

No. 46761-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

BRANDON K. DAHL, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 14-1-00249-1

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The prosecutor did not commit misconduct during closing argument as alleged by Dahl, because contrary to Dahl's assertions on appeal, the prosecutor did not vouch for a witness, did not impugn the integrity of defense counsel, and (although the prosecutor did utter the word "true") did not argue or imply that the jury was to deliver the truth rather than perform its true function of determining whether the State had proved the charges beyond a reasonable doubt.
2. Trial counsel was not ineffective for not objecting to the prosecutor's closing arguments for arguing that there was no evidence from which to infer that the police witnesses had a motive to make up testimony or for using the word "true" when arguing that a function of the jury was to determine the credibility of witnesses. But even if error did occur, the prosecutor's brief arguments were not so egregious that there is any reasonable probability that the arguments effected the verdicts
3. The State concedes that neither alcohol nor bars, taverns, or places that serve liquor contributed in any way to Meyer's crime of conviction and that it is, therefore, error to require as a condition of community custody that she not frequent places where the primary business is the sale of alcohol.

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B. FACTS AND STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), for the purposes of the issues raised in Dahl's appeal, the State accepts Dahl's recitation of the procedural history and facts, except that the State adds additional facts as needed to develop its arguments, below.

C. ARGUMENT

1. The prosecutor did not commit misconduct during closing argument as alleged by Dahl, because contrary to Dahl's assertions on appeal, the prosecutor did not vouch for a witness, did not impugn the integrity of defense counsel, and (although the prosecutor did utter the word "true") did not argue or imply that the jury was to deliver the truth rather than perform its true function of determining whether the State had proved the charges beyond a reasonable doubt.

Within the closing arguments of this case, Dahl identifies three instances where he alleges that the prosecutor committed prosecutorial misconduct by arguing improperly. Dahl alleges that prosecutor improperly vouched for police witnesses, that the prosecutor intentionally impugned the character of defense counsel, and that the prosecutor, by using the word "true" when urging the jury to weigh the credibility of

witness testimony, improperly told the jury that its proper role was something other than its true duty of determining whether the State had proved the offenses beyond a reasonable doubt. Br. of Appellant 3-9. Finally, as a fourth allegation, Dahl asserts the cumulative error doctrine and avers that these three errors taken together prevented him from receiving a fair trial.

The State will examine and discuss each of these four allegations separately, as follows:

a) Vouching for police witnesses (no trial objection).

During the defense closing argument, Dahl's attorney addressed the jury as follows:

We talked a little bit in voir dire, and actually during the course of this case, about police officers and how much they testify in court, and how much more credible they probably are going to appear because they testify all the time. They're practiced. They know things like to look at the jury. They know how to answer the question that the prosecutor puts to them. They know how to avoid difficulties on cross examination, that sort of thing.

RP 186-87. The State contends that this argument by Dahl, which was unsupported by any actual evidence, worked to undermine the credibility of the witnesses.

In rebuttal, when arguing to the jury about statements that Dahl made to the officers, the State then responded as follows:

He denied that he said these things to the officers. What motive can you possibly imagine the officers making these up? There is no — there is no reason for them to do that. Absolutely not one shred of reason anywhere for them to make this up. What motive does he have? Well, we can figure that out.

RP 198.

Dahl did not object in the trial court. On appeal, Dahl avers that this argument by the prosecutor constituted improper vouching for the State's witnesses. The State contends that the prosecutor's argument was not vouching and that, therefore, there was no valid objection that Dahl's trial attorney could make.

“Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony.”

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State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010). Neither occurred in the instant case. The only thing that the prosecutor did here was to argue a logical inference from the evidence. Prosecutors are permitted to argue logical inferences from the evidence. *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006); *State v. Brett*, 126 Wn.2d 136 175, 892 P.2d 29 (1995). The prosecutor “has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). The prosecutor has especially wide latitude when rebutting an issue the defendant raised in closing argument. *Id.* at 240.

Still more, “[t]o raise prosecutorial misconduct on appeal when no objection was made at trial, the defendant must show that the alleged misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered.” *Coleman*, 155 Wn. App. at 956-57, citing *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007). The State contends that the prosecutor’s statement here was not vouching, it wasn’t flagrant, it wasn’t ill intentioned, and even if it

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was error, which it wasn't, it could have been cured with an instruction from the court had Dahl objected.

b) Impugning integrity of defense counsel (objection at trial overruled).

During the defense closing argument, Dahl's trial attorney, speaking of the credibility of the State's witnesses, made the following argument to the jury:

And I want you to contrast that with the State's civilian witnesses, all of whom all of a sudden couldn't remember. Oh, the times changed.

None of us really know what the dynamic is between all of these people. But it's clear enough that there's something going on. When one person characterizes another as a fiancée, and the other person characterizes one as a baby's daddy.

