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Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL RAY PRESTON, JR., Appellant.	No. 50238-1-II UNPUBLISHED OPINION

MAXA, C.J. – Michael Preston, Jr. appeals his convictions for second degree theft and second degree trafficking in stolen property.[1] The convictions arose when Preston kept and then pawned a diamond ring he found on the floor of a Walmart store. The statutory definition of "theft" includes appropriating another's property when the actor knows the property has been lost. RCW 9A.56.020(1)(c); RCW 9A.56.010(2).[2]

We hold that (1) the State presented sufficient evidence to prove that Preston knew the ring was lost property, (2) Preston's argument that the trial court's jury instructions did not adequately define or distinguish between "lost property" and "abandoned property" is not reviewable because the challenge to these definitional jury instructions were raised for the first

[1] Preston also was convicted of bail jumping for failing to appear at a pretrial hearing. Preston does not appeal that conviction.

[2] RCW 9A.56.010 has been amended since the events of this case transpired. However, these amendments do not impact the statutory language relied on by this court. Accordingly, we do not include the word "former" before RCW 9A.56.010.

time on appeal, (3) the prosecutor did not commit misconduct during closing argument in discussing the law regarding lost property or the reasonable doubt standard, (4) Preston's claim of ineffective assistance of counsel fails, and (5) the cumulative error doctrine does not apply.

Accordingly, we affirm Preston's convictions.

FACTS

On February 18, 2015, Preston was shopping in Walmart in Tumwater when he found a diamond ring on the floor. Video surveillance footage showed him picking up the ring and pausing before walking out of the store. The next day he took the ring to a pawn shop and used the ring to secure a loan for $175. Preston said that the ring belonged to his girlfriend, who lived in Texas.

The ring, which belonged to Nicole Amacker, was a wedding band with three diamonds that had a retail value of $3,200. Amacker had taken the ring off in the parking lot while assisting a man who had locked his keys in the car, but forgot to put the ring back on. She went inside the store for a short time and then returned home, where she discovered that the ring was missing. Amacker later viewed the store's surveillance video, which showed that the ring had been stuck to her sweater while she was in the store and that she had been in the area where Preston found the ring. The video showed that Preston picked up the ring approximately 12 minutes after Amacker was in the area.

Amacker posted an advertisement on Craigslist offering a reward for the lost ring. Through the advertisement, Amacker came into contact with Preston. He said that he had found the ring and had pawned it. Amacker told him that she needed him to be present to get the ring back from the pawn shop. She said that she would pay the amount needed to obtain the ring, but

that the payment would come out of the reward. Preston then became uncooperative and would not assist Amacker in retrieving the ring from the pawn shop.

Amacker contacted the police. Lieutenant Bruce Brenna investigated the loss, which included meeting with Amacker, talking with Preston, and viewing the surveillance footage. The State eventually charged Preston with second degree theft and second degree trafficking in stolen property.

At trial, Officer Brenna testified that while conducting his investigation he received a phone call from Preston. Brenna stated that Preston explained how he found the ring in the Walmart. Preston told him that he believed that Amacker no longer owned the ring because she had lost it and he had found it, and the ring now belonged to him. Brenna testified that Preston did not seem to have any intention of assisting with the retrieval of the ring, his demeanor was manipulative, and he was not remorseful. Brenna also suggested that he believed Preston had violated the law.

Preston testified in his own defense. He confirmed that he found the ring at Walmart. Preston stated that he did not take it to customer service because there was a long line. He stated that he took the ring to the pawn shop for safe keeping. Preston testified that he thought the ring might be missing and that he hoped to find the owner. He stated that he found out about the Craigslist ad because he was interested in returning the ring to its owner. When asked on cross-examination if he had found something somebody had lost, Preston stated, "I'm believing that, yes, at that point initially." Report of Proceedings (RP) (Mar. 14, 2017) at 30.

