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No. 69543-6-I

THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION ONE

STATE OF WASHINGTON,
RESPONDENT,

VS.

ZACHARY D. NGUYEN,
APPELLANT

2013 DEC -3 PM 1:27
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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

THE HONORABLE BRUCE E. HELLER

PRO SE STATEMENT OF ADDITIONAL GROUNDS
FOR REVIEW

ZACHARY D. NGUYEN
APPELLANT

A. ISSUES

- 1.) In trial court during closing arguments, the prosecutor violated my due process rights committing prosecutorial misconduct by impermissibly vouching for states witnesses' credibility.
- 2.) The states witness violated a 3.5 ruling during his testimony by introducing another crime to the jury.
- 3.) The trial court was in violation of due process allowing constitutional abuse of discretion occur during voir dere jury selection, when a juror witnessed me come out of the courtroom in handcuffs. Instead of requiring an inquisition to find out if the jury pool was tainted, the trial court dismissed the juror and continued with voir dere.
- 4.) My defense counsel was ineffective due to a failure to move for a mistrial or an inquisition to see if the jury pool was tainted.
- 5.) The jury instructions failed to require unanimity as to which act constituted the substantial step toward commission of attempted robbery in the first degree, in which is a violation to my constitutional right to due process and a unanimous verdict.

B. STATEMENT OF CASE

On August 21st, 2012, I, ZACHARY D. NGUYEN, was convicted in a trial court by a jury of my peers for the charges of Burglary in the first degree, Attempted Robbery in the first degree, Assault in the second degree. All 3 crimes were accompanied by 3 firearm enhancements. I was sentenced to 212 months imprisonment on October 26th, 2012. This appeal followed.

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C. ARGUMENT

1. On August 21st, 2012, during the prosecutors closing arguments of the case, she committed an act of prosecutorial misconduct by improperly vouching for the credibility of my co-defendants, in which the credibility of the states witnesses was a significant factor against me. It is clear that the prosecutor is not arguing an inference from the evidence but instead is expressing a personal opinion about credibility. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145, State v. Jackson, 150 Wn. App. 877, 884, 209, P.3d 553. Referring to the record V.T.P. 08/21/2012 Page 16, Line 3-17, Page 17 Line 1-2, in this occurrence the prosecutor uses the stamp of the state to assure the jury that the witnesses are credible. There is a substantial likelihood that the misconduct affected the jurys verdict. State v. Dhalwal, 150 Wn. 2d 559, 578, 79 P.3d 432.

2. On August 15th, 2012, during the testimony of the states witness Officer Matthew Hurst, the state was in violation of a ruling made in 3.5 hearing of motions in limine, V.T.P. 08/13/2012 Page 18-21, where the prosecutor was obligated to instruct the officer of the parameters he was to withstand in his testimony concerning the case presented at trial. The officer introduced to the jury another incident unrelated to the case. V.T.P. 08/15/2012 Page 157-158. State v. Pitner, 118 Wash. App. 1073

The introduction of this information was prejudicial and most likely had an impact on the jury's verdict that was beyond harmless.

3. On August 14th, 2012, my rights to due process were violated, when the judge encompassed a constitutional abuse of discretion during voir dire jury selection at which a juror witnessed me depart the courtroom in handcuffs, violating my constitutional rights stating absent extraordinary circumstances, a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles. State v. Finch, 137 Wn. 2d, 792, 842, 975 P. 2d 967, Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353. When the issue was brought to attention, instead of requiring an inquisition to detect if the jury pool was tainted by the juror, the judge dismissed the juror and moved forward with the voir dire jury instruction. V.T.P. 08/14/12 page 6 Line 10-22

4. On August 14th, 2012, my defense counsel, Eugene Picullet was ineffective to assist me failing to move for a mistrial or making an objection to the dismissal of a juror that witnessed me in handcuffs exiting the courtroom. V.T.P. 08/14/12 Page 6 Line 17-19. In which an objection would likely have been sustained, or a movement for a mistrial would likely have been granted. Strickland v. Washington, 446 U.S. 688, 687, 104, S. Ct. 2052, 80 L. Ed. 2d 674.

5. In my supplemental brief, it is argued that the jury instructions failed to require unanimity as to which act constituted the substantial step toward the commission of attempted robbery in the first degree, in which is a violation to my constitutional right to due process and a unanimous verdict. In Brief of Respondent, the state suggest the claims should be rejected due to the fact that the prosecutor made an election as to the act that formed the basis for the attempted robbery conviction. Specifically, that the act of striking Phillip Maxie in the head with the gun, the act for assault conviction was the basis for the charge of Robbery in the first degree. However, according to the Petrich instruction from State v. Petrich, 101 Wn.2d 566, 683 P.2d 173, "In some instances, the prohibition against double jeopardy may be violated by convicting the defendant of multiple counts on the basis of a single act. When this is true, the jury should be clearly told that each count requires proof of a different act. State v. Ellis, 71 Wn. App. 460, 859 P.2d 632. In State v. Petrich, the ~~trial~~ court held that in cases in which the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: 1.) Requiring the prosecution to elect the act upon which it will rely for conviction ; or 2.) Instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt. When the prosecution chooses not to elect

a jury instruction must be given to assure the jury's understanding of the unanimity requirement. Failure to follow one of the options is "violative of a defendant's state constitutional rights to a unanimous jury verdict and United States constitutional right to a jury trial. State v. Kitchen, 110 Wn. 2d 403, 409, 756 P.2d 105, State v. Hepton, 113 Wn. App. 673, 684, 54 P.3d 233, State v. Camarillo, 115 Wn. 2d 60, 794, P.2d 850.

The issue pertaining to the merging of the assault conviction and attempted robbery conviction for double jeopardy purposes has been conceded by the state.

D. CONCLUSION

As I have explained, there are multiple errors and violations that are beyond harmless error. Improperly vouching for the credibility of a witness violated my right to a fair and impartial jury trial, the prosecutorial misconduct held a substantial likelihood that the misconduct affected the jury's verdict. The ineffective assistance of my counsel resulted in a tainted jury pool, violating my right to appear in front of a fair and impartial, unbiased jury as well as my right to effective assistance from counsel. The state witness' introduction of another crime to the jury prejudiced my defense to the jury and violated a court ruling. The abuse of discretion of the judge for failing to require an inquisition of the potential tainting

of the jury pool was a constitutional error. Failure to require unanimity as to which act constituted the substantial step toward the commission of attempted robbery in the first degree was a violation of my constitutional rights to due process. The law states that an error of constitutional proportions will never be considered harmless unless it was harmless beyond a reasonable doubt. For the reasons set forth above, other than the remandation for the vacation of the assault conviction, I respectfully move this court to hold merits to all these issues and reverse all convictions and remand for a new trial.

Dated this 30th day of November, 2013

Respectfully Submitted,

Zachary D. Nguyen
Appellant No. 69543-C-I

CERTIFICATE OF SERVICE BY MAIL

TODAY I DEPOSITED IN THE MAIL OF THE UNITED STATES OF AMERICA, POSTAGE PREPAID, A PROPERLY STAMPED AND ADDRESSED ENVELOPE DIRECTED TO THE COURT OF APPEALS DIVISION ONE ONE UNION SQUARE 600 UNIVERSITY ST. SEATTLE, WASHINGTON 98101-4170 CONTAINING A COPY OF PRO SE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW RAP 10.10. IN STATE V. ZACHARY NGUYEN, CAUSE No. 69543-6-I, IN THE COURT OF APPEALS, DIVISION ONE,

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

ZACHARY NGUYEN



11-30-13

DONE IN ABERDEEN, WA