

FILED
Court of Appeals
Division III
State of Washington
3/23/2020 2:32 PM

No. 36832-7-III
Whitman County Superior Court No. 19-1-45-38

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Respondent

v.

Vladimir Borisov, Appellant

CORRECTED BRIEF OF RESPONDENT

Attorney for Respondent

Wendy Lierman
Senior Deputy Prosecutor
Whitman County
WSBA No. 46963

PO Box 30
Colfax, WA 99111-0030
(509) 397-6250

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....**III**

ISSUES.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....7

I. THE PROSECUTOR’S CLOSING ARGUMENT REGARDING THE VOLUNTARY INTOXICATION DEFENSE DID NOT CONSTITUTE MISCONDUCT.....7

 A. The prosecutor’s argument was a proper analysis of the evidence at trial to the law of the case.8

 B. The appellant has failed to show the alleged misconduct was prejudicial.12

 C. The appellant waived the error because he did not object at trial and the appellant has failed to prove that prosecutor’s conduct was flagrant and ill intentioned.....14

 D. The defendant has failed to show that a curative instruction would not have obviated any prejudice.....16

 E. The Appellant cannot meet his burden of Proof for an ineffective assistance of counsel claim.....17

II. IT WAS ERROR TO SENTENCE THE APPELLANT TO 364 DAYS IN JAIL.18

III. THE REQUIREMENT TO OBTAIN A SUBSTANCE ABUSE
EVALUATION AND COMPLY WITH RECOMMENDED
TREATMENT SHOULD BE STRICKEN19

IV. THE REQUIREMENT TO READ BOOKS AND REPORT ON
DOMESTIC VIOLENCE SHOULD BE STRICKEN.19

CONCLUSION20

TABLE OF AUTHORITIES

<u>Supreme Court Cases</u>	<u>Page</u>
<i>Strickland v. Washington</i> , 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	17
<u>Washington Cases</u>	<u>Page</u>
<i>In re Glasmann</i> , 175 Wn. 2d 696, 706, 286 P.3d 673, 678 (2012).....	14-15
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997).....	7, 8, 10
<i>State v. Deskins</i> , 180 Wn. 2d 68, 79, 322 P.3d 780, 785 (2014), <i>as amended</i> (June 5, 2014).....	19
<i>State v. Dhaliwal</i> , 150 Wn. 2d 559, 578, 79 P.3d 432, 442 (2003).....	7, 12, 16
<i>State v. Evans</i> , 96 Wn.2d 1, 5, 633 P.2d 83 (1981).....	7
<i>State v. Fleming</i> , 83 Wn. App. 209, 216, 921 P.2d 1076, 1079 (1996).	
<i>State v. Furman</i> , 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).....	7
<i>State v. Humphries</i> , 181 Wn.2d 708, 720, 336 P.3d 1121 (2014).....	17
<i>State v. Jones</i> , 144 Wn. App. 284, 290, 183 P.3d 307, 311 (2008).....	7

<u>Washington Cases Cont'd</u>	<u>Page</u>
<i>State v. Munoz-Rivera</i> , 190 Wn. App. 870, 893, 361 P.3d 182 (2015)....	19
<i>State v. Pirtle</i> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995).....	7, 12
<i>State v. Shelton</i> , 71 Wn. 2d 838, 843, 431 P.2d 201, 205 (1967).....	14

<u>Washington Pattern Jury Instructions</u>	<u>Page</u>
WPIC 10.01.....	12
WPIC 120.06	12
WPIC 18.10.....	10, 12
WPIC 35.23.02.....	12
WPIC 35.50.	12

<u>Statutes</u>	<u>Page</u>
RCW 9A.20.021(3).....	18
RCW 9A.36.031.....	9
RCW 9A.76.040.....	9, 18

RESTATEMENT OF THE ISSUES

- I. Did the prosecutor commit misconduct when he rebutted Appellant's voluntary intoxication defense in closing argument?**
- II. Did the Court exceed its authority when it imposed 364 days in jail after being found guilty of resisting arrest?**
- III. May the court order a substance abuse evaluation and require him to comply with treatment?**
- IV. Would the requirement to read and report on books of domestic violence tend to prevent future crimes of the nature involved in this case?**

