

COA NO. 66150-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES DENSMORE,

Appellant.

2011 FEB 28 PM 4:33
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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

The Honorable Kenneth L. Cowsert, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| Issues Pertaining to Assignments of Error..... | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 2 |
| 1. Procedural Facts..... | 2 |
| 2. Trial..... | 3 |
| C. <u>ARGUMENT</u> | 5 |
| 1. THE PROSECUTOR COMMITTED MISCONDUCT IN ARGUING DENSMORE BELONGED TO A CRIMINAL CULTURE..... | 5 |
| a. <u>The Prosecutor's Rebuttal Argument And Preceding Context</u> | 5 |
| b. <u>By Characterizing Densmore As Part Of A Criminal Culture, The Prosecutor Invited A Verdict Based On Emotion, Prejudice And Densmore's Propensity To Commit Crime</u> | 8 |
| c. <u>The Prosecutor's Misconduct Requires Reversal</u> ... | 12 |
| d. <u>Counsel Was Ineffective In Failing To Object To The Misconduct</u> | 16 |
| 2. THE COURT WRONGLY IMPOSED AN EXCEPTIONAL SENTENCE BASED ON THE CLEARLY TOO LENIENT AGGRAVATOR FACTOR..... | 20 |
| D. <u>CONCLUSION</u> | 25 |

TABLE OF AUTHORITIES

| | Page |
|---|--------|
| <u>WASHINGTON CASES</u> | |
| <u>In re Detention of Gaff</u> , 90 Wn. App. 834, 954 P.2d 943 (1998)..... | 10 |
| <u>In re Marriage of Littlefield</u> , 133 Wn.2d 39, 940 P. 2d 1362 (1997)..... | 16 |
| <u>In re Pers. Restraint of Fleming</u> , 142 Wn.2d 853, 16 P.3d 610 (2001)..... | 20 |
| <u>State v. Alexis</u> , 95 Wn.2d 15, 621 P.2d 1269 (1980) | 15 |
| <u>State v. Alvarado</u> , 164 Wn.2d 556, 192 P.3d 345 (2008)..... | 23 |
| <u>State v. Bacotgarcia</u> , 59 Wn. App. 815, 801 P.2d 993 (1990)..... | 11 |
| <u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988) | 10, 11 |
| <u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007)..... | 12 |
| <u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987)..... | 11, 12 |
| <u>State v. Buttry</u> , 199 Wn. 228, 90 P.2d 1026 (1939)..... | 14 |
| <u>State v. Cardenas</u> , 129 Wn.2d 1, 914 P.2d 57 (1996)..... | 25 |
| <u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956)..... | 8, 14 |

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

| | |
|--|-----------|
| <u>State v. Charlton,</u> 90 Wn.2d 657, 585 P.2d 142 (1978)..... | 8, 14, 20 |
| <u>State v. Davenport,</u> 100 Wn.2d 757, 675 P.2d 1213 (1984)..... | 8, 13 |
| <u>State v. Echevarria,</u> 71 Wn. App. 595, 860 P.2d 420 (1993)..... | 10 |
| <u>State v. Edvalds,</u> 157 Wn. App. 517, 237 P.3d 368 (2010)..... | 22 |
| <u>State v. Elledge,</u> 144 Wn.2d 62, 26 P.3d 271 (2001)..... | 10 |
| <u>State v. Fisher,</u> 165 Wn.2d 727, 202 P.3d 937 (2009)..... | 11, 13 |
| <u>State v. Foxhoven,</u> 161 Wn.2d 168, 163 P.3d 786 (2007)..... | 12 |
| <u>State v. Frazier,</u> 81 Wn.2d 628, 503 P.2d 1073 (1972)..... | 23 |
| <u>State v. Horton,</u> 116 Wn. App. 909, 68 P.3d 1145 (2003)..... | 19 |
| <u>State v. Ish,</u> 170 Wn.2d 189, 241 P.3d 389 (2010)..... | 16 |
| <u>State v. K.E.,</u> 97 Wn. App. 273, 982 P.2d 1212 (1999)..... | 24, 25 |
| <u>State v. Kylo,</u> 166 Wn.2d 856, 215 P.3d 177 (2009)..... | 17, 18 |

