

No. 65213-3-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO RAMOS,

Appellant.

RECEIVED  
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DIVISION ONE  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S REPLY BRIEF  
AND RESPONSE TO MOTION TO STRIKE

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A. ARGUMENT.

1. THE PROSECUTION APPROPRIATELY CONCEDES SOME UNAMBIGUOUS MISCONDUCT BY THE TRIAL PROSECUTOR BUT ASKS THIS COURT TO EXCUSE THE VAST ARRAY OF IMPROPER BEHAVIOR BY A REPEAT OFFENDER, WHICH SHOULD NOT BE TOLERATED.

Recently, a professor in California spearheaded a long-term study of appellate cases documenting instances of prosecutorial misconduct.<sup>1</sup> Among the study's findings are that many of the prosecutors who are identified as having committed misconduct do so repeatedly, leading the authors to conclude that courts should play a greater role in stopping the cycle of misconduct. Ramos's case illustrates the importance of taking a clear and strong line against abuse of process by a prosecutor who has been previously cited for engaging in similar misconduct.<sup>2</sup>

The great pains the prosecution takes on appeal to segregate and try to explain away the numerous instances of the

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<sup>1</sup> Kathleen Ridolfi, Preventable Error: A Report of Prosecutorial Misconduct in California 1997-2009 (2010), available at: [http://law.scu.edu/ncip/file/ProsecutorialMisconduct\\_BookEntire\\_online%20version.pdf](http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf).

trial deputy's improper conduct is, at the end of the day, evidence of the pattern and practice of using disfavored tactics to secure of conviction. The fact that the trial court sustained some of the objections does not mean the prosecution gains a clean slate. Instead, it is the totality of the repeated flouting of the rules of conduct and their impact on the fairness of the proceedings that undermines the appearance of fairness critical to the criminal justice system and favors reversal.

a. The State concedes the most egregious and inexcusable of the misconduct. The prosecution reluctantly concedes that the trial deputy committed some errors. Response Brief at 35. Prosecutor Craig Chambers persistently questioned Ramos about people he knew from "the drug world," including whether he knew their drug addiction history and criminal past even though these two individuals had nothing to do with the charges against Ramos. The insinuation of "guilt by association" implicit in the prosecutor's questioning, coupled with his argument that

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<sup>2</sup> In State v. Neidigh, 78 Wn.App. 71, 76, 895 P.2d 423 (1995), this prosecutor memorably told the judges at oral argument that prosecutors use improper tactics because it is always found to be harmless error. Indeed, he was right because his misconduct was found harmless in that case and the State relies on the harmlessness of that prior misconduct in this case. Response Brief at 21.

Ramos was part of the “drug world,” and in the “drug business,” is unquestionably an impermissible basis for a conviction.

The prosecution minimizes the egregious impact of these questions. Chambers repeatedly questioned Ramos about his knowledge of others in “the drug world.” RP 154-55. Regardless of how Ramos answered these questions and whether the court sustained some, although not all, of Ramos’s objections, asking these questions in the face of sustained objections shows they are targeted toward affecting the jury without regard to whether the question is answered. Both in the course of trial testimony and during closing argument, the prosecutor pointedly referenced Ramos as a member of the drug world, drug business, or person who would continue to sell drugs in the community, all of which is irrelevant to the single charge before the jury. RP 168, 170-72.

Another begrudgingly conceded error occurred at the very start of Chambers’ closing argument to the jury. Response at 35. He told the jury that its purpose was “to stop Ramos” from continuing to sell drugs in the community, in front of the grocery store and movie theater. RP 163. As discussed in detail in Ramos’s opening brief, this argument not only painted Ramos someone who made innocent citizens “wade past coke dealers” in

the parking lot when it was the police who demanded the drug sale occur in that particular parking lot, but most egregiously, it is entirely impermissible to ask the jury to consider itself as the conscience of the community, and to inflame fears and emotions of the jurors in the context of urging a conviction. Opening Brief at 8-15. This was not an appeal to reasoned judgment.

