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NO. 65431-4-I

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

2010 SEP 30 PM 4:15
COURT OF APPEALS
STATE OF WASHINGTON
JULIA A. HARRIS

STATE OF WASHINGTON,

Respondent,

v.

CHARLES BOOME,

Appellant.

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

The Honorable Ira Uhrig, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of his right to a fair trial.

2. The court was without authority to impose several conditions of community custody.

Issues Pertaining to Assignments of Error

1. Where the prosecutor asked questions on cross examination of appellant that implied the existence of prejudicial facts, yet the prosecutor failed to prove up such facts, was appellant deprived of his right to a fair trial?

2. Whether the trial court was without authority to restrict appellant's contact with minors in various ways as conditions of community custody, where the current charges did not involve any minors?

3. Whether the trial court was without authority to require appellant to undergo a drug and alcohol evaluation and follow any treatment conditions as a condition of community custody, where the current charges did not involve any allegation of drug or alcohol use?

4. Whether the trial court was without authority to require appellant to undergo a psychiatric evaluation and follow any

treatment conditions, where the court made no finding mental illness contributed to the current charges?

B. STATEMENT OF THE CASE

Following a jury trial in Whatcom County Superior Court, appellant Charles Boome was convicted of first degree burglary and first degree rape, allegedly committed against Emily Harvey. CP 17-30, 33. This appeal timely follows. CP 2-16.

1. Trial Testimony

Boome testified he encountered Harvey as she was walking home from a bar early in the morning on April 27, 2007. 2RP 24.¹ Harvey was a student at Western Washington University and admitted she had been drinking heavily that evening with friends and that she walked home by herself from a local nightclub.² RP 29, 47-50, 84-85. It was a Thursday night and it was typical for Harvey to meet up and go dancing with friends. RP 41-42, 44.

Boome was panhandling at the time and testified he asked Harvey if she had some food or money. 2RP 25. Harvey reportedly said she had food at her house. 2RP 26. Boome

¹ This brief refers to the transcripts as follows: RP refers to one bound volume for March 8, March 9 and March 10, 2010; 2RP refers to a second bound volume for March 11, March 15, March 16 and April 29, 2010.

walked Harvey home, and Harvey reportedly invited him inside. 2RP 26. Boome claimed that Harvey went into her bedroom but came out briefly and posed at the door, wearing only a tank top and underwear. 2RP 27. Boome testified he followed Harvey into the bedroom, and the two engaged in consensual sexual intercourse. 2RP 27-29. Afterward, however, Harvey told Boome he had to leave. 2RP 29. Boome thought Harvey must not have wanted her boyfriend or roommate to find out about their tryst. 2RP 39.

In contrast, Harvey testified she awoke groggily to find an unknown man having intercourse with her. RP 50. She said or thought, "no," but the man allegedly held her down with his forearm. RP 50; RP 76. Afterward, the man went out into the living room. RP 50-51. Sensing he had not left, Harvey went into the living room and pushed the man out the kitchen door using the heavy end of a pool stick. RP 52-53. Before leaving, the man grabbed Harvey's breast and asked when he could see her again. RP 53.

Reportedly groggy and unsure of what had happened, Harvey went back to bed. RP 77. When she awoke the next morning, she felt it was cold in the apartment. RP 58, 77. She went into the bathroom and reportedly saw that the window above

² Although Harvey testified she walked home alone, her roommate Jordan Melin

the bath was open and there was dirt in the bathtub. She testified she saw a shoe print in the bathtub.³ RP 59.

There was no footprint in the tub, however, when police returned with Harvey to investigate, after she had gone to the hospital. CP 111; see infra. Nor did police see any indication anyone had entered through the window or that the apartment had been broken into. CP 84.

As indicated, Harvey went to the hospital later that day and reported she had been raped. Swabs were taken and ultimately sent off for DNA testing. CP 86; RP 57, 105, 177-78, 181; 2RP 10, 13-14. A male profile was generated and when run through Washington's DNA database came back as matching Boome's profile. RP 109, 111-115.

