IN THE SUPREME COURT, STATE OF WYOMING

2012 WY 119

APRIL TERM, A.D. 2012

September 10, 2012

RICHARD DEAN YOUNGBERG, Appellant (Defendant), v. THE STATE OF WYOMING, Appellee (Plaintiff).	S-11-0202

Appeal from the District Court of Albany County
The Honorable Jeffrey A. Donnell, Judge

Representing Appellant:
Elisabeth M. W. Trefonas, Assistant Public Defender, Jackson, Wyoming.

Representing Appellee:
Gregory A. Phillips, Wyoming Attorney General; David L. Delicath, Deputy Attorney General; D. Michael Pauling, Senior Assistant Attorney General; Stewart M. Young, Faculty Director, Joshua B. Taylor, Student Director, Kyle A. Ridgeway, Student Intern, Prosecution Assistance Program.

Before KITE, C.J., and GOLDEN, HILL, VOIGT, and BURKE, JJ.

VOIGT, Justice.

[¶1] The appellant, Richard Dean Youngberg, was convicted of one count of check fraud and was sentenced to seven to ten years of incarceration. On appeal, the appellant claims that the prosecutor committed misconduct when he told the jury in closing argument that the appellant was informed that there were problems with his checking account on March 17, 2010. The appellant argues that the prosecutor's statement was not consistent with the evidence presented at trial and, as a result, he is entitled to a new trial. We affirm the appellant's conviction.

ISSUE

Did plain error occur when the prosecutor referred to the officer's testimony regarding when the appellant was notified of problems with his checking account?

FACTS

[¶2] On April 7, 2010, Officer Johnson with the Laramie Police Department was dispatched to the True Value hardware store in Laramie regarding a report of check fraud. Officer Johnson learned that the appellant had issued three separate checks to the business, and all three had been returned by the bank because they were written on a closed account. Officer Johnson began an investigation and learned that the appellant was the focus of two other investigations for check fraud regarding the same checking account that were being conducted by the Laramie Police Department. On April 13, 2010, Officer Johnson arrested the appellant for check fraud and, during a search incident to arrest, found the appellant's checkbook in the back pocket of his pants. The checkbook contained carbon copies of the checks written on the account. Officer Johnson determined that the appellant had written 20 checks to businesses in Albany County totaling $2,843 and one check to the NAPA Auto Parts store in Cheyenne for $362.49.

STANDARD OF REVIEW

[¶3] At trial, defense counsel did not object to the prosecutor's comments and argument regarding when the appellant was first notified that his checking account was closed. Because it is being raised for the first time on appeal, we review for plain error. *Lawson v. State*, 2010 WY 145, ¶ 48, 242 P.3d 993, 1008 (Wyo. 2010). "In order to establish plain error, [the appellant] must show: 1) the alleged error clearly appears in the record; 2) the error transgressed an unequivocal rule of law in a clear and obvious way; and 3) the error adversely affected [the appellant's] substantial right resulting in material prejudice to him." *Id*.

DISCUSSION

[¶4] At trial, the appellant's defense to the charges against him was that he did not know that his checking account had been closed when he wrote the 21 checks to various businesses. The appellant claims that the prosecutor committed misconduct when he told the jury in closing argument that the appellant had been notified that there were problems with his checking account on March 17, 2010, and that he continued to write checks on the account until April 10, 2010. He claims that the evidence demonstrated that he did not know there were any problems with his checking account until the NAPA Auto Parts store notified him that his check written on April 10, 2010, had been denied. He argues that the prosecutor's statements and argument were inconsistent with the evidence that was presented at trial and caused material prejudice to the appellant's case.

[¶5] We find that the appellant has failed to demonstrate even the first part of the plain error standard of review--that the alleged error clearly appears in the record. The appellant claims that the prosecutor continually misrepresented that the NAPA Auto Parts store informed him that there was a problem with his checking account on March 17, 2010, when the evidence shows that the appellant did not write a check to the NAPA Auto Parts store until April 10, 2010. However, the record shows that the appellant wrote checks on the closed account to the NAPA Auto Parts store in ***Cheyenne*** and to the NAPA Auto Parts store in ***Laramie***. The record is very clear, and there is no dispute, that the check was written to the Cheyenne store on April 10, 2010. The evidence regarding when the check was written to the Laramie store is not so clear. What is clear is that Officer Johnson testified, without objection, that an employee of the NAPA Store in ***Laramie*** notified the appellant on March 17, 2010, that the check he wrote to that store was returned.

[¶6] The appellant's entire argument is based upon the notion that it was the NAPA Auto Parts store in ***Cheyenne*** that notified the appellant that his check had been returned. In fact, the appellant fails to recognize in his brief on appeal that he even wrote a check to the NAPA Auto Parts store in Laramie, despite the fact that at trial the appellant testified:

> [DEFENSE COUNSEL]: Did you ever -- were you ever confronted about a check that didn't clear?
>
> [APPELLANT]: Yes, I was one time.
>
> Q. Where was that at?
>
> A. That was a NAPA here in Laramie.
>
> Q. Okay. And what happened?

> A. I went to return some items because one of my uncles from Saratoga said that he had those same tools; that he would give them to me, so I went to return those items at NAPA, and somebody from NAPA confronted me and said that they had called my bank, and my account was not good.

Thus, the evidence presented at trial was that, at some point in time, the appellant wrote a check to the NAPA Auto Parts store in ***Laramie***, and he was notified by an employee of that store on March 17, 2010, that the check had been returned. The appellant then wrote a check on April 10, 2010, to the NAPA Auto Parts store in ***Cheyenne*** that was also returned. Since the prosecutor's closing argument was consistent with the evidence presented at trial, we find that the appellant has failed to demonstrate the alleged error clearly appears in the record.

[¶7] Further, the appellant has failed to show that there was a violation of a clear and unequivocal rule of law. When reviewing whether a prosecutor has committed misconduct, we must evaluate "the comment claimed to be improper in the context of the entire closing argument." *Harper v. State*, 970 P.2d 400, 403 (Wyo. 1998). While counsel is allowed latitude in presenting closing argument, it must be "limited to the evidence presented in the courtroom." *Montoya v. State*, 971 P.2d 134, 136-37 (Wyo. 1998). Here, the prosecutor limited his argument to the evidence that was presented at trial. He argued that the appellant became aware of problems with his checking account on March 17, 2010, which was consistent with Officer Johnson's testimony. Because this argument was consistent with the evidence presented at trial, the appellant has failed to demonstrate there was a violation of a clear and unequivocal rule of law.[1]

CONCLUSION

[¶8] Plain error did not occur when the prosecutor argued in his closing statement that the appellant was informed on March 17, 2010, of problems with his checking account, and despite that information, continued to write checks on the account. This argument was consistent with the facts presented at the trial and, therefore, does not amount to prosecutorial misconduct. We affirm the appellant's conviction.

[1] Unfortunately for the appellant, the only facts that this Court has found not to be consistent with the evidence presented at trial are the facts as they have been conveyed to this Court in the appellant's brief.