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

| | |
|---|------------|
| <u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001)..... | 16 |
| <u>State v. Neidigh</u> , 78 Wn. App. 71, 95 P.2d 423 (1995)..... | 13, 16, 18 |
| <u>State v. Powell</u> , 167 Wn.2d 672, 223 P.3d 493 (2009)..... | 22 |
| <u>State v. Powell</u> , 62 Wn. App. 914, 816 P.2d 86 (1991)..... | 14 |
| <u>State v. Ra</u> , 144 Wn. App. 688, 175 P.3d 609 (2008)..... | 11, 12 |
| <u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984)..... | 8, 14 |
| <u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004)..... | 17 |
| <u>State v. Rose</u> , 62 Wn.2d 309, 382 P.2d 513 (1963)..... | 14 |
| <u>State v. Saltz</u> , 137 Wn. App. 576, 154 P.3d 282 (2007)..... | 21-23 |
| <u>State v. Siers</u> , __ Wn. App. __, 244 P.3d 15 (2010)..... | 22 |
| <u>State v. Smith</u> , 123 Wn.2d 51, 864 P.2d 1371 (1993)..... | 24 |
| <u>State v. Smith</u> , 67 Wn. App. 81, 834 P.2d 26 (1992)..... | 24 |

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987)..... 17, 19

State v. Wade,
98 Wn. App. 328, 989 P.2d 576 (1999)..... 11, 12

State v. Warren,
165 Wn.2d 17, 195 P.3d 940 (2008)..... 12

State v. Weber,
99 Wn.2d 158, 659 P.2d 1102 (1983)..... 13

State v. Woods,
138 Wn. App. 191, 156 P.3d 309 (2007)..... 18, 19

FEDERAL CASES

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 21, 22

Smith v. Phillips,
455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) 13

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 17, 19, 20

OTHER STATE CASES

Perez v. State,
689 So.2d 306 (Fla. Ct. App. 1997)..... 9

RULES, STATUTES AND OTHERS

ER 404(b).....12

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

ER 60915

RCW 9.94A.535(2).....21

RCW 9.94A.535(2)(b) 20-23

RCW 9.94A.535(2)(c)23

U.S. Const. amend. V8

U.S. Const. amend. VI1, 8, 17, 21

U.S. Const. amend. XIV8

Wash. Const. art. I, § 38

Wash. Const. art. I, § 228, 17

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of his constitutional rights to a fair and impartial jury trial.

2. Appellant received ineffective assistance of counsel.

3. The trial court erred in ruling appellant received effective assistance of counsel.

4. The court erroneously imposed an exceptional sentence by relying on an invalid aggravating factor.

5. The court erred in finding "The defendant's prior unscored misdemeanor [sic] results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." CP 11-12 (FF 7, CL 7).

Issues Pertaining To Assignments Of Error

1. In arguing appellant was part of a criminal culture, the prosecutor appealed to the prejudices of the jury and appellant's propensity to commit crime in urging conviction. Is a new trial required because there is a substantial likelihood the prosecutor's misconduct prejudiced the outcome? In the alternative, was defense counsel ineffective in failing to object or request a curative instruction?

