NO. 45436-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT L. VANDERVORT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Amber L. Finlay, Judge
Cause No. 13-1-00307-4

BRIEF OF APPELLANT

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01. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Vandervort of his constitutional due process right to a fair trial.

02. The trial court erred in permitting Vandervort to be represented by counsel who provided ineffective assistance by failing to properly object to the prosecutor's closing argument that created a false choice.

03. The trial court erred in imposing a community custody condition prohibiting Vandervort from frequenting places whose primary business is the sale of liquor.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether by creating a false choice, the prosecutor's closing argument constituted prosecutorial misconduct that denied Vandervort a fair trial? [Assignment of Error No. 1].

02. Whether Vandervort was prejudiced as a result of his counsel's failure to properly object to the prosecutor's closing argument that created a false choice and constituted prosecutorial misconduct that denied Vandervort a fair trial? [Assignment of Error No. 2].

03. Whether the trial court acted without authority in ordering Vandervort not to frequent places whose primary business is the sale of liquor? [Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

Robert L. Vandervort was charged by first amended information filed in Mason County Superior Court August 29, 2013, with unlawful possession of methamphetamine, contrary to RCW 69.59.4013(1). [CP 55-56].

The court denied Vandervort's motion to suppress evidence under CrR 3.5 and CrR 3.6 and entered the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

> 1. On July 10, 2013 Officer Jewett discovered a vehicle in the woods on private property near Highway 101 at Purdy Cannon in Mason County Washington. The vehicle was parked 30 yards from the highway in the brush. The vehicle was not on the road and it was surrounded by trees. Officer Jewett approached the vehicle to see if the vehicle was stolen or abandoned.
>
> 2. Upon his initial approach Officer Jewett observed the Defendant and a female in the vehicle asleep and/or non-responsive. Both individuals were partially undressed with no pants on.
>
> 3. Officer Jewett knocked on the window to see if the individuals were in distress and to pursue and (sic) investigation regarding whether or not the individuals in the vehicle were trespassing on private property. Officer Jewett was familiar with the location and knew it to be private property. Officer Jewett initially asked the subjects in the vehicle "if they were ok."

4. Officer Jewett then asked the Defendant for identification. The Defendant retrieved his identification from a backpack located in the back of the vehicle and gave his identification to Officer Jewett. Whereupon Officer Jewett returned to his patrol car and learned the Defendant had an active warrant for his arrest.

5. Officer Jewett returned to the vehicle and discovered the Defendant had fled into the woods with his backpack.

6. Officer Jewett located the Defendant approximately 300 yards away from the vehicle hiding under a cedar tree in a patch of brush. The Defendant was clutching the backpack. Officer Jewett placed the Defendant under arrest and read the Defendant his Miranda rights. The Defendant consented orally and in writing to a search of his backpack that ultimately revealed a stash of methamphetamine. The Defendant was advised that the Defendant had the right to refuse consent.

7. After the arrest there was some discussion regarding what would happen to the methamphetamine. The court finds there was never any promise made by Officer Jewett to destroy the methamphetamine before the case was resolved in exchange for consent to search.

8. The court would also note the Defendant had a prior theft conviction and the Defendant admitted to lying to officer Jewett regarding the existence of a warrant, and therefore the court did not find the Defendant to be a credible witness.

Based upon the foregoing findings of fact, the court hereby makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this action. The State bears the burden of establishing that a statement made by a person

charged with a crime was made knowingly and voluntarily before it will be admitted at a trial or hearing. The court considered the totality of the circumstances surrounding the statements by the Defendant in this case. The Miranda rule only applies if the statements sought to be admitted resulted from a custodial interrogation.

2. The post-Miranda statements by the defendant to Officer Jewett were not the product of a custodial interrogation and were freely and voluntary given and not coerced. Therefore, the statements are admissible.

3. Officer Jewett was initially performing a community caretaking function which gave him the authority to approach the vehicle and determine if the occupants of the vehicle were in need of assistance. Further, Officer Jewett had reasonable and articulable suspicion that the occupants of the vehicle were trespassing on the property.

