

No. 40709-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ISAAC W. FORGEY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Lisa Worswick, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to suppress statements made as a result of custodial interrogation when the defendant was not advised of his rights and the “booking” exception to Miranda¹ did not apply.

2. Forgey assigns error to conclusion of law 1 of the Findings of Fact/Conclusions of Law regarding the admissibility of statements (Findings/Conclusions), which provides:

The Court finds that the questions Officer Klemme asked the defendant during the booking process on May 29, 2009, were necessary questions asked pursuant to Pierce County Jail’s routine booking procedure such that *Miranda* warnings are not required.

CP 93.

3. Forgey assigns error to conclusion of law 5 of the Findings/Conclusions, which provides:

The Court finds that the defendant’s response to Officer Klemme’s request for the defendant’s address, 1213 Hillcrest Loop, Kettle Falls, Washington, is admissible at trial.

CP 93.

4. Forgey assigns error to “Conclusion as to Admissibility” of the Findings/Conclusions, which provides:

The State has established by a preponderance of the evidence that the questions posed to the defendant by Officer Klemme on May 29, 2009 were part of the Pierce County Jail’s routine booking procedure and thus *Miranda* warnings were not required. The State has also established by a preponderance of the evidence that the defendant’s responses to Officer Klemme’s questions were voluntary. The statement to Officer Klemme regarding his address is admissible at trial.

¹Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R. 974 (1966).

CP 94.

5. The prosecutor committed flagrant, prejudicial misconduct by misstating the juror's role and minimizing the burden of proof and by repeatedly misstating crucial law.

6. Forgey was deprived of his Sixth Amendment and Article 1, § 22 rights to effective assistance of counsel.

7. The sentencing court violated Forgey's due process rights and acted outside its statutory authority in imposing conditions of community custody which gave the Community Corrections Officer ("CCO") unfettered discretion to define the conditions. This further violated Forgey's rights to meaningful appeal. Forgey assigns error to the following conditions set forth in the judgment and sentence:

Follow all direction, instructions + conditions of CCO.

CP 103 (section 4.4).

The defendant shall participate in the following crime-related treatment or counseling services: any per CCO.

...

The defendant shall comply with the following crime-related prohibitions: any per CCO.

...

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: per CCO.

CP 105 (section 4.6).

OTHER: per Appendix F + CCO.

CP 109 (section 5.10).

The offender shall participate in crime-related treatment or counseling services, Per CCO

...

[x] The offender shall comply with any crime-related prohibitions.

...

[x] Other: Any conditions imposed by CCO.

CP 111 (Appendix "F").

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Questioning for the purposes of booking is not exempt from the requirement of Miranda warnings if it is not "routine" or if the booking officer knew or should have known that the questions being asked were reasonable likely to lead to incriminating responses, in light of the offense for which the defendant was being booked.

Forgey was booked for and later charged with failing to comply with sex offender registration requirements which mandated him to reside at a particular address that he had previously provided. The booking officer was aware of the charge when he booked Forgey.

In holding that the booking officer's questioning about Forgey's current address was not subject to Miranda, the trial court focused only on whether the questions were routine, without examining whether the officer knew or should have known their potential for incrimination.

Did the trial court err in failing to apply both parts of the analysis?

Did the trial court err in admitting the statements from Forgey regarding his address where the officer knew the offense for which Forgey was being booked and Forgey's current address was directly relevant to and could even amount to an admission of guilt for the offense?

Is reversal required because the prosecutor repeatedly relied on the

“admission” by Forgey about his current address as evidence of Forgey’s guilt?

2. Did the prosecutor commit flagrant misconduct in repeatedly telling the jurors that they had a duty to determine “who is being truthful” in order to decide the case, thus misstating the jury’s role and function and minimizing her own constitutionally mandated burden?

3. The prosecutor’s main theory was that Forgey was guilty because he had actually become a transient for the purposes of the registration law and had failed to register as such. For that theory, the definition of whether Forgey had a “fixed residence” was crucial. Did the prosecutor commit flagrant misconduct in repeatedly misstating the law of “residence” in closing argument and urging them to apply a “common sense” definition of the term, which was far different than the legal definition?

