

FILED
Court of Appeals
Division III
State of Washington
2/5/2018 3:52 PM

No. 35350-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

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

APPELLANT'S OPENING BRIEF

Kate Benward
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION.....1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

D. STATEMENT OF THE CASE..... 4

E. ARGUMENT 7

1. The trial court allowed irrelevant, highly prejudicial testimony about a forged check and Mr. Dunbar’s lack of employment that served no relevant, non-propensity purpose for the charged crime of theft.....7

 a. Other misconduct can never be used to prove a character trait and action in conformity therewith.....7

 b. Evidence of the forged check and Mr. Dunbar’s lack of employment were not admitted for a permissible non-propensity purpose.....9

 c. The unauthorized check and Mr. Dunbar’s lack of employment had no non-propensity relevance to the charge of theft; rather this evidence was used as propensity evidence of dishonesty and poverty....12

 d. The court’s erroneous admission of propensity evidence in violation of ER 404 (b) requires reversal....15

2. Reversal is required for the prosecution’s flagrant misconduct, including misstating the burden of proof by urging the jury to disregard the presumption of innocence when evaluating the evidence of Mr. Dunbar’s prior statements, and vouching for its witness and expressing an opinion that Mr. Dunbar was not telling the truth....16

 a. Prosecutorial misconduct deprives the accused of due process.....17

b. <u>The Prosecutor committed misconduct by urging the jury to abandon the presumption of innocence when considering the evidence about Mr. Dunbar’s prior statements.....</u>	18
c. <u>The prosecutor committed misconduct by vouching for Officer Eckersley and the State, and discrediting Mr. Dunbar.....</u>	20
d. <u>This misconduct was flagrant and ill intentioned because it subverted the court’s s ruling striking Officer Eckersley’s opinion of guilt regarding Mr. Dunbar’s prior statements.....</u>	23
3. The court’s imposition of consecutive sentences under RCW 9.94A.589 (3) is not authorized by the SRA.	26
a. <u>Mr. Dunbar was sentenced for “current offenses.”.....</u>	26
b. <u>The court’s consecutive sentence is not permitted by law.....</u>	27

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

<i>In re Finstad</i> , 177 Wn.2d 501, 301 P.3d 450 (2013).....	27
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012)... 25	17, 18, 19, 20, 21, 25
<i>State v. Brown</i> , 113 Wn.2d 520, 782 P.2d 1013 (1989), <i>opinion</i> <i>corrected</i> , 787 P.2d 906 (1990)	9, 12
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	8
<i>State v. Gower</i> , 179 Wn.2d 851, 321 P.3d 1178 (2014)	9, 15
<i>State v. Gresham</i> , 173 Wn.2d 405, 269 P.3d 207 (2012)	7, 16
<i>State v. Gunderson</i> , 181 Wn.2d 916, 337 P.3d 1090 (2014)	8, 12, 15, 16
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	18
<i>State v. Moen</i> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	26
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	21
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	21
<i>State v. Quaale</i> , 182 Wn.2d 191, 340 P.3d 213 (2014)	21
<i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	8
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	18
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	18, 19

Washington Court of Appeals Decisions

<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005).....	17
<i>State v. Coleman</i> , 155 Wn. App. 951, 231 P.3d 212 (2010).....	21
<i>State v. Embry</i> , 171 Wn. App. 714, 287 P.3d 648 (2012).....	21

<i>State v. Jones</i> , 93 Wn. App. 166, 968 P.2d 888 (1998)	13, 14
<i>State v. Matthews</i> , 75 Wn. App. 278, 877 P.2d 252 (1994).....	13
<i>State v. Rasmussen</i> , 109 Wn. App. 279, 34 P.3d 1235 (2001)	26, 28

Washington Constitutional Provisions

Const. art. I, sec. 22.....	3, 17
-----------------------------	-------

Statutes

RCW 9.94 A.589 (1) (a)	26
RCW 9.94A.400 (1) (a)	26
RCW 9.94A.535.....	3, 26, 27, 28
RCW 9.94A.589 (1).....	28
RCW 9.94A.589 (1) (a)	1, 3, 26, 28
RCW 9.94A.589 (3).....	26, 27, 28
RCW 9A.56.030.....	9

Federal Constitutional Provisions

U.S. Const. amend. VI	3, 17
U.S. Const. amend. XIV	17

United States Court of Appeals Decisions

<i>United States v. Edwards</i> , 154 F.3d 915 (9th Cir. 1998).....	21
---	----

Rules

ER 404(a)	2
ER 404(b).....	passim
ER 609(a)	12
RAP 2.5(a)(3).....	18

Other Authorities

American Bar Association Standards for Criminal Justice std. 3-5.8..... 21

A. INTRODUCTION

Daniel Dunbar was charged with theft in the first degree for taking a travel trailer. During trial, the State introduced highly prejudicial, irrelevant propensity evidence of a forged check found inside the trailer with Mr. Dunbar's name on it. The State used this unauthorized check to highlight Mr. Dunbar's lack of income, which also was improper propensity evidence.

