Supreme Court No. 99798-5
Court of Appeals No. 80346-8-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

BRUNO MOLINA,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Bruno Molina, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. Following a partial grant of Mr. Molina's motion to reconsider and the State's motion to publish, the Court of Appeals issued the published opinion on April 22, 2021. Copies of these rulings and the opinion are attached in the appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. When a person acts in lawful self-defense, he or she is not guilty of assault. Charged with two counts of assault, Mr. Molina testified he acted in self-defense when he hit the two alleged victims. But his attorney did not request the jury be instructed on self-defense and instead conceded Mr. Molina assaulted the two victims. Was Mr. Molina's Sixth Amendment rights to counsel and to defend violated by counsel's failure to request self-defense instructions or by counsel's concession of guilt?

2. Over Mr. Molina's objection, the prosecutor argued to the jury that an eye-witness corroborated the alleged victim's testimony that she fell unconscious after being hit by Mr. Molina. This was untrue. Did this and other prosecutorial misconduct deprive Mr. Molina of his right to a fair trial?

C. STATEMENT OF THE CASE

Bruno Molina, who was then 20 years old, attended his friend's birthday party. RP 1259-60. His friend, Emanuel Espana, was turning 19.

Mr. Espana had another friend named Israel Hermosillo-Alvarez who attended the party. RP 784-85. Israel,[1] who was about 19 years old, brought three young women to the party named Ana Pocasangre, Alexis Hernandez, and Nicole Williams.[2] RP 786, 869, 887-78.

The three young women were friends. Ms. Pocasangre was 15 years old, and Ms. Hernandez and Ms. Williams were 14. RP 691, 869, 991. Ms. Pocasangre told everyone she was 16. RP 869, 964. The three young women liked to drink alcohol and go to parties. RP 699, 853, 886. Ms. Pocasangre had a problem with alcohol and was in therapy. RP 888, 941; Ex. 5, p. 2. Ms. Hernandez testified that "when [Ms. Pocasangre] gets drunk she gets really aggressive." RP 717. At the party, Ms. Pocasangre and her friends got very drunk. RP 791-93, 1141, 1266-67.

Israel got very drunk and passed out in the back seat of the car he used to drive the three young women to the party. RP 791-93, 1141, 1266-

[1] For clarity and to avoid confusion with Israel's siblings who share the same last name, Israel is referred to by his first name.

[2] For reasons that are unclear, many (but not all) of the volumes in the transcript redact the names of these three witnesses and use their initials instead. The context, however, shows that their full names were used in the trial court.

67. To get Israel and the others home, Mr. Espana drove Israel's car. RP 1140-41. Because the vehicle was full, Ms. Pocasangre's friends told Ms. Pocasangre she should she ride with Mr. Molina. RP 890. Mr. Molina agreed to give her a ride. RP 1267.

Mr. Espana told Mr. Molina to meet them at a McDonald's where Israel had picked up the three women. RP 710, 1267. Mr. Molina recalled the plan was that they would meet Israel's cousins to drop Israel's car off. RP 1268.

Mr. Molina explained that Ms. Pocasangre was drunk and brought bottles of alcohol into his car. RP 1267. On the way to the McDonald's, Ms. Pocasangre asked him odd questions, such as whether he "hit licks" or had been to jail before. RP 1269. Mr. Molina got to the McDonald's before Mr. Espana and parked. RP 1269-70. While in the car, Ms. Pocasangre asked Mr. Molina if he had a girlfriend. RP 1269. Mr. Molina told her he was married and had a child. RP 1269. Ms. Pocasangre said she did not believe him and tried to show him pictures of herself on her phone. RP 1270. She tried to kiss him. RP 1270.

Mr. Molina got out of the car. RP 1270. Concerned about Ms. Pocasangre spilling alcohol in the car, which he had borrowed from his mother, he tried to get Ms. Pocasangre out. RP 1262, 1720. Ms.

Pocasangre did not want to get out until the others arrived. RP 1270. She called Mr. Molina "gay" and a "little bitch." RP 1271.

Mr. Espana arrived at the McDonald's about 25 minutes after Mr. Molina. RP 840, 1143, 1315. Ms. Hernandez recalled they had dropped a guy and his girlfriend off before going to meet Mr. Molina and Ms. Pocasangre at the McDonald's. RP 711.

Ms. Pocasangre went over to Mr. Espana's car and made derogatory comments about Mr. Molina to her friends, Ms. Hernandez and Ms. Williams. RP 1272-73. Mr. Molina told Mr. Espana to calm Ms. Pocasangre down. RP 1273. Mr. Molina did not leave because Mr. Espana wanted Mr. Molina to stay so he could give him a ride. RP 1272.

Mr. Molina tried to help Ms. Pocasangre back into Mr. Molina's car so she could wait inside. RP 1146, 1273. Unfortunately, Ms. Pocasangre's leg or foot got caught between the car door when Mr. Molina tried to close it, which hurt Ms. Pocasangre. RP 1146, 1177, 1273. Ms. Pocasangre became furious and started to chase Mr. Molina. RP 1146, 1273. As Ms. Williams testified, "She was trying to hit him or something like that. She was going after him." RP 1005. Ms. Williams recalled that Ms. Pocasangre was pretty drunk, and that Ms. Pocasangre and Ms. Hernandez had been doing shots. RP 1012.