STATEMENT OF THE CASE

The Respondent adopts the Appellant's Statement of the Case and adds the following. The Judge read the following Jury Instructions to the jury verbatim: Instruction 6 and 7, the to convict instructions for Assault 3rd Degree on Officer Handley and Deputy Olin; Instruction 8, the to convict instruction for resisting arrest; Instruction 9, defining assault as "an intentional touching or striking or another person with unlawful force

that is harmful or offensive regardless of whether any physical injury is done to the person”; Instruction 10 defining Intent, which states “ A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime”; Instruction 13 the voluntary intoxication defense which states, “No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.”

VRP 198-201.

In closing argument the prosecutor addressed the Jury with the following:

Now on No. 1, we'll start with Joe Handley. That on or about the 28th day of February 2019 the defendant assaulted Joe Handley. --start with Cory Alcantar's testimony that he went to this residence and -- he went up, spoke to people there -- Mr. Borisov was there, -- his -- his wife was there. He learned that there was a filing for a divorce and there was an issue that she -- didn't want her there. So, -- says he talks to the parties, he talks to the defendant, and he -- the defendant (inaudible) to mention that he doesn't like men in uniform, and he hates cops. Okay. --says that. He also says -- he says to come knock on the door. He says, “Talk to her, come knock on my door,” and Cory Alcantar says, “You want me to go up the stairs and (inaudible) your residence,” and he - - tells them -- “someone comes up these stairs I will kill them.” --telling them he doesn't like law enforcement, he's telling what -- happen to law enforcement when they do things he doesn't want them to do, this is the reaction. Later on when -- after being invited on the porch, he invites Cory on the porch and Cory leaves, talks to the wife, he says,

"Come knock on my door -- done talking to her." Off. Handley gets there, he goes up on the porch and he knocks on the door, as -- suggested, and -- you've seen the video from there. Mr. Borisov comes out and starts having a conversation. --not "Get off my porch, you're not allowed here," no. He knocks on the door, "Let's talk." They start talking about the issue -- Both officers have testified as to what they've seen so far. Cory Alcantar says he's seen him drink -- what he believed to be hard alcohol out of -- bottle. (Inaudible) bottle there, he's admitted to drinking, he's drinking something out of a -- bottle -- dark liquid out of a clear bottle. Testified as to the smell of alcohol, testified that he had to use things to hold himself up. His attitude is fluctuating. He's getting angry and then he'll be calm, and then he'll -- outburst -- And then you see these outbursts in the video. You see him -- realize the door's open and just slam it as hard as he can, like he's -- Something's going on, it's not quite right. And the officers believe this. You heard Joe Handley ask him, "You sober?" And he said, "Yeah, I - - No -- been drinking, drinking a little tonight," it's okay. You know, (inaudible), -- "Well, anything else? Any drugs?" I mean, -- names off a couple drugs, and the attitude changes. This is one of those mood swings. You see him. His response is "Fuck you." "Get off my porch," "Get the fuck off my porch," and he grabs--. Now, these videos are in evidence. I -- play it for you again so you can watch, but I'd ask you to watch the time length between when he first tells him, "F you," and then "Get off my porch." That's the direction. "You're not allowed on my porch any more" -- to when he actually makes contact.

...

[Officer Handley] gets pushed back harder. And this time with the statement, "You want me to crack you over the head with this bottle." Now these statements I bring up they're important because -- we need to look at the definition of assault. And the definition of assault is in Instruction No. 9.