This impermissible propensity evidence was followed by flagrant prosecutorial misconduct, where the prosecutor, after being admonished by the trial court for eliciting the investigation officer's opinion about Mr. Dunbar's guilt on direct-examination, expressed an opinion that Mr. Dunbar was not telling the truth, and vouched for this same officer and the State in closing. The prosecutor also instructed the jury that the presumption of innocence did not apply to the evidence of Mr. Dunbar's prior statements introduced by this same officer.

After the jury found Mr. Dunbar guilty of theft, he was sentenced to consecutive sentences for current offenses, contrary to the court's sentencing authority under RCW 9.94A.589 (1) (a).

These errors require reversal and remand for a new trial and sentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by allowing the prosecutor to introduce evidence of an unauthorized check found in the travel trailer and evidence of Mr. Dunbar's lack of income as propensity evidence for theft of the trailer.

2. The prosecutor committed misconduct by instructing the jury that that the presumption of innocence did not apply to the State's evidence of Mr. Dunbar's prior statements made to Officer Eckersley, vouching for the State and its witness, and discrediting Mr. Dunbar.

3. The trial court erred in imposing a consecutive sentence for current offenses.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under ER 404(a), evidence of "other" malfeasance is categorically inadmissible to show the character of a person and action in conformity therewith. ER 404(b) prohibits the evidence of uncharged misconduct except in limited circumstances. Did the trial court err in admitting propensity evidence of a forged check, found in the travel trailer Mr. Dunbar was charged with theft for taking, which the prosecutor also used to highlight Mr. Dunbar's lack of gainful employment, neither of

which were relevant to the charged crime, and were highly prejudicial propensity evidence?

2. The right to a fair trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. U.S. Const. amend. VI; Const. art. I, sec. 22. Prosecutorial misconduct may deprive the accused of these fundamental rights. The prosecutor may not misstate the burden of proof or vouch for its own witnesses. Here, the prosecutor urged the jury to abandon the presumption of innocence about key evidence in its case, and credited its own witness and the State, while expressing disbelief in Mr. Dunbar's testimony; was this prosecutorial misconduct warranting reversal?

3. RCW 9.94A.589 (1) (a) requires that when a person is sentenced on more than one felony offense on the same day, the sentences are to run concurrent unless the court makes findings in support of an exceptional sentence under RCW 9.94A.535. Here, the court sentenced Mr. Dunbar in the same sentencing hearing, imposed consecutive sentences, but not as an exceptional sentence. Does this sentence violate the SRA?

D. STATEMENT OF THE CASE

Daniel Dunbar rented a travel trailer located on his friend's property. RP 408. He stayed there with his girlfriend until he was arrested on an unrelated matter. RP 398, 409.

While Mr. Dunbar was in jail, police learned that this same trailer had been previously reported stolen. RP 372, 375. No one saw Mr. Dunbar take the trailer, but Mr. Dunbar was seen with the travel trailer when he stopped by to see his son after taking it to the dumping station. RP 408.

Mr. Dunbar did not know the travel trailer was stolen. RP 409. He told Officer Eckersley that he rented the trailer from his friend Ocean. RP 408, 424. When the officer talked to the other people on the property where the trailer was located, they confirmed that Mr. Dunbar had been staying on the property in the trailer. RP 422. But the officer did not take additional steps to confirm that Mr. Dunbar was renting the trailer from a friend on the property. RP 433.

When police were removing Mr. Dunbar's personal belongings from the trailer, they found a check issued to him from Grassroots Therapy. RP 406. When Officer Eckersley interviewed Mr. Dunbar about the trailer, he also questioned him about the check. RP 409. Mr. Dunbar

said he did maintenance work for his friend “AZ,” who issued him the check. RP 409.

Mr. Dunbar was originally charged with forgery and theft. CP 4. After the court denied his motion to bifurcate these two charges, he plead guilty to the forgery charge and proceeded to trial on the theft charge alone. RP 89-90; 93-98; 237.