As Mr. Molina ran figure eights around the cars, he initially thought the situation was humorous. RP 1273. But he soon realized that Ms. Pocasangre was serious about hitting him. RP 1273. Ms. Pocasangre's friends encouraged her to beat Mr. Molina up. RP 1186. Ms. Williams, who was in the front seat of the other car, yelled "beat his ass" and "get him." RP 1274. Mr. Molina told Ms. Pocasangre he would defend himself. RP 1279-80, 1297. Mr. Espana recalled that at some point, Ms. Pocasangre picked up a big rock and threw it at Mr. Molina. RP 1179-80. Mr. Espana tried to restrain Ms. Pocasangre, but she got away and charged at Mr. Molina. RP 1297-98. To defend himself, Mr. Molina hit Ms. Pocasangre in the face as she ran at him and she fell to the ground. RP 1275, 1279-80, 1298-99. Mr. Molina recalled that Ms. Pocasangre got right back up. RP 1275.

When Ms. Pocasangre fell, Ms. Williams got out of the car and came at Mr. Molina quickly in a fighting stance. RP 1280-81, 1293-95. Because it looked like Ms. Williams was going to try to throw a punch at him, he instinctively hit her in the face. RP 1294-97.

Mr. Molina got in his car. RP 1282. As Mr. Molina drove away, Ms. Pocasangre hit the window of Mr. Molina's car and yelled about getting revenge. RP 928, 1282. Ms. Pocasangre admitted that she told Mr. Molina he was going to pay. RP 927.

Ms. Pocasangre's version of events differed from Mr. Molina's. She claimed Mr. Molina kissed her and asked for oral sex while they were in the car. RP 895-98. She alleged that without her consent, Mr. Molina was able to digitally penetrate her vagina, despite her pants being tight and also wearing tights and underwear. RP 900-01, 909, 914-15.

She elbowed Mr. Molina and got out of the car because her mother was calling her on her phone. RP 904-05. She claimed that after they got out of the car, Mr. Molina hit her twice and threw her to the ground. RP 911, 918. She thought she briefly lost consciousness after falling to the ground. RP 920-21.

Ms. Williams admitted she confronted Mr. Molina after she saw Ms. Pocasangre fall to the ground. RP 1003, 1020. However, she denied hitting Mr. Molina or trying to hit him. RP 1015. Ms. Pocasangre recalled that after Mr. Molina hit Ms. Williams, Ms. Williams told Mr. Molina "she could take his pussy hits." RP 958.

Israel's older brother, Josue Hermosillo-Alvarez testified that he received a call from Israel. RP 565. Concerned about how intoxicated his brother sounded, he got in his car with his brother Moses, and drove to the McDonald's. RP 567.

Just as he got there, Josue saw a man (Mr. Molina) and a young Hispanic woman (Ms. Pocasangre) having a physical encounter. RP 571-

72, 574. He saw Mr. Molina punch the young woman. RP 572. She got back up. RP 573, 578-79. He saw a young African-American woman (Ms. Williams) "running towards [Mr. Molina] trying to fight him and another punch being thrown." RP 571, 573. Ms. Williams had her fist out and was throwing punches before Mr. Molina punched her. RP 579.

Josue decided he would drive the young women home. RP 575. Although Ms. Pocasangre's home was right next to the McDonald's, she did not go home and got in the car with the others. RP 575, 579. Josue stopped at a gas station for fuel and so that the women could use the restroom. RP 579. When they returned from inside the station, Josue noticed they had alcohol that they did not have before. RP 591-92. Ms. Pocasangre claimed that Ms. Hernandez bought the alcohol. RP 959. The young women, who appeared intoxicated, talked about getting revenge against Mr. Molina. RP 592-93. Josue told them karma would take care of it. RP 593.

Ms. Pocasangre went to the hospital with her mother later that day. RP 605-06, 860. She alleged someone tried to force her to have oral sex and had tried to touch her vagina. RP 614.

The prosecution charged Mr. Molina with one count of third degree rape; one count of second degree assault for allegedly assaulting

Ms. Pocasangre; and one of fourth degree assault for allegedly assaulting Ms. Williams. CP 9-10.

At trial, Mr. Molina testified that he did not rape Ms. Pocasangre, denying Ms. Pocasangre's allegations. RP 1282, 1270. He admitted he had hit Ms. Pocasangre and Ms. Williams, but that he had done so because he believed it was necessary to defend himself. RP 1275, 1279-80, 1294-99. However, he regretted hitting them. RP 1282, 1303-04.

Notwithstanding the evidence showing he acted in self-defense, Mr. Molina's attorney did not argue self-defense and did not ask the court to instruct the jury on self-defense. RP 544-56, 1110-28, 1371-84. Defense counsel conceded that Mr. Molina assaulted Ms. Pocasangre and Ms. Williams, but argued for acquittal on the rape charge and to convict Mr. Molina of fourth degree assault for the assault against Ms. Pocasangre rather than second degree assault. RP 1379-80, 1383-84.

