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Division II
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No. 50925-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

AHRIA JAMES KELLEY,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Ahria Kelley stipulated to having a prior serious offense conviction where he was alleged to have unlawfully possessed a firearm. The trial court admitted irrelevant testimony and the prosecutor exceeded the scope of Mr. Kelley's stipulation in rebuttal argument, both errors separately or cumulatively prejudicing him and requiring reversal of his conviction.

B. ASSIGNMENTS OF ERROR

1. Mr. Kelley's constitutionally protected rights to due process and a fair trial were violated when the prosecutor called him a "convicted felon" during rebuttal argument.

2. The admission of Mr. Kelley's Community Corrections Officer (CCO) testimony regarding irrelevant and prejudicial facts violated his right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Due Process Clauses of the Washington and United States Constitutions, a defendant is guaranteed the right to a fair trial. Prosecutorial misconduct in closing argument, which prejudices the defendant, violates that right to a fair trial and requires reversal of the convictions. During rebuttal, the prosecutor called Mr. Kelley a

“convicted felon” where Mr. Kelley had stipulated he had been convicted of a serious offense, an element of first degree unlawful possession of a firearm. Was there a substantial likelihood that this misconduct affected the jury’s verdict, thus requiring reversal of Mr. Kelley’s convictions?

2. Only relevant evidence that is more probative than prejudicial is admissible at trial. Over Mr. Kelley’s objection, the trial court allowed his CCO to testify that Mr. Kelley was on community custody and not allowed to possess or consume alcohol, neither of which was relevant to the issues involved and were prejudicial. Was there a substantial likelihood that this error affected the jury’s verdict, thus requiring reversal of Mr. Kelley’s convictions?

D. STATEMENT OF THE CASE

On August 31, 2016, at around 3:00 in the morning, Pierce County Sheriff’s Deputies were called to an apartment complex on a report of a man with a gun. RP 289, 355. When the deputies arrived, they saw several men standing in the parking area. RP 355. Deputy Latour saw a man, later identified as Ahria Kelley, stagger, then lean on one of the buildings and began to urinate. RP 353. Mr. Kelley did not

match the description of the person who had been seen with a gun. RP 386.

Deputy Latour flashed his light on Mr. Kelley, who grabbed his pants and scurried away. RP 354. Deputy Latour did not immediately follow Mr. Kelley. RP 354.

Deputy Redding, also responding to the call, on arrival saw Mr. Kelley running. RP 292. The deputy told Mr. Kelley to stop and according to the deputy, Mr. Kelley kept running. RP 293. Deputy Redding lost sight of Mr. Kelley briefly then regained view of him as he ran between two buildings. RP 293. The deputy chased Mr. Kelley through the breezeway between the buildings. RP 293. Deputy Redding again lost sight of Mr. Kelley briefly and heard a metal sound. RP 294.

Deputy Latour also heard the metal sound, then saw Mr. Kelley running out of the breezeway. RP 356. Deputy Latour stopped Mr. Kelley as he came out of this breezeway and detained him. RP 295.

Deputy Redding went into the breezeway and discovered an alcove inside of which was a BBQ. RP 303. Speculating that Mr. Kelley went into this alcove, the deputy opened a BBQ stored in the alcove and discovered a loaded gun. RP 303-08.

Mr. Kelley was subsequently charged with first degree unlawful possession a firearm and obstructing a law enforcement officer. CP 3-4. Prior to trial, Mr. Kelley stipulated he had been previously convicted of a serious offense, an element of first degree unlawful possession of a firearm.¹ RP 12, 498.

During pretrial motions, Mr. Kelley moved to preclude, as irrelevant and more prejudicial than probative, testimony from Mr. Kelley's CCO that Mr. Kelley was on community custody at the time of this incident and was barred from possessing or consuming alcohol or possessing any firearms. RP 4-8, 12-13. The court denied Mr. Kelley's request and allowed the CCO to testify at trial. CP 8.

First of all, I am going to I [sic] allow the DOC officer to testify that he was on DOC supervision and the conditions would provide that he was not -- he was not supposed to have any alcohol or possession of any firearm and limit it to that subject matter, exactly the offer of proof that [the prosecutor] made to the Court.

RP 13.

¹ A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter.

RCW 9.41.040(1)(a).

CCO Nguyen subsequently testified Mr. Kelley was on his caseload because he was on community custody. RP 277. CCO Nguyen noted the conditions of community custody included law abiding behavior, no alcohol or controlled substances, and no firearms. RP 278. CCO Nguyen testified he advised Mr. Kelley of these conditions orally during Mr. Kelley's intake interview. RP 279. CCO Nguyen stated that on August 31, 2016, Mr. Kelley was on community custody and he could not consume alcohol or possess firearms. RP 280.

Following testimony and during his rebuttal argument, the prosecutor stated:

Counsel says, well, if he was -- look at the way the defendant was carrying the gun. Well, I don't know how he was carrying the gun, but if you're convicted of a serious offense so you know you can't have a gun, and if you know that you're on community custody and you can't have a gun, are you going to carry a gun in a holster? Here's my gun, ladies and gentlemen. Is that how you're going to carry it? *If you know you're a convicted felon* and can't have a gun, you're probably going to carry it in your pocket.

