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Division II
State of Washington
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No. 50414-6-II

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

STATE OF WASHINGTON

Respondent

vs.

KEITH ROBERSON

Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR CLALLUM COUNTY
The Honorable Christopher Melly
Superior Court No. 16-1-00058-3

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

- A. The prosecutor's cross-examination of Mr. Robertson was improper. The error was adequately preserved by an objection.

The state relies on *State v. Wright*, 76 Wn. App. 811, 888 P.3d 1214 (1995) to support its argument that the prosecutor did not commit reversible misconduct by repeatedly asking Mr. Robertson to express the opinion that Mr. Walters was "making up" his story to the 911 dispatcher. This reliance is misplaced for several reasons.

First, the *Wright* court made it clear that the error in the prosecutor's cross examination and closing argument were not preserved by any objection and could not be raised on appeal. The discussion of the issue is thus *dicta*:

Although we conclude that the questions were objectionable because they elicited irrelevant evidence, *Wright* cannot challenge his conviction on this basis because his attorney failed to object to the questions. The issue, therefore, has not been preserved for appeal. In the absence of a proper objection, even the issue of prosecutorial misconduct cannot ordinarily be raised for the first time on appeal.

Wright at 76 Wn. App at 822, 823.

Secondly, while the *Wright* court disagreed with some previous decisions about the reason why this type of cross-examination is improper, the panel noted that the

fundamental rationale for disallowing this type of cross-examination is because it places irrelevant information before the jury and *potentially prejudices the defendant. To the extent they do in fact prejudice the defendant, we agree that 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.

Wright at 821, 822 (emphasis added).

The *Wright* court concluded that the questions put to the defendant in that case were objectionable, but as noted above, found that the error had not been preserved by an objection.

While the prosecutor here did not ask, “So, are you saying Mr. Walters was lying to the dispatcher?”, she did ask the functionally equivalent question by asking repeatedly, “So he was just making that up for 911?” The repeated questions clearly asked Mr. Roberson to give his opinion about whether Walters was “making it up” i.e. *fabricating* what was happening.

Unlike *Wright*, where the objection was not preserved by any means, here there were several objections which gave the court a basis to rule. In addition, the repeated requests for Mr. Roberson to affirm that Mr. Walters was “making it up” was intended to place him in a bad light before the jury and was thus prejudicial. Even under the *Wright* court’s analysis, this was misconduct.

The prosecutor also suggests that the misconduct is not reversible error unless the questioning was “flagrant and ill intentioned.” Resp. Br at 17. This is not the proper standard of review in a case where the error is preserved by objections that were made to the questions. The “flagrant and ill intentioned” standard is for misconduct cases where no objection is made to the misconduct at all. See *State v. Clafin*, 38 Wn. App. 847, 690 P.2d 1196 (1984)¹ See also *State v. Belgarde*, 110 Wn. 2d 504, 507, 755 P.2d 174 (1988). For this reason, the quotation from *State v. Vassar*, 188 Wn. App. 251, 352 P.3d 856

¹ The *Clafin* court rejected the prosecutor’s argument that a request for a curative instruction was required in addition to an objection or motion for mistrial, but noted that neither is needed if the misconduct is flagrant. *Clafin* at FN 2, 38 Wn. App. at 855.

(2015), Resp. Br. at 18, is also inapposite, since in *Vassar*, there was no objection to the cross-examination of the defendant. *State v. Stover*, 67 Wn. App. 228, 834 P.2d 671 (1992), cited by the *Vassar* court, is also not on point regarding the standard of review, because no objection was made to the misconduct. *Stover* at 230.

The appropriate standard of review for prosecutorial misconduct is whether there was a substantial likelihood that the misconduct affected the verdict on Count II. *State v. Casteneda-Perez*, 61 Wn. App. 354, 810 P.2d 74 (1991). Because Mr. Roberson's intent was the key issue for the jury on this count, the prosecutor's tactical questions regarding whether Mr. Walters was "making this up for 911" was designed to smear Mr. Roberson in front of the jury and destroy his credibility. Where the defendant's intent is the key issue, as it was here, there is a substantial likelihood that the misconduct affected the verdict. *State v. Padilla*, 69 Wn.App. 295, 302, 846 P.2d 564 (1993) (reversing where issue of defendant's intent was critical). This court should hold that this error was not harmless and requires reversal of Count II.

B. There was insufficient evidence to convict on Count II.

The parties basically agree on the standard of review for the sufficiency of the evidence. The state points out that Mr. Walters testified that he was in fear because of Mr. Roberson's conduct. His subjective reaction, while necessary, is not enough to sustain the conviction.

Second degree assault requires that the state prove the defendant had the specific intent to cause fear and apprehension. *State v. Byrd*, 125 Wn. 2d 707, 713, 887 P.2d 396 (1995); *State v. Austin*, 59 Wn. App. 186, 193, 796 P.2d 746 (1990). Mr. Roberson did not have this specific intent, and the prosecutor points to no evidence in the record that

would show that he had actually demonstrated such intent or from which the jury could make that inference. He did not threaten Walters verbally, demand entrance into his house by threat, or threaten to take property from him. Rather, the record shows Mr. Roberson did not have the intent to cause fear in Mr. Walters, because he was depending on Walters to help him summon the police for aid or protection against the person or persons he thought were stalking him and trying to hurt him. While Mr. Roberson's admittedly erratic behavior may have created apprehension on Walter's part, this was clearly not his intention. This court should reverse the conviction on Count II and dismiss it.

