

FILED

MAR 14 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29247-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON M. ZURICK, APPELLANT

BRIEF OF RESPONDENT

Karen Horowitz
Attorney for Respondent, State of Washington
WSBA # 40513
Grant County Prosecuting Attorney's Office
P.O Box 37
Ephrata, WA 98823-0037
(509) 754-2011

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A. ASSIGNMENTS OF ERROR

The Respondent, State of Washington, asserts that no error occurred in the trial and conviction of the Appellant and respectfully requests that his conviction be affirmed.

The matter should be remanded for resentencing to correct the scrivener's error regarding the legal financial obligations and with instructions to limit the contested community custody condition to require alcohol evaluation and treatment.

B. STATEMENT OF THE CASE

The Appellant, Jason Michael Zurick, was convicted following a jury trial of one Assault in the Third Degree under RCW 9A.36.031(1)(g). CP 44. A standard range sentence was imposed. CP 44-59. 1 RP 13.¹ Mr. Zurick was sentenced to six months of total confinement with thirty days of total confinement converted to 240 hours of community restitution. CP 47. 1 RP 13. The court also imposed 12 months of community custody. CP 48. 1 RP 13. As a condition of community custody the court ordered that Mr. Zurick “undergo an evaluation for, and

¹ The Report of Proceedings consists of four separate volumes. The State of Washington has adopted the system of referring to these volumes used in Appellant's Brief. The first volume contains an omnibus hearing and the sentencing hearing, and 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 is referred to herein as “3 RP ___.”

fully comply with treatment for substance abuse.” CP 49. 1 RP 13.

Further, the court imposed legal financial obligations in the amount of \$1400. CP 49-50. 1 RP 13.

On April 10, 2010 Moses Lake Police Department Officers Aaron Hintz and Rick Rodriguez responded to a domestic disturbance call at the home of Ruth and Jose Rocha. 2 RP 34-37. When Officer Hintz entered the home he saw Mr. Zurick seated in a chair in the dining room. 2 RP 38. Mr. Zurick appeared intoxicated. 2 RP 38-39. Officer Hintz observed signs of a previous fight in the home, including abrasions to Mr. Zurick’s hand and elbow, and an upturned chair. 2 RP 39-40.

Officer Hintz spoke with Mr. Zurick while Officer Rodriguez spoke with Mr. and Mrs. Rocha. 2 RP 41. Mr. Zurick was ignoring Officer Hintz while Officer Hintz attempted to obtain Mr. Zurick’s version of what had occurred that night. CP 42. At one point while Mrs. Rocha was attempting to talk to Officer Rodriguez, Mr. Zurick began to yell at her, “That’s not what happened.” 2 RP 43. Officer Hintz eventually yelled at Mr. Zurick to divert Mr. Zurick’s attention from Mr. and Mrs. Rocha and to quiet Mr. Zurick. 2 RP 44.

Mr. Zurick then shifted his weight back in the chair, cocked his right arm back, and made a fist. 2 RP 44-45. Officer Hintz moved closer to Mr. Zurick, anticipating an attack. 2 RP 45-46. Mr. Zurick then let out

a loud growl and lunged out of his chair, striking Officer Hintz in the chest with his left hand. 2 RP 46. In response, Officer Hintz delivered a palm strike to the middle of Mr. Zurick's chest. 2 RP 49-50. Mr. Zurick fell backwards over a chair onto the ground and was eventually taken into custody. 2 RP 50-53.

C. STATEMENT OF THE ISSUES

1. Was there prosecutorial misconduct warranting reversal when, during rebuttal closing argument, the prosecutor asked "why would the officers make up a story like this?"
2. Did the court err in imposing as a condition of community custody a requirement that the defendant undergo a substance abuse evaluation and comply with the treatment recommendations?
3. Should the matter be remanded to correct a scrivener's error in the judgment and sentence which erroneously listed the total legal financial obligations as restitution owed?

D. ARGUMENT

1. No prosecutorial misconduct occurred during the State of Washington's rebuttal closing argument when the prosecutor argued that the jury could find the State of Washington's witnesses more credible than the defense witnesses.

No prosecutorial misconduct occurred during the State of Washington's rebuttal closing argument. In its rebuttal closing argument, the State of Washington 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. There's just no other reasonable explanation.” 3 RP 118-19.

The defense did not object to this statement. 3 RP 118-19.

A defendant claiming prosecutorial misconduct bears the burden of establishing both the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice is established if the defendant demonstrates a substantial likelihood that the misconduct affected the jury's verdict. *Id.* A defendant who does not timely object and request a curative instruction waives any claim on appeal unless the argument is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Allegedly improper comments are to be reviewed on appeal in the context of the prosecutor's entire argument, the issues in the case, the

evidence addressed in the argument, and the instructions given to the jury.