RP 568 (emphasis added). Mr. Kelley moved for a mistrial based upon the prosecutor's argument.² RP 72-73. The trial court overruled Mr. Kelley's objection. RP 578.

² Mr. Kelley did not object to the argument when made because he did not want to draw the jury's additional attention to it. RP 575.

The jury found Mr. Kelley guilty as charged. RP 583-84.

E. ARGUMENT

1. The prosecutor's misconduct during rebuttal argument was prejudicial and requires reversal of Mr. Kelley's convictions.

- a. *Prosecutorial misconduct violates a defendant's constitutionally protected right to a fair trial.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a “duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). “A ‘[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

To establish that the prosecutor committed misconduct during closing argument, the defendant must prove the prosecutor's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Mr. Kelley's post-argument motion for a mistrial was a sufficient objection to the misconduct. *See State v. Lindsay*, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014) (motion for a mistrial made at the close of prosecutor's rebuttal argument sufficient objection to preserve issue for appellate review). Thus, since he timely objected to the misconduct, Mr. Kelley was not required to request a curative instruction.³ *Allen*, 182 Wn.2d at 375; *State v. Classen*, 143 Wn.App. 45, 64, 176 P.3d 582 (2008).

b. The prosecutor exceeded the stipulation and argued otherwise inadmissible facts.

It is improper for a prosecutor to argue to the jury facts that were not admitted as evidence during the trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704-05, 286 P.3d 673 (2012); *Thorgerson*,

³ As in *Lindsay*, "[t]he judge ruled that the prosecutor's comments were not improper – thus, curative instructions were not discussed." *Lindsay*, 180 Wn.2d at 431.

172 Wn.2d at 443. A prosecutor may not mislead the jury through misstatement of the law or the evidence. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

Mr. Kelley was on trial for first degree unlawful possession of a firearm, which forbids possession of firearms if a person has previously been convicted of any serious offense. RCW 9.41.040(1)(a). He stipulated to the prior conviction. “The existence of a constitutionally valid prior conviction is an essential element of the offense, one the State must prove beyond a reasonable doubt.” *State v. Lopez*, 107 Wn.App. 270, 276, 27 P.3d 237 (2001), quoting *State v. Reed*, 84 Wn.App. 379, 384, 928 P.2d 469 (1997).

The stipulation established the fact of Mr. Kelley’s prior serious offense, thereby conceding an element of the crime and relieving the State of its burden of proof on that element. *State v. Humphries*, 181 Wn.2d 708, 716, 336 P.3d 1121 (2014). The trial court read this stipulation to the jury before it read the jury instructions. RP 498. The court also instructed the jury in a limiting instruction that: “You may consider evidence that the defendant has been previously convicted of a crime solely for the purpose of deciding whether the State has proved that, while in possession of a firearm, the defendant had been

previously convicted of a serious offense. *Such evidence may be considered for no other purpose.*” (emphasis added).

In arguing to the jury that Mr. Kelley was a “convicted felon,” the prosecutor exceeded the scope of the stipulation and used the fact of Mr. Kelley’s prior conviction as evidence of a prior bad act. Yet the prosecutor never submitted this theory to the court and the court allowed the prior conviction only as to the element of unlawful possession. Thus, the court never identified a purpose for its admission under ER 404(b). *See State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207, 213 (2012) (trial court must identify the purpose for which 404(b) evidence is sought to be introduced).

In addition, the prosecutor encouraged the jury should ignore the limiting instruction and use the fact of the prior conviction to find Mr. Kelley was guilty solely because he had the prior conviction. This was misconduct.

c. *The misconduct was prejudicial and there is a substantial likelihood that it affected the jury’s verdict.*

Since Mr. Kelley objected to the misconduct here, he need only show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict. *Allen*, 182 Wn.2d at 375; *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

“[D]eciding whether a prosecuting attorney commit[ed] prejudicial misconduct ‘is not a matter of whether there is sufficient evidence to justify upholding the verdicts.’” *Allen*, 182 Wn.2d at 376, quoting *Glasmann*, 175 Wn.2d at 711. “Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury’s verdict.” *Glasmann*, 175 Wn.2d at 711.

Initially, it must be noted that comments made at the end of a prosecutor’s rebuttal closing are more likely to cause prejudice. *Lindsay*, 180 Wn.2d at 443, citing as examples “*United States v. Sanchez*, 659 F.3d 1252, 1259 (9th Cir.2011) (significant that prosecutor made improper statement “at the end of his closing rebuttal argument, after which the jury commenced its deliberations”); *United States v. Carter*, 236 F.3d 777, 788 (6th Cir.2001) (significant that “prosecutor’s improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations”).”