4. If the misconduct could have been cured by instruction, was counsel prejudicially ineffective in failing to request such instruction?

5. In imposing conditions of community custody, the sentencing court repeatedly failed to provide any specifics, instead delegating to the Community Corrections Officer (CCO) to define what “crime-related treatment or counseling services,” “crime-related prohibitions,” or “[o]ther conditions” to impose.

Are all of these conditions unconstitutionally vague and in violation of Forgey’s due process rights because they fail to provide any notice from which a reasonable person could determine what conduct was mandated or prohibited and fail to provide any standards for enforcement,

let alone standards sufficient to protect against arbitrary and capricious enforcement?

Because the Legislature specifically granted to sentencing courts the authority to impose conditions of community custody within statutory limitations, did the trial court effectively abdicate its role and improperly delegate its authority to the CCO?

Are Forgey's rights to a meaningful, full and fair review of his criminal conviction and judgment and sentence implicated because the failure to set the conditions has effectively deprived him of this Court's review of the conditions on direct appeal?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Isaac W. Forgey was charged by amended information with failing to register as a sex offender. CP 29; RCW 9A.44.130. Trial was held before the Honorable Lisa Worswick on April 13-15, 19, 20 and 21, 2010, after which the jury found Forgey guilty as charged. RP 1, 155, 361;² CP 90.

On April 28, 2010, Judge Worswick ordered Forgey to serve a standard range sentence of 12 months and a day in custody. SRP 10; CP 96-116. Forgey appealed and this pleading follows. See CP 117-34.

²The verbatim report of proceedings consists of four volumes, which will be referred to as follows:
the chronologically paginated volumes containing the trial of April 13-15, 19-21, 2010, as "RP;"
the sentencing transcript as "SRP."

2. Testimony at trial

In 1991, Issac Forgey was convicted of a sex offense and, in 2008, he was still required to register as an offender. RP 410, 414. In May of 2008, he moved to Pierce County from Kettle Falls, where he had lived with someone he called his “grandmother.” RP 412-24. He gave his new address and notice to the Pierce County Sheriff’s Department sex offender unit on May 19, 2008, listing the Kettle Falls address as his previous address and a new address for the home of his aunt, Carla Hellerud. RP 217, 219.

On November 2, 2008, Officer David Thaves of the Bonney Lake Police Department went to conduct a “verification check” of Forgey’s address, at 10 at night. RP 128-36, 139. Once at Carla’s Bonney Lake address, the officer spoke to Michael Hellerud,³ Carla’s husband. RP 140, 165. Hellerud answered the door and, when asked, said he lived there but Forgey did not. RP 140, 165.

In fact, Hellerud lived in Carla’s home only off and on because their relationship was rocky and Hellerud would “take off” for months, during which time he would live with others. RP 320. As a result, Hellerud only stayed with Carla periodically and it was “hit and miss” to try to find him there. RP 321.

Officer Thaves did not do anything to verify that Hellerud actually lived at the address, instead just taking Hellerud’s word for it. RP 147,

³Because they share the same last name and because there is another person named Michael in this case, for clarity Carla Hellerud will be referred to herein as “Carla” and Michael Hellerud, as “Hellerud.” No disrespect is intended.

167. He also just took Hellerud's word for it that Forgey did not live there. RP 147, 167. Instead of doing some double-checking on what Hellerud told him, Thaves just turned the case over to the prosecutor's office to charge Forgey with failing to register at the address where he actually lived. RP 139, 167.

The November 3 visit was not Thaves' first visit to the address to check on Forgey. RP 140. At trial, Thaves testified that he thought he had been at the home "within weeks" of the November 3 visit and that he had spoken with other people there. RP 142, 165, 177.