2. Under the Sixth Amendment, applicability of the "clearly too lenient" aggravating factor requires a factual determination that must be

made by a jury rather than a judge. In addition, the State must allege this factor in the charging document. In this case, the judge rather than the jury found the presumptive sentence was "clearly too lenient" and the State did not provide notice of this factor in the charging document. Must the exceptional sentence on both counts be vacated and the case remanded for resentencing because the court improperly found and relied on the "clearly too lenient" aggravating factor?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged James Densmore with second degree burglary and first degree theft. CP 145-46. A jury returned guilty verdicts. CP 52-53. Densmore had an offender score of "18" for the burglary and "10" for the theft. CP 3. The court also found Densmore had 18 prior unscored misdemeanor convictions. CP 11. The court imposed an exceptional sentence of 120 months on both counts after finding two aggravating circumstances: (1) the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished; and (2) the defendant's prior unscored misdemeanor convictions result in a presumptive sentence that is clearly too lenient. CP 3-4, 11-12. This appeal follows. CP 24-25.

2. Trial

In the early morning hours of February 17, 2009, a commercial establishment called Jay's Market was burglarized. 1RP¹ 25-26, 32-34, 60. A surveillance video showed three individuals wearing masks inside the establishment. 1RP 39-40, 48-49, 105-06. The safe was cut open. 1RP 30. Over \$4000 was removed. 1RP 35. A camera was taken. 1RP 114.

Andrea Huntley knew Densmore as an acquaintance — he lived with her best friend and his dad. 1RP 78-79. Densmore knew Huntley had a drug problem and that she stole things to support her drug use. 1RP 79.

On March 26, police detained Huntley after she was caught car prowling. 1RP 55, 79. In an effort to avoid going to jail,² Huntley provided information about the Jay's Market burglary. 1RP 65, 79-80, 85-86, 97, 101.

Huntley maintained Densmore and Byron Bowman called her at around 5 a.m. on February 17, requesting that she come and pick them up. 1RP 81, 99. Phone records showed a phone call from a number associated

¹ The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of May 17-19, 2010, June 30, 2010, Oct. 20, 2010; 2RP - May 6, 2010; 3RP - July 12, 2010; 4RP - Sept. 24, 2010.

² Huntley needed to take a urinalysis test that day related to Child Protective Services. 1RP 79, 86-87. She was also concerned about how her children would be provided for in the event of her arrest. 1RP 101-02. In return for offering information, Huntley did not go to jail the night she was caught car prowling. 1RP 86. At first, she was told a car prowl charge would not be filed. 1RP 86. The charge was later filed and Huntley was convicted and sentenced to work release. 1RP 86.

with Densmore to Huntley's phone at about 6 a.m. 1RP 91-93, 119, 123-24, 127-28, 131.

Huntley lived near Jay's Market. 1RP 67. She arrived and saw Densmore and Bowman hiding in some bushes in front of an apartment complex that was between her house and Jay's Market. 2RP 83. Densmore wore a light colored sweatshirt and Bowman wore a black hooded sweatshirt. 1RP 84. According to Huntley, this clothing was consistent with what those in the surveillance video wore. 1RP 104, 105-06, 132-33.

Huntley drove them back to her house. 1RP 84. Inside, the two men dumped out money from a duffel bag and split it between them. 1RP 84. Bowman gave Huntley \$150. 1RP 85. They said they wanted to hurry and get back to Bowman's car. 1RP 85. They left behind a video camera taken from Jay's Market, which Huntley gave to police. 1RP 57, 65, 85, 89, 114-16. Huntley drove them to the car and the two men drove away. 1RP 85.

Huntley denied having anything to do with the burglary. 1RP 89, 94. She kept the money they gave her and the camera part. 1RP 101. It was not until she was arrested for car prowling that she offered to tell police about the Jay's Market burglary. 1RP 101.

Kale Cooper, Huntley's live-in boyfriend and father of her children, testified that he saw Densmore and Bowman in the house talking to Huntley in the early morning of February 17. 1RP 108, 111, 113. Cooper was a long

time drug user and was using at the time. 1RP 108-10. He said he saw a pile of money. 1RP 112. Cooper went back upstairs to go to sleep because it was "nothing new to me. I mean, I've seen Byron with money a few times[.]" 1RP 112. What he saw was "[n]othing out of the norm." 1RP 113.

