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Division III
State of Washington
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No. 36467-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

JASON LEE PLANQUE,

Appellant.

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

The Honorable Judge Henry A. Rawson

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Mr. Planque.
2. The trial court abused its discretion in denying Mr. Planque's request for a residential drug offender sentencing alternative (DOSA) sentence.
3. The judgment and sentence contains an error that should be corrected: it lists the wrong statute for Mr. Planque's third degree assault conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Mr. Planque.

Issue 2: Whether trial court abused its discretion in denying Mr. Planque's request for a residential drug offender sentencing alternative (DOSA) sentence.

Issue 3: The judgment and sentence contains an error that should be corrected: it lists the wrong statute for Mr. Planque's third degree assault conviction.

C. STATEMENT OF THE CASE

Jason L. Planque lived with his mother, Sheri Thomson, and his grandmother, in Loomis, Washington. (RP 107, 145-146). Late one evening in November 2018, Mr. Planque came home intoxicated, and he was angry and yelling. (RP 108-111, 134, 146-147, 150-151, 153). Concerned about Mr. Planque's yelling, Ms. Thomson called 911. (RP 110-112). She informed the 911 operator Mr. Planque shoved her, but she later denied this occurred. (RP 112-113, 118).

Okanogan County Sheriff's Office Deputy Isaiah Holloway responded to Mr. Planque's residence following the 911 call. (RP 120, 122-123). Deputy Holloway, carrying a flashlight in his hand, contacted Mr. Planque outside of the residence. (RP 126-127, 140). According to Deputy Holloway, after using the flashlight to illuminate the scene, he saw a knife sheath on Mr. Planque's hip, and he could not tell if there was a knife in it or not. (RP 127). Deputy Holloway decided to detain Mr. Planque. (RP 128). While attempting to do so, Deputy Holloway claims Mr. Planque pushed him twice. (RP 129-131, 143). Deputy Holloway then decided to arrest Mr. Planque. (RP 131-132). According to Deputy Holloway, Mr. Planque was pulling his hands away as he attempted to handcuff him. (RP 132). Deputy Holloway was the only officer present during this encounter. (RP 125, 132-133, 153).

The State charged Mr. Planque with one count of third degree assault against Deputy Holloway, under RCW 9A.36.031(1)(g), and one count of resisting arrest.¹ (CP 16-17). The case proceeded to a jury trial. (RP 32-202). Three witnesses testified: Ms. Thomson, Deputy Holloway, and Mr. Planque. (RP 105-158).

¹ The State also charged Mr. Planque with one count of fourth degree assault, domestic violence, against Ms. Thomson. (CP 17). Mr. Planque was acquitted of this charge. (CP 164; RP 199). Therefore, this count is not on appeal here.

In addition to the facts stated above, Ms. Thomson testified that before she called 911, Mr. Planque was running up and down the stairs in their residence. (RP 110-112, 118).

Deputy Holloway testified that when he approached Mr. Planque, there was an obvious odor of intoxicants. (RP 134). He testified he told Mr. Planque he was going to detain him so he could investigate. (RP 128, 142, 144, 157). He testified he attempted to do so, and Mr. Planque pushed him twice. (RP 129-131, 143). Deputy Holloway testified Mr. Planque then stood in a more aggressive “bladed stance,” meaning one foot in front of the other. (RP 129-131). He testified he then hit Mr. Planque in the side of the face: “[s]o, at that point, you know, things are escalating and I used a closed fist strike to the left side of his face.” (RP 131).

Deputy Holloway testified when he hit Mr. Planque, Mr. Planque fell to the ground on his back, “so I grabbed one of his arms and I rolled him to his stomach to try to get him into a handcuffing position[,]” in order to arrest him. (RP 131-132). Deputy Holloway testified:

[The State:] And what happened when you were trying to get his hands?

[Deputy Holloway:] So, I got him on his stomach and I was on the left side of his body so I trapped his left arm against his body. I reached over and grabbed his right hand and I brought it to the small of his back and so I got my handcuffs out and I cuffed his right hand and as I did that, he was trying to pull his hand away, so I was pulling that hand in and I tried to get his left hand up to get him on his back so I could cuff him, but he kept trying to pull is

hands apart so I couldn't handcuff him. So, once I kind of made a quick little movement to get his hands closer, I just snapped the cuffs on him real quick and as soon as I did that, he kept trying to grab my hands and he's trying to move around more still like he's still trying to get out from off --- cause at that point, one of my knees was on his back and I'm trying, you know, to take control of it at that point.

