

COA NO. 71756-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ELMER VILLAFUERTE,

Appellant.



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

The Honorable Barbara Linde, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State improperly commented on appellant's exercise of his constitutional right to pre-arrest silence.

2. Prosecutorial misconduct violated appellant's due process right to a fair trial.

3. Cumulative error deprived appellant of his due process right to a fair trial.

4. The court erred in prohibiting appellant from consuming "non-prescribed drugs" as a condition of community custody.

5. The court erred in finding appellant has a chemical dependency and ordering appellant to engage in substance abuse treatment.

Issues Pertaining to Assignments of Error

1. Whether the State improperly commented on appellant's constitutional right to pre-arrest silence by eliciting officer testimony that appellant did not tell his side of the story after being contacted by police?

2. Whether the prosecutor committed prejudicial misconduct in telling the jury its job was to figure out what happened, thereby misstating the burden of proof?

3. Whether the community custody prohibition on consuming any "non-prescribed drugs" is invalid because it encompasses legal drugs unrelated to the offense?

4. Whether the community custody condition requiring appellant to obtain a "substance abuse evaluation" is invalid because (1) the court did not obtain the statutorily required Department of Corrections screening report; (2) substantial evidence does not support a chemical dependency finding; and (3) the finding that was made related to alcohol, not substance abuse?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Elmer Villafuerte with second degree assault by strangulation against his wife, Christelle Villafuerte.¹ CP 16-17. A jury found Villafuerte guilty and returned a special verdict that this was a domestic violence offense. CP 49, 50. The court imposed six months confinement and community custody. CP 81, 84. Villafuerte appeals. CP 86-94.

2. Trial Evidence

On the evening of July 24, 2013, Teresa Coalman was driving down the street with her husband near the Seattle Center when she saw a woman, later identified as Christelle, waving, looking upset and in need of help. RP 419-20. Coalman rolled down her window. RP 421. Christelle

¹ To avoid confusion, this brief refers to Elmer Villafuerte as "Villafuerte" and Christelle Villafuerte as "Christelle."

was shaking and crying. RP 420-21. She asked to use Coalman's cell phone. RP 421. Coalman asked what happened. RP 421. Christelle said her husband choked her. RP 421. Coalman asked where he was. RP 422. Christelle pointed to a man down the sidewalk, who took off running. RP 422. She told Coalman that she had grabbed his shirt, and that he choked and hit her, pointing to her face. RP 425. Coalman noticed no injuries. RP 426-27. Coalman called 911. RP 421. During the 911 call, Christelle repeated that he choked her. Ex. 2; RP 321-22.

Officer Gill responded to the 911 call to find Christelle crying with red eyes. RP² 238-41, 274. She blurted out "he choked me" and named her husband. RP 241, 243. She was hysterical. RP 242.

Christelle gave her husband's cell phone number to Gill, who called the number. RP 245. Villafuerte answered and said he was nearby. RP 245-46. Gill said she was with Villafuerte's wife and that she may have to arrest her. RP 246. Gill explained to the jury that she was bluffing to see if Villafuerte would come back. RP 246. Gill wanted more information about what happened because there were two sides to every story and she wanted to get Villafuerte's story. RP 247. Villafuerte told Gill "She didn't do anything, don't do that." RP 247. At the conclusion of

² The verbatim report of proceedings is referenced as follows: RP – seven consecutively paginated volumes consisting of 2/11/14, 2/12/14, 2/13/14, 2/18/14, 2/19/14, 2/20/14 and 2/28/14.

the phone conversation, officers went looking for Villafuerte but did not find him. RP 267-68. Gill had no further contact with Villafuerte. RP 269-70.

Firefighter Kidwell responded to the scene to see if Christelle needed medical assistance. RP 386-88. He asked what happened. RP 390. She said her husband grabbed her neck and demonstrated by putting her hand on her Adams apple. RP 390-91. She said she was not in any pain. RP 390. She had some very minor abrasions on both sides of her neck.³ RP 390, 392. She declined to go to the hospital. RP 390. Christelle gave a recorded statement to Officer Gill in which she stated her husband choked her for 10 seconds. RP 261, 266-67.

