

NO. 74122-5-I

FILED
8-8-16
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO OTERO,

Appellant.

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

The Honorable Carol Schapira, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct deprived appellant of his right to a fair trial.

Issue Pertaining to Assignment of Error

Did prosecutorial misconduct deprive appellant of his right to a fair trial where the prosecutor impermissibly commented on appellant's credibility during trial?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Roberto Otero with one count of residential burglary and three counts of second degree identity theft for an incident that occurred February 28, 2015. CP 1-8, 10-11; 1RP¹ 3-4. A jury declined to find Otero guilty of residential burglary and the charge was later dismissed by the prosecutor. CP 85, 123; 1RP 855, 868-69, 877, 882. A jury found Otero guilty of three counts of second degree identity theft. CP 86-88, 122; 1RP 855-58.

The court imposed concurrent prison sentences of 45 months for each of the identity theft convictions to run consecutive to Otero's sentence for an unrelated drug offender sentencing act revocation. 1RP

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – August 17, 18, 19, 20, 24, 26 and September 15, 2015; 2RP – August 25, 2016.

877-78; CP 125. The court also sentenced Otero to 12 months of community custody. CP 126.

The trial court waived all non-mandatory legal financial obligations (LFOs), concluding that Otero “is indigent and of course his earning capacity is limited at this point since he’s going to be in custody for a lenth[y] period of time.” 1RP 879; CP 124. Otero timely appeals. CP 132-41.

2. Trial Testimony

Alissa Dare had two margaritas at dinner before taking a car service with friends to her apartment in downtown Seattle late in the evening of February 27, 2015. 1RP 522, 525-26, 549, 572. Dare did not take an inventory of what was in her wallet at the time she paid at the restaurant. 1RP 572. She also did not take an inventory of her wallet contents when she returned to her apartment. 1RP 572-73.

Dare lived on the 12th floor of the apartment building. 1RP 371, 384, 519. A key was required to unlock her individual apartment door. In addition, a key fob was required to enter the apartment building after 7 p.m. and to use the building elevators. 1RP 366, 376, 384, 526-27.

After returning home, Dare took her dog for a ten minute walk outside. 1RP 527-28. Dare went to bed shortly after the walk. 1RP 540. Dare recalled closing her apartment door, placing her small purse on the

kitchen counter, and placing her larger bag on the couch. 1RP 533-34, 545. Usually however, Dare kept her purses on a table by her apartment entryway. 1RP 533.

That night, Dare recalled hearing her dog jump off the bed and whine and growl. Dare associated the dog's behavior with a dream. 1RP 554. She woke up the dog and put him back on her bed before going back to sleep herself. 1RP 554-55, 584-85.

Dare awoke on February 28 around 7 a.m. 1RP 540. Her apartment door was closed. 1RP 553. Dare did not see her purse on the kitchen counter. She eventually found her wallet near the front door. 1RP 534, 545. The wallet was inside her large bag. The large bag also contained her purse. 1RP 534, 545-46. Dare noticed cash, her bus pass, and Boeing employee credit union (BECU) credit and debit cards were missing from her wallet. 1RP 546-48. Dare then noticed that although her apartment door was closed, a backpack strap near the front door prevented the door from latching. 1RP 551-53, 573-75, 576-77.

Dare contacted her apartment building manager, Stephen McCauley, who then reviewed surveillance video from the prior evening. 1RP 371-74. McCauley saw a man he did not recognize as a building resident enter the building shortly after 11 p.m. 1RP 369, 380. The man walked toward one of the elevator banks in the building. McCauley could

not see where exactly the man went. 1RP 381-82. Dare also looked at the surveillance video and did not recognize the man. 1RP 556-58, 566-68. She acknowledged however, that she was not familiar with every resident of the apartment building. 1RP 567.

After speaking with a BECU card security analyst, Dare challenged several purchases made with her visa and debit cards on February 28, 2015, including a purchase at QFC for \$10.83, a purchase at Walgreens for \$84.53, and a purchase at Finish Line for \$175.19. 1RP 427-29, 433, 565.

Dare also contacted police. Police observed no signs of forced entry into her apartment. 1RP 580-81, 634, 640. No fingerprints or DNA were found inside Dare's apartment. 1RP 579-80, 631, 634, 642-43. Police obtained surveillance from the QFC and Walgreens where the purchases were made. 1RP 324-26, 335, 345-48, 351-53, 357. No surveillance video from the Finish Line was available. 1RP 512, 630. Based on the surveillance video, police also created a bulletin. 1RP 622.