And an assault is an intentional touching or striking of another person with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person. Now there was no testimony as to whether this hurt Off. Handley, or the scuffle hurt. But he touched him and he grabbed him. After saying, "F you," "Get the F off my porch," and "You want me to crack you with the bottle." These show intent. These show why he's acting the way he is. He's already said, "I don't like people in uniform," "I hate cops." He's -- telling -- "Get off my porch" while he's grabbing him. He's using obscenities. And then he threatens to crack him over the head with a bottle. --says to you that he intended to grab him, he intended for this to be harmful, and offensive. You can tell this by his language, his demeanor that night. He's unhappy. He -- he doesn't like cops but he wants to use cops that night, for what's going on. He wants to make sure his wife knows she's got to leave at a certain time, that's why they're there. But he wants to make it clear that, "You" -- "I can" -- "(inaudible) killed if you come in here," "I don't like you," and -- second, he gets started asking some incriminating questions, -- he thinks he can change the situation and he doesn't -- any time to react before he's physically touching somebody. Going back to No. 7, this is -- this is for Count 2. This is the one concerning Chris Olin. Now, you've already heard these statements. Chris Olin's also law enforcement. He doesn't like law enforcement. He doesn't like men in uniform, hates cops. He's being put in a car, he's going to be taken away from -- son. His wife's there, he doesn't want her there. You heard his testimony about a boy inside. He's going to be taken (inaudible). He doesn't -- he doesn't think he should be arrested, (inaudible) -- you can tell that, "Stop," "Stop," "Stop," "Stop," "Stop." I don't know how many times he says it. He doesn't want to be arrested. As he's being put in the car, -- doesn't like it. He -- you can hear it in the video, you can -- hear from all of this testimony, you hear

(inaudible). He doesn't know what's happening in his car so he opens up his car and tells him to stop. You can hear his language here. He says, "Give me" -- "Give me your word as a man," "Give me your word that I'll be back here at nine." He says, "Well, I can't say -- back here at nine but we'll make sure your kid's safe." "Nope, give me your word," and then -- said -- "'Cause you're not a man, you're a piece of shit fuckin' cop." That's his words. As he tries to get out of the vehicle again, is pushed back. This time, kicks him in the leg. He's talking to him. It's calm. You can watch what he said. It happened. You can hear him say, "Don't touch me." You can hear -- Cory Alcantar respond, "Don't kick Olin." His leg moves back -- he sees him move back (inaudible). Testifies that (inaudible) got kicked in the hip. Again, -- got to prove that it's intentional. You look at what he said, well, right around the same time. The names he calls him, doesn't like that he's a cop, -- doesn't like that he won't get him back there. -- suggest to you that both those have been proven.

VRP 206-211. A little while later the prosecutor addresses the voluntary intoxication defense. He argues:

No. 13, this is voluntary intoxication. No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Now the definition of assault, it has to be an intentional touching or striking that is harmful or offensive. Look at the things he did that night. He called the police. He talked to the police. He asked them questions, they asked him questions. He responded, (inaudible). He had some (inaudible). There's no question he had been drinking. He admitted to it. There's a bottle of alcohol out there. He smells like alcohol, and is holding onto things. No question that

alcohol's at play. But it's got to be enough alcohol to destroy the intent to do something. Well, he's worried about his -- his wife being there; she's not supposed to be there, according to him. He -- his intention is to make sure she's not there. So, -- what does he do? He calls law enforcement. When he doesn't think the cops should be on his property any more he intends to get 'em off. He -- What does he do? He gets mad. It's not an appropriate response to start yelling and screaming and shoving someone the second they ask something you don't think is right. But he does. He intends to get them off the property. His language, he repeats himself, some of the words are out of order. There's -- there's some signs of intoxication here. But it's the state's position that it's not enough to not form that intent to commit these crimes. That's just not there. He did several things that night. He's able to -- he is to stand, he is able to talk. Slurring, there's other signs of belligerence, but just not enough. You don't have to find that the alcohol -- was enough to exacerbate, or to make him angry, or that he's violent when he's drunk. That's not the issue here. It has to be so much that he can't form an intent to do something. That's just not here.

VRP at 215- 217. He then goes on to discuss the resisting arrest and describes that it took a long time to gets the cuffs on because Borisov is flexing and fighting them and screaming stop, and that he has to be dragged to the patrol car because he will not walk there, will not let law enforcement close the door of the car, and kicks the car. VRP at 218. The prosecutor suggests that every element has been met. VRP at 218. He then plays the video of the altercations for the jury. *Id.* at 218-222.

