FILED
FEB 07 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

29247-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON M. ZURICK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Jill Reuter
Attorneys for Appellant

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A. ASSIGNMENTS OF ERROR

1. The State engaged in prosecutorial misconduct in its rebuttal closing argument, by arguing that, in order to acquit Mr. Zurick, the jury had to find that the police officers were lying.

2. The trial court erroneously imposed a substance abuse evaluation and treatment as a condition of community custody.

3. The judgment and sentence contains a scrivener's error that should be corrected.

B. ISSUES

1. In its rebuttal closing argument, the State asked the jury why the police officers would "make up" this story. Did the State engage in prosecutorial misconduct by arguing that, in order to acquit Mr. Zurick, the jury had to find that the police officers were lying?

2. No evidence showed Mr. Zurick's consumption of a substance other than alcohol contributed to the charged crime. Did the trial court err when it ordered Mr. Zurick to submit to a substance abuse evaluation and treatment as a condition of community custody?

3. The judgment and sentence states that Mr. Zurick owes 1400 dollars in restitution. The trial court did not impose restitution, but rather imposed 1400 dollars in legal financial obligations. Should this scrivener's error in the judgment and sentence be corrected?

C. STATEMENT OF THE CASE

The State charged Jason Michael Zurick with one count of third degree assault, of a law enforcement officer, in violation of RCW 9A.36.031(1)(g). (CP 1-2). The case was tried to a jury. (2 RP 33-133; 3 RP 3-128).

Moses Lake Police Officers Aaron Hintz and Ricardo Rodriguez had responded to a 911 call at the home of Ruth Rocha and her husband Jose Rocha. (2 RP 34-36, 98-100; 3 RP 18-19, 63). Mr. Zurick, who is Mrs. Rocha's brother, was staying at the Rochas' home to help them rebuild one of their vehicles. (3 RP 8, 53-54, 63-64)[1].

Mr. Zurick appeared to the police officers to be intoxicated. (2 RP 38-39). Officer Hintz told the jury that he spoke with Mr. Zurick, while Officer Rodriguez spoke with Mr. and Mrs. Rocha. (2 RP 41, 104).

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[1] The Report of Proceedings consists of four separate volumes. The first volume contains an omnibus hearing and the sentencing hearing, and it is referred to herein as "1 RP." The second and third volumes contain the first day of trial, June 9, 2010, and are referred to herein collectively as "2 RP." The fourth volume contains the second day of trial, June 10, 2010, and it is referred to herein as "3 RP."

According to Officer Hintz, Mr. Zurick was ignoring him as he tried to talk to him. (2 RP 42). After Mr. Zurick started to yell, Officer Hintz acknowledged that he yelled back at him. (2 RP 43-44). Officer Hintz testified that Mr. Zurick then shifted his weight back into the chair he was sitting in, and cocked his right arm back, making a fist. (2 RP 44-45). Officer Hintz stated that he stepped closer to Mr. Zurick, then Mr. Zurick "let out a loud growl and lunged up out of his chair striking me in the chest with his left hand." (2 RP 45-46).

Officer Rodriguez testified that he heard Mr. Zurick "kind of growl[ ] or like a belchy sound" and then saw Mr. Zurick and Officer Hintz on the ground. (2 RP 107-108). The police officers placed Mr. Zurick under arrest. (2 RP 51-54, 108-110).

According to Mrs. Rocha, she and her husband had been gone from home during the day. (3 RP 8-9, 64-65). When they arrived home that evening, they found Mr. Zurick passed out outside of their home. (3 RP 9-10, 65-66). Mr. Zurick was "really drunk." (3 RP 10). Mr. Rocha helped Mr. Zurick into their home. (3 RP 10-11, 66). Mr. and Mrs. Rocha tried to get Mr. Zurick to go to sleep. (3 RP 12, 14, 66-69). When they were unable to do so, Mrs. Rocha called 911. (3 RP 18, 68).