On direct examination, the prosecutor elicited Huntley's testimony that she was a long time drug user who committed crimes when she was using drugs. 1RP 77-78. When the prosecutor asked about her criminal history, Huntley acknowledged possession stolen property and drug paraphernalia charges. 1RP 78. On cross examination, Huntley testified she had prior convictions for possession of stolen property (two convictions), second degree theft and forgery. 1RP 95-96.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT IN ARGUING DENSMORE BELONGED TO A CRIMINAL CULTURE.

The prosecutor committed misconduct by appealing to passion, prejudice and criminal propensity in urging jurors to convict Densmore. Reversal of the convictions is required.

a. The Prosecutor's Rebuttal Argument And Preceding Context.

On redirect examination, the prosecutor elicited the following testimony from Huntley:

Q: Do you think that they would have expected you to call the police?

A: No.

Q: Why not?

A: Because it was my best friend's dad and his friend. I'd never, ever done anything like that before.

Q: Would never have called on somebody that you knew like that?

A: (Nodding head.)

Q: And, being blunt, you were part of the criminal element?

A: Yes.

Q: That's kind of the code, so to speak?

A: (Nodding head.)

Q: You're nodding your head. Can you speak out loud for the record.

A: Yes. Sorry.

Q: They called up, they needed a ride, you gave them one?

A: Yes.

1RP 106-07.

In closing argument, the State followed up on this testimony by theorizing why Densmore would call Huntley to pick him up after the burglary:

Hey, I know who lives in the neighborhood; Andrea Huntley lives in the neighborhood. Let's give her a call. So they call her, and she comes and picks them up. And they dump the stuff out, and they're not concerned; she's part of the criminal element. She knows the code. She talked about, you don't rat on your friends, you don't rat on other people, you don't rat on your best friend's dad and his buddy. You saw the emotion that she had over that. I hate to say this, but it was almost more emotion than she had over her children. You don't tell. I think she was very conflicted. I think that the drug culture impacts that.

1RP 156-57.

In rebuttal argument, the prosecutor referenced defense counsel's argument about Huntley's criminal history. 1RP 170. The relevant portion of the prosecutor's argument is as follows:

He made a big deal about her criminal history; that the sole evidence is coming to you from a woman who has a scarlet "A" on her forehead -- oh, wait not that. She had crimes of dishonesty. She breaks into cars. She takes things. All of these things she does when she's on drugs. The thing is, the person who told you all of that was Andrea Huntley. She didn't come in here saying, "I'm pure as the driven snow," that she's Little Miss -- you know -- Girl Scout. I don't know what the equivalent in Girl Scouts is to an Eagle Scout.

She doesn't say that. She says her life has been messed up since she was 14.

I don't know about you guys, but I don't expect that I would get a call at 6:00 in the morning from James Densmore when he has just committed a burglary. I don't think I'm the person that he thinks, Hey, who can I call to get me out of a jam that won't call the police. I doubt that.

I think that he goes, Who do I know who is a criminal like myself, who won't rat on me when I call them and say, Come pick me up, or who will just come and pick me up.

It's a culture. They have a code. He is her best friend's dad's friend. He and her best friend's dad, Byron Bowman, need her to come pick them up. They're a block away.

1RP 170-71.

Densmore's trial counsel did not object. Substitute counsel filed a post-verdict motion for new trial, contending among other things that the prosecutor committed misconduct in rebuttal argument and trial counsel

was ineffective in failing to object. CP 36-40, 43-44, 48. The trial court denied the motion for new trial. 4RP 3-5, 12.

b. By Characterizing Densmore As Part Of A Criminal Culture, The Prosecutor Invited A Verdict Based On Emotion, Prejudice And Densmore's Propensity To Commit Crime.

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A defendant's due process right to a fair trial and the right to be tried 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. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, §§ 3, 22.