ARGUMENT

I. THE PROSECUTOR'S CLOSING ARGUMENT REGARDING THE VOLUNTARY INTOXICATION DEFENSE DID NOT CONSTITUTE MISCONDUCT.

The prosecutor did not commit prosecutorial misconduct.

Appellant bears the burden of first proving that misconduct occurred and then proving that the conduct had a prejudicial effect. *State v. Dhaliwal*, 150 Wn. 2d 559, 578, 79 P.3d 432, 442 (2003)(citing *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). The reviewing court looks at the prosecutor's entire argument, evidence the prosecutor discusses in his argument, the case's issues, and the jury instructions when analyzing alleged improper statements. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Only if the Appellant shows that the allegedly improper statements created a substantial likelihood that the misconduct affected the verdict is prejudice established. *State v. Pirtle*, 127 Wn. 2d at 672. (citing *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981)).

Furthermore, prosecutors have "wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307, 311 (2008).

"Failure to object to an improper comment constitutes waiver of

error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. *State v. Brown*, 132 Wn. 2d at 561. *as amended* (Aug. 13, 1997). If the error could have been obviated with a curative instruction that defense counsel failed to request then reversal is not required. *Id.* In this case, Appellant has not met any of his burdens.

A. The prosecutor's argument was a proper application of the evidence presented at trial to the law as set forth in the jury instructions.

Appellant misstates the State's burden for proving assault and resisting arrest and mischaracterizes the prosecutor's argument. In so doing he erroneously argues that the prosecutor's closing argument constituted misconduct. Appellant argues, "A person can have the intent to do all sorts of non-criminal things, like walking and talking, but still lack the intent to commit a crime. The required mental state is the intent to commit the crime, not the intent to do something else" and "[t]he prosecutor in effect told the jury that it should find Borisov had criminal intent if he was capable of forming the intent to do anything." Appellant's Brief at 12. The State is not required to prove that Appellant intended to commit a crime, but it has to prove Appellant intended to do some act, which in the case of assault that he intentionally touched or struck another person and in the case of resisting arrest that he intentionally prevented or attempted to

prevent a peace officer from arresting him. RCW 9A.36.031 and 9A.76.040. The prosecutor did not in effect argue that if Borisov intended to do anything then the jury should find he had criminal intent. Nor did the Prosecutor argue, as alleged by Appellant, that the jury should find Borisov intended to commit the crimes because he was able to stand and talk. What the prosecutor did argue was that because Borisov was able to do those things he had not consumed so much alcohol that he lacked the ability to form an intent to do something. The prosecutor had actually argued earlier that Borisov formed the intent to assault Officer Handley because he intentionally touched him in an effort to forcefully remove him from the porch and he argued that he intentionally lashed out at Deputy Olin because he was being taken to jail and away from his son.

The Prosecutor did not misstate the law. The prosecutor stated, “But it’s the state’s position that it’s not enough to not form that intent to commit these crimes.” That is an accurate statement of the State’s position regarding the voluntary intoxication defense Appellant raised and it does not misstate the law. The other two references the prosecutor makes regarding the “intent to do something” is obviously in regards to the intent to commit the three separate crimes for which he was charged: two counts of assault third degree and one count of resisting arrest.

The Court has to look at the argument as a whole, at the jury instructions, and at the evidence the prosecutor discusses. *State v. Brown*, 132 Wn.2d at 561. The prosecutor in his argument drew the jury's attention to the voluntary intoxication instruction and read the instruction which properly stated the defense of involuntary intoxication. WPIC 18.10. The prosecutor's references to Borisov being able to stand and being able to talk is both an argument that the degree of Borisov's intoxication was not enough to prevent him from forming the intent to commit the crimes for which they were in trial and were a reference to the statements he made about hating cops and threatening to hit the officer with a bottle and his being able to get into a physical confrontation with law enforcement. Earlier in closing argument the prosecutor argued what evidence supported a finding that Borisov intended to assault Officer Handley. The prosecutor had listed the verbally offensive/aggressive language Borisov used (how he hated cops, would kill them if they came in his house, and threatening to hit Ofc. Handley with a bottle) had described his behavior (pushing/ grabbing the officer) and had argued that was evidence that showed Borisov intentionally grabbed Officer Handley to forcibly remove him from the porch and intending it to be harmful and offensive. The prosecutor had then went on to describe Borisov's comments and behavior when in Deputy Olin's car (calling him a piece of

