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Washington State
Court of Appeals
Division Two

August 18, 2020

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

STATE OF WASHINGTON, Respondent, v. BRIAN O'GRADY FRALEY, Appellant.	)))))))))	No. 52841-0-II UNPUBLISHED OPINION

SIDDOWAY, J.[1] — Brian Fraley appeals his convictions for unlawful possession of payment instruments and bail jumping. He raises a challenge to an elements instruction and argues that prosecutorial misconduct during Mr. Fraley's cross-examination deprived him of a fair trial. We reject his contention that "knowing possession" is an element of unlawful possession of payment instruments under RCW 9A.56.320(2)(a). He fails to demonstrate that the prosecutor's cross-examination, to which no objection was made, was so flagrant and ill-intentioned that no curative instruction could have neutralized the resulting prejudice. For those reasons, and because Mr. Fraley raises no meritorious issues in his statement of additional grounds, we affirm.

[1] The Honorable Laurel Siddoway is a Court of Appeals, Division Three, judge sitting in Division Two under CAR 21(a).

FACTS AND PROCEDURAL BACKGROUND

In the summer of 2017, Gary Chamberlain was living on state retirement and Social Security at his home in Tumwater with Rebecca Matthews, a "friend of a friend" who needed a place to stay. Report of Proceedings (RP) at 34. Sometime in or around late July 2017, Brian Fraley appeared at Mr. Chamberlain's home in a new recreational vehicle (RV) in which he was living, having been told by Ms. Matthews that he, too, could stay on Mr. Chamberlain's property for a while. Mr. Chamberlain agreed.

About a month after Mr. Fraley began living at the property, Mr. Chamberlain realized his checkbook was missing. He traveled to his credit union and obtained temporary checks that he kept in the trunk of his car, a 1967 Ford Galaxy.

Around mid-September, Mr. Fraley's RV went missing, and he believed that Tom Beatty, a friend of Mr. Chamberlain's, knew something about what had happened to it. On September 12, police were called to the Chamberlain property where they spoke to Mr. Fraley, Mr. Beatty, and Mr. Chamberlain. The officers told Mr. Fraley he needed to leave, and that he was not welcome at the property. Mr. Fraley did not believe he had been trespassed, however; according to him, Mr. Chamberlain never personally told him he did not want him at his property.

A week later, at around 9:30 p.m. on September 19, Mr. Chamberlain was sitting on his couch when he heard his car start. Mr. Chamberlain believed it was Mr. Fraley and yelled, "'You're going to run out of gas. Don't take the car.'" RP at 43. Mr. Fraley

drove off anyway. Since the car had been taken without permission, Mr. Chamberlain immediately called the police and reported it stolen.

A responding Tumwater police detective was on his way to Mr. Chamberlain's home to get more information when he saw the distinctive maroon and black Ford Galaxy in the parking lot of a Walmart store not far from where Mr. Chamberlain lives. The detective pulled in behind the Galaxy, activated his emergency overhead lights, and began giving orders to Mr. Fraley, who angrily emerged from the car. The detective arrested him. In a search incident to arrest, the detective found Mr. Chamberlain's missing checkbook in the left rear pocket of Mr. Fraley's shorts; tucked into the checkbook were some of Mr. Chamberlain's temporary checks and a $300 check drawn on a third party account that was payable to Ms. Matthews. After the detective reported locating Mr. Fraley and the car, another officer drove Mr. Chamberlain to the Walmart parking lot, where Mr. Chamberlain completed a stolen vehicle report form.

Mr. Fraley was charged with theft of a motor vehicle and unlawful possession of payment instruments. After he failed to appear for hearings in December 2017 and January 2018, the State amended the information to add two counts of bail jumping.

The case proceeded to a jury trial in June 2018. The State presented testimony from Mr. Chamberlain, two police officers, and two prosecutors with personal knowledge of facts underlying the bail jumping charges. During Mr. Chamberlain's redirect

examination, the prosecutor asked the following question about what Mr. Chamberlain knew about a possible effort to cash one of his checks:

> Q. Okay. Have you ever been alerted by another police department of somebody attempting to cash one of your checks?
>
> A. Lacey Police Department.

RP at 63.