During trial, over defense objection, the State offered the testimony of Lori Eastep with Grassroots Therapy, to testify that her company did not hire maintenance workers and never employed Mr. Dunbar or “AZ.” RP 318-338; 476-477. Over continued defense objection, the State emphasized this unauthorized check and Mr. Dunbar’s lack of employment throughout the trial, even questioning how he could afford the truck the travel trailer was attached to. RP 355, 406, 409-410, 436, 452, 510-515, 520-522, 527-530, 533, 566-567, 588.

No one saw Mr. Dunbar take the trailer. RP 380-381. Police did not investigate the other people who knew the trailer’s owner was away on vacation. RP 381, 434. The State relied heavily on Officer Eckersley’s testimony about Mr. Dunbar’s prior statements to him at the jail and Mr.

Dunbar's jail phone calls to support the State's charge of theft. RP 407-415; 423-429; 434-437.

During trial, the prosecutor was admonished for eliciting Officer Eckersley's opinion on Mr. Dunbar's guilt regarding his prior statements introduced at trial. RP 436-437, 469. The court struck Officer Eckersley's testimony and issued a curative instruction rather than granting the defense's motion for a mistrial. RP 465, 469.

In closing argument, the prosecutor expressed his own opinion that Mr. Dunbar's prior statements did not tell Officer Eckersley what "actually happened." RP 588-589. In rebuttal closing argument, the prosecutor focused the jury's attention to this evidence of Mr. Dunbar's prior statements to Officer Eckersley, and instructed that "there is no presumption of innocence" when Sergeant Eckersley was interviewing Mr. Dunbar in the jail. RP 603. The prosecutor further misstated its burden of proof and vouched for Officer Eckersley and the State by telling the jury it would be a crime of "malicious prosecution" to falsely accuse Mr. Dunbar. RP 602. And the State discredited Mr. Dunbar by describing his testimony and statements as a "disco ball dropping down" in front of the

jury, a distraction that takes our eyes away from the “person picking our pocket.” RP 604.

The jury convicted Mr. Dunbar of theft, and the court imposed consecutive sentences for current offenses, which was not authorized by statute. CP 42, 302. Mr. Dunbar appeals.

E. ARGUMENT

1. The trial court allowed irrelevant, highly prejudicial testimony about a forged check found in the travel trailer, and Mr. Dunbar’s lack of employment that served no relevant, non-propensity purpose for the charged crime of theft of the trailer.

Over defense objection, the trial allowed testimony that the check was not lawfully issued to Mr. Dunbar. This impermissibly told the jury that Mr. Dunbar was guilty of another crime he was not on trial for. This ruling also allowed the prosecutor to engage in an extended inquiry into Mr. Dunbar’s lack of financial resources at trial, which was impermissible, highly prejudicial propensity evidence.

- a. Other misconduct can never be used to prove a character trait and action in conformity therewith.

“ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). To give effect to the rule against using other bad acts to show criminal propensity, the State bears a “substantial

burden” of justifying admission with a valid non-propensity purpose. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). Non-propensity purposes for admitting other bad acts may include “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). Any doubts as to admissibility are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

When a trial court admits evidence under ER 404(b), it must “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). This weighing must be done on the record. *Id.* If the court admits the evidence, the trial court must also give a limiting instruction to the jury. *Id.*

A trial court’s evidentiary ruling is reviewed for abuse of discretion, and will not be upheld if the decision is “manifestly unreasonable or based upon untenable grounds or reasons.” *Gunderson*, 181 Wn.2d at 922. A court acts on untenable grounds “if its factual findings are unsupported by the record.” *State v. Berniard*, 182 Wn. App.

106, 118, 327 P.3d 1290 (2014) (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). An erroneous admission of ER 404(b) evidence requires reversal when there is a reasonable probability the outcome of the trial would have been materially affected without the error. *State v. Gower*, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014)

- b. Evidence of the forged check and Mr. Dunbar's lack of employment were not admitted for a permissible non-propensity purpose.

The unauthorized check was not relevant to an element of the offense of theft, which required the State to prove that Mr. Dunbar wrongfully obtained and exerted unauthorized control over the trailer. CP 4; RCW 9A.56.030.

“The trial court must identify the purpose for which the evidence is sought to be introduced, and determine whether the evidence is relevant to prove an essential element of the crime.” *State v. Brown*, 113 Wn.2d 520, 526, 782 P.2d 1013 (1989), *opinion corrected*, 787 P.2d 906 (1990). The relevancy determination “requires that the purpose for which the evidence is sought to be introduced is of consequence to the outcome of the action and that the evidence tends to make the existence of the identified fact more probable.” *Id.*

At trial, the State indicated that it would be calling the owner of the company named on the check, Lori Eastep, to testify that her company did

not issue the check to Mr. Dunbar. RP 315. The State's claimed purpose for this evidence was that Mr. Dunbar "can't make the argument that he had a job working maintenance for Grassroots Therapy as a basis to say that he purchased or was renting the trailer. That's it. Nothing about forged. Just that they never sent, never gave him a check." RP 317; see also RP 333.