During closing arguments, the prosecutor misrepresented Josue's testimony, contending his testimony corroborated Ms. Pocasangre's claim that she became unconscious after being hit. RP 1358. Mr. Molina's objection was overruled. RP 1358. The prosecution also repeatedly made arguments vouching for Ms. Pocasangre's credibility and contended that the jury had to find Ms. Pocasangre was lying under oath to reject her

testimony. Again, the court overruled but Mr. Molina's objections. RP 1365-66.

The jury found Mr. Molina not guilty on the charge of rape. CP 57. The jury, however, found Mr. Molina guilty on the two assault charges. CP 58, 60.

On appeal, Mr. Molina argued prosecutorial misconduct deprived him of a fair trial. He also argued he was deprived of his right to effective assistance of counsel by his counsel's failure to seek a self-defense instruction and by counsel's concession of guilt when he testified he acted in self-defense. The Court rejected Mr. Molina's arguments. Following a motion to reconsider, the Court amended its opinion. The Court granted the State's motion to publish the decision.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court should grant review to decide whether defense counsel may concede guilt on charges of assault when a defendant testifies he acted in self-defense and the evidence supports a self-defense instruction.

a. *On the assault charges, Mr. Molina testified he acted in acted in self-defense. In violation of Mr. Molina's constitutional rights, defense counsel conceded her client was guilty of assaulting the two named victims.*

The accused have the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is performance falling below an

objective standard of reasonableness. Id. at 687. When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Regardless of how sound of a strategy it may be, defense counsel may *not* concede guilt if it is contrary to the wishes of the defendant. McCoy v. Louisiana, __ U.S. __, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). "Autonomy to decide that the objective of the defense is to assert innocence" belongs to the client, not the lawyer. Id. at 1508. As summarized by the Court:

> With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

Id. at 1505. Although McCoy was a capital case, it applies outside that context. People v. Flores, 34 Cal. App. 5th 270, 282-83, 246 Cal. Rptr. 3d 77 (Cal. Ct. App. 2019).

On appeal, Mr. Molina argued his right to effective assistance of counsel was violated by his trial attorney's failure to seek a self-defense instruction on the assault charges and by conceding Mr. Molina was guilty of assaulting the two young women.

In rejecting these arguments, the Court of Appeals acknowledged that the evidence was sufficient to entitle Mr. Molina to a self-defense instruction. Slip op. at 6. But the Court then asserted that "to actually establish self-defense, Molina would need to show that he had a good faith belief in the necessity of force and that that belief was objectively reasonable." Slip op. at 6. The Court emphasized that the self-defense statute states self-defense is lawful "in case the force is not more than is not more than is necessary." Slip op. at 6.

This account of the law misunderstands self-defense. Once there is "some evidence" of self-defense, the defendant is entitled to instructions on self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983). The defense has no burden to "establish self-defense" because it is not a true affirmative defense. See State v. Wiebe, 195 Wn. App. 252, 256-257, 377 P.3d 290 (2016). Rather, due process requires the prosecution to prove the absence of lawful self-defense beyond a reasonable doubt. Walden, 131 Wn.2d at 469; State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984).

Here, there was more than enough evidence to make self-defense an element of the prosecution's burden of proof on both assault charges. Testimony from multiple witnesses recounted that Ms. Pocasangre chased

Mr. Molina with the purpose to hit him. RP 1005, 1146, 1177, 1273. Ms. Williams encouraged Ms. Pocasangre to "beat his ass" and "get him." RP 1274. Ms. Pocasangre may have had a large rock. RP 1179-80. Even after Mr. Molina warned Ms. Pocasangre that he would defend himself and Mr. Espana tried to hold Ms. Pocasangre back, Ms. Pocasangre charged at Mr. Molina. RP 1274, 1279-80, 1297-98.

As for Ms. Williams, she encouraged Ms. Pocasangre to assault Mr. Molina. RP 1274. Josue testified that he saw Ms. Williams charge at Mr. Molina and that she was throwing punches before Mr. Molina hit her. RP 571, 573, 579.

Despite this evidence, defense counsel did not obtain self-defense instructions or argue self-defense. Instead, she conceded that Mr. Molina was guilty of assaulting Ms. Pocasangre and Ms. Williams, but was not guilty of raping Ms. Pocasangre.[3] RP 1379-80, 1383-84.

After cherry picking the evidence and providing a misleading account, the Court of Appeals reasoned it was reasonable litigation strategy for defense counsel to concede that Mr. Molina was guilty of assaulting the two young women and "focus on disputing the degree of the

[3] As a lesser included or inferior degree offense, the jury was instructed on fourth degree assault on count two, the assault charge as to Ms. Pocasangre. CP 51-52, 55-56. Defense counsel argued the jury should convict Mr. Molina of this lesser offense because the evidence did not show that Ms. Pocasangre lost consciousness or suffered a concussion. RP 1379-80.

assault [as to Ms. Pocasangre] and the third degree rape charge." Slip op. at 7. The Court did not explain why it was reasonable to concede the fourth degree assault charge as to Ms. Williams.