RP 192. During rebuttal closing argument, the prosecutor responded as follows:

You know, making comments like the credibility of the – the witnesses and saying that one says fiancée and one says baby daddy, frankly, that's kind of offensive. As jurors, you saw what was going on.

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RP 196. Dahl objected to the State's response to his argument, but the trial court overruled his objection. PR 196.

“[A] prosecutor must not impugn the role or integrity of defense counsel.” *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). But the prosecutor's comment here, which was short and in direct response to defense counsel's argument, was not about defense counsel's role and was not about his integrity. At most, the comment was a poorly expressed attempt to persuade the jury to base its verdicts on facts in evidence rather than upon passion or prejudice.

The comment at issue here was fleeting and not clearly disparaging of defense counsel. In contrast to the facts of the instant case, when examining an allegation that the prosecutor disparaged defense counsel, the Court in *Lindsay* considered a long list of obviously disparaging comments and came to the following conclusion:

¶ 18 This exchange (and the many more like it) is self-centered and rude. It is all about the lawyers' personalities, not the parties' cases. It is clearly the fault of both lawyers, and it is so obnoxious and so continuous that it permeates the record. In fact, it seems to this court that it would be incredibly difficult to focus on the issue of guilt or innocence with this grating noise in the background. Such incivility threatens the fairness of the trial, not to mention

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public respect for the courts. *See Jones v. City of Seattle*, 179 Wn.2d 322, 371, 314 P.3d 380 (2013) (Gonzalez, J., concurring). ¶ 19 These comments quoted immediately above, alone, though, probably do not require reversal. ...

Lindsay, 180 Wn.2d at 432.

Unlike the facts of *Lindsay*, the prosecutor here did not malign defense counsel's integrity or refer to his arguments as a "crook." The Court in *Lindsay* reasoned that use of the term "crook" to describe defense counsel's arguments implied "deception and dishonesty." *Id.* at 433-34. These circumstances do not resemble the facts of the instant case. Here, the prosecutor's use of the word "offensive" did not imply anything at all about defense counsel's integrity or suggest any deception or dishonesty.

In the instant case, the prosecutor's comment was fleeting rather than flagrant, and it was not ill intentioned. Instead, considered in the correct context, the prosecutor was merely trying to persuade the jury to base its verdicts on logic and reason rather than prejudice. On these facts, the prosecutor did not commit misconduct.

c) ***Prosecutor's argument that jurors took an oath to figure out the truth when weighing witness credibility (no objection at***

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trial).

Dahl avers that the prosecutor in this case committed misconduct by misinforming the jury that its “duty [was] to decide the case, which included ‘figur(ing) out what’s true and not true....’” Br. of Appellant at 8; RP 181.

But the prosecutor’s statement should be given more context. The prosecutor said that the jury should “listen to the witnesses, figure out what’s true and what’s not true,” and decide the case based on the law as instructed by the judge. RP 181. So, in proper context, the comment was really just the prosecutor’s way of saying that the jury was the judge of witness credibility. The trial court’s instructions say as much, but without using the word “true” or “truth.” CP 22-23 (Jury Instruction No. 1).

The jury’s function is to render a verdict based solely on whether it is convinced of the defendant’s guilt beyond a reasonable doubt. *See, e.g. State v. Emery*, 174 Wn.2d 741, 760-65, 275 P.3d 653 (2012). “The jury’s job is not to determine the truth of what happened; a jury therefore does not ‘speak the truth’ or ‘declare the truth.’” *Id.* at 760, quoting *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009).

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The instant case is unlike *State v. Emery*, 174 Wn.2d 741, 760-65, 275 P.3d 653 (2012), *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012), or other cases where use of the word “truth” led to reversible error. The prosecutor in the instant case did not tell the jury to speak the truth by returning a guilty verdict. Nor did the prosecutor urge the jury to focus on finding the truth rather than finding reasonable doubt. Instead, here the prosecutor merely used the word truth when reminding the jury that it was the judge witness credibility. RP 181.

The prosecutor’s statement here was brief and isolated in the context of the entire trial and entire closing argument. The prosecutor’s comment was neither flagrant nor ill intentioned. The prosecutor merely wished to emphasize to the jury, in a case where credibility was key, that it was the judge of witness credibility. Dahl did not object. RP 181.

The State contends that on these facts, error did not occur, but even if there was some possibility that the prosecutor’s mere use of the word “truth” might misinform the jury, Dahl waived any possible error by not objecting. *State v. Emery*, 174 Wn.2d 741, 760-61, 275 P.3d 653 (2012). Because Dahl did not object, he must show that the prosecutor’s statement

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was flagrant and ill intentioned and that any prejudice could not have been cured with an instruction from the court. *Id.* Here, Dahl cannot show that there was any prejudice, and even if some slight prejudice could have occurred, an instruction from the court could have easily cured it. *Id.* at 760-65.

d) Cumulative error.

