NO. 30764-6-III

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

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STATE OF WASHINGTON,

Respondent,

v.

STEVEN SWINFORD,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable Lesley A. Allan, Judge

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# BRIEF OF APPELLANT

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1. Flagrant, prejudicial prosecutorial misconduct denied the appellant a fair trial.

2. The trial court erred in denying the appellant's motion for new trial based on prosecutorial misconduct and in entering findings 7 and 10 in support of the denial.[1]

3. The trial court erroneously ordered the appellant to participate in a substance abuse evaluation and recommended treatment as a condition of community custody.

Issues Pertaining to Assignments of Error

1. Did the prosecutor commit flagrant, prejudicial misconduct when, continuing a theme employed throughout trial, he argued the appellant had not satisfied his "duty of care" to his friend, whom he shot, and that therefore the State had proven the appellant did not act in self-defense?

2. Similarly, given the pervasiveness of the "duty of care" theme at trial, did the trial court err in denying the appellant's motion for a new trial based on the "duty of care" argument?

3. Did the trial court err when it ordered appellant to complete a substance abuse evaluation and participate in recommended treatment as

[1] CP 118-24.

a condition of community custody, where the court did not make a statutorily required finding that chemical dependency contributed to the offense?

B. STATEMENT OF THE CASE[2]

1. Procedural facts

The State charged Steven Swinford with second degree murder based on the shooting death of Swinford's friend, Paul Raney. CP 1-4. Swinford asserted he shot Raney in self-defense. 2RP 226.

Swinford's first trial ended in a mistrial after the jury could not reach a verdict. CP 150-55. A second jury convicted Raney as charged. CP 70-71.

Swinford later moved for a new trial based on prosecutorial misconduct, including the comments discussed below. The motion was denied. CP 72-106, 118-24; 5RP 9-19.

The court sentenced Swinford within the standard range. CP 107-116. The court also ordered him to complete 36 months of community custody and that he follow certain conditions. CP 110.

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[2] This brief refers to the verbatim reports as follows: 1RP – 2/3 and 2/6/12; 2RP – 2/7/12; and 3RP – 2/8/12; 4RP – 2/9 and 2/10/12; and 5RP – 3/30/12.

2. Trial testimony

Steven Flick rented a house in Manson near the southeastern shore of Lake Chelan. 2RP 256-57. Swinford, whom Flick had known since elementary school, needed a place to live, so the two became roommates in January of 2011. Their mutual friend Jessy Juarez moved in the same time as Swinford. 2RP 257-59; 2RP 309-10. Another mutual friend, Raney, did not live with the men but stayed there frequently. 2RP 260.

January 28, 2011 began as a typical day for the young men. Flick initially played video games with Swinford, then left the house to exercise and have dinner with his family. 2RP 260. The other men went target shooting. 2PR 276, 312

After everyone returned, Swinford and Raney sat downstairs where Flick watched a movie. 2RP 262. According to Flick, Swinford and Raney were drinking alcohol in large cups and playing a drinking game. 2RP 261-62. Flick eventually joined them but he did not think he drank as much as Swinford and Raney.[3] 2RP 262-64, 270, 276, 300.

The mood was genial. 2RP 263. That changed when Swinford and Raney began arguing. According to Flick, the bickering was common, and he expected it to end uneventfully as usual. 2RP 264.

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[3] The forensic pathologist testified Raney had a blood alcohol concentration of .10. 2RP 370.

At one point, however, Raney told Swinford to "[s]top being a fucking badass." 2RP 266, 281. As Flick turned his back and reached for a beer, he heard a "cocking" noise, then seven or eight gunshots. 2RP 266-67, 284, 284. When he turned around, Flick saw Raney leaning back in his chair with his hands up, although his hands were falling as the shots struck him. 2RP 268. Raney had held a gun earlier in the evening, but his hands were empty. 2RP 268, 277.

After the gunshots, Swinford put down his gun and called 911. 2RP 268-69. Flick had to take the phone from Swinford to help describe where the house was located, as the authorities were having trouble finding the address. 2RP 269.

After the operator directed Flick to attempt CPR, Flick and Juarez lifted Raney onto the floor.[4] But neither performed CPR, believing it would be futile because Raney showed no vital signs. 2RP 272-73, 315-16, 319; Ex. 48.