[The State:] And what was his demeanor?

[Deputy Holloway:] He was yelling and cussing, yeah.

[The State:] Okay, was he indicating to you that you were hurting him?

[Deputy Holloway:] No.

(RP 132).

Deputy Holloway testified Mr. Planque was able to walk to his patrol car, and he did not appear to have any issues walking there. (RP 135).

Mr. Planque testified in his own defense. (RP 145-157). He testified he started drinking beer around noon that day. (RP 146). Mr. Planque testified he later went night fishing, during which he consumed "a lot of vodka." (RP 147). He testified he returned home at approximately 11:00 p.m., and he and Ms. Thomson had a verbal disagreement, centered around his drinking. (RP 147, 149-151). Mr. Planque testified he went out into the yard of the residence "just trying to remove myself from the situation and calm down." (RP 151).

Mr. Planque testified the following occurred when Deputy Holloway entered the yard:

[Mr. Planque:] I heard Deputy Holloway coming down through the yard, you know, I saw he had come through the gate and was coming down the stairs. He identified himself as --- he identified himself Okanogan Sheriff's Office, [Mr. Planque], why don't you come over here or he said why don't you come up here and talk to

me. I approached him. I hobbled up to him and I approached him and he shined what must have been, it was very bright, it must have been a tactical flashlight, into my face. I felt a solid blow and I was on the ground.

[Defense Counsel]: And then what happened?

[Mr. Planque:] He grabbed a hold of my arms, I tried to explain, you can't rip my arms around like that. It will dislocate my shoulders or pop my elbows.

[Defense counsel:] And then what happened?

[Mr. Planque:] He kept on doing it. He put a knee on my back, shoved my face into, bloodied my lip and chipped the tooth on my partial and when I saw myself the next day I had a full blown black eye.

[Defense counsel]: Alright, okay.

[Mr. Planque]: He cuffed me.

(RP 152).

Mr. Planque testified he does not remember Deputy Holloway telling him he was going to detain him. (RP 154-155). Mr. Planque denied pushing Deputy Holloway. (RP 155). He testified if he did try to push Deputy Holloway, he would have popped his arm out of the socket. (RP 155). The State then asked Mr. Planque if he had any medical documentation with him, and he testified he did not. (RP 155).

Mr. Planque testified he cannot walk very well, due to an injury he sustained to his left leg and foot. (RP 146, 148). He also testified he has other physical limitations:

There's many. I've got - - I was run over in 2007 and you can't - - I can't pull my arms up above my arm and I don't - - my elbows are both snapped off. My sternum crushed. So, I can't even hardly swing a hammer.

(RP 150).

Mr. Planque testified he is able to limp up and down the stairs in his residence, because he has to, given that it is his home. (RP 156).

In rebuttal, Deputy Holloway testified that Mr. Planque did not advise him of any medical or physical issues that would prevent him from being handcuffed. (RP 157-158).

In his closing argument, defense counsel argued as follows regarding Mr. Planque's physical limitations:

But, by way of argument, we have divergent testimony. Deputy Holloway described sort of --- he attempted one, his handcuffing technique and then he attempted an arm bar and then --- and then he did tell us, he did not de-escalate the situation, but he chose to escalate the situation and struck the subject along side the head, knocked him to the ground, proceeded to get knee control with the subject belly down, handcuffed him. Examining this for well, Mr. Planque's ability to gravel against a seasoned law enforcement officer on the top of his game and [Mr. Planque] has a broken ankle, broken shoulders, broken elbows and with these injuries and size difference, part of your duty during deliberations is to determine whether this actually occurred. Both accounts share the similarity that he received a blow to the head, knocked him to the ground. From the prone position, on the ground, he was cuffed.

.....

[T]he arrest occurred when Deputy Holloway had probable cause to believe that he had been assaulted or that the officer had been assaulted and from there we're looking at resisting arrest, basically pulling away from the cuffs in the knee control position, belly down. And, the simple physical fact is that with bad shoulders and bad elbows, that's not a position for [Mr. Planque]. That's not resisting arrest.