Dahl argues that cumulative error deprived him of a fair trial. Br. of Appellant at 9. Even when several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effects of the errors denied the defendant a fair trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Application of the cumulative error “doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Dahl has not shown that error occurred in this case. But even if one or more of Dahl’s assertions of error were correct, Dahl nevertheless

has not shown that he was denied a fair trial. Thus, the cumulative error doctrine does not justify reversal of the jury's verdicts. *Id.*

2. Trial counsel was not ineffective for not objecting to the prosecutor's closing arguments for arguing that there was no evidence from which to infer that the police witnesses had a motive to make up testimony or for using the word "true" when arguing that a function of the jury was to determine the credibility of witnesses. But even if error did occur, the prosecutor's brief arguments were not so egregious that there is any reasonable probability that the arguments effected the verdicts.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, Dahl must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

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Dahl avers that his trial counsel was ineffective for not objecting to the prosecutor's closing argument. Br. of Appellant at 11. Of the three errors that Dahl alleges on appeal, two were unobjected to at trial. These two alleged errors were Dahl's allegation on appeal that the prosecutor vouched for a police witness and his allegation that the prosecutor erred by referring to truth when arguing to the jury. Br. of Appellant at 5-7, 8-9; RP 181, 198.

The State contends that no prosecutorial misconduct occurred in this case. And even if Dahl's trial counsel would have objected to what he now alleges as misconduct, it is unlikely that the trial court would have sustained his objection. Still more, Dahl cannot show prejudice; therefore, he cannot show that there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

3. The State concedes that neither alcohol nor bars, taverns, or places that serve liquor contributed in any way to Meyer's crime of conviction and that it is, therefore, error to require as a condition of community custody that she not frequent places where the primary business is the sale of alcohol.

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A defendant may challenge illegal or erroneous sentences for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). A trial court's authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

A sentencing court has discretionary authority to impose crime-related prohibitions. RCW 9.94A.703(3)(f); *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013), *review denied*, 177 Wn.2d 1016 (2013). A "crime-related prohibition" is one that involves "conduct that directly relates to the circumstance of the crime for which the offender has been convicted." RCW 9.94A.030(10).

A trial court has authority to prohibit alcohol consumption as a community custody condition, regardless of the underlying offense's nature. RCW 9.94A.703(3)(e). But the trial court lacks authority to prohibit the purchase and possession of alcohol unless alcohol is "reasonably related to the circumstances of [the defendant's] alleged offenses." *State v. McKee*, 141 Wn. App. 22, 34, 167 P.3d 575 (2007).

In the instant case, entering places whose primary business is the sale of liquor does not reasonably relate to the circumstances of Dahl's crimes of taking a motor vehicle without permission and obstruction of a law enforcement officer. Thus, the State concedes that it was error to restrict Dahl from entering places whose primary business is the sale of liquor. *McKee*, 141 Wn. App. at 34.

D. CONCLUSION

The prosecutor did not bolster its police witnesses by using the prestige of the office or suggest the existence of extraneous evidence to enhance the witnesses' credibility. Therefore, the prosecutor did not vouch for its police witnesses when it merely argued an inference from the evidence that there was no evidence from which it could be inferred that witnesses had a motive to make up their testimony.

The prosecutor did not impugn the integrity of defense counsel by merely stating that it was offensive to impugn the credibility of the civilian witnesses at trial by suggesting something sinister about the relationships of "fiancée" and "baby's daddy". The prosecutor's comment said nothing

about the integrity of defense counsel, and the only point of the comment, which was brief and not particularly shocking, was to remind the jury to base its verdicts on logic and reasoned consideration of the evidence rather than prejudice.

The prosecutor used the word “true” when addressing the jury, but the prosecutor did not argue that the jury’s duty was to speak the truth or to do some other thing different than its true function of determining whether the State had proved the charges beyond a reasonable doubt. Instead, the prosecutor merely urged the jury to vigorously exercise its function of judging the credibility of witnesses when it was performing its true function of determining whether the State had proved the charges beyond a reasonable doubt.

Even if one, two, or all three of the errors alleged by Dahl was a true error, no combination of these alleged errors adds up to require a new trial under the cumulative error doctrine. None of these alleged errors is likely to have prejudiced the jury or tainted the jury’s verdict.

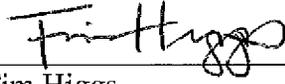
Trial counsel was not ineffective for failing to object to the alleged vouching and the alleged improper argument using the word “true,” first

because no error occurred, and because even if error did occur, in the context of the total case and all the instructions provided to the jury, it is not reasonably probable that the alleged errors had any effect on the jury's verdict.

Finally, the State concedes that there is no evidence in the record to suggest that alcohol contributed in any way to Dahls crimes in this case. So, the State agrees with Dahl that the condition that he not visit places where alcohol is sold or served should be stricken from his judgment and sentence because this condition is not crime related and, therefore is not authorized by statute on the facts of this case.

DATED: May 1, 2015.

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