Juarez recalled that he, Swinford, and Raney brought their handguns inside the house when they returned from target shooting. The guns included two 9-mm pistols, a .40-caliber pistol and a .45-caliber

[4] Flick thought Raney's chair might have fallen over in the process. 2RP 291. Juarez recalled the chair fell over, although police officers testified it was again upright by the time they arrived. 2RP 320, 323-25, 390, 393; 3RP 410.

pistol. 2RP 313; 3RP 411. Juarez went upstairs, fell asleep, and was awakened by gunshots. 2RP 314.

When Juarez was going down the stairs, he was passed by Swinford, who said he shot Raney and would go to jail. When Juarez asked why he shot Raney, Swinford said he didn't know, although he commented that both had "got[ten] mad." 2RP 315.

Raney sustained gunshots to his chest, abdomen, pelvis, right arm, and left hand. 2RP 353-58, 371-72. A firearms expert confirmed that the .45-caliber pistol fired the bullets recovered from Raney's body. 3RP 515-20.

Detectives combed the shooting scene for evidence. One detective noticed a .40 caliber pistol tucked between the right armrest and seat cushion of the chair Raney had been sitting in. 2RP 380, 384-85; 3RP 415-17. The back sights, hammer, and grip of the gun were visible. 3RP 423; Ex. 11. The gun was ready to fire immediately if the trigger were pulled. 3RP 462-63; 521-24.[5]

Microscopic examination of the gun revealed blood spatter on the rear sights, hammer, and firing pin. 3RP 468, 479. By the time of the

[5] The forensic pathologist who conducted the autopsy noted there was some blood spatter on the inside of Raney's right hand, but she was unable to opine which shot would have caused it, or whether he was holding a gun at some point before being shot. 2RP 359, 372.

exam, however, the gun had been test-fired and processed for fingerprints, which may have removed blood from other parts of the gun. 3RP 488-89, 494, 507; Ex. 11. The examining expert believed some of the areas where he found blood would have been covered by the chair cushion if, at the time of the shooting, the gun had been placed as depicted in the pictures. 3RP 498-500.

Swinford's memory of events was similar to that of his roommates. 4RP 539-42. After returning from target shooting, Raney made a mixed drink, whereas Swinford attempted to defrost a mixed drink from the previous day. 4RP 543-44. His drink did not taste good, so Swinford did not drink as much as Raney. 4RP 544.

Swinford disassembled the .45-caliber pistol and Raney the.40-caliber pistol, but they never cleaned the guns. Instead, they just reassembled and reloaded them. 4RP 543. Swinford knew Raney loaded the .40-caliber pistol to maximum capacity, putting 14 rounds in the magazine and one in the chamber. 4RP 543-44.

During this activity, Flick had been watching a movie. 4RP 544. Upon its conclusion,. Flick, Swinford, and Raney decided to listen to music. 4RP 545. Swinford retrieved his iPod and plugged it in so it could play and charge at the same time. 4RP 545. Raney became annoyed and

angrily told Swinford to "quit being a fucking badass." Swinford attributed the comment to Raney's drunkenness. 4RP 547.

But when Swinford turned and saw Raney's hand wrap around the grip of the pistol tucked in his chair, Swinford feared he was about to be shot. 4RP 547, 551. With only a split second to make his decision, Swinford reached for the pistol on the coffee table, closed his eyes, and shot at Raney. 4RP 549, 557-58.

Swinford immediately called 911 but from the outset had trouble communicating with the operator, who could not find the address Swinford provided. 4RP 549; Ex. 48. Swinford explained that he made strange-sounding statements including "there is a current murder" because he was overwhelmed by the fact Raney was dying and he was responsible. 4RP 550, 560, 564. But he testified that before shooting Raney he was afraid and "[w]hen you're afraid for your life, things are different than when you have time to sit down and think." 4RP 568.

On cross-examination, the prosecutor asked Swinford if he "used care" when he shot at Raney before seeing him *raise* the pistol. Swinford answered that he "cared for his life." 4RP 558. The prosecutor later asked Swinford if he owed Raney a "duty of care." Swinford stated that he did not know if he owed Raney a "duty of care." 4RP 572.

