

NO. 65213-3-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO RAMOS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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COMMUNICATIONS SECTION
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STATE OF WASHINGTON


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A. INTRODUCTION.

Anthony Ramos testified at his jury trial that he was not the person who sold drugs to a police informant on March 29, 2009. The prosecutor cross-examined him by eliciting that in 2008, he had been in prison for a drug conviction, and in 2007 was in jail for another drug conviction, even though these incidents had no bearing on whether Ramos participated in the single drug sale charged.

The prosecutor also persistently questioned Ramos about whether he knew certain people from “the drug world.” He argued to the jury that Ramos was in “the drug business.” He asked Ramos why the prosecution’s witnesses would lie. He claimed that the police witnesses were “100% candid.” He told the jurors that their role was “to stop” Ramos from “continuing” to sell drugs, so that the local shopping centers would be free from “coke dealers” like Ramos.

The array of flagrantly improper tactics employed by the prosecutor with the purpose of influencing the verdict denied Ramos his right to a trial that is fair and appears fair.

B. ASSIGNMENTS OF ERROR.

1. Ramos was denied a fair trial by the prosecutor's use of flagrantly improper tactics, in violation of the Fourteenth Amendment and Article I, sections 3, 21, and 22 of the Washington Constitution.

2. The court imposed unauthorized legal financial obligations without making the required findings of fact.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A prosecutor's efforts to urge a jury to return a verdict on impermissible grounds denies an accused person a fair trial. A prosecutor may not inject his own experience or opinion into the trial, elicit unrelated bad acts for the purpose of convincing the jury that the defendant is a bad person makes the community unsafe, or ask one witness to comment on another witness's motive to lie. Where the prosecutor employed a number of flagrantly improper tactics to convince the jury to find the defendant guilty, and the prosecutor has been admonished for similar tactics in the past, does the prosecutor's resort to clearly unfair tactics undermine the fairness of the trial?

2. A court lacks authority to impose legal financial obligations unless it first determines that the individual has some

ability to pay and assesses the actual cost of the items for which the defendant is required to pay. Here, the court imposed numerous legal financial obligations without any information about Ramos's ability to pay, even though it had previously found him indigent, and did not ascertain whether the requested costs were actually incurred during the trial. Did the court lack authority to impose non-mandatory legal financial obligations?

D. STATEMENT OF THE CASE.

Police informant Lance Tatum arranged a drug sale with a person he knew as "Tony," on March 29, 2009. RP 96-97. Tatum would receive \$100 if the drug sale occurred. RP 39.

At the insistence of Detective Glen Slick, Tatum requested the drug sale occur in a parking lot in Bellingham, where there was a grocery store, movie theater, Rite Aid, a bank, and other shops and eateries. RP 8, 15, 43, 97-98, 103. Several police officers came to the parking lot in unmarked cars to observe the drug sale. RP 8, 55, 72-73.

The police saw Tatum enter a van, sit inside the van for a few minutes, and leave. RP 105-07. Tatum gave Slick the cocaine he received during the drug sale. RP 108.

The police could not see inside the van when the drug sale occurred. RP 106. They saw Antonio Ramos get out of the van after the drug sale, go inside the Cost Cutter grocery store, return to the van, and sit inside with his lunch before he left. RP 11-12, 80, 141, 158.

Antonio Ramos worked as a plasterer, and had a job working on a home in a nearby area. RP 139. Ramos did not drive, because his license was suspended, and an acquaintance named Dave gave him a ride to the grocery store so Ramos could get lunch. RP 140. Ramos denied being involved in a drug sale that day, although he admitted he used drugs. RP 142.