The State claims that a recent Sixth Circuit case shows the error “community conscience” appeal is harmless. Response Brief at 23, 31-35. In United States v. Wettstain, 618 F.3d 577, 583-88 (6<sup>th</sup> Cir. 2010), the defendants were charged with multiple counts involving many years of drug-selling. The prosecutor made what the reviewing court deemed to be “inflammatory” remarks that the jurors were the “conscience of the community,” and said the defendants were a plague on the community by peddling drugs in the community for 10 years. Id. at 588-89. The Wettstain Court held, “These statements appealed to jurors’ fears, not to their reasoned judgment,” and were therefore improper. Id. at 589.

The Wettstain Court was troubled by the prosecutor’s efforts to seek a conviction by improper means, but ultimately concluded the error was not flagrant because they were isolated instances of misconduct. Id. Furthermore, the remarks by the prosecutor were

factually accurate and borne out by admissible evidence. The two defendants had been engaged in a multi-year drug selling business in this community. Id. (“the comment accurately identified Wettstain and Stewart as drug dealers who lived and peddled methamphetamine in their community.”).

Unlike in Wettstain, Ramos was accused of a single drug sale. It was the police who demanded that the sale occur in this parking lot where there was a grocery store, movie theater, and otherwise served as a community hub. It was the prosecutor who injected the claim that Ramos needed to be stopped from “continuing line of activities,” as there was no properly admitted evidence that Ramos was regularly dealing coke in the parking lot. Moreover, unlike Wettstain, this appeal to the community conscience was not isolated as the only type of misconduct that occurred.

b. The prosecutor asked Ramos to explain why witnesses would lie when testifying against him. When Chambers asked Ramos to explain why another witness would lie, he was impermissibly requesting that Ramos comment on the veracity of another witness. See State v. Suarez-Bravo, 72 Wn.App. 359, 367, 864 P.2d 426 (1994); RP 157. The prosecutor was also

insinuating that Ramos must supply a reason why the State's witness would fabricate his testimony. State v. Traweek, 43 Wn.App. 99, 106, 715 P.2d 1148 (1986), disapproved on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). The prosecutor directly demanded Ramos comment on and explain the veracity of other witnesses. He need not say the word "lie" to show that he seeks Ramos's comment on the other witnesses' veracity. See State v. Boehning, 127 Wn.App. 511, 524-25, 111 P.3d 899 (2005). The prosecutor should not have asked Ramos to explain why his testimony was different from others, or why others might lie, because he should not seeks comments on the credibility or motives of others. The prosecutor should have been particularly cautious about such an appeal since this Court made its impropriety clear in Neidigh, 78 Wn.App. at 76-77.

c. Vouching, including declaring police are telling the truth and "100% candid," is a significant, flagrant error. "[N]o attorney shall '[a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused.'" State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (quoting The Code of Professional Responsibility, DR 7-106(C)(4)).

The prosecution offers a meager defense of the vouching used to convey to the jury that the police should be believed and Ramos should be convicted. Chambers spoke as a voice of authority, and assured the jury that the “truth” is that the police were “100% candid.” RP 184-85. He said, “we know” Ramos is guilty. RP 185. The State claims that when the prosecutor said “we know,” this “we” just meant anyone who listened to the testimony. This parsing is silly. By saying “we know” Ramos is guilty, the prosecutor was standing in his own shoes, urging a conviction as a prosecutor. He was not the 13<sup>th</sup> member of the jury and cannot be treated as a person on the street. Rules prohibiting vouching have long existed because of the significant, and improper, weight accorded to a prosecutor’s statements, and again, the prosecutor’s actions inexplicably and flagrantly crossed the line in this case. United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); State v. Case, 49 Wn.2d 66, 68, 298 P.2d 500 (1956).

d. The prosecutor cannot blame Ramos for honestly answering the State’s questions as “opening the door” to extraneous, highly prejudicial bad acts. The State painstakingly parses each individual question and answer to blame Ramos for

answering the prosecutor's questions in a way that the prosecutor could exploit by injecting more irrelevant, prejudicial information into the case.

