

No. 40626-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

SAMANTHA MASSEY,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Rosanne Buckner, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial misconduct in cross-examination and in closing argument.

2. Appellant Samantha Massey was deprived of her Sixth Amendment and Article I, § 22, rights to effective assistance of counsel.

3. Massey's due process rights and right to appeal were violated and the sentencing court acted without statutory authority in delegating its authority to set the conditions of Massey's term of community custody to the Department of Corrections (DOC).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is well-settled that it is serious misconduct for a prosecutor to ask a defendant in cross-examination to comment on whether the state's witnesses are lying or mistaken. Did the prosecutor commit flagrant, ill-intentioned misconduct in repeatedly asking Massey to declare that the crucial state's witness was "either lying or grossly mistaken" and whether an officer was also "either lying or grossly mistaken?" Further, was counsel prejudicially ineffective in failing to object to this repeated misconduct?

2. The jury need not decide who is "telling the truth" in order to decide the case. Instead, it is tasked simply with determining whether the state has proven its case, beyond a reasonable doubt. Did the prosecutor commit flagrant, ill-intentioned misconduct in asking Massey in cross-examination to declare that jurors had to decide who was telling the truth and being honest? Was counsel prejudicially ineffective in failing to object?

3. More than 13 years ago, it was made clear that arguments which tell the jury they cannot acquit unless they find the state's witnesses are lying or mistaken are serious, flagrant and ill-intentioned misconduct. Did the prosecutor commit such misconduct in repeatedly arguing in closing that the jury could not find Massey "not guilty" unless they found that the crucial state's witnesses were "lying or grossly mistaken" and that an officer was lying? And was counsel again ineffective in failing to object to this highly prejudicial misconduct?

4. In closing argument, the prosecutor repeatedly told the jury they could not acquit unless they found facts which would indicate that someone else had committed the crime. Was this argument flagrant and ill-intentioned misconduct which misstated the jury's role, effectively shifted a burden to Massey to disprove guilt and violated the presumption of innocence? Was counsel again prejudicially ineffective in sitting mute during this argument?

5. If the misconduct could have been cured by instruction, is reversal required based upon counsel's ineffectiveness in failing to object to or attempt to address the prejudice caused by the prosecutor's misconduct?

6. In sentencing Massey, the court did not set forth all the conditions with which Massey will have to comply for her term of community custody. Instead, the court delegated to the community corrections officer (CCO) with DOC the authority to establish "other terms," including what "crime-related treatment or counseling services" and "crime-related prohibitions" will apply.

Did the sentencing court err and were Massey's due process rights to notice violated by the court's failure to specify the "crime-related" treatment, counseling and prohibitions with which she will have to comply?

Further, was the court's delegation of its authority to set the terms of Massey's community custody a wholly improper abdication of its duties?

Did the improper delegation of setting the terms with which Massey will have to comply to a DOC employee at some point in the future violate Massey's constitutional right to a meaningful appeal?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Samantha Massey was charged by information with obtaining or attempting to obtain a controlled substance by fraud, deceit or misrepresentation. CP 1; RCW 69.50.403(1)(c)(I). After a pretrial hearing on a motion to suppress before the Honorable Judge Rosanne Buckner on March 30, 2010, a jury trial was held before Judge Buckner on March 31, April 1 and April 5, 2010.¹ Once the jury found Massey guilty as charged, the court sentenced Massey to serve a standard-range sentence. CP 50, 86-99; RP 311. Massey appealed and this pleading follows. See CP 66-78.

¹The verbatim report of proceedings consists of 3 volumes, which will be referred to as follows:
the volume containing the CrR 3.5 hearing of March 30, 2010 (mistakenly labeled "March 30, 2009"), as "1RP;"
the two chronologically paginated volumes of March 31, April 1, 5 and 23, 2010, as "RP."

2. Testimony at trial

On January 29, 2009, someone presented two prescriptions, written for I.H.² by the Odessa Brown Clinic (“clinic”), to a Safeway pharmacy. RP 15-19. Starlyn Hedges was working as a pharmacy technician that day and interacted with the woman who brought in the prescriptions. RP 12-13. Hedges, whose shift was from 10 a.m. to 6 p.m. every day, said that when the woman came in she gave Hedges the prescriptions and a medical “coupon” from the state, covering the costs. RP 16-17. The coupon was in the name of I.H., whose birthdate indicated he would be about 12. RP 18-19. The coupon was signed with the name “Samantha Matthews.” RP 18-19. The person had not been in and had prescriptions filled before, so Hedges took down some information. RP 18-19.

The prescriptions were for Rhinocort, a nasal spray for allergies, and Percocet, a narcotic painkiller. RP 20. The Percocet was for 120 pills at what a nurse from the clinic later testified was a fairly strong dose. RP 20, 93.

Hedges said that the woman who gave Hedges the prescriptions had done so sometime around 6 p.m. RP 16. Because it usually takes a little time to fill a prescription, Hedges thought the woman was “probably” told to return in about 25 minutes. RP 16.

When Hedges took the prescriptions, she decided to ask the pharmacists about them. RP 21. Hedges thought it was strange that the

²Because he is a juvenile, he will be referred to only by his initials herein.

two prescriptions were together, because “[y]ou wouldn’t need Percocet for your allergies.” RP 21. Hedges also thought it was unusual for a child to get that many pills of that strength of Percocet, rather than Tylenol 3 or Vicodin, which she thought was more commonly prescribed for a child. RP 21-22.

According to Hedges, the pharmacists said they never would have questioned the prescriptions, which were on real paper and had an appropriate sticker on them. RP 22. The pharmacy manager decided to try to call the clinic, but it was closed. RP 23. The pharmacists and Hedges then checked to see if they had enough Percocet to even fill the prescription, discovering they did not have enough in stock. RP 23. They decided to tell the woman they would have more in stock the next day and ask her to return. RP 23. This would give them a chance to speak to the doctor. RP 23.

