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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II BY KSC
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA D.C. RHOADES,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Christine Pomeroy, Judge
Cause No. 08-1-00572-4

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing the prosecutor to imply facts not in evidence and to improperly bolstered the credibility of the State's key witness.
02. The trial court erred in sustaining the objection to the impeachment evidence of the State's key witness for a prior juvenile adjudication for a crime of dishonesty.
03. The trial court erred in not taking count I, malicious mischief in the second degree, from the jury for lack of sufficiency of the evidence.
04. The trial court erred in failing to instruct the jury in the court's to-convict instruction 17 on all of the elements of a violation of a no-contact order as charged in count II.
05. The trial court erred in failing to dismiss Rhoades's convictions where the cumulative effect of the claimed errors materially affected the outcome of the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the prosecutor's flagrant and ill-intentioned closing argument, which implied facts not in evidence and improperly bolstered the credibility of the State's key witness, Javier Martinez, substantially affected the jury's verdict and destroyed the possibility that even a precise objection or a carefully worded curative instruction would have obviated the resultant prejudice? [Assignment of Error No. 1].

02. Whether the trial court erred in sustaining the objection to the impeachment evidence of the State's key witness for a prior juvenile adjudication for a crime of dishonesty? [Assignment of Error No. 2].
03. Whether there was sufficient evidence that Rhoades was an accomplice to the offense of malicious mischief in the second degree as charged in count I? [Assignment of Error No. 3].
04. Whether the trial court's to-convict instruction 17 under which Rhoades was convicted of violation of a no-contact order unconstitutionally omitted the mental element of the offense? [Assignment of Error No. 4].
05. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Rhoades's convictions? [Assignment of Error No.]. 6

C. STATEMENT OF THE CASE

01. Procedural Facts

Joshua D.C. Rhoades (Rhoades) was charged by information filed in Thurston County Superior Court on March 28, 2008, with malicious mischief in the second degree, count I, and violation of no-contact order (domestic violence), a gross misdemeanor, count II, contrary to RCWs 9A.48.080(1)(a), 26.50.110(1), 10.99.020 and 10.99.050. [CP 3].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on September 22, the Honorable Christine Pomeroy presiding.

The jury returned verdicts of guilty as charged, Rhoades was sentenced within his standard range and timely notice of this appeal followed. [CP 72-74, 108-118].

02. Substantive Facts¹

According to fourteen-year-old Javier Martinez, he, Rhoades, Steven Romero, Richard Molina and Luis Meza arrived at Nadine Chenot's house in the early morning hours of December 11, 2007. [RP 166-171]. Rhoades was the father of Chenot's one-year-old son. [RP 19]. Romero and Martinez were juveniles. [RP 98]. Initially, they listened to music and drank alcohol before Martinez and Rhoades went to Wal-Mart where Rhoades purchased five cans of spray paint at approximately 1:50 a.m. [RP 172-75, 216]. After returning to Chenot's, the five "just hung out for a little bit more." [RP 176]. Martinez and Romero then left to go spray-painting, which is known as "tagging." [RP 177, 198].

¹ All references to the Report of Proceedings are to the transcripts entitled JURY TRIAL, VOLUMES I-II.

Around 3:00 a.m., the police went to Chenot's to ask her about the graffiti found spray-painted throughout the neighborhood. [RP 20-21, 26, 34, 84-86]. A spray can of black paint was noticed near a garbage can in driveway, and similar cans were observed inside the residence. [RP 86-87, 96-97]. The nozzle of the can in the driveway "had black paint on it, it was still wet, which matched the graffiti in the area." [RP 109]. While Martinez said that Rhoades was hiding in a closet when the police arrived [RP 178, 180], Chenot maintained that Rhoades was gone by this time.

(B)ecause him and his friends got in a disagreement about this spray paint thing because he didn't want problems at my house for our son, so he left.

[RP 32].

Sergeant Patrick Fitzgerald, identified the four individuals and Rhoades, testifying that they were all associated in varying degree with the gang known as LVL or Little Valley Locus, and that the graffiti found in Chenot's neighborhood was associated with this gang. [RP 44-56, 60]. As a result of the spray-painting, damage to property exceeded \$250.00. [RP 140, 146, 155].

