

FULL
COURT OF APPEALS
DIVISION II

NO. 37944-9-II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA M. SHADDAY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael Sullivan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Increasing Joshua Shadday's sentence with a 24 month enhancement in Counts 1, 2, and 3 based on the allegation that he committed the offenses 53 feet from a school bus stop without readily ascertainable standards governing the proscribed conduct violated his right to due process of law.

2. Prosecutorial misconduct deprived Shadday of his due process right to fair trial by an impartial jury.

3. Shadday did not receive effective assistance of counsel because his attorney did not object to prosecutorial misconduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Prohibiting drug sales within 1000 feet of a school bus stop violates the right to due process of law where the location of the school bus stop is not readily ascertainable by the public. Here, the bus stop was unmarked and lacked signage, the location was not available to the public unless requested from the Transportation Supervision for the Ocean Beach School District or through the Office of the Superintendant of Public Transportation, and the locations of the stops are designated by their longitude and latitude. Where the location of school bus stops are not readily

available to the public, does it violate due process to increase Shadday's sentence with school bus stop enhancements? Assignment of Error No. 1.

2. Was Shadday's right to a fair trial violated when the deputy prosecutor improperly vouched for the police's confidential informant in closing argument by stating that the informant "has led them on investigations that have led to arrests and convictions, four in the past" and that "[t]here must a reason that they keep going back to him." 2RP at 166-67. Does this instance of misconduct require reversal of the convictions? Assignment of Error No. 2.

3. Was Shadday denied his right to effective assistance of counsel because defense counsel failed to object to the prosecutor's improper vouching statements regarding the confidential informant? Assignment of Error No. 3.

C. STATEMENT OF THE CASE

1. Procedural history:

Joshua Shadday [Shadday] was charged by information filed in Pacific County Superior Court with three counts of delivery of methamphetamine, contrary to RCW 69.50.401(1) and (2)(b), and one count of possession of methamphetamine, contrary to RCW 69.50.4013. The State

alleged that Counts 1, 2, and 3 were committed within 1000 feet of a school bus stop designated by a school bus district, adding an additional 24 month sentencing enhancement to each count, pursuant to RCW 69.50.435(1)(c). Clerk's Papers [CP] at 2-4.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on February 26, 2008, the Honorable Michael Sullivan presiding.

No objections or exceptions to the court's instructions to the jury were made. 2Report of Proceedings [RP] at 96, 140-141.¹

The jury returned a verdict of guilty to all counts as charged. CP at 41, 42, 43, and 44. By special verdict, the jury found that Counts 1, 2, and 3 were committed within 1000 feet of a school bus stop. CP at 45, 46, and 47.

On June 27, 2008, after numerous continuances, the court imposed a standard range DOSA sentence. CP at 54-69.

Timely notice of appeal was filed on July 3, 2008. Supp. CP at 90. The State filed a notice of cross-appeal on July 15, 2008, asking the Court to review the sentence to determine if it is in compliance with RCW

¹ The record consists of two volumes:
1RP February 26, 2008, first day of jury trial and sentencing hearings.
2RP February 27, 2008, second day of jury trial.

9.94A.533(6). CP at 228-243.

This appeal follows.

2. Trial testimony:

Frank Warner pleaded guilty in Lewis County Superior Court to possession of methamphetamine, first degree criminal trespass, and possession of drug paraphernalia. 1RP at 91, 106. He entered into a contract with Deputy James Bergstrom of the Pacific County Sheriff's Office, to buy drugs as a so-called "confidential informant." 1RP at 27. Under the terms of the agreement, if Warner made nine buys from three people, the Lewis County Prosecutor's Office would permit Warner to withdraw his plea to possession of methamphetamine and dismiss the charge. 1RP at 91, 106. Warner had previously acted as a confidential informant under contract with the Pacific County Sheriff's Office. Deputy Bergstrom testified that Warner "had approached me sometime back and entered into a contract and had made several narcotics purchases for me which led to arrests and convictions." 1RP at 27-28. Deputy Bergstrom said that Warner had been involved in 13 or 14 buys as a police informant. 1RP at 29. Warner testified that he had performed 14 controlled buys under Deputy Bergstrom's supervision. 1RP at 116.