But the evidence did not reflect that Mr. Dunbar claimed that he was able to pay for the trailer because of the income for the check found in the trailer. RP 118-119, 317, 326-330, 424.¹ Mr. Dunbar clarified for the court that there was no evidence that Mr. Dunbar had made any such claim regarding the rental of the trailer being tied to the check, and he did not intend to make this claim at trial.² RP 317, 326- 330.

¹ During the 3.5 hearing, Officer Eckersley testified that Mr. Dunbar made a prior statement that he was renting the trailer for \$315 a month. RP 117. Officer Eckersley also asked Mr. Dunbar about the check he found in the trailer. RP 118-119. Mr. Dunbar told the officer that he had done landscaping for the company named on the check. RP 119. Officer Eckersley reported that Mr. Dunbar had cashed several checks from that company in the past. RP 119.

² The defense argued: "There is no tie in to the checks. And so the State is saying they want to offer it to rebut Mr. Dunbar's statements that that employment is how he was paying for it. But Mr. Dunbar doesn't make that statement. It's not in the reports. It wasn't in the 3.5. And that, Your Honor, is why I believe that the State's intention to introduce them is really more of an attempt to get in 404(b)." RP 328.

The State also argued that this unauthorized check permitted further inquiry into to Mr. Dunbar's lack of gainful employment:

MR. LINDSEY: Mr. Dunbar claims that he has sufficient financial resources to either purchase the trailer, which is valued at \$11,000, or to rent the trailer at \$315 a month. That's the issue. He either does or he does not. This forecloses the argument. The only source that Mr. Dunbar indicated to Sergeant Eckersley was that he was, that he received compensation from Grassroots Therapy Group for doing maintenance work, and that's basically what he, Mr. Dunbar, is telling the sergeant this is how I afford renting this trailer for \$315 a month.

RP 331-332.

The trial court admitted the evidence based on the State's flawed reasoning and mischaracterization of the record, erroneously finding that the unauthorized check "ties Mr. Dunbar to the trailer" and "demonstrates that [Mr. Dunbar] was not telling the truth to Sergeant Eckersley, at least as Sergeant Eckersley described what Mr. Dunbar said." RP 318-338 (argument); RP 338 (ruling).

Though Mr. Dunbar's name on the check may have tied him to possession of the trailer, the unauthorized status of the check certainly was not relevant for this limited purpose. Insofar as the court admitted evidence of this forged check as evidence of Mr. Dunbar's prior inconsistent statements, these statements were admitted for use in the

State's case-in-chief.³ See *Brown*, 113 Wn.2d at 531 (“A defendant’s credibility, key to the believability of his testimony, is quite a different matter from the purposes for which evidence is admitted under ER 404(b)”); see also *Gunderson*, 181 Wn.2d at 924 (though ER 404 (b) evidence may be used to impeach a witness’s inconsistent statements, the witness’s own conduct or statements must raise the question of credibility.).

The court’s admission of the prior acts evidence was an abuse of discretion because the court’s factual basis for admission of the evidence was unsupported by the record, and not based on tenable grounds or reasons. *Berniard*, 182 Wn. App. at 118 (citing *Rundquist*, 79 Wn. App. at 793).

- c. The unauthorized check and Mr. Dunbar’s lack of employment had no relevant, non-propensity purpose; this evidence was used as propensity evidence of dishonesty and poverty.

The unlawful status of the check was simply not relevant to the charge of theft of the trailer; rather, it was used as propensity evidence of a

³ The State did not seek to admit Mr. Dunbar’s prior conviction for this offense under ER 609(a). RP 8-9. Nor did the State seek to admit the prior conviction of forgery under ER 404(b). RP 8-9. Had the State sought admission of his prior conviction of forgery, the damaging detail that the unauthorized check was inside the trailer he was on trial for would not have been presented, which supports the defense’s claim that this was a tactic to introduce impermissible ER 404(b) evidence. RP 328.

crime of dishonesty against Ms. Eastep, whose testimony informed the jury that she was a victim of another crime committed by Mr. Dunbar, because he possessed an unauthorized check in his name, drawn on her account. RP 321-322; 475-477.