The Court of Appeals reasoned that Mr. Molina could not have demonstrated any regrets for his acts at sentencing if he argued his actions were justified during trial. Br. of Resp't at 7. But lawful self-defense encompasses situations where the actor may regret their actions and wonder if there had been another option. Remorse and circumspection are not incompatible with lawful self-defense. The world is not black and white. Moreover, the sentencing reform act recognizes, as mitigating circumstances, that victims may provoke incidents and that a guilty person may have only had an incomplete defense. RCW 9.94A.525(1)(a), (c).

Obtaining self-defense instructions would have only made it more difficult for the prosecution to convict Mr. Molina. This was deficient performance that prejudiced Mr. Molina. State v. Temple, No. 34853-9-III, noted at 4 Wn. App. 2d 1006, 2018 WL 2688176, at *9-10 (2018) (unpublished).[4]

Regardless, even if counsel's decision to concede guilt rather than argue self-defense could be deemed reasonable under a Strickland

[4] Cited as persuasive authority. GR 14.1.

framework, it was illegitimate under McCoy. Mr. Molina proclaimed his innocence when testified that he acted in self-defense when he hit Ms. Pocasangre and Ms. Williams. A person acting in self-defense acts *lawfully* in using force, which negates the intent element of assault. Acosta, 101 Wn.2d at 617-18.

The Court of Appeals reasoned that Mr. Molina's testimony, by itself, was not enough to trigger McCoy. Slip op. at 9. Instead, the Court of Appeals reasoned the case was more akin to Florida v. Nixon, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004). In that case, there was overwhelming evidence that the defendant was guilty of murder. Nixon, 543 U.S. at 180. With the hope of gaining credibility with the jury and avoiding a jury recommended sentence of death, defense counsel conceded guilt. The United States Supreme Court rejected a claim of ineffective assistance of counsel. Critically, the defendant in the case did not testify and the record showed that the defendant was "unresponsive" when defense counsel informed him of counsel's strategy. Id. at 186, 192.

In contrast, Mr. Molina asserted his innocence by testifying he acted in self-defense. This is more akin to McCoy where the defendant also "testified in his own defense, maintaining his innocence." 138 S. Ct. at 1507. Distinguishing Nixon, the Supreme Court reasoned:

> If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way.

Id. at 1509 (emphasis added).

To be sure, the objection by the defendant in McCoy was "intransigent." But it is unfair to require this clarity. As a California appellate court has held:

> we do not think preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court before his or her conviction. Rather, the record must show (1) that defendant's plain objective is to maintain his innocence and pursue an acquittal, and (2) that trial counsel disregards that objective and overrides his client by conceding guilt.

People v. Eddy, 33 Cal. App. 5th 472, 482, 244 Cal. Rptr. 3d 872 (2019). Moreover, it is unreasonable to expect a layperson to lodge an express objection against the actions of their own attorney. As a Texas appellate court has reasoned, "a defendant faced with a McCoy issue should not be expected to object with the precision of an attorney." Turner v. State, 570 S.W.3d 250, 276 (Tex. Crim. App. 2018). "A defendant makes a *McCoy* complaint with sufficient clarity when he presents 'express statements of [his] will to maintain innocence.'" Id. (quoting McCoy, 138 S. Ct. at 1509). Here, Mr. Molina's testified he acted in self-defense out of

necessity on both charges of assault. This assertion of innocence that could not be any clearer. See United States v. Read, 918 F.3d 712, 719 (9th Cir. 2019) (McCoy violated where defense counsel presented insanity defense over client's earlier rejection of that defense; client had gone pro se so that this defense could be withdrawn, but court reappointed counsel and this counsel proceeded to present an insanity defense despite wishes of client).

b. This issue presents a significant constitutional question and is one of substantial public interest. Review should be granted.

This issue warrants this Court's review. It presents a significant constitutional question on whether a defendant's testimony that he acted in lawful self-defense is sufficient to trigger McCoy. RAP 13.4(b)(3). It is also an issue of substantial public concern, which will recur. RAP 13.4(b)(4). Independent of counsel's strategy, defendants have a right to testify. State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). Thus, they will continue to testify and this testimony may contravene concessions by defense counsel on one or more charges. The decision also sends an incorrect message that defense attorneys may unilaterally concede guilt on lesser charges even if the defendant testifies to their innocence on these charges.

Additionally, the prosecution acknowledged the importance of the issue in its motion to publish. The prosecution represented, "Both

attorneys and trial judges would benefit from a published opinion clarifying that strategic concessions remain valid post-McCoy except in certain circumstances where the defendant expressly objects." Mot. to publish at 4-5.

Given the importance of the issue and consequences of letting the Court of Appeals' opinion stand, the Court should grant review.

2. Objected to prosecutorial misconduct during closing argument deprived Mr. Molina of his right to a fair trial. The Court should grant review and reverse.

Mr. Molina argued on appeal that the prosecutor committed several acts of misconduct during closing arguments and that the trial court erred by overruling his objections. Br. of App. at 22-31.

In summary, the prosecutor misrepresented key eye-witness testimony by stating that Josue corroborated Ms. Pocasangre's claim that she lost consciousness when struck by Mr. Molina. Josue did not testify as the prosecutor claimed. Br. of App. at 24-25. Being unsupported by the evidence, this was misconduct. State v. Reeder, 46 Wn.2d 888, 892-94, 285 P.2d 884 (1955).