Ramos was charged with a single count of delivering drugs. CP 47. He was convicted after a jury trial and received a sentence near the high end of the standard range, 110 months. CP 19, 27. The court also imposed \$5500 in legal financial obligations. CP 18. This appeal timely follows.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. THE PROSECUTOR'S FLAGRANTLY IMPROPER QUESTIONS AND ARGUMENT, REPEATEDLY INJECTING IMPERMISSIBLE CONSIDERATIONS INTO THE JURY'S DELIBERATIONS, DENIED RAMOS A FAIR TRIAL AND OFFENDS THE APPEARANCE OF FAIRNESS REQUIRED BY THE CONSTITUTION AND COMMON LAW

- a. A prosecutor may not employ improper tactics to gain a conviction. Trial proceedings must not only be fair, they must "appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Misconduct by a prosecutor violates the "fundamental fairness essential to the very concept of justice." Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (quoting Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941)); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); see

State v. Hunson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (prosecutor’s “trial behavior must be worthy of his office, for his misconduct may deprive the defendant of a fair trial.”). A prosecutor “may strike hard blows, [but] he is not at liberty to strike foul ones.” Id.

Because the public expects that the prosecutor acts impartially,

improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

When reviewing prosecutorial misconduct, the court first considers whether the prosecutor’s actions were improper, and second, whether there is a substantial likelihood that the misconduct affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.2d 937 (2009). The failure to object to misconduct does not waive the error on appeal if the remark amounts to a manifest constitutional error. State v. Dixon, 150 Wn.App. 46, 57, 207 P.3d 459 (2009). Where a prosecutor’s remarks are so flagrant and ill-intentioned that they evince “an enduring and

resulting prejudice,” the court will grant relief without regard to whether there was a trial objection. Fisher, 165 Wn.2d at 747.

b. The prosecutor told the jury its duty was to make the community safe from drug dealers. It is a “long standing principle” that a prosecutor may not “exhort” the jury to join a war on drugs or appeal to the jury’s fear of criminal groups. State v. Perez-Mejia, 134 Wn.App. 907, 916, 143 P.3d 838 (2006) (“a prosecutor engages in misconduct when making an argument that appeals to jurors’ fear and repudiation of criminal groups.”). Not only is the appeal to jurors’ fear of crime unduly inflammatory, such arguments may suggest that evidence not presented at trial provides additional grounds to find the accused person guilty, and “a prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.” Id. (emphasis added).

For example, it is improper for a prosecutor to “direct the jurors’ desires to end a social problem toward convicting a particular defendant.” Id. at 916 n.8 (quoting United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991)). In Solivan, the court reversed a conviction due to the prosecutor’s call to send a message to drug dealers, notwithstanding curative instruction given

by trial court. The court condemned “appeals to the community interest to end a societal evil” by quoting United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985):

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

Solivan, 937 F.2d at 1153.

In Ramos’s trial, the prosecutor began his closing argument by explaining this trial was about “drug activity in the community” that the jurors “had no idea was going on,” thus planting the seed for the implication that Ramos was a participant in regular drug activity. RP 163. Then, the prosecutor explained,

This is also why we are here today, so people can go out and buy some groceries at the Cost Cutter or go to a movie at the Sunset Square and not have to wade past the coke dealers in the parking lot.

RP 163.

He continued,

That's why they were there, that's why you're here, and that's why I'm here, to stop Mr. Ramos from continuing that line of activities. That's what this case is about and that's what the truth of this case is about and that's why this is a serious case.

RP 163.

One underlying premise of this argument was that Ramos and others regularly engage in drug deals in front of the grocery store and movie theater. Yet it was the police detective who insisted the drug sale occur in the Cost Cutter parking lot. The drug seller had asked to meet in a rural area, but the police officers "said no" and requested the drug purchase occur in this parking lot.

RP 97. This appeal to the jurors' community safety concerns was not even based on facts in evidence.

A second insidious premise of this argument is that the jurors and prosecutor are there "to stop" Ramos and others from continuing to sell drugs right under the noses of the jurors. The jurors are not there to "ameliorate society's woes." Solivan, 937 F.2d at 1153. Nor are the jurors there to "protect community values, preserve civil order, or deter future lawbreaking." Id. Jurors must be focused on whether the State proved the charges, not whether a guilty verdict is necessary for the good of society.

