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Court of Appeals
Division III
State of Washington
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NO. 36237-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

BENNY SEDANO,
Appellant.

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

The Honorable Kristin M. Ferrera, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove the essential element of identity in the charges of felony violation of a no contact order.
2. The court abused its discretion by permitting the state to attempt to identify the voices in the telephone call as those of Sedano and the protected party without a sufficient foundation, which denied Sedano his right to a fair trial.
3. Sedano was denied his right to a fair trial by prosecutorial misconduct.

Issues Presented on Appeal

1. Did the state fail to prove the essential element of identity in the charges of felony violation of a no contact order where the only evidence identifying the voices came from an officer who had never met one of the persons and had minimal exposure to the other, Mr. Sedano?
2. Did the court abuse its discretion by permitting the state to attempt to identify the voices in the telephone call as those of Sedano and the protected party without a sufficient foundation?
3. Was Sedano denied his right to a fair trial by prosecutorial misconduct where the prosecutor argued a critical fact not in

evidence regarding the owner of the telephone account, and where the prosecutor improperly shifted its burden to prove an essential element of the crime to the jury?

B. STATEMENT OF THE CASE

Mr. Sedano was charged with two counts of domestic violence violation of a no contact order with Lisa Eaton based on a police officer listening to telephone calls made in the Chelan County Jail on December 22, 2017 and December 23, 2017. CP 31-32. On December 22-23, 2017, Sedano was housed with Eduard James Salvador. RP 69-70, 141. One call not charged as a crime was placed from Sedano's account on December 17, 2017. RP 109.

Ryan Wineger, the deputy director of the Chelan County jail testified that each inmate at the Chelan Jail receives an individualized PIN that is entered before each call. RP 67-71. Wineger testified that it was possible for other inmates to use another person's PIN to make a call if the inmate listed on the account first voice identified himself and then handed the phone to a different inmate. RP 72-73. The phone system in the jail does not activate without the owner of the PIN using his or her natural voice.

RP 70-72.

Mr. Sedano's counsel unsuccessfully moved in limine and during a trial voir dire to exclude the recordings of conversations between a person at the Chelan jail the state claimed to be Sedano, based on Chelan County Detective Aaron Seabright's testimony claiming he recognized the voices as Mr. Sedano's and Ms. Eaton's voices. The telephone calls were made from another inmate's account: Edward James Salvador. RP 90-91.

Sedano argued that Seabright could not meet the foundational requirements of ER 901(b)(5) based on Seabright listening to telephone calls with only minimal exposure to Mr. Sedano, and without ever meeting Ms. Eaton. RP 85, 90-91. The trial court denied the motion. RP 91.

Seabright only spoke to Sedano a few times between 2005 and 2017 and listened to jail calls where Sedano was a suspect in a prior case at an unidentified time frame, and at some point in December 2017 while Sedano was in custody. RP 78-79, 93. Based on this past, Seabright testified that he recognized Sedano's voice during calls made to Lisa Eaton or her mother on Salvador's account where Salvador was first required to identify himself as the

caller. RP 93-100.

Seabright never met Lisa Eaton or her mother and only listened to calls Eaton made to her mother, but Seabright never claimed to have previously heard the mother's voice. RP 85-86, 131. Seabright testified that he could identify Lisa Eaton's voice based on listening to jail calls involving a telephone number she used as her number when she was in custody which was also the same number she used to call her mother, and the same number associated with Salvador's account. RP 93-95, 131-35.

Seabright testified that he recognized Sedano's voice, Eaton's voice and Eaton's mother's voice on Chelan Jail telephone calls on December 22, 23, 2017 . RP 97-99, 104-05, 107-08. Seabright claimed that Eaton pretended to be her mother during calls with Sedano but slipped. RP 85-86.