At the outset of the defense case, before calling Mr. Fraley as his only witness, defense counsel informed the court that he recently learned the State had information that Mr. Fraley was a "person of interest in a forgery of one of Mr. Chamberlain's checks"—the Lacey Police Department matter mentioned in Mr. Chamberlain's redirect examination. Defense counsel asked that the State be required to present "an offer of proof at some point before he can get into that in front of the jury." RP at 169. The trial court responded with the following ruling:

> I'm not going to require an offer of proof by the state at this time, but I agree with you . . . that based upon what I have heard if the state wants to question your client about some other potential criminal conduct that an offer would need to be made outside the presence of the jury before any such question would be allowed.

RP at 169. The trial court asked the prosecutor if he understood the court's ruling, to which the prosecutor responded, "Yes, Your Honor." *Id.*

Mr. Fraley testified he had driven Mr. Chamberlain's car many times with permission, and that he asked for and received Mr. Chamberlain's permission to use the car on the night of September 19, 2017. He said he borrowed the car that night because

he was going to pick up Mr. Beatty and bring him back to Mr. Chamberlain's home so the three of them could talk about Mr. Fraley's missing RV. He claimed that he and Mr. Chamberlain discussed Mr. Fraley's plan to borrow the car for that purpose for at least half an hour before he left.

As for the checks, Mr. Fraley testified that earlier in the day on the 19th, Mr. Chamberlain left home to visit his mother and Mr. Fraley later left for a short time to go to the store. He explained that a friend he and Mr. Chamberlain had encountered the prior evening had spent the night and was still there; he was concerned that while he was at the store, she would be alone at Mr. Chamberlain's home. Noticing the checkbook and checks on a coffee table, he decided to take them with him for safekeeping. He claimed that on returning to the home, "It just didn't cross my mind" to remove the checks from his back pocket. RP at 185.

During cross-examination, after Mr. Fraley admitted having Mr. Chamberlain's checks in his pocket when arrested, the prosecutor asked him about using the checks:

> Q. Had you used any of those checks?
> A. No, I had not.
> Q. Did you ever remove any of those checks from the checkbook?
> A. No, I did not.
> Q. So if a check was attempted to be cashed in Lacey, that would have nothing to do with you.
> A. That is correct.
> Q. Do you know a Vaughn Krueger?
> A. No, I do not.
> Q. Would Vaughn Krueger know you?
> A. I couldn't say.

RP at 221. The prosecutor did not make an offer of proof before posing these questions. The defense did not object.

After the defense rested, the trial court invited any objections or exceptions to its jury instructions; the defense had none.

The jury was excused to begin its deliberations late in the morning on the third day of trial. Mid-afternoon, it submitted a question about what to do if it could not reach agreement on two of the counts. The court responded, "Please continue to deliberate. Please refer to your jury instructions." RP at 312. Less than an hour later, the jury sent out a further note, this time referring to being "stuck in a deadlock" on two counts. RP at 312-13. This time, the trial court questioned the presiding juror about the reasonable probability of the jury reaching a verdict within a reasonable time on each count. When the presiding juror answered no with respect to count one (theft of a motor vehicle) and count three (a bail jumping charge), the parties stipulated to a mistrial on those counts. The jury found Mr. Fraley guilty of the remaining unlawful possession of payment instruments and bail jumping charge.

Several weeks later Mr. Fraley moved to dismiss or for a new trial, arguing that the State committed prosecutorial misconduct by asking Mr. Fraley about the attempted check cashing in Lacey without first making an offer of proof. At the hearing on the motion, Mr. Fraley argued that the State had committed "three wrongs": it had not timely

disclosed information to the defense, it had violated the trial court's ruling requiring an offer of proof, and it had insinuated in closing argument that Mr. Fraley had committed an uncharged crime. RP at 335-36.

The State's response to the motion provided further detail on how and when it came by the information alluded to in its cross-examination. The prosecutor explained that while preparing for trial, he learned that Mr. Chamberlain was identified as a victim in a second case: an attempt by a person named Vaughan Krueger to cash one of Mr. Chamberlain's checks in Lacey. The prosecutor learned that Mr. Krueger claimed to have received the check from "Beau Fraley." The name "Beau" prevented the connection from being made earlier. The prosecutor said he notified defense counsel on the morning of June 11 (the day before trial) of Mr. Krueger's name, the case number, the arresting agency, and the arresting officer.