Hedges said the woman returned just as Hedges was leaving work. RP 23. The woman said she would come by the next day, and she and Hedges walked out of the store together. RP 23-24. Hedges said she “kind of felt a rapport with” the woman and asked if everything was okay because it was “not usual” to see Percocet written for a child. RP 24. Hedges said she almost cried because she was told by the woman that her son had cancer and was going through chemotherapy, and that the woman herself was a cancer survivor, too. RP 24.

The next day, when Hedges got to work, a different pharmacist was there and he told Hedges the prescription was a “forgery.” RP 25. Hedges wanted to be sure so she called the clinic herself, even though the

pharmacist had apparently done so. RP 25. Hedges explained that she “just wanted to make sure before we called the police that it was definitely a forgery.” RP 25. Hedges spoke with a nurse at the clinic and then ultimately called police, who came and took the prescriptions into custody. RP 25-26. That afternoon, when an “average height” man with “dark skin” came in to get the prescriptions, the pharmacist told him “we had found the prescription was a forgery and wouldn’t be dispensing the medication.” RP 30. He was also told he could call the sheriff’s office if he had any questions. RP 30. The man seemed like he did not know what they were talking about. RP 36.

Sometime later, Hedges was shown a photographic montage and asked if she could pick out the person she thought had given her the prescriptions. RP 30. Hedges testified that she “immediately” picked out the person, who she identified at trial as Samantha Massey. RP 13, 15, 34.

Hedges first testified that she did not remember ever seeing Massey, except for on the 29th, when she presented the prescriptions. RP 37. When confronted with her statement to police, however, Hedges admitted that she had, in fact, seen Massey in the Safeway store several times, but had not interacted with her. RP 38.

At trial, Hedges admitted that she did not think she had ever seen any of the other women depicted in the montage. RP 39-40. As a result, she conceded, Massey’s face was the only familiar face in the montage, so “she would be the only face” Hedges could have identified. RP 39-40.

Randi Goetz, a Tacoma Police Department (TPD) officer, was assigned the case and called Samantha Massey to come to the police

station for an interview. RP 43. On April 21, Massey did so, and was questioned about the allegations. RP 45. Massey responded that she had gone to that pharmacy in the past but had not been there since November of 2008. RP 49. Massey also answered questions about her children, including I.H., who was then 12 and who was a patient at the clinic. RP 49. Massey said she had previously had prescriptions filled for herself and her daughter at that Safeway pharmacy but that she had not been the person who had attempted to fill the forged prescriptions. RP 50. Goetz asked Massey if she knew anyone who would do “something like this” and Massey responded that her daughter’s father might but she did not know. RP 74.

At that point, Goetz told Massey that the officer had to talk to the pharmacy people herself, saying “[m]aybe there is something that I’m missing” and “I’m not going to call you a liar.” RP 50. The officer let Massey go and said they would talk later. RP 51. Goetz then spoke to Hedges on May 5, 2009, showing Hedges a photomontage which contained a photo of Massey. RP 52, 55. According to Goetz, Hedges looked at the montage “for about two seconds” before picking out Massey’s photo. RP 52, 55. Goetz also said that the officer thought she had clarified with Hedges that Hedges was not “confusing” the sightings of Massey at the store with the prescription incident. RP 69.

As a result of her contact with Hedges, Goetz called Massey and said they needed to talk again. RP 57. Goetz arranged to go to Massey’s house the next day, May 6, with another officer. RP 57. Standing on Massey’s porch, Goetz again read Massey her rights and questioned

Massey about the incident. RP 58. Goetz showed Massey the photo of her contained in the montage and Massey agreed that it looked like her. RP 58, 75. Goetz also “confront[ed]” Massey with the medical coupon and compared it to Massey’s signature on the rights form, opining that the signatures looked the same. RP 59-60. Massey did not agree, saying it was not her signature on the coupon. RP 59.

A pediatric nurse practitioner at the clinic, Cynthia Brown, testified about seeing Massey and I.H. on January 29, 2009. RP 82-84. I.H. had pain in his right arm, a sinus infection and was apparently suffering pain in both his feet and a headache which had not been resolved by ibuprofen. RP 97-98. I.H. was complaining of light sensitivity with his headaches, as well as some vomiting. RP 98. He was given an eye exam at one point during the appointment. RP 113.

Ultimately, Brown wrote prescriptions for I.H. for Rhinocort and Toradol, a pain medication. RP 85. Brown said that prescriptions from the clinic have white stickers on them which are created at the time of the visit for each patient. RP 85-86. When shown the prescriptions presented to the Safeway pharmacy, Brown said they were not the ones she had written and she did not think the signatures and handwriting belonged to anyone in the clinic. RP 87-88.

At the time of the appointment, Brown admitted, people were allowed to “kind of” roam and sit around the clinic freely. RP 125. There was a center “station” where prescription pads were then lying around, and people would often congregate there, with kids playing on the chairs. RP 88, 126. The stickers generated for each visit were kept in the file at

the time, if there were any left over. RP 89-91. Brown said the practices of the clinic had changed as a result of “this particular incident” and the prescription pads were now kept behind the desk and locked up in the evening, as well as the stickers being shredded after the visit was over. RP 89-91.

Brown said that Percocet was not a medication she used in children and the dose was “fairly high” for an adult. RP 93. She also thought that 120 tablets would not have been prescribed. RP 93. Brown said there was no documentation for Percocet in I.H.’s medical file. RP 93.

Brown said the appointment could have been in the late afternoon, at 4:15. RP 105. She also said that it could have been later, even 30 minutes later, before I.H. was actually seen. RP 106. She thought everyone was usually out of the clinic by 5:30. RP 107. To her knowledge, Brown said, I.H. did not have cancer. RP 116.

I.H. testified and said he remembered the January 29 appointment at the clinic, because that is the date of his mom’s birthday. RP 135-36. I.H., who was 13 at the time of trial, said he had headaches and neck pains that day, which is why he went in. RP 138. Although the appointment was at 4:15, he said they were not actually seen until about 30 minutes later, at 4:45. RP 138. They did not leave the clinic until about 5:40 or 5:45, after which they went to a nearby Taco Del Mar to celebrate Massey’s birthday. RP 141.