The prosecutor's insistence that the "truth is" that this is "a serious case," because otherwise people will be "wading past coke dealers" when buying groceries, is a plain effort to incite passion for improper reasons. The specificity of the argument as a direct appeal to individual jurors adds to the impact of the argument on the jurors. As explained in Solivan, an appeal to the community conscience, such as by telling the jurors they should tell drug dealers they are not welcome, is an extremely prejudicial and impermissible basis for seeking conviction. 937 F.2d at 1153. Here, the prosecutor made sure that the jury understood the impact of "coke dealers in parking lots" on their own lives by explaining that unless they "stop Mr. Ramos from continuing this line of drug activities" they will not be safe when running basic, family-oriented errands such as buying groceries or going to the movies. RP 163.

Ramos was accused of one single drug sale. He was not alleged to have committed many in "that line of activities." RP 163. By the plural nature of needing to stop Ramos from "continuing this line of activities," the prosecutor implied that Ramos is a frequent dealer of drugs, notwithstanding the single drug transactions with which he was charged, which is another aspect of prosecutorial misconduct addressed in more detail below.

c. The prosecutor told the jury Ramos was in the “drug business,” lived in “the drug world” and associated with criminals. Jurors presume that a prosecutor has a wealth of experiential knowledge beyond the facts of the particular case. Thus, when a prosecutor discusses facts not in evidence, jurors will inevitably conclude that the prosecutor speaks from his experience and rely on those allegations. United States v. Brooks, 508 F.3d 1205, 1209-10 (9th Cir. 2007) (prosecutor “threatens integrity” of conviction by indicating information not presented to jury supports government’s case). A prosecutor “carries a special aura of legitimacy” as a representative of the State. United States v. Bess, 593 F.2d 749, 755 (6th Cir. 2000). Thus, “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own.” United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

The prosecutor made several references to Ramos as being a member of “the drug world” and a person who is in “the drug business.” These tactics not only painted Ramos as a fixture in the underworld of selling drugs, they led the jury to consider his

propensity for criminal activity as a reason in and of itself to convict him.

When questioning Ramos at trial, the prosecutor asked him about two people Ramos spoke with in the parking lot after the alleged drug sale. One police detective had identified these two people as Rachel Lebec and Aaron Salsbury, and said he knew them from “an investigation.” RP 78. There was no evidence either person was involved at all in the charged crime. Rather, Ramos saw them when he was entering the grocery store to buy food, after the apparent drug sale.

The prosecutor asked Ramos if he knew Lebec “from the drug world?” RP 154. The court overruled Ramos’s objection. RP 154. The prosecutor repeated his question about whether he recognized Lebec “from the drug world,” and Ramos said he did not know. RP 154.

The prosecutor asked if he knew Lebec “has a serious drug problem?” RP 154. Ramos answered “I don’t know,” before the court sustained defense counsel’s objection. RP 154.

Undeterred, the prosecutor asked if he knew Lebec is “in drug court now?” RP 155. The court sustained Ramos’s objection. RP 155.

Continuing in this same line of questions, the prosecutor asked Ramos if he recognized Aaron Salsbury, the person with Lebec, and Ramos said no. RP 155. Yet the prosecutor persisted, asking whether Ramos knew him “from the drug world?” RP 155. Ramos said no. The prosecutor again persisted, even though Ramos had said he did not know Salsbury, asking Ramos if he knew Salsbury “has convictions?” RP 155. The court sustained the defense objection and granted the motion to strike the last answer.