The trial court also allowed evidence of this unauthorized check as a basis for the prosecutor to make Mr. Dunbar's financial resources a central theme at trial. This was an impermissible use of poverty as propensity evidence. *State v. Jones*, 93 Wn. App. 166, 174, 968 P.2d 888 (1998) (citing *State v. Matthews*, 75 Wn. App. 278, 286, 877 P.2d 252 (1994) ("poor people are not more likely to steal than are people of higher income levels."))

In *Jones*, the defendant was charged with delivery of a controlled substance, and was arrested with \$422 dollars in his pocket. *Jones*, Wn. App. at 175. The court determined that "the relevance and probative value of this large sum of money after an alleged drug deal is undisputed." *Jones*, 93 Wn. App. at 175. But the court also found that "if Jones had been found with no money after the alleged offense, or with an insignificant sum, the admission of evidence of Jones's financial situation would have been error." *Id.* at 176. Here, the forged check in the trailer was not related to the theft of the trailer, thus it was entirely unlike the cash found on Jones's person after he was arrested for selling narcotics,

which allowed the State to inquire as to the source of the money Jones had in his possession at the time of the arrest. *Id.* at 175-176.

The theme of Mr. Dunbar's dishonesty in relation to the check, his employment, and his inability to pay for the things in his possession was central to the State's case. The State explored this extensively in direct examination of Officer Eckersley (RP 406, 409-410, 560,586), cross-examination of Mr. Dunbar (RP 511-515, 520-522, 526-530; 532-534;) and in opening and closing argument (RP 355, 586-587). The State was even allowed to cross-examine Mr. Dunbar about the cost of his vehicle, again implying that Mr. Dunbar's lack of financial resources made him more likely to steal:

Mr. Dunbar, you claim to have a job sufficient for you to pay out \$315 a month to rent a trailer and you had a vehicle to pull that trailer that was seen by Ms. Thompson. How much did the vehicle cost you?

RP 520. Mr. Dunbar's counsel objected to the State badgering Mr. Dunbar about his income, and Mr. Dunbar himself objected on relevance grounds throughout the State's cross-examination, but the court allowed this extensive inquiry into his financial status. RP 511-514, 521-522, 526.

This propensity evidence related to the unauthorized check and Mr. Dunbar's lack of employment simply had no relevance to the charge of theft other than to show that Mr. Dunbar was more likely to have stolen

the trailer because he unlawfully possessed a check in the trailer and because of his poverty. This use of propensity evidence was prohibited by ER 404(b).

- d. The court's erroneous admission of propensity evidence in violation of ER 404 (b) requires reversal.

Mr. Dunbar's credibility was central to the State's charge of theft, and there was no instruction to limit the jury's reliance on this improper evidence, which makes it reasonably probable that the error affected the outcome. *Gunderson*, 181 Wn.2d at 926; *Gower*, 179 Wn.2d at 857.

This analysis "does not turn on whether there is sufficient evidence to convict without the inadmissible evidence." *Gower*, 179 Wn.2d at 857. Rather, the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence. *Id.*

Here, the State heavily relied on this inadmissible propensity evidence to discredit Mr. Dunbar to the jury. This was crucial to the State's case where Mr. Dunbar had an explanation for his use of the trailer, as well as for the jail phone call the State attempted to argue was an

admission of theft, not a joke with his girlfriend as explained by Mr. Dunbar. RP 408-409, 414, 509- 510, 587-590.

When evidence is allowed under ER 404(b), the court is required to instruct the jury on its limited purpose: “the court should state to the jury whatever *it determines* is the purpose (or purposes) for which the evidence is admissible; and it should also be *the court’s duty* to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes.” *Gresham*, 173 Wn.2d at 424 (emphasis in original).

Here, the court did not provide a limiting instruction as required, and so the jury was able to consider this propensity evidence without limit. CP 27-41. Where this irrelevant propensity evidence was so central to the State’s case, there is a reasonable probability it affected the outcome, requiring reversal of Mr. Dunbar’s conviction for theft. *Gunderson*, Wn.2d at 926-927.

2. Reversal is required for the prosecution’s flagrant misconduct, including misstating the burden of proof by urging the jury to disregard the presumption of innocence when evaluating the evidence of Mr. Dunbar’s prior statements, and vouching for its witness and expressing an opinion that Mr. Dunbar was not telling the truth.

During Mr. Dunbar’s trial, the prosecutor committed misconduct by urging the jury to abandon the presumption of innocence in regards to the evidence of Mr. Dunbar’s prior statements. The prosecutor also

misinformed the jury that if Officer Eckerlsey and the State falsely charged Mr. Dunbar, this would be a malicious prosecution. This misconduct was particularly flagrant because it undermined the curative instruction to the jury to not consider Officer Eckersley's stricken statement that Mr. Dunbar's conduct during his interview indicated guilt.

a. Prosecutorial misconduct deprives the accused of due process.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. "Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial." U.S. Const. amend. VI, XIV *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Accordingly, "[p]rosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012).

