

65726-7

65726-7

NO. 65726-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN JAY FOSTER,

Appellant.

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

OPENING BRIEF OF APPELLANT

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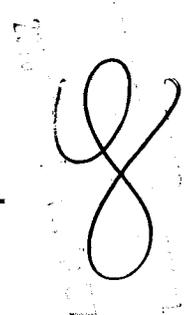


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A. ASSIGNMENTS OF ERROR.

1. The prosecutor committed misconduct by presenting improper closing argument which appealed to the passions of the jury.

2. The court violated Mr. Foster's rights under the Sixth and Fourteenth Amendments by sua sponte finding his offense constituted a crime of domestic violence and imposing an additional financial penalty based on that finding.

3. The court failed to exercise its discretion by imposing legal financial obligations without inquiring into Mr. Foster's indigence or requiring proof that the costs imposed were actually incurred in the case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A prosecutor, as a quasi-judicial officer, has an obligation to seek a verdict based upon reason, and the duty to see that the accused is given a fair trial before an impartial jury. Here, the prosecutor appealed to the passions of the jury, using improper and inflammatory argument. Did the prosecutor's closing argument thus deprive Mr. Foster of a fair trial?

2. Did the court's assessment of an additional \$100 penalty for "domestic violence," based solely on the court's determination

of domestic violence, violate Mr. Foster's right to a jury determination of any factual issue that increased the punishment imposed?

3. A court lacks authority to impose legal financial obligations unless it first determines that the individual has some ability to pay and assesses the actual cost of the items for which the defendant is required to pay. Here, the court imposed numerous legal financial obligations without any information about Mr. Foster's ability to pay, even though it had previously found him indigent, and did not ascertain whether the requested costs were actually incurred during the trial. Did the court lack evidence that Mr. Foster had the ability to pay costs and lack authority to impose non-mandatory legal financial obligations?

C. STATEMENT OF THE CASE.

After a volatile eleven-year marriage, John and Mary Foster filed for divorce. RP 45.¹ After John moved out of the family home,

¹ The Verbatim Report of Proceedings consists of one consecutively paginated volume from proceedings on June 29 and 30, 2010, which will be referred to as "RP." The sentencing on July 6, 2010 will be referred to as "2RP."

he established his own temporary residence at the Queen Anne Motel in Oak Harbor. RP 45.²

An Island County District Court no-contact order was in effect which prohibited John Foster from contact with Mary. RP 46. Although there was no evidence that John attempted to visit Mary or otherwise violate the terms of the order, Mary stated that she “made a mistake” and visited John’s motel room late in the evening of April 25, 2010. RP 45, 65.

Mary Foster testified that she decided to visit John at his motel room at approximately 11:00 p.m. that night, in order to pick up some divorce paperwork. She conceded that it had been a mistake, as she “had no right to be in his home.” RP 65. When Mary arrived at John’s motel room, she became enraged to find John’s new girlfriend there, who was known to Mary as her own former drug connection. RP 58-59, 68.³

An argument ensued concerning John’s apparent unfaithfulness, and Mary stated that she pushed John. RP 53-54.

² Since Mr. and Ms. Foster share a last name, first names may be used for clarity; no disrespect is intended.

³ Scarlett Tull, appellant’s then-girlfriend and an eye-witness to the incident, testified at trial. RP 107-19. She stated that Mary had arrived enraged, and that she saw no acts of aggression on Mr. Foster’s part. RP 108-09.

Both Mary and John had been drinking alcohol. Id. Mary stated that in John's efforts to restrain her, she bumped her knee. RP 55.⁴

Mary told John that she wanted to leave, that she loved him, and that she would call him the next day. RP 56. At the same time, she testified that she was screaming that someone should call 911. Id. Police responded and charged John Foster with violation of the no-contact order. CP 46-47.

