No. 44533-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jimmy Perkins,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-01152-1

The Honorable Judge Michael H. Evans

Appellant's Reply Brief

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I. THE PROSECUTOR COMMITTED NUMEROUS INSTANCES OF FLAGRANT, ILL-INTENTIONED, AND PREJUDICIAL MISCONDUCT.

A. The prosecutor committed misconduct by arguing that he feared Mr. Perkins would assault him.

A prosecutor may not make arguments designed to inflame the passions or prejudices of the jury. Nor may a prosecutor express a personal opinion on the accused person's guilt. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Likewise, a prosecutor commits misconduct by arguing that the jury should convict based on the accused's "bad character" or propensity to commit crimes. *State v. Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000); *State v. Fisher*, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009).

At Mr. Perkins's trial, the prosecutor argued that he thought Mr. Perkins was going to attack him during cross-examination. RP 339-40. He described Mr. Perkins to the jury as the kind of person who would attack someone else. 346.

Respondent admits that the prosecutor's personal feelings about Mr. Perkins's demeanor were "irrelevant to the trial." Brief of Respondent, p. 6. Respondent characterizes the prosecutor's arguments as

directed to the juror's role of judging witness credibility. Brief of Respondent, p. 6.

This is incorrect.

At trial, the prosecutor argued that Mr. Perkins's supposedly aggressive attitude on cross-examination proved that he "was and is the aggressor." RP 346. The prosecutor also suggested that Mr. Perkins's behavior was "suggestive of someone who is going to attack someone." RP 346.

These are exactly the type of propensity-based inference that due process prohibits. *Fisher*, 165 Wn.2d at 757. Mr. Perkins does not assign error to any arguments about his credibility. Instead, he challenges the state's improper attempt to suggest he has a propensity toward violence.

Respondent also suggests that Mr. Perkins's demeanor during his testimony was "an example of the level of calculation he took before attacking John Mayfield." Brief of Respondent, p. 8. This claim mirrors the impermissible propensity argument the prosecutor made at trial.

An accused person cannot "open the door" to prosecutorial misconduct. *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008). Nonetheless, Respondent argues that Mr. Perkins brought on the prosecutor's improper remarks by "act[ing] aggressively" during cross-examination. Brief of Respondent, p. 7. Rather than making an improper

closing argument, the prosecutor should have asked the court to excuse the jury and admonish Mr. Perkins. *Id.*

A curative instruction is insufficient if it tells the jury only to disregard the improper argument's evidentiary value. *Fisher*, 165 Wn.2d at 749. A curative instruction must also make clear that jurors may not use the information to assess the accused person's propensity to commit the crime. *Fisher*, 165 Wn.2d at 749. Respondent argues that any error was cured with the court's instruction telling the jury to disregard the prosecutor's statements about his own feelings. Brief of Respondent, p. 9. But the instruction did not admonish the jury against making the impermissible propensity inference the prosecutor encouraged. Furthermore, the prosecutor continued to make impermissible propensity-based arguments even after the court gave the instruction. RP 346.

The court's instruction was insufficient to cure the prejudicial effect of the prosecutor's misconduct. *State v. Stith*, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993). The court should have ordered the jurors not to consider any alleged propensity toward assaultive behavior as well. *Fisher*, 165 Wn.2d at 749.

The prosecutor's statement that he feared that Mr. Perkins would assault him and that Mr. Perkins is the type of person who would attack someone constituted flagrant, ill-intentioned, and prejudicial misconduct

that could not be cured by the court's instruction. *Fisher*, 165 Wn.2d at 748-49. Mr. Perkins's conviction must be reversed. *Id.*

B. The prosecutor committed misconduct by mischaracterizing the law of self-defense.

It is misconduct for a prosecutor to misstate the law in a way that lowers the state's burden of proof regarding self-defense. *State v. McCreven*, 170 Wn. App. 444, 471, 284 P.3d 793 (2012) *review denied,* 176 Wn.2d 1015, 297 P.3d 708 (2013).

1. The prosecutor mischaracterized the law of self-defense by arguing that Mr. Perkins had a duty to retreat.

In Washington, a person who believes s/he is being attacked has no duty to retreat and is entitled to use force in self-defense. *State v. Jordan*, 158 Wn. App. 297, 301 n. 6, 241 P.3d 464 (2010). At trial, the prosecutor argued that Mr. Perkins's use of force was not reasonable because he could have asked to be placed in protective custody. RP 294-95, 339. This argument comprised a substantial portion of the state's theory regarding why Mr. Perkins's use of force was not lawful.

Respondent cites the "reasonable person" standard, and suggests that Mr. Perkins's claim would preclude the state from ever arguing against self-defense. Brief of Respondent, p. 13. But the argument to which Mr. Perkins assigns error did not mention the reasonable person

standard. The prosecutor was free to argue that a reasonable person in Mr. Perkins's position would not have felt threatened. Instead, the prosecutor chose to improperly imply that Mr. Perkins had a duty to retreat.

