No. 45436-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ROBERT L. VANDERVORT, APPELLANT

Appeal from the Superior Court of Mason County
State of Washington
The Honorable Judge Amber L. Finlay

No. 13-1-00307-4

BRIEF OF RESPONDENT

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A. STATE'S RESTATEMENT OF APPELLANT'S ASSIGNMENTS OF ERROR

1. By creating a false choice, the prosecutor's closing argument constituted prosecutorial misconduct that denied Vandervort a fair trial.

2. 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.

3. The trial court acted without authority in ordering Vandervort not to frequent places whose primary business is the sale of liquor.

B. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Vandervort testified at trial that he did not know that he possessed methamphetamine. The arresting officer testified that Vandervort admitted to him that he possessed methamphetamine. Vandervort argued at trial that the fact that he possessed methamphetamine was proved beyond a reasonable doubt, but he argued the affirmative defense of unwitting possession because he did not know that he possessed methamphetamine. The prosecutor argued that in order for the jury to believe that Vandervort did not know that he possessed methamphetamine, it must disbelieve the officer. Because this comment did not shift the burden of proof in regard to Vandervort's affirmative defense for which he bore the burden of proof, and because the prosecutor only pointed out the obviously irreconcilable conflict between Vandervort's testimony and the officer's testimony, the prosecutor did not commit misconduct by making this comment.

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2. It was not error for the prosecutor to make reference to the irreconcilable conflict between Vandervort's testimony and the arresting officer's testimony in closing argument, but even if this was error, it was harmless error, and defense counsel's failure to object did not constitute ineffective assistance of counsel because the conflict in the testimony was obvious and apparent to the jury and would have been considered by the jury irrespective of the prosecutor's reference to it during closing argument; and, the prosecutor's reference to it is, therefore, unlikely to have had any effect on the jury's verdict.

3. Because there is no finding by the trial court that entry into bars, taverns, lounges, or other places whose primary business is the sale of liquor contributed to his crime, the community custody condition that prohibits Vandervort from entering such places should be stricken from his judgment and sentence.

B. FACTS AND STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Vandervort's recitation of the procedural history and facts, with the exception of additional facts as needed to develop the State's arguments, below.

C. ARGUMENT

1. Vandervort testified at trial that he did not know that he possessed methamphetamine. The arresting officer testified that Vandervort admitted to him that he possessed

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> methamphetamine. Vandervort argued at trial that the fact that he possessed methamphetamine was proved beyond a reasonable doubt, but he argued the affirmative defense of unwitting possession because he did not know that he possessed methamphetamine. The prosecutor argued that in order for the jury to believe that Vandervort did not know that he possessed methamphetamine, it must disbelieve the officer. Because this comment did not shift the burden of proof in regard to Vandervort's affirmative defense for which he bore the burden of proof, and because the prosecutor only pointed out the obviously irreconcilable conflict between Vandervort's testimony and the officer's testimony, the prosecutor did not commit misconduct by making this comment.

Officer Jewett testified that when he contacted Vandervort at the time of arrest, Vandervort told him there was methamphetamine in a black container in his backpack. RP 87. But at trial, Vandervort testified that he found the black container in the back seat of the car and that he put it into his backpack but didn't know what it contained. RP 82-83. At trial, Vandervort denied that he ever told Officer Jewett that the black container contained methamphetamine. RP 83.

In closing argument, Vandervort freely admitted that each of the elements of possession were proved beyond a reasonable doubt, but he then asserted that his possession was unwitting. RP 106-09. Unwitting possession is an affirmative defense that the defendant must prove by a

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preponderance of evidence. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

In the State's rebuttal closing argument, the prosecutor argued that "[i]n regard to the unwitting possession defense, that defense is just simply not credible. It doesn't add up when you consider all the evidence." RP 110. The prosecutor then pointed out that:

> The methamphetamine was in his backpack. That shows you he has knowledge. That goes into your calculus of determining whether or not on a more probable than not basis he had knowledge. He admitted it was there to Officer Jewett. That should factor into your calculus. He showed Officer Jewett exactly where the methamphetamine was in the backpack.