shit cop, saying he does not like men in uniform, telling the officer repeatedly to stop) before Borisov allegedly assaulted Deputy Olin, and again argued how this showed Borisov's intent to kick Deputy Olin. Clearly when the prosecutor then later rebutted the voluntary intoxication defense the prosecutor's argument was an abbreviated rehash of his earlier extensive argument when discussing the to convict instructions for the assault charges arguing, "When [Borisov] doesn't think the cops should be on his property any more he intends to get 'em off. He-What does he do? He gets mad. It's not an appropriate response to start yelling and screaming and shoving someone the second they ask something you don't think is right. But he does. He intends to get them off the property." The prosecutor's actual argument therefore is that Borisov intended to get Officer Handley off his property by physically removing him from the property and in so doing Borisov intentionally assaulted Officer Handley and that Borisov was angry at Deputy Olin for arresting him and taking him away from his son, so he intentionally (allegedly) kicked Deputy Olin. This argument was proper because the State has "wide latitude" to draw inferences from evidence and to argue those inferences to the jury. So when considering the prosecutor's argument as a whole he did not commit misconduct because he properly argued that Borisov formed the intent to assault the officers and to resist arrest.

The Appellant has not cited a single case where a similar argument to the one the prosecutor made in this case was found to be a misstatement of the law let alone finding the argument to be misconduct. That burden is on the Appellant. Because he has failed to prove that the prosecutor committed misconduct the Court should affirm Borisov's convictions.

B. The appellant has failed to show the alleged misconduct was prejudicial.

Even if the Court were to find that misconduct occurred Appellant has not proved that the misconduct was prejudicial. Appellant has failed to show how the prosecutor's argument "created a substantial likelihood" that the prosecutor's alleged misconduct affected the verdict. Both of those burdens fall on the Appellant. *State v. Dhaliwal*, 150 Wn. 2d at 578; *State v. Pirtle*, 127 Wn. 2d at 672. The jury was given and read the Jury Instruction on Voluntary Intoxication, the Jury Instruction which defined assault as an intentional touch or strike, the to convict instruction for resisting which states the defendant must act intentionally, the to convict instructions for both assaults, and the instruction which defines intent. All these instructions were proper and there is no assignment of error to them. WPICs 18.10, 35.23.03, 120.06, 35.50 and 10.01.

The jury heard the testimony about Appellant's actions and demeanor and saw the altercation between Officer Handley and saw how Appellant resisted arrest. The Jury also heard extensive argument from the prosecutor of all of Borisov's verbal comments and behavior that showed his intent to assault and resist the officers because he did not like "cops" and did not want to be arrested and taken away from his son. The most telling evidence that the prosecutor's argument did not create a substantial likelihood that the verdict was effected is the fact that they acquitted Appellant of the Assault 3 charge against Officer Olin. Surely, if the misconduct was so prejudicial as to overwhelm the Jury they would have found Borisov guilty of all three counts and not acquitted him of one.

Given all the jury instructions, the evidence the Jury heard and saw during the trial, and the entirety of the prosecutor's arguments which addressed intent, the prosecutor's two lines about "the intent to do something" in regards to the voluntary intoxication instruction did not create a substantial likelihood that the jury ignored everything else to affect the verdicts that found Borisov guilty of two of the three charges.

//

//

C. The appellant waived the error because he did not object at trial and he has failed to prove that the prosecutor's conduct was flagrant and ill intentioned.

Appellant failed to object to the alleged misconduct at trial and in so doing waives the error because the argument, even were the Court to find it constituted misconduct, was not flagrant and ill intentioned.

