IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD MICHAEL AMARO, Appellant.	No. 38589-9-II UNPUBLISHED OPINION

Penoyar, J. — Richard Michael Amaro appeals his convictions of twelve counts of first degree theft (counts 1-12), two counts of second degree theft (counts 14 and 16), three counts of contracting without a license (counts 13, 15 and 17), and an exceptional sentence. Amaro claims that the trial court gave an improper jury instruction on count 1, made an improper comment on the evidence, and improperly imposed 10-year no contact orders on counts 14 and 16. In a SAG,[1] he challenges the sufficiency of the evidence as to 6 counts of first degree theft and complains that a juror fell asleep during the trial. We reverse count 1, affirm the remaining convictions, and remand for resentencing. At resentencing, the court shall correct the judgment and sentence to exclude count 1 and to impose 5-year no contact orders on counts 14 and 16.

FACTS

During Thanksgiving 1987, Pam and Byron Leibel moved into a new home they had built in Fairway Village, an over-55 retirement community, in Vancouver, Washington. Leibel continued to live there after Byron's death in 1994. In 2002, she had $872,157.41 in assets. This included her home, which was paid for and had a tax assessment value of $361,000, and nearly

[1] Statement of additional grounds under RAP 10.10.

$500,000 worth of investments in Edward Jones accounts. In December 2007, she had -$177.97 in her checking accounts, $328,788.60 in liabilities, church members were collecting food for her, her home was in foreclosure, she had pawned her wedding rings and jewelry, her phone and utilities had been shut off, and her car was about to be repossessed.

What happened? In short, as a jury found, she met Richard Amaro. She met him in 2002 when he knocked on her front door and asked to clean her gutters. During the next five years, he re-roofed her house, put up vinyl siding, rebuilt her deck twice, painted her interior, and performed many other smaller jobs in her home. Amaro charged her $35,000 for the siding work, which, according to a siding contractor, was unnecessary as her siding only needed painting not replacing and should have cost only $8,400. Amaro charged her nearly $27,000 to do the roof, which, according to a roofing contractor did not need to be replaced as she had a 30-year roof on her home and should have cost only $7,050.31. And Amaro charged her twice to rebuild the deck, which a contractor testified should have cost about $6,870.06, but cost her $115,750.

Additionally, Leibel gave Amaro money to promote his business, $45,000 to buy a home on Fourth Plain that was to be torn down to build a museum, money for a vending machine business venture, and money to purchase other homes in Fairview Village that Amaro was to fix-up and sell. Audits of Leibel's accounts show no income from any of these investments. None of these transactions was in writing.

Leibel's friends became concerned and called the police when Leibel asked to borrow money to pay $1,400 in notary fees for the Fourth Plain home. The trial court appointed a guardian for Leibel. The guardian was able to obtain refinancing on Leibel's home, get her groceries and sundries, pay off the $1,000 car debt, and get Leibel a cell phone.

Vancouver police interviewed Amaro twice. He consented to having both interviews recorded, and he spoke to the detectives for over an hour in both interviews. Amaro talked about the work he had done on Leibel's house and admitted that some of his bids were higher than they should have been. He denied taking money from Leibel to "flip" houses. The second interview took place three months later after the police arrested Amaro. This time he admitted that his bids for the deck were higher than they should have been, and he said he was sorry for charging so much.

Leibel could not remember many details of her transactions with Amaro, but she had kept notes of the amounts she paid and the purpose of the payments, which she turned over to the police. Leibel's notes, as well as cancelled checks and bank records, were used in a forensic accounting, which attempted to track money from Leibel's accounts to Amaro's. The forensic accountant verified through bank records that from December 2002 through December 2007, $482,001.70 was paid from Leibel's accounts to accounts Amaro or his wife owned. The accountant was unable to verify that the amounts relating to counts 3, 5, 6, and 8 went into Amaro's accounts, and could only partially verify the amounts in counts 2 and 10. When the forensic accountant was unable to verify transactions through bank records, he relied on Leibel's notes to determine where the money withdrawn from her accounts had gone.

The State also presented evidence that Amaro was not licensed as a contractor until May 8, 2007, and his license was suspended on August 25, 2007, when his insurance was cancelled.

In October 2007, Evelyn Logie and Marlys Johnston hired Amaro to paint their houses. They made down payments to cover the paint, but Amaro did not deliver the paint, return the money, or paint the houses.

