

64304-5

64304-5

NO. 64304-5-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

NOLAN M. DENUNZIO,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael Rickert, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Nolan DeNunzio was convicted by a jury of Felony Driving under the Influence. He claims that the prosecutor committed misconduct in a question posed to him and in closing argument. Because the question was not inappropriate and the argument was supported by the record, there was no prosecutorial misconduct. DeNunzio also failed to object at the trial court and the claimed errors were not flagrant and ill-intentioned.

DeNunzio also claims his counsel was ineffective in failing to stipulate to the fact of the prior conviction for Vehicular Assault. Because DeNunzio used the prior conviction to explain why he would not drive while intoxicated, the decision was likely tactical. In addition, DeNunzio cannot establish he was prejudiced given the trial court's limiting instruction.

II. ISSUES

1. Was a prosecutor's question asking a defendant why he should be believed misconduct?
2. Where a prosecutor's closing argument was based upon facts in the record, was there misconduct?

3. Where the defendant failed to seek curative instructions, was the alleged misconduct so flagrant and ill-intentioned that reversal is required?
4. Where the defendant did not stipulate to his prior conviction and used the prior conviction to his advantage, was his trial counsel ineffective?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On July 17, 2009, Nolan DeNunzio was charged with Felony Driving under the Influence alleged to have occurred on July 1, 2009. CP 1. The felony was based upon DeNunzio having alleged to have driven under the influence and having a prior conviction for Vehicular Assault. CP 4, 6-12.

On August 28, 2009, DeNunzio filed a motion to bifurcate the fact that DeNunzio had a prior conviction from proof of the charge of Driving Under the Influence. CP 14-18.

On September 9, 2009, the trial court denied bifurcation but required that the jury be instructed to disregard the existence of the

prior conviction for any purpose than proof of the prior conviction.
1RP 37-8¹.

On September 14, 2009, the case proceeded to trial. 1RP 40.

The jury was instructed regarding Felony Driving under the Influence. CP 35.

The jury was specifically instructed that the evidence of the prior conviction of DeNunzio was not to be used for the purpose of proving that the defendant was driving under the influence. CP 34.

On September 16, 2009, the jury found DeNunzio guilty of Driving under the Influence. CP 39. The jury also unanimously found a special verdict that DeNunzio had refused to submit to a breath test. CP 40.

On October 1, 2009, the trial court sentenced DeNunzio to the low end of the standard range of 15 months in prison. CP 44, 46, 50.

On October 1, 2009, DeNunzio timely filed a Notice of Appeal. CP 41.

2. Statement of Facts

i. Summary of Trial Testimony

¹ There are two verbatim reports of proceedings in this case. The State will refer to them as follows:

1RP 9/9/09 3.5 hearing and bifurcation motion & 9/14/09 Trial Day 1
2 RP 9/15/09 Trial Day 2 & 10/1/09 Sentencing.

Chief Paul Budrow of the Upper Skagit Tribal Police testified. 1RP 41. Budrow had been a police officer for more than twenty-five years. 1RP 41. Budrow had been a traffic officer for many years and was able to judge vehicle speed with one or two miles per hour based on that experience and use of radar. 1RP 55. Budrow had received a number of complaints that Nolan DeNunzio was seen driving a tribal member's vehicle while extremely intoxicated. 1RP 42-3. DeNunzio was known to Budrow. 1RP 42. Budrow observed DeNunzio driving a van at 40 to 45 miles per hour in excess of the 35 mile-per-hour speed limit and noticed that as he turned a corner, his vehicle went halfway into the oncoming lane. 1RP 44, 48, 54. Budrow activated his lights and siren to stop the vehicle but DeNunzio kept driving and even turned a corner. 1RP 44. Budrow activated his siren one or two more times and DeNunzio pulled off until his van was halfway on the shoulder. 1RP 44, 48. Budrow got out and approached DeNunzio's van and DeNunzio started to inch his car forward each time Budrow approached. 1RP 47. Eventually DeNunzio stopped and Budrow went back to his car to move it closer. 1RP 47.