Yet a trial is not a tit-for-tat. If prior bad act evidence was relevant, the prosecution needed to use proper mechanisms for its admission. See State v. Sanford, 128 Wn.App. 280, 285, 115 P.3d 368 (2005) (explaining necessary steps prior to admitting bad act evidence). The prosecutor asked questions knowing that Ramos would likely answer them in a way that would insert irrelevant and prejudicial information into the case. The prosecutor may not "seize[ ] the opportunity to admit otherwise clearly inadmissible and inflammatory" evidence by virtue of a question to a witness, because "[a] defendant has no power to 'open the door' to prosecutorial misconduct." State v. Jones, 144 Wn.App. 284, 295, 183 P.3d 307 (2008). Chambers asked questions knowing that that answers showed Ramos had been in prison and in jail, and had prior drug convictions. These questions were unnecessary, highly prejudicial, and not vetted by a trial judge before they were injected into the case by the prosecutor.

e. The repeated efforts to inject irrelevant and highly prejudicial considerations into the case is not only flagrant and ill-

intentioned, but also undermines the appearance of fairness central to the criminal justice system. The prosecutor's pattern of misconduct is detailed in Ramos's opening brief and discussed only in part in the instant reply. The critical component missing from the State's brief is any measure of how, notwithstanding the inappropriate questions asked despite sustained objections, the court's overruling of some legitimate objections, and this Court's own admonitions to this very prosecutor, it can simply be harmless to flout the rules of professional conduct and precedential authority that constrains a prosecutor's argument.

There is substantial likelihood that these improper tactics affected the jury, and therefore, Ramos is entitled to relief.

2. THE LEGAL AND FINANCIAL OBLIGATIONS WERE NOT PROPERLY IMPOSED.

RCW 10.01.160(3) provides in part, "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." The ability to pay is not only a statutory prerequisite, but a constitutional requirement.

The court entered a finding that Ramos was able to pay substantial legal and financial obligations without even inquiring into his ability to pay. CP 17. Moreover, the court concluded that

Ramos had “zero” credibility when he testified at trial that he had a good job and therefore would not need to sell drugs. RP 189. The court has found Ramos indigent throughout the trial and for purposes of appeal. The court’s “finding” included as preprinted boilerplate on a form are directly contrary to the record of Ramos’s indigence that was before it. CP 17. The lack of support for this purported finding demonstrates that it was improperly entered.

The prosecution supplements the record regarding the fees and costs imposed on Ramos by attaching a form that was not previously part of the record and has not been designated. It requests “judicial notice” in a footnote, but in Washington, RAP 9.11 sets forth particular rules for a court to take judicial notice of any adjudicative fact, in addition to the requirements of ER 201. See Spokane Research v. City of Spokane, 155 Wn.2d 89, 97, 117 P.3d 1117 (2005). The State’s brief does not explain why judicial notice is required under RAP 9.11.

The State also objects to Ramos’s citation to a study by a court commission that comments on the propriety and real-life effect of imposing legal and financial obligations on a person who is unable to pay. While these policy arguments may make the prosecution uncomfortable, they are in keeping with the statutory

requirement that fees should not be imposed unless the court specifically finds the person is or will be able to pay, based on a properly presented record demonstrating that ability. RCW 10.01.160(3). The report comes from a study conducted under the auspices of the courts, by the Washington State Minority and Justice Commission, which was created by the Supreme Court and is charged with ensuring fair and equal treatment of all people in the courts in this state. See Minority and Justice Commission, Commission bylaws, Preamble., available at: [www.courts.wa.gov/committee](http://www.courts.wa.gov/committee). The Research Report cited in Ramos's opening brief, was commissioned by this Supreme Court-led committee and is a formal assessment of the consequences and ramifications of the imposition of legal and financial obligations in this state. Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008).<sup>3</sup> It is available on the court's website.

The prosecution's basis for filing a motion to strike is that the "wisdom" of imposing fees is better left to the legislature.

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<sup>3</sup> Available at:  
[http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

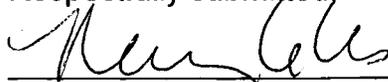
Response at 40. But the trial court has discretion when imposing fees, by statute, and is also legally required to find a person is able to pay before imposing such fees. The Report by the Minority and Justice Commission contains useful information for evaluating the imposition of legal and financial obligations and this Court should not turn a blind eye to the policy considerations underlying such costs and fees upon a poor person. The State's motion to strike should be denied.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Ramos respectfully requests this Court remand his case for further proceedings.

DATED this 18<sup>th</sup> day of November 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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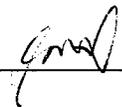
STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 65213-3-I
	)	
ANTONIO RAMOS,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2010.

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