Thaves admitted that the other people he had so recently spoken to at the home had said, contrary to Hellerud, that Forgey lived there. RP 142, 165, 177. He did not have any documentation of when he had been there or with whom he had spoken, explaining that he did not think it was needed because there was no "crime" as Forgey's registration address had been verified. RP 168. He said he did not keep a record of visits if he is told the person he is looking for lives at the address. RP 168. Whoever he spoke to told him that Forgey lived there but worked for a moving company and was often away from home for work. RP 140-41.

Thaves admitted that there has now been a change in procedure to require documentation any time a residence check occurs, regardless of the outcome. RP 172.

In his report, Thaves did not make clear that he had spoken to others on previous visits, instead indicating only that others had said Forgey lived there, thus raising the question of whether others had made those statements at the time Hellerud had said to the contrary. RP 147.

Ben Duffy, Forgey's cousin and Carla's son, was living at Carla's along with Forgey in November of 2008 and remembered answering the door and speaking to an officer, telling the officer Forgey lived there but was at work. RP 319-29. He was sure this was after Halloween because he remembered being embarrassed about the pumpkins still rotting on the porch. RP 329, 337.

Duffy later learned from Hellerud that Hellerud had also talked to the officers that same day. RP 300-24. The officer Duffy spoke to that day did not ask Duffy for his name or any identifying information. RP 331-34.

At trial, Hellerud admitted that, on the day he spoke to the officer, he was wrong. RP 178. Forgey was actually still living there but Hellerud just did not know it because he was not himself living there or had only been back a few days. RP 178.

Carla was very angry with Hellerud when she got home and found out that he had told officers Forgey was not living there because Forgey was, in fact, living there. RP 179, 191. Hellerud did not remember exactly what he told the officers about Forgey but he remembered his wife "reaming" him for what he had said. RP 182. Hellerud thought he must have said Forgey was not there because he had not seen him for two or three days. RP 183. But Hellerud admitted that he had only been at the home for those two or three days and had only assumed he was not there because he had not seen him during that time. RP 183. Hellerud conceded that he knew that Forgey kept his stuff in the garage and in the two or three days Hellerud had been back Hellerud had not gone into the

garage. RP 183.

At the time, Hellerud and Carla were “having a lot of problems,” including Hellerud’s anger over Forgey and others living there. RP 178-79. Hellerud, who admitted being transient himself at the time of trial, said he had moved in and out many times from Carla’s house over the issue. RP 170-94. He knew that Forgey was Carla’s nephew and admitted that Forgey had moved in about six months before the officer’s visit. RP 176. Indeed, Hellerud said, Carla claimed that Forgey was paying some money for expenses, but Hellerud said he had “a real hard time” believing anything Carla said so he was not sure. RP 194.

Carla confirmed that Forgey paid her \$100 a month towards rent and she gave him receipts. RP 342-47. She had receipts from September 1, 2008, to the last receipt in January of 2009, which she said was the last month so he paid only \$75.00, as they moved out a little before the end of the month. RP 343-44, 347-48. Although she had other receipts from May to August, she could not find them because she was packing to move out of state and her garage was full. RP 350, 364. She initially said she thought he had started living there in September but then recalled that it was actually earlier, in May of 2008, that he had started living there. RP 350, 364.

Forgey slept in either a rollaway bed in the garage or the couch, and he had a couple of cardboard boxes and a closet thing where he hung his clothes and items in the garage. RP 179, 327, 425-26.

Both Carla and Duffy confirmed that Forgey also got his mail at the Bonney Lake address until the end of January of 2009. RP 327, 333,

occasion if it was late. RP 397. Mills would also pick Forgey up and drop him off at the Bonney Lake home before and after visits and was sure Forgey was still there, with his stuff, in November of 2008. RP 386, 390, 396.

At the time of trial, Hellerud himself was transient, did not “have a shoe to spit in” and stayed at his daughter’s home, his friend’s home and sometimes in Pacific with Carla. RP 188. Hellerud admitted that checking on Forgey was not the only reason the police came out to the Bonney Lake address, although he maintained that one of the times they came it was he, Hellerud, who had called them. RP 195. Hellerud also conceded that he had at some times had restraining orders against him which kept him from going to Carla’s when she lived in Bonney Lake. RP 190. He had recently had to get a police escort to get out of the place where Carla was now living because it was such a bad situation. RP 190.