Budrow was familiar with DeNunzio and the two other occupants of the van because it was a small community and he knew

them all by family. 1RP 48. Budrow arrested DeNunzio for outstanding warrants and because he was a suspended driver. 1RP 48. Budrow also noted an overwhelming odor of stale beer from the van. 1RP 48, 56. Budrow also saw numerous beer cans inside the van. 1 RP 56. Even after DeNunzio was removed from the van, Budrow could smell the odor of intoxicants from the person and the breath of DeNunzio. 1RP 49, 52.

Budrow noted that DeNunzio's clothes were all disheveled and his hair was a mess. 1RP 49. Budrow testified that DeNunzio was normally well-kept and dressed sharp. 1RP 49.

When the prosecutor asked about DeNunzio's demeanor, Budrow said that DeNunzio gets argumentative when he gets intoxicated. 1RP 49. At that point, DeNunzio's counsel objected as non-responsive to the question and it was sustained by the trial court. 1RP 49. There was no motion to disregard the comment requested by DeNunzio's counsel. 1 RP 49.

Budrow went on to testify that DeNunzio's eyes were extremely bloodshot and watery looking and that his ability to walk was hindered. 1RP 50. As DeNunzio stepped out of his van, he had stumbled. 1RP 50. Budrow had to help DeNunzio walk to the patrol car so he didn't fall down and hurt himself and also assist him to walk

over to bushes so that DeNunzio could go to the bathroom. 1RP 50.

Budrow smelled the odor of multiple beers on DeNunzio. 1 RP 58.

Budrow also testified that the other two occupants of the van were extremely intoxicated. 1RP 50-1.

Budrow testified that he had seen DeNunzio on numerous occasions when he did not appear under the influence and had seen him under the influence various times. 1RP 51. When the prosecutor asked if Budrow believed DeNunzio was under the influence, DeNunzio's counsel objected as calling for a conclusion as to the essential element of the crime which was sustained by the trial court.

1RP 51-2

Although Budrow had placed DeNunzio under arrest, he did not process him for the Driving under the Influence because he was the only tribal officer on duty and the time that would take. 1RP 51.

Budrow called in a Skagit County Sheriff's officer to assist in processing DeNunzio. 1RP 51.

During cross-examination, Budrow presented the opinion that he believed DeNunzio was intoxicated. 1RP 53. Budrow also testified on cross-examination without objection that:

Again, it's very easy to tell on Nolan. Like I said, he's very sharp dressed, always clean. There's not a time that I've seen Nolan not in clean, perfect attire, unless

he's intoxicated, on drugs or something. So with that, when he stepped out of that car it just continued to give me one more element to the fact that –

1RP 60. Budrow turned DeNunzio over to the sheriff's officer about an hour after the initial reports by the civilians. 1 RP 63.

Deputy Nevares of the Skagit County Sheriff's Office was the officer who arrived to process DeNunzio. 1RP 67, 70. Nevares took DeNunzio to the Sedro Woolley Police Department to process him for DUI. 1RP 71-3. DeNunzio voluntarily performed the field sobriety tests. 1RP 72. Nevares described the testing process and how DeNunzio performed on the tests. 1RP 73-82. Nevares also asked DeNunzio standard questions. 1RP 82-88. During the questions, DeNunzio denied driving the vehicle, said he had not been drinking then said he had a single beer the night before. 1RP 86-8. Nevares characterized DeNunzio's attitude as cooperative and laughing, coordination as good, clothes as orderly, eyes as water and bloodshot, facial color as flushed, odor of intoxicants as strong and speech as fair. 1RP 89-90. Nevares characterized DeNunzio's impairment as slight. 1RP 105.

Nevares testified that he offered DeNunzio a breath test, but DeNunzio refused. 1RP 90-2.