The State presented proposed jury instructions on theft based on pattern instructions, including an instruction that "appropriate lost property" meant obtaining control over property that an actor knows has been mislaid. Preston did not object to the State's proposed instructions

or request that the court give more specific instructions regarding lost property and abandoned property. The court adopted the proposed instructions.

In closing argument, the prosecutor argued that any reasonable person who found the diamond ring would know that it was lost property and that the ring belonged to another person.

The prosecutor also tried to explain the meaning of the reasonable doubt standard in colloquial terms. She said that the key inquiry for the jury was "whether or not you have a reasonable doubt, an abiding belief in the truth of the charge." RP (Mar. 15, 2017) at 98. The prosecutor stated that really believing that the defendant committed the crime is an abiding belief in the truth of the charge. Preston did not object to these statements.

The jury found Preston guilty of second degree theft and second degree trafficking in stolen property. Preston appeals his convictions.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Preston argues that the State did not present sufficient evidence to convict him of either theft or trafficking in stolen property because the State did not prove that he knew the diamond ring he found was lost. We disagree.

1. Standard of Review

The test for determining sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Id.* Credibility determinations are made by the trier of fact and are not subject to

review. *State v. McClure*, 200 Wn. App. 231, 234, 402 P.3d 355 (2017). Circumstantial and direct evidence are equally reliable. *Id.*

2. Appropriation of Lost Property

Under RCW 9A.56.040,[3] a person is guilty of second degree theft if he or she commits theft of property that exceeds $750 in value but does not exceed $5,000 in value. The definition of theft includes "[t]o appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(c). The phrase "appropriate lost or misdelivered property or services" is further defined as "obtaining or exerting control over the property or services of another which the actor *knows to have been lost or mislaid*." RCW 9A.56.010(2) (emphasis added).

The common law distinguishes between property that has been "lost" and property that had been "abandoned." *State v. Kealey*, 80 Wn. App. 162, 171, 907 P.2d 319 (1995). Property is lost when "the owner has parted with possession unwittingly and no longer knows its location." *Id.* Property is abandoned when "the owner intentionally relinquishes possession and rights in the property." *Id.* A person who loses property retains ownership, but a person who abandons property loses any ownership interest. *Id.* at 171-72. As a result, appropriation of abandoned property generally does not constitute theft. *Cf. State v. Wagner–Bennett*, 148 Wn. App. 538, 543, 200 P.3d 739 (2009) (claim of abandonment relates to the intent element of theft).

[3] The legislature amended RCW 9A.56.040 in 2017. However, those amendments are immaterial here.

Under RCW 9A.82.055(1), a person is guilty of second degree trafficking of stolen property if he or she recklessly traffics in stolen property. The definition of stolen property includes property obtained by theft. RCW 9A.82.010(16).

3. Analysis

Preston argues that the State failed to present evidence that he knew the ring he found was lost rather than abandoned. He claims that the State proved only that he picked up a ring that he knew nothing about. But the evidence created at least a reasonable inference that Preston knew that the ring was lost when he appropriated it.

First, the mere fact that Preston picked up a diamond ring from the floor of a Walmart store gives rise to an inference that he knew the ring was lost rather than abandoned. It is unlikely that the owner of a diamond ring would choose to abandon it on the floor of a store.

Second, when Preston pawned the ring he concealed the fact that he had found it, claiming that it belonged to his girlfriend in Texas. A reasonable juror could infer from Preston lying about ownership of the ring that he was aware that he had appropriated a ring belonging to someone else and that he was trying to hide his appropriation of it.

Third, Preston's own testimony provides evidence that he knew the ring was lost. When asked on cross-examination if he had found something somebody had lost, Preston stated, "I'm believing that, yes, at that point initially." RP (Mar. 14, 2017) at 30. He also testified that when he found the ring he wanted "to try to find the owner" because "if it was real it's obviously missing." RP (Mar. 14, 2017) at 13. And Preston testified that he pawned the ring because "I was going to be needing [money] trying to find the owner." RP (Mar. 14, 2017) at 14.