Christelle had two kids with her husband and was pregnant with a third at the time of trial. RP 296. She loved him and did not want to get him in trouble. RP 299, 339-40. She was worried about their future and their kids not having a father. RP 340, 359-60. She was also worried about him losing the job he had lined up. RP 310. She did not want to testify against her husband. RP 359.

³ Officer Gill did not see any swelling, abrasions, bruising or ruptured capillaries. RP 276. In other investigations involving reported strangulations, she saw victims that did not have marks on their necks. RP 279. Officer Nelson did not observe any injuries when he responded to the scene. RP 284, 290

On the stand, Christelle testified they were at a party for the restaurant where she worked on the night in question. RP 299. They both had too much to drink.⁴ RP 299. Villafuerte thought she was flirting with a coworker. RP 299. They got into an argument. RP 299, 301. He ran off. RP 299, 301. She found him 15 minutes later and attempted to persuade to come home. RP 299. She was angry and upset. RP 302. He was still angry. RP 302. He refused to go home and "things got physical." RP 299. She remembered "pulling on him to come with me" in an aggressive manner and he pushed her away. RP 303, 346. She grabbed his shirt or the side of his body. RP 345. He pushed her with one hand "towards her chest area, by my neck too." RP 303, 320, 347, 355. He was trying to get away from her. RP 348. It did not appear he was purposely trying to hurt her. RP 348. He ran off. RP 304. She tried chasing him. RP 304. She was shocked and mad. RP 304, 358. She was embarrassed. RP 350. She was afraid they might be on the verge of splitting up. RP 350.

She started crying and flagged down a passing car. RP 304, 306. A woman got out of the car and asked what was wrong. RP 306. She asked to use the woman's phone, intending to call her mother. RP 306.

⁴ Christelle later denied that Villafuerte was intoxicated and claimed she did not feel the effect of the champagne she drank. RP 344.

She remembered holding her neck. RP 304. She told the woman that her husband grabbed her. RP 307. RP 304, 307.

When police arrived, she told them he grabbed her. RP 308. She remembered the police asking if he choked her or grabbed her neck. RP 308, 309. She said he grabbed her neck. RP 309. But she did not think that really happened. RP 309. She was in shock and emotional, angry and sad. RP 309. She felt like the police were trying to get her to say that her husband choked her. RP 309. The police were the first to mention anything about choking. RP 309. When an officer asked if her husband choked her, she responded, "Okay, yeah, that's what it was." RP 322.

According to Christelle, Villafuerte just pushed her. RP 321. He did not choke her. RP 356, 362. She did not remember Villafuerte squeezing her neck or slapping her. RP 347, 349. In a defense interview, she said he did not squeeze her neck. RP 347-48.

Christelle did not remember the conversation with the woman who called 911. RP 323. She might have told the woman he choked her. RP 323. With reference to the recorded statement she gave police, Christelle testified she was still upset and angry when she made the recording, thinking her husband might leave her. RP 351. When asked if she told the officers some things that were not true, she answered, "I guess not. I don't remember." RP 351.

Evidence was admitted of a prior physical altercation between Villafuerte and his wife in June 2012 during which he forcibly tried to remove her from their residence. RP 326-36. In February 2012, Christelle was arrested for slapping Villafuerte. RP 324-26. She had gotten physical with him in the past when he tried to leave. RP 357-58.

C. ARGUMENT

1. THE PROSECUTOR IMPERMISSIBLY COMMENTED ON VILLAFUERTE'S EXERCISE OF CONSTITUTIONALLY PROTECTED RIGHT TO PRE-ARREST SILENCE.

"The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). The court improperly allowed the State to comment on Villafuerte's exercise of his right to pre-arrest silence by means of officer testimony. The court excluded testimony that Officer Gill invited Villafuerte to return to the scene. But the court admitted testimony that Officer Gill wanted Villafuerte to come back to get his side of the story, Villafuerte did not come back, and Gill had no further contact with Villafuerte. In this manner, the court admitted testimony that commented on Villafuerte's pre-arrest silence. Reversal of the conviction is required because the State cannot show the comment on

the exercise of Villafuerte's constitutional right to pre-arrest silence was harmless beyond a reasonable doubt.