3. Closing argument

The jury was instructed that "homicide is justifiable when committed in the lawful defense of the slayer." CP 62 (Instruction 17); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) 16.02 (3rd ed. 2008).[6] The State proposed, and the court rejected, an instruction based on a defense of "excusable" homicide – which was

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[6] The instruction provides:

> It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction. Homicide is justifiable when committed in the lawful defense of the slayer when:
>
> 1. the slayer reasonably believed that the person slain intended to inflict death or great personal injury;
> 2. the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
> 3. the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

not raised – stating that "the exercise of ordinary caution is essential to a claim of excusable homicide." CP 106; 4RP 533-34, 582, 590.[7]

In closing, the prosecutor argued the State had disproved at least one of the three WPIC 16.02 criteria and thereby shown the homicide was not justifiable. He then suggested a fourth criterion the State had disproved, arguing that "[c]ertainly [Swinford] owes a duty of care to his best friend inside this house. And when he pulls the trigger, he ignores that." 4RP 599. Swinford did not object.

C. ARGUMENT

1. FLAGRANT, PREJUDICIAL PROSECUTORIAL MISCONDUCT DENIED SWINFORD A FAIR TRIAL.

The prosecutor argued in closing that Swinford had not satisfied his "duty of care" to Raney and that therefore the State had proven he did not act in self-defense. Because the argument, which misstated the law and shifted the burden of proof to the defense, was both flagrant and so prejudicial that no instruction could have cured it, this Court should reverse Swinford's murder conviction.

[7] In his argument to the trial court in favor of the proposed instruction, the prosecutor appeared to be conflating the defenses. 4RP 582.

a. Prosecutorial misconduct may deny an accused his right to a fair trial.

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

Prosecutors, like judges, are servants of the law. State v. Gorman, 219 Minn. 162, 175, 17 N.W.2d 42 (1944). When a prosecutor commits misconduct, he may deny the accused the fair trial guaranteed by the state and federal constitutions. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005); see U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

A prosecutor's argument must be confined to the law stated in the trial court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law, and there is a substantial likelihood that the misstatement affected the jury verdict, the accused is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity that may mislead the jury. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

This Court reviews the State's comments during closing argument in the context of the total argument, the issues in the case, the evidence

addressed in the argument, and the jury instructions. Boehning, 127 Wn. App. at 519. Where a defendant fails to object to prosecutorial misconduct, reversal is required if the misconduct is so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

b. The State must prove the absence of self-defense beyond a reasonable doubt.

A self-defense instruction must be given when the accused produces evidence of self-defense. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). The State's burden is to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); Janes, 121 Wn.2d at 237.

Under RCW 9A.16.050, homicide is "justifiable" when committed:

> (1) In the lawful defense of the slayer . . . when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
>
> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence . . . .

Consistent with the statute, WPIC 16.02 requires that the slayer: (1) "reasonably believed that the person slain intended to inflict death or

great personal injury;" (2) "reasonably believed that there was imminent danger of such harm being accomplished;" and (3) "employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared" at the time of and prior to the incident.

Again, it is the State's burden to prove the defendant has not met these criteria. Walden, 131 Wn.2d at 473. Here, Swinford undeniably produced evidence from which a reasonable juror could find that he acted in self-defense.

c. The prosecutor committed flagrant, prejudicial misconduct by reducing the State's burden to show the absence of self-defense.

In closing argument, the prosecutor contended Swinford "certainly" owed a "duty of care" to Raney, which he breached by shooting him. 4RP 599. This argument, in a case where both the slayer and the deceased were indisputably under the influence of alcohol, was prejudicial.

In the civil realm, a cause of action for negligence requires a plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121,

127-28, 875 P.2d 621 (1994). If this duty is breached, civil liability may lie. Tincani, 124 Wn.2d at 127.

Of course, Swinford's is not a civil case. Swinford owed Raney no separate "duty of care" that precluded him from raising an otherwise valid self-defense claim. The prosecutor's argument to the contrary added a non-existent prong for the State to disprove, thereby shifting the burden of proof to Swinford. 4RP 599.

State v. Walker is instructive. 164 Wn. App. 724, 265 P.3d 191 (2011). There the prosecutor explained that the self-defense standard was tantamount to arguing, "I would do it too if I knew what he knew. That's the objective standard in defense of others." Id. at 735. Later, the prosecutor repeated the message, "While you're listening to the defense argument, while you're deliberating this, ask yourselves and ask each other repeatedly, 'Would I do it too if I knew what he knew?'" Id. Later, the prosecutor argued, "I would suggest to you, in addition, there isn't a single one of you who would do what he did." Id.