A court order entered the previous September 12, prohibited contact between Rhoades and Chenot for one year. [RP 29].

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D. ARGUMENT

01. THE PROSECUTOR'S FLAGRANT AND ILL-INTENTIONED CLOSING ARGUMENT, WHICH IMPLIED FACTS NOT IN EVIDENCE AND IMPROPERLY BOLSTERED THE CREDIBILITY OF THE STATE'S KEY WITNESS, JAVIER MARTINEZ, SUBSTANTIALLY AFFECTED THE JURY'S VERDICT AND DESTROYED THE POSSIBILITY THAT EVEN A PRECISE OBJECTION OR A CAREFULLY WORDED CURATIVE INSTRUCTION WOULD HAVE OBIATED THE RESULTANT PREJUDICE.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Where there is no objection to the prosecutor's comment, the right to assert prosecutorial misconduct on this basis is waived unless the remark was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

In this state, prosecutors are held to the highest professional standards.

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial (citation omitted).

State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

During closing, the prosecutor, without objection, ardently argued that:

So Javier Martinez. You heard, well, he said one thing here, one thing here. There's never been any contradiction that when he testified in court, whether it was here or Mr. Molina's trial. Mr. Molina was convicted; he's not going to be here. He said the one thing that matters in this case. Joshua Rhoades was the person that took him to Wal-Mart and Joshua Rhoades is the person that bought the spray paint. He's testified in two trial under oath.

[RP 300].

Although a prosecutor has some latitude to argue facts and inferences from the evidence, he or she is not permitted to make prejudicial statements unsupported by the record. State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), cert. denied, ___ U.S. ___, 127 S.

Ct. 2986, 168 L. Ed. 2d 714 (2007). And it is generally improper for a prosecutor to bolster the credibility of a witness. See, State v. Smith, 67 Wn. App. 838, 844-45, 841 P.2d 76 (1992).

By arguing there was no contradiction between Martinez's testimony under oath in the prior trial of co-defendant Molina and his sworn testimony in this case, the prosecutor was asserting that Martinez should be believed because he had given consistent testimony, which is relevant only on the issue of Martinez's truthfulness, for lack of consistency would suggest that Martinez was either lying or, more politely, mistaken, while consistency would imply that Martinez was truthful and accurate, which is an indirect way of bolstering Martinez's testimony. It was improper.

Further, the prosecutor's argument cloaks a more fundamental problem: it impermissibly implied facts not in evidence. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) ("prejudicial allusions to matters outside the evidence, are inappropriate") (quoting State v. Belgarde, 46 Wn. App. 441, 448, 730 P.2d 746 (1986), review granted, 108 Wn.2d 1002 (1987)). Since the State presented no evidence that Molina was ever convicted, the prosecutor's assertion to the contrary was without question a "prejudicial allusion" to matters outside the record. And to argue, as the prosecutor impliedly did, that Rhoades was guilty

because Molina had been found guilty because Martinez had testified consistently in both trials, which the jury should consider as further evidence of guilt, not only is improper and demeans the system and the parties involved, but unmask any semblance of impartiality while simultaneously falling woefully short of representing the public interest. This argument was indefensible.

The State's case that Rhoades was an accomplice was very close and turned almost entirely on whether the jury believed Martinez's claim that Rhoades had purchased the cans of spray paint at Wal-Mart because there was no evidence that he participated in the spray-painting of the neighborhood. Indeed, as argued by the State:

“(Martinez) said the one thing that matters in this case. Joshua Rhoades was the person that took him to Wal-Mart and Joshua Rhoades is the person that bought the spray paint.”

[RP 300].

The prosecutor's improper argument impermissibly bolstered Martinez's credibility. Given the evidence, it cannot be claimed that the jury would have rendered the same verdict without the prosecutor's misconduct, which not only substantially affected the jury's verdict but also destroyed the possibility that even a precise objection or a carefully worded curative instruction would have cured the prejudicial effect of the

prosecutor's argument, with the result that Rhoades was denied a fair trial and his conviction for malicious mischief in the second degree must be reversed and remanded for a new trial.

