

NO. 64553-6-I

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

REC'D
JUN 11 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

STEVEN E. BOTTOMLEY,

Appellant.

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

The Honorable Michael Heavey, Judge
The Honorable Laura G. Middaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed several kinds of misconduct in closing argument, the cumulative effect of which was deprivation of the appellant's constitutional rights to a fair trial by an impartial jury.

2. The trial court exceeded its statutory sentencing authority by imposing three community custody conditions that were not related to the circumstances of the offense.

Issues Pertaining to Assignments of Error

1. Did the prosecutor deprive the appellant of his right to a fair trial by an impartial jury by arguing facts not in evidence and appealing to the passions of the jurors?

2. Did the trial court exceed its statutory sentencing authority by imposing community custody conditions related to substance abuse, purchase and possession of alcohol, and use of the internet that were not related to the facts of the offense?

B. STATEMENT OF THE CASE

1. Substantive facts

Steven E. Bottomley and the 14-year-old S.V. attended an annual 10-day summer church camp in June 2006 on the campus of the Auburn

Adventist Academy. 3RP 47, 56-62, 67-72, 134-35, 277-78.¹ Participants traveled from throughout the Northwest to attend meetings and engage in activities designed to build social and spiritual ties among Seventh Day Adventists and to learn more about their faith. 3RP 48, 76, 134-35. Children commonly attended with their parents and the activities were organized by age group. 3RP 48, 51-52, 76, 129. The younger children were monitored by their parents, but teens were generally free to do as they wished. 3RP 52-53.

One of the unofficial activities on campus was volleyball, courtesy of Bottomley, who traditionally provided the equipment for the games. 3RP 68, 136, 289-90. It was during one of the volleyball games that S.V. met Bottomley. 3RP 136-37. During the game, which was played primarily by teens, Bottomley made inappropriate remarks that S.V. and two adult women heard. 3RP 125-26, 137-39, 277-80, 285. One of the women recalled Bottomley made comments about dropping soap in the shower, hugging as a group in the shower, and saying "Hey, big boy." 3RP 279-80, 283-84.

¹ This brief cites to the verbatim report of proceedings as follows: 1RP – 6/23-25/2009; 2RP -- 6/29-30/2009; 3RP -- 11/9, 16/2009; 4RP – 11/17-18, 12/4/2009.

The women reported Bottomley's actions to camp security personnel when the volleyball game ended. 3RP 68-71, 125, 279-84. As a result, the security supervisor shut down the volleyball court and asked Bottomley to stay away from children on the campus. 3RP 71-72.

S.V. was displeased the volleyball games ended because he wanted to continue to play. 3RP 140-41. He had no problem with Bottomley and had contact with him during the camp away from volleyball. 3RP 141. One evening after the volleyball incident, S.V. stopped by to watch Bottomley play cards with some adults. S.V. and Bottomley began talking and the two left the card game and walked to Bottomley's van, which was parked in another area of the campus. 3RP 151-57, 297.

S.V. sat on a mattress in the back part of the van while he and Bottomley talked first about mundane matters, and then about sex. S.V. asked Bottomley what it was like to have sex with a woman, and Bottomley asked whether S.V. ever had sexual contact with boys. 3RP 147-49, 154-56. Before long Bottomley began rubbing S.V.'s groin area both outside and inside his pants. S.V. took off his pants and Bottomley first masturbated him, then performed oral sex. 3RP 160-63. Bottomley then tried to have anal sex with S.V. but was not successful. 3RP 164-66. The incident ended within 45 minutes when S.V. and Bottomley each

ejaculated onto a towel. 3RP 166-68. Bottomley gave S.V. \$100 and asked him not to tell anyone about the encounter. 3RP 168-69.

In the days after the encounter, S.V. accepted rides from Bottomley in the van to S.V.'s home, downtown Auburn, and a convenience store near the campus. 3RP 141-47, 196. S.V. and Bottomley also walked to the convenience store one time. On the way to the store they were walking through some woods when, without discussion, each of them stopped and masturbated themselves. Neither touched the other, and when they finished, they continued to the store. 3RP 177-78, 196.