Deputy Bergstrom said that it was Warner who wanted to attempt to

buy methamphetamine from Joshua Shadday. 1RP at 29. Deputy Bergstrom and another deputy went to Warner's house on October 2 and searched him outside of the house while the other deputy searched his car, an older model Camaro. 1RP at 32, 77, 82. Warner was given \$100.00 in "buy money" in order to purchase drugs and then he drove to a house at 125 East Spruce Street in Ilwaco, Washington. 1RP at 33, 40.

Police saw Warner enter the house, he went to Shadday's apartment located inside the house, and then both Shadday and Warner emerged from the house. 1RP at 34.

Warner stated that inside the house, Shadday gave him "a teener"² of methamphetamine in exchange for \$100.00. 1RP at 118. Warner went back to his car, and Shadday walked down the street. 1RP at 35. Warner went back to his house and was searched again. 1RP at 36. He gave police a baggie that contained a white crystalline substance. 1RP at 36.

Police searched Warner and his Camaro again at a graveyard in Ilwaco on October 10, and he was given \$100.00. 1RP at 40, 41, 42, 86. Warner drove to Shadday's apartment on East Spruce Street and went into the house, where he remained for a few moments, at which point police saw

² Warner testified that a "teener" is one-sixteenth of an ounce of drugs. 2RP at 15.

Shadday emerge from the house and walk down the street. 1RP at 42.

Shadday was gone for twelve minutes and then returned. 1RP at 42, 43.

Warner stated that he asked Shadday to sell him methamphetamine. He let Shadday use his cell phone, and Shadday told him that he would have to come back in while. 1RP at 121. Warner then left the house and then drove to a store and waited until Shadday called him. He stated that he went back to Shadday's house "[w]hen his partner had let him know—he called me and told he that Mr. Shadday had come back home." 1RP at 121. Warner stated that he then returned to Shadday's house and received methamphetamine from him. 1RP at 122. Warner later gave Deputy Bergstrom a baggie containing a white crystalline substance. 1RP at 44. He and his vehicle were searched. 1RP at 44.

Deputy Bergstrom met Warner at the graveyard again on November 15 and he and his vehicle were searched. 1RP at 48, 88. He was given \$100.00 and he drove to Warner's apartment. 1RP at 49. Warner said that Shadday said that he would have to call and see when Warner asked him for drugs. 1RP at RP at 124. Shadday used his own cell phone to make a call. 1RP at 124. Shadday then left the house. 1RP at 125. Two other people were in Shadday's house. 1RP at 125. Shadday left the house and was gone for approximately seven minutes, and then returned. 1RP at 50. Warner stated that when Shadday returned, he had methamphetamine and that Warner

“gave [Shadday] a little bit for his efforts, which I had to do before and—to keep things in check.” 1RP at 123. He stated that “[t]hey shared some and passed it around and to keep myself from being noticed, I had to indulge a little bit and then I left.” 1RP at 125. Warner left the house and gave Deputy Bergstrom a baggie containing a white crystalline substance. 1RP at 126.

Shadday’s house was searched on November 26, 2007 and Shadday was arrested. 1RP at 55, 56. Police found several plastic baggies that contained a white crystalline substance in Shadday’s coat pocket when he was searched incident to arrest. 1RP at 56, 58.

A school bus stop is located at 126 East Spruce Street, across the street from 125 East Spruce Street, where Shadday lived. 1RP at 59. Deputy Bergstrom stated that the distance from the school bus stop to the fence next to the entry to Shadday’s house is 53 feet. 1RP at 60. Transportation Supervisor for the Ocean Beach School District—Ben Mount—testified that there is a school bus stop located at 126 East Spruce Street in Ilwaco. 2RP at 36. He stated that a list of all bus stops in the school district is prepared in October each year and the list of the stops, with the longitude and latitude of the stops is sent to the Superintendent of Public Instruction. 2RP at 35. Mount stated that the list of the stops with their individual longitude and latitude may be obtained through his office or through the Superintendent of

Public Instruction. 2RP at 35, 36.

