91115-1

IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

ROBERT L. VANDERVORT,

Petitioner.

FILED
DEC 16 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

Court of Appeals No. 45436-0-II
Appeal from the Superior Court for Mason County
The Honorable Amber L. Finlay, Judge
Cause No. 13-1-00307-4

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FILED IN COA ON DECEMBER 17, 2014

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is ROBERT L. VANDERVORT, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the unpublished opinion in the Court of Appeals, Division II, cause number 45436-0-II, filed November 18, 2014. No Motion for Reconsideration has been filed in the Court of Appeals.

A copy of the unpublished opinion is attached hereto in the Appendix at A1-A6.

C. ISSUES PRESENTED FOR REVIEW

01. Whether the prosecutor committed misconduct by presenting the jury with a false choice?

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?

D. STATEMENT OF THE CASE

As provided in Vandevort's Brief of Appellant, which sets out facts and law relevant to this petition and is hereby incorporated by reference, he was convicted of unlawful control of a controlled substance. On appeal, he argued, in part, that his conviction should be reversed

because the prosecutor committed misconduct by presenting the jury with a false choice, and because he received ineffective assistance of counsel for his counsel's failure to object to the prosecutor's argument.

Relying on Division I's decision in State v. Wright, 76 Wn. App. 811, 823, 888 P.2d 1214 (1995), superseded by statute on other grounds RCW 9.94A.364(6), Division II found no misconduct, holding:

> This case is similar to Wright. There the prosecutor argued that in order to believe the defendant, "the jury would have to believe that the officers got it wrong." Wright, 76 Wn. App. at 823 (internal quotation marks omitted). This was distinguishable from a prosecutor saying that to find a defendant not guilty, the jury would have to believe that the officers were lying. Wright, 76 Wn. App. at 823.

[Slip Op. at 4]. This reasoning is misplaced.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

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01. THE PROSECUTOR CREATED A FALSE CHOICE BY ARGUING IN REBUTTAL THAT EITHER THE POLICE OFFICER IS MISTAKEN OR BEING DISHONEST OR THE DEFENDANT IS BEING DISHONEST.

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 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 that 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].

This argument constituted misconduct for it is improper for the prosecutor to argue that in order to acquit a defendant or to believe his or her testimony is credible the jury must find 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); State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991). A jury need only find that the State failed to prove its case beyond a reasonable doubt. Id. at 875-76. In

Wright, where the prosecutor argued that "the jury would need to believe that the State's witnesses were mistaken," the court found no misconduct, explaining the argument did not foreclose the possibility that the testimony was "'incorrect ... without any deliberate misrepresentation ....'" Wright, 76 Wn. App. at 824.

In contrast, as above noted, here the prosecutor framed his argument in the alternative: to acquit Vandervort, the jury would have to find that Officer Jewett was either mistaken or dishonest. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE defines "dishonest" as:

> 1. not honest; disposed to lie, cheat, or steal; not worthy of trust or belief: a dishonest person.... (emphasis in the original).

THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 412 (1966).

The short of it: The prosecutor was arguing that the jury could acquit Vandervort if it found that the Officer Jewett was disposed to lie, cheat, or steal, or was not worthy of trust or belief. 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 consider that the State's witnesses are lying. State v. Wright, 76 Wn. App. 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-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).

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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.[1]

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 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

[1] 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.

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.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse Vandervort's conviction and remand for retrial consistent with the arguments presented herein

DATED this 17th day of December 2014.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

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

Tim Higgs timh@co.mason.wa.us	Robert L. Vandervort #815445 WSP 1313 North 13th Avenue Walla Walla, WA 99362-8817

DATED this 17th day of December 2014.

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APPENDIX

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT L. VANDERVORT, Appellant.	No. 45436-0-II UNPUBLISHED OPINION

WORSWICK, P.J. — Robert Vandervort appeals his conviction for unlawful possession of a controlled substance. He argues that the prosecutor committed misconduct by presenting the jury with a false choice, and that he received ineffective assistance of counsel because his attorney failed to object to the prosecutor's rebuttal closing statement. He also appeals his sentencing condition that prohibits him from going into any place whose primary place of business is the sale of liquor. We affirm his conviction, but remand to the trial court to strike the sentencing condition.

FACTS

On July 10, 2013, Officer Matthew Jewett of the Department of Fish and Wildlife spotted a vehicle about 30 yards off the road on Highway 101 near Purdy Canyon. As he approached the car, Officer Jewett observed a man and a woman sleeping inside. Officer Jewett woke the occupants, asked for their identification, and asked whether either of them had a warrant. The woman did not have identification, but gave her name and date of birth. The man, Robert Vandervort, removed his identification from a backpack and gave it to Officer Jewett. Vandervort

denied having an outstanding warrant. Officer Jewett investigated both names and discovered Vandervort's outstanding warrant. In the meantime, Vandervort fled into the woods.

After backup officers arrived, Officer Jewett found Vandervort about 50 yards from the vehicle, lying face down behind a large tree and holding onto the backpack. Officer Jewett arrested Vandervort and read him his *Miranda*[1] rights. Officer Jewett asked Vandervort how much methamphetamine he had in his backpack. Vandervort answered that there was a small amount and that he would show Officer Jewett where it was, which he did. Officer Jewett found methamphetamine inside a container in the backpack.