State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

Prosecutorial misconduct is grounds for reversal only when the conduct “was both improper and prejudicial in the context of the entire record and circumstances at trial.” *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

Mr. Zurick claims that the State of Washington’s rebuttal closing argument was a statement to the jury that it could only acquit Mr. Zurick if it found that the police officers were lying. In making his argument he relies on *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996).

Fleming is easily distinguished from the statement made here in rebuttal closing argument. In *Fleming*, the prosecutor in a rape trial argued the following during closing:

“Ladies and gentlemen of the jury, for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.” *Id.* at 213.

The court held that “it 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.” *Id.* The jury does not need to find that the

complaining witness was mistaken or lying in order to acquit; instead, the jury was required to acquit unless it had an abiding conviction in the truth of her testimony. *State v. Larios-Lopez*, 156 Wn. App. 257, 261, 233 P.3d 899 (2010), quoting *Fleming*, 83 Wn. App. at 213.

When considered in the context of the State of Washington's arguments during rebuttal closing, the prosecutor here was clearly not arguing that the jury must find that the officers were lying in order to be able to acquit. Instead, his argument referred to why the testimony of Mr. and Mrs. Rocha was not credible and why the testimony of Officer Hintz was more reasonable than theirs in the context of all of the other evidence before the jury.

The prosecutor began by stating that, "So I'd like to take some time to point out inconsistencies in the defense's case, because there are some holes there, as well." 3 RP 116. He then described Mrs. Rocha's confusion while testifying, inconsistencies between the testimony of the defense witnesses, and the position of Mr. and Mrs. Rocha during the assault on Officer Hintz which would have limited their ability to view the action. 3 RP 116-18. At that point, the prosecutor made the statement that Mr. Zurick claims was intended to argue that the jury could only acquit Mr. Zurick if it found that Officer Hintz was lying. 3 RP 118-19. The prosecutor, however, continued to discuss witness credibility by asking the

jury to “Think about the holes in the Rochas’ testimony.” 3 RP 119.

Further, he then directed the jury to look at Instruction No. 1 which instructed the jury members that they are the sole judges of the credibility of each witness. 3 RP 119-20. Taken in its full context, the prosecutor’s statement was clearly not improper argument and reversal is not warranted.

2. Because there was no evidence that controlled substances contributed to the defendant’s crime, the matter should be remanded to limit the community custody conditions to require only alcohol evaluation and treatment.

As a condition of community custody the court ordered that Mr. Zurick “undergo an evaluation for, and fully comply with treatment for substance abuse.” CP 49. 1 RP 13. Mr. Zurick now argues that the substance abuse condition is overly broad because there is no evidence that controlled substances contributed to his offense.

The record shows that Mr. Zurick was drinking alcohol on the day of the incident, but there is nothing in the record to indicate drugs were involved. 2 RP 38-39. 3 RP 10, 55-56. Under the Sentencing Reform Act’s sentencing scheme, a substance abuse evaluation and treatment condition can be imposed only when controlled substances, as opposed to alcohol alone, contribute to the defendant’s crime. *See* RCW 9.94A.703(3)(c). *See also State v. Jones*, 118 Wn. App. 199, 207-08, 76

P.3d 258 (2003) (holding that a sentencing court erred in ordering alcohol counseling when the evidence showed that methamphetamines, but not alcohol, contributed to the offense). The proper remedy would be to remand for resentencing with instructions to limit the condition to alcohol evaluation and treatment.

3. The matter should be remanded to correct a scrivener's error which mistakenly listed the total of the legal financial obligations as restitution owed.

The court imposed legal financial obligations in the amount of \$1400. CP 49-50. 1 RP 13. These obligations consist of a \$500 victim assessment, \$200 court costs, \$600 court appointed attorney fees, and a \$100 DNA collection fee. CP 49-50. It appears that the sum of these legal financial obligations, \$1400, was erroneously written on a line in the Judgment and Sentence labeled "Restitution" which is located directly above a line labeled "Total." The State of Washington agrees that remand to correct the scrivener's error is appropriate.

E. CONCLUSION

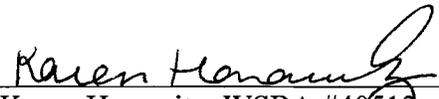
For the reasons set out above, the State respectfully requests that the defendant's conviction be affirmed. The matter should be remanded for resentencing to correct the scrivener's error regarding the legal financial obligations and with instructions to limit the contested community custody condition to require alcohol evaluation and treatment.

DATED: March 10, 2011

Respectfully submitted:

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