The State also called Nigha Bollinger. 2RP 26-7. Bollinger lived on the Upper Skagit Indian Reservation. 2RP 27. Bollinger worked at Upper Skagit Housing and saw DeNunzio while at work on July 1, 2009. 2RP 27-8. Bollinger saw DeNunzio driving the van which he parked. 2RP 30. DeNunzio got out of the van and asked Bollinger for a cigarette. 2RP 30. Bollinger smelled alcohol on DeNunzio. 2RP 30. DeNunzio walked into an apartment and when he came back out, talked to Bollinger again. 2RP 31. DeNunzio invited Bollinger to a party which she declined. 2RP 31. As DeNunzio backed out the van, he offered Bollinger a beer, which she declined. 2RP 31. DeNunzio drove fast and the vehicle skidded as it took off. 2RP 31-2. Bollinger saw Budrow later in the day and told him what she had observed DeNunzio doing. 2RP 32-3.

The trial court admitted certified records showing DeNunzio's prior conviction for Vehicular Assault. 2RP 37, 79.

DeNunzio testified. 2RP 38. He claimed that he had been drinking on June 30th and had drunk enough to make himself sick. 2RP 40-1. He testified he woke up on July 1st at about 8:00 in the morning. 2RP 42. He went over to Ernie's house with his sister where he was offered a drink but declined and drank soda and ate pizza instead. 2RP 44. He vomited up the soda and pizza. 2RP 44-

5. DeNunzio did not believe he was still drunk. 2RP 45. DeNunzio claimed that he offered to drive Ernie and his sister to the store because they were too intoxicated. 2RP 45. DeNunzio says the reason he offered to drive was because he was previously involved in an accident when he was intoxicated and broke both his legs. 2RP 45.

DeNunzio testified that the night before the traffic stop, he had been drinking whiskey called tequila tarantulas. 2RP 46. He testified he had three or four of the shots. 2RP 56. He claimed had not drank any beer. 2RP 46. He claimed his last drink was between 12:30 and 1:00 that morning and he went home shortly after that where he slept until later that morning. 2RP 49. He said he did not feel any effects of alcohol on his driving. 2RP 49. He was stopped by Budrow at about 10:30 in the morning. 2RP 49.

He claimed he did not recall seeing Bollinger on the day he was stopped by Budrow and had driven to the apartments where she worked. 2RP 50-1. DeNunzio claimed he recalled signing the implied consent warnings for breath but did not recall reading it. 2RP 54. He said he didn't take the breath test because he had drank the day before had thoughts about puking up the alcohol. 2RP 54.

On cross-examination DeNunzio admitted that he was pretty sure the three or four drinks were double shots and thus equivalent to six to eight drinks of straight alcohol. 2RP 57-8. On cross-examination, DeNunzio admitted in his prior traffic accident where he had been intoxicated, two others in his car had received significant injuries. 2RP 59-60. DeNunzio could not recall how much he had to drink on that occasion. 2RP 62. DeNunzio also admitted that it was an eighteen pack of beer that he had purchased at the convenience store on the morning of July 1st. 2RP 63-4.

DeNunzio admitted to having three prior theft convictions. 2RP 70. When asked why he should be believed with the prior theft convictions, defense counsel objected and the trial court sustained the objection. 2RP 71.

DeNunzio called a friend, Joshua Anders, to testify. 2RP 18, 23.. Anders testified he had seen DeNunzio at 3:00 in the morning coming out of a convenience store with a beer in his hand. 2RP 19. DeNunzio claimed to be buying the beer for his uncle and his girlfriend. 2RP 19. On cross-examination, Anders admitted to having prior convictions for Theft in the Third Degree and Possession of Stolen Motor Vehicle. 2RP 22.

DeNunzio also called Ernest Cheer who testified that he lived on the reservation and was friends with DeNunzio. 2RP 83-4. Cheer had seen DeNunzio at his house. 2RP 85. Cheer said DeNunzio drove him into town to buy some beer. 2RP 86. Cheer claimed he asked DeNunzio to drive because he had not seen DeNunzio drinking. 2RP 86.

