

FILED
Apr 29, 2016
Court of Appeals
Division I
State of Washington

NO. 74315-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LANGSTON,

Appellant.

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

The Honorable Bruce I. Weiss, Judge
The Honorable Millie M. Judge, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	8
1. THE TRIAL COURT ERRED WHEN IT PERMITTED JURORS TO HEAR THAT LANGSTON ADMITTED INVOLVEMENT WITH THE STOLEN PHONE	8
2. APPEAL COSTS SHOULD NOT BE IMPOSED.	12
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	12
<u>State v. Bourgeois</u> 133 Wn.2d 389, 945 P.2d 1120 (1997).....	9
<u>State v. Cronin</u> 142 Wn.2d 568, 14 P.3d 752 (2000).....	8
<u>State v. Gould</u> 58 Wn. App. 175, 791 P.2d 569 (1990).....	8
<u>State v. Johnson</u> 90 Wn. App. 54, 950 P.2d 981 (1998).....	9
<u>State v. Neal</u> 144 Wn.2d 600, 30 P.3d 1255 (2001).....	11
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016).....	12
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	11
<u>State v. Wilson</u> 144 Wn. App. 166, 181 P.3d 887 (2008).....	11

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 401	8
ER 402	1, 8
ER 403	1, 8
RAP 14.....	12
RCW 10.73.160.....	12

A. ASSIGNMENT OF ERROR

The trial court erred under ER 402, ER 403, and ER 404(b), and denied appellant a fair trial, when it permitted evidence that appellant was involved in a theft separate from the conduct for which he was charged in this case.

Issue Pertaining to Assignment of Error

Over a defense objection, the trial court permitted jurors to hear evidence that appellant admitted involvement in the reported theft of a cell phone prior to his arrest on the charged offenses. Where this evidence was irrelevant, unnecessary, misleading, and highly improperly prejudicial, did it deny appellant a fair trial?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Office charged Charles Langston with (count 1) Second Degree Identity Theft and (count 2) Second Degree Theft. CP 78.

A hearing under CrR 3.5 on the admissibility of Langston's statements to police revealed that, on April 16, 2015, Edmonds police responded to a reported theft at a cell phone store. 1RP¹ 5-7,

¹ This brief refers to the verbatim report of proceedings as follows: 1RP - August 13, 2015; 2RP - August 24, 2015; 3RP - August 25, 2015; 4RP - October 27, 2015.

16-18. In a nearby casino, officers located a man (Langston) and a female matching the descriptions of the two people involved and stopped them on suspicion of theft. 1RP 7-9, 18. Langston admitted that the female had handled a phone cord, but denied that they had taken a phone attached to that cord. 1RP 9.

When Langston was asked his name, he told officers "Eddie Robinson" and, from a wallet he was carrying, pulled out a card bearing Robinson's name and social security number. 1RP 10-11. Department of Licensing records revealed that Langston did not match Robinson's physical description. 1RP 14, 22-23. A casino employee provided to police the identification Langston had used at that business, which revealed his true name. 1RP 14, 20, 23. It was then discovered that Langston had outstanding warrants and he was placed under arrest. 1RP 14, 20, 23. Both Langston and the female were searched, and officers did not find a cell phone on either of them. 1RP 12.

Following Miranda² warnings, Langston indicated that nothing in the wallet he was carrying belonged to him. 1RP 20-21, 23-24. Langston explained that he found the wallet on the bus and he

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

pretended to be Robinson to avoid arrest on the warrants. 1RP 26-27. Langston's statements to police – both pre- and post-arrest – were found to be admissible under Miranda. CP 79-82; 1RP 32-33.

In a motion in limine, defense counsel asked the trial court to preclude the State from eliciting evidence concerning theft of the cell phone, including Langston's statements regarding that theft. CP 83-84; 2RP 11-12. Recognizing the State should have some ability to explain officers' initial contact with Langston and his female companion, defense counsel asked the court to limit the evidence to informing jurors that officers had stopped the couple "pursuant to a theft investigation" without any additional details regarding the otherwise irrelevant theft. 2RP 12-14.

The court granted the defense motion only in part. The court ruled that officers could say they were investigating a theft without adding additional details, except that the prosecutor could elicit everything Langston himself said to officers about the theft, which had been deemed admissible at the CrR 3.5 finding.³ 2RP 14-15.

³ Defense counsel argued that the CrR 3.5 ruling did not dictate the outcome on his in limine challenges to admissibility of the statements. See 2RP 12. The trial judge did not agree.

