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COURT OF APPEALS, DIVISION II

ISIAH DAVON MARTIN

APPELLANT

v.

STATE OF WASHINGTON

RESPONDENT

Appeal from the Superior Court of Pierce County

The Honorable Frank Cuthbertson, Cause No. 16-1-0222-3

REPLY BRIEF OF APPELLANT

By

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A. STATEMENT OF THE CASE.

Appellant makes the following corrections to the State's statement of the case:

The pistol was in the foot-well beneath the driver's seat. 5 VRP 345-46. Defendant, bracing himself with his right hand on the steering wheel, used his left hand to pick up his urine filled catheter bag from the ground and drop it in the foot-well beneath the driver's seat. RP 43, 139, 176. When Officer Bradley saw the firearm, he was standing in a vantage point that defendant did not have and never would have had, given that he had to be carried like a baby when he was put in and taken out of the car. RP 139, 142. Defendant had difficulty maintaining a sitting position when his hands were cuffed behind him in the car. RP 47, 173, 174, 176.

Thus the State presented no evidence that the defendant could have seen the firearm.

The State presented no evidence that defendant could have seen the firearm at any time from his position entering the car or sitting in the car.

The State erroneously asserts: “Defendant and the State stipulated that defendant had been convicted on March 19, 2016 of a serious offense. The trial court read the stipulation to the jury.” State’s response brief, page 6. Defendant was on trial for unlawful possession of a firearm in the first degree alleged to have been committed on March 19, 2016. CP 29.

There was no stipulation to his guilt and the trial court read nothing of the sort to the jury. Rather the stipulation read that the defendant had “previously” been convicted of serious offense. CP 29. That serious offense was defendant’s conviction for promoting prostitution in the first degree from 8/12/2013. CP 146-158.

1. THE TRIAL COURT ERRED WHEN IT IMPOSED THE
FELONY FIREARM OFFENDER REGISTRATION
REQUIREMENT.

RCW 9.41.330 requires trial courts to decide whether to require a defendant convicted of a felony firearm offense to register under *RCW 9.41.333*. Under *RCW 9.41.010(9)(a), (e)*, “felony firearm offense” is defined as “[a]ny felony offense that is a violation of this chapter [and a]ny felony

offense if the offender was armed with a firearm in the commission of the offense.”

Because the decision to require registration is discretionary, *RCW 9.41.330*, appellate courts review a trial court's decision to require a convicted defendant to register as a felony firearm offender for abuse of discretion. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011). “A court abuses its discretion when an order is ‘manifestly unreasonable or based on untenable grounds.’” *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). An order is manifestly unreasonable or based on untenable grounds if it results from applying the wrong legal standard or is unsupported by the record. *Rafay*, 167 Wn.2d at 655.

In deciding whether to require registration, courts consider the following non-exclusive factors: the defendant's criminal history, whether he has been previously found not guilty of an offense by reason of insanity, and evidence of the defendant's propensity for violence. *RCW 9.41.330(2)*¹. Here,

¹ **9.41.330. Felony firearm offenders — Determination of registration.**

(1) On or after June 9, 2016, except as provided in subsection (3) of this section, whenever a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, the court must consider whether to impose a

the trial court considered these three factors, as well as the “facts of [the] current case.”

In this case, all of Martin’s prior convictions predate his paralysis in 2015. Even assuming that he went through a period of noncompliance with some laws from 2009 to 2011, he stopped. Further, none of Martin’s prior convictions are violent crimes. His prior convictions include a juvenile conviction for making/having burglary tools and adult convictions for theft in the second degree, taking a motor vehicle without owner’s permission, possession of stolen property in the second degree, residential burglary in the first degree, and promoting prostitution in the first degree.

requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.

(2) In determining whether to require the person to register, the court shall consider all relevant factors including, but not limited to: (a) The person’s criminal history; (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and (c) Evidence of the person’s propensity for violence that would likely endanger persons.

(3) When a person is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense that was committed in conjunction with any of the following offenses, the court must impose a requirement that the person comply with the registration requirements of RCW 9.41.333:

(a) An offense involving sexual motivation;

(b) An offense committed against a child under the age of eighteen; or

(c) A serious violent offense.

(4) For purposes of this section, “sexual motivation” and “serious violent offense” are defined as in RCW 9.94A.030.