The prosecutor repeated this theme in rebuttal. Defense counsel objected that the argument was a misstatement of the law, but the trial court overruled the objection. The prosecutor then repeated that the jury "determine[s] the reasonably prudent person's standard. And that's, would you do it too if you knew what he knew?" Id.

On appeal, Division Two of this Court found the comments improper and prejudicial even under the standard for unobjected-to comments. Id. at 736 n. 7. The Court held the prosecutor misstated the law by suggesting the reasonableness standard addressed whether the individual jurors would have employed the same force as the defendant. Rather, the standard was objective: Whether the accused "employ[ed] such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared . . . taking into consideration all of the facts and circumstances known . . . at the time of and prior to the incident." Walker, 164 Wn. App. at 736 (citing Janes, 121 Wn.2d at 238). According to the Walker Court, the prosecutor's comments encouraged the jury to judge the events based on their subjective beliefs about how they would have responded, thereby misstating the objective defense of others standard.

A similarly serious misstatement occurred in Swinford's case. The prosecutor, encouraging the jury to find the absence of self-defense based on, apparently, his own subjective belief about what the law of self-defense should be, informed jurors that Swinford had a separate duty of care apart from RCW 9A.16.050. This improperly shifted the burden of proof. This claim was both flagrant and prejudicial, and therefore, requires reversal. Gregory, 158 Wn.2d at 859.

First, the misconduct was flagrant. See State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956) ("[T]here comes a time. . . when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error." ). Throughout trial, the State repeatedly suggested that Swinford owed Raney a "duty of care." This began as soon as voir dire, when the prosecutor asked, "Does anybody agree you should use ordinary care before you use . . . have to use deadly force? Does everybody agree that you should use ordinary care . . . ?" 1RP 178.

The State later proposed an instruction stating that "the exercise of ordinary caution is essential to a claim of excusable homicide." CP 106; 4RP 533-34, 582, 590. The State based this request on State v. Griffith, 91 Wn.2d 572, 589 P.2d 799 (1979), a case involving a rejected claim of "excusable" homicide.[8] Id. at 575. But Swinford did not raise the defense of excusable homicide. Distinguishing Griffith, the trial court correctly declined to give this instruction. 4RP 585-86.

[8] Homicide is "excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent." RCW 9A.16.030; see also WPIC 15.01 (so stating).

Finally, on cross-examination, the prosecutor asked Swinford if he "used care" when he shot at Raney before seeing him raise his gun.[9] 4RP 558. The prosecutor later asked Swinford if he owed Raney a "duty of care." Not surprisingly, Swinford stated that he "didn't know." 4RP 572.

While the first example, occurring in voir dire, could be construed as a reference to the "reasonably prudent person" standard set forth in WPIC 16.02, it becomes increasingly clear the State was trying to inject a definition of self-defense that integrated a separate "duty of care," above and beyond the requirements of WPIC 16.02 and RCW 9A.16.050. But that is not the appropriate standard in this state. Proof that Swinford did not live up to a "duty of care" as a possessor of premises (or some other theory of liability) in no way proved the absence of self-defense. Yet that is precisely what the State asked the jury to find, having negligently or deliberately planted the seeds for such misconception from the first moments of trial.

Second, the misconduct was prejudicial. This was a close case in which Swinford took the stand and explained his actions from his perspective at the time. The jury was entitled to believe his account of the fear he felt and to find that, under the circumstances, such fear was reasonable.

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[9] Swinford answered that he "cared for his life." 4RP 558.

Although the State attempted to argue otherwise, Swinford's testimony was consistent with the physical evidence. The forensic pathologist testified that while there was blood spatter on Raney's right hand, she could not say when it was placed there. 2RP 372. The police found the gun in its resting place in the chair only after the chair had been jostled and knocked over. 2RP 291, 320, 323-25, 390, 393; 3RP 410. While the State attempted to argue that the blood spatter ultimately found on the gun was consistent with the gun remaining securely tucked into the chair, such testimony was, instead, ambiguous. 3RP 468, 479, 488-89, 494, 498-500, 507; Ex. 11.

Swinford's testimony was also consistent with other witnesses' testimony. For example, consistent with Flick's testimony, Swinford did not testify he saw the gun raised, only that he saw Raney put his hand on it. 2RP 268; 4RP 547, 549, 551, 557-58. Significantly, Swinford knew that gun was fully loaded and ready to fire. 3RP 522-24; 4RP 543-44. He also knew that Raney had been drinking. 2RP 370; 5RP 544.

