

NO. 49053-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SUSAN KRAMER,

Appellant.

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

The Honorable Bryan Chushcoff, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct in closing argument denied appellant a fair trial.

2. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Prosecutors must not disparage defense counsel's constitutionally mandated role. Here, the prosecutor argued that defense counsel's closing argument was intended to confuse the jury into thinking there was doubt as to the State's case. Did the prosecutor commit misconduct that requires reversal of appellant's conviction?

2. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

On May 27, 2015, the Pierce County Prosecuting Attorney charged appellant Susan Kramer with one count of unlawful possession of a controlled substance: methamphetamine. CP 1; RCW 69.50.4013. The case proceeded to jury trial before the Honorable Bryan Chushcoff, and

the jury returned a guilty verdict. CP 51. The court applied the First Time Offender waiver and imposed a sentence of three days confinement and 12 months community custody. CP 60. Kramer filed this timely appeal. CP 75.

2. Substantive Facts

On February 15, 2015, Dupont police officer Jordan Goss responded to a report of a suspicious vehicle at an apartment complex, but he did not locate the vehicle. RP 213. A short time later he noticed a minivan driving in the parking lot of a nearby business that was closed. Thinking that was suspicious and that it could be related to the earlier call, he conducted a traffic stop. RP 213-15. Goss requested backup, and Officer Gregory Feleppa from Steilacoom responded. RP 220, 333.

Susan Kramer was driving the minivan, and she identified herself by showing Goss her driver's license. RP 215, 259. A man was in the van as well, lying on the floorboards behind the front seats. Goss asked Kramer to unlock the door so he could talk to the passenger, and she complied. RP 216. The man complained of pain. RP 217. When asked to identify himself he gave a name and date of birth but said he did not have any identification with him. RP 217. He did not give his true name, however, and he provided several other false names before officers identified him. RP 218-19. The passenger had a felony escape warrant

out of Utah, and he was arrested and placed in the back of a patrol car. RP 221.

After removing Kramer from the van, the officers asked who the vehicle belonged to. She said she had recently bought it from the neighbor of a friend, but she did not have a bill of sale or registration with her. RP 222, 335. Because the van was filled with a large number of items, and because the passenger had been acting suspiciously, Goss asked Kramer if he could search the vehicle. RP 223. He told her she could refuse, restrict, or revoke the search, and she gave him permission to search the van. RP 224-25.

Goss found a purse sitting on top of the back seat, and he asked Kramer if it was hers. She said it was not, and there was nothing in the purse identifying it as Kramer's. RP 227, 265, 267-68. Goss opened the purse, and inside a zipped pocket he found a small baggy of methamphetamine and a glass pipe. RP 184, 231. Goss asked Feleppa to detain Kramer at that point. RP 235. After she was informed of her Miranda rights Kramer said the van belonged to the passenger, and she gave his true name and date of birth. RP 239, 343.

Kramer testified at trial that she had been dating the passenger for about two weeks when they decided to travel together from Nevada to Washington to visit her daughter. RP 413-14. The passenger had loaded

the van with numerous belongings without her help. RP 414-15. Kramer testified that she did not own a purse, she did not put a purse in the van, and she was not aware there was a purse in the van. RP 415-16. She told Goss when he asked that the purse was not hers, and she was shocked when she saw him pull a glass pipe out of it. RP 418-19. Kramer admitted that she had initially told the officers that the van was hers, even though that was not true. RP 423. After her arrest, however, she provided the passenger's true name and told the truth about who owned the vehicle. RP 435.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT BY DISPARAGING DEFENSE COUNSEL AND BOLSTERING THE OFFICER'S CREDIBILITY.

At trial Officer Goss testified about his contact with Kramer and his search of the van. Goss testified that the purse he searched was in the back seat, behind the passenger, who was between Kramer and the purse. RP 255. Goss took photos of the purse once he removed it from the vehicle, but he took no photos to show where the purse was found or what other items were near it. RP 256. Although he testified that he identified Kramer through her driver's license, on cross exam he was unable to recall where she had retrieved her license from. RP 259. He did not recall seeing her reach toward the purse to retrieve the license. RP 259. Goss

admitted that there was no mention in his report about Kramer retrieving the license from the purse in the back seat. RP 260-61. When questioned about whether he would have documented it in his report if Kramer had reached into the purse for her license, Goss responded that if he documented everything that happened, his report would be 100 pages long. RP 260. Goss returned to this explanation when questioned further about his lack of memory and what he chose to include in his report. RP 273 289.