Martin also has no evidence of propensity for violence, and certainly the trial court did not cite any such evidence in support of its order that he register as a felony firearm offender. Further, the instant offense occurred after Martin became paralyzed from the nipples down in 2015, a serious medical even which caused him to become dependent on others for assistance performing the most basic needs of life and therefore requiring a personal care assistant. RP 463, 440, 441, 444. His care needs are so great that arresting officers called an ambulance to transport him to the jail when he was arrested. RP 109, 456.

By time of sentencing, the trial court had further evidence of the defendant's physical disabilities. The jail refused to book him because they could not care for him. After defendant was convicted and the court ordered him taken into custody, the Pierce County Jail refused to accept him because they could not care for him. RP 597. The jail sergeant explained to the court, "We are unable to accept Mr. Martin for booking for medical purposes; therefore he is being medically rejected." RP 598-98. Defendant then was released until the jail arranged a special transport for him to DOC. *Id.*

The State's argument that defendant has ready access to firearms at his residence is not true. While it is true that his full time care giver has a legal

conceal pistol license and legally owns firearms, she keeps guns in her home in locations the defendant “cannot get to because of his disability.” RP 450. On the date of this event she had forgotten that she had left a gun in her car. *Id.*

Defendant became paralyzed from the nipples down in 2015. RP 440. The reality of defendant’s physical condition is that he spends his days either lying down or sitting in his wheelchair. RP 440. RP Defendant had no control of his legs and thus cannot walk. RP 440.

Requiring defendant to register as a felony firearm offender is an abuse of discretion. It is unreasonable and based on untenable grounds. It is purely punitive to require a man who cannot even get into an automobile unless another person carries him to the car and places into the driver’s seat to drive to the sheriff’s department to register as such. RP 441, 442, 444.

This court should order the trial court to vacate this condition of his judgment and sentence.

2. THE PROSECUTOR'S REBUTTAL ARGUMENT WAS IMPROPER

A prosecutor may not express an independent, personal opinion as to the defendant's guilt or the credibility of a witness. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). There is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case. *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905). It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion, but when judged in the light of the total argument and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. *McKenzie*, 157 Wn.2d at 53-54. Prejudicial_ error does not occur until it is clear that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *Id.*

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In this case, the deputy prosecutor made arguments that were nothing more than expressions of his personal opinions of defendants guilty and/or the lack of credibility of defense witnesses. Consider his testimony about True Treasure Bonds and her cars. Although True Treasure Bonds testified that she owned two cars, the Camaro and an older Audi, she testified that the Audi did not operate and was not licensed. RP 465. This testimony was uncontroverted although the State has unlimited resources and the quick ability to ascertain what vehicles are registered to what citizens. For a deputy prosecutor to disingenuously argue to the jury that Ms. Bonds had two vehicles available for her use was a misstatement of the facts and a deliberate attempt to use the prestige and power of the government to mislead the factfinder. The prosecutor made this argument, knowing that it was unsupported by any evidence, to suggest to the jury that defendant was out driving around for some purpose other than to meet Ms. Bonds and take her home.

Further the prosecutor blatantly misstated the facts when he argued that the defendant was faking his paralysis. The deputy prosecutor argued that it “might be more reasonable” that defendant really was not paralyzed and “that he might just pull himself into vehicle, isn’t it pretty likely that he’s going to be able to see the contents in that vehicle?” RP 547-48.

Although this rebuttal argument is an interesting concession that defendant could not have seen the firearm had he been put into the car in the manner described by Ms. Bonds and himself, the prosecutor nevertheless committed misconduct when he argued that defendant was faking paralysis when that argument was contrary to all of the evidence, including the evidence of the State's own police officers, who summoned an ambulance to remove defendant from the scene because of his medical condition. The prosecutor's misstatement of the facts here constituted a baseless condemnation of defendant's credibility, a central issue at any trial where a defendant testifies. A prosecutor's expression of his personal opinion of the defendant's credibility can be reversible error. *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014).

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Defendant rests on his other arguments in this section. Defendant has included the trial court's responses to trial counsel's objections to indicate that trial counsel at some point faced the difficult choice to continuing to interpose valid objections or sustain the scorn of the trial court in the presence of the factfinder deciding defendant's case.

DATED this 26th day of October, 2018.

/s/ Barbara Corey
Barbara Corey, WSB #11778

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via the filing portal a copy of this Document to: Appellate Division Pierce County Prosecutor's Office and via USPS to Isiah Martin #368017 Stafford Creek Correctional Facility 191 Constantine Way Aberdeen, WA 98520

10/26/18
Date

/s/ William Dummitt
Signature

BARBARA COREY, ATTORNEY AT LAW

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