I.H. said they were all hungry because they had been at the clinic for awhile. RP 141-42. They were at the restaurant for about 30-40

minutes and left there about 6:45, according to the “giant clock” I.H. saw at the restaurant. RP 142. They then headed back from Seattle, with his mom’s friend Fred Braggs driving. RP 143. Because the traffic was “bumper-to-bumper,” they did not get home until around 8:15 or 8:20. RP 143. This made I.H. unhappy, because he had missed his favorite show, “Ninja Warrior.” RP 143. He was able to catch another episode, though, which was on at 9. RP 143.

Fred Braggs, who had met Massey at church, testified about driving Massey, I.H. and Massey’s daughter to the clinic that day. RP 149-50, 161. Braggs was clear that they came out of the clinic at about 20 minutes to 6 and then went to Taco Del Mar to celebrate Massey’s birthday. RP 152. They were at the restaurant for about 40-45 minutes, leaving there sometime about 6:40 or 6:45. RP 153.

Braggs also remembered the traffic being bad getting out of Seattle and almost through Fife. RP 154. Braggs thought he got them to Massey’s house around 8:20 or so. RP 155.

Samantha Massey testified that she took her son, I.H., and her daughter to the clinic on January 29, 2009, which happened to be her birthday. RP 174. They were not actually seen by Brown until 4:45 and Massey told Brown about I.H.’s having nasal congestion and “severe migraine headaches.” RP 178. He had also complained about his feet, so they were examined, as was Massey’s daughter. RP 179-81. Brown left for awhile during the appointment, then came back in later and told Massey she wanted to give I.H. nasal spray and was going to refer him to a foot doctor. RP 181.

Massey remembered getting only one prescription, which was for some nasal spray. RP 182. She stuck it in her purse but ended up losing it between the doctor's office and Taco Del Mar. RP 182, 226. Massey thought that she had called the clinic and asked for a replacement, although the clinic's notes did not so indicate. RP 227-28.

Like her son and Braggs, Massey remembered that the traffic was bad when they left Taco Del Mar. RP 184-85, 228. She also remembered not getting home until about 8:20 or 8:30. RP 184-85. Massey was clear that she did not go to the Safeway pharmacy on January 29, 2009, or meet Hedges on that day or tell her anything about her or her son having cancer. RP 248-49.

Massey's mother looked almost like her twin and was living with her at the time. RP 232.

When Massey was contacted by Goetz, she did not really know what was going on. RP 189. Goetz did not tell Massey the day or time the prescriptions were dropped off but asked about January 29, 2009, so Massey gave her all the details of her activities on that day. RP 189-90. When Goetz came to Massey's house a few weeks later, Massey said the officer said she did not believe Massey, then threatened to take her kids away and arrest her. RP 192-94.

Massey said that the medical "coupon" that Hedges had provided to police was not, in fact, complete. RP 200. Such coupons usually have another section which contains important information, although the part that Hedges had contained the relevant information, too. RP 200, 245-46.

The prosecution submitted documents Massey had signed from

this case and a previous case from 2008. RP 209. Massey explained that some of her signatures on those documents were different from the way she normally signs things because she had been on medication or withdrawing from medication at the time they were signed. RP 212-20. She submitted other documents which had a signature similar to the one she said was her normal one. RP 244. At trial, when shown a driver's license for Massey, Goetz opined that it appeared to have the same signature as the one on the medical coupon. RP 61.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Unlike other attorneys, prosecutors enjoy “quasi-judicial” status, which places a burden on them to act in the interests of justice, not just as heated partisans, in the conduct of trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely “to produce a wrongful conviction.” State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Because of his role, the words of a prosecutor carry great weight with the jury, so that a prosecutor's misconduct does not just violate his duties but may also deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.

Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22.

Where the prosecutor commits misconduct, reversal is required even absent objection by trial counsel where the misconduct is so flagrant and ill-intentioned it caused enduring prejudice which could not have been cured by instruction. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Further, reversal is required based on counsel's ineffectiveness if the misconduct could have been cured by instruction but counsel failed to object or seek such instruction, there is no legitimate tactical reason for that failure and the failure is prejudicial. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

In this case, reversal is required, because the prosecutor committed flagrant and ill-intentioned misconduct 1) by repeatedly asking Massey to comment on whether other witnesses were lying or mistaken, 2) by using this same theme in closing argument, telling the jury it could not acquit Massey unless they found that the state's witnesses were, in fact, lying or mistaken, 3) by eliciting testimony and arguing that the jury had to decide who was lying and telling the truth in order to perform its function, 4) by telling the jury that it could not acquit Massey unless it found that someone else had committed the crime and 5) by effectively arguing a presumption to convict, rather than a presumption of innocence. Further, counsel was prejudicially ineffective in failing to at least attempt to mitigate the prejudice caused by this improper cross-examination and argument.

a. Relevant facts

During trial, in cross-examination, the prosecutor first asked Massey if the “jury here has to decide who is telling the truth,” and “[h]as to determine who is being honest.” RP 197. The prosecutor then repeatedly asked Massey to comment on whether the crucial state’s witnesses were “either lying or grossly mistaken” in their testimony. RP 236-37, 254. Massey was asked to declare whether Hedges was “lying or grossly mistaken” when she said Massey had given her the identification card. RP 236. Massey was asked to say if Hedges was “either lying or mistaken” when she said she had developed a “rapport” with Massey that night. RP 236. Massey was also asked to comment on whether Hedges was either lying or mistaken when she said she had turned Massey away and told her to come back the next day for the prescription. RP 236-37. And Massey was asked to comment on whether Hedges was lying or mistaken when she testified that Massey had said her son was suffering chemotherapy for cancer and that she herself had cancer. RP 236-37.

Defense counsel did not object. RP 236-37.

A little later, the prosecutor asked the same question of Massey regarding the testimony of Detective Goetz. RP 254. Several times, Massey was asked if Goetz was either “lying or grossly mistaken” when she testified that she read Massey her rights. RP 254.