On cross-examination, Cheer said he recalled DeNunzio stopping at a friend's house and at the convenience store. 2RP 88. Cheer admitted his recollection of that day was "fuzzy." 2RP 89-90.

ii. Objections during closing argument

During closing argument, the prosecutor described the testimony of Chief Budrow. The prosecutor stated:

The Chief knows Nolan. He knows him from being on the tribe. He's familiar with him, very familiar with him. And he testified that he's seen Nolan when he's sober. He said he's a snappy dresser, and that he always looks put together, and that he notices that about him. And he said that on July 1st something was different. And he could tell that he had been drinking.

MS. CANDLER: Objection, Your Honor. Ask that that remark be stricken.

THE COURT: Sustained. It's up to the jury to make that determination.

MS. SULLIVAN: My recollection is that he testified to that. You'll have to go off of your own recollection. But he's familiar with Nolan. He knows what Nolan looks like, and acts like on a normal basis. And he could tell Nolan was disheveled and unkept from what he had

seen before and he could smell the odor of alcohol from him. He's familiar with him. Don't discredit his opinion and his testimony. Think about the fact that he knows him, works up there on a daily basis and sees these same 300 individuals and maybe a few other people.

MS. CANDLER: Objection, Your Honor. This is completely inappropriate argument.

THE COURT: Sustained.

MS. SULLIVAN: I do think that his testimony is critical, though, and his observations of Nolan, of his observations of Nolan's driving and his observation of Nolan emitting the odor of a lcohol coming from his person.

2RP 98-9

No curative instructions were requested and no motion for mistrial was made. Defense counsel made further objections during closing argument but all were denied by the trial court mostly with the trial court noting the issues were within acceptable argument. 2RP 106, 108, 125, 128.

IV. ARGUMENT

1. There was no prosecutorial misconduct² and reversal is not merited.

DeNunzio claims that the prosecutor committed misconduct in asking why he should be believed and in comments during closing argument. The basis for the claim is essentially that there were sustained objections. However, there were no curative instructions or mistrial sought. The State contends that the questions asked and the comments during closing argument were not inappropriate and do not amount to misconduct.

i. Standards regarding prosecutorial misconduct.

² The term prosecutorial misconduct is misleading. Misconduct should be reserved for intentional or at least reckless conduct.

“Prosecutorial misconduct” is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct.

State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Courts in other jurisdictions have recently recognized the unfairness of labeling every mistake made by a prosecutor as “misconduct.” See State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Maluia, 107 Haw. 20, 108 P.3d 974, 979-981 (2005); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), *rev. denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009). The more appropriate term would be prosecutorial error.

[T]he American Bar Association and NDAA urges trial and appellate courts reviewing the conduct of prosecutors, while assuring that a defendant’s rights are fully protected, to use the term “error” where it more accurately characterizes that conduct than the term “prosecutorial misconduct.”

National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10 2010).

Courts of appeal review allegedly improper comments by a prosecutor in the context of the entire argument. State v. Fisher, 165 Wn.2d 727, 746-747, 202 P.3d 937 (2009). Prosecutorial misconduct generally requires a new trial only when there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). A trial court's denial of a defense request for a mistrial is reviewed for abuse of discretion. See State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial, but not a trial free from error. State v. Fisher, 165 Wn.2d 727, 746-747, 202 P.3d 937 (2009). To prevail on his claim of prosecutorial misconduct, the appellant bears the burden of proving, first, that the prosecutor's comments were improper and, second, that the comments were prejudicial. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); See State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor's improper comments are prejudicial "only where there is a substantial likelihood the misconduct affected the jury's verdict." *Id.* (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). A reviewing court does not assess "[t]he prejudicial effect of a

prosecutor's improper comments ... by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Id.* (quoting Brown, 132 Wn.2d at 561, 940 P.2d 546).

In determining whether a trial irregularity influenced the jury, a court may look at the seriousness of the irregularity, whether the statement in question was cumulative of other evidence properly admitted, and whether the irregularity could be cured by an instruction to disregard the remark. In re Det. of Smith, 130 Wn. App. 104, 113, 122 P.3d 736 (2005).

ii. Asking if the defendant could be believed was objected to and the question not answered.