Boome testified he was not aware of the rape allegation until September 2009, when he was in custody in Snohomish County on an unrelated matter. His Snohomish public defender came and told him about the charges. 2RP 31. Defense counsel on the current

claimed he walked her home. RP 139.

³ Melin also testified it was cold in the apartment that morning. RP 142. Reportedly, he also saw dirt in the bathtub when he went in to take a shower. RP 142. Melin claimed that when he went outside to go to class, he noticed a wooden shelving unit underneath the bathroom window. He thought Harvey's friend, who had stayed the night on their couch, must have lost his key and come

charges asked whether Boome “expect[ed] to be charged with, for what occurred that morning?” 2RP 31. Boome responded, “No, I did not. I was surprised.” 2RP 31.

On cross-examination, the prosecutor inquired about Boome’s surprise and the following exchange occurred:

Q. You indicated that you were surprised that you were arrested for this situation with Emily, that’s what you have told us?

A. Yes, I was.

Q. Mr. Boome, you knew that the police were looking for you, didn’t you?

A. No, I did not.

Q. It was on television, isn’t that right?

A. I did not know.

Q. Now, you were then arrested and it was September 3, 2009, right?

A. Yes.

Q. When you were arrested police came to the house you were staying in, didn’t they?

A. I wasn’t staying there.

Q. Weren’t you staying there, weren’t you there when they came?

in through the window. RP 136, 143. Accordingly, Melin just moved the shelving unit out of the way and thought nothing more about it. RP 143.

A. Yes. I was there but I was not staying there.

Q. Weren't you hiding under a bed at that house?

A. Yeah.

MR. HENDRIX [defense counsel]: Objection. Relevancy.

Q. (BY MR. McEACHRAN [prosecutor]): Are you telling us –

THE COURT: Do you wish to respond to the objection?

MR. McEACHRAN: Your Honor, it's relevant. The testimony elicited by counsel, defense counsel, is that he was surprised the police came and looked at him and arrested him.

THE WITNESS: I was arrested on different charges not these ones.

MR. HENDRIX: Continuing objection, Your Honor. There has been no foundation, no relevance for where he was when he was arrested. He testified that he was sitting in the Snohomish County jail when he learned of this. So where he was arrested a week or two prior to that is irrelevant to these charges or the issue that the State is supposedly asking about here.

2RP 46-48.

The prosecutor asserted that evidence of Boome's arrest was relevant because he testified he was surprised by the rape and burglary charges, and because "this is something that was on

television,” and because “he was hiding and I think that goes exactly contrary and impeaches what he had to say.” 2RP 48.

Defense counsel reiterated there was no foundation for the prosecutor’s questions, that he was essentially testifying “as to what was going on at the time that Mr. Boome was arrested” and that the whole line of inquiry was irrelevant. 2RP 48-49. The court disagreed the prosecutor was testifying, as Boome had acknowledged he was under the bed at the time of arrest. 2RP 49. The court also disagreed the evidence was irrelevant and allowed the prosecutor to continue. 2RP 49.

The prosecutor accordingly continued, asking whether Boome was hiding under a bed when he was arrested, whether he was hiding from the police, whether he had no shoes at the time, whether he had seen anything on television about the charges, and whether the police were talking to his friends and family about his whereabouts. 2RP 50-51.

Boome admitted he was hiding under a bed when he was arrested, but explained he was arrested on unrelated charges out of Snohomish County. 2RP 50. He had not watched television or seen his family, as he was homeless. 2RP 51-52.

The state called Detective Michael Moselewski in rebuttal. 2RP 53. He confirmed: "Detective Huchins had contacted Washington's Most Wanted and requested that they run Mr. Boome as a person of interest or a person with a warrant." 2RP 59.

2. Sentencing

The court imposed the maximum term possible, 216 months to life. CP 17-30. As part of community custody, the court also imposed the following conditions:

(1) Avoid all contact with minors, to include his own children, . . . (2) Avoid all places where minors reside or congregate, including schools, playgrounds, child-care centers, church youth programs, services used by minors, and locations frequented by minors, unless otherwise approved by the Department of Corrections with a sponsor approved by the Department of Corrections.