The State's theory was that Kramer was in constructive possession of the methamphetamine in the purse, which it suggested was hers, because she was driving the vehicle, and she could have reached the purse from where she was sitting. RP 446-49. Defense counsel argued that the State had failed to prove its case because a lot of details were unknown due to Goss's inadequate memory and his failure to properly document the encounter with photographs and in his report. Counsel reminded the jury that they were the sole judges of credibility and offered reasons why Goss was not a credible witness. RP 452, 456-59. Counsel argued that just because Goss is a law enforcement officer does not make him a more credible witness. RP 461.

The prosecutor responded to defense counsel's argument in rebuttal:

He came up here and attacked the police officers. Why? Because during the course of this trial, ladies and gentlemen, what the State did for you was -- this case is like a puzzle. What the State did, by putting on witnesses by making arguments, is to put puzzle pieces together so you can better see what happened in this case. When counsel came to do his closing argument and defense did his closing argument, they take apart that puzzle and throw it all over the courtroom and said, look, there is doubt.

They want you to look at this case piece by piece, but not put the pieces together, but look at them individually and say, there is doubt. There is doubt. There is doubt. They talk to you about what police officers did, but say nothing about what the defendant did in this case. The lies. Why? Because they don't want to bring attention to those.

RP 469. The prosecutor then suggested that defense counsel attacked Goss's credibility to confuse the jury:

Defense wants you to put yourself in the position of the officer and say, you should have done this. You should have done that. You should have done this. You should have done this. They don't talk about the fact that the officer followed protocol. Why? To confuse you. To take your attention away from Ms. Kramer, from her behavior, and to blame other people. It is clear, blaming the cop, sworn officer, blaming a passenger. None of this falls on the defendant, they said. She is innocent.

RP 470. Addressing Goss's credibility again, the prosecutor argued as follows:

What does the officer have to gain or lose to tell you what he told you? Counsel says here, he doesn't deserve the trust because he is only being caught for two and a half years. This man has sworn an oath of office to protect and serve, gone through training, gone through field training, is now been trusted to be on his own. If anything, he has achieved quite a bit. The defense says, don't trust him. Don't trust the other officer. Just take apart all of their testimony, find irrelevant information, such as, counsel says, when the other officer was reading Miranda rights -- when Officer

Feleppa was reading Miranda rights, Officer Goss was nowhere near. I wasn't there. Counsel wasn't there. Officer Goss was.... How is that relevant? It is not unless you are trying to confuse someone, and that's what defense is trying to do. Confuse you to forget about everything that Ms. Kramer did do, such as lie continuously, possess the methamphetamine, and just concentrate on what everybody else did. Forget about what Ms. Kramer did. Now, that would be the defense.

RP 476-77. Defense counsel did not object to these arguments.

A prosecutor is a quasi-judicial officer who shares in the court's duty to ensure that every accused person receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A fair trial is one in which the accused person benefits from the effective assistance of counsel for his or her defense. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). Therefore, prosecutors must refrain from attacking defense counsel's vital and constitutionally mandated role. Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983).

A prosecutor who subverts or evades the constitutional safeguards protecting the rights of accused persons can render a criminal trial unfair. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In reviewing prosecutorial misconduct, courts consider the context of the entire trial. Id. at 704. Prosecutorial misconduct requires

reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Id. at 703-04.

Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill-intentioned as to be incurable by instruction. Id. The focus of this inquiry is on whether the effect of the argument could be cured. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) (citing State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012)). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

Here, in the closing rebuttal argument, the prosecutor told the jury that defense counsel's role was to confuse the jury. He commented that, unlike the State, who carefully constructed a puzzle so that the jury would understand what happened, defense counsel's closing argument took apart that puzzle and threw the pieces all over the courtroom in order to make the jury think there was doubt. The prosecutor further suggested that the only reason defense counsel would challenge Goss's credibility was to confuse the jury. This argument undermined Kramer's right to counsel for her defense and requires reversal of her conviction.