- a. **Over defense objection, the State presented evidence that Villafuerte refrained from speaking to police prior to his arrest despite the officer's desire to get his side of the story.**

Defense counsel moved to exclude evidence that Villafuerte failed to return and give his account of events to police, contending such evidence would violate his constitutional right to pre-arrest silence. CP 18-19; RP 34-38. The State claimed the jury was entitled to draw an inference of guilt from evidence that Villafuerte did not return after saying he was going to do so. RP 37-38.

At a pre-trial hearing that functioned as an offer of proof on the matter, Officer Gill testified that she called Villafuerte on the phone after speaking with Christelle. RP 25. Gill told Villafuerte that she wanted to get his side of the story. RP 25. Gill used a ruse in telling Villafuerte that a witness had seen his wife pushing him and that if he did not come back, Christelle would be taken into custody. RP 26. Villafuerte responded that she had done nothing wrong and he was going to come back and talk to the officer. RP 26. Villafuerte gave his location. RP 30. When the officer called him again, Villafuerte said he was walking back. RP 26.

After that, the phone started going to voicemail. RP 26. Villafuerte never appeared. RP 27, 29.

The court initially ruled this evidence, which showed Villafuerte was in the vicinity and was aware that his wife was going to be arrested, was admissible to help the State prove its case. RP 39-40. Defense counsel found no problem with admitting evidence that Villafuerte was in the vicinity and his statement to the officer that his wife did nothing wrong, but argued the failure to come forward and give a statement was irrelevant to what the court had mentioned. RP 40. The court responded that Villafuerte's failure to come forward and give a statement showed consciousness of guilt. RP 40. When counsel argued that was an impermissible inference, the court responded "It's not in isolation; it's in being aware that there is a potential that your wife is about to be arrested for an assault on you." RP 40-41.

Defense counsel moved to reconsider, citing additional authority. CP 45-47; RP 61-62. After hearing further argument, the court decided to limit the officer's testimony in an attempt to avoid the risk that the jury would draw an improper conclusion from pre-arrest silence. RP 67-68. The court excluded officer testimony referring to "if you don't come back this will happen or if you do come back this won't happen, and the fact that he agreed to come back and didn't come back." RP 69. The court did

not want any mention of inviting Villafuerte to return, but allowed testimony that Villafuerte was nearby, he did not come to the scene, and the officer was not able to contact him that day. RP 68-69.

Before Officer Gill took the stand at trial, the prosecutor sought clarification of what could be elicited. RP 225-26. The prosecutor wanted confirmation that the officer could testify that he wanted to get the full story or he would need to arrest Christelle. RP 226-27. The court responded, "that sounds fine." RP 227. Defense counsel objected to any suggestion that Villafuerte should have revealed something more than he did. RP 227. The court cut counsel off, saying she had ruled on the issue. RP 227.

During Officer Gill's subsequent testimony in front of the jury, the prosecutor asked why she told Villafuerte that she might have to arrest Christelle. RP 246. Officer Gill responded "I was bluffing and the reason why was because I wanted to see if he would come back so that I could get --." RP 246. Defense counsel objected. RP 246. The court responded, "I'm going to ask you to ask another question. The answer will stand." RP 246. The prosecutor then asked if the officer was trying to get more information about what happened. RP 247. The officer said yes. RP 247. The prosecutor asked why it was important to get more information about what happened. RP 247. The officer answered "There's two sides to

every story, and I wanted to get his side as well." RP 247. Officer Gill further testified that police looked for Villafuerte and never found him, and that she had no contact with Villafuerte other than the phone call. RP 267-70.

b. The State, through its witness, commented on Villafuerte's exercise of his right to pre-arrest silence.