S.V. told no one about his activities with Bottomley until 10 months later and about two months before the 2007 camp meeting, when he disclosed the incidents to his mother. 3RP 97, 183, 185, 200-01, 308-310. His mother did not contact police because S.V. said he would not cooperate. 3RP 310-14.

S.V. and Bottomley attended the 2007 summer camp meeting as well. 3RP 72-73, 83, 181-83. They briefly chatted a few times but did not get together. 3RP 181-83.

Sometime during that meeting, S.V. pointed Bottomley out to his mother. 3RP 183-85, 308. On the last day of the meeting, June 23, 2007, S.V.'s mother, an attorney, disclosed S.V.'s information to campus security

personnel, who in turn called police. 3RP 73-74, 83-85, 186, 301, 314-15. The responding officer spoke with S.V. and his mother, but S.V. refused to provide a written statement and did not agree to assist in any resulting prosecution. 3RP 74, 85-90, 315-16.

Campus security officers transported Bottomley to their office, where S.V. identified him to the police officer. 3RP 88-89. The officer confronted Bottomley with S.V.'s allegations. Bottomley said he did not know S.V. and denied his assertions. 3RP 90-94.

A detective assigned to the case arranged for an interview with S.V. on July 11, 2007, but the youth did not show up. 3RP 103-04. The detective and a prosecutor eventually interviewed S.V., but not until February 26, 2008. 3RP 110-11. During that recorded interview, S.V. said the sexual contact occurred in a campus tent rather than in Bottomley's van. 3RP 111-12, 187.

In February 2009, nine months after the state had charged Bottomley with third degree child rape based on S.V.'s tent allegations, S.V. changed his story in a recorded interview with the police and a different prosecutor. He contended the sexual contact took place in Bottomley's van, not in a tent. CP 1-4, 3RP 111-12, 187-88, 193-94, 202-04. He originally said he was abused in the tent because he thought it

would not reflect well on him if he admitted he willingly walked to the van with Bottomley and sat inside the vehicle. 3RP 187-88, 203-05.

In a defense interview in May 2009, S.V. said he changed his story because he "had to see if this case was going to be, like, enough evidence, whatever, to proceed." 3RP 211. He also said he believed the tent story would "[s]ound better to them." 3RP 211.

The jury found Bottomley guilty of third degree rape of a child as charged. CP 124. The trial court imposed a standard range sentence and 36 months community custody. CP 154-64. Among other community custody conditions, the trial court ordered Bottomley to undergo a substance abuse evaluation at his expense and follow up with treatment recommendations, if directed to attend such an evaluation by his sexual deviancy treatment specialist or community corrections officer (CCO). The court also prohibited Bottomley from purchasing or possessing alcohol and from accessing the internet without the prior approval of his treatment provider or CCO. CP 162-63.

2. *Prosecutorial misconduct*

During closing argument, the prosecutor identified several "basic truths that we all know" to explain why S.V. delayed reporting the incidents with Bottomley and initially lied about the encounters. 4RP 360-

66. One of those "truths" was that "[c]hildren are confused by sex" and that "peer pressure" and other pressures make children do things they may later regret. 4RP 364-65.

Another "truth" was that that S.V. was a member of a conservative Christian community that "frowned on" extramarital sex, homosexual sex, and sexual contact between people of disparate ages. 4RP 364-65.

The prosecutor also declared that

"[P]eople come to terms with what has happened to them when they are raped, or, frankly, when they have sex early in their lives in different ways, and it often takes time. Not all rape victims run screaming from the rape, even if it is forcible. Not all people who are victims of rape, even if they don't report it to the police, tell their friends. Not all rape victims tell their families. In the best case scenario, they do eventually wind up dealing with it. Some people keep it bottled up forever. How much easier would it be for someone to keep it bottled up when they're dealing with the type of guilt that [S.V.] surely must have felt after breaking each of the taboos we have discussed?

4RP 366.

Defense counsel objected to none of this argument.

The prosecutor also argued the appropriate question jurors should ask was not why S.V. had difficulty disclosing he willingly accompanied a stranger to a van and that the incident occurred in a van, or why he did not initially reveal he masturbated with Bottomley in the woods. The proper question was, according to the prosecutor, "How could [S.V.] find the

strength to talk about it at all? The extraordinary thing in this child is that he was able to talk about it." 4RP 368.