Appellant argues that case law in existence before the trial at hand clearly defined the applicable law and warned against the alleged misconduct in this case, but fails to cite any case that has found the prosecutor's arguments at issue to be misconduct. Only one of the cases cited by Appellant in section 1a of his brief deal with voluntary intoxication and prosecutorial misconduct and that is the *Shelton* case where the Court found it was misconduct for the Prosecutor to read from law books about previous cases involving the intoxication defense. *State v. Shelton*, 71 Wn. 2d 838, 843, 431 P.2d 201, 205 (1967). Such a case can hardly be said to put prosecutors on notice that the argument at issue in this case is one that would result in a finding of prosecutorial misconduct.

In the *Glasmann* case, cited by Appellant, the Court found misconduct where the prosecutor altered the defendant's booking photo that depicted him in an unkempt and bloody state with the words "guilty" and "do you believe him" superimposed on the picture. *In re Glasmann*, 175 Wn. 2d 696, 706, 286 P.3d 673, 678 (2012). The Court cited eight

court opinions finding misconduct for the particular actions and arguments the Prosecutor made in closing arguments in *Glasmann* to show the prosecutor was on notice that altering evidence to express his personal opinion of the defendant's guilt was misconduct. *Id.* Appellant also says that the prosecutor's conduct, in the case at bar, was repeated because of two sentences, but when the Court finds something to be flagrant and ill-intentioned because of repetition that repetition is extensive. In *Glasmann*, where the Court found repeated misconduct it described seven slides in the prosecutor's closing argument that constituted misconduct. *Id.* at 701. In the *Fleming* case, also cited by Appellant's counsel, the repeated misconduct was four different well established examples of misconduct: misstating the nature of reasonable doubt, misstating the role of the jury, infringing on the right to remain silent, and improperly shifting the burden of proof to the defense. *State v. Fleming*, 83 Wn. App. 209, 216, 921 P.2d 1076, 1079 (1996). The two sentences at issue in the case at bar is not the kind of repetitive misconduct for which Court has found there to be flagrant and ill-intentioned misconduct. The Appellant has failed to show that the prosecutor's argument was flagrant and ill intentioned; therefore, he has waived the alleged prosecutorial misconduct error and the Court should Affirm his convictions.

D. The Appellant has failed to show that a curative instruction would not have obviated any prejudice.

Even if the Court were to find the alleged misconduct flagrant and ill-intentioned the appellant has failed to show that the misconduct could not have been cured by an instruction from the Court. The burden is on Appellant to show that the misconduct was so prejudicial that a curative instruction could not have obviated the error. *State v. Dhaliwal*, 150 Wn. at 581.

The Court could have instructed the jury to disregard the Prosecutor's statements and then instruct the jury to look to Jury Instructions Number 6- 10, and 13. Or the Judge could have issued a clarifying instruction that specified that the jury could acquit the defendant if the jury found that he lacked the ability to form the intent to touch or strike Officer Handley, and Deputy Olin and lacked the ability to form the intent to resist his arrest. Appellant fails to show how either such instruction would not have obviated any possible prejudice. The Court should find the appellant has failed to meet his burdens of proof that 1) the prosecutor committed misconduct, 2) the misconduct resulted in prejudice, 3) the misconduct was so flagrant and ill-intentioned that no instruction could have obviated the enduring prejudice such that Appellant's failure to object at trial did not waive the error. The Court should Affirm Appellant's convictions.

E. The Appellant cannot meet his burden of proof for an ineffective assistance of counsel claim.

The burden is on Appellant to establish ineffective assistance of counsel by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) that he was prejudiced by showing there was a reasonable probability that the result of the trial would have been different. *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014) citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The court need not analyze both prongs if Appellant fails to meet either. *Id.* at 697.

For the reasons explained in section 1A of this brief the prosecutor did not commit misconduct; therefore, there was no reason for Defense counsel to object to the argument. Because there was no reason for Defense counsel to object to the prosecutor's proper argument Defense counsel's performance did not fall below an objective standard of reasonableness. Thus, Appellant cannot prove ineffective assistance of counsel.