Jason Dunn, a forensic scientist employed at the Washington State Patrol Crime Laboratory, testified that Exhibits 1, 2, 3, and 4 tested positive for the presence of methamphetamine. 2RP at 116, 123.

The defense rested without calling witnesses. 2 RP at 147.

D. ARGUMENT

1. **THE SCHOOL BUS STOP ENHANCEMENT WAS IMPOSED IN VIOLATION OF SHADDAY'S RIGHT TO FAIR NOTICE SINCE THE LOCATION IS NOT READILY ASCERTAINABLE.**

- a. **The statute increasing punishment for proximity to a school bus route stop is unconstitutionally vague as applied to Shadday.**

The due process clause of the Fourteenth Amendment requires fair warning of proscribed conduct. *Spokane v. Douglass*, 115 Wn.2d 171, 176, 705 P.2d 693 (1990). A criminal statute is unconstitutionally vague if it fails to define the crime with sufficient definiteness so that ordinary people can understand what is proscribed or if it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Becker*, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997)(citing *Douglass*, 115 Wn.2d at 178). Vagueness

challenges to a statute on grounds other than the First Amendment are reviewed in light of the particular facts of each case. *Becker*, 132 Wn.2d at 62; *Douglass*, 115 Wn.2d at 182.

Fair notice of proscribed conduct is insufficient where a statute is applied in such a manner that “persons of common intelligence must guess at its meaning and differ as to its application.” *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)(quoting *Douglass*, 115 Wn.2d at 179).

In *Coria*, the court ruled that the statute proscribing additional punishment for certain actions in proximity to a school bus route stop does not violate due process. *Id.* at 164-68; *see* RCW 69.50.435(a). The statute was not unconstitutionally vague because the school district generates maps designating the bus stops. *Id.* at 176. Moreover, the statute does not violate the requirement of ascertainable standards “provided there is a readily available means of” determining the locations of school bus route stops. *Id.* at 169.

In *Coria*, the school district’s director of transportation testified that anyone could ascertain the location of school bus stops by calling his office. *Id.* at 160. Consequently, the *Coria* Court concluded that no due process violation occurred, because there were “readily understandable available

means” by which the defendants in *Coria* could determine the location of school bus stops that would subject them to additional punishment. *Id.* at 169. The court also noted that the local paper published the school bus stop locations and a passerby would notice the gathering of students at the bus stop. *Id.* at 160-61.

Following *Coria*, the Supreme Court found a substantial violation of due process in a different case where there was “no readily understandable and available means” to determine the location of zones proscribed by RCW 69.50.435. *Becker*, 132 Wn.2d at 65-66. In *Becker*, the school at issue was not marked by a sign and did not appear on a list of schools in the public records. *Id.* at 63. Thus, the court ruled the sentencing enhancement violated due process because proximity to school grounds “could not be ascertained by any readily accessible means.” *Id.* at 65-66; *see also State v. Akers*, 136 Wn.2d 641, 965 P.2d 1078 (1998) (affirming reversal of school zone enhancement based on lack of readily ascertainable information of school’s location even though street had sign identifying nearby school).

Becker distinguished *Coria* based on the testimony in *Coria* that any person could telephone the school district and learn the location of a bus stop. *Becker*, 132 Wn.2d at 63. In *Becker*, there was no testimony that any

member of the public could learn the identity of the school by accessing readily available information. *Id.*

b. Here, the State did not prove that any member of the public could readily learn the location of the school bus stop routes.

Unlike *Coria*, in the case at bar there was no testimony that any member of the public could readily learn the location of school bus stop routes, and in fact, the location of the bus stops is designated by their longitude and latitude, necessitating special equipment and training in order to ascertain where the stops are located. Consequently, this case is controlled by *Becker* rather than *Coria*.

