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ARGUMENT

I. THE PROSECUTOR'S MISCONDUCT VIOLATED MR. JACKSON'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

- A. The prosecuting attorney violated Mr. Jackson's right to a fair trial by expressing his personal opinion that state witnesses were credible.

The prosecutor's closing remarks crossed the line from fair argument to personal opinion. Counsel's argument that the officers were trained to observe and report their observations accurately was permissible, but his claim that "[e]very single one of them did so" was not. RP (3/13/08) 40-41. The argument that the officers all gave "the same testimony" was a permissible (if inaccurate) comment on the evidence; however, the argument that the officers were "all very accurate," was not. RP (3/13/08) 48. Finally, the argument that Nelson's "testimony was accurate and true" was not based on the evidence; instead it was a naked assertion of the prosecutor's opinion. RP (3/13/08) 48.

These arguments were not a reasonable response to defense counsel's proper attacks on the officers' credibility; an accused person may mount a suitable defense, including evidence-based attacks on credibility, without inviting the prosecutor to state a personal opinion.

See, e.g., State v. Jones, 144 Wn. App. 284, 300, 183 P.3d 307 (2008) (prosecutor’s misconduct not invited by defendant’s testimony); *State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (prosecutor’s improper reliance on accomplice theory not invited by defendant’s argument).

This misconduct prejudiced Mr. Jackson, and was so flagrant and ill-intentioned that no curative instruction would have eliminated its effect. The primary issue at trial—the identity of the driver—boiled down to a credibility contest between Nelson and Rose Greene. By putting his thumb on the scale, the prosecutor improperly influenced the jury to decide this critical issue based on improper considerations. Accordingly, the convictions must be reversed and the case remanded for a new trial.¹ *State v. Henderson*, 100 Wn.App. 794, 804-805, 998 P.2d 907 (2000).

B. The prosecutor’s remarks violated Mr. Jackson’s right to a fair trial by shifting the burden of proof.

The American criminal justice system “rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy.” *Weiler v. United States*, 323

¹ Respondent’s lengthy defense of the phrase “I think” is irrelevant, because Mr. Jackson did not argue about the prosecutor’s use of the phrase in closing. Brief of Respondent, p. 4-5; *See* Appellant’s Opening Brief, pp. 10-16.

U.S. 606, 608, 65 S. Ct. 548, 89 L. Ed. 495 (1945). The prosecuting attorney's argument suggesting that the jury could convict based on the quantity of the state's evidence—four state witnesses vs. one defense witness—was an invitation to apply a preponderance standard and ignore the state's burden to prove its case beyond a reasonable doubt. *See* RP (3/13/08) 40-41, 49. *See State v. Miles*, 139 Wn. App. 879, 889-890, 162 P.3d 1169 (2007).

However, even if the “quantity” argument is not misconduct, the prosecutor also argued that Mr. Jackson provided no corroboration for Ms. Greene's testimony. RP (3/13/08) 41. This remark suggested that Mr. Jackson had some obligation to present evidence of his own innocence. This was improper and shifted the burden of proof. *See, e.g., State v. Cleveland*, 58 Wn. App. 634, 648, 794 P.2d 546 (1990). Respondent does not address this argument. *See* Brief of Respondent, pp. 5-6. Accordingly, Mr. Jackson's convictions must be reversed and the case remanded for a new trial. *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

C. The prosecuting attorney commented on Mr. Jackson's constitutional privilege against self-incrimination.

Mr. Jackson rests on the argument made in his Opening Brief.

- D. The prosecuting attorney committed misconduct by arguing that acquittal required the jury to find that Trooper Nelson lied under oath.

Mr. Jackson rests on the argument made in the Opening Brief.

- E. Cumulative misconduct requires reversal.

Mr. Jackson rests on the argument made in the Opening Brief.

II. MR. JACKSON'S SENTENCE MUST BE VACATED, AND THE CASE REMANDED FOR A NEW SENTENCING HEARING.

- A. Respondent concedes a failure to prove that Mr. Jackson was on community custody at the time of the offense.

Respondent concedes a failure to prove Mr. Jackson was on community custody at the time of the offense, and agrees to remand for resentencing without an additional point for that status. Brief of Respondent, p. 22.

The state did apparently file certified copies of Mr. Jackson's prior juvenile and adult felonies. However, these copies were not referenced during the sentencing hearing and were not admitted on the record as an exhibit.² See RP (4/4/08), *generally*. It is not clear they were provided to the court or counsel before sentence was pronounced, and there is no

² They are labeled "Exhibit 1" in a handwritten note, with instructions to file in the court file after the Judgment and Sentence. The author of the note is not identified.

indication that the judge reviewed the documents to determine Mr. Jackson's offender score. Respondent has not designated the documents as clerk's papers, and they are not part of the record on review.

Absent some proof that these documents were submitted to the court and defense counsel prior to sentencing, that defense counsel had the opportunity to object or argue against their use, and that the court considered the documents in determining Mr. Jackson's offender score, the existence of the documents does not establish Mr. Jackson's criminal history. Since Respondent has already conceded that remand is necessary, a proper record can be made at the new sentencing hearing.

B. In the absence of evidence proving otherwise, the trial judge should have found the 2002 DUI and Reckless Driving convictions to be the same criminal conduct.

A trial court's findings are reviewed for substantial evidence.

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Rogers Potato*, at 391; *State v. Carlson*, 130 Wn.App. 589, 592, 123 P.3d 891 (2005). It is more than "a mere scintilla" of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d

958 (2006), *citing Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

Here, the trial judge cited no evidence in support of its decision to score the 2002 DUI and Reckless Driving separately. He referred, briefly to the factors under RCW 9.94A.589(1)(a) in his passing comment that such crimes “can occur at different times, different places, although the same date,” and in his ambiguous remarks regarding intent: “I think the intent is somewhat different... The accident may have occurred as a result of driving under the influence or recklessly, but those are distinct crimes for purposes of that.” RP (4/4/08) 14-15.³

In the absence of evidence, the trial judge’s finding that the 2002 DUI and Reckless Driving should score separately was an abuse of discretion. Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing. At the new hearing, the sentencing court must consider the DUI and the Reckless Driving to be one offense. RCW 9.94A.589

III. FACTS “RELATING TO” PRIOR CONVICTIONS MUST BE PROVED TO A JURY BEFORE THE PRIORS CAN ENHANCE A SENTENCE.

Mr. Jackson rests on the argument in the Opening Brief.

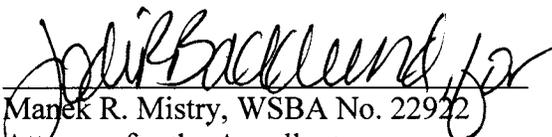
³ One possible interpretation is that the judge meant to score the Hit and Run separately from the other two offenses, based on a difference in intent.

CONCLUSION

Mr. Jackson's convictions must be reversed. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on December 11, 2008.

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DIVISION II

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CERTIFICATE OF MAILING

STATE OF WASHINGTON

BY DEPUTY

I certify that I mailed a copy of Appellant's Reply Brief to:

Elijah Jackson, DOC #845364
Washington Corrections Center
P. O. Box 900
Shelton, WA 98584

and to:

Clallam County Prosecuting Attorney
223 E. 4th Street, Suite 11
Port Angeles, WA 98362-0149

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 11, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 11, 2008.



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