At this point defense counsel objected on the ground the argument appealed to the jurors' passion or prejudice. The trial court overruled the objection without further comment. 4RP 368.

The prosecutor concluded his presentation to the jury as follows: "[S.V.] knows what happened. He told you what happened. Convict him [Bottomley] for him [S.V.]." 4RP 398. Defense counsel did not object.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT THAT PREJUDICED BOTTOMLEY'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

A defendant's due process right to a fair trial by an impartial jury is denied when the prosecutor makes improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amends. 5, 6 and 14; Wash. Const. art. 1, § 22. A prosecutor's remarks during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S.

1007 (1998). To determine whether misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect on the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). The cumulative effect of errors may be so flagrant that no instruction can erase their combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000).

1. The prosecutor argued facts not in evidence.

A prosecutor commits misconduct by arguing facts not in evidence. State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), affd., 159 Wn.2d 500, 150 P.3d 1121 (2007); State v. Perkins, 97 Wn. App. 453, 459, 983 P.2d 1177 (1999), review denied, 140 Wn.2d 1006 (2000); State v. Stover, 67 Wn. App. 228, 231, 834 P.2d 671 (1992), review denied, 120 Wn.2d 1025 (1993).

Bottomley's prosecutor argued facts not in evidence when explaining why S.V. was not immediately or completely forthcoming with his allegations. First, the prosecutor discussed the conservative sexual beliefs of Seventh Day Adventists. The argument was unsupported by facts; of the numerous Seventh Day Adventist witnesses, none mentioned

the tenets of his or her faith, regarding sex or anything else. The prosecutor's unsupported claims are misconduct.

Not only was there no evidence to support the comments, but by making them the prosecutor implied that because those were the beliefs of Adventists, they were the beliefs of S.V. as well and contributed to his purported reluctance to disclose the incident. In an analogous situation, involving unsupported remarks about the defendant's "traits," our Supreme Court repudiated such prosecutorial stereotyping.

In State v. Sang, 184 Wash. 444, 446-47, 51 P.2d 414 (1935), the state charged Sang, who was Chinese, with perjury for allegedly falsely denying being involved with an alleged gambling facility. During closing argument, the prosecutor said, "The Chinese are natural gamblers; no question about that. It is a trait." Sang, 184 Wash. at 446.

The Court reversed Sang's conviction, finding the substance of the prosecutor's argument was that the jury should find Sang was a gambler because he belonged to a race all of whom are gamblers, "as a stepping-stone to a verdict that defendant was guilty of perjury in the first degree as charged." Sang, 184 Wash. at 447. The Court reversed the conviction because there was no proof of such racial trait, and because all charged

defendants are entitled to a fair trial "whatever, if any, may be his racial traits." Id.

The same rationale applies here. There was no proof of any "traits" shared by Seventh Day Adventists, and Bottomley is entitled to a fair trial regardless his religious beliefs or those of the complainant.

The misconduct did not end there. The prosecutor's comments about children's confusion about sex and about pressures that may cause a child to make regrettable decisions about sex find no evidentiary support. For example, the prosecutor did not call a child psychologist or other expert to inform jurors about the sexual maturity of children or the regrettable results of peer pressures. Nor did S.V. display any confusion about sexual acts. He testified Bottomley "started jacking [him] off with his hand," started "doing oral" on his penis, and stopped because S.V. "couldn't cum." 3RP 161-63. Although a bit crude, S.V.'s testimony demonstrated ample knowledge of sexual conduct, not confusion. The prosecutor's argument, unsupported by facts, was misconduct.

The prosecutor committed the same type of misconduct when he argued about the varied reactions of rape victims and the ways they "come to terms" with being sexually assaulted. See State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (prosecutor's argument that "children assess

very carefully who they will disclose sexual abuse to and that long delays are common because people frequently repress sexual abuse" was improper because it was unsupported by evidence), cert. denied, 129 S. Ct. 2007 (2009).