4. Officer Jewett's request for identification was lawful.

5. Officer Jewett had lawful authority to search the backpack incident to arrest. Furthermore, the Defendant freely and voluntarily consented to the search of the backpack.

6. Based on the foregoing findings of fact and conclusions of law the court denies Defendant's Motion to Suppress.

[CP 21-24].

Jury trial commenced September 11, the Honorable Amber L. Finlay presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 92]. Vandervort was found guilty, sentenced within his standard range, and timely notice of this appeal followed. [CP 2-20, 32].

02. Substantive Facts: CrR 3.6 Hearing

After learning that Vandervort had an outstanding "felony warrant for controlled substance [RP 9](,)" Officer Jewett arrested him about 50 yards from the vehicle behind a cedar tree with his backpack under his right arm. [RP 14]. Vandervort waived his Miranda[1] rights [RP 10] and consented to a search of his backpack, which produced a substance that field tested positive for methamphetamine. [RP 11-12]. Jewett denied making any threats or promises to obtain Vandervort's consent. [RP 14, 16].

Vandervort admitted to lying to Jewett about the existence of his outstanding warrant: "I knew I had a warrant so I went and hid in the woods just a little bit away from there." [RP 26]. He claimed he signed the consent form only because Jewett said he would throw away any substance he found in the backpack:

> … I told him that there might be something in there but it's not mine. And he said, well, do I have to get a warrant to search your bag? And I said, well, will you throw it away if there's something in there? And he stated that he would several times on the way back to his truck and at his truck before I signed the papers he said he'd throw it away.

[RP 26-27].

[1] Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

03. Substantive Facts: Trial

Officer Jewett testified consistent with his pretrial testimony [RP 52-58, 62-65], further describing how he found Vandervort in the woods "(l)ess than a half-hour" after he had exited the car [RP 69-70], and how Vandervort showed him where the substance, which subsequently tested positive for methamphetamine, was located in a little black container inside his backpack along with a meth pipe, needles and numerous Ziploc bags. [RP 58-59, 74].

Vandervort again admitted to lying to Jewett about the existence of his outstanding warrant [RP 80, 84] and further explained why he left the car while Jewett was checking his identification:

> Well, I went partly because I had a warrant and I had to get dressed, so I went – and I was tired. I went probably about thirty or fifty feet from the car and I fell asleep, and I was using my backpack for a
> pillow.

[RP 81].

He said he found the black container in "Sheila's car" and put it in his backpack. [RP 82]. He denied knowing the contents of the black container: "I told (Jewett) I didn't know what was in that, that it wasn't

mind." [RP 83]. "I said it may contain some meth because the guy that – Frank Sherrill smoked some meth with us …."[2] [RP 85].

In the State's rebuttal case, Jewett said that when he located Vandervort, his backpack was under this right arm, that Vandervort said methamphetamine was in the black container, and that he never mentioned the name Frank Sherrill. [RP 86-87]. "He led me exactly through the bag to the black container and said that it's inside the Altoid can." [RP 87].

D. ARGUMENT

01. BY CREATING A FALSE CHOICE, THE PROSECUTOR'S CLOSING ARGUMENT CONSTITUTED PROSECUTORIAL MISCONDUCT THAT DENIED VANDERVORT A FAIR TRIAL.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where it is established that the prosecutor made improper comments, this court reviews whether those improper statements

[2] The remaining portion of this response was stricken. [RP 85].

prejudiced the defendant under one of two different standards of review. State v. Emery, 174 Wn. 2d 742, 7761, 278 P.3d 653 (2012).

Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

However, where the State's misconduct violates a defendant's constitutional rights, this court analyzes the prejudice under a different standard: the stringent constitutional harmless error standard. State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996). Under this standard, this court presumes constitutional errors are harmful and must reverse unless the State meets the heavy burden of overcoming the presumption that the error is prejudicial, Id. at 242, which requires proof that the untainted evidence overwhelmingly supports a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Flagrant and ill-intentioned prosecutorial misconduct is a due

process violation. State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984).

A prosecutor's obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d at 762.