(RP 189-191).

In response, in its rebuttal closing argument, the State argued:

Now, there has been no evidence presented other than the defendant's statements that he has these medical issues. There has been no medical documentation presented. There was no inquiry of his mom who might know some of these issues. What'd mom say? She said he was running up and down the stairs. He was all over yelling at her, going to the basement that was, as she said, several stairs and then another set of stairs that's just four stairs, going up and down all of these.

....

He also testified, Deputy Holloway did, that not once did the defendant say oh, that hurts, don't do that because I've got bad elbows, bad shoulders, bad legs, bad ankles. No. There was absolutely no testimony that he said any of that to law enforcement.

....

And, I remind you, there was no testimony that after that when he's being walked to the car, transferred, did he once say anything about this hurts me because I have injuries.

(RP 193-195).

Defense counsel did not object to this argument. (RP 193-195).

The jury found Mr. Planque guilty on both counts. (CP 164; RP 199).

At sentencing, Mr. Planque requested the trial court impose a residential drug offender sentencing alternative (DOSA) sentence. (RP 211-212). Ms.

Thomson submitted a letter to the trial court in support of a DOSA sentence. (CP 201; RP 211-212). She stated that “[i]n his 47 years, records show that alcohol had adversely affected half of his life[,]” and “[h]e has tried many times to regain sobriety and succeeded for a time only to fail again.” (CP 201).

Mr. Planque told the trial court:

In over the course of my life, if you look at my criminal history, every single element of it is the bottom line has always been alcohol. It's consistent. I've had seven DUIs in my lifetime. Everything I've done is bottom line is because I've got fallen off the wagon and haven't been able to control myself and I need help. I'm asking the Court to give me some help. The opportunity to get the appropriate help that I need. I'm not getting any younger.

(RP 214-215).

Mr. Planque informed the trial court he had voluntary went to treatment a couple of times and:

. . . I asked for help and at that point in my life I really didn't care what happened to me. These days I have a lot more responsibility and things to take care of. I have a home now to take care [sic]. I have people I'm responsible for and I want to be a better person.

(RP 215, 217).

The State opposed the DOSA sentence request. (RP 213).

The trial court denied Mr. Planque's request for a DOSA sentence:

From the Court's perspective, as much as I view your history as such, the Court also heard the testimony from the trial, as such. Your mother's now statement that I just received and reviewed is an expression she feels that you need help. The Court has not received any assessment from anyone to basically determine whether your amenable to treatment or not, as such. Again, from my perspective I'm not really one to give up on anybody, but I also think that there's a point where it has to come from you and the way I see here is that you've had numerous encounters with the courts over the years that all relate to alcohol and I guess I really want to know from you, why today? Why today are you asking for help today? Why or what did you tell the judges in those other seven DUIs when you were charged and either found guilty or plead guilty to alcohol related offenses? Why, when you appeared before the judges and were

found guilty on harassment of individual, domestic violence, tags on those cases, why --- why didn't you ask the judge at that time for help, or did you?

....

[T]hose are all things that are good cause it has to come from you. And, there's programs out there that you can voluntarily enter. And, you're asking the Court to order you to do certain things and these are still things that I feel have to come from you. You have to dig deep. If you really want it, you can do it. This Court's not inclined to grant the DOSA as requested today even though your mother is asking that you get help. I think the help really comes from you and I don't have an assessment that you're amenable to treatment, as such. Until such time that's adequately provided to the Court and a program is actually laid out.

....

And, you're asking the Court to order something and I'm not gonna order. I want to find that you have to do it voluntarily. It has to come from you and so from the Court's perspective I'm gonna deny the request for your DOSA.

(RP 216-218).

The trial court imposed a standard range sentence. (CP 189-199; RP 219-222). The trial court entered a finding that Mr. Planque has a chemical dependency that contributed to the offenses. (CP 190; RP 221). The trial court also imposed 12 months community custody, with a condition that Mr. Planque undergo an evaluation for treatment for substance use disorder, and follow any recommended treatment. (CP 194; RP 219, 221-222).

The judgment and sentence states Mr. Planque was found guilty of third degree assault under RCW 9A.36.030(1)(g). (CP 189).