The State charged Vandervort with unlawful possession of a controlled substance. At trial, Vandervort asserted the affirmative defense of unwitting possession. Officer Jewett testified, "I asked him about how much meth he had in his backpack and he said it was just a small amount and that he would show me exactly where it was." Report of Proceedings (RP) at 58. Vandervort testified that he told Officer Jewett that the container "may contain meth" because he had smoked methamphetamine with the person who owned the container. RP at 85. He further testified that he was unaware of the contents of the black container because it belonged to someone else. On cross-examination, Vandervort admitted he had lied to Officer Jewett about the outstanding warrant.

During defense's closing argument, counsel raised the issue of Vandervort's credibility and admitted that the State had proven its case, and counsel then discussed the unwitting possession instruction. During the State's rebuttal, the prosecutor said,

> In regards to the unwitting possession defense, that defense is just simply not credible. . . . [I]n 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

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

> 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.

RP at 110, 112. A jury found Vandervort guilty of unlawful possession of a controlled substance.

At sentencing, the trial court found Vandervort had a chemical dependency that contributed to the offense. As a condition for community custody, the trial court ordered Vandervort to stay away from places whose primary business is the sale of liquor.

ANALYSIS

Vandervort appeals his conviction, arguing that the prosecutor committed misconduct in his closing arguments, and that Vandervort received ineffective assistance of counsel when his attorney did not object to the State's closing argument. He also appeals his community custody condition requiring him to abstain from entering businesses that sell liquor. The State concedes that the trial court did not have the authority to impose this sentencing condition.

PROSECUTORIAL MISCONDUCT

When a defendant asserts a claim of prosecutorial misconduct, the defendant must prove that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011)). Allegedly improper conduct should be viewed "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). To establish prejudice, the defendant must prove that there was a

substantial likelihood that the prosecutor's misconduct affected the jury's verdict. *Thorgerson*, 172 Wn.2d at 442-443. Prosecutors are presumed to act impartially in the interest of justice. *Thorgerson*, 172 Wn.2d at 443. When the defendant does not object at trial, any error is deemed waived "unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-761 (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

A prosecutor commits misconduct if he or she argues that 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 (1996). However, an argument that to believe a defendant, the jury would need to believe that the State's witnesses are mistaken, does not constitute misconduct. *State v. Wright*, 76 Wn. App. 811, 824, 888 P.2d 1214 (1995). Additionally, remarks by the prosecutor, including those that would otherwise be improper, are not grounds for reversal where they are invited by and responded to with remarks by defense counsel, unless they bring in additional matters beyond the record or are "so prejudicial that an instruction would not cure them." *State v. La Porte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

This case is similar to *Wright*. There, the prosecutor argued that in order to believe the defendant, "the jury would have to believe that the officers got it wrong." *Wright*, 76 Wn. App. at 823 (internal quotation marks omitted). This was distinguishable from a prosecutor saying that to find a defendant not guilty, the jury would have to believe that the officers were lying. *Wright*, 76 Wn. App. at 823. Because Vandervort asserted an unwitting possession defense, his defense relied on his credibility. The only evidence tending to prove an unwitting possession defense was Vandervort's own testimony. His defense depended on whether the jury found his version of events credible when he testified he did not know what was in the container containing the

methamphetamine, and that it belonged to someone else. Defense counsel raised the issue of Vandervort's credibility in his closing. The prosecutor, in turn, brought up the issue of conflicting testimony as it related to the defendant's credibility. The prosecutor's reference to the conflicting testimony between Officer Jewett and Vandervort in rebuttal closing was not misconduct.

INEFFECTIVE ASSISTANCE OF COUNSEL

To succeed on an ineffective assistance of counsel claim, a defendant must show both that counsel's representation was deficient, and that this deficiency prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). If a defendant makes an insufficient showing on one prong, we need not address the other. *State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). Because Vandervort has failed to prove that the prosecutor committed misconduct, there was no basis for an objection. Therefore, counsel's performance could not have been deficient. Vandervort's ineffective assistance of counsel claim fails.

SENTENCING CONDITION

Vandervort also argues that the trial court acted without authority when it ordered him not to frequent places whose primary business is the sale of liquor. The trial court has the statutory authority to impose crime-related prohibitions as conditions for community custody. RCW 9.94A.703(3)(f). However, there is nothing in the record showing that alcohol contributed to Vandervort's possession of a controlled substance offense, or that he suffers from alcohol dependency. Accordingly, we accept the State's concession and remand to the trial court to strike the community custody condition requiring Vandervort to stay away from businesses that sell liquor.

CONCLUSION

We affirm Vandervort's conviction because the prosecutor's remarks were not improper. We accept the State's concession regarding the community custody condition, and remand to the trial court to strike the condition ordering Vandervort to stay away from businesses that sell alcohol.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Sutton, J.

DOYLE LAW OFFICE

December 17, 2014 - 3:55 PM

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