Further, here, there was a substantial likelihood the misconduct affected the jury’s verdict. As noted by the United States Supreme Court in *Old Chief*, there is “no question” that “evidence of the name or nature of the prior offense [in an unlawful possession prosecution]

generally carries a risk of unfair prejudice to the defendant.” *Old Chief v. United States*, 519 U.S. 172, 185, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

Finally, cases involving firearms are highly charged and the risk of undue prejudice is greater than in other prosecutions. *See e.g. State v. Freeburg*, 105 Wn.App. 492, 502, 20 P.3d 984 (2001) (evidence defendant possessed firearm while fleeing arrest for murder reversible error where evidence admitted without limiting instruction and allowed the jury to use as tending to show the defendant was a “bad man,” had a propensity to carry guns, or had brought a gun to the scene of the murder). Similarly, the prosecutor’s argument here also was designed to paint Mr. Kelley as a “bad man” because he was a convicted felon.

The prosecutor’s argument was misconduct which prejudiced Mr. Kelley. This Court should reverse Mr. Kelley’s convictions and remand for a new and fair trial.

2. The testimony by CCO Nguyen was erroneously admitted and was more prejudicial than probative.

a. Only relevant evidence is admissible.

To be admissible, evidence must be relevant. ER 402. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401; *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407 (1986). Relevant evidence may be excluded if its probative value is outweighed by its prejudicial effect. ER 403. A trial court’s determination in balancing the probative value of evidence against its prejudicial impact is reviewed for abuse of discretion. *State v. Norlin*, 134 Wn.2d 570, 584, 951 P.2d 1131 (1998). In determining whether to admit evidence of other crimes or misconduct, the evidence must be logically relevant to a material issue before the jury, and the probative value must outweigh the prejudicial effect. *State v. Kelly*, 102 Wn.2d 188, 198, 685 P.2d 564 (1984).

ER 404(b) precludes evidence of a defendant’s other bad acts to show the defendant's propensity for criminal activity. However, when demonstrated, such evidence may be admissible for other purposes

such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (quoting ER 404(b)). Normally, evidence used to prove knowledge is only admissible if knowledge is an element of the crime. *State v. Bacotgarcia*, 59 Wn.App. 815, 821, 801 P.2d 993 (1990).

When admitting ER 404(b) evidence, the trial court must first determine whether the evidence is logically relevant to a material issue. *Powell*, 126 Wn.2d at 258. Where the trial court does not conduct an ER 404(b) inquiry on the record, the appellate court may make the required determinations based on the entire record. *State v. McGhee*, 57 Wn.App. 457, 460, 788 P.2d 603 (1990).

To be admissible, the prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common scheme or plan, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

- b. *The CCO's testimony was not relevant to any issue before the jury and more prejudicial than probative.*

The issues before the jury were whether Mr. Kelley possessed the firearm and whether he obstructed the police investigation. Whether Mr. Kelley was on community custody or was barred from possessing or consuming alcohol was utterly irrelevant to either of those issues. Further, Mr. Kelley was not cited for consuming alcohol nor did any of the police officers testify he was intoxicated or under the influence of alcohol. Deputy Latour testified when he first saw Mr. Kelley, he was urinating on the side of a building. Alcohol had nothing to do with this case.

In addition, whether Mr. Kelley was on community custody was also not relevant. Mr. Kelley was not being tried for being on community custody; he was being tried for possessing a firearm while having previously been convicted of a serious offense. To the extent his knowledge of the prohibition from possessing firearms goes to prove he knowingly possessed the firearm under ER 404(b), the evidence went far beyond what was necessary. Further, the trial court failed to conduct the required ER 404(b) inquiry, thus depriving this Court of a record of the trial court's reasoning for admitting the evidence.

The trial court plainly erred in admitting this evidence.

c. *The error in admitting the CCO's inadmissible testimony requires reversal and remand for a new trial.*

An error which is not of constitutional magnitude, requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). In other words, the inquiry is whether the outcome of the trial would have been different if the error had not occurred. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

As with the issue concerning prosecutorial misconduct, *supra*, the evidence Mr. Kelley was on community custody and in apparent violation of the terms was admitted to paint him as “bad man;” a person who knowingly violated the provisions of community custody or, even when supervised fails to comply, thus leading the jury to infer *a fortiori*, he unlawfully possessed the firearm.

The admission of the irrelevant evidence, within a reasonable probability materially affected the outcome of the trial. Mr. Kelley's convictions should be reversed.

3. The cumulative effect of the errors denied Mr. Kelley of a fair trial.

It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). Thus, under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

To the extent these errors alone are not sufficiently prejudicial to warrant reversal in isolation, the cumulative nature of the errors compel reversal. Together, the two errors encouraged the jury to view Mr. Kelley as someone who knowingly fails to follow the law, leading the jury to inescapably conclude that he also knowingly possessed the firearm. Mr. Kelley's convictions should be reversed.

F. CONCLUSION

For the reasons stated, Mr. Kelley asks this Court to reverse his convictions and remand for a new trial.

DATED this 17th day of January 2018.

Respectfully submitted,

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| |) | |
| Respondent, |) | |
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| v. |) | NO. 50925-3-II |
| |) | |
| AHRIA KELLEY, |) | |
| |) | |
| Appellant. |) | |

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