In closing argument, the prosecutor told the jury that if they were going to find Massey not guilty or even “think for a second” that she was not guilty, they would have to make certain findings. RP 279. First, the prosecutor argued, they would have to find that someone else had access

to a blank prescription. RP 279. Next, the prosecutor argued, the jury could not find Massey not guilty unless it made further, “more preposterous” assumptions, which were 1) that someone other than Massey got ahold of one of I.H.’s stickers, 2) that someone else got his DSHS and medical identification card, 3) that someone else knew a version of Massey’s signature and forged it onto that card, 4) that “someone else got ahold of that Rhinocort prescription and felt a need to fill it,” and 5) “maybe most absurd of all,” the prosecutor argued, “if you are going to find this defendant not guilty, you have to find that this person” had chosen to fill the prescription at the pharmacy Massey had previously gone to. RP 280. The prosecutor then went on:

You also, in order to find the defendant not guilty, have to find that Ms. Hedges is either **lying or grossly mistaken**. There is no reason for her to come into court and finger the defendant in a lie, no reason. She has nothing to gain by being here, by testifying, by viewing a photomontage and identifying the defendant. Or that she is grossly mistaken.

RP 281 (emphasis added). “[L]astly,” the prosecutor argued, in order to find Massey not guilty, while the jury did not “necessarily have to find the defendant is telling you the truth,” they had to find her version of events comported with the evidence, because:

if the defendant is telling you the truth, she is not guilty, but if she is lying to you, there is only one reason to lie to you. The old saying, the truth shall set you free. And if she truly wasn’t the culprit here to try to get that Percocet forged, she would have no reason to lie to you.

RP 282. After arguing that Massey’s credibility was not strong, the prosecutor then said that to acquit Massey, the jury not only had to “believe the defendant over everyone else” but had to find:

Detective Goetz is **lying** when she says that she signed that advisement of rights form. Starlyn Hedges is **lying or grossly mistaken** when she says that that's the person who came in that night. Cynthia Brown is **lying or grossly mistaken** when she says she talked to the defendant about the prescriptions and handed her multiple prescriptions.

RP 283 (emphasis added).

- b. The cross-examination and closing arguments were flagrant, prejudicial misconduct and counsel was prejudicially ineffective

The prosecutor's cross-examination and closing argument was flagrant, ill-intentioned misconduct which compels reversal. First, the prosecutor's cross-examination of Massey about the jury needing to figure out who was telling the "truth" was flagrant, ill-intentioned misconduct and a misstatement of the jury's duties. RP 197. It is not the jury's role to declare or decide the "truth" about what happened; they are instead tasked solely with deciding whether the prosecution has met its burden of proving all essential elements of its case, beyond a reasonable doubt. See, e.g., State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995); State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The questioning of Massey, indicating that the jury had to "decide who is telling the truth" and "determine who is being honest" was a misstatement of the jury's role and duties and thus misconduct.

In addition, the prosecutor's repeated questioning of Massey, asking her to comment on the veracity or credibility of Hedges and Detective Goetz was flagrant, prejudicial misconduct. It was well-settled years ago that it is improper and misconduct for a prosecutor to ask a

defendant whether another witness is lying. See Wright, 76 Wn. App. at 821; Suarez-Bravo, 72 Wn. App. at 366; State v. Walden, 69 Wn. App. 183, 184-85, 847 P.2d 956 (1993); State v. Castaneda-Perez, 61 Wn. App. 354, 810 P.3d 74, review denied, 117 Wn.2d 1007 (1991). The weighing of credibility is the province of the jury. Walden, 69 Wn. App. at 184. As a result, it is completely improper to ask a witness to comment on whether another witness is telling the truth. See State v. Padilla, 69 Wn. App. 295, 846 P.2d 564 (1993).

While some cases have found that such questioning “invades the province of the jury,” Division One has held that it is not that “invasion” which is the “primary and . . . fundamental rationale for disallowing this type of cross-examination.” Wright, 76 Wn. App. at 822. Instead, such questioning is misconduct and improper, Division One held,

because it places irrelevant information before the jury and potentially prejudices the defendant. . . such questions are misleading and unfair. What one witness thinks of the credibility of another witness’ testimony is simply irrelevant. In addition, requiring a defendant to say that other witnesses are lying is prejudicial because it puts the defendant in a bad light before the jury.

76 Wn. App. at 822-23. In Wright, the Court found that asking about whether another witness was “mistaken” was not misconduct because it was not as prejudicial and did not put the defendant in a bad light, but that such questioning was still “objectionable,” because the answer was “irrelevant and not helpful to the jury.” Id. In contrast, however, the Court held, asking a witness to comment on whether other witnesses were lying is highly prejudicial misconduct. Id. Indeed, this Court recently noted that such questioning was, in fact, “flagrant” misconduct.

Boehning, 127 Wn. App. at 525.

Here, unlike in Wright, the questioning was not limited to asking Massey to declare whether the main state's witness, Hedges, was "mistaken," nor was it so limited in relation to Detective Goetz. Instead, Massey was repeatedly asked whether Hedges was "either lying or grossly mistaken" as to multiple, crucial facts. RP 236-37. And she was asked several times if Goetz was "lying or grossly mistaken," as well. RP 254.

Thus, there can be no question that the prosecutor's cross-examination of Massey in this case was serious, flagrant and ill-intentioned misconduct. See Boehning, 127 Wn. App. at 525; Walden, 69 Wn. App. at 184.

As if that misconduct was not enough, the prosecutor then exacerbated the improper cross-examination by exploiting it as part of his theme in closing argument and using it to misstate the function, role and duties of the jury. In order to find Massey "not guilty," the jury was repeatedly told, the jurors had to find that Hedges "is either lying or grossly mistaken." RP 281, 283. Further, in order to acquit, the prosecutor argued, the jury had to find that Brown "is lying or grossly mistaken." RP 283. And more egregious, the jury had to find that "Detective Goetz is lying" in order to acquit - not even leaving the option for the detective being mistaken. RP 283 (emphasis added).