Mr. Planque appealed. (CP 202-213).

D. ARGUMENT

Issue 1: Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Mr. Planque.

In its rebuttal closing argument, the State committed misconduct by shifting the burden of proof to Mr. Planque. The misconduct was prejudicial and incurable, and therefore, requires a new trial.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor's statements are improper.”).

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.” *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction

would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455).

“Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

“A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt.” *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). “A prosecutor generally cannot comment on the defendant's failure to present evidence because the defendant has no duty to present evidence.” *Thorgerson*, 172 Wn.2d at 453.

Accordingly, a prosecutor commits misconduct by making arguments designed to shift the burden of proof onto the accused to “disprove the state's case.” *Fleming*, 83 Wn. App. at 214.

“A prosecutor may commit misconduct by mentioning during closing argument that the defense failed to present witnesses or by stating that the jury should find the defendant guilty based simply on the defendant's failure to present evidence to support his defense theory.” *State v. Sells*, 166 Wash. App. 918, 930, 271 P.3d 952, 958 (2012) (citing *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009)). But, “[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the

defense.” *Id.* (quoting *Jackson*, 150 Wn. App. at 885-886). “It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747, 786 (1994).

Here, the State did not merely argue the evidence presented at trial does not support the defense theory of the case. Instead, the State impermissibly commented on Mr. Planque’s failure to present evidence. *See Thorgerson*, 172 Wn.2d at 453; *see also Sells*, 166 Wash. App. at 930 (citing *Jackson*, 150 Wn. App. at 885). In its rebuttal closing argument, the State argued:

Now, *there has been no evidence presented* other than the defendant’s statements that he has these medical issues. *There has been no medical documentation presented. There was no inquiry of his mom who might know some of these issues.*

....

He also testified, Deputy Holloway did, that not once did the defendant say oh, that hurts, don’t do that because I’ve got bad elbows, bad shoulders, bad legs, bad ankles. No. *There was absolutely no testimony that he said any of that to law enforcement.*

....

And, I remind you, *there was no testimony* that after that when he’s being walked to the car, transferred, did he once say anything about this hurts me because I have injuries.

(RP 193-195) (emphasis added).

Defense counsel did not object to this argument. (RP 193-195).

The State impermissibly commented on Mr. Planque’s failure to present evidence to support his theory that he did not assault Deputy Holloway or resist arrest, due to his physical condition. *See Thorgerson*, 172 Wn.2d at 453; *see also Sells*, 166 Wash. App. at 930 (citing *Jackson*, 150 Wn. App. at 885). The State

impermissibly shifted the burden of proof to Mr. Planque to disprove the events occurred in the manner testified to by Deputy Holloway.

In *Fleming*, the prosecutor improperly shifted the burden of proof by arguing the jury should find the accused guilty because there was no evidence that the alleged victim had fabricated the events or was confused about what had happened. *Fleming*, 83 Wn. App. at 214-15.

In *State v. French*, the State argued in closing, “the defense has given you absolutely no reason to be able to conclude the defendant didn’t do this.” *State v. French*, 101 Wn. App. 380, 383, 386, 4 P.3d 857 (2000). The court held this comment improperly suggested the defendant had a duty to present evidence. *Id.* at 386.

Similarly, here, the prosecutor argued that the jury should convict Mr. Planque because there was no evidence that he had the medical issues he testified to, to support his theory that he did not assault Deputy Holloway or resist arrest due to his physical condition. (RP 193-195). Any evidence of that nature, however, would have had to be presented by the defense. Therefore, the State improperly shifted the burden of proof to Mr. Planque. The prosecutor’s argument was improper.

The State’s argument prejudiced Mr. Planque. *See Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). This case was a credibility contest between Deputy Holloway and Mr. Planque. When a case is largely a credibility

contest, a prosecutor's improper arguments can easily serve as the deciding factor. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011). Further, "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *Fleming*, 83 Wn. App. at 215. The State's evidence was not overwhelming. Only Deputy Holloway and Mr. Planque were present for the incident, and Mr. Planque denied that both an assault of Deputy Holloway and resisting arrest. (RP 125, 132-133, 152-155). Therefore, the prosecutor's comments had a substantial likelihood of affecting the jury verdict.