Maligning counsel is prosecutorial misconduct. State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). Comments by the prosecutor that invite the jury to nurture suspicions about defense counsel's integrity violate the rights to a fair trial and to effective assistance of counsel. Bruno, 721 F.2d at 1195; State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988). It is therefore blatant misconduct for the prosecutor to disparage defense counsel or defense counsel's role. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); Bruno, 721 F.2d at 1195. Such improper argument severely damages the defendant's opportunity to present her case before the jury. Bruno, 721 F.2d at 1195.

The prosecutor's argument also improperly bolstered Goss's credibility with facts outside the record, suggesting Goss had nothing to gain by testifying untruthfully and that he had taken an oath to protect and serve and was therefore more trustworthy than Kramer. It is improper for a prosecutor to vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 174, 892 P.2d 29 (1985), cert. denied, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). Improper vouching occurs if the prosecutor expresses a personal belief about the veracity of the witness or indicates that evidence not presented at trial supports the witness's testimony. United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir.2007). No evidence in the record supports the argument that Goss had no reason

to mislead the jury or that whatever oath he took made him a credible witness. The prosecutor clearly intended to bolster Goss's credibility with personal opinion. As defense counsel repeatedly reminded the jury, credibility of witnesses is entirely within the province of the jury, and it was improper for the prosecutor to influence the jury's credibility determination with assurances of personal belief or matters outside the record.

The prosecutor's arguments disparaging the role of defense counsel and vouching for the prosecution witness's credibility damaged Kramer's ability to present her case. The State's case turned on whether Goss's description of the contact with Kramer and location of the methamphetamine established that Kramer had constructive possession of the substance. Drawing attention to Goss's failure to adequately document the incident, through photos or in his report, was a legitimate defense strategy, as was highlighting the reasons to doubt the State's theory of the case. See Kyles v. Whitley, 514 U.S. 419, 446, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); Bowen v. Maynard, 799 F.2d 593, 613 (CA10 1986) (common trial tactic of defense lawyers is to discredit the police investigation). The prosecutor's accusation that defense counsel was merely trying to confuse the jury was likely to unfairly influence the jury in a way that could not be cured by instruction. It was likely to

bolster the jury's assessment of Goss and unfairly discredit the defense. The prosecutor's misconduct rendered the trial unfair, and Kramer's conviction should be reversed.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

The trial court entered an order of indigency finding that Kramer was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 76-77. The court determined that Kramer had the likely future ability to pay \$500 for court appointed attorney fees in addition to the mandatory LFOs. CP 57.

a. **The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.**

Our supreme court in Blazina recognized the “problematic consequences” legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the

impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS, at 68-69 (2010), available at [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf); KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM’N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf)).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.

The Blazina court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate

costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Kramer has been determined to qualify for indigent defense services on appeal. To require her to pay appellate costs without determining her financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State's ripeness claim that “the proper time to challenge the imposition of an LFO arises when the

State seeks to collect.” Blazina, 182 Wn.2d at 832, n.1. Blank’s questionable foundation has been thoroughly undermined by the Blazina court’s exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to “look to the comment in GR 34 for guidance.” Blazina, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The Blazina court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” Blazina, 182 Wn.2d at 839. This court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the “court of appeals . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State’s requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State’s requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Kramer respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

- b. **Alternatively, this court should remand for superior court fact-finding to determine Kramer’s ability to pay.**

In the event this court is inclined to impose appellate costs on Kramer should the State substantially prevail on appeal, she requests remand for a fair pre-imposition fact-finding hearing at which she can present evidence of her inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the

superior court to appoint counsel for Kramer to assist her in developing a record and litigating her ability to pay.

If the State is able to overcome the presumption of continued indigence and support a finding that Kramer has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on her actual and documented ability to pay.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Kramer's conviction. Further, this Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

DATED November 28, 2016.

Respectfully submitted,



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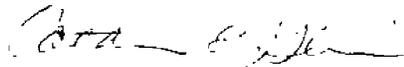
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I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
November 28, 2016

**GLINSKI LAW FIRM PLLC**

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