No. 72538-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ZANDER,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENT OF ERROR

The prosecutor's improper and prejudicial argument denied Christopher Zander a fair trial.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees an individual a fair trial. Courts have long held that it is improper for a prosecutor in closing argument to misstate the law or appeal to the passion of the jury. Where in closing argument, the deputy prosecutor repeatedly misstated the law and appealed to the jury's passions is a new trial required?

C. STATEMENT OF THE CASE

Christopher Zander has a history of severe mental illness. Unfortunately that illness has led to a number of violations of an order barring him from contacting Deborah Condon, with whom he had a relationship many years ago.

Mr. Zander explained to the jury that he is a "Cyborg" under the direction of the "quantum computer." RP 447-48. He went to Ms. Condon's home under the direction of the computer explaining that because of the "override it's outside my control." RP 471.

The instant case arose from four separate violations. On the first occasion, Mr. Zander drove to the gate at the end of Ms. Condon's driveway and threw a purse over the gate. RP 167.The second time, Mr. Zander left a work light, Twinkies, zingers, and airplane size bottles of alcohol. RP 167. The third incident involved Mr. Zander tossing carpet rolls over the gate. RP 174. On the fourth occasion, as Ms. Condon drove into her cul-de-sac one evening she encountered Mr. Zander standing in the middle of the street. RP 178. After a short period of time staring at one another, Mr. Zander retreated into some nearby woods where he stood shining a flashlight. RP 178.

The State charged Mr. Zander with four counts of violating a no contact order. CP 68-69. A jury convicted him as charged. CP 101-04.

D. ARGUMENT

The deputy prosecutor's improper and prejudicial argument denied Mr. Zander a fair trial.

1. *Due process prohibits a prosecutor from engaging in improper and prejudicial argument.*

The Sixth and Fourteenth Amendments and article I, section 3 guarantee the right to a fair trial. *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecuting attorney is the representative of the community; therefore it is the

prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

2. *By disparaging defense counsel, misstating the law, and urging the jury to consider matters beyond their role, the prosecutor denied Mr. Zander a fair trial.*

a. The deputy prosecutor prejudicially disparaged defense counsel.

The Sixth Amendment guarantees a defendant the effective assistance of counsel. It is improper for the prosecution to comment on the role of counsel or disparage defense counsel. *State v. Thorgerson*, 172 Wn.2d 438, 451-52; 285 P.3d 43 (2011); *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); *State v. Gonzales*, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002).

Thorgerson found the prosecutor plainly committed misconduct where in closing argument he told the jury that the defense presentation was "bogus" and involved "sleight of hand." 172 Wn.2d at 452. The

Court found the "sleight of hand" statement particularly problematic as it suggested "wrongful deception" by defense counsel. *Id*.

Here, the deputy prosecutor began his closing argument telling the jury that after the State's argument defense counsel would mislead them and urge them to go beyond their duty. RP 549. Defense counsel immediately objected. *Id*. Telling the jury that defense counsel would mislead them and encourage them to do something improper is precisely the type of argument *Thorgerson* found to be improper.

Despite an immediate objection, the trial court did not correct the error. Indeed, the court seemingly overruled the objection, stating "I'm not going to decide what either lawyer is saying." *Id*. The court then reminded the jury that argument counsel was intended to assist the jury in applying the law to the facts. *Id*. at 549-50. The court never told the jury that the prosecutor's disparaging comments were improper. In fact by telling jurors that argument was intended to assist them, it allowed the jury to believe the prosecutor was attempting to assist them when telling them not to trust defense counsel. Rather than cure the error the court magnified it.

b. The deputy prosecutor improperly and prejudicially urged the jury to consider factors beyond their role.

It is improper for the State to employ in its arguments to the jury inflammatory comments which are a deliberate appeal to the passions and prejudices of the jury. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Such arguments are improper for the added reason that they so often rely on matters outside the evidence. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Here, the deputy prosecutor made such flagrant and prejudicial comments.

At the conclusion of his initial argument, the deputy prosecutor stated "an effort has been made to make this about Mr. Zander . . . this case is not about Mr. Zander, this case is about Ms. Condon and the efforts we go through to protect ourselves . . . ." RP 565. Mr. Zander did not immediately object. However, before the State's rebuttal argument Mr. Zander noted his objection to such arguments. RP 577.