- C. The trial court abused its discretion in refusing to consider an exceptional sentence downward because Mr. Roberson had consumed methamphetamine.

The parties agree that the standard of review for this issue is whether the trial court abused its discretion regarding the sentence. Where the parties disagree is about whether the trial court considered it possible to impose an exceptional sentence on the basis of mental illness under RCW 9.94A.535 (1)(e), if there was also evidence of use of a controlled substance. As the prosecutor correctly observed, Resp. Br. at 23, the court concluded this mitigating factor *did not apply* if there had been drug use *as part of* the behavior leading to conviction. RP 653-54.² This was a categorical denial that this

² "And I'm looking at those mitigating factors that are set forth and quite honestly, *I'm not seeing anything in there* that justifies the Court in giving you a mitigating sentence. To the extent that you were not completely there due to drug use, the legislature took that into consideration and provides that the defendant's capacity -- this is subsection (1)(e), the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to form his or her conduct to the requirements of the law were significantly impaired. *Voluntary use of drugs or alcohol is excluded*. So, to the extent that you were not capable of appreciating the wrongfulness of your behavior that night, that was largely attributable to the fact that you were -- you had voluntarily consumed the methamphetamine." (Emphasis added)

mitigating factor could be applied to this situation, despite the clear evidence of mental health problems that had contributed to Mr. Roberson's behavior.

A court abuses its discretion where it erroneously believes there is no basis for an exceptional sentence. *State v. Grayson*, 154 Wn. 2d 333, 342, 111 P.3d 1183 (2005). In *Grayson*, the court observed that where the trial court "did not appear to meaningfully consider whether a sentencing alternative was appropriate", it had abused its discretion.³ 111 P.3d 1188. ; see also *State v. Houston–Sconiers*, 188 Wn. 2d 1, 391 P.3d 409 (2017) (reversing and remanding for sentencing when sentencing court erroneously believed it could not exercise its discretion regarding the imposition of firearm enhancements).

Although RCW 9.94A.535 (1)(e) does exclude the use of the statutory mitigating factor if the defendant's conduct is based on the voluntary consumption of drugs alone, that was not the case here. Dr. Muscatel's report made it clear that Mr. Roberson was suffering from mental illness above and beyond his use of methamphetamine. The fact that Mr. Roberson was mentally ill was apparently well known to the police and the 911 dispatcher who spoke with Mr. Walters as well. Dr. Muscatel's report concluded that Mr. Roberson "did likely have symptoms of a significant mental disturbance at the time of the incident, and those factors likely affected his behavior, thinking judgment and emotional responses at the time."

The trial court apparently felt constrained by the statute if drug use played a part in the offense conduct, even if there was a significant component of mental illness

³ "Although the trial judge declined to give a DOSA "mainly" because he believed there was inadequate funding to support the program, we recognize that the judge did not state that this was his "sole" reason. But he did not articulate any other reasons for denying the DOSA, and he specifically rejected the prosecution's suggestion that more reasons be placed on the record." 111 P.3d 1188.

present, as was demonstrated here. The statute does not prohibit by its terms a mitigated sentence consisting of both components. Because the trial court apparently believed it could not use the statute because of Mr. Roberson's drug use, it abused its discretion in rejecting an available statutory basis for an exceptional sentence downward.⁴ This court should hold that the trial court was not so constrained by the statute, and abused its discretion in failing to consider and utilize RCW 9.94A.535 (1)(e). This court should vacate the sentence and remand for resentencing.

II. CONCLUSION

The prosecutor's cross-examination questions repeatedly asked Mr. Roberson to accuse Mr. Walters of "making up" or fabricating the accusation of having a gun pointed at him for the benefit of the 911 dispatcher. This was improper cross-examination under numerous Washington decisions, and was properly objected to by defense counsel. The misconduct had a substantial likelihood of affecting the verdict on Count II, since Mr. Roberson's intent was the key issue for this count. This court should reverse the conviction on Count II and remand for a new trial.

While there was evidence that Mr. Walters felt fearful because of Mr. Roberson's erratic behavior on his doorstep, there was no evidence that Mr. Roberson intended to make Walters fearful of harm. On the contrary, he needed Walters as an ally to help him summon the police to find of the person or persons he thought were trying to harm him. This court should vacate the conviction on Count II, and dismiss that count.

The trial court appeared to believe that if drugs were involved in the offense conduct to any degree, an exceptional sentence could not be granted using RCW

⁴ The court also completely ignored defense counsel's suggested analogy to *Houston Sconiers*. RP 642.

9.94A.535 (1) (e). A trial court abuses its discretion if it refuses to consider granting an exceptional sentence downward based on an erroneous interpretation of the law. This was the case here. This court should vacate the sentences on both counts and remand for a new sentencing hearing.

Dated this 26th day of July, 2018

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