D. ARGUMENT

1. MR. FOSTER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

a. Prosecutors have special duties which limit their advocacy. The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173

⁴ Mary also stated that he pulled the motel phone from the wall, but this did not appear in her statement to police. RP 65. Officer Larry Ferguson stated

(1976)). Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

at trial that the motel phone was not torn from the wall. RP 100-01.

b. The prosecutor's closing argument was inflammatory, appealing to the passions of the jury. Here, the prosecutor acknowledged that Mary Foster voluntarily went to John Foster's residence and initiated the event that evening. RP 131. However, in closing argument, the prosecutor repeatedly relied upon inflammatory traditional domestic violence vernacular and exhorted the jury to "stop blaming the victim." RP 131.

Despite the fact that there was no testimony regarding a history of domestic violence, the prosecutor attempted to inject this theme into closing argument. On rebuttal, the prosecutor continued:

It's Mary's fault. Hasn't it always been Mary's fault. It was Mary's fault. He opened that door. It was Mary's fault that John Foster got mad. It was Mary's fault. Let's talk about responsibility, shall we. Mary. Mary the victim. She says, well, I just don't think I'm supposed to be here. She thinks it's her fault, too. Isn't that kind of normal in these situations? She might have been wrong, but she wasn't breaking the law, and that's what we're here to talk about, and that's why he's guilty. He broke the law. She didn't break a law. She made a mistake, which everyone acknowledges.

RP 142 (emphasis added).

Importantly, Mary admitted she unilaterally initiated the contact by going to John's hotel. Mary candidly and rightly acknowledged her actions precipitated the crime.

The prosecutor's reliance on themes familiar to domestic violence cases was a blatant attempt to appeal to the passions of jurors in order to procure a conviction, akin to inciting other forms of prejudice into closing argument, despite the evidence. See, e.g., State v. Perez-Mejia, 134 Wn. App. 907, 915-16, 143 P.3d 838 (2006); State v. Cabrera, 700 N.W.2d 469, 475 (2005) ("The prosecutor is a 'minister of justice' whose obligation is 'to guard the rights of the accused as well as to enforce the rights of the public'") (citations omitted). This type of rhetoric is improper, unduly prejudicial, and must be soundly rejected as a clear violation of Mr. Foster's right to a fair trial and due process of law. State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930) (holding that a prosecutor is a quasi-judicial officer, whose duty it is to assure a defendant a fair and impartial trial, "in the character of fair play").

The prosecutor's attempts to compare this case to others involving domestic violence, arguing – "isn't that kind of normal in these situations?" – invites the jurors to appeal to matters outside of the record, which is expressly forbidden. State v. Rivers, 96 Wn.

App. 672, 675, 981 P.2d 16 (1999); State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993).

c. Prosecutorial misconduct is properly before this court. Generally, an objection to prosecutorial misconduct is waived by the failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). However, the issue may be addressed for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). “When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); Reed, 102 Wn.2d at 145 (conviction reversed where prosecutor repeatedly called defendant a liar and disparaged defendant’s witnesses as outsiders driving fancy cars during closing argument).

Although the instances of misconduct quoted above were not objected to by defense counsel when made, the issues are

nonetheless properly presented for the first time on appeal, since appealing to the passions of the jury in such a manner is so “flagrant and ill-intentioned” as to irrevocably prejudice the jury, lowering the burden of proof and impacting the verdict in this case – thus affecting Mr. Foster’s constitutional right to due process. RAP 2.5(a)(3). Because Mr. Foster’s conviction resulted from prejudicial prosecutorial misconduct, it must be reversed. See also State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (finding manifest constitutional error and reversing conviction, despite failure of defense counsel to object at trial).

d. Reversal is required. The cumulative effect of various instances of prosecutorial misconduct may violate a defendant’s right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the instances of misconduct in the closing argument during Mr. Foster’s trial, there is a substantial likelihood the cumulative effect affected the jury’s verdict; therefore, this Court should reverse his conviction. Reed, 102 Wn.2d at 146-47; see also U.S. v. Holmes, 413 F.3d 770, 778 (8th Cir. 2005) (reversing due to prosecutor’s denigration of defense in closing argument, which court finds particularly egregious due to

comments made during rebuttal, giving defense no opportunity to respond).