The State's 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); see also *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). No curative instruction would have alleviated the belief in the jurors' minds that Mr. Planque was required to disprove the events occurred as Deputy Holloway testified. The error was incurable, given the fact that the case hinged upon the credibility of the two eyewitnesses (Deputy Holloway and Mr. Planque) and the evidence of Mr. Planque's guilt was not overwhelming.

The State committed misconduct in its closing arguments that was prejudicial and incurable, by shifting the burden of proof to Mr. Planque. This Court should reverse his convictions and remand for a new trial.

Issue 2: Whether trial court abused its discretion in denying Mr. Planque’s request for a residential drug offender sentencing alternative (DOSA) sentence.

At sentencing, Mr. Planque requested the trial court impose a residential drug offender sentencing alternative (DOSA) sentence. (RP 211-212). The trial court declined to impose a DOSA sentence. (RP 216-218). The trial court abused its discretion in denying Mr. Planque’s request for a DOSA sentence because it misunderstood the law and its sentencing authority when it denied the request.

“The legislature created a drug offender sentencing alternative to enable eligible offenders a chance for substance abuse treatment and a reduced sentence.” *State v. Williams*, 199 Wn. App. 99, 112, 398 P.3d 1150 (2017). A DOSA sentence is available for all felonies other than violent offenses, sex offenses, crimes committed while armed with a deadly weapon, and felony driving or physical control while intoxicated. *See* RCW 9.94A.660(1)(a)-(c).

“A trial court has discretion to use the alternative.” *Williams*, 199 Wn. App. at 112 (citing RCW 9.94A.660(3)). Generally, the decision of whether to grant a sentencing alternative, such as DOSA, is not reviewable on appeal. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). “However, an offender may always challenge the procedure by which a sentence was imposed.” *Id.* An

offender has the right to challenge the “underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.” *State v. White*, 123 Wn. App. 106, 113-114, 97 P.3d 34 (2004) (quoting *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)). Appellate review is permitted for correction of legal errors or abuses of discretion by the sentencing court. *Id.* at 114.

“[A] trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.* (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). In addition, a trial court abuses its discretion if it erroneously believes it does not have discretion. *State v. Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

“With regard to a DOSA, a court abuses its discretion if it refuses to consider the alternative or refuses to consider the opinion for a certain class of offenders.” *Williams*, 199 Wn. App. at 112 (citing *Grayson*, 154 Wn.2d at 342). “A trial court also abuses its discretion if it exercises discretion on an impermissible basis, such as by denying the sentencing alternative because of the defendant’s race, sex, or religion. *Id.* (citing *State v. Khanteechit*, 101 Wn. App. 137, 138 n.2, 5 P.3d 727 (2000)).

To assist the trial court in determining whether to impose a DOSA, “the court *may order* the department to complete either or both a risk assessment report and a chemical dependency screening report” RCW 9.94A.660(4)

(emphasis added). In addition, “[i]f the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court *may order* an examination of the offender by the department.” RCW 9.94A.660(5)(a) (emphasis added). This Court has held “RCW 9.94A.660 is clear: a trial court need not order or consider any report in deciding whether an offender is an appropriate candidate for an alternative sentence.” *State v. Guerrero*, 163 Wn. App. 773, 778, 261 P.3d 197 (2011).

Here, the trial court abused its discretion because it sentenced Mr. Planque under the mistaken belief it could not impose a DOSA without a report stating that he is amenable to treatment. (RP 216-217). The trial court denied Mr. Planque’s request for a DOSA sentence because such a report was not provided to the court:

The Court has not received any assessment from anyone to basically determine whether your amenable to treatment or not, as such.

....

This Court’s not inclined to grant the DOSA as requested today even though your mother is asking that you get help. I think the help really comes from you and I don’t have an assessment that you’re amenable to treatment, as such. *Until such time that’s adequately provided to the Court and a program is actually laid out.*

(RP 216-217) (emphasis added).

However, the trial court was not required to order or consider any report in deciding whether Mr. Planque is an appropriate candidate for a DOSA sentence. *See* RCW 9.94A.660(4); RCW 9.94A.660(5)(a); *Guerrero*, 163 Wn. App. at 778.

