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No. 72538-6-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ZANDER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND RELIEF REQUESTED

Pursuant to RAP 13.4, Petitioner Christopher Zander asks this Court to accept review of the opinion of the Court of Appeals in *State v. Zander*, 72538-6-I.

B. OPINION BELOW

The Court of Appeals concluded numerous improper remarks made by the deputy prosecutor in closing did not warrant a new trial for Mr. Zander.

C. ISSUE PRESENTED

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?

D. 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.

E. 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).

The opinion of the Court of Appeals deviates from these principles and as shown below is contrary to numerous other decisions. As set forth, this Court should accept review under RAP 13.4.

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 of Appeals characterizes these statements by the trial court as a "curative instruction." Opinion at 5. But 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 control.

It is improper for the State to employ 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).

F. CONCLUSION

For the reasons set forth above, this Court should grant review of this matter and reverse Mr. Zander's convictions

Respectfully submitted this 7th day of December, 2015.

s/Gregory C. Link
GREGORY C. LINK – 25228
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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72538-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: December 7, 2015

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

STATE OF WASHINGTON, Respondent,	)	No. 72538-6-I
v.	)	UNPUBLISHED OPINION
CHRISTOPHER C. ZANDER, Appellant.	)	FILED: November 9, 2015

SCHINDLER, J. — Christopher C. Zander appeals his conviction for five counts of felony violation of a no-contact order under RCW 26.50.110(5).[1] Zander argues prosecutorial misconduct during closing argument deprived him of the right to a fair trial. We disagree, and affirm.

From 1991 to 1994, Deborah Condon and Christopher C. Zander were in a romantic relationship. In 2000, Condon moved to a house in Maple Falls. The house is on a cul-de-sac with three other houses. Condon installed a fence around the house.

In 2003, Condon obtained a no-contact order prohibiting Zander from contacting her. In 2004, Condon installed 20 surveillance cameras on her property.

[1] We note the legislature amended RCW 26.50.110 twice in 2015. SUBSTITUTE H.B. 1316, 64th Leg., Reg. Sess. (Wash. 2015) (adding temporary protection orders under chapters 7.40 and 74.34 RCW to the statute); SUBSTITUTE S.B. 5631, 64th Leg., Reg. Sess. (Wash. 2015) (adding a fine for a violation of a domestic violence no-contact order). Because neither amendment affects subsection (5) of RCW 26.50.110, we refer to the current version of the statute.

In 2005, Zander was convicted of felony violation of a no-contact order (FVNCO) and second degree burglary. At sentencing, the court entered a no-contact order prohibiting Zander from contacting Condon for 10 years. Zander signed and received a copy of the order.

In the early morning hours of April 7, 2012, Zander threw items from his car toward the gate to the driveway of Condon's house. Condon called the police. The police recovered a package of snack cakes, several small apples, a work light, and a small bottle of alcohol.

On April 20, the court entered another no-contact order prohibiting Zander from contacting Condon. Zander signed and received a copy of the no-contact order. On December 13, the court entered a third no-contact order prohibiting Zander from contacting Condon for life. Zander signed a Department of Corrections (DOC) form acknowledging that a no-contact order prohibited him from contacting Condon.

DOC supervision of Zander ended on January 14, 2014. DOC case manager Andrea Holmes met with Zander and explained his ongoing obligation to comply with the no-contact orders.

On January 23, 2014, Condon saw Zander throw a purse over the front gate. A Whatcom County Sheriff Deputy responded. Inside the purse, the deputy found two flashlights wrapped in toilet paper, two perfume samples, a sunglasses case containing four small pencils, a sealed envelope containing four handwritten notes on yellow paper, some coins, and a $1 bill.

On January 31, the court entered a fourth no-contact order prohibiting Zander from contacting Condon. Zander signed and received a copy of the no-contact order.

On May 5, Condon watched from her bedroom window as Zander drove up to the gate, got out of his car, and threw rolls of carpet over the gate. On May 15, the court entered a fifth no-contact order prohibiting Zander from contacting Condon. Zander signed and received a copy of the no-contact order.

At 10:30 p.m. on July 2 as Condon was driving home, she saw Zander's car parked in front of her house and Zander standing under a street light. Condon parked in front of a neighbor's house and honked the horn. Two of her neighbors came outside. Zander grabbed a flashlight and went into a nearby wooded area. Zander then walked back to his car and drove away. Condon called the police.

Condon's video surveillance camera recordings show that on July 3, Zander approached Condon's house at 3:00 a.m. and again at 7:40 a.m. The video shows Zander throwing several items toward Condon's house. A Whatcom County Sheriff Deputy took the items Zander threw near Condon's house into evidence.

The State charged Zander with five counts of FVNCO under RCW 26.50.110(5). Zander pleaded not guilty. Before trial, the court found Zander competent to stand trial and aid in his defense.

A number of witnesses testified during the three-day jury trial including Condon, DOC case manager Holmes, several Whatcom County Sheriff Deputies, and Zander. The court admitted into evidence the no-contact orders and the surveillance video recordings.

Zander testified that he went to Condon's house because he was following a "directive" or "mandate" from a quantum computer. On cross-examination, Zander conceded he knew the no-contact orders prohibited him from going to Condon's house.

Zander admitted he went to Condon's house and left items. The jury convicted Zander as charged of five counts of FVNCO.

