COA No. 43358-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

COREY YOUNG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Ronald E. Culpepper

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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2. Trial counsel provided Mr. Young with ineffective assistance of counsel.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Did the prosecutor commit misconduct in the evidence phase of trial by questioning Mr. Young about unproffered, unadmitted bullet evidence?

2. Where there had been no such bullet admitted, was it flagrant misconduct to advance the claim and contend that the defendant was denying State's evidence against him where no instruction from the court could have erased the assertion, questioning and testimony from the jury's mind?

3. Is reversal required where Mr. Young shows the prejudicial effect of the misconduct, and further, where there is reasonable ground to believe Mr. Young was prejudiced?

4. Did counsel provide ineffective assistance by not objecting where the prosecutor cross-examined the accused on the bullet matter at length?

5. Is reversal required where the bullet matter appeared to connect the defendant to the complainant's version of events, eliminating any adequate confidence in the outcome?

C. STATEMENT OF THE CASE

Mr. Young was convicted of violating the criminal statutes prohibiting robbery, kidnapping, being armed with a gun in a robbery, being armed with a gun in a kidnapping, and possessing the gun illegally. CP 71-74, 139-52.[1]

The alleged victim, Mr. Yang, pulled his car into the driveway of a 7-11 convenience store, only to find that several police officers were congregating in the parking lot. Yang suddenly yelled out to them, and claimed that his passengers, Corey Young and Jero Dagraca, were robbing him at gunpoint. But at trial, Young and Dagraca both explained to the jury that they had approached Mr. Yang a short time earlier, and he had said he would buy them beer at the nearby 7-11. 3/29/12RP at 153-54, 164-65.

In the car, Young and Dagraca gave Yang a "hit" of illegal marijuana, and then agreed to also contact a drug dealer for him.

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[1] In addition to the foregoing, Mr. Young adopts the Statement of the Case set forth in the original Appellant's Opening Brief filed by former appellate counsel, along with the case statements in the briefing of the co-appellant Dagraca. AOB, at pp. 1-3; AOB (Dagraca), at pp. 3-6; see also BOR, at pp. 4-10.

They were using Yang's phone to do so, when Yang panicked upon pulling into the 7-11 and seeing the police. Young and Dagraca panicked themselves when Yang started yelling to the officers, and they ran from the car; additionally, Mr. Young believed he had a warrant. 3/19/12RP at 153-65. Young left behind a jacket on the pavement before being apprehended a short distance later. 3/28/12RP at 20-27. AOB, at pp. 1-3; AOB (Dagraca), at pp. 3-6; BOR, at pp. 4-10.

The police witnesses at trial testified that a magazine-type pistol was found in Mr. Yang's vehicle, loaded with 6 bullets or rounds. 3/28/12RP at 27-31 (Lakewood police officer Michael Wulff).

After preventing Mr. Young from running away, police at the scene located the following items of evidence, which were presented to the jury at trial through the testimony of the law enforcement witnesses, and recorded in the trial court's Exhibit Record (CP 75-76):

> **(1)** A Redskins coat or jacket that Mr. Young shed or dropped to the ground as he ran away. 3/28/12RP at 27-29 (testimony of Officer Wulff); Exhibit 12 [paper evidence bag containing jacket];
>
> **(2)** The aforementioned pistol, a silver-colored magazine-type .22 caliber pistol with 6 bullets in it, which was found by police in the passenger footwell of Mr. Yang's car. 3/28/12RP at 29-31, 42; Exhibit 3 [evidence box containing

handgun), Exhibit 8 [magazine]; Exhibit 9 ["Yellow envelope containing ammunition (6 bullets)"];

(3) A T-mobile cellular telephone belonging to Mr. Yang, which was in Mr. Young's possession. 3/28/12RP 45; 3/28/12RP at 96-97; 3/28/12RP at 123-24; Exhibit 7 [yellow evidence envelope containing cell phone];

(4) Cash currency in the amount of $31.73 in Mr. Young's pants pocket. 3/28/12RP at 99; Exhibit 11 (yellow evidence envelope containing money/currency), see 3/28/12RP at 116 (complainant Yang's assertion that $117 was taken); and

(5) An ID card that a police officer described as belonging to someone else, and a Washington Quest card. 3/28/12RP at 96. Mr. Yang was shown the first card and did not recognize it, and he testified that the second card was similar to his own "Quest" card -- but with a different card number. 3/28/12RP at 96; 3/28/12RP at 124-25; 3/28/12RP 133; Exhibit 4 (After stating that his ID card was taken from him, Yang then stated that he still had it because it was given back).