The State charged Amaro with 12 counts of first degree theft, three counts of contracting without a license, and two counts of second degree theft. RCW 9A.56.030(1)(a); RCW 18.27.020(2)(b); RCW 9A.56.040(1)(a). The State alleged aggravating factors as to all of the first degree theft counts. The jury returned guilty verdicts on all counts and found by special verdicts that the aggravating factors had been proven as to each count of first degree theft.[2] The trial court imposed exceptional sentences of 110 months on the first degree theft convictions, 29 month standard range sentences on the second degree theft convictions, and suspended sentences on the convictions for contracting without a license. Amaro filed this timely appeal.

ANALYSIS

I. Jury Instruction on Count 1

Jury instruction 15 pertained to count 1 of the information. That count, unlike the others, alleged a series of acts rather than a single act of theft. The to-convict instruction provided in part:

> To convict the defendant of the crime of theft in the first degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That between December 1, 2002 and September 21, 2006, the defendant by color or aid of deception, obtained control over property of another;
> (2) That the defendant obtained control of the property by a series of acts which were connected together as part of a common scheme or plan;
> (3) That the property exceeded $1500 in value;
> (4) That the defendant intended to deprive the other person of the property;
> . . . .

[2] The jury found four aggravating factors: (1) Amaro used his position of trust, confidence, fiduciary responsibility to facilitate the commission of the crime; (2) Amaro knew or should have known that the victim was particularly vulnerable or incapable of resistance; (3) Amaro used a high degree of sophistication or planning when committing the crime; and (4) Amaro's crime was a major economic offense or series of offenses.

Clerk's Papers (CP) at 165.

The statute of limitation for this offense is three years, RCW 9A.04.080(1)(h), and acts committed before February 21, 2005, would have been excluded unless they were part of a series of acts under a common scheme or plan. *State v. Mermis*, 105 Wn. App. 738, 745-46, 20 P.3d 1044 (2001). Thus, as Amaro argues, if the jury found that only the acts alleged before February 21, 2005, were committed, the instructions should have clarified that a conviction should not ensue. The State argues a theory of criminal impulse continuing into the limitation period and, at oral argument, that a *Petrich*[3] instruction was not required. Neither argument was adequately briefed, and we agree that the conviction on count 1 (out of twelve convicted counts) could have been based only on acts outside the limitations period and, thus, should be set aside.

II. Comment on the Evidence

Article 4, section 16 of the Washington Constitution provides that "'[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.' A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting Wash. Const. art. IV, § 16). The comment violates the constitution only if those attitudes are "reasonably inferable from the nature or manner of the court's statements." *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999) (quoting *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)).

The following colloquy took place outside the jury's presence regarding the edited versions of the recorded interviews:

[3] *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

> DEFENSE COUNSEL: And just for the Court's clarification, on a foundation for audio recording, the authenticating witness should testify the recording accurately portrays the original conversation, without material addition or deletions. And it's going to be my contest -- me contesting to the Court that if you're sending discs back with the jury, it should not be the edited discs that boil down two and a half hours to 50 minutes. It should be the entire thing. However, I am not objecting to the jury hearing the edited version as opposed to sitting through the entire two and a half hours.

Report of Proceedings (RP) at 354. Following a short break, the State explained to the court:

> PROSECUTOR: We've resolved the difficulties, Judge. . . . As to the whole thing, Counsel is indicating that he didn't necessarily think that we needed to sit through two and a half hours of tapes, either. So the compromise is we'll play the two edited versions, mark all four versions, and send them back in case the jury wants to hear the whole thing.
>
> . . . .
>
> DEFENSE COUNSEL: That is correct, Your Honor.

RP at 355-56.

Before the State played the edited version of the recorded interviews, defense counsel questioned Officer Hemstock about how the entire recording would have shown that the officers repeatedly interrupted Amaro. Hemstock explained that interrupting the suspect is typical of the bantering type of interviews they employ and that it is likely that the two officers interrupted Amaro 100 times during each interview. The State then asked the Hemstock: "You're going to play the edited version, but if you want to play the whole thing, he could play the whole thing, is that right?" RP at 401. Hemstock replied, "Yes." RP at 401 The State then asked, "You were simply just asked to narrow down the time frame?" RP at 401. Hemstock answered, "Yes." RP at 401. The State then asked, "So that we didn't spend two and half hours listening to the same material over and over again; isn't that right?" RP at 401. Hemstock responded, "I believe so, yes." RP at 402.

The trial court then explained to the jury:

> All right. Let me perhaps cut short both your redirect and recross.
> Ladies and gentlemen of the jury: Exhibits 45 and 46 are complete copies of the recorded information. It's appropriate for the parties, in referring to exhibits, to refer to portions of the exhibits to highlight those portions, just as if they wish to highlight portions of documents, they can do that. Either side can play to you or highlight for you those portions of the exhibits that they think benefit them.

RP at 402.