Viewing the evidence in the light most favorable to the State, a reasonable jury could have found that Preston knew the ring was lost when he took possession of and pawned it.

Accordingly, we hold that the State presented sufficient evidence to convict Preston of second degree theft and second degree trafficking in stolen property.

B. ADEQUACY OF JURY INSTRUCTIONS

Preston argues that the trial court's jury instructions were inadequate because they did not include definitions of lost property and abandoned property. We decline to address this argument because Preston did not raise the issue in the trial court.

1. Legal Principles

A party generally waives the right to appeal an error unless there is an objection in the trial court. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception is for "manifest error affecting a constitutional right." RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. To determine whether we consider an unpreserved error under RAP 2.5(a)(3), we inquire whether (1) the error is truly of a constitutional magnitude and (2) the error is manifest. *Kalebaugh*, 183 Wn.2d at 583.

A claim that a jury instruction relieves the State of its burden to prove every element of a crime beyond a reasonable doubt raises an issue of constitutional magnitude. *Id.* at 584. "[T]he omission of an element of a charged crime is a manifest error affecting a constitutional right that can be considered for the first time on appeal." *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015). However, if the instructions properly inform the jury of the essential elements of the crime, an error in defining terms that describe the elements of a crime is not an error of constitutional magnitude. *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011).

2. Trial Court's Jury Instructions

The trial court gave instructions stating:

> Theft means to appropriate lost or misdelivered property of another, or the value thereof, with intent to deprive that person of such property.

. . . .

> "Appropriate lost or misdelivered property" means obtaining or exerting control over the property of another that the actor knows to have been lost or mislaid.

Clerk's Papers (CP) at 94-95. The court's to-convict instruction stated that the State had the burden of proving four elements of theft: that Preston "appropriated lost or misdelivered property of another," that the property had a value between $750 and $5,000, that Preston "intended to deprive the other person of the property," and that the act occurred in Washington. CP at 101.

Preston did not object to these instructions and did not propose other instructions that further defined the term "lost property."

3. Analysis

Preston argues that the failure to give instructions defining lost property and abandoned property relieved the State of its burden of proving that Preston knew the ring was lost. But the trial court properly instructed the jury on the essential elements of the crime of second degree theft, including that the defendant appropriated lost or misdelivered property of another and the defendant intended to deprive the other person of the property. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 70.06 (4th ed. 2016). In addition, the jury was instructed on the statutory definition of "appropriate lost or misdelivered property," which included the requirement that a defendant know the property was lost. RCW 9A.56.010(2); *see* CP at 95.

Further, Preston does not argue that the trial court omitted any essential elements of second degree theft. He argues only that the absence of definitions of lost property and abandoned property prevented the jury from properly determining whether the State had proved these elements.

A to-convict instruction that contains the essential elements of the crime is not deficient simply because it does not contain definitions of terms. *State v. Fisher*, 165 Wn.2d 727, 754-55, 202 P.3d 937 (2009). The instructions Preston now claims the trial court should have given would have merely defined further the elements of theft. Therefore, the failure to give those instructions does not constitute constitutional error. Accordingly, we decline to consider Preston's argument that the trial court should have given jury instructions that defined lost property or abandoned property.

C. PROSECUTORIAL MISCONDUCT

Preston argues that the prosecutor committed misconduct during closing argument by misstating the law regarding lost property and misstating the reasonable doubt standard. We disagree.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that "in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). We review the prosecutor's conduct and whether prejudice resulted therefrom "by examining that conduct in the full trial context, including the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.' " *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (quotation marks omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).[4]

[4] In a prosecutorial misconduct claim, a defendant who fails to object to improper arguments may be deemed to have waived the issue on appeal unless the prosecutor's statements are so flagrant and ill-intentioned that the resulting prejudice could not be corrected by a jury instruction. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). Because we hold that the prosecutor did not engage in misconduct, we do not address waiver.