The prosecutor also improperly vouched for Ms. Pocasangre's credibility and implied the jury had to find she was a liar in order to acquit. She did this by rhetorically asking the jury why Ms. Pocasangre would "swear under oath and tell you a story that she made up?" RP 1365;

Br. of App. at 25-28 This was misconduct. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (vouching improper); State v. Rich, 186 Wn. App. 632, 649, 347 P.3d 72 (2015) (arguments that the jury has to find that a witness is lying constitutes misconduct), reversed on other grounds, 184 Wn.2d 897, 365 P.3d 746 (2016).

Viewed together, there is a substantial likelihood that the misconduct affected the jury's verdicts. Br. of App. at 29-31. That the jury acquitted Mr. Molina of rape only shows how weak the prosecution's case was on that charge. It does not show lack of prejudice on the assault charges, for which the jury convicted. But for the misconduct, there is a substantial chance that the jury would have found reasonable doubt on whether Ms. Pocasangre fell unconscious or suffered a concussion. If so, the jury would have acquitted Mr. Molina of second degree assault because the assault did not result in substantial bodily harm. Br. of App. at 29-30.

The Court of Appeals acknowledged that the "prosecutor overstated the degree to which Josue corroborated [Ms. Pocasangre]'s testimony." Slip op. at 10. Still, the Court reasoned nothing suggested the prosecutor's misconduct in misstating the evidence affect the jury's verdict. To the contrary, the Court's overruling of the objection indicates the misconduct affected the verdict because it erroneously gave the jury the impression

that the prosecutor's argument was proper. State v. Allen, 182 Wn.2d 364, 378, 341 P.3d 268 (2015).

As for the other misconduct, the Court of Appeals reasoned it was not misconduct for the prosecutor to rhetorically ask what Ms. Pocasangre had to "gain" by testifying to "a story that she made up"? RP 1365-66. The Court of Appeals is wrong. This improperly vouched for Ms. Pocasangre. See State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). And it improperly implied that the jury had to find Ms. Pocasangre was lying in order to acquit. Rich, 186 Wn. App. at 649. The published opinion will perpetuate confusion and lead to prosecutors committing the same type of misconduct. This will endanger convictions and deprive defendants of their due process right to a fair trial.

Because its decision conflicts with precedent, the Court should grant review. RAP 13.4(b)(1), (2). Review is in the public interest because prosecutors will read the published opinion and incorrectly conclude that it has a license to engage the same misconduct. RAP 13.4(b)(4).

E. CONCLUSION

Mr. Molina asks this Court to grant review his petition for review on the issues presented.

Respectfully submitted this 20th day of May, 2020.

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Appendix

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

THE STATE OF WASHINGTON, Respondent, v. BRUNO D. MOLINA, Appellant.	)	No. 80346-8-I ORDER GRANTING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

The appellant, Bruno Molina, has filed a motion for reconsideration of the opinion filed on January 19, 2021. The State has not filed a response to the motion. The court has determined that the motion should be granted, and the opinion should be withdrawn and a substitute opinion filed; now, therefore, it is hereby

ORDERED that the motion for reconsideration granted; and it is further

ORDERED that the opinion filed on January 19, 2021 is withdrawn; and it is further

ORDERED that a substitute unpublished opinion shall be filed.

Appelwick, J.

Bowman, J.

Dwyer, J.

FILED
4/22/2021
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. BRUNO D. MOLINA, Appellant.	No. 80346-8-I ORDER GRANTING MOTION TO PUBLISH

The respondent, State of Washington, has filed a motion to publish the opinion filed on March 22, 2021. The appellant, Bruno Molina, has filed a response to the motion. A majority of the panel has reconsidered its prior determination not to publish the opinion filed for the above entitled matter on March 22, 2021 finding that it is of precedential value and should be published. Now, therefore, it is

ORDERED that the motion to publish is granted; it is further

ORDERED that the written opinion filed March 22, 2021 shall be published and printed in the Washington Appellate Reports.

Appelwick, J.
Judge

FILED
3/22/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. BRUNO D. MOLINA, Appellant.	No. 80346-8-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Molina appeals his convictions for second degree assault and fourth degree assault. He argues reversal is required based on ineffective assistance of counsel, prosecutorial misconduct, and legal financial obligations assessed in error. We affirm his convictions, but remand to strike certain legal financial obligations.

FACTS

On January 29, 2018 Bruno Molina, age 20, drove to his friend's party. Molina drank a beer with his friend. A.P., N.W., and A.H., all ages 14 to 15 were also at the party together. The three had been invited and driven there by Israel Hermosillo-Alvarez. A witness later testified that the three girls Israel brought were all drunk at the party. A.P. stated she drank five beers.

Later in the evening, Israel[1] passed out in the backseat of his car due to intoxication. Emanuel Espana decided to drive Israel's car to help the young women and Israel get home. Molina gave A.P. a ride, as there was not room in Israel's car. Espana told Molina to meet them at a McDonald's restaurant parking lot.