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. U.S. Const. amend. V; Wash. Const. art. I, § 9. The right against self-incrimination prohibits the State from using pre-arrest silence in argument or in its case in chief as substantive evidence of a defendant's guilt. State v. Easter, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996); State v. Keene, 86 Wn. App. 589, 593, 938 P.2d 839 (1997). "[W]hen the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated." State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). The standard of review for this constitutional error is de novo. State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); State v. Silva, 119 Wn. App. 422, 428, 81 P.3d 889 (2003).

Reviewing courts distinguish between "comments" and "mere references" to an accused's pre-arrest right to silence. Burke, 163 Wn.2d

at 216. A remark on silence is not considered a comment on the exercise of that right only if it was so subtle and so brief that it did not "naturally and necessarily" emphasize the defendant's pre-arrest silence. Id. (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

State v. Thomas, 142 Wn. App. 589, 174 P.3d 1264, review denied, 164 Wn.2d 1026, 195 P.3d 958 (2008) is instructive. In Thomas, the prosecutor improperly commented on pre-arrest silence in arguing the defendant's refusal to return to the crime scene and tell his story to police was evidence of guilt. Thomas, 142 Wn. App. at 591, 594-97. The officer's testimony was no more than a passing reference: after the officer identified herself on the cell phone, Thomas responded, "What do you want," and "I don't want to talk to you," which was "pretty much the conversation." Id. at 596. But the prosecutor's closing argument plainly conveyed the message that if Thomas was not guilty, he would have returned to the crime scene to tell his side of the story, thus turning what otherwise would have been a passing reference into an unconstitutional comment. Id.; see also State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010) (prosecutor commented on right to silence in arguing Jones fled to Texas and never called the police to try to clear up what had happened).

In Villafuerte's case, the prosecutor did not argue to the jury that Villafuerte's failure to return and tell his side of the story was evidence of

guilt. But the testimony that was elicited was more than a passing reference to his silence. It was more explicit than the testimony in Thomas. Officer Gill testified that she wanted Villafuerte to come back to get his side of the story, Villafuerte did not come to the scene, and neither Gill nor any other officer had further contact with Villafuerte. RP 246-47, 267-70. The unmistakable implication of that testimony is that suspects who have committed no crime will tell their side of the story to the police. There was no other reason to admit this testimony. The State wanted the jury to hear this testimony so that it could draw an inference of guilt from it. RP 37-38. Officer Gill's testimony was a comment on the right to silence, not a mere passing reference.

State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) is also instructive. In that case, a detective testified that Lewis, during a phone discussion, denied that anything had happened and the detective told him "if he was innocent he should just come in and talk to me about it." Lewis, 130 Wn.2d at 703. "The detective did not say that Lewis refused to talk to him, nor did he reveal the fact that Lewis failed to keep appointments. The officer did not make any statement to the jury that Lewis's silence was any proof of guilt." Id. at 706. The prosecutor, meanwhile, in closing argument did not mention defendant's refusal to speak with the police about the charges or about his failure to keep appointments with the

officer. Id. Under those circumstances, the Court concluded "neither the State's witness nor the prosecutor in argument made any comment on the defendant's pre-arrest silence." Id. at 701.

Lewis is distinguishable. The detective in Lewis did not say that the defendant refused to talk to him, "nor did he reveal the fact that Lewis failed to keep appointments." Id. at 706. In contrast, the officer in Villafuerte's case explicitly testified that she wanted to get Villafuerte's side of the story but had no contact with him after the phone call. In this manner, Officer Gill's testimony plainly conveyed to the jury that Villafuerte did not in fact talk to her even though she tried to get him to tell his side of the story through the bluff about arresting his wife. The message was the jury should consider Villafuerte's silence and find him guilty because he did not give his side of the story to the police, even to avoid his wife's unjust arrest.⁵ Officer Gill's testimony violated Villafuerte's pre-arrest right to silence.

⁵ There are many reasons an innocent person may choose to remain silent instead of going to the police and telling their story, including awareness of being under no obligation to speak with police, caution that anything said might be used against him at trial, a belief that efforts at exoneration would be futile, explicit instructions not to speak from an attorney, and mistrust of law enforcement officials. Burke, 163 Wn.2d at 218-19 (citing People v. De George, 73 N.Y.2d 614, 618-19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (N.Y. 1989)).