Mr. Zurick recalled that on the day in question, he drank whiskey and beer. (3 RP 55-56). He remembers drinking the alcohol on the Rochas' deck, and the next thing he remembers is waking up in jail. (3 RP 56-57). Mr. Zurick did not recognize Officer Hintz, and he did not remember any altercation with him. (3 RP 57-58, 61). No one presented evidence that Mr. Zurick had used any substance other than alcohol. (2 RP 33-133; 3 RP 3-81).

In its rebuttal closing argument, the State argued:

> And then you've got to be asking yourselves, because I'm sort of asking myself, *why would the officers make up a story like this?* If the defendant had really done nothing to warrant Officer Hintz's reaction, then what was the stimulus or the action that caused Officer Hintz to react? And there's really no reasonable explanation for that, except that the defendant pushed Officer Hintz and had his right fist drawn back.

(3 RP 118-119).

Defense counsel did not object. (3 RP 118-199).

The jury found Mr. Zurick guilty as charged. (CP 41; 3 RP 126). The trial court imposed a sentence including twelve months of community custody, and as a condition, ordered that Mr. Zurick "undergo an evaluation for, and fully comply with treatment for . . . substance abuse." (CP 49; 1 RP 13).

The judge stated that he was imposing 1400 dollars in legal financial obligations. (CP 49-50; 1 RP 13). But, the judgment and sentence lists this amount as restitution owed, rather than as the total for legal financial obligations. (CP 50). The trial court did not impose any restitution. (1 RP 13).

Mr. Zurick appealed. (CP 60-61).

D. ARGUMENT

1. THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT IN ITS REBUTTAL CLOSING ARGUMENT BY ARGUING THAT, IN ORDER TO ACQUIT MR. ZURICK, THE JURY HAD TO FIND THAT THE POLICE OFFICERS WERE LYING.

To establish prosecutorial misconduct, a defendant bears the burden of showing improper conduct by the prosecutor and prejudicial effect. *State v. O'Donnell*, 142 Wn. App. 314, 327, 174 P.3d 1205 (2007) (*citing State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). "Misconduct is prejudicial when, in context, there is a substantial likelihood that the misconduct affected the jury's verdict." *Id.* at 328 (internal quotation marks omitted) (*quoting State v. Stith*, 71 Wn. App. 14, 19, 856 P.3d 415 (1993)). If the defendant fails to properly object to the misconduct, "'a defendant cannot raise the issue of prosecutorial

misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'" *Id.* (*quoting Munguia*, 107 Wn. App. at 336).

"[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Such arguments "misstate[ ] the law and misrepresent[ ] both the role of the jury and the burden of proof." *Id.* In order to acquit a defendant, the jury is not required to completely disbelieve a witness's testimony, but rather, the jury need only entertain a reasonable doubt about the offense. *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991).

By arguing that if Mr. Zurick was innocent then the officers would have to have "made up" the facts of this offense, the State told the jury that it could only acquit Mr. Zurick if it found that the police officers were lying. *See Fleming*, 83 Wn. App. at 213. This was misconduct. The State's improper comments were prejudicial. *See O'Donnell*, 142 Wn. App. at 328 (*quoting Stith*, 71 Wn. App. at 19) (stating that "[m]isconduct is prejudicial when, in context, there is a substantial likelihood that the misconduct affected the jury's verdict.") Officer Hintz was the only witness who testified to seeing the assault. (2 RP 44-46). It

should have been left to the jury, without impermissible comment by the State, to determine his credibility.

The misconduct "'was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'" *O'Donnell*, 142 Wn. App. at 328 (*quoting Munguia*, 107 Wn. App. at 336). The State's argument was flagrantly improper and prejudicial. Mr. Zurick's conviction should be reversed and remanded for a new trial.

2. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY BY ORDERING, AS A COMMUNITY CUSTODY CONDITION, THAT MR. ZURICK UNDERGO A SUBSTANCE ABUSE EVALUATION AND TREATMENT, WHERE NO SUBSTANCE OTHER THAN ALCOHOL PLAYED A ROLE IN THE CHARGED CRIME.