At trial, Eddie Lee Robinson testified that, in April 2015, he lost his wallet while riding the bus in downtown Edmonds. 2RP 38-39, 43. Among the items Robinson had in his wallet was his social security card, which he did not give anyone permission to use. 2RP 39-41.

Edmonds police officers then testified consistently with their testimony at the CrR 3.5 hearing. On the evening of April 16, 2015, officers responded to the report of a stolen cell phone. 2RP 47-48, 54-55. Officer Nicholas Bickar spotted Langston and a female, who matched descriptions of the thieves, at the nearby casino. 2RP 55. Bickar made eye contact with the two, who stood up and walked out the door. 2RP 55. Bickar caught up with them, said he needed to speak with them, and asked them to have a seat, which they did. 2RP 55. Officer Kraig Strum then arrived at the casino to speak with the two. 2RP 48.

Officers described how Langston identified himself as Eddie Robinson and used his social security card, how they learned Langston's true identity and discovered his warrants, and how they found the wallet in Langston's possession containing several items belonging to Robinson. 2RP 49-51, 61-64, 69-70. Officers testified to Langston's statement that he found the wallet on a bus and his

admissions that none of the items in the wallet were his, that he did not know Robinson, and that he had used Robinson's name to avoid arrest on the warrants. 2RP 52, 71.

The prosecutor raised with both Strum and Bickar the topic of what Langston said about the alleged theft of the cell phone.

First, after establishing that Officer Strum responded to what was initially the report of a cell phone theft, the prosecutor asked Strum what Langston said to him at the casino, and Strum replied:

So I asked him what was going on with regard to the reason why I was contacting them, and they said that they were involved in that, in addition to matching the description. So we attempted to identify the defendant, and so then he provided a name and birth date.

2RP 49.

Similarly, after again eliciting that officers initially responded to a reported cell phone theft, the prosecutor asked Officer Bickar what Langston said once stopped at the casino. 2RP 56-57. Bickar answered, "They said that they were walking by a store and saw - -" but was then interrupted by a defense objection. 2RP 56. Outside the presence of jurors, counsel again argued that officers should not be permitted to testify to the investigation concerning the cell phone. 2RP 57.

The court indicated that the testimony so far had been consistent with its ruling limiting such evidence to what Langston had said to police about the stolen phone. 2RP 57. After additional argument from the defense that evidence concerning the theft was irrelevant, highly prejudicial, and confusing, the court ordered the prosecution to move past the subject. 2RP 57-60.

A third officer – Officer Patrick Clark – testified that he also responded to the reported theft of a cell phone. 2RP 67. Clark testified that he was not aware that anyone had ever been arrested for the theft of that phone. 2RP 67.

Langston testified in his own defense. 2RP 78. He explained how, the day before his arrest, he found Eddie Robinson's wallet, on the bus, tucked down along the side of a seat. 2RP 79. He saw that Robinson's address was listed on an item in the wallet and intended to take the wallet to the local post office. 2RP 79-80, 83. Before he could do so, however, he was stopped by law enforcement at the casino. He was aware of his warrants, he panicked, and he tried to pass himself off as Robinson to avoid arrest. 2RP 80-84. Although there were other items in Robinson's wallet, including a debit card and Electronic Benefits Assistant cards for food purchases, Langston did not use any of them. 2RP 69-74, 85.

During closing argument, defense counsel argued that Langston was not guilty of identity theft because the State had failed to prove that he used Robinson's social security number "with the intent to commit, aid or abet a crime," an essential element of that offense. Rather, it was merely his intent to avoid arrest on the outstanding warrants. 3RP 143, 147-149; CP 32. Regarding theft, defense counsel argued there was no evidence Langston intended to keep the wallet and its contents, which he found on the bus. See CP 37 (requiring proof that defendant "intended to deprive the other person" of lost property). Rather, his intent was to return the items by dropping them off at the post office at his first opportunity. 3RP 141-149. Jurors also were given the option on count 2 of finding Langston guilty of the lesser crime of attempted theft. See CP 41-43.

Jurors convicted Langston on both charged offenses. CP 21-22. The Honorable Millie M. Judge imposed a standard range 45-month sentence, and Langston timely filed his Notice of Appeal. CP 2, 6; 4RP 16-17.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT PERMITTED JURORS TO HEAR THAT LANGSTON ADMITTED INVOLVEMENT WITH THE STOLEN PHONE.

Over defense objection, the trial court permitted Officer Strum to testify that, when he asked Langston and his female companion what was going on with the phone theft, “they said that they were involved in that.” 2RP 49. This denied Langston a fair trial.

