

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

STATE OF WASHINGTON,)	No. 67166-9-I
)	
Respondent,)	
)	
v.)	
)	
SAMANTHA VALERIE MASSEY,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: October 17, 2011
)	

Ellington, J. — Prosecutorial misconduct constitutes grounds for reversal if the prosecutor’s conduct is both improper and prejudicial. Here, the prosecutor committed misconduct in cross-examination and closing argument by provoking the defendant to testify that the State’s witnesses were lying or grossly mistaken and by arguing the jury could not acquit unless it agreed. Likewise, defense counsel’s failure to object to the misconduct constituted ineffective assistance. Given the overwhelming evidence against the defendant, however, we conclude these errors did not affect the outcome of her trial. Finding the remaining argument to be without merit, we affirm.

BACKGROUND

On January 29, 2009, Samantha Massey brought her 12-year-old son, Isaiah Hill, to a medical clinic in Seattle because he was having severe

headaches, nausea and foot pain. Nurse practitioner Cynthia Brown wrote prescriptions for Rhinocort, a nasal steroid, and Toradol, a pain reliever.

The same day, a woman presented two prescriptions to a Safeway pharmacy in Tacoma, along with a medical coupon bearing Isaiah Hill's name and Samantha Massey's signature. One prescription was for Rhinocort, but the other was for 125 tablets of a relatively high dose of the narcotic pain reliever Percoset. The prescriptions were facially valid, on authentic paper and bearing the proper stickers from the medical clinic. Nevertheless, the high dose and large number of Percoset prescribed for a child made pharmacy technician Starlyn Hedges suspicious.

Because the pharmacy wanted to confirm the prescription with the clinic, which had closed for the night, and lacked sufficient quantity of Percoset to fill the prescription in any event, Hedges informed the woman she would need to return the following day. Hedges walked out with her, expressing concern about Isaiah's health, given such extreme pain treatment. The woman told Hedges Isaiah had been diagnosed with cancer and was undergoing chemotherapy. Further, the woman said she also had cancer. Having a child the same age as Isaiah, Hedges was touched by the memorable encounter.

The following day, a pharmacist told Hedges the prescriptions were found to be forgeries. Hedges called the clinic to confirm the information before calling the police. Later that day, an unidentified man came to pick up the falsified prescriptions and was turned away.

Tacoma Police Detective Randi Goetz interviewed Massey in April 2009. Goetz advised Massey of her rights and had her sign an advisement of rights form in her presence. Massey admitted having filled prescriptions at that Safeway in the past, but denied any involvement in the attempt to fill a forged prescription.

Detective Goetz created a photomontage containing Massey's picture and showed it to Hedges in May 2009. Hedges immediately identified Massey as the woman who dropped off the prescriptions and spoke about her son's cancer. Hedges also stated she had seen Massey a few times since, shopping at the Safeway, but had no interaction. Goetz clarified that Hedges was not confusing the later sightings with the prescription incident.

Goetz next contacted Massey at her home. Goetz showed Massey the photomontage, and Massey agreed her photo looked like her. Goetz also showed Massey the medical coupon and pointed out that the signature on the coupon closely resembled Massey's signature on the advisement of rights form. Massey disagreed and claimed she had not signed the coupon.

The State charged Massey with one count of obtaining or attempting to obtain a controlled substance by fraud, deceit, or misrepresentation (prescription fraud).

At trial, nurse practitioner Cynthia Brown testified that Isaiah Hill was her patient and confirmed the appointment on January 29, 2009. She testified that she had prescribed Rhinocort, but the prescription for that drug that had been presented to Safeway was not in her handwriting or that of anyone at the clinic.

Brown explained that at the time of this incident, patients had access to the nurses' station, where prescription pads, patient information, and charts were lying around and that extra stickers necessary for valid prescriptions were kept in the file.

Brown testified Percoset was not used for children and further that the dosage on the forged prescription was fairly high for an adult. She also stated 120 tablets would not have been prescribed. There was no documentation about any Percoset prescription in Isaiah's file, and no indication he had been diagnosed with cancer.