Despite the objection and at the outset of rebuttal, the deputy prosecutor told the jury to "think about how [Ms. Condon] would ask you to exercise [the] power that you have." RP 578. Mr. Zander immediately objected. Without ruling on the objection, the court directed the prosecutor to "move on to your next point." *Id*. The prosecutor continued saying "[t]his case is not about Mr. Zander, this is

about doing what you can to protect yourself." *Id.* Again, Mr. Zander objected. Again without ruling on the objection, the court directed the prosecutor to limit his comments to responses to Mr. Zander's argument. *Id*.

As the defendant, this case was very much about Mr. Zander. To tell the jury otherwise is a fundamental misstatement of the criminal process. The jury's task was to determine Mr. Zander's innocence or guilt and not to decide the case based upon the collateral effects or consequences of that determination. It was not the jury's task to provide protection to Ms. Condon, and no verdict, regardless could provide anything of the sort. The State's comments were wholly improper.

c. The deputy prosecutor misstated the law.

A prosecutor misstating the law in closing argument is "particularly egregious" with "the grave potential to mislead the jury." *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). The Court observed this heightened risk of prejudice stems from the jury's knowledge that the prosecutor is an officer of the State. *Allen*, at 380 (citing *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2007)). "It is,

therefore, particularly grievous that this officer would so mislead the jury" regarding a critical issue in the case. *Allen*, at 380.

The argument the State in this case made with respect to the element of knowledge mirrors that recently found improper in *Allen*. There the prosecutor told to the jury that "knowledge" is established so long as a person "should have known" of a particular outcome. 182 Wn.2d at 374-75. Here in closing argument, the deputy prosecutor told the jury it could find Mr. Zander had knowledge of the no contact orders so long as the jury concluded a reasonable person would have knowledge. RP 561. Just as in *Allen* the prosecutor's argument was improper.

The mens rea of "knowledge," requires actual subjective knowledge on the part of the person. *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980); *Allen*, 182 Wn.2d at 374. RCW 9A.08.010(1) defines "knowledge" as:

> (b) . . . . A person knows or acts knowingly or with knowledge when:
> (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

Shipp made clear the language contained in RCW 9A.08.101(1)(b)(ii) regarding a reasonable person is not an alternative definition of knowledge. 93 Wn.2d at 514-15. This provision instead

> permits but does not require the jury to infer actual, subjective knowledge if the defendant has information that would lead a reasonable person in the same situation to believe that facts exist that are described by law as being a crime.

State v. Vanoli, 86 Wn. App. 643, 648, 937 P.2d 1166 (1997); *Shipp*, 93 Wn.2d at 516.

Shipp recognized there were three potential readings of RCW 9A.08.010(1)(b)(ii). First, a juror might conclude that if a reasonable person might have known of a fact, the juror was required to find the defendant had knowledge. 93 Wn.2d at 514. Second, a juror could conclude the statute redefined "knowledge" to include "negligent ignorance." *Id*. Finally, a juror instructed in the language of the statute could conclude the statute requires he find the defendant had actual knowledge, "and that he is permitted, but not required, to find such knowledge if he finds that the defendant had 'information which would lead a reasonable man in the same situation to believe that (the relevant) facts exist.'" *Id*.

Addressing each of these alternatives in turn, *Shipp* found the first "clearly unconstitutional" as it creates a mandatory presumption. 93 Wn.2d at 515. The Court deemed the second alternative unconstitutional as well, as defining knowledge in a manner so contrary to its ordinary meaning deprived people of notice of which conduct was criminalized. *Id*. at 515-16.

In resting upon the third interpretation as the only constitutionally permissible reading, the Supreme Court said "[t]he jury must still be allowed to conclude that he was less attentive or intelligent than the ordinary person." *Id*. at 516. Thus, the "jury must still find subjective knowledge." *Id*. at 517.

By arguing knowledge is established simply by proving what a reasonable person should know, the State misstated the law. As in *Allen*, that misstatement requires a new trial.

3. The court should reverse Mr. Zander's convictions and afford him a fair trial.

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." *Belgarde*, 110 Wn.2d at 508. Further, where a prosecutor misstates the law there is a substantial risk that it will affect the jury. *Allen*, 182 Wn.2d at 380. Because Mr. Zander repeatedly objected at trial and

because the nature of the improper argument created a substantial likelihood of affecting the jury's verdict, this court should reverse Mr. Zander's convictions. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Zander's convictions

Respectfully submitted this 29th day of April, 2015.

s/ GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 72538-6-I
	)	
CHRISTOPHER ZANDER,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	WHATCOM COUNTY PROSECUTOR'S OFFICE [Appellate_Division@co.whatcom.wa.us] 311 GRAND AVENUE BELLINGHAM, WA 98225	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	CHRISTOPHER ZANDER 811098 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF APRIL, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711