Terry disposed of any stolen property, her conviction must be reversed. Hayes, 164 Wn. App. at 481.

There is no statutory definition of the term “disposed of,” as used in the possession of stolen property statute. Terms not defined in a statute are given their ordinary dictionary meaning. State v. Argueta, 107 Wn. App. 532, 536, 27 P.3d 242 (2001). Webster’s Dictionary defines “dispose of” as “to transfer into new hands or to the control of someone else (as by selling or bargaining away): relinquish bestow . . . to get rid of, throw away, discard” Webster’s Third New Int’l Dictionary 654 (1993); see also Hayes; 164 Wn. App. at 481 (“The parties agree that “dispose of” means to transfer into new hands or to the control of someone else.”).

Even viewing the evidence in the light most favorable to the State, there was no evidence suggesting Terry disposed of any stolen property. She had not transferred the green and red jackets to her mother because her mother had never seen them before. 2RP 122. There was no evidence she transferred them to any other person. The Rankins claimed other items were missing and never recovered, but there was no evidence Terry ever even handled these items, let alone transferred them to anyone else. 1RP 223.

Because there was insufficient evidence of the “disposed of” alternative definition, Terry’s conviction must be reversed. Hayes, 164 Wn. App. at 481. The only exception to this rule would be if the record were to

show, based on the information, the evidence presented, and the closing argument, that the jury could not have relied on this alternative. State v. Rivas, 97 Wn. App. 349, 351-53, 984 P.2d 432 (1999), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007); State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993). No such showing can be made in this case.

The information tracked the jury instructions; it, too, listed all the alternative definitions of possessing stolen property. CP 2. The evidence and closing argument focused on Terry's brother David Thompson and suggested items may have been transferred to or by him. See 2RP 147-48 (testimony of Bruce Distler that Thompson lived at the address where Terry's car was registered and his girlfriend's name is Leesha); 2RP 207 ("This case starts with Mr. David Thompson, and it kind of ends with David Thompson."). The prosecutor specifically argued the missing chainsaws and weed eaters were precisely the types of items Thompson would need for yard work as offered in his note. 2RP 208. Neither the instructions, nor the evidence, nor the closing argument indicated to the jury it could not convict Terry for disposing of stolen property.

The record contains no evidence about what happened to the missing gardening items. The mere fact that they may have been useful to Terry's brother does not amount to substantial evidence she disposed of them.

Because the State failed to prove Terry disposed of any stolen property, her conviction for possession of stolen property must be reversed.

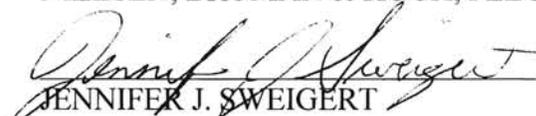
D. CONCLUSION

Prosecutorial misconduct deprived Terry of a fair trial. Additionally, the evidence was insufficient to convict her of possession of stolen property in the third-degree. Therefore, her convictions should be reversed and, in the case of the possession of stolen property conviction, dismissed.

DATED this 12th day of November, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70255-6-1
)	
MELONI TERRY,)	
)	
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 12TH DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF NOVEMBER 2013.

X *Patrick Mayovsky*

01/11/13 11:00 AM
CLERK OF COURT