Keene supports Villafuerte's argument. In Keene, a detective testified that Keene did not return police telephone calls after being warned that she would turn the case over to the prosecutor unless Keene contacted her. Keene, 86 Wn. App. at 590. In closing, the prosecutor asked the jury if these were the actions of an innocent man. Id. The Court of Appeals held both the detective's testimony and the prosecutor's argument constituted impermissible comments on Keene's right to pre-arrest silence. Id. at 590-91. Keene distinguished Lewis: "Unlike in Lewis, [the detective] testified that she never heard from Keene after she warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again." Id. at 594. The detective's comment violated the defendant's right to silence because it suggested guilt. Id.

The detective's testimony in Villafuerte's case is just as explicit in leaving no doubt that Officer Gill never heard from Villafuerte after she contacted him to get his side of the story. Officer Gill's testimony was not subtle. It "naturally and necessarily" emphasized Villafuerte's pre-arrest silence. Burke, 163 Wn.2d at 216. Officer's Gill's testimony qualifies as an impermissible comment on Villafuerte's pre-arrest silence.

The United States Supreme Court's recent decision in Salinas v. Texas, __U.S.__, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013) does not dictate otherwise. In Salinas, a three-member plurality held a defendant

questioned in a non-custodial setting must expressly invoke the right against self-incrimination before it can be relied upon, and mere silence in response to questioning is not enough to invoke the right. Salinas, 133 S. Ct. at 2178-79, 2182-84 (Alito, J., lead opinion). Two justices concurred on the basis that there was no limit on the State's right to comment on a defendant's silence in a pre-custodial interview. Salinas, 133 S. Ct. at 2184 (Thomas, J., concurring in judgment).

"A plurality opinion has limited precedential value and is not binding on the courts." Lauer v. Pierce County, 173 Wn.2d 242, 258, 267 P.3d 988 (2011) (quoting In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)). Salinas is therefore not binding on Washington courts.

At best, the precedential value of a plurality decision "is limited to cases which are squarely on all fours" with that decision. State v. Pittman, 59 Wn. App. 825, 832, 801 P.2d 999 (1990), review denied, 116 Wn.2d 1020, 811 P.2d 219 (1991). Salinas is not on all fours with Villafuerte's case. Villafuerte did not remain silent in the face of an incriminating question. His silence occurred after he got off the phone with the officer, at which time he was not subject to interrogation. As a result, Villafuerte was not in a position to expressly invoke his right to silence in response to a police question, yet his silence was commented upon all the same. See

State v. Krancki, 355 Wis.2d 503, 513-14, 851 N.W.2d 824 (Wis. Ct. App.) (finding Salinas inapplicable in part because the defendant was never asked an incriminating question by the police and therefore "had no opportunity to affirmatively assert his Fifth Amendment right to remain silent in response to that question"), review denied, 2014 Wis. 122 (2014).

c. The State cannot show the comment was harmless beyond a reason doubt.

Comment on the exercise of the constitutional right to pre-arrest silence is reviewed under the constitutional harmless error standard. Burke, 163 Wn.2d at 222. "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Id.

The evidence against Villafuerte was not so overwhelming that the State would necessarily have achieved conviction absent the error. There were no obvious injuries. Christelle's credibility was compromised. She gave inconsistent statements about whether her husband choked her. That put the State in an awkward position, as it was forced to rely on this witness to prove its case while simultaneously drawing lines between when she was credible and when she was not. She was not a strong

witness. Her inconsistency, including her insistence on the stand that her husband did not choke her, left room for reasonable doubt.

Moreover, the jury was instructed on self-defense, based on evidence that Christelle aggressively grabbed or pulled at Villafuerte. CP 64-66; RP 303, 345-46, 425. The comment on Villafuerte's silence had the effect of undermining the self-defense claim. Overall, the comment improperly presented the exercise of Villafuerte's right to silence as substantive evidence of guilt in a case that was not otherwise overwhelming on the issue of guilt. Under the circumstances, the State cannot sustain its burden of showing the comment was harmless beyond a reasonable doubt. The conviction should be reversed for this reason.