The prosecutor's argument that the force used was unlawful because Mr. Perkins had the option of retreat mischaracterized the law of self-defense and lowered the state's burden of proof. *McCreven* 170 Wn. App. at 471. The prosecutor's improper argument requires reversal of Mr. Perkins's conviction. *Id.*

2. The prosecutor mischaracterized the law of self-defense by arguing that Mr. Perkins was not entitled to defend himself until he was being physically attacked.

The use of force is lawful if the accused believes that s/he is in imminent danger. *State v. George*, 161 Wn. App. 86, 99, 249 P.3d 202 (2011) *review denied,* 172 Wn.2d 1007, 259 P.3d 1108 (2011); RCW 9A.16.020(3). Imminent danger does not require a physical attack – a danger that is "hanging threateningly over one's head" can suffice. *Id.* (*quoting State v. Janes*, 121 Wn.2d 220, 241, 850 P.2d 495 (1993)).

Nonetheless, the prosecutor argued that Mr. Perkins was not entitled to act in self-defense until he was being physically attacked. RP 294, 338. This argument mischaracterized the law of self-defense. *Janes*, 121 Wn.2d at 241.

Respondent argues that the prosecutor's argument was a proper statement of the law. Brief of Respondent, pp. 15-16. Respondent helpfully points out that the prosecutor's argument employed the word "is," which is the third person singular form of the verb "to be." Brief of Respondent, p. 16. The verb "to be" was also used in jury instruction 14A. Brief of Respondent, p. 16.

As noted in the court's instructions, a person has the right to use force whenever s/he reasonably believes that s/he is about to be injured. CP 48. Mr. Perkins was not legally required to wait until Mayfield attacked him to act in self defense. *George*, 161 Wn. App. at 99. Rather, he was entitled to lawfully use force if a reasonable person in his position would have felt that s/he was about to be injured. *Id.*, CP 48. The prosecutor's argument misstated the law of self-defense.

Again, Respondent complains that Mr. Perkins's argument would preclude the prosecution from ever arguing against self-defense. Brief of Respondent, p. 15. This is incorrect. As noted above, the prosecutor was free to argue that a reasonable person in Mr. Perkins's position would not have felt threatened. Instead, the prosecutor chose to mischaracterize the law of self-defense.

The prosecutor's argument that the law only permits self-defense when one is being physically attacked misstated the law and lowered the

state's burden of proof. *McCreven,* 170 Wn. App. at 471; *George*, 161 Wn. App.at 99. The misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 704. Mr. Perkins's conviction must be reversed. *Id.*

C. The prosecutor committed misconduct by disparaging the role of defense counsel.

A prosecutor commits misconduct by disparaging the role of defense counsel. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002). At Mr. Perkins's trial, the prosecutor argued that defense attorneys are paid to "use diverting tactics." RP 346.

Respondent concedes that the prosecutor's statement was improper. Brief of Respondent, p. 19. Nonetheless, the state claims that Mr. Perkins was not prejudiced by the prosecutor's misconduct. Brief of Respondent, p. 19-21.

Mr. Perkins's defense rested on his self-defense claim. Rather than argue that a reasonable person in Mr. Perkins's position would not have felt threatened, the prosecutor chose to "draw the cloak of righteousness" around the state's case by disparaging the role of defense counsel. *Gonzales*, 111 Wn. App. at 282. There is a substantial likelihood that the prosecutor's misconduct affected the outcome of the trial. *Glasmann*, 175 Wn.2d at 704. The prejudice is particularly apparent when combined

with the prosecutor's mischaracterizations of the law of self-defense, appeals to the jury's passion and prejudice, and argument of "facts" not in evidence. *State v. Walker,* 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect").

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by disparaging the role of defense counsel. *Gonzales*, 111 Wn. App. at 282. Mr. Perkins's conviction must be reversed. *Id.*

D. The prosecutor committed misconduct by introducing "facts" not in evidence and giving a personal opinion of Mr. Perkins's credibility.

It is misconduct for a prosecutor to argue facts that have not been admitted into evidence or to give a personal opinion of the credibility of the accused. *Glasmann*, 175 Wn.2d at 696; *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). At trail, the prosecutor argued that Mr. Perkins had fabricated an incident in which Mayfield was looking at him through the courtroom window as a diversion tactic. RP 302.

Respondent argues only that a prosecutor is permitted to "discuss the behavior and actions" of witnesses during their testimony. Brief of Respondent, p. 11. This is incorrect.

First, a prosecutor may not discuss witness behavior by making an improper propensity argument. *Fisher*, 165 Wn.2d at 748-49. Second, the prosecution did not introduce evidence that Mr. Perkins's concern about Mayfield was unwarranted. Nothing in the record contradicts Mr. Perkins's statement that Mayfield had been watching him through the window. RP 253-55. Rather than simply commenting on Mr. Perkins's demeanor, the prosecutor's argument improperly "testified" to "facts" not in evidence and provided a personal opinion of Mr. Perkins's credibility. *Glasmann*, 175 Wn.2d at 696; *Reed*, 102 Wn.2d at 145. Based on these "facts" and the attorney's personal opinion on credibility, counsel encouraged the jury to infer that Mr. Perkins intended to commit assault. RP 302-03.