Amaro argues that this comment undermined his inquiry about whether the recordings were being presented in a fair light or were taken out of context. He argues that instead of letting the parties fully explore the issue, the trial court cut them short and instructed the jury that the State's method of presenting the evidence was appropriate. In doing so, he argues, the court conveyed its view that defense counsel was wasting the jury's time in challenging the edited versions of the recordings.

Amaro argues that the trial court's comment related directly to his credibility, which was at issue during the trial. He argues that he wanted the jury to hear his comments in their proper context and not in a version edited to favor the State's case.

It is apparent from the record that defense counsel agreed that the jury only needed to hear the edited versions, with the caveat that they could hear the whole interviews if they wanted. Amaro mischaracterizes defense counsel's questions as advocating for the jury to hear the whole interviews. That was simply not the case. Further, the trial court specifically told the jury that either side could play whatever portions of the recordings he wanted the jury to hear in order to emphasize what that side regarded as important. The trial court's comments did not, as Amaro suggests, undercut his argument or convey to the jury that the State's versions of the recordings was well done.

III. 10-year No Contact Orders

Amaro next contends that the trial court erred in imposing 10-year no contact orders on counts 14 and 16, which were both class C felonies because the maximum sentence for such offenses is 5 years. *State v. Armendariz*, 160 Wn.2d 106, 118-119, 156 P.3d 201 (2007).

The State concedes this was error, explaining that the trial court's imposition of a no-contact order for all Amaro's felonies did not distinguish his class C felonies. The trial court should correct this when resentencing Amaro on remand.

IV. Statement of Additional Grounds Issues

A. Sufficiency as to Counts 2, 3, 5, 6, 8, and 10

Amaro argues that the evidence was insufficient to convict him of counts 2, 3, 5, 6, 8, and 10 because the forensic auditor could not verify from the bank records that Amaro deposited the money in his account that Leibel withdrew from hers.

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Employing this standard, there was ample evidence to support these convictions. Although the forensic accountant could not verify these transactions with bank records, he relied on Leibel's extensive notes to show that the money went to Amaro. This was sufficient for the

matter to go to the jury and thus sufficient to support his convictions..

B. Sleeping Juror

During the third day of trial while the forensic accountant was explaining his accounting numbers, the trial court interrupted the proceedings to ask juror four to pay attention to the proceedings:

> THE COURT: Excuse me. Juror No. 4? Juror No. 4, I do need you to pay attention to the proceedings. If you're having difficulty and you need to stand up and stretch during the course of the proceedings, then whatever you need to do. Would some water or coffee help you?
>
> JUROR 4: Water would.
>
> THE COURT: Could you give Juror No. 4 water, please?
>
> JUROR 4: Let her give me some coffee. Give me the coffee, please.

RP at 334-35.

During cross-examination of that same witness, the trial court took a momentary break to allow everyone to stand and stretch. Addressing Juror No. 4, the trial court asked, "Want another cup of coffee? Is it good enough to drink two cups?" RP 384. Juror No. 4 then had another cup of coffee.

After one more witness testified, the trial court observed:

> As I've indicated to counsel, Juror No. 4, who has been having some difficulty maintaining her focus on the trial, is apparently having a medical condition which is contributing to that. And so rather than continue to have her struggle with it and have the remainder of the back row distracted by it, I'm going to recess the trial for the rest of the day. And, hopefully, the additional time off of being on the jury will assist her in getting back under control.

RP at 403-04. The next morning, the trial court, speaking to counsel, said, "My understanding, she had a good night's sleep; she's ready to proceed." RP at 412.

Whether a juror was so inattentive that the defendant was prejudiced is a matter addressed to the trial court's discretion, and we review only for abuse of that discretion. Unless counsel objects to a juror's inattentiveness during trial, the error is waived on appeal. *State v. Hughes,* 106 Wn.2d 176, 204, 721 P.2d 902 (1986) (citing *Casey v. Williams,* 47 Wn.2d 255, 257, 287 P.2d 343 (1955)). Here, neither the State nor defense counsel asked for a recess nor to have the juror removed. Further, the trial court was aware of the juror's inattentiveness and asked her to stand, stretch, and twice offered her coffee. The trial court recessed the trial early so the juror could get rest and not distract the remainder of the jury.

The trial court was in the best position to decide if the juror needed to be excused and absent any such motion from either side, the trial court's choice to coax the juror along and then dismiss early for the day protected Amaro's right to a fair trial.

We reverse count 1, affirm the remaining convictions, and remand for resentencing. At resentencing, the court shall correct the judgment and sentence to exclude count 1 and to impose 5-year no contact orders on counts 14 and 16.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

Armstrong, J.