Prosecutorial misconduct is found when, "in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *Glasmann*, 175 Wn.2d at 704.

Prejudice is established when there is a "substantial likelihood that the

misconduct affected the jury verdict.” *Glasmann*, 175 Wn.2d at 704 (citing *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011)).

Reversal is required where, as here, there was no objection,⁴ but the conduct was so “flagrant and ill intentioned that an instruction would not have cured the prejudice.” *Glassman*, 175 Wn.2d at 704 (citing *Thorgerson*, 172 Wn.2d at 443).

- b. The Prosecutor committed misconduct by urging the jury to abandon the presumption of innocence when considering the evidence about Mr. Dunbar’s prior statements.

“The presumption of innocence is the bedrock upon which the criminal justice system stands... This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.” *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (citing *State v. Bennett*, 161 Wn.2d 303, 315–16, 165 P.3d 1241 (2007)). Accordingly, it is “particularly grievous” for the prosecutor, an officer of the court, to “mislead the jury regarding the bedrock principle of the presumption of innocence, the foundation of our criminal justice system.” *Warren*, 165 Wn.2d at 27.

⁴ Even if unpreserved, a “claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

In rebuttal, the prosecutor urged the jury to consider Officer Eckersley's testimony about Mr. Dunbar's statements during the course of his investigation *without* the presumption of innocence:

Sergeant Eckersley filed his report within days of completing his investigation of this case. The presumption of innocence attaches when somebody is formally charged. You can be arrested, but unless you are charged, there is no presumption of innocence. So at the time when Sergeant Eckersley is speaking and interviewing Mr. Dunbar, there is no presumption of innocence attached to that. It attaches as soon as the Information is filed charging somebody for the crime. That's where it attaches.

RP 603 (emphasis added). The State then once again directed the jury to abandon the presumption of innocence in regards to its evidence of Mr. Dunbar's prior statements introduced at trial as evidence of his guilt:

So to claim that somehow the presumption of innocence attached to Mr. Dunbar as he's sitting in that interview with Sergeant Eckersley, it might as well be a disco ball dropping down.

RP 604 (emphasis added). This argument relieved the State of its burden of proof for its key evidence—Mr. Dunbar's prior statements introduced through Officer Eckersley. It was misconduct for the prosecutor to misstate its burden of proof by urging the jury to not apply the presumption of innocence to Mr. Dunbar's prior statements as testified to by Officer Eckersley. *Warren*, 165 Wn.2d at 27.

It is also a misstatement of the burden of proof to tell the jury that they must acquit the accused only if they believed him. *Glasmann*, 175

Wn.2d at 701. The inverse occurred here, where the prosecutor told the jury that if they did not believe the State and its witness's accusations against Mr. Dunbar, the State was liable for falsely accusing him:

So there is no motive on the part of Sergeant Eckersley or the State to falsely accuse Mr. Dunbar of a crime. That's called malicious prosecution. That itself is a crime.

RP 602. The prosecutor then argued that from Mr. Dunbar's testimony, "you're supposed to take from that that somehow Mr. Dunbar has been falsely accused; that somehow the State has not met its burden of proof."

RP 604.

In *Glassman*, the prosecutor told the jurors that the law required them to compare the testimony of its witnesses with the defendant's. The prosecutor then told jurors that in order to reach a verdict they must determine: "Did the defendant tell the truth when he testified?" *Glasmann*, 175 Wn.2d at 701. This is just as harmful a misstatement of the burden of proof as in *Glassman*, because it tells the jury that the standard by which to judge the evidence is for false prosecution, rather than proof beyond a reasonable doubt, and further, if the jury disagrees with the State, the State could be criminally liable.

The State's burden of proof does not depend on whether the jury believes the accused or thinks the State is falsely accusing a person—this misstatement of the burden of proof was misconduct.

- c. The prosecutor committed misconduct by vouching for Officer Eckersley and the State, and discrediting Mr. Dunbar.

“A prosecutor may not impart to the jury his belief that a government witness is credible.” *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998). A fair trial prohibits the prosecutor from “throw[ing] the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.” *Glasmann*, 175 Wn.2d at 704 (citing *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011)). Prosecutorial conduct in argument is of “special concern because of the possibility that the jury will give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office but also because of the fact-finding facilities presumably available to the office.” *Glasmann*, 175 Wn.2d at 706 (citing *American Bar Association Standards for Criminal Justice* std. 3–5.8).