Such arguments have been repeatedly condemned in this state. It is well-settled that it is "misleading and unfair to make it appear that an acquittal requires the conclusion" that the prosecution's witnesses are lying. Castaneda-Perez, 61 Wn. App. at 362-63; United States v. Richter,

826 F.2d 206, 209 (2nd Cir. 1987). The argument is improper and misstates the burden of proof and the jury's role, because the jury is *not* required to determine who is telling the truth and who is lying in order to perform its duty. Boehning, 127 Wn. App. at 524. Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. Wright, 76 Wn. App. at 824-26.

Further, the argument incorrectly gives the jury the "false choice" between believing the witnesses are lying or telling the truth, whereas the "testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." Wright, 76 Wn. App. at 824-26; see State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). It is therefore improper to tell jurors they need to decide who is telling the truth and who is lying in order to decide a case. Wright, 76 Wn. App. at 824-25. And it is misconduct to tell the jury that, in order to acquit, they have to find the state's witnesses "are lying or mistaken." Fleming, 83 Wn. App. at 213. A jury does not have to find that the state's witness are "mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction" in guilt. 83 Wn. App. at 213 (emphasis in original).

Just as in Fleming, here the jury did not have to decide that Hedges was lying or mistaken, or that Brown was lying or mistaken, or that Detective Goetz was lying in order to acquit Massey. Instead, jurors simply had to have a reasonable doubt that the state had proven its case. The prosecutor's repeated arguments that the jury could not acquit Massey

unless it found that Hedges was lying or grossly mistaken, as well as the arguments that it had to find Brown was lying or grossly mistaken and that the officer was actually lying were flagrant, ill-intentioned misconduct, especially in light of the improper cross-examination.

The prosecutor then committed further misconduct in misstating the jury's role and duties yet again by declaring that jurors could not find Massey not guilty or even "think for a second" that she was not guilty unless they made "preposterous assumptions" that someone else had access to and got ahold of the relevant medical cards, sticker and other items. RP 280-281. Over and over, the prosecutor told the jury that they could not acquit unless they made findings that someone else had committed the crime i.e., had access to the blank prescription pad, etc. RP 281-82. "[I]f you are going to find this defendant not guilty," the prosecutor said, the jury had to make these findings. RP 280-81.

But the jury did not have to make findings or have evidence to prove that someone else committed the crime in order to acquit Massey. All jurors had to do was to have a reasonable doubt about whether the state had proved its case. The prosecutor's argument effectively told jurors there was a *presumption to convict*, i.e., that they were required to convict unless they could make findings that someone else committed the crime. Thus, the argument turned the presumption of innocence on its head, misleading the jury to believe that they had to "solve" the question of who committed the crime and, because Massey was the only candidate presented, find her guilt.

As this Court recently stated, however, "[a] jury's job is not to

‘solve’ a case. . . [or] ‘declare what happened on the day in question. Rather the jury’s duty is to determine whether the State has proven its allegations against a defendant beyond a reasonable doubt.’” State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). These arguments were further flagrant misconduct.

Reversal is required. In Fleming, the Court found the argument that the jury had to find that the state’s witnesses were lying or mistaken in order to acquit to be flagrant and ill-intentioned misconduct, because the prosecutor in that case had made the argument two years after Castaneda-Perez had been decided, declaring such arguments improper. Fleming, 83 Wn. App. at 214. Here, the offensive argument was made more than 14 years after Castaneda-Perez and was thus even more flagrant and ill-intentioned than the same argument in Fleming.

Further, the misconduct was such that it could not have been “cured” by instruction. The ideas behind the misconduct - that the jury had to figure out who was telling the truth and decide the case on that basis and that they had to find Massey guilty unless they could find that someone else had committed the crime - are the kind of arguments which reflects the common way that people make decisions in their everyday lives. It is evocative and the kind of argument likely to stay with the jury, regardless of any attempt to “cure” it. And it is particularly damaging, because people are willing to make decisions in their personal lives even when they have a great deal of uncertainty, so that such argument effectively minimizes the prosecutor’s burden of proof. See, e.g., Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954);

Anderson, 153 Wn. App. at 432.

Indeed, all of the misconduct in this case went directly to the jury's ability to properly evaluate whether the prosecution had, in fact, met its burden. And it is well-recognized that "[p]rosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215.

In addition, even if each individual act of misconduct did not compel reversal, the cumulative effect of the misconduct, taken together, would require that result. Where there is a substantial likelihood that the cumulative effect of the misconduct affected the verdict, reversal is required. State v. Jones, 144 Wn. App. 284, 300-301, 183 P.3d 307 (2008). There is more than such a likelihood in this case. Massey's entire defense depended upon the jury being able to fairly and impartially evaluate her credibility and the state's evidence. The misconduct not only misled the jury, repeatedly, as to its true role and shifted a burden to Massey, it effectively told the jury it had to convict unless it could find that someone else had committed the crime. All of the misconduct, taken together, conspired to ensure that Massey was deprived of a fair trial.

Further, even if this Court were to find that the cross-examination and closing arguments were not so flagrant and ill-intentioned that they could not have been cured by instruction, reversal is still required because counsel was prejudicially ineffective in failing to object and at least try to mitigate the serious prejudice the improper cross-examination and closing argument caused his client. Both the state and federal constitutions

guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. Madison, 53 Wn. App. at 763-64; see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, those standards have been met. There could be no legitimate tactical reason for counsel to have failed to object to any of the misconduct. First, even if it was legitimate to not object to the first improper question on cross-examination in the hopes of avoiding drawing

attention to it, once the same improper questions were asked multiple times - and attention had thus been repeatedly drawn - there could be no legitimate tactical reason for counsel not to try to prevent further damage to his client's case by objecting and asking for corrective instruction. Similarly, once the prosecutor started with the improper arguments misleading the jury and telling jurors they effectively had to convict unless they found the state's witnesses were lying or grossly mistaken or unless they could find that someone else had committed the crime, there could be no tactical reason to allow the jury to go to deliberations without trying to at least minimize the corrosive effect of the misconduct and try to ensure that the jury would instead apply the proper standard and hold the prosecution to its proper burden.