Defense counsel did not object to these improper comments, but the cumulative effect of errors may be so flagrant that no instruction can erase their combined prejudicial effect. Henderson, 100 Wn. App. at 804. In Bottomley's case, the prosecutor commented on three different subjects without supporting evidence. Each subject was designed to provide jurors with explanations for S.V.'s delayed and incremental disclosures and, more generally, to bolster S.V.'s credibility. This made the prosecutor's misconduct particularly prejudicial because S.V.'s credibility was the decisive question in the state's case. As this Court has noted, there is an increased likelihood of prejudice where such misconduct appears in cases that hinge on credibility. State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993) ("In such a swearing contest, the likelihood of the jury's verdict being affected by improper questioning is substantial.").

Furthermore, regardless whether the prosecutor's assertions were not supported by evidence, a juror is likely to be impressed by what a prosecutor says given his position as representative of the state and the

aura of special reliability he enjoys. State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001). This is especially true with respect to the prosecutor's testimony regarding the varied responses of sexual assault victims and a child's confusion about sexual matters, because a reasonable juror would conclude the prosecutor knew about such matters because of his experience in prosecuting similar cases.

Additionally, misconduct committed in the face of a well established rule can constitute a flagrant and ill-intentioned violation of the proper standards for a prosecutor's trial conduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (finding the prosecutor's misconduct flagrant and ill-intentioned where improper argument came more than two years after case held argument constituted misconduct), review denied, 131 Wn.2d 1018 (1997). The prosecutor's unsupported arguments in Bottomley's case fall into this category, because the rule against arguing facts not in evidence is hardly new. See State v. Whetstone, 30 Wn.2d 301, 340, 191 P.2d 818 (1948) ("We do not commend the practice of counsel, . . . making statements before the jury of facts not supported by the evidence or reasonably inferable therefrom."). It may logically be inferred a prosecutor who repeatedly violates a well-known rule does so with ill intentions. This Court should conclude

Bottomley has not waived this aspect of his misconduct argument on appeal.

2. *The prosecutor appealed to the jury's passions and prejudice.*

The prosecutor has a duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Appeals to the jury's passion or prejudice are forbidden. State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

The prosecutor engaged in this type of misconduct by contending the proper question in Bottomley's trial was, "How could [S.V.] find the strength to talk about it at all? The extraordinary thing in this child is that he was able to talk about it." 4RP 368. In so arguing, the prosecutor sought the jury's sympathy for S.V. and prejudice against Bottomley by implying it took the youth's heroic efforts and "extraordinary" strength to provide the evidence necessary to bring Bottomley to justice.

And unlike the unsupported arguments above, here defense counsel objected, contending the prosecutor was improperly appealing to the jury's passion and prejudice. Counsel has therefore preserved this aspect of Bottomley's argument for appeal. See State v. Stamm, 16 Wn. App. 603,

614, 559 P.2d 1 ("To preserve a claim of prosecutorial misconduct for presentation on appeal, the defense must either object to the conduct at the time it takes place or move for a mistrial."), review denied, 91 Wn.2d 1013 (1977).

The prosecutor compounded this type of misconduct when, in his final comment on rebuttal, he implored the jury to convict Bottomley for S.V., suggesting the youth had done all he could to assure justice and needed the jury's help to complete the job. "A prosecutor's remarks in closing are flagrant and highly prejudicial when they deliberately appeal to the jury's passion and prejudice and encourage a verdict that was not based on properly admitted evidence." In re Detention of Law, 146 Wn. App. 28, 52, 204 P.3d 230 (2008). This is precisely what the prosecutor did here; defense counsel's failure to object should therefore not preclude this Court from considering this aspect of Bottomley's misconduct argument.

3. *There is a substantial likelihood the combined effect of the prosecutor's misconduct deprived Bottomley of a fair trial by an impartial jury.*

Bottomley has established several instances of reviewable prosecutorial misconduct. What remains to be determined is whether it is substantially likely the cumulative effect of this misconduct affected the

jury's verdict, i.e., whether the misconduct resulted in prejudice. State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993)

Courts measure possible prejudice by considering the strength of the state's case. State v. Thomas, 142 Wn. App. 589, 594, 174 P.3d 1264, review denied, 164 Wn.2d 1026 (2008). The state's case against Bottomley was not strong. As in many sexual assault trials, the credibility of the alleged participants was crucial. S.V.'s credibility was in doubt; he admitted he lied about the whereabouts of the purported assault to make his version of events sound more convincing to the prosecutor. 3RP 187-88, 200-05, 209-12, 214-16, 218-19.