Every prosecutor has the duty to ensure that a defendant receives a fair and impartial trial, which means a verdict free from prejudice and based on reason. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Because our justice system treats each defendant on his or her own individual merits, it is always wrong to describe a defendant as a "criminal type." Perez v. State, 689 So.2d 306, 307 (Fla. Ct. App. 1997).

But that is what happened here. The prosecutor did not merely call Densmore a "criminal." Considered in isolation, such a description is a reasonable inference from the evidence that Densmore committed the charged crimes. The problem is that the prosecutor went further and invited the jury to view Densmore as part of the criminal element to which Huntley indisputably belonged. The prosecutor's reference to Huntley being a criminal "like" Densmore, in combination with the argument that Densmore acted the way he did because there is a "culture" and a "code," leads to the unmistakable conclusion that the prosecutor viewed Densmore as a criminal type person who was part of a criminal culture. The prosecutor invited the jury to share this view.

The trial court did not think any misconduct took place here, justifying the comments as no more than an argument that Densmore was a criminal who had a similarity to Huntley in that both were burglars. 4RP 3-5. The court failed to grasp the nature of the problem. It looked at the challenged comments in isolation and took them out of context. In context, the prosecutor's message was quite clear. This was no mistake. The prosecutor deliberately set up this argument in the manner as part of the State's case in chief. The prosecutor elicited Huntley's testimony that she was part of a "criminal culture" and that there was a "code" of not squealing on those who committed crimes. 1RP 107. In closing argument,

the prosecutor drove home the point: "she's part of the criminal element. She knows the code." 1RP 157.

In rebuttal, the prosecutor shifted her focus to include Densmore as part of this criminal element: "It's a culture. *They* have a code." 1RP 171 (emphasis added). The jury heard evidence that Huntley had committed multiple prior crimes and was a long time drug user. 1RP 77-78, 95-96. The prosecutor invited the jury to directly compare Huntley with Densmore: "Who do I know who is a criminal like myself[?]" 1RP 171. The context of the prosecutor's argument makes clear that the jury was expected to infer Densmore had a criminal past as extensive as Huntley's criminal past.

A prosecutor commits misconduct if his or her argument appeals to the jurors' passion and prejudice and invites them to decide the case on a basis other than the evidence. State v. Echevarria, 71 Wn. App. 595, 598-99, 860 P.2d 420 (1993); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Improper appeals to passion or prejudice prevent calm and dispassionate appraisal of the evidence. State v. Elledge, 144 Wn.2d 62, 85, 26 P.3d 271 (2001). Such arguments inspire verdicts based on emotion rather than evidence. Belgarde, 110 Wn.2d at 507-08.

Prosecutors are further prohibited from presenting propensity arguments to the jury. State v. Fisher, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009). The prosecutor, by identifying Densmore as part of a criminal culture, invited jurors to infer Densmore had a propensity to commit crime.

A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). Simple association with criminal elements is enough to trigger propensity concerns. See State v. Ra, 144 Wn. App. 688, 701-02, 175 P.3d 609 (2008) (prosecutor committed reversible error in eliciting gang association evidence, which portrayed Ra and his companions as inherently "bad guys" and fed prosecutor's theme in closing argument that defendant was part of a criminal culture).

Allowing the jury to infer the defendant is a criminal-type with a propensity to commit crime is forbidden. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999); State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336. Evidence of other misconduct and criminality strips away the normal presumption of

innocence. Bowen, 48 Wn. App. at 195. "The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (quoting State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)).

Indeed, ER 404(b) is designed "to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." Ra, 144 Wn. App. at 701-02, 175 P.3d 609 (2008) (quoting State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)). The jury here heard no ER 404(b) evidence related to Densmore. That is what makes the prosecutor's argument so nefarious. The jury heard evidence that Densmore was involved in an isolated criminal event. The jury did not hear evidence that Densmore was a criminal type who was part of the criminal culture. The prosecutor nevertheless branded him as such. The prosecutor's characterization of Densmore as part of the criminal culture was not based on the testimony of any witness but rather was the prosecutor's own prejudicial characterization. It allowed the jury to infer the prosecutor had special knowledge about Densmore that the jury had not heard.

c. The Prosecutor's Misconduct Requires Reversal.