Both Dagraca and Young denied they committed any robbery, attempted robbery, kidnapping, or possession or wielding of any firearm. 3/29/12RP at 150-55, 163-64.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT REQUIRING REVERSAL.

a. Misconduct generally. The right to a fair jury trial is secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State

Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999); U.S. Const. amends 6, 14; Wash. Const. art. 1, sec 22. But prosecutorial misconduct may deprive a defendant of this right to a fair trial. See, e.g., In re Glassman, 175 Wn.2d 696, 286 P.3d 673, 677 (Oct. 18, 2012) (citing State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)).

The Washington Courts review allegations of prosecutorial misconduct by examining the context of the conduct, the issues at hand in the case, the evidence at issue, and the legal instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To prevail on a claim of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

If the defendant failed to object to the misconduct at trial, appellate review is only appropriate if the prosecutorial misconduct is so "flagrant and ill intentioned" that no curative instruction could have obviated the prejudice engendered by the misconduct. State v. Emery, 174 Wn.2d 741, 761–62, 278 P.3d 653 (2012).

b. "Seventh Bullet." Beyond just the general standards of error and appealability above, it is also specific error to argue

evidence to the jury that has not been admitted at trial. State v. Pete, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004); see also State v. Glassman, 286 P.3d at 677-78.

The pistol found in Mr. Yang's vehicle carried a magazine, and 6 bullets or rounds. 3/28/12RP at 27-31.

However, during Mr. Young's testimony, the prosecutor cross-examined him regarding a seventh bullet, which he described as located in the jacket that Mr. Young dropped as he fled Yang's vehicle:

> Q: There was a .22 caliber bullet found in that jacket. Is that your gun?
> A: No, sir. I don't know anything about that.

3/29/12RP at 167-68. Mr. Young repeatedly denied that he knew what the prosecutor was talking about, but the prosecutor then implied that Mr. Young was wrongly denying evidence and in turn then denying that the jacket was his own jacket, in order to avoid the bullet evidence. 3/29/12RP at 168-69.

But the record does not indicate such inculpatory evidence.

c. Mr. Young may appeal and reversal is required. In general, lay jurors tend to trust the prosecutor because he is a representative of the State and the community, with an obligation to do justice. See United States v. Young, 470 U.S. 1, 18-19, 105

S.Ct. 1038, 84 L.Ed.2d 1 (1985); Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934).

Thus the fair trial to which the defendant is entitled certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office into the scales against the accused. State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original).

The misconduct in the present case is akin to that identified in the case of In re Glassman, 175 Wn.2d 696, 286 P.3d 673 (2012), where the Supreme Court found that photographs of the defendant, which had the words "guilty" superimposed over them, were flagrant misconduct because they created nonexistent evidence. Glassman, 175 Wn.2d at 704-05.

The Court held the appellant in Glasmann to the standard that, because he did not object at trial, the errors were waived unless the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. Glassman, 175 Wn.2d at 705 (citing State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). In addition, the Court emphasized that the misconduct injected evidence not before the jury, and stated that the

consideration of unadmitted matters requires reversal where there is "reasonable ground" to believe the defendant may have been prejudiced:

> Our courts have repeatedly and unequivocally denounced the type of conduct that occurred in this case. First, we have held that it is error to submit evidence to the jury that has not been admitted at trial. State v. Pete, [152 Wn.2d 546, 553–55, 98 P.3d 803 (2004)]. The "long-standing rule" is that " 'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.' " Id. at 555 n. 4, 98 P.3d 803 (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted)); see also, e.g., State v. Boggs, 33 Wn.2d 921, 207 P.2d 743 (1949), overruled on other grounds by State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980).

Glassman, 175 Wn.2d at 704-06 (also stating that "here the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence.").

As here, the prosecutor in Glassman invoked evidence not in the record, and by doing so also placed the credibility and prestige of the State behind the matter. Glassman, 175 Wn.2d at 705-07 (citing American Bar Association Standards for Criminal Justice std. 3–5.8; and State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecuting attorney to express his individual opinion that the accused is guilty, independent of the

evidence in the case)); see also State v. Claflin, 38 Wn. App. 847, 849–50, 690 P.2d 1186 (1984) ("a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record").

Reversal is required. Despite Mr. Young's denials, the prosecutor continued to refer to a seventh bullet, continuing to state in front of the jury that a .22 caliber bullet for the gun in Mr. Yang's car had been located by police in the pocket of Mr. Young's dropped jacket, and claiming that police witnesses had collected such evidence. 3/29/12RP at 167-69.