During the State's rebuttal argument, in addressing Vandervort's defense of unwitting possession, the prosecutor argued to find this defense the jury

> would have to be able to explain how it is that Officer Jewett was either mistaken or being dishonest. Because you can't have – there's one truth and three different stories, and you can't have your cake and eat it too, so it's either Officer Jewett is mistaken or being dishonest or the defendant is being dishonest.
>
> It's one or the other, and which is more probable? Is there any motivation on the part of a police officer to come

> in here and lie? And what motivation does the defendant have? Well, he has a stake in the outcome, and he's shown that he can lie under oath....

[RP 112].

""(I)t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997). A "false choice" argument misrepresents the role of the jury and the burden of proof by telling the jurors they must decide who is telling the truth and who is lying in order to reach a verdict. State v. Wright, 76 Wn. App. 811, 825-26, 888 P.2d 1214 (1995).[3] The jury's task is not to choose between competing stories, but the prosecutor's argument improperly suggests otherwise and is improper. It is misleading and unfair to make it appear that an acquittal demands the jury to conclude that the State's witnesses are lying. Id. at 824-26.

Vandervort's sole defense was unwitting possession. [RP 107-08; CP 46]. Without it, he was defenseless, and the prosecutor's argument focused on keeping it that way, which was flat-out wrong and definitely beyond any permissible latitude in closing argument. It was anything but subtle and nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, for it was "'so flagrant and ill-

[3] Wright was superseded by statute on grounds not relevant here.

intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). The prosecutor's misconduct ensured that Vandervort did not receive a fair trial.

> Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient....

In re Glassman, 175 Wn.2d 696, 711, 286 P.3d 673, 681 (2012).

02. VANDERVORT WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT THAT CREATED A FALSE CHOICE AND CONSTITUTED PROSECUTORIAL MISCONDUCT THAT DENIED VANDERVORT A FAIR TRIAL.[4]

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that

[4] While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court determine that counsel waived the issue by failing to properly object to the prosecutor's closing argument that created a false choice, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel would have failed to so object to this argument for the reasons previously argued herein. Had counsel objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident for the reasons set forth in the preceding section.

Counsel's performance thus was deficient because he failed to properly object to the prosecutor's argument here at issue for the reasons previously agued herein, which was highly prejudicial to Vandervort, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

03. THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING VANDERVORT NOT TO FREQUENT PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF LIQUOR.

As a condition of community custody, the court ordered that Vandervort:

> … shall not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor;

[CP 19].

"'In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). This court reviews whether a trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

There was no evidence at trial that alcohol played any part in Vandervort's crime. In State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), the defendant pleaded guilty to several offenses and the court imposed conditions of community custody relating to alcohol consumption and treatment. As here, nothing in the record indicated that alcohol contributed to Jones's offenses. Id. at 207-08. This court found that although the trial court had authority to prohibit consumption of alcohol, it did not have the authority to order the defendant "to participate in alcohol counseling(,)" Id. at 208, reasoning that the legislature intended a trial court to be able "to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." Id. at 206. In contrast, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. Id. at 207-08; See also State v. McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (community custody

provisions prohibiting purchasing and possession of alcohol invalid where alcohol did not play a role in the crime), reviewed denied, 163 Wn.2d 1049 (2008). And while RCW 9.94A.703(3)(e), authorizes the sentencing court to order that an offender refrain from consuming alcohol, there is no such authority forbidding an offender from frequenting places whose primary business is the sale of liquor, sans any evidence and argument that it qualifies as a crime-related prohibition under RCW 9.94A.703, which constitutes "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...." RCW 9.94A.030(10).

The condition prohibiting Vandervort from frequenting places selling liquor is invalid because there was no evidence that alcohol played any part in his offense, with the result that it is not a crime-related prohibition and must be stricken.

E. CONCLUSION

Based on the above, Vandervort respectfully requests this court to reverse Vandervort's conviction and to remand for retrial or resentencing consistent with the arguments presented herein.

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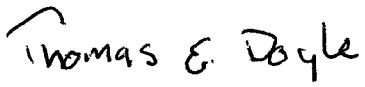

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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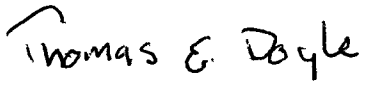

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