In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill intentioned that no curative instruction

could have erased the prejudice. Fisher, 165 Wn.2d at 747. At the same time, if prosecutorial "mistakes" deny a defendant fair trial, then the defendant should get a new one. Id. at 740 n.1. The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Id. at 747.

In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? Davenport, 100 Wn.2d at 762 (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)); accord State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the defendant's due process rights to a fair trial. Davenport, 100 Wn.2d at 762.

Courts are not required to "wink" at prosecutorial misconduct under the guise of harmless error analysis. State v. Neidigh, 78 Wn. App. 71, 79-80, 95 P.2d 423 (1995) (when asked at oral argument why prosecutors continue to engage in clear misconduct, the prosecutor responded, "it's always been found to be harmless error" when no objection is raised). "The best rule for determining whether remarks made

by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks." State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)). If this Court is unable to conclude from the record whether Densmore would or would not have been convicted but for the improper comments, then it may not deem them harmless. Charlton, 90 Wn.2d at 664.

Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. Case, 49 Wn.2d at 70-71. Statements made during closing argument are presumably intended to influence the jury. Reed, 102 Wn.2d at 146. Otherwise, there would be no point in making them. Misconduct is particularly damaging when the jury hears it immediately prior to beginning its deliberations. State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991).

The State's case against Densmore was not overwhelming. It chiefly rested on the credibility of a witness whose believability was severely compromised. Huntley had been convicted of multiple crimes of dishonesty. 1RP 94-95. Evidence of prior convictions under ER 609

enlightens the jury with respect to a witness's credibility. State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). Moreover, Huntley accused Densmore of committing the burglary and theft in an attempt to cut a deal and avoid jail time herself after being caught vehicle prowling. 1RP 65, 79-80, 85-86, 97, 101. She had motive to lie at the time of the accusation.

Moreover, she stole things to support her drug habit, which calls into question whether she was responsible for the pile of money Huntley's boyfriend saw in the house that morning. 1RP 79, 96. Huntley's boyfriend placed Densmore in Huntley's house on February 17, but had no knowledge of the circumstances under which Densmore arrived and what he had with him when he arrived. 1RP 108-13. That crucial information came from Huntley.

In light of Huntley's credibility problems, any rational juror had a basis to discount her story and find the State had failed to prove its case beyond a reasonable doubt. The prosecutor's improper argument likely tipped the scales in favor of conviction in a shaky case.

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. State v. Ish, 170 Wn.2d 189, 241 P.3d 389, 392 (2010). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362

(1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). For the reasons set forth above, the trial court's ruling that no prejudicial misconduct occurred is unreasonable and contrary to law. 4RP 3-5, 12.

d. Counsel Was Ineffective In Failing To Object To The Misconduct.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). There was no legitimate reason supporting the failure to object given the prejudicial nature of the prosecutor's improper argument.

Reasonable attorney conduct includes a duty to investigate and research the relevant law. Kylo, 166 Wn.2d at 862; State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). As this Court recognized in Neidigh, "defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. The prosecutor's comments were improper. Defense counsel objected to a different portion of the prosecutor's rebuttal argument. 1RP 173. Yet the really objectionable comment went unchallenged, implying to the jury that nothing was wrong with it.

The State will contend the misconduct was not so flagrant and ill intentioned that objection and instruction could not have cured the prejudice. If the State is right, then there is no sound reason why counsel should not have objected and requested curative instruction to ensure his client's right to a fair trial. An objection and instruction could have redirected the jury to the proper considerations and perhaps cured the prejudice resulting from the improper comments. Counsel had no legitimate tactical reason for not objecting.