Ultimately, Hellerud thought they had moved out of the Bonney Lake home after Thanksgiving in 2008. RP 185. He said they were asked to leave based on how many people were living there. RP 185. Hellerud remembered his nephew and wife coming and bringing them turkey dinner because they had everything already packed up so he assumed that was Thanksgiving. RP 186. Forgey was not there that day but Hellerud did not know if he had already moved. RP 186-87.

Unlike Hellerud, Carla remembered having Christmas at the Bonney Lake address. RP 373. Carla said her nephew had brought Christmas dinner over, just as he had done at Thanksgiving that year. RP 373.

Hellerud admitted that, in fact, he could not exactly remember when things had occurred because it was so long ago. RP 189.

In contrast to Hellerud, Carla remembered that it was towards the end of January 2009 that they moved. RP 339-42. She remembered how long it took to get the new place ready including shampooing the carpet over and over. RP 342. They got a break on the rent at the new place for agreeing to fix it up and Duffy was doing most of the work. RP 326, 342. During that time, Forgey was still living in Bonney Lake. RP 326, 342.

Duffy confirmed that, although he was not spending most of his nights at Carla's Bonney Lake address in December and January, he would go to Carla's all the time to get supplies or money for the work he was doing and saw Forgey there, many times. RP 332. Duffy and Forgey both helped when Carla moved in the end of January. RP 332.

On January 26, 2009, Forgey had sent the PCSD sex offender registration unit a letter informing them that he had moved as of January 22, 2009, from the Bonney Lake address to an address in Spanaway. RP 225-27.

That address belonged to Helen Klinger.⁴ RP 84. Helen thought that Forgey, Duffy's now ex-wife and children had moved into Helen's home in December of 2008 and had moved out on December 25, 2008. RP 84-85, 111. In fact, she said, she made a whole Christmas dinner and waited for Forgey and Duffy's wife for quite a while because they had

⁴Because she shares the same last name as her husband, Michael Klinger, and because their son is also named Michael Klinger, for clarity Helen Klinger will be referred to as "Helen," Michael Klinger (the elder) will be referred to as "Klinger," and Michael Klinger (the younger) will be referred to as "Michael."

gone to talk with Helen's son, Michael, about renting his place. RP 85. Helen also thought Forgey had moved with Duffy and the kids into Michael's trailer for a few weeks together starting when they moved out from her home but that Forgey had moved out of the trailer to some unknown place on January 25. RP 85, 107.

At trial, Helen said that Forgey did not live with her in January of 2009, although he stopped in a few times. RP 87.

Helen admitted that she was not getting along with Forgey at all in January because his moving into the trailer was causing problems with Helen's other son, Tony, who wanted to live there without noise and small children. RP 84-98. Helen and Forgey were "bickering" "pretty bad" and not getting along at all over the issue, Helen said. RP 87.⁵ Once he moved out, Helen said, she told Forgey several times to make sure that everyone knew he was not living there anymore, reminding him to "go reregister." RP 87. She also told him that she would tell anyone who came asking that he did not live there. RP 87.

Helen, who is on several medications, slept in a hospital bed in her living room and had a caretaker, claimed that she did not really have a problem recalling dates under certain circumstances. RP 100, 114, 434. She admitted, however, that she had some problems knowing some days and that she was "not much" on calendars. RP 114.

Helen said that, during the month that Forgey and Duffy lived in

⁵Klinger also admitted that, after Forgey moved out of Michael's home, Michael had gotten involved with Duffy and they had an unspecified "domestic violence problem" but were engaged. RP 92-94, 108.

Helen's house, Helen's estranged husband, Michael Klinger, was staying there off and on, although he did not live there. RP 99-100, 112.