Michelle Brown and Lisa Tavaréz had been supervising Otero's drug and alcohol treatment since the fall of 2014, and recognized Otero in the police bulletin. 1RP 462-65, 482, 628-29, 640, 678-79, 683-85. Brown and Tavaréz contacted police who then prepared a six photograph montage, to show to Giovanni Dumas, the assistant manager of the Finish

Line. 1RP 499-503, 622-23, 682. Dumas identified Otero in one of the montage photographs as the person who made a \$175.19 shoe purchase on February 28. 1RP 506-11, 667-71, 675. Dare's credit and debit cards were not recovered. 1RP 664.

Otero did not deny being at the apartment building on February 27-28, 2015. He acknowledged that he was the person depicted in the apartment surveillance video and the photograph montage. 1RP 720-22. Otero explained that he was at the building hanging out with some people he had met earlier that evening. 1RP 708, 710-11, 716. Although the people told Otero they lived at the apartment building, he was unsure if that was true. 1RP 717. Otero denied being inside Dare's apartment residence or using her debit or credit cards. 1RP 708, 735.

3. Prosecutorial Misconduct

In his motions in limine, defense counsel sought to prevent several instances of potential prosecutorial misconduct from occurring during the course of Otero's trial, including comments by the prosecutor as to any witness's credibility. CP 23-31. The trial court agreed that any prosecutorial misconduct "would be improper," and granted the defense motions in limine. 1RP 37-42. In granting the defense motion to prohibit the prosecutor from appealing to the jury's passion and prejudice, the trial court specifically noted that the prosecutor, "should not integrate himself

with the jury. So no charm Mr. [prosecutor]...All that charisma, leave it – leave it in your office.” 1RP 43.

The trial proceeded in typical fashion until Otero’s testimony. Otero limited his testimony on direct examination to explaining his presence in the apartment building on the night of the alleged incident. 1RP 708-09. Otero was not asked to explain the alleged purchases made with Dare’s credit and debit cards. During the prosecutor’s cross-examination of Otero, defense counsel made several objections to questions he believed went beyond of the direct examination. Several defense objections were overruled. 1RP 713-14, 718-19, 721-22.

Multiple other defense objections to the prosecutor’s questioning of Otero about the store surveillance video depicting the alleged purchases, the locations of the stores in question, and the credit and debit card numbers used to make the purchases, were sustained on the basis of being beyond the scope of direct exam. 1RP 723-25, 727, 730, 733. After the eighth sustained objection, the prosecutor explained, “the State argues that all of these go to Mr. Otero’s credibility.” 1RP 725. The court responded, “Thank you. I sustained the objection.” 1RP 725.

After four additional sustained objections, the prosecutor remarked, “Is the witness’s credibility not at issue?” 1RP 733. The trial court responded, “Well, thank you for the comment but that’s not your

job. I think it's my job." Id. The court then immediately excused the jury for their morning recess. Id. The court then instructed the prosecutor to refrain from that type of behavior when an objection was ruled upon.

The trial court encouraged the prosecutor to look at the evidentiary rules and "show me how it is that a party is able to prove or disprove credibility[.]" 1RP 733. The trial court noted the distinction between what the prosecutor was trying to accomplish through questioning of Otero, and arguing that certain testimony was not credible based on the other evidence introduced. 1RP 734.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT VIOLATED OTERO'S
RIGHT TO A FAIR TRIAL.

During cross-examination of Otero, the prosecutor repeatedly tried to exceed the scope of Otero's direct examination, resulting in multiple sustained objections. 1RP 723-33. Finally, the apparently frustrated prosecutor remarked, "Is the witness's credibility not at issue?" 1RP 733. The trial court admonished the prosecutor that "that's not your job," before immediately excusing the jury. 1RP 733. By repeatedly attempting to exceed the scope of Otero's direct examination testimony and inserting his personal comments regarding Otero's credibility, the

prosecutor clearly and unmistakably expressed an impermissible personal opinion. Reversal of Otero's convictions is required.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wash.2d 792, 843, 975 P.2d 967 (1999).

Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics.