Brown could not recall the time of Isaiah's appointment, but said it could have been in the afternoon. Her last appointment of the day is at 4:15 p.m. Isaiah could have waited as much as 30 minutes before he was seen, and it was possible that the entire visit could have lasted an hour. That was unlikely, however, because staff and patients are usually gone by 5:30 p.m.

Isaiah testified he remembered the January 29 clinic appointment because it was his mother's birthday. Isaiah said the appointment was scheduled for 4:15 p.m., but they were not seen until 4:45 pm. They did not leave the clinic until about an hour later, after which they went to a nearby restaurant to celebrate his mother's birthday. Heavy traffic prevented them from getting home until after 8:00 p.m. Massey's friend, Fred Braggs, testified he drove Massey and her children to and from the clinic that day and confirmed Isaiah's timeline.

Massey also testified about January 29. She reiterated the timeline Isaiah and Braggs had provided. She testified she remembered being given only one

prescription at the clinic, which she immediately lost. She thought she called for a replacement, but there was no indication of such a request in the clinic notes. She denied going to the Safeway that day, attempting to fill any prescriptions, meeting Hedges or telling her anything about her son having cancer. She also denied that she had signed the advisement of rights form.

The prosecutor presented several examples of Massey's signature, including ones that Goetz testified were similar to the one on the medical coupon. Massey explained that some of the signature samples were different from her normal signature because she had been recovering from surgery, on medication, or withdrawing from medication at the time of each of the samples. She produced several examples of a different signature, which she said was more typical.

The jury convicted Massey as charged. The court imposed a sentence of 18 months of confinement followed by a period of community custody.

DISCUSSION

Massey contends the prosecutor committed reversible misconduct during cross-examination and closing argument and that her counsel was prejudicially ineffective for failing to object.

To prevail on a claim of prosecutorial misconduct, a defendant must show the conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.¹ Courts will find prejudice only if there is a substantial likelihood that the remarks affected the jury's verdict.² Failure to object to an

¹ State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

² Id. at 718-19.

improper remark waives the issue unless the conduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.”³

To prove ineffective assistance of counsel, Massey must show both that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different.⁴ There is a strong presumption that counsel’s representation was effective.⁵ Legitimate trial strategy or tactics cannot serve as the basis for the claim.⁶

During Massey’s cross-examination, the prosecutor pointed out that Massey’s testimony differed substantially from that of the State’s witnesses. The prosecutor asked Massey whether “this jury here has to decide who is telling the truth” and “who is being honest.”⁷ Massey agreed. The prosecutor highlighted Massey’s several convictions for crimes of dishonesty.

Later, the prosecutor asked Massey about Hedge’s testimony:

Q: And then Ms. Hedges is either lying or grossly mistaken when she says it was you that came to the counter that night?

A: Yes.

³ Id. at 719.

⁴ State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

⁵ McFarland, 127 Wn.2d at 335.

⁶ Id. at 336.

⁷ RP (Apr. 1, 2010) at 197.

Q: And she is either lying or mistaken when she says it was you that gave her this identification card?

A: Yes.

Q: And she is either lying or mistaken when she is saying it's you she developed a rapport with that night?

A: Yes.

Q: And she is either lying or mistaken when she said it was you she had to turn away when he said they were out of that amount of Percocets?

A: Yes.

Q: And again, she is either lying or grossly mistaken when she says you told her your son was going through cancer?

A: Yes.

Q: And through chemotherapy?

A: Yes.

Q: And that you had cancer?

A: Yes.^[8]

On recross, the prosecutor questioned Massey about Detective Goetz's testimony about the advisement of rights form:

Q: So when Detective Goetz says she did [read the rights form to Massey], she is either lying or grossly mistaken?

A: Both.

Q: When Detective Goetz says you signed that document?

A: I did not sign that document.

Q: So that means she is either—

A: Because I came in under the pretenses we are just having a

⁸ RP (Apr. 1, 2010) at 236-37.

conversation.

Q: So Detective Goetz is either lying or mistaken?