2. PROSECUTORIAL MISCONDUCT VIOLATED VILLAFUERTE'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed prejudicial misconduct by telling the jury its decision and job was to "figure out what happened here." RP 494. That argument distorts the jury's proper role and misstates the burden

of proof. Reversal is required because there is a substantial likelihood that this misconduct, to which defense counsel unsuccessfully objected, affected the outcome.

In rebuttal argument, the prosecutor argued the jury should disbelieve Christelle's testimony that Villafuerte did not choke her in light of her earlier statements to the contrary. RP 493. In that context, the prosecutor argued "what she said here wasn't all the truth. You know that. What else she said here is she just wants this to go away, she wants to protect him, she loves him, she wants him to be there for her and for the children. That's pretty noble that she's willing to forgive him after all of this. She's willing to stick in this relationship. But her decision is not your decision. *Your decision, your job is to figure out what happened here.*" RP 493-94 (emphasis added). Defense counsel objected to the argument as improper. RP 494. The court responded, "Overruled. The jury's instructed to follow the Court's instruction on the law." RP 494.

The court should not have overruled defense counsel's objection. "Telling the jury that its job is to 'speak the truth,' or some variation thereof, misstates the burden of proof and is improper." State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). "A jury's job is not to 'solve' a case or 'declare what happened on the day in question.'" State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), review denied, 170 Wn.2d

1002, 245 P.3d 226 (2010). "Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Anderson, 153 Wn. App. at 429.

A prosecutor thus commits misconduct in arguing the jury has a duty to decide "the truth of what happened." Id. at 424-25, 429; State v. Walker, 164 Wn. App. 724, 732-33, 265 P.3d 191 (2011) (prosecutor committed misconduct in arguing "by your verdict in this case, you folks, the 12 of you who will deliberate, will decide the truth of what happened to Mario Moss, to [Tavarrus] Moss, and Rooney Key on July 30th of 2006."); State v. Evans, 163 Wn. App. 635, 644-45, 260 P.3d 934 (2011) (prosecutor committed misconduct in requesting jurors to peel back the "different layers of the onion to get to the truth" and urged the jurors to "apply those elements and decide: Is [this] what happened? [I]s that not what happened.").

Here, as in the above cases, the prosecutor "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 jury's decision and job is not, as argued by the prosecutor "to figure out what happened here." RP 494.

Reviewing claims of prosecutorial misconduct for prejudice is not a matter of determining whether there is sufficient evidence to convict. In

re Pers. Restraint of Glasmann, 175 Wn.2d 696, 710, 286 P.3d 673 (2012).

Rather, the standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. Glasmann, 175 Wn.2d at 711.

Statements made during closing argument are intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Prosecutors, in their quasi-judicial capacity, command respect and usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). The jury could thus be expected to act on the prosecutor's improper comment.

Further, the trial court's overruling of counsel's objection "lent an aura of legitimacy to what was otherwise improper argument." Davenport, 100 Wn.2d at 764; see also State v. Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (effect of improper argument compounded when the court overruled objection, which gave additional credence to the argument); State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (in overruling objection to misconduct, "[t]he trial court, at best, failed to cure the prejudicial impact of the improper argument. At worst, the trial court augmented the argument's prejudicial impact by lending its imprimatur to the remarks."). This increased the likelihood that the misconduct affected the jury's verdict. Perez-Mejia, 134 Wn. App. at 920.

As argued in section C.1.c., supra, the State's case had its problems. Christelle was a poor witness. Reasonable doubt could linger in the midst of her inconsistencies. The prosecutor's misstatement of the jury's role and the burden of proof may have led the jury astray on whether the State had properly proved its case beyond a reasonable doubt. The timing of the misconduct is also significant. Improper comments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice. Lindsay, 180 Wn.2d at 443.