RP 110. But Vandervort argued that his possession was unwitting, so in response, the prosecutor argued as follows:

> The defendant's story doesn't make sense either, and you should consider that we've heard three different stories. Story number one is the story he told Officer Jewett, which is that yes, I have methamphetamine; it's in my bag, let me show you where it is. Story number two is what he testified to on direct exam when he was questioned by his attorney when he testified, I didn't know the black container in my backpack contained methamphetamine.
>
> Story number three came up and was where we left off, and the story he stuck with when I cross-examined him. I asked him, well, didn't you testify under oath at a prior hearing that maybe there was a little meth in the black canister in the backpack? Yeah, finally he admitted that's true. That's story number three. So, we have three different stories from the defendant.
>
> On a more probable than not basis, which story is more likely true? When he's confronted by Officer Jewett, when he has

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> motivation to tell the truth, when perhaps he's looking for leniency from the officer that's placing him handcuffs, or months later when he has a skin in the game? Months later when he's concerned about repercussions and when he's had time to think about how he could potentially get out of this.
>
> My last point in regards to on a more probable than not basis whether he had knowledge, for you to find that on a more probable than not basis he did not know the methamphetamine was in his backpack, you 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. He was caught red-handed. He ran away from the police officer. Flight is evidence of guilt.
>
> It's up to you now. I ask you to uphold the law, and I'm asking you to find the defendant guilty, and I'm asking you to reject the unwitting possession defense. Thank you.

RP 111-12.

The instant case is distinct from those cited by Vandervort, because here Vandervort bore the burden of proof in regard to his affirmative defense of unwitting possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). For example, the case of *In re Glassman*, 175 Wn.2d 696, 286 P.3d 673 (2012), is distinguishable from the instant case because the Court in *Glassman* found that the prosecutor erroneously shifted the burden of proof to the defendant when the

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prosecutor argued to the jury that in order to reach a verdict it must determine whether the defendant lied when he testified. *Id.* at 713-14. But such reasoning is not applicable here, where Vandervort bore the burden of proof in regard to his affirmative defense. *Bradshaw* at 538.

The jury in the instant case was presented with two conflicting versions of facts to support whether Vandervort knew he possessed methamphetamine: Vandervort testified that he did not know the black case in his backpack contained methamphetamine; and, Officer Jewett testified that Vandervort told him there was methamphetamine in a black case in his backpack. RP 82-83, 87. "Where, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." *State v. Wright,* 76 Wn. App. 811, 825, 888 P.2d 1214 (1995) (footnote omitted).

The prosecutor in the instant case argued to the jury that, because of the conflicting versions of the testimony, in order to find that Vandervort did not know there was methamphetamine in his backpack, the jury "would have to be able to explain how it is that Officer Jewett was either mistaken or being dishonest." RP 112. This statement, of course, is

not entirely correct, because the jury did not need to understand or explain Officer Jewett's testimony or belief – all that the jury was required to do was to determine whether Vandervort probably did not know that he possessed methamphetamine. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

"[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 Wash.App. 209, 213, 921 P.2d 1076 (1996). This is because this argument suggests that the jury may base its verdict on something other than whether the State proves the defendant's guilt beyond a reasonable doubt. *Id.* at 213; *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995). However, the State contends that this reasoning is inapplicable to the instant case, where Vandervort conceded that the elements of the offense were proved beyond a reasonable doubt.

Still more, the prosecutor did not argue that the jury needed to resolve Officer Jewett's testimony "in order to acquit [the] defendant," as in *Fleming*. Instead, here, the prosecutor merely emphasized the irreconcilable conflict between the two witnesses' versions of what had occurred in regard to the knowledge element of Vandervort's affirmative defense, and he argued that, in order to conclude that Vandervort probably

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didn't know he possessed methamphetamine in his backpack, there would have to be some explanation for how he could have told Officer Jewett about the methamphetamine in his backpack even though he didn't know there was methamphetamine in the backpack. RP 111-12.

During closing argument, the prosecuting attorney may draw inferences from the evidence as to why the jury would want to believe one witness over another. *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Vandervort testified that he did not know there was methamphetamine in his backpack and that he never told Officer Jewett that he did; Officer Jewett testified that Vandervort told him there was methamphetamine in his backpack. RP 82-83, 87. Here, the prosecutor did not argue that in order to acquit Vandervort it must believe that Officer Jewett was lying; instead, the prosecutor argued that "it's either Officer Jewett is mistaken or being dishonest or the defendant is being dishonest." RP 112. Resolving this conflicting testimony was relevant because if Vandervort knew he possessed methamphetamine, the affirmative defense of unwitting possession would fail. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Where a jury must resolve conflicting testimony, the prosecutor may argue that if it accepts one version, it must

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reject the other. *State v. Wright*, 76 Wn. App. 811, 825. 888 P.2d 1214 (1995).