Other conditions may be imposed by the court or Department during community custody, or are set forth here: (2) Obtain a psychiatric evaluation and comply with any recommended treatment or medication regimes; . . . (5) Do not date people or form relationships with people who are less than 20 percent of your age. . . . (6) You shall not stay overnight in a residence where there are minor children without the express, prior approval of your therapist and Community Corrections Officer; (7) Do not seek employment or volunteer positions that would place you in contact with or control over minors;

CP 22-23.

With the exception of the psychiatric evaluation condition, to which counsel did not object, defense counsel objected the conditions were unauthorized, as the current offenses did not involve any minors. 2RP 142-144. Defense counsel also objected to the requirement that Boome obtain a chemical dependency evaluation and comply with any recommended treatment, as there was no allegation of drug use related to the current charges. CP 23.

The court maintained the conditions, except it modified the judgment to allow Boome's children to visit him while he is incarcerated under DOC supervision. CP 23.

C. ARGUMENT

1. THE PROSECUTOR'S CROSS EXAMINATION OF BOOME SUGGESTING THE EXISTENCE OF PREJUDICIAL INFORMATION WITHOUT PROVING SUCH INFORMATION WAS PREJUDICIAL MISCONDUCT DENYING BOOME A FAIR TRIAL.

Washington courts have repeatedly found misconduct where prosecutors attempt to have it both ways, i.e., to suggest prejudicial information exists, yet choose not to attempt to admit it through the proper channels. Here, the state elicited evidence Boome was hiding under a bed at the time of arrest. Boome explained his arrest concerned an unrelated matter out of Snohomish County.

The prosecutor's and defense counsel's statements to the court during the defense motion for a mistrial confirmed Boome's assertion.⁴ 2RP 84-88.

Yet, the prosecutor insinuated – through his cross examination – that in reality, Boome knew he was being sought in connection with the current rape charge, because the allegation had been on television, and because the police had been questioning Boome's family about his whereabouts. The problem with this is that the state offered no evidence Boome had seen the television story or that he knew the police were questioning his family. The state did not even offer evidence the police *had in fact* questioned Boome's family.

In addition, the prosecutor insinuated that Boome was wearing no shoes at the time of arrest. Again, however, the state offered no evidence to support this suggestion.

The end result is that jurors were likely to conclude Boome's act of hiding under the bed showed "consciousness of guilt" for the current charges, as opposed to the unrelated Snohomish County

⁴ In the motion, the defense asserted the prosecutor violated discovery rules by not disclosing the circumstances of Boome's arrest in advance. 2RP 84-88. The prosecutor responded he had no report on the matter, but merely heard about the circumstances through "word of mouth," which the prosecutor argued, only

matter, for which he was arrested. The end result is patently unfair because the inference is based on the prosecutor's improper innuendo rather than evidence.

A prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence. State v. Stover, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992), review denied, 120 Wn.2d 1025 (1993). A prosecutor has no right to call to the attention of the jury matters the jurors have no right to consider. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). A prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact. State v. Miles, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007). It is therefore flagrant misconduct for a prosecutor to ask questions that imply the existence of a prejudicial fact without proving that fact by means of extrinsic evidence. Id. at 888.

became relevant once Boome testified he was surprised by the charges. 2RP 87.

Miles involved a charge of delivery of a controlled substance. Id. at 881. Miles claimed he was incapacitated at the time he was alleged to have delivered the substance. Id. at 882. The prosecutor committed flagrant misconduct by questioning defense witnesses about Miles's participation in specific boxing matches during the time Miles claimed to be incapacitated without producing extrinsic evidence of those fights. Id. at 881, 888.