In closing argument, the prosecutor turned to Ramos’s apparent association with people who are supposedly in the drug world even though any such association had no bearing on the charged offense. He told the jury that Ramos had spoken with Lebec and Salsbury, “two people he [Detective Hanger] had opened investigations on, and he recognized them.” RP 168. Hanger had not testified that he investigated Lebec and Salsbury for criminal activity, only that he had met them during “an investigation,” which could have been when they were victims or witnesses, not necessarily perpetrators. RP 78. But the prosecutor confirmed for the jury that Hanger had investigated the two people Ramos spoke with in the parking lot. The jury would presume the

prosecutor would know the underlying facts of the police detective's investigation, even if the detective had not testified about it.

Futhermore, emphasizing this alleged "drug world" connection underscored the State's efforts to convict Ramos based on his associations, propensity, and dangerousness to the community.

Additionally, when discussing the lack of police investigation into the telephone number Ramos and the informant used, the prosecutor explained that people who work "in the drug business" do not register their phones, and therefore further investigation of Ramos's telephone number would be fruitless. RP 172. There was no evidence that Ramos was part of "the drug business," other than the prosecutor's efforts to paint him as a professional drug dealer.

The prosecutor also explained that "we'd like to have done additional purchases of drugs" from Ramos but the informant Tatum had been unable to contact Ramos to arrange them, which presumed that Ramos would have sold drugs to Tatum had they successfully connected. RP 170. Then the prosecutor argued that Ramos was probably in jail and that was why more transactions could not be arranged. He said the because Ramos had spent a

lot of time in jail, he “might be a difficult guy to get a hold of.” RP 170.

The prosecutor’s argument and elicitation of plainly irrelevant evidence about Lebec and Salsbury’s presence in the “drug world,” who have “convictions” or a “serious drug problem,” had absolutely nothing to do with whether Ramos sold drugs to the informant. It was an improper means of tainting Ramos by his association with people “from the drug world” or being in the “drug business.” The insidious painting of Ramos as a person who lived in a different world, called “the drug world,” tainted the trial.

d. The prosecutor asked Ramos to declare that the State’s witnesses must be lying. A prosecutor’s efforts to induce an accused person to call the State’s witnesses liars “rises to the level of flagrant misconduct.” State v. Suarez-Bravo, 72 Wn.App. 359, 367, 864 P.2d 426 (1994); see also State v. Boehning, 127 Wn.App. 511, 525, 111 P.3d 899 (2005) (“Asking one witness whether another witness is lying is flagrant misconduct.”). It invades the province of the jury to ask “a witness to judge whether or not another witness is lying.” Id. at 366. Furthermore, it is “misleading and unfair to make it appear than an acquittal requires the conclusion” that the State’s witnesses are lying. State v.

Casteneda-Perez, 61 Wn.App. 354, 362, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991).

The prosecutor asked Ramos to give a reason that would explain why the informant, Tatum, would lie, after Ramos said he did not know Tatum. RP 157. The prosecutor asked, “So he would have no reason whatsoever to make up anything untrue about you, would he?” Ramos objected as calling for speculation and the court sustained the objection. The prosecutor asked again, “Can you think of any reason why he might be making up something untrue about you?” RP 157. Ramos said no.

The prosecutor next asked Ramos why, when the parking lot was “virtually crawling with police,” he was the only person seen near the van. RP 157. The court sustained Ramos’s objection to this question, which implicitly asked Ramos to explain why the police were lying about another person also being in the van with Ramos.

In Boehning, this Court condemned a similar line of questioning. The prosecutor asked Boehning why, when the complainant had “no reason to be mad *at you, has come forward and made this up for no reason at all* [?]” 127 Wn.App. at 524 (emphasis in original). Boehning did not object, but on appeal, the

court characterized this question as exactly the type of flagrant misconduct long-recognized as improper, because the prosecution may not ask one witness to explain why another witness would lie. Id. at 525. This same analysis applies here, when the prosecutor asked Ramos to tell the jury why Tatum would be making up an “untrue” story, and Ramos timely objected. RP 157.

e. The prosecutor injected himself into the case and vouched for the credibility of the State’s witnesses. It is “extremely prejudicial” as well as unethical for a prosecutor to “impress upon the jury the deputy prosecuting attorney’s personal belief in the defendant’s guilt.” State v. Case, 49 Wn.2d 66, 68, 298 P.2d 500 (1956); State v. Sargent, 40 Wn.App. 340, 343-44, 698 P.2d 598 (1985), rev’d on other grounds, 111 Wn.2d 641 (1988); see United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (prosecutor's expression of personal opinion of guilt is improper).