In contrast to Helen, Michael Klinger was sure that Forgey, Duffy and the girls had moved out sometime after Christmas and that they were there for Christmas that year. RP 122. Indeed, he specifically recalled Forgey being present that Christmas evening. RP 123. He thought they moved into Michael's trailer when they moved. RP 124. He also thought, contrary to Helen, that they were still in the trailer in March when he went there for some septic problems. RP 124. Klinger admitted, however, that he did not really go out to the house when Forgey was there and did not know how long Forgey lived there or where he lived after that. RP 124.

According to Helen, in March of 2009 or thereabouts, a "couple of months" after Helen thought Forgey had moved out, police came to the home looking for him. RP 88, 98. Helen told them that Forgey had been living there but had moved out. RP 98. She also told them that she had told Forgey to take her address off his records and that Forgey had told her that it had been done. RP 98.

PCSD officer Andrew Gerrero testified that, at around 9:15 at night on February 19, 2009, he went to Helen's address in Spanaway to do an address verification on Forgey. RP 264-67. Helen answered in a wheelchair, identified herself and said Forgey no longer lived there. RP 266-69. She also said he was asked to leave because he was causing problems with other members of her family and not contributing around the house. RP 271.

Contrary to what she said at trial, however, Helen told the officer

that Forgey had been asked to leave the first week of January. RP 271.

Helen admitted that, throughout the time after she said Forgey had moved, he still got mail at her home and would stop by to get it. RP 96-97.

Forgey testified that he lived in Kettle Falls, Washington until about the middle of May of 2008, when he moved to Pierce County because he needed to find a job. RP 419. He had registered at his new home in Bonney Lake, where he lived with Carla, his aunt. RP 419. He had lived with her until January of 2009, when he had moved into Helen's place, and registered accordingly. RP 440-47.

Forgey detailed his work as a furniture mover for truck drivers, describing how he was often gone for days at a time as a result. RP 422. He would ride along with the truck to its destination, help with the move and then come back. RP 421-22.

Forgey also explained that, when he was living with Carla and was home, he tried to stay in the garage as much as possible, not only because he did not like to be around people "too much" but also because of the issues with Hellerud. RP 424. He kept his stuff in the garage, mostly, and had "kind of asked" to have the garage as his area so he could be left alone. RP 425.

Forgey freely admitted that, while he was living at Carla's, sometimes he would visit his Aunt Vicki's and stay a night or visit others on occasion. RP 426. He also said that, towards the end of 2008, he was at Helen's "quite a bit helping with the family situation there." RP 427. He said there was "hostility" with Carla's husband and he thought

would get home late enough that he would just “crash” in his car if everyone was asleep when he got there, because he did not have a key. RP 447.

Forgey got mail at Helen’s and only there through about March, when he got a box. RP 448. Once he got the box, he still did not have any other residence besides Helen’s home. RP 453.

Forgey did not agree that he was “homeless” at this time because he still had his stuff at Helen’s and he was there two or three times in a week off and on. RP 454. He said he slept more nights in his car than “most people would like to” because of issues at Helen’s but that was still in the driveway of Helen’s home. RP 454.

During the times he spent nights at other homes while he was living at Helen’s, he still considered Helen’s place his home. RP 471. He never spent more than a night or two at a friend’s house and was at Helen’s all the other times when he was not away on a job. RP 471.

Forgey said that, in fact, he had not rented Michael’s trailer but had just visited and stayed there “on occasion” when Duffy’s ex-wife and children lived there. RP 449.

PCSD officer Todd Klemme testified about booking Forgey on May 29, 2009, into the Pierce County jail, and said that he believed Forgey gave an address in Kettle Falls as his. RP 288-96. Forgey said he first gave the Kettle Falls address because that was his intention to move there after he was released. RP 450-51. At the time of his arrest, he said, he was “at the end of a drug abuse issue” and he knew he needed to get away from the “drama” with the family so he was going back to Kettle

Falls. RP 451.