Evidence must be relevant to be admissible. ER 402. Relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Even if relevant, however, evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” ER 403. Unfair prejudice “is that which is more likely to arouse an emotional response than a rational decision by the jury,” or an undue tendency to suggest a decision on an improper basis. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)). In addition, “[e]vidence of other crimes, wrongs, or acts is not admissible to

prove the character of a person in order to show action in conformity therewith.” ER 404(b).

The trial court's balancing of probative value and prejudicial impact, and its decision to admit evidence, is reviewed for abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997); State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

The relevance of allowing Edmonds police officers to mention the reported phone theft was that it explained their initial contact with Langston. Defense counsel did not object to officers testifying that they responded to a reported theft. But counsel did object to sharing any details regarding the theft investigation. See 2RP 12-14. These additional details were irrelevant. They did not make the existence of any fact of consequence more or less probable. The resulting prejudice, however, was significant because Officer Strum's testimony that “they said they were involved in that” gave the false impression that Langston may have stolen a phone immediately before his contact with police and immediately before the conduct underlying the charges in his case. Langston had denied taking the phone and claimed he was merely present when his female companion picked up a phone cord. 1RP 9; 2RP 59. Yet Strum's

testimony that Langston said he was “involved” – while technically accurate – implied just the opposite. It portrayed Langston as a thief and, therefore, more likely to have committed the current charged crimes.

In allowing the State to elicit this evidence, the trial judge reasoned that because Langston himself had admitted some involvement in the phone incident, and his statements to police had already been deemed admissible at the CrR 3.5 hearing, they were fair game for the prosecution at trial. 2RP 15 (“If he made statements that were adverse to his own interests, that’s on him.”). The court failed to recognize that, even when the evidence at issue comes from the defendant’s own lips, it is subject to a balancing of probative value and prejudice under ER 403. See State v. Grier, 168 Wn. App. 635, 645-649, 278 P.3d 225 (2012); State v. Grimes, 92 Wn. App. 973, 981, 966 P.2d 394 (1998); see also State v. Bedker, 74 Wn. App. 87, 93, 871 P.2d 673 (“statements, like any other evidence, are subject to analysis under ER 403”), review denied, 125 Wn.2d 1004, 886 P.2d 1133 (1994).

The erroneous admission of evidence requires reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Wilson, 144 Wn. App. 166, 178, 181 P.3d 887 (2008) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). The error is harmless “if the evidence is of minor significance when compared with the evidence as a whole.” Wilson, 144 Wn. App. at 166 (citing State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

Evidence that Langston was “involved” in the phone theft was not of minor significance. His defense to the charges for which he was convicted turned on his ability to convince jurors of his non-criminal intent. For identity theft, this meant convincing them he did not use Robinson’s social security card “with the intent to commit, aid or abet a crime.” Rather, he simply sought to avoid arrest on the warrants. 3RP 143, 147-149. And, for theft, this meant convincing them he intended to return the wallet rather than deprive Robinson of his property. 3RP 141-149. Evidence that Langston admitted he was “involved” in the phone theft, however, made it far less likely jurors would accept his version of events. It portrayed him as a thief generally.

Langston should receive a new trial.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Langston to be “totally indigent” and entitled to appointment for our office’s services at public expense because he “lacks sufficient funds to prosecute this appeal”⁴ CP 1. Moreover, Langston is serving a prison sentence approaching four years. CP 6. Although he plans to work once he serves his sentence, he has no job waiting for him. 4RP 18. His prospects for paying appellate costs are dismal. Therefore, if Langston does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

⁴ Indeed, the declaration concerning Langston’s finances reveals that “[h]is total assets consist of none” and that “[h]e can contribute \$0 to the expense of review.” Supp. CP ____ (sub no. 54, Motion and Declaration For Order Authorizing The Defendant To Seek Review At Public Expense).

Trial courts must make individualized findings of current and future ability to pay before they impose 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 order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Langston’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding.⁵ And without a basis to determine that Langston 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.

⁵ In fact, the trial court waived all discretionary LFOs. See CP 8; 4RP 17.

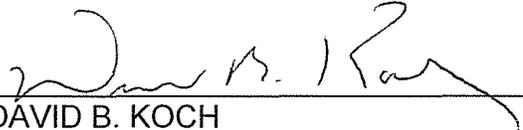
D. CONCLUSION

The trial court denied Langston a fair trial when it permitted jurors to learn that he admitted to being "involved" in the phone theft. His convictions should be reversed and his case remanded for a new and fair trial.

DATED this 29th day of April, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 74315-5-I
)	
CHARLES LANGSTON,)	
)	
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 29TH DAY OF APRIL 2016, 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] CHARLES LANGSTON
DOC NO. 725897
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 9833

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL 2016.

X *Patrick Mayovsky*