The prosecutor may neither vouch for the credibility of the witness nor against the credibility of a witness. State v. Horton, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003); State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997).

The prosecutor urged the jury to convict Ramos because the police officers were “100 % candid” and “we know” that Ramos sold drugs that day. RP 184-85. The prosecutor asserted

the truth of the matter is they [the police officers] were just telling you what they saw and they were not being anything less than 100% candid.

RP 184. Ramos objected but the court overruled the objection. RP 184.

The prosecutor next explained,

The State submits we know what happened out there that day, March 25, 2009, at the Cost Cutter parking lot on Sunset Drive. We know that there was a drug delivery. And we know that he delivered those drugs and is guilty as charged. So I ask you to return that verdict.

RP 185.

The prosecutor also claimed that under the story Ramos “concocted,” the police “would have to be absolutely blind and dumbfounded to testify the way they have and . . . try to falsely convict” Ramos. RP 185.

Insisting that the “truth” is the police were completely honest and “we know” Ramos is guilty as charged both vouched for the credibility of the police witnesses and inserted the prosecutor’s

personal opinion, drawn from his own experience, that “we know” Ramos is guilty. Brooks, 508 F.3d at 1209-10.

f. The prosecutor repeatedly injected Ramos’s prior drug convictions and prison sentence into the case. An individual’s prior conviction for or use of a controlled substance on an unrelated occasion has no bearing on whether he possessed a controlled substance on a charged date. State v. Pogue, 104 Wn.App. 981, 17 P.3d 1272 (2001). The mere fact of a prior drug conviction has little probative value and tremendous prejudicial effect. See State v. Wade, 98 Wn.App. 328, 335, 989 P.2d 576 (1999) (to use prior acts for a nonpropensity theory, there must be some similarity among the facts of the acts themselves).

Evidence of prior drug use is inadmissible to impeach a witness unless the witness was under the influence of drugs either at the time of the incident or at the time of testifying at trial. State v. Tigano, 63 Wn.App. 336, 344, 818 P.2d 1369 (1991), rev. denied, 118 Wn.2d 1021 (1992). Otherwise, it is inadmissible because it is improperly prejudicial. Id. at 344-45. Evidence of drug addiction “is necessarily prejudicial in the mind of the average juror.” State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1975).

A defendant can “open the door” to testimony about a prior act or uncharged wrongdoing only by asserting that no such misconduct ever occurred, or that he or she does not have to character to commit such an offense. State v. Stockton, 91 Wn.App. 35, 40, 955 P.2d 805 (1998). A passing reference to an otherwise prohibited topic during direct examination does not “open the door” to more probing questions eliciting otherwise improper information about prior misconduct. Stockton, 91 Wn.App. at 42 (“Drug possession and use are not probative of truthfulness because they have little to do with [the] witness's credibility.”).

Furthermore, the prosecution is not excused from complying with the Rules of Evidence based on its belief that a door has been opened. State v. Jones, 144 Wn.App. 284, 295, 183 P.3d 307 (2008). The prosecutor may not “seize[] the opportunity to admit otherwise clearly inadmissible and inflammatory” evidence by virtue of a defense question to a witness, because “[a] defendant has no power to ‘open the door’ to prosecutorial misconduct.” Id.

Here, Ramos denied selling drugs but agreed that he had used drugs in his direct testimony. RP 142. He also testified that he was working at the time of the incident in a stucco business and made about \$35 an hour. RP 139. He had been working in this job

for about one month, although he had been plastering stucco for many years. He said he made 60 or 70 thousand dollars a year in this field. RP 139.

