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Court of Appeals
Division II
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No. 51895-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SAUNDERS,

Appellant.

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

BRIEF OF APPELLANT

TIFFINIE B. MA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

Christopher Saunders was charged with failure to register as a sex offender. At trial, the jury heard extensive testimony about Mr. Saunders's community custody conditions, including his requirement to stay away from minors and places where minors frequent; his numerous violations of his conditions resulting in incarceration; his history of being on warrant status; his risk to the community; his history of cutting off his GPS monitor, and his substance abuse issues. Counsel failed to object to this unduly prejudicial testimony.

Additionally, the State committed prosecutorial misconduct when it urged the jury to convict Mr. Saunders for failing to register during a time period not charged in the information. Lastly, the court imposed discretionary legal financial obligations on Mr. Saunders, which this Court should strike in light of the Supreme Court's decision in *State v. Ramirez* because Mr. Saunders is indigent. This Court should reverse.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth Amendment, Mr. Saunders received ineffective assistance of counsel.

2. The State committed prosecutorial misconduct by urging the jury to convict Mr. Saunders for failing to register during a time period not charged in the information.

3. In light of changes to the law that apply to Mr. Saunders under *State v. Ramirez*¹, the trial court erred by imposing discretionary legal financial obligations on him because he is indigent.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment right to the effective assistance of counsel is denied where counsel's performance is deficient and prejudices the outcome of trial. Here, counsel failed to object to irrelevant and prejudicial testimony regarding Mr. Saunders's community custody conditions and violations. Where counsel's performance fell below an objective standard of reasonableness and prejudiced his client, did Mr. Saunders receive ineffective assistance of counsel?

2. Prosecutors are quasi-judicial officers who may not misstate the law to the jury about what they are required to prove to establish the offense charged. Statements by the prosecution during arguments must be confined to the law as set forth in the court's instructions. Here, the

¹ 191 Wn.2d 732, 426 P.3d 714 (2918).

court's instructions required the State to prove Mr. Saunders committed the charged offense between June 22, 2017 and July 7, 2017.

Nevertheless, the State told the jury it could convict Mr. Saunders based on conduct which allegedly occurred between July 8, 2017 and October 2017. In misstating the law and urging the jury to convict Mr. Saunders based on uncharged conduct, did the State deny Mr. Saunders a fair trial by jury?

3. Recently-amended RCW 10.01.160(3) prohibits courts from imposing discretionary LFOs or a criminal filing fee on persons who receive public assistance, are involuntarily committed, or have an income of 125 percent or less of the federal poverty line. These amendments apply prospectively to cases still pending on appeal. Here, the court found Mr. Saunders indigent for purposes of appeal, but imposed the \$200 criminal filing fee and a \$100 DNA collection fee despite Mr. Saunders's prior felony convictions. Should this Court strike the discretionary LFOs imposed on Mr. Saunders because his income was below the poverty line at the time of sentencing?

D. STATEMENT OF THE CASE

Christopher Saunders was charged with failing to register as a sex offender. CP 8-9. At trial, the parties stipulated to certain facts,

relieving the State of its burden to prove those facts to the jury. CP 15-17. Mr. Saunders stipulated to his ongoing duty to register, to two prior convictions for failure to register, and to the fact that he was on community custody when the offense allegedly occurred. CP 15-17. His defense was general denial, and he testified that he registered with the Pierce County Sheriff's Department on June 19, 2017, within three business days of his release from jail on June 16.² He did not fill out a complete change of address registration packet because he believed his rent had been paid through July. RP 276, 281. He admitted he did not register between July 7, 2017 and October 2017. RP 281.

Nevertheless, the State presented testimony from Sally Saxon, Mr. Saunders's community corrections officer. Ms. Saxon told the jury she actively supervised Mr. Saunders from February 2017 through June 16, 2017, after which they lost contact. RP 116. During that time, Mr. Saunders had been receiving housing assistance from the Department of Corrections, but the assistance ended due to violations of his community custody conditions. RP 111. She listed all of Mr. Saunders's conditions, including that he provide urinalysis samples and

² RCW 9A.44.130(4)(a)(i) requires a sex offender register within three business days of release from custody. Mr. Saunders would not have had to register during the time period charged if he registered on June 19, 2017.

that he not have contact with minors or visit places where minors frequent. RP 112.

Ms. Saxon noted Mr. Saunders was frequently in violation of his conditions and was either in jail or on warrant status for “quite a period of time” during the four months she supervised him. RP 116. She placed Mr. Saunders on GPS monitoring because he “met all qualifications to be placed on GPS,” including that he was a “risk to the community.” RP 118. Ms. Saxon told jurors Mr. Saunders did not comply with his GPS monitoring, cutting the monitor off on multiple occasions or letting the battery die. RP 120. Mr. Saunders frequently missed curfew, and the GPS monitor results did not support his explanations of where he had been and why he had missed curfew. RP 121. On the last day Ms. Saxon was able to track the GPS device before it ran out of power, it showed Mr. Saunders proceeding to “move about Tacoma to various different locations for the next two days.” RP 122. Counsel did not object to any of this testimony.

In closing, the State argued the jury should disregard Mr. Saunders’s testimony. RP 307. Alternatively, it argued Mr. Saunders had nonetheless failed to register between July 7, 2017 and October 2017, urging the jury to convict Mr. Saunders based on violations

which occurred during this uncharged time period. The prosecutor stated:

And I've just gone over that with you previously in regards to him not registering upon release from custody on the 16th of June and from his own testimony not registering at all between July and October when he was put back into custody again, and that during that time period, the defendant knowingly failed to comply with the requirement of Sex Offender Registration.

RP 304 (emphasis added). The State further argued:

And furthermore, we know from the testimony that he did not register from July until October. He failed his registration requirement, and that's very evident from the testimony you heard throughout this trial.

RP 313 (emphasis added).

The jury convicted Mr. Saunders as charged. CP40-41. At sentencing, the court imposed a \$200 criminal filing fee and a \$100 DNA collection fee, even though Mr. Saunders has previously provided a DNA sample as a result of prior convictions. CP 47-60.

E. ARGUMENT

1. Mr. Saunders’s counsel was constitutionally ineffective because he failed to object to Ms. Saxon’s testimony, failed to move to dismiss the case for insufficient evidence, and failed to object to the State’s improper arguments.

a. The Sixth Amendment guarantees an accused the right to effective assistance of counsel; counsel is ineffective where his performance is objective unreasonable and the defendant is prejudiced by counsel’s deficient performance.

An accused in a criminal case has a Sixth Amendment right to “effective assistance by the lawyer acting on the defendant’s behalf.” *State v. Adams*, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978); U.S. Const. amend. VI. To establish an ineffective assistance of counsel claim, an accused must show that his attorney’s performance fell below an objective standard of reasonableness, and that he was prejudiced as a result. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 926 (2010); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is deficient if there is no legitimate, tactical reason for the incompetent act, and a defendant is prejudiced thereby. *State v. Doogan*, 82 Wn. App. 185, 189, 917P.2d 155 (1996). This Court reviews claims of ineffective assistance of counsel de novo. *State v. Rafay*, 168 Wn. App. 734, 775, 285 P.3d 83 (2012).

b. Counsel was ineffective for failing to object to Ms. Saxon's irrelevant and prejudicial testimony, and his deficient performance prejudiced Mr. Saunders.

Here, counsel failed to object to Ms. Saxon's irrelevant and prejudicial testimony portraying Mr. Saunders as a bad person. There was no legitimate, tactical reason for this failure, particularly in light of Mr. Saunders's stipulations to virtually all elements of the offense of failure to register as a sex offender.

Irrelevant evidence is always inadmissible. ER 402. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Even where evidence may be relevant, it must be excluded if the danger of unfair prejudice substantially outweighs any probative value the evidence may have. *Id.* at 776. Evidence of other bad acts is also inadmissible to show "the character of a person in order to show action in conformity therewith." ER 404(b). These rules must be read together to determine the admissibility of evidence. *Smith*, 106 Wn.2d at 775.

Here, counsel failed to object to Ms. Saxon's highly prejudicial and irrelevant testimony. Ms. Saxon's testimony was largely unnecessary. At best, her testimony demonstrated Mr. Saunders had knowledge he was required to register, however later testimony from a Pierce County Sheriff's records custodian established this fact. RP 112.

Moreover, at the onset of trial, Mr. Saunders stipulated to the fact that he has two prior felony sex offense requiring him to register for life, to his ongoing duty to register during the time period charged, and to two prior convictions for failure to register as a sex offender. CP 15-17, 26.

Nevertheless, Ms. Saxon was permitted to testify to the following evidence:

- Mr. Saunders lost his DOC housing assistance due to violations of his community custody conditions;
- He was required to provide urinalysis samples;
- He was not permitted to contact minors or visit places where minors frequent;
- For “quite a period of time” while Ms. Saxon supervised him, Mr. Saunders was alternately in jail for violations of his conditions or in warrant status;
- He was placed on GPS monitoring because he “met all qualifications,” including that he was a “risk to the community;”
- He frequently missed curfew and lied about his whereabouts;
- Mr. Saunders cut off his GPS monitor at least three times and let the batter die on other occasions;
- When Ms. Saxon ultimately lost track of Mr. Saunders, the GPS monitor showed he “proceeded to move about Tacoma to various locations” for the next several days before the monitor powered down; and
- “Unfortunately,” Mr. Saunders was “hardly ever at home” for Ms. Saxon to verify he was living at his registered address.

RP 111-29.

There is no legitimate, tactical reason why counsel would not have objected to this evidence. *Doogan*, 82 Wn. App. at 189. *State v.*

Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), is instructive. In *Hendrickson*, the defendant was charged with delivering a controlled substance, subject to enhancements that the delivery occurred in a county jail and that he had twice been convicted of prior drug offenses. *Id.* at 68. The State entered two judgments and sentences to prove *Hendrickson* had suffered two prior drug-related offenses. *Id.* at 78.

The Supreme Court could not “discern a reason why *Hendrickson*’s counsel would not have objected to such damaging and prejudicial evidence.” *Id.* at 78. It reasoned that while *Hendrickson* could not have kept from the jury the fact that he was incarcerated, “there was no compelling need for the jury to know the cause of that incarceration. Nor did the jury need to know at all that *Hendrickson* had a second prior conviction for a drug-related offense.” *Id.*

The evidence here was even more damaging and prejudicial than in *Hendrickson*. Here, Ms. Saxon’s testimony revealed unnecessary and damaging details about Mr. Saunders’s past bad conduct. This evidence was irrelevant to the charge of failure to register as a sex offender during the specific time charged. ER 402. More importantly, this evidence was highly prejudicial to Mr. Saunders. ER 403. Without objections, the jury learned Mr. Saunders had a substance

abuse problem and that his underlying sex offenses involved minors, information that should never have been presented to the jury under the evidence rules. *See* ER 404(a), (b). Moreover, Ms. Saxon testified extensively about Mr. Saunders's numerous community custody violations, informing the jury he was alternately in custody for those violations or on warrant status, he cut off or deactivated his GPS monitor, and he missed curfew and lied about his whereabouts. This type of testimony is classic bad acts evidence which is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). There is no discernable reason why competent counsel would not have objected to this evidence. *Hendrickson*, 129 Wn.2d at 78.

As a result of counsel's unreasonable performance, Mr. Saunders was prejudiced. A defendant demonstrates prejudice where he shows there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's errors must be so serious as to deprive the defendant of a fair trial. *State v. Classen*, 4 Wn. App. 2d 520, 543, 422 P.3d 489 (2018).

Here, Mr. Saunders testified he registered as required by law with the Pierce County Sheriff's Department on July 19, 2017, three days after he was released from jail. RP 277. He believed the Sheriff's Department had lost his paperwork. RP 285-86. However, counsel's failure to object to Ms. Saxon's irrelevant and prejudicial testimony deprived Mr. Saunders of a fair trial in which the jury could impartially weigh Mr. Saunders's testimony against that of the State's witnesses. Because this evidence of uncharged misconduct or damaging behavior had little to no probative value, its sole effect was to "arouse an emotional response" rather than "a rational decision by the jury," unfairly prejudicing Mr. Saunders in the minds of the jurors. *State v. Haq*, 166 Wn. App. 221, 261, 268 P.3d 997 (2012). Counsel permitted this unfair prejudice by failing to object to Ms. Saxon's testimony, demonstrating a reasonable probability the jury would have accepted Mr. Saunders testimony as true but for counsel's failure. Reversal is required.

2. The State committed flagrant and ill-intentioned prosecutorial misconduct when it argued the jury could convict Mr. Saunders based on his failure to register during a time period not charged in the information.

a. A prosecutor may not misstate the law or misstate what it is required to prove to establish the offense charged.

A prosecutor commits misconduct when “in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” *State v. Pinson*, 183 Wn. App. 411, 416, 333 P.3d 528 (2014) (quoting *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (plurality opinion)) (internal quotation marks omitted). A prosecutor’s argument must be confined to the law as stated in the trial court’s instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A prosecutor is a “quasi-judicial officer representing the people of the State.” *State v. Swanson*, 181 Wn. App. 953, 958, 327 P.3d 67 (2014) (quoting *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (internal quotation marks omitted). As such, the prosecutor has a duty to act impartially and in the interest only of justice and may not misstate the law. *Id.* at 958-59. This includes a duty not to misrepresent what elements the State is required to prove to establish the offense charged. *See id.* A prosecutor’s misstatement of the law can be a serious irregularity

having the grave potential to mislead the jury. *See State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Where a defendant fails to object to the challenged portions of the State's argument, he may still raise a claim of prosecutorial misconduct if the prosecutor's actions were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Pinson*, 183 Wn. App. at 415 (citing *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012)). This determination focuses more on whether the resulting prejudice could have been cured rather than whether the prosecutor's misconduct was flagrant or ill-intentioned. *Id.* (citing *Emery*, 174 Wn.2d at 762).

b. The State's closing arguments misstated the law and improperly urged the jury to convict Mr. Saunders for violations which occurred outside the charging period.

Here, the State charged Mr. Saunders with failure to register as a sex offender, alleging the offense occurred between June 22, 2017 and July 7, 2017. CP 8-9. The court instructed the jury that his conduct must have occurred in this time frame. CP 25. In closing argument, however, the State argued Mr. Saunders had admitted he also failed to register between July 8, 2017 and October 2017. It argued that even if the Mr. Saunders did register within three days of his release from jail

on June 16, 2017, the jury could nonetheless convict him of failure to register because he admitted he did not register between July and October 2017, even though he was not charged with this conduct.

The prosecutor stated:

And I've just gone over that with you previously in regards to him not registering upon release from custody on the 16th of June and from his own testimony not registering at all between July and October when he was put back into custody again, and that during that time period, the defendant knowingly failed to comply with the requirement of Sex Offender Registration.

RP 304 (emphasis added). The State further argued:

And furthermore, we know from the testimony that he did not register from July until October. He failed his registration requirement, and that's very evident from the testimony you heard throughout this trial.

RP 313 (emphasis added). This was a clear misstatement of the law and incorrectly informed the jury the State had met its burden because Mr. Saunders admitted he did not register between July and October, which was outside the time period stated in the information and in the jury instructions.

c. The misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. This prejudice denied Mr. Saunders a fair trial and was substantially likely to have affected the jury's verdict.

The State's "direct and specific argument" could not have been repaired with a curative instruction. *Pinson*, 183 Wn. App. at 419. Even if the trial court had reminded the jury it had to find Mr. Saunders's violation occurred between June 22 and July 7, 2017, the jury would likely be affected by the prosecutor's introduction of this new theory, that Mr. Saunders had failed to register at some point, even if the violation occurred outside the charged time period. The prejudicial effect of this improper argument was compounded by Ms. Saxon's damaging testimony earlier in the trial, leaving jurors with the impression that a child sex offender was out of custody for months, unmonitored and unregistered. The State's argument was so flagrant and ill-intentioned that no instruction would have eliminated that prejudice. Thus, Mr. Saunders did not waive his prosecutorial misconduct argument.

The State's blatantly improper arguments and misstatements of the law prejudiced Mr. Saunders and were substantially likely to have affected the jury's verdict. "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 Wash.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932) (alteration in original)).

In the context of the entire record, the State’s improper argument played a significant role in the jury’s verdict. The State impermissibly shifted the jury’s attention to uncharged acts and urged a verdict on that basis. This argument misstated the law and the elements the State was required to prove, and had a substantial likelihood of affecting the jury’s verdict. Therefore, Mr. Saunders’s conviction must be reversed.

3. The legislature recently changed the law as to legal financial obligations. Under *Ramirez*, these changes apply to cases on appeal. Applying the law in effect, the Court should order the trial court to strike Mr. Saunders’s discretionary LFOs.

In 2018, the law on legal financial obligations changed. Now, it is categorically impermissible to impose any discretionary costs on indigent defendants. RCW 10.01.160(3). In addition, the previously mandatory \$200 filing fee cannot be imposed on indigent defendants. RCW 36.18.020(2)(h). It is also improper to impose the \$100 DNA

collection fee if the defendant's DNA has been collected as a result of a prior conviction. RCW 43.43.7541.

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). In other words, that the statute was not in effect at time of the trial court's decision to impose legal financial obligations does not matter. *Id.* Applying the change in the law, our Supreme Court in *Ramirez* ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.* at 750.

Here, Mr. Saunders is indigent. CP 49. He was, and continues to be, represented by appointed counsel. Despite this finding, trial court imposed a \$100 DNA fee and the \$200 criminal filing fee. CP 47-60.

As in *Ramirez*, the changes in the law apply to Ms. Saunders's case because it is on direct appeal and not final. Accordingly, this Court should strike the \$200 criminal filing fee and the \$100 DNA fee because Mr. Saunders has had his DNA collected as a result of a prior conviction.

F. CONCLUSION

For the reasons stated above, reversal is required.

DATED this 28th day of February 2019.

Respectfully submitted,

/s Tiffinie B. Ma

Tiffinie B. Ma (51420)

Attorney for Appellant

Washington Appellate Project (91052)

1511 Third Ave, Ste 610

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-2711

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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v.)	NO. 51895-3-II
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CHRISTOPHER SAUNDERS,)	
)	
Appellant.)	

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Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

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