Finally, the fact that the jury previously deadlocked likewise supports the fact that the State's argument was prejudicial. CP 155.

Contrary to the trial court's findings 7 and 10, which incorrectly found the prosecutor's comments to be "isolated," the pervasiveness of the State's "duty of care" theme during trial made the error incurable.

Reversal is, therefore, required. See State v. Venegas, 155 Wn. App. 507, 524-25, 228 P.3d 813 (2010) (State committed flagrant misconduct by repeatedly undermining presumption of innocence with improper "fill-in-the-blank" argument).

2. THE TRIAL COURT WRONGLY ORDERED SWINFORD TO ENGAGE IN SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered Swinford to "undergo an evaluation for treatment for . . . substance abuse." CP 111. Because the court failed to make any finding in support of this requirement, the condition should be stricken.

RCW 9.94A.703(3)(c) allows a sentencing court to impose "crime-related treatment or counseling services" only if the problem in need of treatment contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing alcohol treatment).

Before rehabilitative chemical dependency treatment may be imposed, however, RCW 9.94A.607(1) requires the court to find a chemical dependency contributed to the offense:

> *Where the court finds that the offender has a chemical dependency that has contributed to his or her offense*, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime

> for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

(Emphasis added).

The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a criminal statute is clear on its face, the appellate court assumes the Legislature means exactly what it says. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The court did not find Swinford was chemically dependant. Under the plain terms of RCW 9.94A.607(1), the court was required to make such a finding before it could impose the condition regarding substance abuse evaluation and treatment.

The State may argue that the condition may nonetheless be affirmed based the decision of Division Two of this Court in State v. Powell, 139 Wn. App. 808, 162 P.3d 1180 (2007), reversed on other grounds, 166 Wn2d 73 (2009). There, the Court remarked the trial court correctly imposed substance abuse treatment as a community custody condition, despite the lack of a finding as required by RCW 9.94A.607(1), because the trial evidence showed the defendant consumed methamphetamine before committing the offense and the defense asked the court to impose substance abuse treatment. Id. at 819-20.

Any such argument should be rejected. First, the Court's remarks in Powell are dicta because the Court had already decided to reverse conviction on a separate issue when it addressed the community custody condition. See State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was dicta); In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta have no precedential value. Bauer v. State Employment Sec. Dept., 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

Second, the Court's reasoning in Powell does not stand up to a plain reading of the statute. Under RCW 9.94A.607(1), the court may impose substance abuse treatment only "[w]here the court finds that the offender has a chemical dependency that has contributed" to the offense." Powell ignored this requirement in holding such a condition is valid even if the court makes no finding so long as the trial record could support such a finding. 139 Wn. App. at 819-20. The Powell Court's approach renders the statutory language referring to the need for a finding superfluous. But "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."

State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation and internal quotation marks omitted).

Finally, any such argument should be rejected because "[a]ppellate courts are not fact-finders." State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). "[I]t is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence or the credibility of witnesses." Davis v. Department of Labor and Industries, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). The court in Powell violated these well-established principles when it independently reviewed the record and, in effect, made a finding the sentencing court never made.

Sentencing errors may be raised for the first time on appeal. Jones, 118 Wn. App. at 204; State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). Under the plain language of RCW 9.94A.607(1), this Court should order the sentencing court to strike the condition pertaining to substance abuse treatment and counseling on remand. See State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (striking community custody condition where court did not make statutorily required finding that mental illness contributed to crime), review denied, 164 Wn.2d 1012 (2008).

D. CONCLUSION

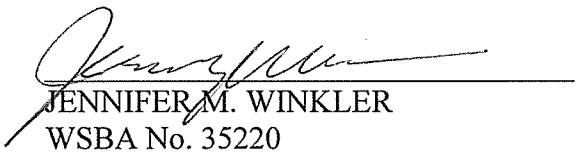
The prosecutor's flagrant, prejudicial misconduct in closing argument denied Swinford a fair trial. Reversal and remand for retrial are therefore required.

In any event, this Court should remand with an order to strike the community custody condition ordering substance abuse evaluation and treatment.

DATED this 31ST day of August, 2012.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



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State v. Steven Swinford

No. 30764-6-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 31st day of August, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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**Signed** in Seattle, Washington this 31st day of August, 2012.

X Patrick Mayovsky