The prosecution exploited this testimony by purposefully eliciting Ramos's drug convictions and prison or jail sentences during the few years before the charged incident. Although this charged drug sale occurred in 2009, the prosecutor questioned Ramos how he earned money in 2008. RP 142. Ramos admitted he "went to prison" in 2008. RP 142.

Then the prosecutor questioned Ramos about his ability to work in 2007. RP 143. He asked him "what part of the year" he worked in 2007, and whether he worked in April and May 2007. RP 143. He asked these questions knowing that Ramos was in jail during those months of 2007. RP 143. After Ramos said he was in jail in 2007 because his license had been suspended and he was using drugs, the prosecutor asked,

Q. You were in jail on April 12th of 2007 because you had been convicted of possession of hydrocodone and received a two-month sentence, is that correct?

A. Yes.

Q. Is that right?

A. Yes.

Q. You also spoke of going to prison in the year of 2008, did you not?¹

A. Yes.

Q. That was also for drugs, wasn't it?

A. Yes.

RP 160-61.²

The prosecutor then asked, over repeated defense objections, whether “[p]eople who don’t make enough money to buy drugs . . . sometimes sell drugs . . . to support their habit?” RP 161. The court sustained Ramos’s objection. Id.

The prosecutor also emphasized Ramos’s familiarity with jail by asking Ramos whether he met Dave, the person he said owned the van he was driving in during the March 2009 incident, while in the Whatcom County Jail. RP 144. Ramos testified he met Dave while working at a cannery in 2009. The prosecutor asked, “you met him when you got out of jail?” RP 144. Ramos explained he met Dave “inside.”

The prosecutor asked, “Did you do time with him inside the Whatcom County Jail?” RP 144. Ramos agreed he had.

¹ This testimony was elicited by the prosecutor. RP 142.

² In 2007, Ramos was arrested for driving with a suspended license, and was charged with possession of hydrocodone based on two pills that were in a jacket pocket. His appeal from that conviction is pending at COA 59921-6-I. His testimony about being arrested for driving with a suspended license as well as drug use accurately portrayed the underlying circumstances. See COA 59921-6-I, Appellant’s Opening Brief, p.3.

In his closing argument, the prosecutor said, “Mr. Ramos seems like he spends a lot of time in jail, from his testimony” for driving while suspended and “drug charges,” so “he might be a difficult guy to get a hold of.” RP 170. The prosecutor explained that “We’d like to have done” more drug purchases from Ramos but could not arrange them, implying that Ramos was probably in jail and therefore unavailable to sell drugs. RP 170.

Ramos’s criminal convictions for drug possession were not admissible under the Rules of Evidence. His time in jail or prison in 2007 and 2008 pre-dated the charged incident and had nothing to do with the single drug sale with which Ramos was charged. This clearly inadmissible evidence was elicited by the prosecutor for the purpose of showing that Ramos must support himself by selling drugs and he cannot be trustworthy because he is continually being prosecuted for drug-related offenses.

g. The prosecutor drew on racial stereotypes. Race-based arguments are not tolerated as a means of encouraging a conviction. State v. Perez-Mejia, 134 Wn.App. 907, 918, 143 P.3d 838 (2006) (State’s argument about “machismo” was “clearly designed to call attention to” defendant’s ethnicity and thus an “unquestionably improper” appeal to ethnic prejudice). Racism’s

pernicious influence arises in the internal workings of a juror's thoughts and in secret deliberations, so it cannot be used to impugn the integrity of the verdict.

The prosecutor here drew special attention to Ramos's ethnicity. He asked Ramos whether Ramos' acquaintance Dave, was "American." He further asked, "does he sound American?" RP 152.

In closing argument, he described Ramos as having a "Hispanic accent," noting Dave did not have that accent. RP 183-84.