The defense successfully objected to the testimony from Eric Bakke, a Wenatchee police officer who never met Salvador but believed he could identify his voice based on listening to telephone calls. RP 147-50. Sedano argued that Bakke was not a voice recognition expert and his testimony would carry the weight of an expert due to his being an officer, even though he was not qualified

as an expert. RP 148. The court agreed that Bakke did not have adequate personal knowledge to identify Salvador's voice and suppressed the testimony. RP 150. Salvador, not Sedano made four separate calls to Eaton's telephone number. RP 139-40.

Prosecutor Argument

The prosecutor in closing argument informed the jury that they just needed to listen to the voices to determine that the voices belonged to Sedano and Eaton that came from Sedano's account. RP 188-89.

We are talking about this relationship here back and forth. We've got -- This is clearly from Benny Sedano's account. And the other calls, you look at the context and you listen to the voices. Listen to the voices. He said, *Oh, the State didn't have an expert.* You don't need an expert. You can just listen to these yourselves and hear that they're the same voices. You hear --

Id. Seabright's uncontroverted testimony indicated that the account belonged to Salvador, not Sedano. RP 108. Later, the prosecutor argued:

It's about these calls and also about figuring out who these people are. It's nice, direct evidence that Detective Seabright says, *Yep, that's Benny. I know Benny's voice. Yep, that's Lisa's voice. I've listened to a lot of Lisa's calls. That's Lisa's voice.* That's direct evidence. But that direct evidence -- even without that, the circumstances of this make it plain as day

who these people are on the calls. You don't need anyone else to say that. You folks can put those pieces together yourselves even ignoring that and find that.

RP 197.

This timely appeal follows. CP 54-62.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. SEDANO "CONTACTED" MS. EATON AS ALLEGED IN COUNTS I AND II.

The state failed to present sufficient evidence of violation of a no-contact order in counts I and II. The state bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the state, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

This Court should hold the state to its burden and hold that

the state did not present sufficient evidence to sustain a conviction in counts I and II for violation of a no-contact order because the evidence does not show that Sedano had direct or indirect contact with Eaton.

To prove the offense alleged in Counts I and II the state was required to establish beyond a reasonable doubt that on December 22, 23, 2017, Sedano had telephone "contact" with Eaton and knowingly violated a provision of the no contact order admitted as Exhibit 1. RP 64-65. RCW 26.50.110(1), (5). As applied to the evidence, the prohibited conduct at issue was the purported telephone contact with Eaton. RP 65.

The evidence did not prove Sedano had "contact" with Eaton because there was insufficient evidence to establish beyond a reasonable doubt that the person's on the telephone calls were Sedano's and Eaton's voices.

First, the prosecution did not present sufficient evidence that Seabright adequately knew Sedano's voice to provide an identification beyond a reasonable doubt. Instead, the prosecution argued that Salvador dialed Eaton and because it believed Sedano spoke using Eaton and her mother's telephone number this was

sufficient to establish Sedano's voice identity beyond a reasonable doubt.

It is possible that the male voice was Sedano's or Salvador's and the female voices either Eaton or her mother, but because Seabright never spoke with Eaton he had no ability to compare her voice to her mother's or to any other female. Similarly, Seabright's limited contact with Sedano made it impossible for him to identify with certainty Sedano's voice. Accordingly, Sedano's convictions on counts I and II must be reversed and dismissed for insufficient evidence. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED AUDIO RECORDINGS OF TELEPHONE CALLS FROM /TO THE CHELAN COUNTY JAIL WITHOUT SUFFICIENT EVIDENCE TO AUTHENTICATE THE IDENTIFY OF THE MALE AND FEMALE VOICES HEARD ON THE RECORDINGS.

A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds. *Magers*,

164 Wn.2d at 181.

Authentication is a threshold requirement designed to assure that evidence is what it purports to be. *State v. Williams*, 136 Wn. App. 486, 499-500, 150 P.3d 111 (2007) (citing Karl B. Tegland, *Washington Practice: Evidence law and Practice* § 900.2, at 175; § 901.2, at 181-82 (4th ed.1999)). A condition precedent to the admissibility of a recording, the proponent must present evidence sufficient to support a finding that the recording is what it purports to be.

