No. 44020-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Enrique Cahue,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00051-1

The Honorable Judge Marilyn K. Haan

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 3

ARGUMENT 4

I. The prosecutor committed misconduct that was flagrant and ill-intentioned. 4

A. Standard of Review 4

B. The prosecutor improperly urged jurors to consider factors other than probative evidence and sound reason in deciding Mr. Cahue's guilt. 5

II. Mr. Cahue was denied the effective assistance of counsel when his attorney failed to object to the prosecutor's misconduct during closing argument. 6

A. Standard of Review 6

B. An accused person is constitutionally entitled to the effective assistance of counsel. 7

C. If the issue of prosecutorial misconduct is not preserved for review, Mr. Cahue was denied the effective assistance of counsel by his attorney's failure to object. 8

III. The record does not support the sentencing court's finding that Mr. Cahue has the ability or the likely future ability to pay his legal financial obligations. 9

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 7

Hodge v. Hurley, 426 F.3d 368 (6th Cir., 2005) 8, 9

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 7

United States v. Salemo, 61 F.3d 214 (3rd Cir. 1995) 7

WASHINGTON STATE CASES

In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) 5, 6, 8, 9

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 6

State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011) 9

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 8

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) 5

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 7, 8

State v. Toth, 152 Wn. App. 610, 217 P.3d 377 (2009) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 1, 5, 7, 9

U.S. Const. Amend. XIV 1, 5, 7, 9

Wash. Const. art. I, §22 ..... 5, 7

ASSIGNMENTS OF ERROR

1. The prosecutor committed prejudicial misconduct that violated Mr. Cahue's Fourteenth Amendment right to due process.

2. The prosecutor inappropriately urged jurors to convict based on improper factors.

3. Mr. Cahue was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

4. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

5. The sentencing court erred by finding that Mr. Cahue has the ability or likely future ability to pay his legal financial obligations.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor may only seek conviction based on probative evidence and sound reason, and may not attempt to undermine jurors' feelings about the need to strictly observe legal principles and take appropriate care in deciding a case. Here, the prosecutor urged jurors to ask "[w]hat does your head, what does your heart, what does your gut say?" Did the prosecutor commit misconduct that was flagrant and ill-intentioned by directing jurors to consider something other than probative evidence and sound reason in reaching a verdict?

2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to prejudicial misconduct during the prosecuting attorney's closing argument. Was Mr. Cahue denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. A court may not find that an offender has the ability or likely future ability to pay legal financial obligations absent some support in the record for the finding. Here, the sentencing court made such a finding

without any supporting evidence. Was the sentencing court's finding clearly erroneous?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Wednesday night is one dollar drink night at Las Rocas in Longview. RP 10, 43-44. Lots of people were there on October 13, 2011, including Enrique Cahue, Andrew Elkins, William Zimmerman, and Marley Meyers. RP 10-12, 43. After last call, several went outside to say their goodbyes. RP 13, 48, 180. Cahue had not seen Meyers for some time, and was hugging her goodbye. RP 181. Both Elkins and Zimmerman made comments to him.[1] RP RP 14, 29, 49, 181.

Elkins was punched hard in the jaw, causing one of his teeth to loosen and eventually fall out. RP 20-21. Elkins didn't see who hit him. RP 20. Zimmerman and Elkins's former girlfriend claimed it was Mr. Cahue who hit Elkins. RP 55, 75, 83. Three other witnesses said that Mr. Cahue was pushed but did not hit Elkins. RP 126, 148, 153-154, 164, 173. Mr. Cahue said that he had left the area after being yelled at by Elkins and Zimmerman and hit no-one. RP 181-183.

[1] Elkins and Zimmerman claimed that Mr. Cahue was unsafely trying to pick up Meyers. RP 14, 49, 69. Mr. Cahue said that both men were telling him to not touch Meyers. RP 181.

The state charged Mr. Cahue with Assault in the Second Degree.[2] CP 1.

During her closing argument, without objection from the defense, the prosecutor told the jury:

> When you're thinking of beyond a reasonable doubt – beyond a reasonable doubt means that you have an abiding belief in the truth of the charge. What does your head, what does your heart, what does your gut say?
> RP 232.