The prosecutor did not overtly ask Ramos his citizenship status but implied that a person who sounds "American," could not have an accent, thus drawing attention to Ramos's lack of "Americanness."

h. The flagrant, cumulative nature of the misconduct denied Ramos a fair trial. In State v. Neidigh, 78 Wn.App. 71, 895 P.2d 423 (1995) this Court's decision explains:

The court at oral argument asked why prosecutors continue to pose "liar" questions notwithstanding the cases cited above. Mr. Chambers, on behalf of the State, responded, "it's always been found to be harmless error" when no objection is raised and that this kind of cross examination is "never really very important to the case."

78 Wn.App. at 76.

The Neidigh Court faulted **this** prosecutor's tactics, listing many cases holding those tactics are misconduct. Id. at 73, 76-77. The Court expressly ruled, "The practice of asking one witness whether another is lying 'is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason.'" Id. at 77 (quoting Casteneda-Perez, 61 Wn.App. at 363). Ultimately, the Neidigh Court found the prosecutor's misconduct harmless, just as Mr. Chambers predicted it would.

But the same prosecutor, Craig Chambers, has now had 15 years of notice that it is "contrary to the duty of prosecutors" to ask a witness whether another is lying, yet he asked Ramos explain why a State's witness would lie. Neidigh, 78 Wn.App. at 77; RP 157. The prosecutor has also had many years to understand that it is flagrant misconduct to vouch that the police officers were "100% candid," to assuage the jury that "we know" Ramos is guilty of selling drugs, to tell the jurors that the prosecutor and jury's roles are to "stop" drug dealing "in the community," and to elicit testimony that a defendant has been convicted of drug crimes in the past and must be barred from "continuing in these activities." Despite the

prosecutor's ethical and legal duty to refrain from seeking a verdict by improper means, the same prosecutor who flouted his ability to make improper arguments in Neidigh without repercussions continues to flout his duty.

While the case against Ramos could perhaps have been proven without resort to the array of improper tactics employed by the prosecutor, the prosecutor did not resist the urge to taint and inflame the jury. There is a substantial likelihood that the prosecutor's conduct affected the jury's deliberations and denied Ramos fair consideration of his testimony based solely on the facts of the case. Furthermore, the prosecutor's flagrantly improper tactics should not be tolerated, because they undermine the appearance of fairness necessary to the criminal justice system and continue unabated notwithstanding this Court's admonishment.

2. THE COURT'S FINDINGS IN THE JUDGMENT AND SENTENCE SUPPORTING THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829

P.2d 166 (1992); RCW 10.01.160(3). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty.

a. There is insufficient evidence to support the trial court's finding that Ramos had the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the constitution “direct [a court] to consider ability to pay.” Id. at 915-16. RCW 10.01.160(3) provides,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Here, the court made an express and formal finding that Ramos had the ability to pay. CP 17.³ But a finding must have

³ In what appears to be a boilerplate section of the Judgment and Sentence, the court's findings include the statement:

support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). Here, there is no evidence in the record to support a finding that Ramos had the ability to pay the \$5550 in costs imposed.

The court did not inquire of Ramos's present financial ability in any manner. The court found Ramos indigent when appointing counsel upon the inception of the case. See Order Authorizing Defendant to Seek Review at Public Expense and Appointing an Attorney. The court affirmed that finding in the motion for indigency filed for purposes of appeal. Id.

Although Ramos had testified at trial that he worked as a plasterer and made a good living, the prosecution sought to discredit that testimony by showing Ramos had spent significant portions of 2007, 2008, and 2009 in jail or in prison. Indeed, the court found Ramos's "credibility was zero," in his trial testimony.

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 17.

RP 189. According to the court at sentencing, Ramos's testimony "didn't carry any weight whatsoever." RP 190. Thus, it would be nonsensical for the court to find Ramos's ability to pay had been proven at trial when the court construed his trial testimony as worth no weight whatsoever.