Molina and A.P. arrived at the McDonald's before Espana, and the two waited in his car. Molina and A.P.'s stories differed about what happened before the other group arrived.

Molina testified that A.P. asked him if he had a girlfriend and tried to kiss him, leading to him getting out of the car. Molina claimed he tried to get A.P. out of the car because he was concerned A.P. would spill alcohol she had brought from the party in the car. He claimed she did not want to get out, and she called him derogatory names.

According to A.P., Molina had asked her to perform oral sex on him, which she refused. She said he kissed her, and afterward she told him to stop touching her. According to A.P., he then put his hand down her pants and digitally penetrated her vagina. She told him to stop, elbowed him, and got out of the car.

As A.P. was exiting Molina's car, Israel's car arrived. A.P. approached the car and gave N.W. and A.H. her account of what happened. Molina told Espana to calm A.P. down. Espana asked Molina to wait until Israel's older brother, Josue

[1] This case involves two witnesses, brothers Israel Hermosillo-Alvarez and Josue Hermosillo-Alvarez. For clarity, they are each referred to by their first names.

Hermosillo-Alvarez, came to pick up Israel and his car, because Molina was his only ride home.

Molina said he then asked A.P., "Could I help you [get] in the car?" He said A.P. did not want to try to move Israel, so he opened the driver's side door and "tried to put her in slowly." Molina claims he accidentally shut the car door on her leg. Angered, A.P. got out of the car and began to chase Molina around the two cars. N.W. later testified that A.P. "was trying to hit him or something like that." Molina initially found the situation humorous. He claimed he eventually felt the need to defend himself. He hit A.P. in the face, causing her to fall to the ground. Molina recalled A.P. getting back up right after falling. A.P. said she lost consciousness, which N.W. corroborated.

N.W. exited the car and approached Molina. At trial, witnesses gave differing accounts of what N.W. said and her demeanor as she approached Molina. N.W. said she checked on A.P. and then asked Molina why he had punched A.P. Josue said she ran towards Molina to fight him. Molina then hit her in the face. Molina claimed this was instinctive, as he believed N.W. was going to try to throw a punch at him. Molina testified that A.P. and N.W.'s friend then came out of the car and tried to do the same thing, but Espana got between them and told Molina to go home. Molina then left the parking lot.

The day after the party, A.P. went to the hospital accompanied by her mother. She told hospital staff that someone had tried to force her to have oral sex and had touched her vagina.

The State charged Molina with third degree rape and second degree assault of A.P. It also charged Molina with fourth degree assault of N.W.

At trial, the State called Israel's older brother Josue as a witness. He testified that he had driven to McDonald's the night of the incident because he was alarmed that Israel was intoxicated. Josue testified that he saw Molina punch the two girls and that A.P. "had fallen and she had gotten back up."

Molina's attorney did not ask for a jury instruction on self-defense or argue self-defense. During closing arguments, Molina's attorney conceded that Molina had hit A.P. and N.W., but denied the rape and argued the conduct did not rise to second degree assault. In arguing the State had failed to prove second degree assault beyond a reasonable doubt, Molina's attorney noted, "Josue Hermosillo testified that he saw [A.P.] get hit and get back up. . . . She did not lose consciousness."

During its closing argument, the State said Josue had "corroborated" A.P.'s story and "saw her getting knocked to the ground." Molina objected that the State was arguing facts not in evidence, but was overruled.

The prosecutor also said, "Why would [A.P.] come in here, swear under oath and tell you a story that she made up?" Molina objected and his objection was overruled. Twice more the State asked what A.P. would have to gain from moving forward with the case and testifying. Both times Molina objected and was again overruled.

The jury acquitted Molina of the rape charge, but convicted him of second degree assault and fourth degree assault. At sentencing, the trial court imposed several fees, including a $100 DNA (deoxyriboneucleic acid) collection fee, a $500 victim penalty assessment for each conviction, and a supervision fee.

Molina appeals.

DISCUSSION

Molina asserts his judgment and sentence must be reversed based on claims of ineffective assistance of counsel and prosecutorial misconduct. Further, he asserts remand is necessary to remedy the improper imposition of legal financial obligations.

I. Ineffective Assistance of Counsel

First, Molina asserts his attorney's failure to argue self-defense and request a self-defense instruction deprived him of his right to effective assistance of counsel.

Criminal defendants are guaranteed the right to effective assistance of counsel under our state and federal constitutions. U.S. CONST. amend. VI; CONST. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 680, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and that the defendant was prejudiced by that deficiency. Strickland, 466 U.S. at 687; In re Pers. Restraint of Crace, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). Scrutiny of counsel's performance is highly deferential and we strongly presume reasonableness. In re Pers. Restraint

of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). To rebut the presumption of reasonableness, a defendant must establish the absence of any legitimate trial tactic that would explain counsel's performance. Id.

Molina argues because force used in self-defense is lawful and the threshold burden of production for a self-defense instruction is low, failing to ask for such an instruction constituted deficient performance. Further, he argues "as the jury was properly instructed to consider each charge separately, there was no downside in obtaining a self-defense instruction."

But, given the facts in Molina's case, deciding not to seek a self-defense instruction was a legitimate trial tactic. This decision did not constitute ineffective assistance of counsel.