DeNunzio claims that the prosecutor committed misconduct in asking DeNunzio why he should be believed he had theft convictions. Brief of Appellant at page 10-11. The State contends that question was not objectionable, it was sustained, and there was no curative instruction or mistrial sought. The extent of the question and objection was as follows:

Q. Okay. So if you have these theft convictions, more than one, why should we believe anything that you have to say today?

MS. CANDLER: Objection, Your Honor.
THE COURT: Sustained.

2RP 71.

DeNunzio contends that this question was improper cross examination as to the content of his prior conviction. Brief of Appellant at page 11 citing State v. Coe, 101 Wn.2d 772, 776, 685 P.2d 668 (1984) (cross examination regarding letter sent to judge handling prior conviction was inadmissible because it exceeds scope under ER 609(a)). Here, the question did not inquire into the facts of the prior conviction. Thus it was not inappropriate in that regard. The question was more succinctly just “why should we believe you?” That question is not objectionable.

DeNunzio also claims that the prosecutor was expressing her personal belief in the question. Brief of Appellant at page 11 citing State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (prosecutor arguing that witness would remember an incident where her husband murdered in her presence was not an expression of personal opinion). Here there was no expression by the prosecutor whether she believed DeNunzio, just asking him why he should be believed.

Furthermore, DeNunzio’s trial counsel did not seek a curative instruction or mistrial based upon the question. To preserve a claim

of prosecutorial misconduct, a defendant must timely object or move for a mistrial. See In re Det. of Law, 146 Wn. App. 28, 50-51, 204 P.3d 230 (2008); State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000); State v. Belgarde, 110 Wn.2d 504, 517-18, 755 P.2d 174 (1988). Either course allows the trial court to cure the error through a curative instruction. State v. Stamm, 16 Wn. App. 603, 614, 559 P.2d 1 (1976).

However, when the defendant has failed to either object to the impropriety at trial, request a curative instruction, or move for a mistrial, reversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Therefore, DeNunzio is entitled to relief only if the question was so flagrant and ill-intentioned that the only remedy is mistrial.

The State contends that this question by the prosecutor does not rise to that level. See Darden v. Wainwright, 477 U.S. 168, 179-82, 106 S.Ct. 2464, 2470-72, 91 L.Ed.2d 144 (1986) (remarks about a defendant's future dangerousness were criticized but not regarded as reversible error), State v. Russell, 125 Wn. 2d 24, 89, 882 P.2d 747, 787 (1994) (statements regarding possibly withheld evidence and possibility defendant was serial killer did not rise to

the level of flagrant and ill-intentioned comments resulting in misconduct).

iii. The closing argument by the prosecutor was appropriate in light of the evidence presented and the sustained objections do not establish prosecutorial misconduct.

DeNunzio argues that the prosecutor committed misconduct by arguing that the officer knew DeNunzio well enough to determine that he was intoxicated. The State contends that despite the trial court's ruling there was un-objected to evidence supporting that argument. In addition, the argument is not misconduct meriting reversal.

In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." State v. Fisher, 165 Wn.2d 727, 746-747, 202 P.3d 937 (2009)(citing State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)). If defense counsel failed to request a curative instruction, the court is not required to reverse. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

During closing argument, the prosecutor described the testimony of Chief Budrow. The prosecutor stated:

The Chief knows Nolan. He knows him from being on the tribe. He's familiar with him, very familiar with him. And he testified that he's seen Nolan when he's sober. He said he's a snappy dresser, and that he always looks put together, and that he notices that about him. And he said that on July 1st something was different. And he could tell that he had been drinking.

MS. CANDLER: Objection, Your Honor. Ask that that remark be stricken.

THE COURT: Sustained. It's up to the jury to make that determination.

2RP 98-9.