Additionally, Vandervort did not object to the prosecutor's argument at trial. RP 109-12. Because Vandervort did not object, the issue may not be raised for the first time on appeal unless the alleged error is a manifest error that affects a constitutional right. RAP 2.5(a). In the instant case had there been an objection to the prosecutor's argument, a jury instruction could have cured the error, if it was error. The alleged error was not so flagrant or ill-intentioned as to be incurable by an objection and instruction from the court. The error alleged here does not amount to manifest constitutional error. *State v. Barrow*, 60 Wn. App. 869, 876, 809 P.2d 209 (1991). Because Vandervort did not object at trial, he should not be permitted to raise this issue on appeal. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

2. It was not error for the prosecutor to make reference to the irreconcilable conflict between Vandervort's testimony and the arresting officer's testimony in closing argument, but even if this was error, it was harmless error, and defense counsel's failure to object did not constitute ineffective assistance of counsel because the conflict in the testimony was obvious and apparent to the jury and would have been considered by the jury irrespective of the prosecutor's reference to it during

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> closing argument and the prosecutor's reference to it is, therefore, unlikely to have had any effect on the jury's verdict.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, Vandervort must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

The State contends foremost that the prosecutor's argument on the facts of this case was not improper, but that even if the prosecutor had not referenced the irreconcilable conflict between Vandervort's testimony and Officer Jewett's testimony, the conflict was nevertheless obvious to the jury. Thus, it is unlikely that the prosecutor's mere reference to this obvious conflict had any affect at all on the jury's verdict. It is more likely that, irrespective of the prosecutor's reference to the conflict, the jury's verdict was based only upon its assessments of evidence and that it

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would have made these assessments regardless of any argument made by the prosecutor. Because there is not a reasonable likelihood that the outcome of the trial would have been different had defense counsel objected, Vandervort cannot show prejudice, and his claim of ineffective assistance of counsel should, therefore, fail. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007)

3. Because there is no finding by the trial court that entry into bars, taverns, lounges, or other places whose primary business is the sale of liquor contributed to his crime, the community custody condition that prohibits Vandervort from entering such places should be stricken from his judgment and sentence.

At sentencing, the trial court found that Vandervort has a chemical dependency that contributed to the offense. CP 4. As a condition of community custody, the trial court prohibited Vandervort from the possession or use of drugs or alcohol. CP 15. Additionally, the trial court ordered as a condition of community custody that Vandervort "not go into bars, taverns, lounges or other places whose primary business is the sale of liquor[.]" CP 16.

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A review of the Judgment and Sentence does not reveal any finding by the trial court that Vandervort suffers from alcohol dependency or that going into bars, taverns, lounges, or other places whose primary business is the sale of liquor contributed to his crime in this case. RP 3-20.

The legislature has sole province to establish legal punishments; thus, community custody conditions must be authorized by statute. *State v. Kolesnik,* 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied,* 165 Wn.2d 1050 (2009); *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003). The sentencing court had discretionary authority to impose crime related prohibitions. RCW 9.94A.703(3)(f). But, because the trial court did not make a finding that going into bars, taverns, lounges, or other places whose primary business is the sale of liquor contributed to Vandervort's crime of conviction, the court lacked statutory authority to impose that condition. *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

Because the condition is not crime related, and because there is otherwise no specific statutory authority to impose the condition, the condition should be stricken from Vandervort's judgment and sentence. *State v. Jones*, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003).

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D. CONCLUSION

For the reasons stated above, the State asks the court to deny Vandervort's appeal and to confirm his conviction, but the State asks the matter be returned to the trial court with an order to strike from his judgment and sentence the community custody condition that he not enter bars or taverns.

DATED: May 12, 2014.

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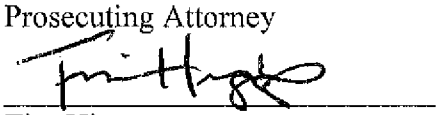

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