After hearing argument, the trial court ruled there was no discovery violation because the State notified the defense of the information as soon as it learned of it. While it found (and the State conceded) that the prosecutor failed to comply with the court's ruling that it make an offer of proof before questioning Mr. Fraley about the attempted check cashing, it also found that the violation was not flagrant or ill-intentioned. It observed that in the midst of trial "there are so many issues [the lawyers] are trying to deal with" and it took the prosecutor "at his word" that he was thinking an offer of proof would be required before he could present evidence of the attempted check cashing in

rebuttal. RP at 349-50. The court observed that the State had a good faith basis for its questions and expressed its view that the prosecutor's questions about removing or attempting to cash a check were "insignificant compared to the other topics that were discussed in the cross-examination." RP at 352.

The trial court sentenced Mr. Fraley to a prison based drug offender sentencing alternative. Mr. Fraley appeals.

ANALYSIS

Mr. Fraley makes two assignments of error. For the first time on appeal, he challenges the elements instruction on the unlawful possession of payment instruments charge. He also renews his posttrial argument that the State's cross-examination about the alleged check-cashing attempt in Lacey was prosecutorial misconduct.

I. NO ERROR IN THE ELEMENTS INSTRUCTION IS SHOWN

RCW 9A.56.320, under which Mr. Fraley was charged with unlawful possession of payment instruments, provides:

> (2)(a) A person is guilty of unlawful possession of payment instruments if he or she possesses two or more checks or other payment instruments, alone or in combination:
>
> (i) In the name of a person or entity, or with the routing number or account number of a person or entity, without the permission of the person or entity to possess such payment instrument, and with intent either to deprive the person of possession of such payment instrument or to commit theft, forgery, or identity theft.

No pattern elements instruction exists for the charge, so one was drafted by the State and edited by the trial court. The instruction, to which the defense did not object, states:

> To convict the defendant of the crime of unlawful possession of payment instruments, as charged in count 2, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 19, 2017, the defendant, did possess two or more checks, in the name of a person or entity, or with routing number or account number of a person or entity, without the permission of the person or entity to possess such payment instrument;
>
> (2) That the defendant, intended to deprive the other person or entity of such payment instrument; and
>
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers at 87 (Instruction 13).

Although the instruction informed jurors of a required mens rea—"[t]hat the defendant intended to deprive the other person or entity of such payment instrument"—Mr. Fraley argues that the trial court erred by failing to instruct the jury that "knowing possession" was also an essential element.

Under RAP 2.5(a) we generally will not entertain issues not raised in the trial court, but an exception exists for manifest error affecting a constitutional right. RAP

2.5(a)(3). An instruction that allows the jury to convict a defendant without finding an essential element of the crime charged relieves the State of its burden of proving all elements of the crime charged beyond a reasonable doubt, thereby depriving the defendant of a fair trial. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). Omission of an essential element is thus manifest error and an error of constitutional magnitude. Mr. Fraley offers no persuasive argument that knowing possession is an essential element of unlawful possession of payment instruments, however.

He first points out that the State alleged knowing possession of the checks in its original and amended informations, making it law of the case. But unnecessary elements become law of the case only when they are included in instructions to the jury. *State v. Hull*, 83 Wn. App. 786, 797-98, 924 P.2d 375 (1996) (citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)).

Next, citing a couple of examples of crimes included in chapter 9A.56 RCW, Mr. Fraley argues that *all* of the "unlawful possession" crimes included in that chapter require both knowledge that the defendant possesses the item and knowledge that possession is illegal. But his examples are of statutes that expressly require knowing possession, which the statute under which Mr. Fraley was charged does not. *See* RCW 9A.56.140(1) (possession of stolen property "means *knowingly* to receive, retain, possess, conceal, or dispose of stolen property"); 9A.56.380(2) (possesses stolen mail "means to *knowingly* receive, retain, possess, conceal, or dispose of stolen mail") (emphasis added). Mr.

Fraley argues that we should impute a knowledge requirement, but we do not read words into a statute unless doing so is imperatively required to make it a rational statute. *State v. Taylor*, 97 Wn.2d 724, 728-29, 649 P.2d 633 (1982). The statute under which Mr. Fraley is charged is rational; it requires proof of a mens rea more culpable than knowledge of possession.

Finally, he argues that "[t]he law disfavors strict liability offenses" and makes the case that factors considered in determining whether the legislature intended to create a strict liability offense weigh against finding that intent here. Br. of Appellant at 11. But those factors are only reviewed when a statute "is silent on the mental intent element." *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). The statute under which Mr. Fraley was charged is not silent on the intent required. Unlawful possession of payment instruments requires proof of "intent either to deprive the person of possession of such payment instrument or to commit theft, forgery, or identity theft." RCW 9A.56.320(2)(a)(i). Strict liability offenses are offenses that do not contain a mental element. *State v. Bash*, 130 Wn.2d 594, 604, 925 P.2d 978 (1996).