As a community custody condition, the trial court ordered that Mr. Zurick "undergo an evaluation for, and fully comply with treatment for . . . substance abuse." (CP 49; 1 RP 13). Although Mr. Zurick did not object to the imposition of this condition, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'") (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Whether the trial court has

statutory authority to impose a community custody condition is reviewed *de novo*. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Treatment and counseling conditions of community custody are restricted to matters directly related to the underlying offense: "[a]s part of any term of community custody, the court may order an offender to . . . [p]articipate in crime-related treatment or counseling services." RCW 9.94A.703(3)(c); *see also State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

In *State v. Jones*, the defendant pleaded guilty to first degree burglary and several other crimes. *Jones*, 118 Wn. App. at 202. At the plea hearing, Mr. Jones's attorney stated that the defendant was using methamphetamine at the time of the crimes. *Id.* The trial court did not have any evidence suggesting alcohol contributed to the defendant's crimes. *Id.* The trial court ordered the defendant to participate in alcohol counseling as a community custody condition. *Id.* at 203. The reviewing court held that pursuant to the statute in effect at the time[2], the trial court erred by imposing this condition, reasoning that "nothing in the evidence here shows that alcohol contributed to [the defendant's] offenses, or that

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[2] *See* former RCW 9.94A.700(5)(c) (2001). This statute contained the same language as the statute applicable here, allowing the court to order a defendant to "participate in crime-related treatment or counseling services." RCW 9.94A.703(3)(c); former RCW 9.94A.700(5)(c) (2001).

the trial court's requirement of alcohol counseling was 'crime-related.'" *Id.* at 207. The court ordered that the condition be stricken on remand. *Id.* at 212.

Mr. Zurick's consumption of alcohol on the date of the charged crime is undisputed. (2 RP 38-39; 3 RP 10, 55-56). However, no evidence suggested that Mr. Zurick consumed or used any substance other than alcohol on the evening of the alleged assault. Therefore, the community custody condition of a substance abuse evaluation and treatment was not crime-related. *See* RCW 9.94A.703(3)(c); *Jones,* 118 Wn. App. at 207-08. Accordingly, this court should remand this case with an order that the trial court strike the substance abuse community custody condition. *See Jones*, 118 Wn. App. at 212; *see also State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition).

3. THE JUDGMENT AND SENTENCE CONTAINS A SCRIVENER'S ERROR THAT SHOULD BE CORRECTED.

The judgment and sentence states that Mr. Zurick owes 1400 dollars in restitution. (CP 50). The trial court did not impose any restitution. (1 RP 13). Instead, the trial court imposed a total of 1400

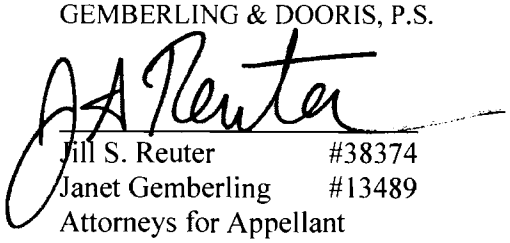
dollars in legal financial obligations. (CP 49-50; 1 RP 13). Therefore, this court should remand this case for correction of the judgment and sentence to reflect no restitution owing, and a total of 1400 dollars in legal financial obligations. *See, e.g., State v. Naillieux*, -- Wn. App. --, 241 P.3d 1280, 1287 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

E. CONCLUSION

Prosecutorial misconduct in the State's rebuttal closing argument requires reversal and remand for a new trial. This court should order the trial court to strike the substance abuse community custody condition, and correct the scrivener's error in the judgment and sentence regarding restitution.

Dated this 3rd day of February, 2011.

GEMBERLING & DOORIS, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29247-9-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JASON M. ZURICK,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on February 3, 2011, I mailed copies of Appellant's Brief in this matter to:

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and

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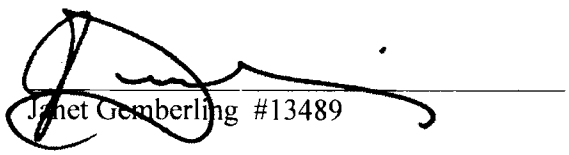
Signed at Spokane, Washington on February 3, 2011.



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