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Monday, 171 Wn.2d at 676. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988) (analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Yates, 161 Wash.2d 714, 774, 168 P.3d 359 (2007). Even if a defendant does not object, he does not waive his right to review of flagrant misconduct by a prosecutor. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

A defendant may be cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify. State v. Etheridge, 74 Wn.2d 102, 113, 443 P.2d 536 (1968); State v. Olson, 30 Wn. App. 298, 300-01, 633 P.2d 927 (1981). But, a prosecutor's line of questioning becomes improper when it exceeds the scope of direct examination. See State v. Hobbs, 13 Wn. App. 866, 868, 538 P.2d 838 (recognizing that cross-examination is limited to the scope of the direct examination), rev. denied, 85 Wn.2d 1019 (1975).

Nor may a prosecutor express personal opinions about a defendant's credibility. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699

(1984). To do so “constitutes misconduct, and violates the advocate-witness rule, which ‘prohibits an attorney from appearing as both a witness and an advocate in the same litigation.’” State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (quoting U.S. v. Prantil, 764 F.2d 548 (9th Cir. 1985)). This is because the jury alone determines issues of witness credibility. State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005).

While not every mention of credibility rises to the level of prosecutorial misconduct, as the trial court aptly recognized here, there is an important distinction between a prosecutor arguing that certain testimony should be discredited because it conflicts with other introduced evidence, and the prosecutor’s blanket assertion that Otero’s credibility was an issue. 1RP 733-34.

State v. Lindsay² provides a useful analogy. There, both the Court of Appeals and the Supreme Court found that many of the prosecutor’s statements during closing argument were improper. During closing argument in Lindsay’s trial, the prosecutor described Lindsay’s co-defendant’s testimony as “funny,” “disgusting,” “comical,” and “the most ridiculous thing I’ve ever heard.” 171 Wn. App. at 833; 180 Wn.2d at

² 171 Wn. App. 808, 288 P.3d 641, 654 (2012), as amended (Feb. 8, 2013), reversed, 180 Wn.2d 423, 326 P.3d 125 (2014).

438. The Court of Appeals was not particularly troubled by these comments, noting that “taken in isolation,” the comments were similar to one’s previously found not to be improper. Lindsay, 153 Wn. App. at 832-33 (citing State v. Anderson, 153 Wn. App. 417, 430, 220 P.3d 417 (2009), rev. denied, 170 Wn.2d 1002 (2010)).

But, both the Court of Appeals and Supreme Court were disturbed with the prosecutor’s remark that the co-defendant should not “get up here and sit here and lie.” Lindsay, 153 Wn. App. at 833; 180 Wn.2d at 438. As the Court of Appeals noted, such language was a “clear and unmistakable” expression of impermissible personal opinion because it was not drawing reasonable inferences regarding the witness’s credibility from the evidence, or arguing that the defendant’s versions of events seemed unreasonable, illogical, or unlikely. Lindsay, 153 Wn. App. at 833. The Supreme Court agreed and concluded that the prosecutor’s impermissible expressions of his personal opinion about the defendant’s credibility to the jury required reversal of Lindsay’s convictions and a new trial. Lindsay, 180 Wn.2d at 438.

Like Lindsay, here the context in which the prosecutor’s comments about credibility were made demonstrates they were a clear and unmistakable expression of an impermissible personal opinion. Before the prosecutor’s first remark about Otero’s credibility, the trial court had

already sustained eight defense objections to the prosecutor's questions on the basis they were beyond the scope of the direct examination of Otero. 1RP 723-33. The trial court had likewise signaled to the prosecutor that it did not share his opinion that the questions were proper questions that were relevant to Otero's credibility. 1RP 725. The prosecutor nonetheless continued in the same vein of cross-examination, resulting in four additional sustained defense objections. 1RP 725-33. After a total of 12 sustained objections, the evidently frustrated prosecutor asked, in an apparent rhetorical manner, "is the witness's credibility not an issue?" 1RP 733. The trial court recognized the prosecutor's comment was improper and admonished him accordingly. 1RP 733-34.

The manner of the prosecutor's questions and rhetorical comment about Otero's credibility demonstrate the prosecutor's comment was not an argument that Otero's testimony seemed unreasonable, illogical, or unlikely. Indeed, at the time of the statement, closing arguments had not yet started because the presentation of evidence had not yet concluded. Nor was the comment a reasonable inference regarding the credibility of Otero's testimony when compared to other admitted evidence. Rather, the comment was intended to convey the prosecutor's personal opinion that Otero's credibility was an issue. Similar statements conveying a prosecutor's personal belief that a defendant is lying have been found to

be misconduct. Compare State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003) (misconduct when prosecutor told the jury, “then you have the defendant. The manner in which he testified, the State believes, this prosecutor believes, that he got up there and lied.”); with, State v. Calvin, 176 Wn. App. 1, 316 P.3d 496, 505 (2013) (no misconduct where prosecutor’s recitation of a long list of things that did not make sense in defendant’s testimony when compared to other testimony reflected an explanation of the evidence, not a clear and unmistakable expression of personal opinion), review granted in part, cause remanded, 183 Wn.2d 1013, 353 P.3d 640 (2015); State v. Copeland, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996) (use of word “liar” as comment on defendant’s credibility was not improper where prosecutor was drawing inference from evidence).