Even if this Court finds that the improper opinions and comments could somehow have been "cured," reversal is still required based on counsel's ineffectiveness in failing to make such attempts.

The misconduct in this case was not trivial but went to the heart of the entire case against Massey. Based upon the cumulative effect of that prejudicial, flagrant and ill-intentioned misconduct or on counsel's utter ineffectiveness in failing to object and at least try to mitigate the prejudice caused to his client, reversal is required.

2. MASSEY’S DUE PROCESS RIGHTS AND RIGHT TO APPEAL WERE VIOLATED AND THE SENTENCING COURT IMPROPERLY DELEGATED ITS AUTHORITY TO DOC TO DEFINE THE TERMS OF MASSEY’S COMMUNITY CUSTODY; COUNSEL WAS AGAIN INEFFECTIVE

Even if reversal and remand for a new trial with new counsel was not required, reversal and remand for new sentencing, also with new counsel, should be granted. Because “[o]nly the legislature may establish potential legal punishments,” the sentencing court is limited to imposing only those conditions of community custody or placement which are statutorily authorized. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Further, the due process rights guaranteed under the state and federal constitutions prohibit imposition of conditions which are unconstitutionally vague. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005).

In this case, the sentencing court went outside its statutory authority and violated Massey’s due process rights and her right to appeal by failing to specify and in fact delegating to DOC the authority to define the conditions with which Massey is required to comply for her term of community custody. In the judgment and sentence, the sentencing court wrote into section “4.4” several conditions, including one which provided, “other terms including drug treatment per CCO.” CP 93.³ Then, in the section of the judgment and sentence referring to community custody, the court referred back to section 4.4, “checking the box” next to boilerplate

³For the Court’s convenience, a copy of the judgment and sentence is attached as Appendix A.

language which provided, “[t]he defendant shall participate in the following crime-related treatment or counseling services” and “[t]he defendant shall comply with the following crime-related prohibitions.” CP 95. After each of those two boilerplate sentences, written in was “see section 4.4.” Id. The court then checked the blank lines next to boilerplate language in Appendix “F” to the judgment and sentence which provided, “[t]he defendant shall participate in crime-related treatment or counseling services” and “[t]he defendant shall comply with any crime-related prohibitions.” CP 99. Appendix “F” also referred to section 4.4 of the judgment and sentence, providing “Other: see section 4.4.” Id.

These delegations to the CCO to decide the conditions of Massey’s community custody were improper, in violation of Massey’s due process rights and an abdication of the trial court’s responsibility.

As a threshold matter, these issues are properly before the Court. Where the sentencing court imposes a sentencing condition which is illegal or erroneous, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Further, a challenge to an unlawful condition of community custody may be made prior to enforcement of the condition when it is primarily a legal question and no further development of the facts is required. Bahl, 164 Wn.2d at 745-46. In this case, the sentencing provisions Massey is challenging are ripe for preenforcement review because they meet those standards.

Those provisions, allowing DOC *carte blanche* to set the treatment and prohibition conditions of Massey’s community custody, violate Massey’s due process rights to notice and are unconstitutionally vague.

A condition is vague and in violation of due process if it either is not defined with sufficient definiteness so that an ordinary person could discern what conduct was prohibited or if it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Sansone, 127 Wn. App. at 639, citing, Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

The “conditions” here, allowing the CCO to decide what treatment and prohibitions Massey must follow during her community custody fails on both prongs of the due process analysis, because they fail to define the prohibited conduct sufficiently for Massey to understand what they encompass and fail to provide ascertainable standards - or even any standards - to prohibit arbitrary or discriminatory enforcement.

Bahl, supra, and Sansone, supra, are instructive. In Bahl, the sentencing court imposed a condition of community placement/custody which mandated that Bahl refrain from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 754. The Supreme Court held that the condition was unconstitutionally vague. 164 Wn.2d at 758. Indeed, the Court declared, “[t]he fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement.” 164 Wn.2d at 758.

Similarly, in Sansone, supra, the Court struck down as unconstitutionally vague a condition which mandated that the defendant

not possess or peruse pornographic materials “unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer.” 127 Wn. App. at 634-35. The condition stated that what constituted pornography was to be “defined by the therapist and/or Community Corrections Officer.” Id. On review, the Court of Appeals first held that the term “pornography” was unconstitutionally vague and a violation of due process, because it “has not been defined with sufficient definiteness such that ordinary people can understand what it encompasses.” 127 Wn. App. at 639. Indeed, the Court noted, the vagueness of the condition was made clear by the delegation of defining “pornography” to DOC - “a requirement that would be unnecessary if ‘pornography’ was inherently definite.” 127 Wn. App. at 639.

Further, the Court held, the defendant could be found in violation of the prohibition for bringing in materials to ask whether they were pornographic, if the officer deemed them to be so. And the delegation of the authority to define what is prohibited to the CCO was especially improper because it creates “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds” to be so - even if it is not, legally, pornography. Id., quoting, United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir.), cert. denied, 537 U.S. 1004 (2002) (citations omitted).

These cases illustrate that it is not only a violation of due process but also patently improper to delegate to the agent of the enforcing agency the unfettered ability to define what is, in fact, prohibited conduct or what is “crime-related.” Indeed, trial courts themselves have been known to

overreach when imposing conditions which do not meet that legal requirement. See Zimmer, 146 Wn. App. at 413 (trial court abused its discretion in imposing a condition regarding cell phones when there was no evidence one was used in the crime).

Regardless of the potential difficulty in deciding which conditions to impose, however, it is the duty of the sentencing court to make that decision. Delegating to DOC to set the conditions at some point in the future not only violated Massey's due process rights to notice but also the doctrine of separation of powers and the trial court's duties. A sentencing court may delegate certain administrative tasks to DOC but is not permitted to delegate its authority to DOC in a way which "abdicates its judicial responsibility" for setting the terms of community custody. Sansone, 127 Wn. App. at 642. Instead, it is the court's responsibility to set forth those conditions in the judgment and sentence, leaving to DOC to handle monitoring and enforcement. Former RCW 9.94A.700(5)⁴ provides the court with the authority - and the responsibility - to decide which conditions were proper and order those conditions. Setting the conditions is not "an administrative detail" that could be properly delegated, just as defining what was prohibited could not be delegated in Sansone.