Mr. Fraley demonstrates no error in the elements instruction.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING NO ILL-INTENTIONED, FLAGRANT, OR PREJUDICIAL PROSECUTORIAL MISCONDUCT

Mr. Fraley renews his argument that the prosecutor committed prosecutorial misconduct when it cross-examined him about the attempted check cashing in Lacey

without first making an offer of proof. "'[A] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable'; 'a prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove that fact.'" *State v. Babich*, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993) (alteration in original) (quoting *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir. 1984)).

Prosecutorial misconduct is not attorney misconduct in the sense of violating rules of professional conduct. *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009). It is, instead, a term of art that refers to "prosecutorial mistakes or actions [that] are not harmless and deny a defendant [a] fair trial." *Id.* To succeed on a prosecutorial misconduct claim, an appellant has the burden of establishing that the prosecutor's conduct was improper (as being at least mistaken) and was prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). Where, as here, a defendant fails to object in the trial court to a prosecutor's statements, he waives his right to raise a challenge on appeal unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.* at 719.[2] "Under this heightened standard, the defendant must

[2] Mr. Fraley suggests that because defense counsel telegraphed his concern about the Lacey case, we should treat this like an adverse in limine ruling, where a party is treated as having a standing objection. The trial court had not made a ruling adverse to Mr. Fraley, however; it had reserved ruling on admissibility and simply ruled on the

show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Where, as here, the trial court had an opportunity to make its own ruling on a claim of prosecutorial misconduct, its ruling will be given deference on appeal. "'The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial.'" *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995) (quoting *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)).

The trial court's ruling was well explained. While the prosecutor violated the trial court's requirement that an offer of proof be made before raising the Lacey check cashing attempt, the trial court accepted the prosecutor's explanation that he misunderstood or misremembered the ruling as dealing with evidence offered in rebuttal, not cross-examination. The trial court is in the best position to make that assessment.

The fact that there had reportedly been an attempt to cash one of the stolen checks was in evidence, through Mr. Chamberlain's unobjected-to testimony. Information produced in responding to Mr. Fraley's posttrial motions demonstrated a good faith basis for questioning Mr. Fraley about his knowledge of the attempted check cashing in Lacey.

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procedure to be followed.

As the trial court pointed out, had defense counsel made a timely objection, it could have granted the objection, struck the answer and "done away with this issue entirely." RP at 353-54. It recognized, however, that experienced defense counsel knew that when Mr. Fraley answered no to the prosecutor's questions, "the state had nowhere else to go" and "any objection by the defense could have served to highlight the information." RP at 351.

The record supports the trial court's ruling that the challenged testimony was not significant, the evidence on the unlawful possession of payment instruments count was strong, and this was not a situation of incurable prejudice.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Fraley raises two: (1) his trial did not commence until June 12, 2018, contrary to an earlier ruling that it was required to commence no later than 8:00 a.m. on June 11, 2018, and (2) the State violated CrR 4.7 by injecting information that he was a person of interest in the Lacey investigation.

The second additional ground appears to be raising the prosecutorial misconduct issue raised in the opening brief, which was adequately addressed by counsel. Further review is not required. *See* RAP 10.10(a). If Mr. Fraley is alleging a discovery violation under CrR 4.7, his identification of the nature and occurrence of the error is insufficient. *See* RAP 10.10(c).

As to the first additional ground, the State has responded and pointed out an error in Mr. Fraley's representation of the facts. Mr. Fraley's SAG states that at the time of a hearing "on Thursday, June 7th 2018 it was ruled by [Judge] Eri[k] Price that my trial was to commence no later than Monday June 11th 2018 at 8:00 a.m." and this "was agreed by both parties on the record." SAG at 1. In fact, Judge Price ruled at the June 7 hearing that time for trial under CrR 3.3 would run on July 11, 2018. His ruling on that score is reflected in both the transcript of proceedings and the resulting order.[3] Trial commencing on June 12, 2018, was timely.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

, C.J.

Maxa, J.

[3] Mr. Fraley might be confusing a May 10, 2018 continuance order that set his trial date for June 11, 2018. But even that order recognized that the last allowable date for trial under CrR 3.3 was July 11, 2018.