2. Misstatement of the Law

It is misconduct for a prosecutor to misstate the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Although Preston's argument is somewhat unclear, he appears to claim that the prosecutor misstated the law by suggesting that property was lost if he found the property and knew that it belonged to another person. Preston seems to argue that the proper statement of the law would have been to clarify that property that once belonged to another person could be abandoned instead of lost.

The prosecutor stated,

> Appropriate lost or misdelivered property or services -- just property in this case -- means obtaining or exerting control over the property or services of another the actor knows to have been lost. . . . [W]e know that he knows it's lost; he's admitted that. And quite plainly, any reasonable person also knows that in that same situation, I would submit to you.
> . . . .
> I would also submit to you that the defendant appropriated lost or misdelivered property of another, the last classification of that, also not at issue. We know that that's lost property, we know it belongs to another person, and we know the defendant took it.

RP (March 15, 2017) at 101, 105.

These statements did not misstate the law. The prosecutor was arguing that Preston knew that the ring was lost, based on his own admission. The prosecutor did point out that the ring belonged to another person, but did not specifically argue that this fact automatically meant that the ring was lost. And the prosecutor had no obligation to distinguish between lost property and abandoned property.

We hold that the prosecutor did not misstate the law regarding lost property and therefore did not commit prosecutorial misconduct in this respect.

3. Reasonable Doubt Standard

A prosecutor who addresses the reasonable doubt standard in closing argument acts improperly by "trivializ[ing] and ultimately fail[ing] to convey the gravity of the State's burden and the jury's role in assessing its case against [the defendant]." *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Preston claims that the prosecutor misstated the reasonable doubt standard.

The prosecutor stated,

> [W]hat does abiding mean? . . . I would submit to you that means at the ends [sic] of today or the end of your – tomorrow, whenever you finish deliberations, do you believe that the defendant did what he was charged with. Tomorrow morning or the next day when you wake up, do you believe the defendant did what he was charged with. Next month, next year, five years from now, do you believe that the defendant did what he was charged with. That's the reasonable doubt.
> . . . .
> [S]ometimes you'll hear in a case or on TV somebody comes back and says, "Well, you know, I really believe that they did it, I just really believe that, but they didn't prove it to me." And when I hear that, what I hear is, oh, you applied the wrong standard. . . . So if you walk out and say, "Well, I really believe he did it," that's an abiding belief in the truth of the charge. So you can't say, "Well, I believe he did it, I really, really believe he did it but they didn't prove it," because to me that says you're applying the wrong standard. If you don't believe that they did it, then you don't have an abiding belief in the truth of the charge, but if you believe then you do, and I have met my standard of beyond a reasonable doubt.

RP (Mar. 15, 2017) at 97-99.

These statements did not misstate the reasonable doubt standard. The prosecutor did not mischaracterize the term "abiding belief." The prosecutor may have minimized the importance of reasonable doubt to some extent by stating "if you believe then you do." But within the context of the entire argument, the prosecutor properly emphasized the long-term and settled aspects of the certainty required for a conviction.

We hold that the prosecutor did not misstate the reasonable doubt standard and therefore did not commit prosecutorial misconduct in this respect.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Preston argues that he received ineffective assistance of counsel because his defense counsel failed to (1) object to certain evidence, (2) propose alternative jury instructions, and (3) object to statements in the prosecutor's closing argument. We disagree.

1. Legal Principles

We review ineffective assistance of counsel claims de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Id.* at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 458. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. *Id.*

We apply a strong presumption that counsel's performance was reasonable. *Id.* Counsel's conduct is not deficient if it was based on what can be characterized as legitimate trial strategy or tactics. *Id.*

2. Failure to Object to Evidence

Preston argues that defense counsel was deficient because he did not object to (1) Amacker's testimony that Preston refused to help her recover the ring; (2) Brenna's testimony that Preston did not seem to have any intention of assisting with the retrieval of the ring, his demeanor was manipulative, and he was not remorseful; and (3) Brenna's testimony implying that he believed Preston had violated the law.