The prosecutor's comments prior to the first objection were all supported by the record. Budrow was familiar with DeNunzio and the two other occupants of the van because it was a small community and he knew them all by family. 1RP 48. Budrow noted that DeNunzio's clothes were all disheveled and his hair was a mess. 1RP 49. Budrow testified that DeNunzio was normally well-kept and dressed sharp. 1RP 49. Budrow testified that DeNunzio's eyes were extremely bloodshot and watery looking and that his ability to walk was hindered. 1RP 50. As DeNunzio stepped out of his van, he had stumbled and Budrow had to help DeNunzio walking so he didn't fall down and hurt himself. 1RP 50. Budrow could smell the odor of multiple beers from the person of and the breath of DeNunzio. 1RP

49, 52, 58. Furthermore there was testimony which was not objected to that described Chief Budrow's prior observations of DeNunzio.

Q. Okay. Have you had an occasion to see Mr. DeNunzio when, in your opinion, he appeared not under the influence?

A. Numerous times.

Q. Okay. So you're familiar with him and you've seen him both under the influence of intoxicants and not?

A. Various, many times.

1RP 51 (direct examination without objection).

Again, it's very easy to tell on Nolan. Like I said, he's very sharp dressed, always clean. There's not a time that I've seen Nolan not in clean, perfect attire, unless he's intoxicated, on drugs or something. So with that, when he stepped out of that car it just continued to give me one more element to the fact that –

1RP 60 (cross-examination by DeNunzio's counsel).

Neither defense counsel nor the trial court specified the basis for the objection and did not specify which portion of the argument was objectionable. Chief Budrow had testified how DeNunzio was different on the date of the incident and had testified to his opinion that DeNunzio had been drinking beer. Argument supported by the record is not inappropriate.

DeNunzio also claims that the prosecutor again committed misconduct in the argument that came thereafter.

MS. SULLIVAN: My recollection is that he testified to that. You'll have to go off of your own recollection. But

he's familiar with Nolan. He knows what Nolan looks like, and acts like on a normal basis. And he could tell Nolan was disheveled and unkept from what he had seen before and he could smell the odor of alcohol from him. He's familiar with him. Don't discredit his opinion and his testimony. Think about the fact that he knows him, works up there on a daily basis and sees these same 300 individuals and maybe a few other people.

MS. CANDLER: Objection, Your Honor. This is completely inappropriate argument.

THE COURT: Sustained.

MS. SULLIVAN: I do think that his testimony is critical, though, and his observations of Nolan, of his observations of Nolan's driving and his observation of Nolan emitting the odor of alcohol coming from his person.

2RP 99.

Again, the facts referenced in this portion of the argument are supported by the record. Chief Budrow testified without objection that DeNunzio was normally well-kept and dressed sharp but on that date his clothes were disheveled and his hair was a mess. 1RP 49, 61. And the officer testified he could smell the odor of multiple beers on DeNunzio and from his breath and that he had seen DeNunzio both while intoxicated and sober. 1RP 49, 51, 52, 58, 61.

On appeal, DeNunzio cited to the rulings during trial when the prosecutor questioned Chief Budrow regarding his observations of DeNunzio. But, the first objection was that Budrow's testimony was non responsive and the second objection was that the prosecutor

was leading. 1RP 49, 50. The third objection was when the prosecutor asked if the officer's opinion was that DeNunzio was intoxicated. 1RP 51-2. The trial court sustained that objection as calling for the officer's opinion on an essential element. 1RP 51. However, if this Court looks at the portions of closing argument relied upon by DeNunzio, the prosecutor did not express that the officer had that opinion, only that he believed DeNunzio had been drinking.

Furthermore, no curative instructions were requested and no motion for mistrial was made. Defense counsel also made further objections during closing argument but all were denied by the trial court mostly with the trial court noting the issues were within acceptable argument. 2RP 106, 108, 125, 128.

Viewed in context of the entire argument and the evidence at trial the prosecutor's comments were not misconduct.

Given that there was no curative instruction requested, the motion for mistrial must be denied because the argument was not flagrant or ill-intentioned.