Defense attorneys must vigilantly defend their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. Neidigh, 78 Wn. App. at 79 ("defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line."); Woods, 138 Wn. App. at 197 (reasonable attorney conduct includes a duty to know the relevant law). The objection invited by the prosecutor's misconduct, but not made, would have highlighted the prosecutor's desperation in trying to secure convictions based on improper argument. No legitimate strategy justified allowing the prosecutor's prejudicial comment to fester in the juror's minds without instruction from the court that its improper argument should be disregarded and play no role in deliberations.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Densmore "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). This makes sense because the purpose behind both the prohibition against prosecutorial misconduct and the right to effective assistance is to protect the defendant's right to a fair and impartial trial. Strickland, 466 U.S. at 684; Charlton, 90 Wn.2d at 664-65. For the reasons set forth above and in section C. 1. c., supra, the prosecutor's improper argument and lack of defense objection prejudiced the outcome.

Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). The trial court's ruling

on the ineffective assistance issue is entitled to no deference. For the reasons set forth above, the trial court erred in ruling defense counsel was not ineffective. 4RP 2-5, 12.

2. THE COURT WRONGLY IMPOSED AN EXCEPTIONAL SENTENCE BASED ON THE CLEARLY TOO LENIENT AGGRAVATOR FACTOR.

The exceptional sentence must be vacated because the trial court relied on an invalid aggravating factor.

The trial court here imposed an exceptional sentence for both counts under RCW 9.94A.535(2)(b), which provides "The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." CP 11-12.

RCW 9.94A.535(2) allows the trial court to impose this aggravated exceptional sentence without a finding of fact by a jury. RCW 9.94A.535(2)(b) violates the Sixth Amendment because it allows a judge rather than a jury to find whether a sentence would be "clearly too lenient." State v. Saltz, 137 Wn. App. 576, 583-84, 154 P.3d 282 (2007).

Under the Sixth Amendment, any fact that increases the penalty for a crime beyond the prescribed statutory maximum other than the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct.

2531, 159 L. Ed. 2d 403 (2004). The statutory maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303.

While the fact of a misdemeanor history is an objective determination, the "clearly too lenient" language calls for a subjective determination because of the serious harm or culpability given the number or nature of unscored misdemeanors, which would not be accounted for in calculating the sentencing range. Saltz, 137 Wn. App. at 582. That factual determination must be made a jury rather than a judge. Id. at 583-84.

"Unless a defendant consents to judicial fact-finding, a sentencing court's finding that a presumptive sentence is 'too lenient' taints an exceptional sentence based on this factor." Id. at 583. Densmore acknowledged the facts of his misdemeanor criminal history. CP 27. But he did not stipulate to the fact that the presumptive sentence was too lenient. Saltz, 137 Wn. App. at 583. "The trial court then had to make additional factual findings above and beyond the admitted facts to support the exceptional sentence." Id. at 583-84. RCW 9.94A.535(2)(b) is unconstitutional as applied to Densmore under Blakely. Id. at 584.

The court erred in imposing an exceptional sentence based on the "clearly too lenient" aggravating factor for another reason. The State failed to provide notice in the charging document that it was seeking an exceptional sentence based on this factor. CP 145-46. For post-Blakely cases, the State must include in the information any aggravating factor it intends to prove for purposes of seeking an exceptional sentence above the standard range. State v. Powell, 167 Wn.2d 672, 690, 691, 223 P.3d 493 (2009) (Stephens, J., concurring); (Owens, J., dissenting) (five justices agreed aggravating factors that require proof of additional facts to be found by a jury must be charged in the information); State v. Edvalds, 157 Wn. App. 517, 533, 237 P.3d 368 (2010); State v. Siers, ___ Wn. App. ___, 244 P.3d 15, 16 (2010).

For both these reasons, the court erred in finding the defendant's prior unscored misdemeanor convictions resulted in a presumptive sentence that was clearly too lenient. CP 11-12 (FF 7, CL 7). When a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, constitutional due process requires the issue of whether that factor is present to be decided by the jury upon proper allegations. State v. Frazier, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972). The court cannot impose the harsher penalty when those requirements have not been honored. Frazier, 81 Wn.2d at 633.