02. RHOADES'S STATE AND FEDERAL RIGHTS TO PRESENT A DEFENSE, TO CONFRONTATION AND TO PROPER IMPEACHMENT WERE VIOLATED WHEN THE COURT SUSTAINED THE OBJECTION TO HIS ATTEMPT TO IMPEACH THE STATE'S KEY WITNESS, JAVIER MARTINEZ, WITH MARTINEZ'S PRIOR JUVENILE ADJUDICATION FOR A CRIME OF DISHONESTY.

The accused have a constitutional right to present evidence relevant and material to their defense. Rock v. Arkansas, 483 U.S. 44, 53-55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Further, both the federal and state constitutions guarantee the right to confrontation, which includes the right to meaningful cross-examination and impeachment of witnesses. U.S. Const. Amend VI; Wash. Const. Art I, § 22. See Davis v. Alaska, 415 U.S. 308, 315-18, 94 S. CT. 1105, 39 L. Ed. 2d 347 (1994); and State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 51 (1983), limited in part on other grounds by, State v. Darden, 145 Wn.2d 612, 615, 41 P.3d 1189 (2002). Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis, 415 U.S. at 316. This right is so important that a criminal defendant is

given “extra latitude” to cross-examine or impeach crucial prosecution witnesses on issues such as credibility or motive. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1981).

In this case, Rhoades’s rights to present a defense, to cross-examination and to proper impeachment were violated when the trial court sustained the objection to his attempt to impeach Martinez with his prior 2007 juvenile adjudication for taking a motor vehicle without permission. [RP 160, 63-65].

Crimes of dishonesty are per se admissible for impeachment purposes under ER 609(a)(2). State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 122 (1991). The crime of taking a motor vehicle without permission is a crime of dishonesty. State v. Trepanier, 71 Wn. App. 372, 381, 858 P.2d 511 (1993). ER 609(d) provides:

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission of the evidence is necessary for a fair determination of the issue of guilt or innocence.

ER 609(d).

As underscored in the preceding section of this brief, the importance of Martinez’s testimony cannot be overstated. He was the one

who named Rhoades as the purchaser of the cans of spray paint, which by inference served as the nexus to the claim that Rhoades was guilty as an accomplice to the acts of malicious mischief. Martinez was the key. And it cannot be reasonably asserted that evidence of his prior offense for dishonesty was not necessary for a fair determination of his credibility in the current proceeding. This evidence was necessary for a fair determination of the issue of Rhoades's guilt or innocence.

Error of constitutional magnitude is harmless error only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). On the other hand, the erroneous admission or exclusion of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984). In this context, harmless error occurs when the evidence is of "minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Regardless of the analytical prism employed, under either standard, the exclusion of the evidence here at issue was not harmless. In light of the reasons argued, there is a reasonable doubt that the jury would have

reached the same verdict for this charge if the evidence of the prior offense of taking a motor vehicle without permission had been admitted. The exclusion of this evidence was reversible error. Concomitantly, for the same reasons, the evidence at issue would have materially affected the outcome of the trial, especially when viewed in the shadow of each witness's statements and in consideration of the crucial role credibility played in this case, and it is on this point that the denial of the impeachment evidence cut the deepest, since Rhoades was convicted in large part on the basis of Martinez's testimony, the credibility of which was left unchallenged by his prior offense for a crime of dishonesty. The error was of major significance and not harmless and requires the reversal of Rhoades's conviction for malicious mischief in the second degree.

03. THERE WAS INSUFFICIENT EVIDENCE
TO UPHOLD RHOADES'S CRIMINAL
CONVICTION FOR MALICIOUS
MISCHIEF IN THE SECOND DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.

Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928

Rhoades was convicted of malicious mischief in the second degree. [CP 74]. As charged, the State was required to prove that Rhoades, as a principal or an accomplice, knowingly and maliciously caused physical damage to the property of another in excess of \$250.00. RCW 9A.48.080. [CP 3]. The theory of the State’s case was that Rhoades was an accomplice to the events, since there was no evidence that he actually participated in the spray-painting of the neighborhood. [RP 271]. In this regard, the State relied heavily on the testimony of Javier Martinez, arguing in closing that it was Martinez who linked Rhoades to the crime by testifying that it was Rhoades who “bought the spray paint” at the Wal-Mart on the morning of the offense. [RP 300]. Maybe so.