2. THE COURT IMPROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS BASED ON AN UNSUPPORTED AND INCORRECT FINDING MR. FOSTER HAD THE ABILITY TO PAY

Courts may require an indigent defendant to reimburse the state for only certain authorized costs and only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty. See Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

a. There is no evidence to support the trial court's finding that Mr. Foster had the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW

10.01.160 and the constitution “direct [a court] to consider ability to pay.” Id. at 915-16. RCW 10.01.160(3) provides,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Here, the court made a finding in the Judgment and Sentence that Mr. Foster had the ability to pay financial obligations. CP 5.⁵ But a trial court’s findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep’t of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

There was no evidence Mr. Foster was employed or employable following his release from prison. As the court remarked at sentencing, Mr. Foster has a substance abuse problem and was in need of treatment. 2RP 12. Mr. Foster was represented by a court-appointed attorney during trial and the court found he remained unable to pay for counsel on appeal or to pay

⁵ The court found as follows:

for the cost of his appeal. Yet inexplicably, the court found Mr. Foster “has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 5.

The trial court’s explicit finding that Mr. Foster had the ability to pay legal financial obligations is contrary to the record and should be stricken. Moreover, because the record does not support a finding that Mr. Foster has the present or future ability to pay costs, non-mandatory legal financial obligations may not be imposed. Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

b. The court improperly and without authority ordered Mr. Foster to pay discretionary costs and penalties. Costs that may be imposed on a criminal defendant must be “expenses specially incurred by the state in prosecuting” and convicting the defendant. RCW 10.01.160(1), (2). “Costs may be imposed only upon a convicted defendant,” and therefore, costs incurred when a defendant is not convicted may not be imposed. RCW 10.01.160(1).

The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 5.

The court ordered Mr. Foster to pay a \$100 “domestic violence penalty” under RCW10.99.080. The jury did not find Mr. Foster committed a domestic violence offense. The court’s own finding that Mr. Foster’s offense constituted domestic violence cannot be used to increase his punishment, without violating his rights under the Sixth and Fourteenth Amendments. Blakely v. Washington, 542 US. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Furthermore, the statute “encourages” judges to consider the offender’s financial obligations and actual ability to pay before determining that this penalty should be imposed. RCW 10.99.080(5). The trial court did not evaluate Mr. Foster’s ability to pay before imposing an added penalty.

In addition, the court imposed a \$400 fee for a court appointed attorney without inquiry into the actual cost or Mr. Foster’s ability to pay. CP 7. Here, the court insisted on imposing costs and fees notwithstanding uncontested evidence of Mr. Foster’s indigence.

One of the goals of the Sentencing Reform Act is to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. Washington State

Sentencing Guidelines Commission, Adult Sentencing Manual, I-vii (2008). But the amount of fines and fees imposed upon conviction vary greatly by “gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced.” See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008). This study found that, three years post-sentencing, less than 20 percent of the fees, fines and restitution had been paid for roughly three quarters of the cases in the study. Id. at 20.

The court’s imposition of legal financial obligations without giving any weight to the person’s ability to pay exacerbates the problems that those released from confinement must face and may, in fact, lead to increased recidivism.

It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

Beckett, The Assessment of Legal Financial Obligations in Washington State, at 74.

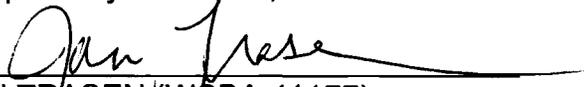
The court's imposition of substantial legal financial obligations, even though it knew of Mr. Foster's on-going poverty and substance abuse, coupled with the obvious hardship of reentering society after spending time in prison, constitutes significant punishment that violates the right to equal protection of the law, is contrary to statute, and must be reconsidered on remand, giving attention to his poverty.

E. CONCLUSION

For the foregoing reasons, Mr. Foster respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 21st day of December, 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

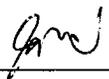
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65726-7-I
v.)	
)	
JOHN FOSTER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF DECEMBER, 2010.

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