“The State may not vouch for a government witness’s credibility.” *State v. Embry*, 171 Wn. App. 714, 752, 287 P.3d 648 (2012) (citing *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010)). Nor may the prosecutor express an individual opinion of guilt. *Glassman*, 175 Wn.2d at 706. “Opinions on guilt are improper whether made directly or by inference.” *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014) (citing *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008)).

In closing, the prosecutor told the jury that Mr. Dunbar was not telling the truth when Officer Eckerlsey interviewed him:

And as Sergeant Eckersley says, “Well, what about this?” Mr. Dunbar comes up with something else. Comes up with something else, comes up with something else. And as the circle starts to close on Mr. Dunbar because he's not telling -- he is not telling the detective what actually happened, what happens.

RP 588-589.

The defense, in closing, argued the State had not met its burden of proof through lack of investigation and evidence, and emphasized Mr. Dunbar’s testimony that contextualized his statements that the State introduced against him in its case-in-chief. RP 592-601.

On rebuttal, the State credited its witness and the State’s judgment of guilt and innocence by arguing, as discussed above, that neither the State nor Officer Eckersley had a motive to “falsely accuse” Mr. Dunbar. RP 602. The prosecutor further credited Officer Eckerlsey as a mere neutral recorder of fact:

Sergeant Eckersley has no motivation in the matter. Sergeant Eckersley is simply an investigator who reported what he found, testified to it, and he recorded it in a report that was filed within days of the contact with Mr. Dunbar.

RP 601-602.

By contrast, the prosecutor refers to Mr. Dunbar's testimony as a "disco ball dropping down," or as a ruse to trick the jury:

What happens when a disco ball drops down? Does anybody look at their shoes? Everybody look around? Everybody check their wallet? No. You look at the disco ball because it's shining and it's reflecting and it's showing nice lights everywhere. That's our initial reaction is to look at that, and look at stuff on the wall, not a person picking our pocket. Not what's happening right around us.

RP 604 (emphasis added). This statement characterizing Mr. Dunbar's testimony as the distraction of a thief was the final word to the jury, impermissibly arguing that the State and its witness, who the prosecutor claims had no motive, would be liable for malicious prosecution if Mr. Dunbar were not guilty, and the jury would be duped by a thief's trick if it believed Mr. Dunbar. This was impermissible vouching for the State's witness and discrediting of the defendant that was prosecutorial misconduct.

- d. This misconduct was flagrant and ill intentioned because it subverted the court's ruling striking Officer Eckersley's opinion of guilt regarding Mr. Dunbar's prior statements.

This was flagrant, ill intentioned misconduct, because it undermined the court's previous ruling prohibiting the parties from expressing an opinion of guilt and striking Officer Eckersley's opinion of guilt as to Mr. Dunbar's prior statements.

The trial court ruled, in limine, that no party could express personal opinion of the guilt or innocence of the defendant during trial, including prohibiting personal vouching for the credibility of Mr. Dunbar, the victim, or any witness, including during closing remarks. RP 10-11.⁵

The State introduced through its witness, Officer Eckerlsey, Mr. Dunbar's previous statements, including his statements in response to Officer Eckersley telling him the trailer was stolen, and Mr. Dunbar's responses to the officer questioning him about the check located in the trailer. RP 407-10. Officer Eckersely described that Mr. Dunbar's answers became more "short" and "angry." RP 436. The prosecutor then asked how Officer Eckersley interpreted that, and Officer Eckersley answered, as "a sign of guilt." RP 436-437. This impermissible testimony was objected to and stricken. RP 437.

The court denied the defense's motion for a mistrial, but instructed the jury to disregard evidence that had been stricken. RP 439. The court admonished the prosecutor:

I do want to say something. It's evident to me, Mr. Lindsey, from reading these cases, that you're an experienced appellate lawyer.

⁵ The State's motions in limine are not part of the court file in this case, but the record reflects that the court was reviewing a copy of them, and the defense claimed familiarity with them from other trials. Indeed, the State's motions in limine contained in COA #35349-4-III appear to be the same motions as orally discussed the court in this case (COA # 35349-4-III, CP 46).

You know this area. You know the law of 702, 703, 704. So please let's not go even close to the line of ultimate opinion about either guilt or credibility.

RP 469.

Despite the court's ruling and admonition to the prosecutor, in rebuttal closing argument, the prosecutor urged the jury to adopt Officer Eckersley's opinion at the time of interviewing Mr. Dunbar in the jail by telling them not to apply the burden of proof to this evidence at trial, and to instead consider the evidence at the time he interviewed Mr. Dunbar in the jail, *when the presumption of innocence* did not apply. Meaning, when Officer Eckersley impermissibly told the jury that he interpreted Mr. Dunbar's answers to be "a sign of guilt." RP 437.