Ocean Beach School District Transportation Supervisor Ben Mount testified that his office establishes bus stops for students in his district, and each October his office sends to the State “a list of all our bus stops with all of their longitude and latitude locations for the State.” 2RP at 34. The longitude and latitude is established using a Global Positioning System [GPS] unit that they physically take to the location of each stop. 2RP at 34. The list, longitude and corresponding latitude is sent to the Superintendent of Public Instruction. 2RP at 35. Mount testified that the list is available from his office or from the Office of the Superintendent. 2RP at 35-36. There was no testimony that the Ocean Beach School District lists bus stops on its website or that it provides maps to the public of the various bus stops. See

for being within 1000 feet of a school bus stop while in possession of a controlled substance violates due process of law. *Id.* at 65. Accordingly, the enhancements must be reversed and the bus stop penalty stricken from his sentence.

2. **THE PROSECUTION DENIED SHADDAY A
FAIR TRIAL BY VOUCHING FOR THE
CONFIDENTIAL INFORMANT'S
CREDIBILITY.**

Prosecutorial misconduct exists where (1) the prosecutor has made improper comments and (2) there is a substantial likelihood the comments affected the jury. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Review is proper despite the lack of objection below when (1) the cumulative effect of the misconduct rises to the level of manifest constitutional error that is not harmless beyond a reasonable doubt or (2) the misconduct is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by a limiting instruction. *State v. Fleming*, 83 Wn.App. 209, 216, 921 P.2d 1076 (1996); *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988). Here, the deputy prosecutor improperly vouched for the credibility of a crucial State's witness; this endorsement likely affected the jury's verdict; and the result is manifest constitutional error that was not harmless beyond a

reasonable doubt and could not have been cured by a limiting instruction.

The State's duty to ensure a fair and constitutional trial prevents a prosecutor from vouching for or endorsing the credibility of prosecution witnesses. *See, e.g., State v. Sargent*, 40 Wn.App. 340, 344, 698 P.2d 598 (1985); *State v. Horton*, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003). Prejudicial error occurs when it is “clear and unmistakable” the argument is an expression of personal opinion and is not based on the evidence. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). Here, the deputy prosecutor stated during rebuttal that the confidential informant, Frank Warner, “had led” the police on four previous investigations “that have led to arrests and convictions[.]” 2RP at 166. The deputy also argued that “[t]here must be a reason that they keep going back to him.” 2RP at 166-67. These two statements impermissibly endorsed Warner’s credibility.

The prosecutor's comments were improper because they bolstered Warner’s credibility and directly placed the integrity of the prosecution on his side. In *State v. Sargent*, the prosecutor stated in closing that he believed the State's witness. *Sargent*, 40 Wn.App. at 343. Division I concluded this required reversal because the statements (1) bolstered the credibility of the only witness directly linking the defendant to the crime, and (2) “directly

place[d] the integrity of the prosecution” on the side of the witness. *Sargent*, 40 Wn.App. 344-45. In the present case, the prosecutor's remarks had the same effect, indicating to the jury the prosecutor believed Warner, who was the only witness in a position to identify Shadday as the person who supplied the drugs he gave to the police. 2RP at 166-67.

The prosecutor's comments likely affected the jury's verdict because Warner was a critical State witness whose credibility was highly suspect. Like the witness in *Sargent*, Warner was the only witness who could identify Shadday as the person who sold him the methamphetamine. *Sargent*, 40 Wn.App. at 345. Without the prosecutor's comments, Warner lacked credibility. He had violated his contract with the police by using methamphetamine on November 15, 2007, while acting as an agent of the State, and by ingesting methamphetamine purchased with “buy money” provided by the police. 2RP at 125. Moreover, everything a prosecutor says carries a ring of authenticity and an implicit stamp of believability as it is endorsed by the power and force of government. *United States v. Vargas*, 583 F.2d 380, 387 (7th Cir. 1978). The prosecutor's comment declaring Warner to be the informant the police “keep going back to” because of what he argued are prior successful prosecutions had the improper effect of tipping the scale

in favor of the State.

Where, as here, there is a substantial likelihood that improper comments affected the jury's verdict, there is manifest constitutional error because the defendant is deprived of the fair trial guaranteed by the Fourteenth Amendment. *See, e.g., State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988).