But, again, the theory was accomplice liability. Whether Rhoades did in fact purchase the spray paint, standing without more, much more, does not establish that he was an accomplice to the subsequent offense.

There was no evidence that he painted anything, no evidence that he said what the paint was for and no evidence that he either directed or encouraged anyone to go tagging. Martinez, who lead the way for the State, even acknowledged that he was not sure if Rhoades even knew he had gone outside with Romero to go tagging, which seemed like a spontaneous moment. [RP 208-209].

I remember like eventually me and Steven (Romero) were hanging out in the kitchen, something like that, and then, "Hey, let's go grab some spray paint and go tagging." He was, like, "Yeah, why don't we." We grabbed two cans and went outside.

[RP 208].

When asked if Rhoades was aware of this, he answered: "I don't know if he knows." [RP 209].

This evidence was insufficient to support Rhoades's conviction either as a principal or as an accomplice. See State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) ("A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed." Citations omitted); see also State v. Robinson, 73 Wn. App. 851, 897 P.2d 43 (1994). The evidence must demonstrate more than that the accused was present and knew what was going to happen. In order to

convict under an accomplice liability theory, the State must demonstrate some nexus between the party committing the act and the party deemed the accomplice. State v. Wilson, 95 Wn.2d 828, 631 P.2d 362 (1981). A defendant's presence at the scene of criminal activity combined with knowledge of the criminal activity, does not establish accomplice liability. In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979); State v. Amezola, 49 Wn. App. 74, 89, 741 P.2d 1024 (1987). The State must also show that the defendant "associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by his actions to make it succeed." In re Wilson, 91 Wn.2d at 491. Here, the record shows merely that Rhoades may have purchased some spray paint. Aside from this and his mere presence at Chenot's house, the State did not demonstrate a sufficient connection between Rhoades and the criminal activity at issue.

04. THE TO-CONVICT INSTRUCTION UNDER WHICH RHOADES WAS CONVICTED OF VIOLATION OF A NO-CONTACT ORDER UNCONSTITUTIONALLY OMITTED THE MENTAL ELEMENT OF THE OFFENSE.

A criminal defendant has the right to have the jury base its decision on an accurate statement of the law applied to the facts of the case. State v. Miller, 131 Wn.2d 78, 90-92, 929 P.2d 372 (1997). The failure to instruct on each essential element of the crime charged

constitutes manifest error of constitutional magnitude that may be considered for the first time on appeal under RAP 2.5(a). State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); See also State v. Aumick, 126 Wn.2d 422, 429-30, 894 P.2d 1330(1995).

The court's instruction 17 reads in pertinent part:

To convict the defendant of the crime of violation of a protection order as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 11, 2007, the defendant violated the provisions of a Lewis County District Court protection order #C83828, by having contact with Nadine Chenot;
- (2) That the defendant knew of the existence of the protection order....

[CP 44].

Violation of a no-contact order, as charged here under RCWs 26.50.110(1) and 10.99.020, contains the element that the accused “knowingly” violat(es) the restraint provisions” of the order. [CP 3]. A separate definitional instruction stated, in part, that a person commits violation of a no-contact order “when he or she willfully has contact with another when such contact was prohibited by a no-contact order....” [CP 43].² Rhoades did not propose nor object to these instructions. [CP 47-71].

² While the cited statutes reference “willful violation” of the order, as does the court's definitional instruction 16 [CP 43], it appears that the appropriate mental state is

That the separate definitional instruction defined the offense to include a willful violation of the order does not cure the omission of the mental element in the to-convict instruction, for jurors are not required to look beyond the “to-convict” instruction for elements of a crime. State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997) (citing State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). The omission of the mental element from the “to-convict” instruction was reversible constitutional error.

05. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF RHOADES’S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Rhoades’s convictions, the cumulative effect of these errors

“knowing,” as charged in the information. [CP 3]. See State v. Dejarlais, 136 Wn.2d 939, 942, 969 P.2d 90 (1998). In any event, since neither “willful” nor “knowing” was properly set forth in the court’s instruction 17, the argument is the same for both terms.

materially affected the outcome of his trial and his convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

E. CONCLUSION

Based on the above, Rhoades respectfully requests this court to reverse and dismiss his convictions consistent with the arguments presented herein.

Dated this 29th day of April 2009.

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