Molina may have had sufficient evidence to entitle him to a self-defense instruction. But, to actually establish self-defense, Molina would need to show that he had a good faith belief in the necessity of force and that that belief was objectively reasonable. State v. Dyson, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997). RCW 9A.16.020(3) provides that the use of force upon another person is not unlawful when used by a person about to be injured "in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary." (Emphasis added.)

Molina's counsel could have decided a jury would find that Molina's force was "more than necessary" given the facts. Id. Molina was larger and heavier than A.P. A.P. was five feet, four inches tall and weighed 125 pounds. Molina was five feet, ten inches tall and weighed 155 pounds. A.P. admitted to drinking five

beers, and a witness had testified she was drunk at the party. Molina was also 5 to 6 years older than A.P., and testified he knew he was "quite a bit older" at the time of the incident. When he stop running from A.P., he struck her with such force that she was knocked down and may have been rendered unconscious. This suggests the use of more force than was necessary to prevent injury from a smaller, intoxicated minor.

Molina also testified that he laughed when A.P. began to chase him around the cars "because [he] thought it was kind of funny that [he was] being chased around by a girl." This testimony undercuts the suggestion that he was afraid he was about to be injured.

Arguing self-defense in these circumstances could have undercut Molina's credibility with the jury. He needed credibility with the jury, because the evidence regarding whether he knocked A.P. unconscious and whether he committed third degree rape largely came down to his testimony versus that of A.P. It was a reasonable litigation strategy to concede the assaults occurred and focus on disputing the degree of the assault and the third degree rape charge.

Further, this strategy allowed Molina to show contrition before the court. Molina testified that he regretted hitting both A.P. and N.W. He said, in retrospect, perhaps he should have run away or held A.P. He would not have been able to demonstrate his regrets had he attempted to argue his actions were justified. At sentencing, the trial court noted, "I've given this one a lot of thought because of what I saw and heard at trial and because of what I believe to be some measure of contrition and remorse on Mr. Molina's part." The court did not sentence Molina

at the top end of the sentencing range as requested by the State. So, the decision not to argue self-defense may have benefitted Molina at sentencing.

We find no ineffective assistance of counsel under Strickland. Nonetheless, Molina argues that even if his claim does not satisfy the Strickland standard, "counsel's decision to concede guilt rather than argue self-defense" was "per se illegitimate under McCoy v. Louisiana, __ U.S. __, 138 S. Ct. 1500, 200 L. Ed. 2d 281 (2018)."

In McCoy, the Court addressed "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." Id. at 1507. It held the autonomy to decide that the objective of the defense is to assert innocence is reserved for the defendant. Id. at 1508. Defendant McCoy consistently asserted an alibi, and expressly opposed counsel's "assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." Id. at 1509. So, the Court held that defense counsel violated McCoy's autonomy by conceding that McCoy had committed three murders. Id. at 1507, 1511.

But, concession strategies are not per se improper where a client has pleaded innocent. See Id. at 1509. The McCoy Court clarified that its holding was not contrary to its prior case, Florida v. Nixon, 543 U.S. 175, 178125 S. Ct. 551, 160 L. Ed. 2d 565 (2004). Id. In Nixon, under a traditional Strickland analysis, the Court held that no blanket rule impeded defense counsel's guilt concession strategy where the defendant had not objected or protested to his counsel's guilt concession strategy. 543 U.S. at 178, 192. The McCoy Court noted that Nixon

never verbally approved or protested counsel's strategy, complaining about the admission of his guilt only after trial. McCoy, 138 S. Ct. at 1509. In contrast, McCoy had "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505.

Here, there is no evidence Molina ever raised concern about defense counsel's trial strategy with counsel or the court. Molina does not claim to have asserted to counsel that his testimony represented an objective to maintain his innocence. At closing, Molina's counsel stated,

> Mr. Molina is not guilty of Assault in the Second Degree. The Second Degree assault is the more serious charge that requires substantial bodily injury. Assault in the Fourth Degree is the less serious assault.
>
> Mr. Molina hit [A.P.], he testified to that. He felt justified at the time, but he soon realized there's no justification for hitting her. The evidence shows that despite her claim[, s]he did not lose consciousness.

Rather than contradicting her client, defense counsel reiterated his testimony. Her argument that Molina's actions constituted the lesser assault charge was consistent with his own concessions at trial. As in Nixon, counsel did not negate Molina's autonomy by overriding his desired defense objective, because Molina never asserted any such objective. McCoy, 138 S. Ct. at 1509.

We find no ineffective assistance of counsel.

II. Prosecutorial Misconduct

Next, Molina asserts that prosecutorial misconduct during closing argument deprived Molina of his right to a fair trial.

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995). The defendant bears the burden of establishing that the conduct was both improper and prejudicial. State v. Song Wang, 5 Wn. App. 2d 12, 30, 424 P.3d 1251 (2018). "Any allegedly improper statements 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, 442 (2003). To establish prejudice, the defendant must show a substantial likelihood that the error affected the jury verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Molina asserts the prosecutor committed misconduct during closing argument by misrepresenting the evidence about whether Josue's testimony corroborated the fact that A.P. was knocked unconscious.