It appears that Mr. Planque was statutorily eligible for a DOSA sentence. *See* RCW 9.94A.660(1). Furthermore, Mr. Planque presented evidence of alcohol use, including at the time of the crimes charged here. (CP 201; RP 111, 134, 146-147, 214-215); *cf. Williams*, 199 Wn. App. at 112 (finding the trial court did not abuse its discretion in denying the defendant's DOSA request, where he presented no evidence of drug use or that substance abuse led to his crimes). The trial court acknowledged that Mr. Planque's issues with alcohol led to his crimes, by entering a finding that he has a chemical dependency that contributed to the offenses, and imposing a community custody condition requiring Mr. Planque to undergo an evaluation for treatment for substance use disorder and follow any recommended treatment. (CP 190, 194; RP 219, 221-222).

Although the trial court mentioned Mr. Planque's criminal history when denying his request for a DOSA sentence, it did not state this as the basis for denying his DOSA request. (RP 216-218). Instead, the trial court merely questioned why Mr. Planque had not asked for court-ordered treatment previously. (RP 216-217). The trial court's basis for denying Mr. Planque's DOSA request was the lack of a report stating that he is amenable to treatment. (RP 216-217).

The trial court abused its discretion in denying Mr. Planque's request for a residential DOSA sentence, because it did so under the mistaken belief it could not impose a DOSA sentence without a report stating that Mr. Planque is

amenable to treatment. Given the evidence of alcohol use, including at the time of the crimes charged here, and the trial court's acknowledgment of such use, it is not clear the trial court would have imposed the same sentence had it correctly understood the law and its sentencing authority. This case should be reversed and remand for resentencing.

Issue 3: The judgment and sentence contains an error that should be corrected: it lists the wrong statute for Mr. Planque's third degree assault conviction.

Mr. Planque was convicted of third degree assault under RCW 9A.36.031(1)(g). (CP 16-17, 145, 164; RP 199). However, the judgment and sentence states Mr. Planque was found guilty of third degree assault under a different statute, RCW 9A.36.030(1)(g). (CP 189).

Mr. Planque was not convicted of third degree assault under RCW 9A.36.030(1)(g). (CP 16-17, 145, 164; RP 199). RCW 9A.36.030 was repealed effective July 1, 1988, and the crime here occurred in 2018. *See* Laws of 1986, ch. 257, § 9. Therefore, this court should remand this case for correction of the judgment and sentence to state Mr. Planque was found guilty of third degree assault under RCW 9A.36.031(1)(g), the statutory provision charged. *See* CP 16; *see also e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (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).

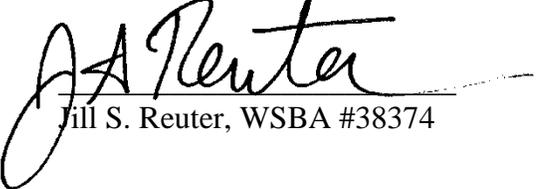
E. CONCLUSION

This case should be reversed and remanded for a new trial because the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Mr. Planque.

In the alternative, the trial court abused its discretion in denying Mr. Planque's request for a residential DOSA sentence. This case should be reversed and remand for resentencing.

The judgment and sentence should also be corrected to state Mr. Planque was found guilty of third degree assault under RCW 9A.36.031(1)(g), rather than RCW 9A.36.030(1)(g).

Respectfully submitted this 26th day of April, 2019.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

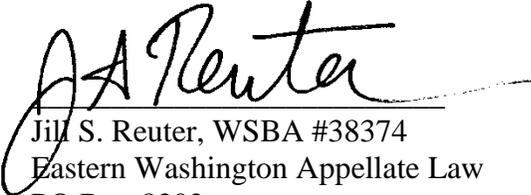
STATE OF WASHINGTON) COA No. 36467-4-III
Plaintiff/Respondent)
vs.) Okanogan Co. No. 18-1-00335-9
)
JASON LEE PLANQUE)
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 26, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Jason Lee Planque DOC #847901
Airway Heights Corrections Center
PO Box 2049
Airway Heights WA 99001

Having obtained prior permission, I also served a copy on the Respondent at anoma@co.okanogan.wa.us and sfield@co.okanogan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 26th day of April, 2019.


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