A: Yes.^[9]

The prosecutor continued this theme in closing argument. Stating that the “evidence in this case is overwhelming,” the prosecutor argued the jury would have to reach certain conclusions to find Massey not guilty.¹⁰

You also, in order to find the defendant not guilty, have to find that Ms. Hedges is either lying or grossly mistaken. There is no reason for her to come into court and finger the defendant in a lie, no reason. She has nothing to gain by being here, by testifying, by viewing a photomontage and identifying the defendant. Or that she is grossly mistaken. The defense wants you to believe that she is grossly mistaken because she has shopped in that Safeway in the past.

. . . .

Then you have to believe the defendant over everyone else. Detective Goetz is lying when she says that she signed that advisement of rights form. Starlyn Hedges is lying or grossly mistaken when she says that that’s the person who came in that night. Cynthia Brown is lying or grossly mistaken that she talked to the defendant about the prescriptions and handed her multiple prescriptions. You also will have to believe the defendant when she is the one that had all the access and all the tools to make this prescription fraud occur.^[11]

⁹ Id. at 254.

¹⁰ RP (Apr. 5, 2010) at 278-81. Specifically, the jury would have to “find that someone else had access to a blank prescription;” to “assume that someone other than the defendant got a hold of Isaiah’s I.D. stickers” from the January 29 appointment; “to find that someone else got a hold of Isaiah’s DSHS and medical identification card.” Id. at 278-79. In addition, the prosecutor argued, “[y]ou also have to assume, to find her not guilty, that someone else knew a version of the defendant’s signature and forged it onto that I.D. card.” Id. at 279. The prosecutor also suggested that to find her not guilty, the jury would also have to find “that someone else got a hold of that Rhinocort prescription and felt a need to fill it;” and “that this person . . . chose to go to the very pharmacy that the defendant gets her drugs filled at.” Id. at 280.

This court has long held it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken.¹² Such argument is "improper because it is misleading and misstates the jury's role in reaching its verdict in a criminal case, which is to determine whether the State has met its burden of proving the case beyond a reasonable doubt."¹³

Further, "questions of one witness whether another is lying or not telling the truth are improper and constitute misconduct because they are designed to elicit testimony which is both irrelevant and prejudicial."¹⁴ Although asking a witness whether another is mistaken is permitted when conflicts in the testimony make the discrepancies relevant, that is not the case where two versions of events are completely at odds and there is nothing to clarify.¹⁵

The prosecutor's repeated efforts to elicit Massey's opinion that the State's witnesses were "either lying or grossly mistaken," and her argument that the jury could not find Massey not guilty without finding that the State's witnesses were "lying or grossly mistaken" were clearly misconduct.

And just as we find the prosecutor committed misconduct, so must we find that defense counsel rendered deficient performance by failing to object. The

¹¹ Id. at 281, 283.

¹² State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

¹³ State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995).

¹⁴ Id. at 825.

¹⁵ Id. at 822-23, 825-26.

State argues counsel had a legitimate basis for failing to object because doing so would “merely emphasize the disparity between the two cases.”¹⁶ But even if it this were a reasonable strategy, by failing to object, counsel simply allowed the prosecutor to stress the disparity repeatedly. A timely objection during cross-examination would have halted the State’s unfair line of questioning and preempted the improper argument. We see no tactical reason for counsel’s failure to object.¹⁷ Counsel’s performance was deficient.

Though we find the prosecutor committed misconduct and defense counsel was deficient, we do not reverse. To find reversible misconduct or ineffective assistance of counsel, there must be a substantial likelihood that the improper questions and comments affected the jury’s verdict. “Some of the factors considered in determining whether the misconduct likely affected the verdict are whether the prosecutor was able to provoke the defense witness to say that the State’s witness must be lying, whether the State’s witness’s testimony was believable and/or corroborated, and whether the defense witness’s testimony was believable and/or corroborated.”¹⁸

The forged prescriptions included one medication that was actually prescribed that day for Isaiah. They were submitted along with a medical coupon

¹⁶ Br. of Respondent at 20.