In addition, the state presented no physical evidence to corroborate S.V.'s testimony, such as S.V.'s fingerprints from the back part of Bottomley's van, DNA collected from the semen S.V. and Bottomley allegedly deposited on a towel, or videotape from the convenience store S.V. said he went to with Bottomley in the van and on foot. 3RP 142-47, 166.

Further, the state did not present any witnesses who said they saw Bottomley and S.V. together at all during the 2006 meeting except during volleyball games. This was despite the fact S.V. knew many of the camp attendees, security personnel cruised the campus watching interactions

between children and adults, especially Bottomley, and S.V. took rides in the van and walked to a store with him after the alleged mutual masturbation incident. 3RP 75-76, 129-30, 140-47, 176-80, 195-96.

In addition to the weaknesses in the state's case, a trial court that overrules a timely and specific objection to an improper comment adds to the prejudice by lending an "an aura of legitimacy" to the prosecutor's argument. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Here, defense counsel timely objected to the prosecutor's "proper question" argument on the proper ground it appeal to the jury's passion. The trial court's summary overruling of the objection was not only incorrect, it also signaled to the jury the prosecutor's assertion was proper and worthy of its consideration.

Furthermore, the prosecutor's plea that jurors should convict Bottomley for S.V. was the final remark jurors heard before deliberating. The timing of the comment adds to the prejudicial effect. See State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (court found misconduct warranted reversal where prosecutor's improper comments "were made at the completion of the final closing argument, immediately prior to the jury beginning their deliberations."), review denied, 118 Wn.2d 1013 (1992).

Finally, while an "isolated" instance of misconduct is less likely to be found prejudicial, the cumulative effect of several improper arguments increases the overall prejudice. See State v. Agren, 28 Wn. App. 1, 8, 622 P.2d 388 (1980) (trial court did not err by denying defendant's new trial motion where prosecutor's sole improper remark was isolated); cf. See State v. Torres 16 Wn. App. 254, 264, 554 P.2d 1069 (1976) ("[I]t is patent that the cumulative effect of the many instances of misconduct prejudiced and effectively denied the defendants' constitutional right to a fair trial."). The prosecutor made several improper remarks during closing argument and rebuttal in Bottomley's case. For that reason and the ones set forth above, there was a substantial likelihood the misconduct affected the verdict. This Court should reverse Bottomley's conviction.

2. THE SENTENCING COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING CERTAIN COMMUNITY CUSTODY CONDITIONS BECAUSE THEY ARE NOT REASONABLY RELATED TO THE CIRCUMSTANCES OF THE OFFENSE.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851

(2000), review denied, 143 Wn.2d 1003 (2001). An offender has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd., 135 Wn.2d 326, 957 P.2d 655 (1988); see also Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague sentencing condition).

The jury convicted Bottomley for third degree rape of a child, which the Sentencing Reform Act (SRA) categorizes as a sex offense. RCW 9.94A.030(42)(a)(i). At the time Huggins committed his crimes, sex offenders were sentenced according to former RCW 9.94A.715 (2006). That statute authorized a trial court to impose a term of community custody. RCW 9.94A.715(1). Here the court imposed a community custody term for 36 months. CP 157, 162-63.

Under RCW 9.94A.715(2)(a), unless the court waives a condition, the conditions of community custody shall include those set forth in RCW 9.94A.700(4), and may include those provided for in RCW 9.94A.700(5). In addition, a trial court may order participation in rehabilitative programs or to otherwise perform affirmative conduct “reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community” RCW 9.94A.715(2)(a).