ER 901(b(5) addresses voice identification. It provides that " Identification of a voice, whether heard first hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." *Id.* The Court in *State v. Jackson*, 113 Wn. App. 762, 767, 54 P.3 739 (2002) explained this rule to require "a foundational witness (or someone else with the requisite knowledge) usually must identify those voices." *Jackson*, 113 Wn. App. at 767. In *Jackson*, the 911 caller testified and identified her voice on the 911 tape.

Similarly in *Williams*, 136 Wn. App. 486, 499-501, 150 P.3d

111 (2007), the 911 caller identified herself on the 911 tape which the court held sufficient for the voice identification prong of ER 901(b)(5).

In *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 171, 758 P.2d 524 (1988), *review denied*, 112 Wn.2d 1001(1989), Division I of this Court ruled that the circumstantial evidence was sufficient to authenticate a telephone call where there was testimony that the caller had self-identified as the person in question, the caller was returning a call as requested, and the caller demonstrated familiarity with the facts of the incident. *Passovoy*, 52 Wn. App. at 171.

Similarly, in *Danielson*, 37 Wn. App. 469, Division I again found sufficient authentication of a recording where the caller self-identified himself, knew personal information, and had returned a call as requested. *Danielson*, 37 Wn. App. at 472-73.

In all of these cases, self-identification alone was insufficient to establish identity. In these cases, self-identification combined with circumstantial evidence was sufficient to support admission of the recording. *Williams*, 136 Wn. App. at 500; *Jackson*, 113 Wn. App. at 767; *Passovoy*, 52 Wn. App. at 171; *Danielson*, 37 Wn.

App. at 472-73.

These cases establish that self-identification in addition circumstantial evidence may be sufficient for a voice identification. In this case, contrary to these cases, neither Sedano nor Eaton self-identified their voices. Rather, the state presented equivocal circumstantial evidence. :Here, Seabright stated that he only met Sedano a few times and he never met Eaton or her mother, and never identified Salvador's voice. RP 85-86, 131. The recorded calls contain references to Salvador, Eaton and her mother but not Sedano. The record is far from clear that the conversations in question involve Eaton and Sedano, rather than between Salvador and Eaton's mother.

This evidence falls short of all of the requirement for self-identification plus circumstantial evidence required for voice identification. . conditions adhered to in *Passovoy* and *Danielson*. The evidence, either direct or circumstantial, was insufficient to support a finding of identification, with the result that the voices were not properly identified and should not have been admitted. The testimony may have been sufficient to establish that the calls were placed by Salvador with a telephone number associated with

Eaton and her mother, but there was insufficient evidence to conclusively establish the identity of the male and female speakers. The recordings were therefore not properly authenticated and should not have been admitted.

The error in admitting evidence that is inadmissible is prejudicial when “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (*quoting, State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

The trial court's error in admitting the jailhouse recordings was not harmless here, because it was the only evidence presented by the State to establish that Sedano actually had telephone contact with Eaton on December 22, 23, 2017. If the court had not abused its discretion and admitted the tapes, the state would not have been able to proceed with the prosecution of the charges against Sedano.

Accordingly, Sedano’s convictions must be reversed.

3. SEDANO WAS DENIED HIS
CONSTITUTIONAL RIGHT TO A FAIR
TRIAL BY PROSECUTORIAL
MISCONDUCT.

The prosecutor argued to the jury that the telephone calls were made from Sedano's account. RP 188-89. This was not true - the account was Salvador's. RP 108. Following this argument, the prosecutor continued that Sedano and Eaton had a relationship: "You can just listen to these yourselves and hear that they're the same voices. You hear". RP 188-89. "You don't need anyone else to say that. You folks can put those pieces together yourselves even ignoring that and find that." RP 197. This argument suggested that the jury could decide the voice identification rather than requiring the state to meet its burden of proof.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999).