Where a claim of ineffective assistance of counsel is based on defense counsel's failure to object, the defendant must show that the objection likely would have been sustained. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

One of the elements of theft is the intent to deprive the owner of that property. RCW 9A.56.020(1)(c). Amacker's and Brenna's testimony about Preston's refusal to cooperate in recovering the ring and lack of remorse arguably was relevant to his intent. Therefore, Preston cannot show that the trial court would have sustained any objection.

Brenna's testimony that Preston's demeanor was manipulative related to Preston's awareness that he had committed a crime. Brenna stated that during questioning Preston tried to steer him away from certain details. A defendant's demeanor during questioning may be admissible. *See State v. Barry*, 183 Wn.2d 297, 310, 352 P.3d 161 (2015) (stating that nothing precludes the State from introducing pre-arrest, non-testimonial evidence like the accused's demeanor). Therefore, Preston cannot show that the trial court would have sustained any objection.

Regarding Brenna's testimony about Preston's violation of the law, when asked on redirect examination if Preston had returned the ring "[would] it make him any less, by your opinion, in violation of the law," Brenna answered "no." RP (Mar. 13, 2017) at 124. An officer's opinion about whether the defendant is guilty generally is objectionable. *State v. Quaale*, 182 Wn.2d 191, 197, 340 P.3d 213 (2014).

However, a party who introduces evidence on a particular subject may open the door to otherwise inadmissible testimony offered to explain, clarify, or contradict that evidence. *State v. Wafford*, 199 Wn. App. 32, 36-37, 397 P.3d 926, *review denied* 189 Wn.2d 1014 (2017). On cross-examination Preston asked Brenna whether he would have referred the case to a prosecutor

for criminal charges if Preston had returned the ring, and Brenna answered. "Probably not." RP (Mar. 13, 2017) at 122. This line of questioning opened the door for the prosecutor's question on redirect about whether returning the ring would negate Preston's violation of the law. Therefore, Preston cannot show that the trial court would have sustained any objection.

We hold that Preston's ineffective assistance of counsel claim fails in this respect because he cannot demonstrate that the trial court would have sustained any of the objections he claims defense counsel should have made.

3. Failure to Propose Adequate Jury Instructions

Preston argues that defense counsel was deficient because he failed to propose jury instructions that defined lost property and abandoned property. He suggests that these instructions would have informed the jury that the ring was not necessarily lost because it was lying on the floor, and could have been abandoned.

But Preston did not testify that he thought the ring was abandoned; he essentially admitted during his testimony that he thought the ring was lost and that he wanted to find the owner. And defense counsel did not argue that the ring had been abandoned. His primary argument was that Preston did not intend to commit a crime. As a result, there was no strategic reason for defense counsel to have proposed instructions that made a distinction between lost property and abandoned property. Therefore, we hold that defense counsel was not deficient in failing to propose these instructions.

4. Failure to Object to Closing Argument

Preston argues that defense counsel was deficient because he failed to object to what he claims were improper statements during closing argument. But as discussed above, we hold that

the prosecutor's statements were not improper. Therefore, we hold that defense counsel was not deficient in not objecting to those statements.

E. CUMULATIVE ERROR

Preston argues that we should reverse his convictions under the cumulative error doctrine. But as discussed above, Preston has not demonstrated that the trial court committed any errors. Accordingly, we reject Preston's cumulative error claim.

F. APPELLATE COSTS

Preston asks that we not impose appellate costs. The State does not contest this request. Accordingly, we decline to impose appellate costs.

CONCLUSION

We affirm Preston's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, C.J.

We concur:

WORSWICK, J.

MELNICK, J.