Miles follows a long line of cases holding it is misconduct for the prosecutor to ask questions implying the existence of a prejudicial fact and then fail to introduce extrinsic evidence of the fact. See, e.g., State v. Babich, 68 Wn. App. 438, 441-42, 842 P.2d 1053 (1993) (prosecutor tried to impeach defense witnesses by questioning them about contents of allegedly recorded conversation; prosecutor did not enter recorded conversation into evidence after witnesses either denied making the statements or stated they could not remember making them); State v. Beard, 74 Wn.2d 335, 338-39, 444 P.2d 651 (1968) (prosecutor questioned defendant about several prior convictions but produced no evidence of those convictions upon defendant's denial of their existence); Yoakum, 37 Wn.2d at 143-44 (prosecutor tried to impeach defendant by questioning him about transcript of taped

interview with police, but did not offer the interview as extrinsic evidence); State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (finding reversible misconduct where prosecutor introduced evidence suggesting Ra was a gang member in an indirect manner without seeking a court ruling to admit such evidence), review denied, 164 Wn.2d 1016 (2008).

Each of these cases directly applies to the prosecutor's questions on cross-examination of Boome. Specifically, the prosecutor asked Boome about seeing or hearing of the rape allegations on television, about hearing of the investigation through his family members, and about not wearing any shoes at the time of the arrest. Yet, the state offered no evidence Boome actually viewed the story on television, spoke to his family about the investigation or was taken into custody without shoes. The state's innuendo – in the absence of proof – constituted flagrant prosecutorial misconduct.

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). There is a substantial likelihood here. A defendant's attempt to flee or hide from police is considered circumstantial evidence of guilt.

See e.g. State v. Thompson, 69 Wn.App. 436, 444, 848 P.2d 1317 (1993). Because Boome was arrested on an unrelated matter out of Snohomish County, it is likely jurors would not have viewed Boome's act of hiding under the bed as consciousness of guilt for the current charges. As a result of the prosecutor's questions regarding the television program and investigation of Boome's family, however, jurors were more likely to conclude Boome's act of hiding under the bed showed consciousness of guilt for the current charges instead. The prosecutor's unsupported innuendo was especially prejudicial, as it undercut Boome's consent defense.

The innuendo about Boome's lack of shoes was likewise prejudicial in that the state presented footprint evidence in the current case, although it was not tied specifically to Boome. See e.g. RP 196-97 (footwear impression visible on shelving unit); 2RP 54-55 (similar shoe print discovered several weeks later on top of upside down bucket outside Harvey's window).

Although Boome asserts the prosecutor's cross examination constituted flagrant misconduct for which no curative instruction could have been given, he nevertheless preserved his objection to the state's questions when defense counsel objected to the lack of foundation for such questions and asserted the prosecutor was

essentially testifying. The court erred in overruling defense counsel's objections and allowing the prosecutor to continue with the improper line of questioning.

To preserve a claim of prosecutorial misconduct for appeal, the defense must either object to the conduct at the time or move for a mistrial. Both afford the trial judge an opportunity to cure error, provided it is not so flagrant and prejudicial that no curative instruction would have remedied it. State v. Stamm, 16 Wn. App. 603, 614, 559 P.2d 1 (1976). In contrast, the defense cannot remain silent, gamble on a favorable verdict, and then assert error for the first time on appeal. Stamm, 16 Wn. App. at 614.

Boome did not gamble on a favorable verdict. Not only did he object to the prosecutor's cross examination, but he moved for a mistrial, albeit it on different grounds. Accordingly, whichever standard is applied, this Court should reverse Boome's convictions.

2. THE COURT ACTED WITHOUT AUTHORITY IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY THAT WERE NOT CRIME-RELATED.

The trial court erred in restricting Boome's contact with minors, in requiring him to obtain a chemical dependency evaluation and to comply with any recommended treatment, and in requiring him to obtain a psychiatric evaluation and to comply with

any recommended treatment or medication regimen. None of these conditions was statutorily specified or permitted as a crime-related prohibition.

Boome was sentenced as a non-persistent offender under RCW 9.94A.712. Unless a condition is waived by the court, the conditions of community custody must include:

those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the 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, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

RCW 9.94A.712(6)(a)(i) (emphasis added).

The following conditions are provided for in RCW 9.94A.700(4):

- (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- (d) The offender shall pay supervision fees as determined by the department; and

e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

The following conditions are provided for in RCW

9.94A.700(5):

(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;

(e) The offender shall comply with any crime-related prohibitions.

