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September 16, 2016
Court of Appeals
Division I
State of Washington

No. 73946-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GREGORY NOVOA,

Appellant.

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

REPLY BRIEF

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

THE PROSECUTORIAL MISCONDUCT WAS
FLAGRANT AND ILL-INTENTIONED, REQUIRING
REVERSAL.

- a. The deputy prosecutor misstated the law, lowered the burden of proof, and urged the jury to speculate as to excluded evidence.

In closing argument, the deputy prosecutor argued the State had satisfied its burden to show Mr. Novoa's "intent to commit a crime against a person or property therein" (citing CP 15) by showing Mr. Novoa had violated the no-contact order. 7/22/15 RP 97-98.

However, the deputy prosecutor proceeded to suggest to the jury that it need not find Mr. Novoa had the intent to commit any particular crime, thus encouraging the jury to speculate:

And if you are not satisfied in finding that he was there with the intent to see her and, therefore, commit the crime of violation of the no contact order, he could have been there to commit any other number of crimes against her. Do you ever call 911 on someone who is coming over to have coffee? No.

7/22/15 RP 98 (emphasis added).

This was misconduct. The State may not urge jurors to convict for the intent to commit any crime that "he could have been there to commit," but that the State did not prove. Although jurors need not unanimously agree on the specific crime intended by the accused, the

law does require proof that the person intended an actual crime against persons or property within the residence – not simply “any number of crimes” beyond sharing a cup of coffee. 7/22/15 RP 98.

The State’s argument improperly suggested that conviction could be predicated upon a vague notion that Mr. Novoa intended criminal or insidious activity against his former wife generally, and that jurors did not have to find he intended any specific crime.¹

The State responds that Mr. Novoa fails to discuss the fact that there was no objection in the trial court to the prosecutorial misconduct. Respondent’s Brief at 9-10.² Moreover, the State seems abashed that its closing argument, including its misstatement of the law, be called “misconduct” at all. In a footnote, the State requests that this Court instead, refer to its conduct as “prosecutorial error.” Id. at 9 n.2 . Although the State cites several foreign courts and its own National District Attorneys Association for this proposition, the only Washington case upon which it relies does not say what the State thinks it says. Id.; see State v. Fisher, 165 Wn.2d 727, 740 n.1, 749, 202 P.3d 937 (2009). The Fisher majority seemed to acknowledge in a footnote

¹ This would be contrary to State v. Devitt, for example. 152 Wn. App. 907, 912, 218 P.3d 647 (2009) (the intended crime must be a crime against persons or property, not against the public at large).

that certain prosecutorial “mistakes” might be harmless; however, the Court reversed in Fisher due to egregious prosecutorial misconduct. 165 Wn.2d at 740 n.1, 749.

In addition, it is well-settled that where a prosecutor’s misconduct is flagrant, the error may be raised for the first time on review. State v. Walker, 164 Wn. App. 724, 730, 265 P.3d 191 (2011); State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citing State v. Stenson, 132 Wn.2d 668, 726-27, 940 P.2d 1239 (1997)) (error not deemed waived where prosecutorial misconduct is so flagrant and ill intentioned that it could not have been neutralized by a curative instruction); see also State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); RAP 2.5(a); see also Opening Brief of Appellant at 13.

Lastly, as the jury question shows, the jury struggled with the very issue that was the subject of the prosecutor’s improper comments in closing argument. CP 58 (jurors ask if all violations of no-contact order cases “include” a residential burglary charge, and if this is the reason the burglary is charged). It is clear that the deputy prosecutor’s argument deviated from the court’s instructions, misstated the law, and that this misconduct resulted in prejudice. State v. Davenport, 100

² This issue is discussed at Opening Brief of Appellant at 13.

Wn.2d 757, 762, 675 P.2d 1213 (1984) (prosecutor's statements to the jury on the law must be confined to law set forth in jury instructions).

- b. The prosecutor tainted the jury venire by questioning about the effect of illegal drugs on behavior.

Mr. Novoa moved in limine to exclude allegations that he was using methamphetamines on or before the date of the incident, arguing any such discussion was overly prejudicial, irrelevant, and lacked foundation. 7/20/15 RP 77-80. The court agreed, excluding any reference to drug use, finding it irrelevant. Id. at 81-82.

However, the deputy prosecutor emphasized this excluded topic during voir dire, asking several questions regarding the effect of illegal drugs on behavior. Id. at 63-65. Although Mr. Novoa timely objected to the topic, his objection was overruled. Id. at 63.

The State responds that the motion in limine and court ruling regarding illegal drug use took place earlier in the proceedings than the voir dire procedure. Respondent's Brief at 17-18. While this timeline seems to be reflected in the verbatim reports, the Court is invited to examine the portion of the reports that Mr. Novoa cited in the Opening Brief. RP 77. During the motions in limine, the following exchange occurred:

THE COURT: Okay, folks. Do we want to talk about this issue we discussed in Chambers, certain evidence the Prosecutor would like to present? Why don't you tell me what the State intends to do.

MS. SEBENS: Certainly, Your Honor. There is an allegation of methamphetamine use at or around the date in question. I don't know if Your Honor wants to hear from the Defense first because I believe it was raised as a Defense motion in limine. I certainly will have an objection and will be responding.

RP 77 (emphasis added).

The trial court's and the State's references to the prior discussion of issue of the exclusion of this evidence is troubling. This indicates the State was on notice of Mr. Novoa's motion to exclude, and regardless, used the evidence in voir dire, regardless.

Such inquiry in voir dire indicates an intentional and flagrant disregard for the discussion in chambers regarding the drug evidence, which was then ruled excluded. 7/20/15 RP 77-78; see, e.g., Emery, 174 Wn.2d at 760-61, supra.

c. Reversal is required.

A prosecutor commits misconduct when he or she "allude[s] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." RPC 3.4(e); State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). Because the prosecutor's misconduct was flagrant, these two errors may be raised for

the first time on review. Walker, 164 Wn. App. at 730, supra; Emery, 174 Wn.2d at 760-61; RAP 2.5(a).

B. CONCLUSION

For the above reasons, as well as those stated in the Opening Brief, Mr. Novoa's convictions should be reversed.

Respectfully submitted this 15th day of September, 2016.

s/ Jan Trasen

JAN TRASEN (WSBA 41177)
Washington Appellate Project - 91052
Attorneys for Appellant

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GREGORY NOVOA,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **REPLY 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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SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() AGREED E-SERVICE
VIA COA PORTAL</p> |
| <p>[X] GREGORY NOVOA
369122
WASHINGTON CORRECTIONS CENTER
PO BOX 900
SHELTON, WA 98584</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF SEPTEMBER, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711