Considered "in the context of the record and all of the circumstances of the trial," these misstatements about the burden of proof and discrediting Mr. Dunbar's statements and testimony was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. And though not objected to, this was a flagrant, ill intentioned flouting of the court's rulings prohibiting opinions of guilt, and specifically undermined the court's striking of this evidence and its curative instruction. *Id.*

An additional curative instruction, at the very end of the State's final argument, where defense counsel had no opportunity to respond, would not have cured this intentional disregard of the court's previous

order and curative instruction. Reversal is required for this flagrant and ill intentioned misconduct.

3. The court’s imposition of consecutive sentences under RCW 9.94A.589 (3) is not authorized by the SRA.

Because Mr. Dunbar was sentenced for “current offenses,” RCW 9.94 A.589 (1) (a) controls, and the court did not have authority to sentence Mr. Dunbar to consecutive sentences under RCW 9.94A.589 (3).⁶

a. Mr. Dunbar was sentenced for “current offenses.”

Felony offenses sentenced on the same day are “current offenses” and must be sentenced concurrently, unless sentenced under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589 (1) (a); *State v. Rasmussen*, 109 Wn. App. 279, 286, 34 P.3d 1235 (2001) (“RCW 9.94A.400 (1) (a)⁷ controls and requires that a court make finding of aggravating circumstances warranting imposition of an exceptional sentence before sentences imposed on the same day may be served consecutively if appropriate.”)).

⁶ Though this issue was not raised below, it is uncontroverted that “[t]his court may address for the first time on appeal the imposition of a criminal penalty that is not in compliance with sentencing statutes.” *State v. Rasmussen*, 109 Wn. App. at 283 (citing *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996)).

⁷ Recodified as § 9.94A.589 by Laws 2001, ch. 10, § 6.

“While the SRA does not formally define ‘current offense,’ the term is defined functionally as convictions entered or sentenced on the same day.” *In re Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013).

Mr. Dunbar was sentenced on the same day, in the same sentencing hearing, for this matter, Superior Court #16-103608-3 (count I, theft I; count II, forgery), and for Superior Court #16-01-04914-2 (witness tampering, possession of a stolen motor vehicle).⁸ RP 617-619. Because Mr. Dunbar’s offenses in these cases were sentenced on the same day, in the same hearing they were “current offenses.” His cases fall squarely under RCW 9.94A.589 (1) (a), and the trial court was required to impose concurrent sentences for those convictions unless it followed the exceptional sentence provisions of RCW 9.94A.535.⁹

b. The court’s consecutive sentence is not permitted by law.

The trial court sentenced Mr. Dunbar to consecutive sentences under RCW 9.94A.589 (3). CP 302. But this this provision expressly

⁸ Court of Appeals number 35349-4-III.

⁹ The State argued that the court could impose an exceptional sentence under RCW 9.94A.535 (2) (c) based on Mr. Dunbar’s offender score, but the court did not impose an exceptional sentence under this statutory authority. CP 53-55 (State’s sentencing memo); CP 301 (court did not enter exceptional sentence). *See* RCW 9.94A.535 (2) (c) (where “the defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished,” the trial court may impose an aggravated exceptional sentence without a finding of fact by a jury).

states that it is “subject to” RCW 9.94A.589 (1), which applies to the sentencing of current offenses. Because the Mr. Dunbar was sentenced on “current offenses,” RCW 9.94A.589 (1) applies, and the court was required to either sentence Mr. Dunbar to concurrent sentences or impose an exceptional sentence under RCW 9.94A.535.¹⁰

The trial court’s imposition of a consecutive sentence for the forgery and witness tampering convictions was not authorized by law, requiring his sentence be vacated and remanded for a new sentencing hearing. *Rasmussen*, 109 Wn. App. at 286.

F. CONCLUSION

Mr. Dunbar was convicted after a trial riddled with impermissible ER 404(b) evidence and prosecutorial misconduct that requires reversal and remand. And because Mr. Dunbar was sentenced to consecutive sentences not authorized by statute, the judgment and sentence must be vacated for resentencing.

DATED this 5th day of February, 2018.

Respectfully submitted,

s/ Kate Benward

¹⁰ Under RCW 9.94A.535, the trial court must find “substantial and compelling reasons justifying an exceptional sentence” and “set forth the reasons for its decision in written findings of fact and conclusions of law.” The trial court did not make any such findings here.

Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711
E-mail: katebenward@washapp.org