- 2. The decision not to stipulate to the prior conviction could be a trial tactic and the defense cannot establish prejudice such that the decision was no ineffective assistance.**

DeNunzio claims that his trial counsel was ineffective for failure to seek a stipulation that he had a prior felony for vehicular assault. Brief of Appellant at 17. The State was required to prove beyond a reasonable doubt that DeNunzio had a prior conviction for Vehicular Assault by Driving under the Influence. CP 35. Because in this case, that decision could have been a trial tactic and because DeNunzio cannot establish prejudice, he cannot establish ineffective assistance.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) **defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;** and (2) **defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.** State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)).

State v. McFarland, 127 Wn.2d 322, 334-5, 899 P.2d 1251 (1995)

(emphasis added).

Courts engage in a strong presumption counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109

Wn.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)

(emphasis added).

If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

State v. Foster, 128 Wn. App. 932, 940, 117 P.3d 1175 (2005).

DeNunzio could not have waived his right to a jury trial on a prior conviction element. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). Trial courts have discretion to reduce unnecessary prejudice in instructing the jury as to proof of prior convictions. Id.

DeNunzio was being tried on a charge of Felony Driving under the Influence based upon a prior conviction for Vehicular Assault under the Influence. CP 4, 6-12. As the defendant testified that he did not drive while intoxicated because he was aware of the risks as a result of the prior incident where he was seriously injured. 2RP 45. Thus in the present case, the decision not to stipulate to the prior conviction appears to be a tactical decision therefore precludes

characterization as ineffective assistance. His defense counsel was using his client's awareness of the risk that came with driving under the influence since he had suffered two broken legs, coupled with the facts of the case where he claimed he had only been drinking the night before to attempt to establish that the defendant would not have driven on that day had he been under the influence. His prior conviction was also for a single incident as opposed to multiple prior convictions for Driving under the Influence. Multiple prior convictions could have led the jury to believe DeNunzio a propensity to drive while intoxicated. He called others to support that he was not intoxicated and since he had refused the breath test, there was no reading to challenge his contention that he had sobered up from the night before. The decision to allow evidence of the prior conviction and to let the jury determine the fact appears to have been a trial tactic.

In addition to what could have been a trial tactic, DeNunzio cannot establish ineffective assistance because he cannot establish that the jury took any negative inferences from the past incident. Despite DeNunzio's testimony on direct examination referring to his past vehicular assault and the cross examination by the prosecutor which would have expanded the relevance of his prior conviction, the

trial court gave a limiting instruction. 2RP 45, 59-61, CP 34. That instruction read:

Evidence has been introduced in this case on the subject of prior offenses for the limited purposes of proving whether the defendant has been convicted under RCW 46.61.520(1)(a) or RCW 46.61.522(1)(b). The jury is not to speculate as to the nature of the prior conviction. You must not consider this evidence for the purpose of proving that the defendant was driving under the influence of intoxicating liquor or any drug in this incident, or for any other purpose.

CP 34. A jury is presumed to follow the court's instructions on the law. State v. Lord, 117 Wn.2d 829, 861, 822 P.2d 177 (1991).

Since the jury was instructed to disregard evidence of DeNunzio's prior conviction for any other purpose, this Court must presume that the fact of conviction was not a part of the jury's consideration of whether or not DeNunzio was under the influence on the date of the present incident. DeNunzio's argument that the jury would have relied on the fact of conviction to draw negative inference fails in light of the trial court's instruction.

DeNunzio fails to establish that he was in fact prejudiced.

V. CONCLUSION

For the foregoing reasons, DeNunzio's conviction for Felony Driving under the Influence must be affirmed.

DATED this 18th day of June, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

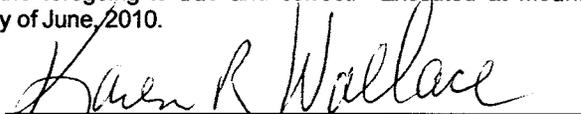
By: 

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jonathan M. Palmer and Dana M. Lind, addressed as Nielsen, Broman & Koch, 1908 E. Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 18th day of June, 2010.


KAREN R. WALLACE, DECLARANT