The jury returned a verdict of guilty. RP 250. Without argument or comment, the court entered a finding on the Judgment and Sentence that Mr. Cahue "has the ability or likely future ability to pay the legal finanacial obligations imposed herein. CP 5.

Mr. Cahue timely appealed. CP 16.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. *In re Glasmann,* 175 Wn.2d 696, 704,

[2] The state also charged Mr. Cahue with assault in the fourth degree for allegedly punching Zimmerman. CP 2. The jury acquitted on that charge. RP 250.

286 P.3d 673 (2012).[3] Even absent an objection, error may be reviewed if it is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Id, at* 704.

Furthermore, prosecutorial misconduct may be argued for the first time on appeal if it is a manifest error that affects a constitutional right. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show harmlessness beyond a reasonable doubt. *State v. Irby,* 170 Wn.2d 874, 886, 246 P.3d 796 (2011).

B. The prosecutor improperly urged jurors to consider factors other than probative evidence and sound reason in deciding Mr. Cahue's guilt.

The state and federal constitutions secure for an accused person the right to a fair trial. *Glasmann, at* 703; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, §22. Prosecutorial misconduct can deprive an accused person of this right. *Glasmann, at* 703-704.

A prosecutor must seek conviction based only on probative evidence and sound reason. *Glasmann*, *at* 704. It is misconduct to undermine "the

[3] Citations are to the lead opinion in *Glassman*. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers "agree[d] with the lead opinion that the prosecutor's misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct." *Glasmann, at* 714 (Chambers, J., concurring). Justice Chambers wrote separately because he was "stunned" by the position taken by the prosecution. *Id.*

jurors' feelings about the need to strictly observe legal principles and the care it must take in determining… guilt." *Glasmann, at* 706.

Here, the prosecutor urged jurors to consider factors other than probative evidence and sound reason:

> When you're thinking of beyond a reasonable doubt—beyond a reasonable doubt means that you have an abiding belief in the truth of the charge. What does your head, *what does your heart, what does your gut say?*
> RP 232 (emphasis added).

By urging jurors to focus on their heads, hearts, and guts rather than probative evidence and sound reason, and by attempting to undermine the jurors' commitment to strictly observe legal principles and to take appropriate care in determining guilt, the prosecuting attorney committed misconduct and violated Mr. Cahue's right to a fair trial. *Glasmann, at* 704, 709.

The misconduct was flagrant and ill-intentioned. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id, at* 714.

II. MR. CAHUE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, art. I, §22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel…." Wash. Const. art. I, §22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice - "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's

performance. *Reichenbach, at* 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

C. If the issue of prosecutorial misconduct is not preserved for review, Mr. Cahue was denied the effective assistance of counsel by his attorney's failure to object.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

> At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge v. Hurley, 426 F.3d 368, 386 (6th Cir., 2005).

In Mr. Cahue's case, defense counsel should have objected to the prosecutor's flagrant and ill-intentioned misconduct. The prosecutor's misconduct undermined the jurors' duty to strictly observe legal principles and to take appropriate care in determining Mr. Cahue's fate. *Glasmann, at* 706.

Mr. Cahue was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. *See Glasmann, at* 704. The failure to object deprived Mr. Cahue of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley, at* 386. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE RECORD DOES NOT SUPPORT THE SENTENCING COURT'S FINDING THAT MR. CAHUE HAS THE ABILITY OR THE LIKELY FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

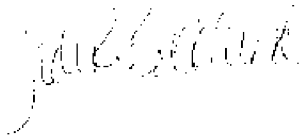
In this case, the sentencing court entered such a finding without any support in the record. CP 5; *see* RP *generally.* Indeed, the record suggests that Mr. Cahue lacks the ability to pay the amount ordered, given his lengthy incarceration and the impact his felony conviction will have on his prospects for employment. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Cahue's conviction must be reversed and the case remanded for a new trial. In the alternative, Finding No. 2.5 must be vacated.

Respectfully submitted on March 25, 2013,

BACKLUND AND MISTRY



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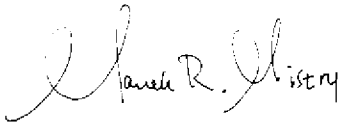

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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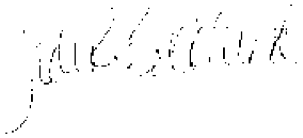
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on March 25, 2013.



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