Prosecutors have a duty to see that those accused of a crime receive a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interest of justice, a prosecutor must

act impartially, seeking a verdict free of prejudice and based upon reason. *Charlton*, 90 Wn.2d at 664.

Prosecutorial misconduct may deprive a defendant of his 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 is required to show that 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. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice, there must be a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

However, when the defendant fails to object to the prosecutor's conduct or request a curative instruction at trial—as is the case here—the misconduct is reversible error if the defendant shows the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

a. Misstatement of Law

In this case, the prosecutor failed in his duties, and committed misconduct, when he misstated the law during closing argument. A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011); *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972).

When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *Walker*, 164 Wn. App. at 736; *State v. Gotcher*, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *Davenport*, 100 Wn.2d at 764.

Our Courts have never hesitated to reverse where misconduct denies the defendant a fair trial. *State v. Venegas*, 155 Wn. App. 507, 524-25, 527, 228 P.3d 813 (2010). In *Venegas*, the Court found flagrant misconduct where the prosecutor repeatedly attacked Venegas's presumption of innocence with improper argument. See *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (court would not hesitate to reverse for prosecutor's

misstatements of reasonable doubt standard if the trial court had not intervened to correct the mischaracterizations).

Here, the prosecutor committed flagrant misconduct when he misstated the law on the state's burden to prove its case by informing the jury to substitute their identification of the voices on the tape rather than requiring the state to prove the identity of the voices. The state not the jury must prove the elements of the crimes charged. *Winship*, 397 U.S. at 364; *Green*, 94 Wn.2d at 221. This means that the prosecutor's misstatement of the law also relieved the state of its burden of proof.

Furthermore the jury's ability to identify the voices in the tapes as "the same" does not prove the voices were Sedano's and Eaton's because the jury could not recognize the voices without having prior familiarity. But the prosecutor's argument instructed that the jury could identify the voices as "the same".

This comment is similar to the improper comment in *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). In *Anderson* the Court held improper the prosecutor's request that the jury "declare the truth," because "[a] jury's job is not to 'solve' a case" or "declare what happened on the day in question."

Anderson, 153 Wn. App. at 429. Rather, “the jury’s duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” *State v. Evans*, 163 Wn. App. 635, 644, 260 P.3d 934 (2011) (quoting *Anderson*, 153 Wn. App. at 429).

In *Anderson* the court held the comments improper but in light of the strength of the state’s case determined that *Anderson* did not establish prejudice. In *Evans* the prosecutor told the jury “to get to the truth” when the jury heard only state witnesses. The Court noted that “weighing witness credibility an adversarial context is appropriate when the jury hears both state and defense witnesses and conflicting evidence from the defense. *Evans*, 163 Wn. App. at 644.

But in *Evans*, the defense did not present any witnesses. The Court held this made the prosecutor’s argument improper because it “invited the jury to overlook any credibility issues with the State’s own witnesses by ‘[peeling] back [the] different layers of the onion to get to the truth”, presumably those parts of the witnesses’ testimony that supported the state’s case. *Evans*, 163 Wn. App. at 644.

The prosecutor also urged the jurors to “apply those elements and decide: Is [this] what happened? [I]s that not what happened.” *Evans*, 163 Wn. App. at 644-45. This comment “miscast the jurors’ role as one of determining what happened and not whether the State had met its burden of proof.” *Evans*, 163 Wn. App. at 645. The Court held that these arguments were both improper and prejudicial because they “suggested to the jury that it had an obligation to determine the truth and that it should disregard the less appealing parts of the State’s witnesses’ testimony.” *Evans*, 163 Wn. App. at 645. The Court held the comments to be both improper and prejudicial and reversed and remanded for a new trial where the victim did not testify, and the evidence was otherwise conflicted and a curative instruction likely would not have cured the misconduct. *Evans*, 163 Wn. App. at 647-48.