The only remaining question is prejudice. Here, defense counsel successfully objected to the prosecutor’s testimony 12 separate times. Although a curative instruction for the prosecutor’s comment pertaining to Otero’s credibility was not sought, this should not preclude review of the misconduct issue. Appellate courts are not required to wink at prosecutorial misconduct under the guise of harmless error analysis. See State v. Neidigh, 78 Wn. App. 71, 79-80, 95 P.2d 423 (1995) (when asked at oral argument why prosecutors continue to engage in clear misconduct,

the prosecutor responded, it's always found to be harmless error when no objection is raised.) In any event, the record demonstrates that defense counsel was not presented with an opportunity in which to request a curative instruction close in time to the comment itself. After the prosecutor's comment, the trial court immediately excused the jury and then admonished the prosecutor. The court did not ask for defense counsel's input during the exchange that occurred immediately prior to taking the morning recess. 1RP 733-34.

Even assuming the repeated objections do not preserve the misconduct issue, the prosecutor's comment was still flagrant and ill-intentioned in light of cases such as Lindsay and Reed which were decided before Otero's trial. See e.g. State v. Fleming, 83 Wash.App. 209, 214, 921 P.2d 1076 (1996) (improper prosecutorial arguments were flagrant and ill-intentioned where that court had previously recognized those same arguments as improper in a published opinion). Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215. Considering the imprimatur of the

prosecutor's office, and the clear indication to the jury that the prosecutor did not believe Otero, it would have been impossible to unring the bell had defense counsel sought a curative instruction for the prosecutor's statement regarding Otero's credibility. See e.g., State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (curative instruction will not "unring the bell" of flagrant misconduct), rev. denied, 118 Wn.2d 1013 (1992); Fleming, 83 Wn. App. at 215-16.

There is also a substantial likelihood the prosecutor's reference to Otero's credibility affected the jury's verdict. Otero anticipates the State will point out that surveillance video and witness identification placed Otero at the apartment building and at the stores where the purchases at issue were made. But, the State's evidence was also lacking in several important respects. No eyewitness placed Otero inside Dare's apartment and no fingerprints were found. Similarly, neither the credit cards nor items allegedly purchased by Otero were found on his person at the time of his arrest, or anytime thereafter.

Moreover, the jury clearly questioned the State's presentation of evidence as demonstrated by its inability to reach a verdict on the residential burglary charge. Without the prosecutor's impermissible comment about Otero's credibility, jurors may have been reluctant to convict Otero based on evidence that was lacking in several important

areas. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdict but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). This Court should reverse Otero’s convictions.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Otero was entitled to seek review at public expense, “by reason of poverty,” and therefore appointed appellate counsel. CP 142-44. If Otero does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair³ (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant’s brief). RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State’s request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO

³ 192 Wn. App. 380, 367 P.3d 612 (2016), review denied, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 3909799 (filed June 29, 2016).

order appropriate to the individual defendant's circumstances." Id. Accordingly, Otero's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees, concluding that Otero "is indigent and of course his earning capacity is limited at this point since he's going to be in custody for a length[y] period of time." CP 122-30; 1RP 879.

Without a basis to determine that Otero has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

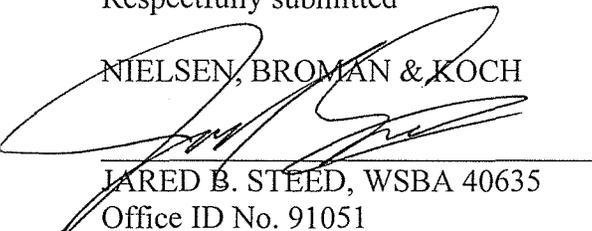
D. CONCLUSION

For the reasons discussed above, this Court should reverse Otero's convictions and remand for a new trial.

Dated this 8th day of August, 2016.

Respectfully submitted

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