Notably, the improper delegation also effectively prevents Massey from exercising her constitutional right to appeal those conditions. Massey's right to appeal from the judgment and sentence is effective now,

⁴This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

after imposition of the sentence. See, e.g., State v. Sweet, 90 Wn.2d 282, 287, 581 P.2d 579 (1978); Art. I, § 22. There is no similar way for her to appeal from a CCO's later decision of what conditions she must follow.

The sentencing court's improper delegation to the CCO, a DOC employee, to decide what "crime-related" treatment and prohibitions Massey would be required to follow as conditions of her community custody failed to give Massey proper notice of those conditions, failed to provide sufficient standards to prevent arbitrary enforcement, precluded Massey from fully exercising her constitutional right to appeal and was a wholly improper abdication of the court's responsibilities. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 20th day of October, 2010.

Respectfully submitted,


KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant
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(206) 782-3353

CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

- TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,
Tacoma, WA. 98402;
- TO: Samantha Massey, DOC 340123, WCCW, 9601 Bujacich Rd.
N.W., Gig Harbor, WA. 98332-8300.

DATED this 20th day of October, 2010.


KATHRYN A. RUSSELL SELK, No. 23879
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(206) 782-3353

FILED
COURT OF APPEALS
DIVISION II
10 OCT 21 PM 12:40
STATE OF WASHINGTON
BY  DEPUTY

09-1-02853-4



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 09-1-02853-4

vs.

JUDGMENT AND SENTENCE (FJS)

APR 26 2010

SAMANTHA VALERIE MASSEY

Defendant.

- Prison RCW 9.94A.712 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Breaking The Cycle (BTC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: 24434933
DOB: 01/29/78

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on April 5, 2010 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	OBTCNSUBCON (J96) PERCOCET, SCHED II	69.50.403(1)(c)(i)	NONE	01/29/09	TPD 090300426

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the Original Information

The court finds that the offender has a chemical dependency that has contributed to the offense(s).
RCW 9.94A.607.

JUDGMENT AND SENTENCE (JS)
(Felony) (7/2007) Page 1 of

10-9-64997-6

09-1-02853-4

[] 3 YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

By direction of the Honorable

Dated: 4.23.10

[Signature]
JUDGESOSANNE BUCKNER

KEVIN STOCK
CLERK

By: *[Signature]*
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

APR 26 2010 *[Signature]*

STATE OF WASHINGTON

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____.

KEVIN STOCK, Clerk
By: _____ Deputy

A





09-1-02853-4 34183095 JDSWCD 04-26-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 09-1-02853-4

APR 26 2010

vs.

SAMANTHA VALERIE MASSEY,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

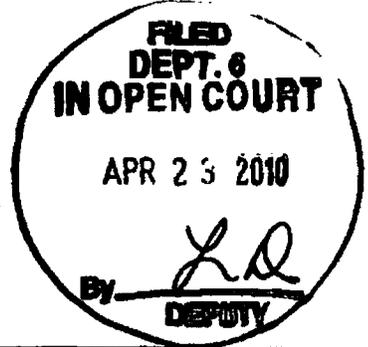
[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

09-1-02853-4

IDENTIFICATION OF DEFENDANT



SID No. 24434933
(If no SID take fingerprint card for State Patrol)

Date of Birth 01/29/78

FBI No. 284271WC6

Local ID No. UNKNOWN

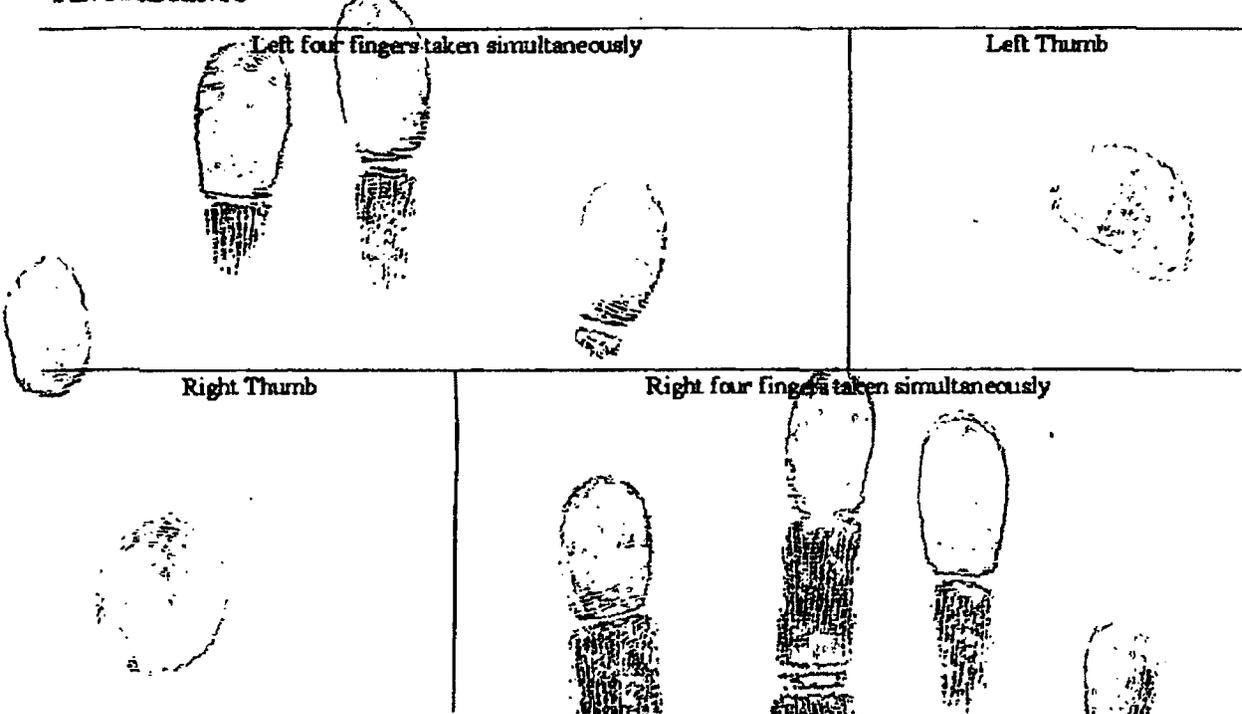
PCN No. UNKNOWN

Other

Alias name, SSN, DOB:

Race:		Ethnicity:		Sex:	
<input type="checkbox"/>	Asian/Pacific Islander	<input type="checkbox"/>	Black/African-American	<input checked="" type="checkbox"/>	Caucasian
<input type="checkbox"/>	Native American	<input type="checkbox"/>	Other :	<input checked="" type="checkbox"/>	Non-Hispanic
				<input type="checkbox"/>	Hispanic
				<input type="checkbox"/>	Male
				<input checked="" type="checkbox"/>	Female

FINGERPRINTS



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, [Signature] Date Apr. 23, 2010

DEFENDANT'S SIGNATURE: X Samantha Massay

DEFENDANT'S ADDRESS: X ~~6035 S Lawrence St~~ 6035 S Lawrence St
Tacoma WA 98409

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to law fully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: _____

per CCO

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: see sections 4.3 & 4.4

(III) The offender shall participate in crime-related treatment or counseling services;

(IV) The offender shall not consume alcohol; _____

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: see section 4.4

09-1-02853-4

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 09-1-02853-4

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

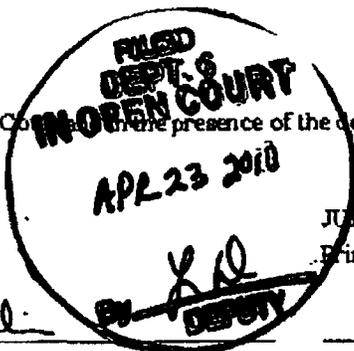
Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

Court Reporter

09-1-02853-4

DONE in Open Court in the presence of the defendant this date: April 23, 2010



JUDGE
Print name

Rosanne Buckner
ROSANNE BUCKNER

Jesse Williams
Deputy Prosecuting Attorney
Print name: Jesse Williams
WSB # 35543

Dennis P. Burns
Attorney for Defendant
Print name: Dennis P. Burns
WSB # 25844

Samantha Massey
Defendant
Print name: Samantha Massey

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: Samantha Massey

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING.

[] Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.

N/A

5.8 [] The court finds that Court _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: _____

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[] For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 [] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the Courty Jail or Department of Corrections: _____

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offense not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories, or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor, or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC, and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[] The defendant shall not consume any alcohol.

Defendant shall have no contact with: see section 4.3 & 4.4

Defendant shall remain within outside of a specified geographical boundary, to wit: per CCO

[] Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8))

The defendant shall participate in the following crime-related treatment or counseling services: see section 4.4

The defendant shall undergo an evaluation for treatment for [] domestic violence [] substance abuse [] mental health [] anger management and fully comply with all recommended treatment. see section 4.4

The defendant shall comply with the following crime-related prohibitions: see section 4.4

Other conditions may be imposed by the court or DOC during community custody, or are set forth here:

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4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>18</u> months on Count	<u>I</u>	_____ months on Count	_____
_____ months on Count	_____	_____ months on Count	_____
_____ months on Count	_____	_____ months on Count	_____

Actual number of months of total confinement ordered is: 18 months

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 0 days

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

COMMUNITY CUSTODY is ordered as follows:

Count I for a range from: 9 to 12 Months;

Count _____ for a range from: _____ to _____ Months;

Count _____ for a range from: _____ to _____ Months;

commencing _____ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT Safeway store or premises
The defendant shall not have contact with 707 South 56th St (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 5 years (not to exceed the maximum statutory sentence).

[] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

<u>no use or possession of nonprescribed controlled substances</u>
<u>no association with drug users or sellers</u>
<u>other terms including drug treatment per CCO</u>
<u>Forfeit property seized by law enforcement</u>

4.4a BOND IS HEREBY EXONERATED

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2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows: N/A

III. JUDGMENT

3.1 The defendant is GUILTY of the Courts and Charges listed in Paragraph 2.1.

3.2 The court DISMISSES Courts _____ The defendant is found NOT GUILTY of Courts

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

- RTN/RJN \$ _____ Restitution to: _____
- \$ _____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).
- PCV \$ 500.00 Crime Victim assessment
- DNA \$ 100.00 DNA Database Fee
- PUB \$ 1500 Court-Appointed Attorney Fees and Defense Costs
- FRC \$ 200.00 Criminal Filing Fee
- FCM \$ _____ Fine
- CLF \$ _____ Crime Lab Fee deferred due to indigency
- CDF/DFA-DFZ \$ _____ Drug Investigation Fund for _____ (agency)
- WFR \$ _____ Witness Costs

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 2300 TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____

RESTITUTION. Order Attached

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ per CCO per month

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- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	THEFT 1	09/17/08	PIERCE, WA	03/22/08	A	NV
2	MAL MISCH 1	09/17/08	PIERCE, WA	03/22/08	A	NV
3	SOCIAL SECURITY FRAUD	03/16/09	DIST CT-WESTERN DIST WA	12/02/08	A	NV
4	POSS ID DOC W/INT TO DEFRAUD THE US	03/16/09	DIST CT-WESTERN DIST WA	12/02/08	A	NV

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	4	I	6+ - 18 MONTHS	NONE	6+ - 18 MONTHS	5 Yrs/ \$10,000

- 2.4** **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:
- within below the standard range for Count(s) _____.
 - above the standard range for Count(s) _____.
 - The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
 - Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.
- Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defend'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 that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):
-

- The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:
-