While the language used in this case differed, the result is the same. Here, the prosecutor exhorted the jury to determine guilt based on the prosecutor’s presenting a tape of voices it claimed to be Eaton’s and Sedano’s, rather than based on proof that the voices were Sedano’s and Eaton’s. The prosecutor’s improper argument to the jury was prejudicial because similar to *Evans*, the

state shifted the burden of proof to the jury rather than acknowledging the state's burden. Also, similar to *Evans*, here the defense did not present witnesses and the victim did not testify, thus encouraging the jury to overlook the weaknesses in the state's case in much the same manner the jury was unable to weight the credibility of state and defense witnesses where only state witnesses testified. *Evans*, 163 Wn. App. at 647-48.

Under *Evans*, this Court should reverse and remand for prejudicial prosecutorial misconduct because there is a substantial likelihood that the misconduct affected the jury verdict by the prosecutor's flagrant and ill-intentioned misstatement of law and facts. *Lindsay*, 180 Wn.2d at 430; *Evans*, 163 Wn. App. at 647-48.

b. Misstatement of Facts

Next, while counsel is given latitude in closing argument to draw and express reasonable inferences from the evidence, counsel may not mislead the jury by misstating the evidence; this is particularly true of a prosecutor—a representative of the court, who has a duty to see that the defendant receives a fair trial. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 704-05, 286 P.3d 673 (2012); *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). It is also misconduct for a prosecutor to make arguments

that introduce extraneous evidence not before the jury. *State v. Belgarde*, 110 Wn.2d 504, 516-17, 755 P.2d 174 (1988).

In *Glassman*, the prosecutor altered admitted evidence to influence the jury to find the defendant guilty. *Glassman*, 175 Wn.2d at 705. Specifically, the prosecutor put captions under a bloody, disheveled photographic image of Glassman that challenged his veracity. The Court held that “the prosecutor’s modification of photographs by adding captions was the equivalent of unadmitted evidence. There certainly was no photograph in evidence that asked [for example] ‘DO YOU BELIEVE HIM?’” *Glassman*, 175 Wn.2d at 706.

The Court held the altering evidence was prejudicial in the same manner as the admission of facts not in evidence because both involved the improper use of the “prestige associated with the prosecutor’s office [] [and] because of the fact-finding facilities presumably available to the office.” *Glassman*, 175 Wn.2d at 706.

In this case, the prosecutor during closing argument misinformed the jury that the voices on the calls came from Sedano’s account and informed the jury that they need not rely on the evidence but could just listen to the voices and determine they were

Sedano's. RP 188-89. During testimony, the state elicited uncontroverted testimony from Seabright that the account was Salvador's not Sedano's. RP 108.

By arguing to the jury that the account was Sedano's and the voices Sedano's and Eaton's, the prosecutor exhorted the jury to fill in the state's gap in evidence to find guilt based on facts not in evidence. This was flagrant ill-intentioned, prejudicial misconduct.

This Court should reverse and remand for prejudicial prosecutorial misconduct that could not have cured with an instruction. *Lindsay*, 180 Wn.2d at 430.

D. CONCLUSION

Mr. Sedano respectfully requests this Court reverse his conviction for insufficient evidence and in the alternative remand for a new trial based on the court's abuse of discretion which denied Sedano his right to a fair trial and based on prosecutorial misconduct which also denied Sedano his right to a fair trial.

DATED this 30th day of October 2018.

Respectfully submitted,



LISE ELLNER
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I, Lise Ellner, a person over the age of 18 years of age, served the Chelan County Prosecutor's Office prosecuting.attorney@co.chelan.wa.us and Benny Sedano, 1099 Ivan Morse Road, Manson, WA 98831 a true copy of the document to which this certificate is affixed on October 30, 2018. Service was made by electronically to the prosecutor and Benny Sedano by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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