RCW 9.94A.700(5) provides:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

Although RCW 9.94A.700(5)(d) authorizes the trial court to prohibit alcohol consumption, Bottomley's sentencing court also prohibited the *purchase* or *possession* of alcohol. CP 163 (condition 22). In addition, the court ordered Bottomley to undergo a substance abuse evaluation at his own expense and follow any recommended treatment if so directed by his sexual deviancy treatment specialist or CCO. CP 55 (Condition 20). Because these conditions are not included in RCW 9.94A.700(5), the trial court had no authority to impose them unless they reasonably relate to the circumstances of the offense. RCW 9.94A.715(2)(a). Under State v. Jones,² they do not.

² Under 118 Wn. App. 199, 76 P.3d 258 (2003).

Jones pleaded guilty to first degree burglary and other crimes. During the plea hearing, Jones's attorney explained Jones was bipolar and not only off of his medication, but also using methamphetamine at the time of his crimes. Counsel contended this combination caused Jones to offend. Jones, 118 Wn. App. at 202. There was no evidence, however, that alcohol played a role in Jones' crimes.

The court sentenced Jones after accepting his pleas. The sentence included community custody, a condition of which was abstinence from alcohol and participation in alcohol counseling. The court made no finding alcohol contributed to Jones's crimes. Jones, 118 Wn. App. at 202-03.

On appeal, the Jones court held the trial court could not require Jones to participate in alcohol counseling given the lack of evidence alcohol contributed to his crimes. Jones, 118 Wn. App. at 207-08.

In reaching this conclusion, the court first observed RCW 9.94A.700(5)(c) authorizes a trial court to order an offender to "participate in crime-related treatment or counseling services." Jones, 118 Wn. App. at 207. The court held because the evidence failed to show alcohol contributed to Jones's offenses or the trial court's alcohol counseling

condition was "crime-related," the trial court erred by ordering Jones to participate in alcohol counseling. Jones, 118 Wn. App. at 207-08.

The Court also acknowledged, however, RCW 9.94A.715(2)(b) permitted a trial court to order an offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" Jones, 118 Wn. App. at 208. This condition also applies to Bottomley.

The Court held:

If reasonably possible, [RCW 9.94A.715(2)(a)] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. . . . If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-related." Accordingly, we hold that alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.

Jones, 118 Wn. App. at 208 (footnote omitted).

The same language analyzed in Jones applies to Bottomley's case. Therefore, the Jones analysis should apply here. Just as there was no evidence alcohol contributed to Jones's offenses, there was likewise no evidence substance abuse contributed to Bottomley's offense. That

portion of the community custody condition requiring Bottomley to obtain a substance abuse evaluation and follow recommended treatment is too broad and not reasonably related to the circumstances of Bottomley's offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana).

Nor was there evidence alcohol played a role in Bottomley's commission of the crime. Therefore, the trial court had no authority to prohibit purchase and possession of alcohol.

For these reasons, the "substance abuse" condition, as well as the "purchase and possess alcohol" community custody conditions should be stricken from Bottomley's judgment and sentence. Jones, 118 Wn. App. at 207-08, 212.

Similarly, there was no evidence the internet contributed to Bottomley's offenses. Despite that, the trial court prohibited Bottomley from accessing the internet without prior approval of his CCO and sex offender treatment provider. CP 163 (Condition 23). Absent a connection between internet use and Bottomley's offense, the trial court lacked authority to prohibit him from surfing the World Wide Web.

Because the prohibition is not crime-related, it should also be stricken from the judgment and sentence. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (because there is no evidence O'Cain accessed internet before committing rape or that internet use contributed in any way to offense, condition of community custody prohibiting internet use must be stricken).

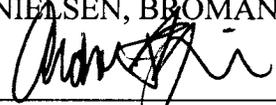
D. CONCLUSION

The prosecutor violated Bottomley's right to a fair trial by an impartial jury by committing misconduct in closing and rebuttal arguments. This Court should reverse Bottomley's conviction and remand for a new trial. Alternatively, the trial court exceeded its statutory sentencing authority by imposing community custody conditions that were not crime-related. This Court should remand the judgment and sentence for vacation of the unlawful conditions.

DATED this 11 day of June, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64553-6-I
)	
STEVEN BOTTEMLEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN BOTTEMLEY
DOC NO. 336015
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*