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. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). The evidence against Villafuerte was not overwhelming. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdict but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

3. CUMULATIVE ERROR DEPRIVED VILLAFUERTE OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. XIV;

Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

As discussed above, an accumulation of errors affected the outcome and produced an unfair trial in Villafuerte's case. These errors include (1) the State's comment, through elicitation of officer testimony, on the right to silence and (2) prosecutorial misconduct in telling jurors that their job is to determine what happened. The State's actions combined to create a cumulative prejudicial force that deprived Villafuerte of his due process right to a fair trial. The conviction should be reversed for this reason.

4. THE COURT'S ORDER NOT TO CONSUME ANY "NON-PRESCRIBED DRUGS" AS A CONDITION OF COMMUNITY CUSTODY IS UNAUTHORIZED BY STATUTE.

As a condition of community custody, the court ordered "The defendant shall not consume any alcohol or non-prescribed drugs." CP 84. The provision pertaining to "non-prescribed drugs" must be removed from the judgment and sentence because consumption of any "non-prescribed drugs" is too broad to be considered a valid crime-related prohibition.

The court's decision to impose a crime-related prohibition is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). But a court may only impose a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9.94A.703(3)(f) authorizes the court to impose crime-related prohibitions. A condition is "crime-related" only if it "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Unless waived, the court shall impose the following condition of community custody: "Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." RCW 9.94A.703(2)(c). The court here correctly imposed this condition on Villafuerte because the law required it absent affirmative waiver. CP 84.

But it lacked authority to also order Villafuerte not to use any "non-prescribed drugs" whatsoever. The unqualified prohibition on "non-prescribed drugs" is not limited to use of non-prescribed controlled substances and encompasses any legal drug, including something as

benign as aspirin or cold medicine. Consumption of a legal, non-prescribed drug had nothing to do with the offense.

The broad prohibition on the consumption of such drugs is not crime related and therefore unauthorized by statute. Challenges to improper sentencing conditions may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Community custody conditions prohibiting conduct that are not crime-related must be stricken from the judgment and sentence. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). This Court should vacate the improper condition pertaining to "non-prescribed drugs."

5. THE COURT FAILED TO FOLLOW STATUTORY REQUIREMENTS IN IMPOSING SUBSTANCE ABUSE TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

At sentencing, the State recommended that Villafuerte "obtain a substance abuse evaluation, follow any treatment recommendations." RP 517. The court orally ordered that Villafuerte "obtain an alcohol and drug evaluation and engage in any counseling." RP 526. In the judgment and sentence, the court checked the box next to the following condition of community custody: "The court finds that the defendant has a chemical dependency ([X] alcohol [] other substance) that has contributed to his or her offense. Treatment is reasonably related to the circumstances of

this crime and reasonably necessary or beneficial to the defendant and the community. (RCW 9.94A.607). Therefore, the defendant shall participate in the following treatment: substance abuse treatment as recommended." CP 84.

Villafuerte challenges this condition on three grounds. First, the court failed to follow the requisite statutory procedure in imposing chemical dependency treatment without first ordering a Department of Corrections (DOC) screening report under RCW 9.94A.500. Second, the chemical dependency finding is unsupported by substantial evidence in the record. Third, even if the chemical dependency finding is legitimate, the condition must be clarified to reflect that only alcohol treatment, as opposed to substance abuse treatment, is a sentencing condition.

As a condition of community custody, the court is authorized to require an offender to "[p]articipate in crime-related treatment or counseling services" and in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c), (d). "The SRA specifically authorizes the court to order an offender to obtain a chemical dependency evaluation and to comply with recommended treatment only if it finds that the offender has a

chemical dependency that contributed to his or her offense." State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

RCW 9.94A.607(1) thus states: "Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender."

RCW 9.94A.500 provides "Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report *before imposing a sentence* upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or *any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense.*" (emphasis added). The term "department" means the Department of Corrections. RCW 9.94A.030(17).