Emphasis added.

Accordingly, any conditions not specified by statute must be crime-related. A crime-related prohibition is an order that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(13).

There is no connection between the crime of conviction here and the restrictions regarding Boome's contact with minors, including his own children. The burglary and rape allegations for which Boome was sentenced did not concern minors. Nor was there any allegation or testimony that Boome was under the influence of alcohol or controlled substances at the time of the

alleged offenses. Accordingly, these community custody conditions were not crime-related and therefore unauthorized. See, e.g., State v. Jones, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003) (because alcohol did not contribute to Jones' offense, the requirement of alcohol treatment was neither crime-related nor reasonably related to Jones' offense and therefore not authorized by statute).

Similarly, the court did not have authority to require Boome to undergo a psychiatric evaluation and follow treatment recommendations, including medication regimens. Under RCW 9.94A.505(9), the trial court may not order an offender "to participate in mental health treatment or counseling" as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P. 3d 258 (2003).

RCW 9.94A.505(9) provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that

reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

Significantly, in reaching its decision in the Jones case, the appellate court recognized the apparent tension between RCW 9.94A.505(9) and other provisions authorizing the court to impose "affirmative conduct reasonably related to . . . the offender's risk of reoffending, or the safety of the community."

Once again, we do not overlook the 1999 amendment that we utilized in section I. Currently codified as RCW 9.94A.715(2)(b), it provides that when sentencing for certain crimes committed on or after July 1, 2000, including first degree burglary, a trial court may order the 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." If reasonably possible, it must be harmonized with RCW 9.94A.700(5)(c) and RCW 9.94A.505(9), so that no part of any statute is rendered superfluous. If we were to characterize mental health treatment and counseling as "affirmative conduct reasonably related to . . . the offender's risk of reoffending, or the safety of the community," with or without evidence that the offender suffered from a mental illness that had influenced his crimes, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that

such counseling be "crime-related," and also RCW 9.94A.505(9)'s requirement the trial court find, based on a presentence report and any applicable mental status evaluation, that the offender is a mentally ill person whose condition influenced the offense.

Jones, 118 Wn. App. at 210; see, e.g., RCW 9.94A.712(6)(a)(i) (authorizing court to impose on non persistent offenders "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense") and former RCW 9.94A.715(2)(a) (authorizing court to impose same conditions for certain offenders).

The court resolved the seeming tension as follows:

Accordingly, we hold that mental health treatment and counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the court obtains a presentence report or mental status evaluation and finds that the offender was a mentally ill person whose condition influenced the offense.

Jones, 118 Wn. App. at 210 (footnotes omitted, emphasis added).

The court, in sentencing Boome, did not make the statutorily mandated finding that Boome was a "mentally ill person" as defined by RCW 71.24.025, or that a mental illness influenced the crimes for which he was convicted. The court thus erred when, without following statutory prerequisites, it ordered Boome to submit to a

psychiatric evaluation and treatment. See also State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007).

Sentencing errors derived from the court's failure to follow statutorily mandated procedures can be raised for the first time on appeal. Jones, 118 Wn. App. at 204. On remand, this Court should order the trial court to strike the conditions pertaining to minors, controlled substances treatment and psychiatric evaluations.

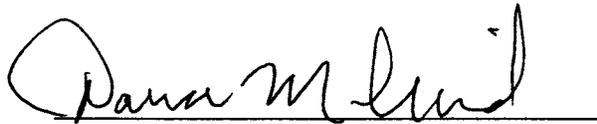
D. CONCLUSION

Because the prosecutor's cross-examination of Boome amounted to trial by innuendo and undercut his consent defense, this Court should reverse his convictions. Alternatively, this court should remand to the sentencing court to strike the community custody conditions challenged herein.

Dated this 30th day of September, 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. 65431-4-I
)	
CHARLES BOOME,)	
)	
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 30TH DAY OF SEPTEMBER, 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.

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DIVISION ONE
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*