Mr. Young continued to respond "no" and expressed his denial and confusion over the prosecutor's claims. 3/29/12RP at 168 ("I don't get what you are trying to say."). The prosecutor thus pursued the bullet evidence claim at length, including essentially accusing Mr. Young of wrongfully denying it. This misconduct was so cumulative and pervasive that it meets the standard that it could not have been cured by an instruction. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

When there is a reasonable ground to believe that the defendant may have been prejudiced by unadmitted matters, the verdict must be vitiated. Pete, supra (citing State v. Rinkes, 70

Wn.2d at 862). Further, Mr. Young has shown that the prosecutor's flagrant conduct was both improper and prejudicial. Thorgerson, 172 Wn.2d at 442. Considering the differing accounts of events of the parties and the connection that the bullet matter appeared to create to the complainant's account, Mr. Young has shown a substantial likelihood that the misconduct affected the jury verdict. Id.; State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE BULLET QUESTIONING, REQUIRING REVERSAL.

a. Ineffective assistance. Defense counsel's failure to object to the bullet questioning (assuming arguendo that cure was possible) independently requires reversal, because it undermines any constitutional confidence in the outcome. It was ineffective assistance under the Sixth Amendment standard of Strickland v. Washington and the requirement that guilt in criminal cases be established beyond a reasonable doubt in a constitutional trial. U.S. Const. amend. 14.

Mr. Young was entitled to receive effective assistance of his trial counsel. U.S. Const. amend. 6; State v. Reichenbach, 153 Wn.2d 126, 128-32, 101 P.2d 80 (2004) (citing Strickland v.

Washington, 466 U.S. 668, 686-8, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Alleged attorney deficiency is assessed by looking to all the objective circumstances of the case. See State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

Mr. Young argues that the error of deficient performance in the present case cannot be dismissed under the "tactical choice" rubric. There is a strong presumption that defense counsel performed adequately. See State v. Reichenbach, 153 Wn.2d at 130. Indeed, if trial counsel's conduct can be characterized as legitimate trial strategy or tactics, the representation will be deemed not deficient, assuming such characterization has support in the record. State v. Hendrickson, 129 Wn.2d 61, 77–79, 917 P.2d 563 (1996). However, this assumption is overcome when there is no conceivable reasonable tactic explaining counsel's challenged actions or non-actions. See Reichenbach, 153 Wn.2d at 130; State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Here, there was no tactical advantage to refraining from objecting and requesting a statement to disregard from the court, which would be presumed to be followed by the jury. See State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987).

The failure to object cannot be deemed tactical based on a

theory that counsel did not object in hopes that the jury would forget a prejudicial matter introduced in passing, and the belief that objecting would only highlight it. The prosecutor's repeated claims that a gun bullet was found in Corey's jacket pocket continued at length, and the State's interjection of the matter was no mere 'passing reference' that a defense attorney might decide to refrain from drawing the jury's attention to by objecting. 3/28/12RP at 167-69. These objective circumstances of the case must lead to a determination that counsel's conduct in failing to object was not reasonable. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

b. Reversal. Prejudice in the context of ineffective assistance of counsel is established where the deficiency in counsel's performance undermines the reviewing court's confidence in the outcome of the trial. State v. Mohamoud, 159 Wn. App. 753, 246 P.3d 849 (2011) (citing Strickland, 466 U.S. at 694). Here, there can be no confidence in the outcome under this standard. The bullet matter allowed the jury to reject Mr. Young's defense. Both Mr. Young and Mr. Dagraca described in detail how they had approached Mr. Yang that night, because they were trying to find an adult who would purchase alcohol for them. RP 146-148,

157, 162-63. After some effort, Mr. Yang agreed to buy them beer, and Mr. Yang also wanted the two young men to locate an amount of marijuana for him to purchase. RP 153-54, 164-65.

When Yang's car pulled into the 7-11, Yang suddenly and falsely yelled out the window to the police officers that he was being robbed. RP 150, 165. Mr. Young and Mr. Dagraca got out of the car and ran away because they were scared and they had marijuana on them. RP 150-52. Mr. Young also explained that he ran because he had warrants. RP 165-66. This was an entirely credible account of the events. However, the bullet appeared to support the jury accepting Mr. Yang's version of events over that of the testifying co-defendants. Reversal is required.

E. CONCLUSION

Based on the foregoing, Mr. Corey Young asks this Court to reverse his judgment and sentence.

DATED this 8 day of November, 2013.

Respectfully submitted,

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Washington Appellate Project – 91052
Attorneys for Appellant

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DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 43358-3-II
v.	)	
	)	
COREY YOUNG,	)	
	)	
APPELLANT.	)	

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