The court in Villafuerte's case did not specifically waive a chemical dependency screening report prepared by the DOC. Nor did it

order the DOC to complete a chemical dependency screening report. The court thus erred in ordering chemical dependency treatment. A court may impose only a sentence that is authorized by statute. Barnett, 139 Wn.2d at 464. Under RCW 9.94A.500, the court lacked authority to sentence Villafuerte to substance abuse treatment absent a specific waiver for the screening report. Under the plain language of the statute, such a report must be ordered *before* a sentence requiring the offender to participate in chemical dependency treatment can be imposed. The court wrongly ordered substance abuse treatment because it failed to follow the statutory prerequisite. See State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (trial court erred in imposing mental health conditions without considering statutorily-required DOC presentence report). The remedy is remand for the trial court to strike the condition unless it determines "that it can presently and lawfully comply" with the statutory requirement. State v. Jones, 118 Wn. App. 199, 212 n.33, 76 P.3d 258 (2003).

There is a second, independent reason why the condition is erroneous. Factual findings made by a sentencing court must be supported by substantial evidence in the record. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). The court

entered a finding that Villafuerte "has a chemical dependency ([X] alcohol [] other substance) that has contributed to his or her offense." CP 84. However, this finding is not supported by substantial evidence.

The record shows Villafuerte drank alcohol before the offense occurred. RP 299-300. But the record does not show Villafuerte is chemically dependent on alcohol. There is a difference between alcohol consumption and chemical dependency. A person can drink alcohol and be affected by it without being chemically dependent on it.

The SRA does not define the term "chemical dependency." The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders defines the term "substance dependence."⁶ There is no

⁶ The criteria for "substance dependence" include a maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three or more of the following during a 12 month period: (1) tolerance or markedly increased amounts of the substance to achieve intoxication or desired effect or markedly diminished effect with continued use of the same amount of substance; (2) withdrawal symptoms or the use of certain substances to avoid withdrawal symptoms; (3) use of a substance in larger amounts or over a longer period than was intended; (4) persistent desire or unsuccessful efforts to cut down or control substance use; (5) involvement in chronic behavior to obtain the substance, use the substance, or recover from its effects; (6) reduction or abandonment of social, occupational or recreational activities because of substance use; (7) use of substances even though there is a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance. American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders 197 (4th rev. ed. 2000).

evidence that Villafuerte meets the criteria for substance dependence. Again, the remedy is remand for the trial court to strike the condition unless it determines "that it can presently and lawfully comply" with the statutory requirement. Jones, 118 Wn. App. at 212 n. 33.

Finally, even if the chemical dependency finding for alcohol is somehow supported by substantial evidence, the condition is still improper because the court ordered substance abuse treatment rather than alcohol treatment. Court-ordered treatment must address an issue that contributed to the offense. Id. at 207-08. Even assuming alcohol abuse is a type of chemical dependency, alcohol abuse and chemical dependency or substance abuse are not interchangeable terms for purposes of RCW 9.94A.607(1). Warnock, 174 Wn. App. at 613-14; Jones, 118 Wn. App. at 202, 207-08 (recognizing a difference between controlled substances and alcohol in holding alcohol counseling was not statutorily authorized when methamphetamines but not alcohol contributed to the offense); Motter, 139 Wn. App. at 801 (distinguishing between "substance abuse" and "alcohol" treatment as a condition of community custody).

Because there is no evidence and finding that anything other than alcohol contributed to Villafuerte's offense, the remedy is to remand with directions to amend the judgment and sentence to impose only alcohol treatment. Warnock, 174 Wn. App. at 614; see also State v. Kinzle, 181

Wn. App. 774, 786, 326 P.3d 870 (2014) ("Evidence at trial suggested that Kinzle was drinking alcohol shortly before the charged incidents. But here, as in Warnock, there is no evidence that a substance other than alcohol contributed to Kinzle's offense. We remand with directions to amend the judgment and sentence to impose evaluation and recommended treatment only for alcohol.").

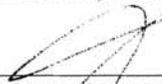
D. CONCLUSION

For the reasons set forth, Villafuerte requests reversal of the conviction. If the Court declines to reverse, then the erroneous community custody conditions should be stricken or fixed.

DATED this 19th day of November 2014

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71756-1-I
)	
ELMER VILLAFUERTE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] ELMER VILLAFUERTE
13734 12TH AVENUE SW
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BURIEN, WA 98166

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF NOVEMBER 2014.

X Patrick Mayovsky

RECORDED
NOV 20 2014