To prove ineffective assistance Appellant also has to prove that had defense counsel objected to the argument there is a reasonable probability that the outcome of the trial would have been different. Appellant in his brief at page 16, supposes that if an "objection and

instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments, then counsel had no legitimate tactical reasoning for not objecting”, but that argument does not prove that the outcome of trial would have been different. In fact, that seems to be a concession that Appellant cannot *prove* that an objection and curative instruction would have changed the outcome of trial on the one hand and on the other seems to admit that a curative instruction may have been able to be given that could have obviated the misconduct, which would in effect waive his prosecutorial misconduct error. There was sufficient evidence at trial, as set out in Section 1A, to show the Defendant formed the intent to commit the crimes for which he was found guilty, such that no instruction would have changed to the jury’s verdicts. Appellant has failed to show how an objection to the argument or what kind of instruction could have been issued that would “create a reasonable probability that the outcome of the trial would have been different.” As such Appellant has failed to meet his burden to prove ineffective assistance of counsel and the verdicts should be Affirmed.

II. IT WAS ERROR TO SENTENCE THE APPELLANT TO 364 DAYS IN JAIL.

Resisting arrest is a misdemeanor. RCW 9A.76.040. The maximum jail penalty for a misdemeanor is 90 days in jail. 9A.20.021(3).

The State concedes it was error to sentence Appellant to a sentence greater than 90 days and the case should be remanded to enter a sentence within the statutory allowance.

III. THE REQUIREMENT TO OBTAIN A SUBSTANCE ABUSE EVALUATION AND COMPLY WITH RECOMMENDED TREATMENT SHOULD BE STRICKEN.

The State concedes that because the only evidence produced at trial was in regards to alcohol, evaluation and treatment should be limited to alcohol per *State v. Munoz-Rivera*. 190 Wn. App. 870, 893, 361 P.3d 182 (2015). The case should be remanded to amend the Judgement and Sentence to impose an assessment and recommended treatment to only alcohol and to remove the requirements as to substance abuse.

IV. THE REQUIREMENT TO READ BOOKS AND REPORT ON DOMESTIC VIOLENCE SHOULD BE STRICKEN.

The State concedes that the requirement to read books on domestic violence and then to write reports on it should be stricken as it will not tend to prevent the type of crime for which Appellant was convicted. *State v. Deskins*, 180 Wn. 2d 68, 79, 322 P.3d 780, 785 (2014), *as amended* (June 5, 2014). As the State concedes this issue it does not reach the other arguments. The case should be remanded for resentencing.

CONCLUSION

Based on the foregoing, the Respondent requests this Court affirm the defendant's convictions for Assault in the Third Degree and Resisting Arrest and to remand for resentencing in accordance with the Court's directives.

Dated this 18th day of March 2020.



Wendy Lierman, WSBA 46963
Senior Deputy Prosecuting Attorney
Whitman County
PO Box 30
Colfax, WA 99111-0030
(509) 397-6250

Certificate of Mailing

I hereby certify that I emailed a true and accurate copy of the foregoing document, Corrected Brief to Casey Grannis, attorney for Appellant, to grannisc@nwattorney.net



Wendy Lierman, WSBA 46963
Senior Deputy Prosecuting Attorney

WHITMAN COUNTY PROSECUTOR'S OFFICE

March 23, 2020 - 2:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36832-7
Appellate Court Case Title: State of Washington v. Vladimir V. Borisov
Superior Court Case Number: 19-1-00045-1

The following documents have been uploaded:

- 368327_Briefs_20200323142812D3106836_5390.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Corrected Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- VVB@NEWHORIZONTECHNOLOGIES.COM
- denist@co.whitman.wa.us
- grannisc@nwattorney.net
- nielsene@nwattorney.net

Comments:

The only correction is the cover page as directed by the Court of Appeals

Sender Name: Amanda Pelissier - Email: amandap@co.whitman.wa.us

Filing on Behalf of: Wendy Marie Lierman - Email: wendy.lierman@co.whitman.wa.us (Alternate Email: amandap@co.whitman.wa.us)

Address:
PO Box 30
Colfax, WA, 99111
Phone: (509) 397-6250

Note: The Filing Id is 20200323142812D3106836