When asked what happened with the first girl Molina had punched, Josue stated that she "had fallen and she had gotten back up." But, during the prosecutor's closing argument, the following exchange occurred:

> [Prosecutor]: [A.P.] told you that she fell to the ground, that she lost consciousness. Her friends corroborated that too. In fact, even [Josue], whom she doesn't know very well corroborated that.
>
> [Defense Counsel]: Objection. Arguing facts not [in] evidence, Your Honor.
>
> THE COURT: Overruled.

The prosecutor overstated the degree to which Josue corroborated A.P.'s testimony. However, Josue corroborated that A.P. was hit and fell to the ground.

He stated that she got back up, but not how long it took her to do so. Any potential confusion was further ameliorated by defense counsel reaffirming in its own closing argument after the above exchange that "Josue Hermosillo testified that he saw her get hit and get back up." And, the trial court instructed the jurors to disregard any remarks by the attorneys the evidence did not support. We presume the jurors followed the court's instructions. State v. Hopson, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989). To the extent Molina argues the repeated overruling of his objections "likely gave the jury the impression that the prosecutor's argument was proper," the jurors were also instructed against drawing such conclusions. Nothing suggests that the remarks affected the jury verdict.

Molina further asserts the prosecutor improperly vouched for the credibility of A.P. during closing argument. It is improper for a prosecutor personally to vouch for the credibility of a witness. State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985). "Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010).

But, in closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. Sargent, 40 Wn. App. at 344.

Molina relies on State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). This case is distinguishable. In Jones, the State argued that a confidential informant was credible because the police would have discontinued using an untrustworthy informant. Id. at 293-94. That argument clearly placed the prestige of the government behind the informant.

Here, the prosecutor did not state that she personally found A.P. to be credible or indicate that external evidence supported A.P.'s credibility. While a prosecutor may not vouch for a witness's credibility, a prosecutor may freely comment on witness credibility based on evidence. See State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

Molina also argues the prosecutor's statements "implied to the jury that in order to find the State had not proved its case beyond a reasonable doubt, the jury had to find that [A.P.] had lied under oath." We disagree.

Molina focuses on a segment of the prosecutor's closing where she asked "Why would [A.P.] come in here, swear under oath and tell you a story that she made up?" This court has held a prosecutor's statement that a witness had no motive to lie was not impermissible vouching. State v. Robinson, 189 Wn. App. 877, 893-94, 359 P.3d 874 (2015). There, the court found the prosecutor's comments were argument that the trial evidence demonstrated the witness had no reason to lie. Id. at 894. Likewise, the rhetorical questions posed by the prosecutor in Molina's case drew reasonable inferences from the trial court record about A.P.'s lack of motivation to lie.

We find the prosecutor did not commit prosecutorial misconduct in closing argument.

III. Legal Financial Obligations

Finally, Molina asserts that a DNA collection fee, a second $500 victim penalty assessment, and discretionary supervision fees were each assessed in error. The State concedes that all three legal financial obligations should be stricken from the judgment and sentence. We agree.

First, Molina asserts the $100 DNA collection fee should be stricken. RCW 43.43.754 requires the collection of a DNA sample from every adult or juvenile convicted of a felony. Individuals sentenced for crimes specified in RCW 43.43.754 must pay a $100 DNA collection fee, unless their DNA was previously collected as a result of a prior conviction. RCW 43.43.7541.

At sentencing, the trial court imposed a $100 DNA collection fee. But, Molina had two prior felony convictions as a juvenile. The State concedes its records show that Molina had submitted a DNA sample prior to sentencing in this case. The $100 DNA fee should not have been imposed. Striking the fee is required under Ramirez, consistent with the State's records indicating Molina's DNA had previously been collected. State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

Second, Molina argues the trial court improperly imposed two $500 victim penalty assessments rather than a single $500 penalty assessment. RCW 7.68.035(1)(a) mandates one $500 victim penalty requirement "for each case or cause of action that includes one or more convictions of a felony or gross

misdemeanor." Molina was convicted of two counts of assault under a single cause number. So, only one $500 penalty should have been assessed. At sentencing, the court stated with regards to the $500 penalty that its "intention, of course, is not that it be double collected for the sake of the record." However, this statement is not included in the judgment and sentences. The written orders impose two assessments, one in the felony judgment and sentence on the second degree assault conviction and a second in the nonfelony judgment and sentence on the fourth degree assault conviction. Washington is a written order state. State v. Huckins, 5 Wn. App. 2d 457, 469, 426 P.3d 797 (2018). The written order is controlling and the trial court's oral statements at sentencing are no more than a verbal expression of its informal opinion at the time. Id. One fee must be stricken.

Third, Molina argues that discretionary supervision fees should not have been imposed due to his indigency. The supervision fees were not imposed at sentencing. The State conceded that the court intended to waive any nonmandatory fees but imposed the supervision fee because of its inclusion on a stock form. We accept that concession.

We affirm the judgment and sentence, but remand to strike the DNA collection fee, the second victim penalty assessment, and the discretionary supervision fees.

Appelwick, J.

WE CONCUR:

Bowman, J.

Dwyer, J.

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. 80346-8-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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