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Court of Appeals
Division II
State of Washington
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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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT 1

 1. The prosecutor committed misconduct during his rebuttal argument which prejudiced Mr. Kelley requiring reversal of his convictions. 1

 2. The fact Mr. Kelley was on community custody and Community Corrections Officer’s (CCO) conditions was irrelevant and its admission rendered the trial unfair. 3

B. CONCLUSION 4

TABLE OF AUTHORITIES

FEDERAL CASES

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)..... 1

WASHINGTON CASES

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 2

State v. Freeburg, 105 Wn.App. 492, 20 P.3d 984 (2001)..... 2

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997) 4

A. ARGUMENT

1. **The prosecutor committed misconduct during his rebuttal argument which prejudiced Mr. Kelley requiring reversal of his convictions.**

The State's argument in response apparently misunderstood Mr. Kelley's argument. The State argues that since Mr. Kelley stipulated to having previously been convicted of a serious offense, the prosecutor was free to refer to Mr. Kelley as a "convicted felon" because a serious offense is necessarily a felony. Brief of Respondent at 11-14. Whether or not a serious offense is a felony is no moment. The prosecutor committed misconduct by using Mr. Kelley's stipulation to a serious offense beyond the terms of the stipulation and contrary to the court's limiting instruction.

Mr. Kelley entered the stipulation solely as evidence of one of the elements of possession of a firearm under *Old Chief v. United States*, 519 U.S. 172, 190-91, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) ("The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that [the legislature] thought should bar a convict from possessing a gun."). In addition, the trial court limited the jury's use of the prior conviction:

You may consider the 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.*

RP 498 (emphasis added).

Nevertheless, despite the limitations on its use, the State argues the prosecutor was free to use the fact Mr. Kelley had previously been convicted of a felony freely for other purposes, such as to paint Mr. Kelley as a violent felon. Contrary to the State's suggestion, this constituted misconduct on the part of the trial prosecutor.

The State also contends that, even if it was misconduct, Mr. Kelley cannot show prejudice from the misconduct. Brief of Respondent at 14. As noted in the Brief of Appellant, cases involving firearms are highly charged and the risk of undue prejudice is greater than in other prosecutions. *State v. Freeburg*, 105 Wn.App. 492, 502, 20 P.3d 984 (2001). By labeling Mr. Kelley as a "felon" the prosecutor was not relying on the evidence presented to convict Mr. Kelley, but instead, urging the jury to convict him based on past conduct. The prosecutor's improper argument resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Emery*,

174 Wn.2d 741, 760, 278 P.3d 653 (2012). Mr. Kelley is entitled to reversal of his convictions.

2. The fact Mr. Kelley was on community custody and Community Corrections Officer's (CCO) conditions was irrelevant and its admission rendered the trial unfair.

Mr. Kelley was charged with unlawful possession of a firearm and obstructing a police investigation, thus, the issues the jury was to determine were whether Mr. Kelley possessed the firearm and whether he obstructed the police investigation. The State argues the CCO's testimony about collateral facts regarding his community custody status and resulting conditions was proper in order to prove Mr. Kelley's motive. But whether Mr. Kelley was on community custody and what the conditions were was not relevant to the issues before the jury. Again, stressing to the jury that Mr. Kelley was a convicted felon reinforced to the jury that he was a bad person and should be convicted of the charged offenses not by the evidence presented but on his past conduct.

Further, the State argues Mr. Kelley can show no prejudice from the trial court's error. Brief of Respondent at 18-19. But the State's theory on why the error was harmless is based on a false premise; that jurors somehow know that someone who has previously been convicted

of a serious offense may be on community custody as a result of the conviction. *Id.* One would be hard pressed to believe that the average juror knows community custody automatically follows from conviction for certain felonies.

Again as in the previous issue, the prejudice Mr. Kelley suffered was the State's reliance on his past acts to prove the current offenses. There is a reasonable probability that the error materially affected the outcome of the trial. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). Mr. Kelley's convictions should be reversed.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Kelley asks this Court to reverse his convictions and remand for a new trial.

DATED this 11th day of July 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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AHRIA KELLY,)	
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Appellant.)	

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