Zander argues prosecutorial misconduct during closing argument denied him a fair trial. A defendant alleging prosecutorial misconduct during closing argument must establish that the conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If the defendant does not object, we will not reverse unless the prosecutor's statement was "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991)). Any allegedly improper statements must be viewed in the context of the issues in the case, the evidence, and the instructions to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

Zander contends the prosecutor improperly disparaged defense counsel during closing argument. It is improper for the prosecutor to make disparaging comments related to "defense counsel's role or impugn the defense lawyer's integrity." Thorgerson, 172 Wn.2d at 451. In Thorgerson, the court held the prosecutor improperly argued the defense counsel's argument was " 'bogus' " or a " 'sleight of hand,' " but concluded the misconduct was not likely to alter the outcome of the trial. Thorgerson, 172 Wn.2d at 451-52.

Here, the prosecutor stated at the beginning of closing argument, "[T]here will be other things argued in the next hour or so that encourage you to go beyond what your duty is as a juror." The defense counsel objected. The court instructed the jury it "should consider the lawyer's arguments and statements as intended to help you understand the evidence and [apply] the law to the evidence." The court reminded the jury of the court's instructions, which included the jury's "duty to decide the facts in this case based upon the evidence presented."

We conclude the court's curative instruction to the jury alleviated any prejudice. In addition, the prosecutor's statement was not likely to alter the outcome of the trial.

Zander argues the prosecutor improperly appealed to the passion and prejudice of the jury. A prosecutor commits misconduct by appealing to the passion or prejudice of the jury. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). A prosecutor may express reasonable inferences from the evidence but may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. Russell, 125 Wn.2d at 87.

At the beginning of closing argument, the prosecutor stated:

> I said nearly a week ago now that this case was about doing what you can to protect yourself. . . . This case is not about the mental illness of Mr. Zander, it's not how Defense had argued it to you. This case is about Deborah Condon doing what she can to protect herself.

At the end of closing, the prosecutor argued:

> [A]n effort has been made to make this about Mr. Zander in the last, Wednesday last week and here again this morning, this case is not about Mr. Zander, this case is about Ms. Condon and the efforts we go through to protect ourselves, that's what you heard about. So I ask you to find Mr. Zander guilty of five different charges, five different crimes he's committed in this case.

Defense counsel did not object. However, before rebuttal, defense counsel objected to the prosecutor arguing that "it's the duty of the jury to protect a victim" as an "inappropriate comment on the law and the realm of the jury."

During rebuttal, the prosecutor argued, "I want you, when you deliberate, to think about Deborah Condon, okay. I want you to think about how she would ask you to exercise that power that you do have." Defense counsel objected. The court directed the prosecutor "to proceed on to your next point." The prosecutor then argued, "This case is not about Mr. Zander, this is about doing what you can to protect yourself." After defense counsel objected, the court directed the prosecutor to focus on "factual issues that were raised in the defense closing." The prosecutor then addressed the elements as set forth in the to-convict jury instruction and asked the jury to focus on the evidence supporting the elements of the crime.

> And at the end of your deliberation I submit that what you'll find is that Christopher Zander did those things on those five different occasions; April 7th, January 23rd, May 5th, January 2nd and again on July, excuse me, on July 2nd and again on July 3rd, that he committed violations of the protection order that protected Deborah Condon and I ask you that you find him guilty.

We conclude the prosecutor's argument was not improper. The undisputed evidence established Condon obtained no-contact orders to protect herself from Zander. We also conclude there was not a substantial likelihood that the prosecutor's argument affected the jury verdict.

Last, Zander argues that the prosecutor committed misconduct by misstating the law in describing the "knowledge" element of the crime of FVNCO. Zander relies on State v. Allen, 182 Wn.2d 364, 380, 341 P.3d 268 (2015), to argue the prosecutor

committed misconduct by misstating the law. In Allen, the State charged the defendant as an accomplice, alleging he promoted or facilitated the premeditated first degree murder committed by the principal. Allen, 182 Wn.2d at 369-70. The prosecutor repeatedly argued the jury could convict the defendant if he " 'should have known' " the principal was going to commit the crime. Allen, 182 Wn.2d at 371-72. The court concluded the prosecutor committed prejudicial misconduct by misstating the law of accomplice liability. Allen, 182 Wn.2d at 374-75. The court held the State had the burden of proving the defendant actually knew he was promoting or facilitating the principal in the commission of the crime. Allen, 182 Wn.2d at 374. Under Washington law, "a person has actual knowledge when 'he or she has information which would lead a reasonable person in the same situation to believe' that he was promoting or facilitating the crime eventually charged." Allen, 182 Wn.2d at 374 (quoting RCW 9A.08.010(1)(b)(ii)). "To pass constitutional muster, the jury must find actual knowledge but may make such a finding with circumstantial evidence." Allen, 182 Wn.2d at 374 (citing State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980)).

Here, unlike in Allen, the prosecutor correctly stated the law with respect to Zander's knowledge. The prosecutor correctly used the statutory language in arguing that Zander knew of the no-contact orders. The prosecutor argued, in pertinent part:

> And then importantly the last part of this instruction on knowledge is if the person has information that would lead a reasonable person in the same situation to believe that the facts exists [sic], the jury, you, is permitted to find that he acted with knowledge of that fact. Okay, so it's even the law that you've been instructed on goes even further than you believing Mr. Zander knew that these protection orders were in place and that he was violating them. If a reasonable person would have had the information to know that, that's also a permitted showing of knowledge for this case, okay. And we know that a reasonable person in the shoes of

> Mr. Zander would know that these orders were in place because he sat in court, was told the orders were in place by a judge, signed his name on them, put his fingerprints on them, was reminded of them on numerous occasions by Ms. Holmes, a reasonable person in the mind of Mr. Zander would know those orders are in place.

Zander did not object.

We conclude that in context, the prosecutor did not misstate the law. In any event, the argument was not "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Russell, 125 Wn.2d at 86.

We affirm the jury conviction.

Schindler, J.

WE CONCUR:

Ann, J.

Appelwick, J.