Without citation to authority, Respondent claims that a prosecutor should be permitted comment on the accused's behavior at trial if the defense attacks the complaining witness's credibility. Brief of Respondent, p. 12. This argument lacks merit.

First, as argued above, the accused cannot "open the door" to prosecutorial misconduct. *Jones*, 144 Wn. App. at 295. A prosecutor cannot express a personal opinion or "testify" in closing, regardless of the accused person's behavior or any defense attacks on witness credibility.

Second, any "attack" made by defense counsel does not carry the "prestige associated with the prosecutor's office." *Glasmann*, 175 Wn.2d at 706. Mr. Perkins's challenge to the credibility of the state's witnesses does not carry the same prejudicial weight as a prosecutor's testimony about "facts" that have not been admitted into evidence.

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by asserting "facts" that were not in the record and by giving a personal opinion on credibility. *Glasmann*, 175 Wn.2d at 696; *Reed*, 102 Wn.2d at 145. Mr. Perkins's conviction must be reversed. *Id.*

II. THE COURT ERRED BY ADDING A POINT TO MR. PERKINS'S OFFENDER SCORE FOR BEING ON COMMUNITY CUSTODY AT THE TIME OF THE OFFENSE.

The SRA requires a one-point increase in an offender score if the accused was "under community custody" when the offense was committed. RCW 9.94A.525(19). A person is not "under community custody" while in jail. *State v. Crawford*, 164 Wn. App. 617, 623, 267 P.3d 365 (2011).

The sentencing court added a point to Mr. Perkins's offender score even though he was in jail when the offense occurred. RP 63; CP 4. The court lacked statutory authority to do so.

Respondent suggests that Mr. Perkins remained "under community custody," alleging that his supervision did not toll. Brief of Respondent,

p. 21-23 (citing RCW 9.94A.171(3)(a)). Under the statute, community custody is tolled "unless the offender is detained pursuant to RCW 9.94A.740 or RCW 9.94A.631... for violation of sentence conditions..." RCW 9.94A.171(3)(a). Brief of Respondent, pp. 21-22. Respondent's argument lacks merit.

First, nothing in the record proves that Mr. Perkins was "detained pursuant to RCW 9.94A.740 or RCW 9.94A.631..." He testified that he was "doing a three-day probation violation." RP 227. The term "probation" suggests that he was not on community custody, community placement, or community supervision by the Department of Corrections. Instead, he may have been detained for violation of the terms of a suspended sentence imposed by district or municipal court. *See* RCW 35.20.255(1); RCW 3.66.068.

Second, the cited statute does not address what it means to be "under community custody" for purpose of the offender score calculation. RCW 9.94A.171(3)(a). Mr. Perkins was not in the community at the time he committed the current offense. Regardless of whether or not any period of supervision tolled while he was confined, the point should not have been added to his offender score. *Crawford*, 164 Wn. App. at 623. A person cannot be "under community custody" and in jail at the same time: "the nature of community custody is such that an offender cannot be

simultaneously incarcerated and 'under community custody.'" *Crawford*, 164 Wn. App. at 623. Mr. Perkins was in jail when the alleged assault took place. RP 63. He was not "under community custody." *Id.*

Respondent erroneously claimed that Mr. Perkins "agreed and stipulated on the record to the State's rendition of his criminal history and his offender score." Brief of Respondent, p. 22. Respondent does not cite to the record for this assertion. Presumably, Respondent intended to cite RP 368-369, as was done in Respondent's statement of facts. *See* Brief of Respondent, p. 4.

Mr. Perkins stipulated to his criminal history. RP 368-368. He did not stipulate to a particular offender score.[1] RP 368-369. He did not "affirmatively and expressly agree[ ] to his score," and thus did not "waive[ ] his right to complain about this issue." Brief of Respondent, pp. 22-23.

The court erred by adding a point to Mr. Perkins's offender score for an offense that occurred while he was in jail. *Crawford*, 164 Wn. App. at 622. The case must be remanded for resentencing. *Id.*

[1] He stipulated in order to go forward with sentencing without requiring the prosecutor to prove his criminal history. He had no reason to stipulate to waive legal arguments or stipulate to a particular offender score. RP 368-369.

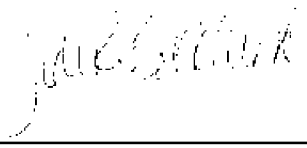
CONCLUSION

Prosecutorial misconduct denied Mr. Perkins a fair trial. His conviction must be reversed.

In the alternative, the sentencing court erred by adding a point to Mr. Perkins's offender score for being on community custody. The case must be remanded for resentencing.

Respectfully submitted on February 5, 2014,

BACKLUND AND MISTRY



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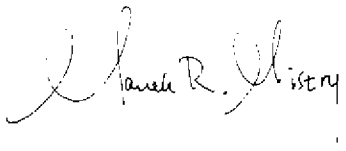

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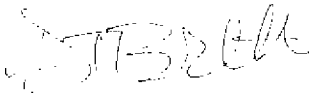

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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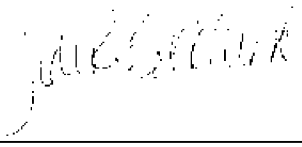
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 5, 2014.



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