¹⁷ In some cases, failure to object to “liar” questions might be strategic. In State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995), for example, we considered counsel’s decision not to object reasonable where the defendant “stood up well to the improper questioning” and “refused to agree that the State’s witnesses were lying or incorrect.” This is not such a case.

¹⁸ State v. Padilla, 69 Wn. App. 295, 301, 846 P.2d 564 (1993).

in Isaiah's name, which bore a signature closely resembling one Massey commonly uses.¹⁹ Hedges was unequivocal in her identification of Massey as the woman she talked to on the evening of the crime. Their interaction was neither brief nor fleeting, and was memorable because of the story Massey told her. Further, the State's theory about how Massey could have obtained prescription pads and clinic stickers was believable, given the clinic's practices at the time. Massey's general denial defense was implausible given the number of coincidences necessary for someone else to have committed the crime.

Under these circumstances, the prosecutor's improper questions and comments and defense counsel's failure to object them did not substantially affect the outcome of the case. Once again, we condemn the practice of posing "liar" questions and arguing the jury may not acquit without finding the State's witnesses to be lying or mistaken. But here, the errors caused no prejudice and do not require reversal.

Sentencing

Massey next argues the court violated due process and improperly delegated its authority by failing to specify every condition of community custody. We disagree.

The court wrote into section 4.4 of the judgment and sentence several conditions, including that Massey comply with "other terms including drug

¹⁹ The State presented nine documents, Massey's driver's license, and the advisement of rights form, all of which bore a signature similar to the one used on the medical coupon.

treatment per CCO [community corrections officer].”²⁰ Section 4.4 also required that Massey refrain from the “use or possession of nonprescribed controlled substances” and from “association with drug users or sellers,” and that she forfeit property seized by law enforcement.²¹

In the section pertaining to community custody, next to checked boxes providing that Massey “shall participate in the following crime-related treatment or counseling services” and “comply with the following crime-related prohibitions,” the court wrote “see section 4.4.”²² Likewise, in appendix F to the judgment and sentence, the court required Massey to comply with crime-related treatment and prohibitions, again referencing section 4.4.²³

Massey argues the court improperly delegated to the community corrections officer the task of deciding what treatment and prohibitions Massey must follow. That is not so. Rather, the court specified the applicable prohibitions and treatment: refraining from possession of nonprescribed controlled substances, avoiding drug users and drug sellers and participating in drug treatment “according to your corrections officer.”²⁴

Further, the court was required to impose as a condition of community custody that Massey “comply with any conditions imposed by the department

²⁰ Clerk’s Papers at 91.

²¹ Id.

²² Clerk’s Papers at 93.

²³ Clerk’s Papers at 97.

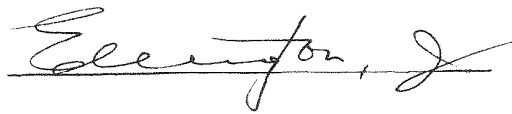
²⁴ RP (Apr. 23, 2010) at 312.

under RCW 9.94A.704.”²⁵ Under that provision, the department has authority to decide what “rehabilitative programs” and “affirmative conduct” is required during Massey’s term of community custody.²⁶ There was no improper delegation.

Massey also argues that her sentence is unconstitutionally vague because it leaves to the community corrections officer the “unfettered ability to define what is, in fact, prohibited conduct or what is ‘crime-related.’”²⁷ RCW 9.94A.704 defines the parameters of the department’s supervision during community custody, so the community correction officer’s discretion is not “unfettered.” Further, the department determines the conditions of community custody “based upon the risk to community safety,” not their relation to the crime.²⁸

Finally, Massey argues the delegation to the community corrections officer to decide the conditions of community placement deprives her of her opportunity for review. That is not so. If any additional conditions are imposed, Massey will have the opportunity to request administrative review within the department.

Affirmed.

A handwritten signature in black ink, appearing to read "E. E. E. E. E.", written over a horizontal line.

WE CONCUR:

²⁵ RCW 9.94A.703(1)(b).

²⁶ RCW 9.94A.704(4).

²⁷ Br. of Appellant at 28.

²⁸ RCW 9.94A.704(2).

Jan, J.

Schiveller, J.