The court's finding regarding Ramos's ability to pay cites RCW 9.94A.753 as the pertinent statutory authority. CP 17. RCW 9.94A.753 pertains to the court's authority to impose restitution, and does not speak to other fees paid to the courts or county or fines imposed as punishment. One important difference between restitution and other fees or fines is that restitution is mandatory. Under RCW 9.94A.753(1) & (3), "the court shall order restitution in all cases where the victim is entitled to benefits," and the offender's ability to pay is considered when setting the monthly payment schedule. This restriction does not apply to the largely discretionary legal financial obligations, of which only a small portion are mandatory. See RCW 9.94A.760(1) (court "may" impose a legal financial obligation); see also RCW 43.43.690 (Mandatory DNA collection fee); RCW 7.68.035 (mandatory victim penalty assessment).

The trial court's explicit finding that Ramos had the ability to pay legal financial obligations is unsupported by the record and should be stricken. Moreover, because the record does not support a finding that Ramos has the present or future ability to pay costs, non-mandatory legal financial obligations may not be imposed. Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

b. The record does not support the costs imposed.

Even if this Court finds there is sufficient evidence to support the trial court's finding that Ramos has the ability to pay the costs imposed, there is no evidence to support most of the amounts imposed.

Costs that may be imposed on a criminal defendant must be "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2).

The judgment and sentence requires Ramos pay \$1500 as a fee for the court-appointed attorney. CP 18. But there was no evidence offered regarding the costs of court-appointed counsel to a defendant found indigent. The same is true of the \$200 "Criminal filing fee," and the \$250 "Jury demand fee." CP 18. Each of these amounts were preprinted on the judgment and sentence as if they are imposed as a matter of routine rather than based on

the amounts actually incurred. See CP 18. Because there is no evidence in the record to establish the actual costs, the trial court erred in imposing the cost of counsel, the filing fee, and the jury demand fee.

The court also imposed \$2000 as a VUCSA fine. CP 18. Under RCW 69.50.430, the court may suspend or defer this fine when a person is indigent. Despite the significant evidence of Ramos's indigency, including his need for court-appointed counsel at trial and on appeal, the significant time he recently spent in jail or prison, the 110-month sentence, and the lack of any apparent resources, the court imposed the full amount of fine permitted and did not consider Ramos's poverty.

Similarly, the court imposed a \$100 Crime lab fee under RCW 43.43.690. But this statute directs the court may suspend part or all of the fee if the person is indigent. Here, the court failed to consider Ramos's apparent indigence and imposed all available fees and fines without considering his obvious inability to pay and his likely long-term indigence.

One of the goals of the Sentencing Reform Act is to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. Washington State

Sentencing Guidelines Commission, Adult Sentencing Manual, I-vii (2008). But the amount of fines and fees imposed upon conviction vary greatly by “gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced.” See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008). This study found that, three years post-sentencing, less than 20 percent of the fees, fines and restitution had been paid for roughly three quarters of the cases in the study. Id. at 20.

The court’s imposition of legal financial obligations without giving any weight to the person’s ability to pay exacerbates the problems that those released from confinement must face and may, in fact, lead to increased recidivism.

It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

Beckett, The Assessment of Legal Financial Obligations in Washington State, at 74.

The court's imposition of substantial legal financial obligations without any inquiry into Ramos's ability to pay constitutes significant punishment that violates the right to equal protection of the law, is contrary to statute, and must be reconsidered on remand, giving attention to Ramos's poverty.

F. CONCLUSION.

For the reasons stated above, Antonio Ramos respectfully asks this Court to reverse his conviction based on extensive prosecutorial misconduct. Alternatively, he asks this Court to reverse the imposition of non-mandatory legal financial obligations. Mr. Ramos also asks that no costs be awarded in the event that he does not substantially prevail on appeal.

DATED this 29th day of July 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 65213-3-I
)	
ANTONIO RAMOS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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BELLINGHAM, WA 98225 | (X)
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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2010.

X _____ 

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA
