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NO. 54206-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

CHRISTOPHER DECICIO,
Appellant.

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

The Honorable Amber L. Finlay, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court abused its discretion by imposing non crime related community custody conditions.
2. The prosecutor committed reversible misconduct.

Issues Presented on Appeal

1. Did the court abuse its discretion by imposing non-crime related community custody conditions related to housing and employment?.
2. The prosecutor committed reversible misconduct when he stated during closing that that he and the jury knew that the complainant was telling the truth and the defendant was lying and the only way to believe the defendant was to leave common sense at the door and accept a conspiracy theory?

B. STATEMENT OF THE CASE

Christopher Decicio was charged by amended information with one count of assault in the second degree. CP 10-11. The jury acquitted on this charge and found Decicio guilty of the lesser included offense of assault in the third degree. CP 75-77.

During trial Decicio testified that he did not strike Lucas

Anderson with brass knuckles or the butt of a gun, when Anderson who drove up a road near Decicio's mailbox, while Decicio was walking his dogs, and Anderson was screaming at Decicio about the dogs. RP 84-88.

Anderson testified that Decicio struck him in the face twice with brass knuckles and several times with the butt of a gun, while Anderson was in his car, but Anderson's only injury was redness and swelling near his eye that resolved in a few days. RP 36. Anderson did not seek medical attention and the police did not retrieve a gun or brass knuckles from Decicio or his residence. RP 44, 59.

During closing argument, the prosecutor argued as follows:

There's only one person it could have come from, ladies and gentlemen, and that's the defendant. That's the only person he had contact with, the only person. And he got this injury. And he got this injury in the spots where he said the defendant had struck him and shoved the gun into his face. That's where he got this injury. So, we know, we know that Mr. Anderson is telling the truth and the defendant isn't.

RP 158.

Now, to believe the story of the defendant, here's what you have to do. First of all, you have to take your common sense and just heave it out the door. That's your first step. But then you have to believe that there is this conspiracy, a conspiracy between Corporal Clark, Mr. Anderson, Detective Drogmund to get the

defendant, because according to the defendant's testimony, what he said happened, he's basically saying that Detective Drogmund -- well, he couldn't remember Detective Drogmund. He remembered talking - he thought it was a male officer, but it was Detective Drogmund. He couldn't remember what he said to her, but then he had a completely different story than Mr. Anderson and he had a completely different story than Corporal Clark.

So, to believe the defendant you have to believe that this was a big conspiracy against him to basically frame him maybe, for whatever reason. But, ladies and gentlemen, there is absolutely no reason whatsoever to do that. Why would you want to frame a person?

RP 163.

The court sentenced Decicio to 45 days as a first offender and imposed the following community custody conditions:

[x] Defendant shall pay a community placement fee as determined by the Department of Corrections;

[x] A notice of payroll deduction may be issued or other income withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed;

[x] Legal financial obligation payments are to be made on a schedule established by the Court to begin as directed by the Court.

CP 79-95. The court entered an order of indigency. CP 97-98. This timely appeal follows. CP 96.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT

This Court should reverse due to misconduct by the prosecuting attorney. The prosecutor acted improperly during closing arguments, in three ways. First, he improperly vouched for the complaining witness, Lucas Anderson. Second, he expressed his personal opinion about Decicio. Third, he improperly implied that in order to acquit Decicio, the jury needed to believe in a conspiracy theory and that the state's witnesses lied or were not truthful. Taken together, this misconduct was flagrant and prejudiced Decicio.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). 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). In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and

prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met here.

- a. The prosecutor committed prejudicial misconduct by vouching for Anderson's credibility

The prosecutor in this case committed misconduct by expressing his personal belief about Anderson's credibility.

Specifically, in closing the prosecutor told the jury:

There's only one person it could have come from, ladies and gentlemen, and that's the defendant. That's the only person he had contact with, the only person. And he got this injury. And he got this injury in the spots where he said the defendant had struck him and shoved the gun into his face. That's where he got this injury. So, we know, we know that Mr. Anderson is telling the truth and the defendant isn't.

RP 158. Defense counsel did not object.

This Court reviews claims of prosecutorial misconduct for abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Every criminal defendant is entitled to a fair trial. *Finch*, 137 Wn.2d at 843. Improper vouching undermines that right. Vouching occurs when a "prosecutor expresses his or her personal belief as to the veracity of the witness." *Ish*, 170 Wn.2d at 196. For example, a prosecutor commits misconduct by stating that he or

she personally believes a witness. *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985).

In *Sargent*, the state charged the defendant with murder and arson based largely on statements from his cellmate, Jerry Lee Brown. *Sargent*, 40 Wn. App. at 345. In closing, the prosecutor stated, "I believe Jerry Lee Brown." *Sargent*, 40 Wn. App. at 434. The defendant failed to object at trial. *Sargent*, 40 Wn. App. at 435. The Court of Appeals reversed, holding that the prosecutor's statements improperly "bolstered the credibility of the only witness directly linking Sargent to the crime. All of the other evidence against Sargent is circumstantial." *Id.* The Court concluded that these remarks "could not have been cured with an appropriate instruction" and were "so prejudicial as to deprive Sargent of a fair trial." *Id.*

Here, like in *Sargent*, the prosecutor's statements bolstered the state's key witness, in a case that otherwise was not very strong. Absent Anderson's testimony, the remaining evidence was non-existent. This was a he said he said case where each version was barely plausible. The prosecutor's statement that "we know, we know that Mr. Anderson is telling the truth and the defendant isn't"

improperly bolstered Anderson's credibility, prejudicing Decicio.

- b. The prosecutor committed misconduct by expressing her personal opinion about Decicio's guilt

The prosecutor also committed misconduct by expressing his personal belief about Decicio's guilt. In closing argument, the prosecutor argued that because Anderson said Decicio struck him in the face, and could not be lying, this proved the state's case. "And he got this injury. And he got this injury in the spots where he said the defendant had struck him and shoved the gun into his face. That's where he got this injury. So, we know, we know that Mr. Anderson is telling the truth and the defendant isn't." RP 158.

The right to a fair 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)). Decicio did not object to these statements at trial. Thus, he must show that a jury instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443. "[T]he cumulative effect of repetitive prejudicial prosecutorial

misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

It is well established that a prosecutor cannot use his or her position of power and prestige to sway the jury. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). A prosecutor may not express an individual opinion of the defendant’s guilt, independent of the evidence actually in the case. *Id.* Such an opinion is “likely to have significant persuasive force with the jury” due to the “prestige” of the office and the “fact-finding facilities presumably available” to prosecutors. *Id.* (internal quotations omitted).

Many Washington cases warn of the danger of a prosecutor expressing a personal opinion of guilt. See, e.g., *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecutor to express his individual opinion that the accused is guilty, independent of the testimony in the case); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (permitting latitude to attorneys to argue the facts in evidence and reasonable inferences therefrom, but prohibiting statements of personal belief of a

defendant's guilt or innocence); *State v. Stith*, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993) (deeming a prosecutor's comment in closing argument that the appellant "was just coming back and he was dealing [drugs] again" impermissible opinion "testimony"); *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "knew" the defendant committed the crime).

The Washington Supreme Court examined this issue in *Monday*, 171 Wn.2d 667. In that case, the prosecutor made a "variety of improper comments during opening statements and closing argument," including expressing his personal belief about the strength of the state's case. *Monday*, 171 Wn.2d at 676-77. The Court reversed, holding that the prosecutor committed misconduct by improperly commenting on "the guilt and veracity of the accused." *Monday*, 171 Wn.2d at 677.

Here, like in *Monday*, the prosecutor improperly expressed his personal opinion of Decicio's guilt in his closing argument. Stating, "And he got this injury. And he got this injury in the spots where he said the defendant had struck him and shoved the gun into his face. That's where he got this injury. So, we know, we know

that Mr. Anderson is telling the truth and the defendant isn't." RP 158.

The prosecutor's misconduct also prejudiced Decicio. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *Ish*, 170 Wn.2d at 195. The Washington Supreme Court examined prejudicial prosecutorial misconduct in *Glasmann*, 175 Wn.2d 696. In that case, the prosecutor improperly expressed his personal belief that Mr. Glasmann was guilty. *Glasmann*, 175 Wn.2d at 699. The prosecutor used PowerPoint slides during closing argument, showing pictures superimposed with the prosecutor's own commentary. *Glasmann*, 175 Wn.2d at 701.. Several slides depicted pictures of Mr. Glasmann with "GUILTY" superimposed over them. Defense counsel did not object. *Glasmann*, 175 Wn.2d at 702.

The Washington Supreme Court reversed, holding that the prosecutor committed misconduct by expressing his personal opinion of Mr. Glasmann's guilt. *Glasmann*, 175 Wn.2d at 707. The Court held that "[a] prosecutor could never shout in closing argument that 'Glasmann is guilty, guilty, guilty!' and it would be

highly prejudicial to do so.” *Glasmann*, 175 Wn.2d 708.

Here, like in *Glasmann*, the prosecutor used repetition to drive home his personal belief about Decicio’s guilt. He concluded his closing argument by repeating: “So, we know, we know that Mr. Anderson is telling the truth and the defendant isn't.” RP 158. “[T]o believe the story of the defendant, here's what you have to do. First of all, you have to take your common sense and just heave it out the door..... you have to believe that there is this conspiracy... you have to believe that this was a big conspiracy against him to basically frame him”. RP 162. These comments prejudiced Decicio by improperly influencing the jury’s assessment of the facts of this case, requiring reversal.

- c. The prosecutor committed prejudicial misconduct by implying that the jury must find that Decicio lied or was mistaken in order to acquit

Finally, the prosecutor told the jury in closing, “[n]ow, to believe the story..... you have to believe that there is this conspiracy, a conspiracy between Corporal Clark, Mr. Anderson, Detective Drogmund.....to frame him... [b]ut, ladies and gentlemen, there is absolutely no reason whatsoever to do that.”.

RP 162. “So, we know, we know that Mr. Anderson is telling the truth and the defendant isn’t”. RP 158. These statements improperly implied that the jury had to find that all of the state’s witnesses lied or were mistaken in order to acquit Decicio.

The Court of Appeals examined a similar scenario in *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996). In *Fleming*, the defendants were accused of rape. 83 Wn. App. at 210. In closing, the prosecutor argued that for the jury to find the defendants not guilty, “you would have to find either that [the alleged victim] has lied about what occurred in that bedroom or that she was confused.” *Fleming*, 83 Wn. App. at 213. The Court held that this statement was flagrant and ill-intentioned because it contradicted established caselaw. *Fleming*, 83 Wn. App. at 213-14. (citing *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991)). The Court also held that it misstated the law and had the potential to reverse the burden of proof by requiring the defendants to prove that the alleged victim was not truthful. *Fleming*, 83 Wn. App. at 214.

Here, like in *Fleming*, the prosecutor implied that the jury needed to disbelieve all of the state’s witnesses in order to acquit

Decicio. RP 162. And expressly informed the jury that Anderson was telling the truth and Decicio was lying. . RP 158. This had the potential to confuse the jury about the burden of proof. It also could lead jurors to conclude “that an acquittal would reflect adversely upon the honesty and good faith” of the complaining witnesses. *Casteneda-Perez*, 61 Wn. App. at 361 (discussed in the context of police witnesses). This Court should reverse and remand for a new trial because the prosecutor’s statements deprived Decicio of a fair trial.

2. THE TRIAL COURT IMPOSED
COMMUNITY CUSTODY CONDITIONS
THAT ARE NOT CRIME RELATED

An unlawful sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).¹ Defendants may generally challenge community custody conditions that are contrary to statutory authority for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 745, 193 P.3d 678 (2008). The appellate courts review community custody conditions for an abuse of discretion. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015).

¹ Superseded by statute on other grounds as stated in *State v. Cobos*, 182 Wn.2d 12, 338 P.3d 283 (2014).

“An abuse of discretion occurs only when the decision of the court is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.2d 32 (2009) (quoting *Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The abuse of discretion standard applies when this court is reviewing a crime-related condition. *Irwin*, 191 Wn. App. at 656.

Generally, courts may impose crime-related conditions on a defendant during their time in community custody. RCW 9.94A.505(9), .703(3)(f). A “[c]rime-related prohibition’ ... prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted” RCW 9.94A.030(10). “‘Directly related’ includes conditions that are ‘reasonably related’ to the crime” *Irwin*, 191 Wn. App. at 656 (quoting *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014)).

The community custody conditions set forth in the facts section related to home and work are not crime related to assault in the third degree of a distant neighbor. The conditions are also not mandatory or waivable under RCW 9.94A.703(1)-(2), or RCW 9.94A.704. Thus, they are discretionary conditions under RCW

9.94A.703(3)(f) and must be crime related in order to be imposed.

The state presented no evidence that Decicio's living situation or work situation were in any way related to the crime for which Decicio was convicted. Community custody conditions must be "relate[d] to the circumstances *of the crime for which the offender has been convicted.*" RCW 9.94A.030(10) (emphasis added). "Directly related' includes conditions that are 'reasonably related' to the crime." *Irwin*, 191 Wn. App. at 656 (quoting *Kinzle*, 181 Wn. App. at 785). There was no evidence or argument presented that Decicio's living or work situation was related to the conviction at hand, accordingly, the community custody conditions are not crime related and must be vacated.

D. CONCLUSION

For the reasons discussed herein, Mr. Decicio respectfully requests this Court reverse and remand for a new trial court prosecutorial misconduct and vacate the community custody provisions that are not crime related.

DATED this 19th day of May 2020.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Mason County Prosecutor's Office timw@co.mason.wa.us and Christopher Decicio (at private mailing address) a true copy of the document to which this certificate is affixed on May 19, 2020. Service was made by electronically to the prosecutor and Christopher Decicio by depositing in the mails of the United States of America, properly stamped and addressed.



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