The remaining issue is remedy. The court imposed an exceptional sentence after finding two aggravating factors — the clearly too lenient factor under RCW 9.94A.535(2)(b) and the unpunished crimes factor under RCW 9.94A.535(2)(c). The unpunished crimes aggravator required no jury finding. State v. Alvarado, 164 Wn.2d 556, 559, 192 P.3d 345 (2008).³

But "remand for resentencing is required where the reviewing court cannot conclude from the record that the trial court would have imposed the same sentence if it had considered only the valid aggravating factors." State v. Smith, 67 Wn. App. 81, 92, 834 P.2d 26 (1992). Remand for resentencing is appropriate when there is a possibility the lower court would grant a different disposition. State v. K.E., 97 Wn. App. 273, 284-85, 982 P.2d 1212 (1999). Such is the case here.

In the written findings, the court found "all the above aggravating circumstances individually and together support the imposition of an exceptional sentence in this case[.]" CP 12. Boilerplate written findings are not dispositive. See State v. Smith, 123 Wn.2d 51, 58 n.8, 864 P.2d

³ Alvarado distinguished Saltz: "We agree that there is a difference between the 'clearly too lenient' language in current RCW 9.94A.535(2)(b) and former 'free crimes' provisions and the mathematical calculation that allows an exceptional sentence under RCW 9.94A.535(2)(c).". Alvarado, 164 Wn.2d at 565-66.

1371 (1993) (remanding for resentencing after two of four aggravators invalidated on appeal even though trial court found "[e]ach of the above findings of fact is a substantial and compelling reason justifying an exceptional sentence of 100 months on each count to run consecutively.").

Reagrdless, whether an individual aggravator supports the exceptional sentence is not the same thing as saying the court would have imposed the same sentence if only one factor were present. The trial court did not find there were substantial and compelling reasons to impose an exceptional sentence based on the free crimes aggravator alone. In its oral opinion, the trial court did not single out the free crimes aggravator for special emphasis. RP 198-200. The court found both aggravators were applicable and referenced Densmore's criminal history, which applies to both factors. RP 200. The court was clearly troubled that a standard range sentence would be too lenient in light of Densmore's unscored misdemeanor history. RP 198-99. Furthermore, the court, in imposing an exceptional sentence on both counts, determined that only one of the counts went unpunished under the free crimes aggravator. CP 11. This shows the court relied on the invalid "clearly too lenient" factor to encompass both counts.

To avoid remand for resentencing, this Court must be able to determine with certainty from the record that the trial court would have

imposed the same sentence in the absence of invalid aggravators. K.E., 97 Wn. App. at 284-85. The record does not show the court would have exercised its discretion in the same manner in the absence of the invalid aggravator upon which it relied. Cf. State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (appellate court satisfied trial court would have imposed same sentence where it stated any of the factors standing alone would be a substantial and compelling factor justifying the exceptional sentence and indicated in its oral opinion that the primary reason for imposing the exceptional sentence was based on the remaining valid aggravator). The exceptional sentence must be vacated and this case remanded to the trial court for resentencing.

D. CONCLUSION

For the reasons stated, this Court should reverse the convictions and remand for a new trial. In the event this Court declines to do so, the exceptional sentences should be reversed.

DATED this 24th day of February, 2011.

Respectfully Submitted,

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

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|---------------------------|---|-------------------|
| STATE OF WASHINGTON/DSHS, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 66150-7-1 |
| |) | |
| JAMES DENSMORE, |) | |
| |) | |
| 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 28TH DAY OF FEBRUARY 2011, 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] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

[X] JAMES DENSMORE
NO. 210038972
KING COUNTY JAIL
500 FIFTH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY 2011.

x *Patrick Mayovsky*