The error was not harmless beyond a reasonable doubt because the prosecutor's statements were disconnected from the evidence. By contrast, the error in *State v. Hoffman* was harmless and curable by instruction. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The Court explained that the prosecutor's opinions, which were preceded by such phrases as "I think" and "I think the evidence shows" were indeed supported by the evidence. *Id.* Unlike the statements in *Hoffman*, the prosecutor's comments here were not explicitly linked to the evidence by a phrase such as "I think the evidence shows." *Id.* The prosecutor simply stated that the police kept going back to Warner, implying that he had testified in cases resulting in prosecutions in the past, that he was a reliable, believable informant, and that he was honest with police. 2RP at 166-67. Therefore, unlike *Hoffman*, the error here was not harmless.

Warner's testimony was crucial. The prosecutor's comments unfairly clothed him in the legitimacy of State power. Under these circumstances, an instruction could not have cured the prejudice and, as a result, the jury likely convicted Shadday due to the improperly bolstered credibility of the confidential informant. The prosecutor's actions deprived Shadday of a fair trial and therefore his convictions should be reversed.

3. **SHADDAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT.**

If the court finds the prosecutorial misconduct issues was not preserved for review because defense counsel failed to object, then Shadday was denied his right to effective assistance of counsel. A defendant is denied the Sixth Amendment right to effective assistance of counsel when (1) his attorney's representation falls below an objective standard of reasonableness and (2) there is a probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 80 L.Ed. 2d 674, 104 S. Ct. 2052 (1984).

The failure to object was unreasonable because a timely objection could have avoided prejudice to the client. In *State v. Horton*, defense counsel

failed to present evidence of prior inconsistent statements by the complaining witness and "significantly exacerbated" the problem by failing to object when the prosecutor improperly vouched for the witness's credibility. *State v. Horton*, 116 Wn.App. 909, 922, 68 P.3d 1145 (2003). This Court held that Horton was denied effective assistance of counsel and ordered a new trial. *Id.* This Court explained that when a prosecutor improperly vouches for the credibility of a crucial state witness, there is no legitimate strategic reason for failing to object. *Id.* at 921. Similarly, here there was no legitimate strategic reason for counsel not to object when the prosecutor improperly vouched for Warner's credibility and reliability. 2RP at 166-67. The failure to object was unreasonable.

But for the lack of objection, the outcome of the proceedings would have been different. *See Strickland*, 466 U.S. at 687. An objection would likely have been sustained because the prosecutor improperly endorsed the credibility of a critical State witness. *See Horton*, 116 Wn.App. at 921. The jury could have been instructed to disregard the improper endorsements. With such an instruction, the jury would have remained properly skeptical of Warner's crucial testimony—particularly in light of his admission that he used methamphetamine while acting as a police informant on November

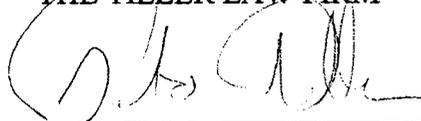
15—and the result of the proceedings would have been very different. Counsel's deficient performance deprived Shadday of his constitutional right to effective assistance of counsel.

D. CONCLUSION

For the foregoing reasons, the Court should reverse the convictions and remand for new trial. In the alternative, the Court should vacate the school bus stop enhancements and remand the case for further proceedings consistent with this Court's proceedings. In the event that Shadday does not prevail on appeal, he asks this Court to deny any request for costs.

DATED: November 24, 2008.

Respectfully submitted,
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vs.

JOSHUA M. SHADDAY,

Appellant.

COURT OF APPEALS NO.
37944-9-II

PACIFIC COUNTY NO.
07-1-00255-1

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to, Joshua M. Shadday, Appellant, and Michael N. Rothman, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on November 24, 2008, at the Centralia, Washington post office addressed as follows:

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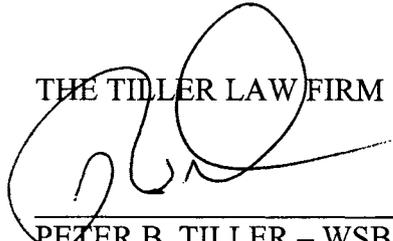
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