Klemme admitted that Forgey told him that the Kettle Falls address was his grandmother's address and that Forgey gave his grandmother's name, as well. RP 309. Klemme did not remember if Forgey told him he had two separate addresses, i.e., one which was his home and one which was his mailing address. RP 310. Klemme said he could only assume that the address was both because he only wrote one down instead of two. RP 310. When asked if he would have entered two addresses if they had been given, Klemme admitted "[i]t depends," and that Forgey had said his "next of kin" was his grandmother at the Kettle Falls residence so he left that same address as the "point of contact" address which he said was also Forgey's residence. RP 312. Klemme said, however, that, if someone had both a mailing address and a residence address, it could be so indicated. RP 308.

A few days later, when Forgey was released, the conditions of release dated June 1, 2009, and entered by the Pierce County superior court required him to reside at the Kettle Falls address upon release. RP 301. The bail bond had the Kettle Falls address, too. RP 216, 303. Forgey's driver's license also listed the Kettle Falls address and was issued February 2, 2010. RP 304. Forgey said he gave the Kettle Falls address when he had to post bond because that was where the court order said he was supposed to be as of June 1st. RP 455-56. Forgey was released June 3 and went directly to Kettle Falls and registered there the next day. RP 456.

The Pierce County sex offender registration unit said that Forgey

had not sent them information that he was moving to Kettle Falls. RP 230. They had updated their information when they learned he had registered in Kettle Falls. RP 230. Forgey said he believed that the county had been notified of his move because he was subject to a county court order requiring him to be at that address. RP 450-56.

Forgey had a previous conviction in King County for Forgey for “Failure to Register as a Sex Offender” in 2000. RP 216.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS STATEMENTS MADE IN ANSWER TO QUESTIONS AT BOOKING WHEN THE OFFICER KNEW OR SHOULD HAVE KNOWN THE STATEMENTS WOULD BE INCRIMINATING AND THUS THE “BOOKING EXCEPTION” TO MIRANDA DID NOT APPLY

Under the Fifth Amendment and Article I, § 9, when a state agent subjects a person to custodial interrogations, the agent must give Miranda warnings to the person being interrogated. Miranda, 384 U.S. at 44; State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009). There is an exception, however, for some questions asked during booking, if they are part of “routine booking procedures.” State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987); see Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990) (plurality). Because such questions “rarely elicit an incriminating response,” Miranda warnings are not required unless the officer knew or should have known that the questions were reasonably likely to elicit an incriminating response. Wheeler, 108 Wn. 2d at 238.

In this case, the trial court erred in admitting evidence under the

“booking” exception to the Miranda requirements, both by skipping an entire part of the analysis and by allowing in evidence elicited by questions which the booking officer knew or should have known were reasonably likely to produce an incriminating response in light of the crime for which Forgey was being booked.

a. Relevant facts

Prior to trial, counsel moved to suppress statements that Forgey made when he was arrested and booked into jail. CP 32-39.

At the suppression hearing, Pierce County Sheriff’s Department officer Todd Klemme testified about handling Forgey’s booking. RP 20. Klemme, who also did all other kinds of police work as well, said that his duties as a booking officer included entering information about people being arrested into the Pierce County system, “LINX,” such as their name, address, date of birth, if they were employed, what their job was, how long they had worked, any medical concerns and what items of property they had with them, as well as the crimes with which they were being charged. RP 22. The information was not just used for booking but also for other purposes of the sheriff’s office. RP 23.

Klemme said that, “[t]ypically,” he would ask for the information from the person he was booking into custody, but “[a] lot of times” he would use their identification even before they were in front of him for processing. RP 24. He said he would “kind of get a start off with driver’s license[s] or state ID” before people “come to [his] station.” RP 24. According to Klemme, it is not standard to “Mirandize” people when they come into custody and begin the booking process. RP 27.

The process for booking is that the arresting officer fills out a paper indicating that the person is being booked into custody and that information is transferred to the booking officers, who then call the name of the person next in line to be booked. RP 25. At the time they perform the booking, Klemme admitted, the booking officer is aware of the charges the person being booked was facing. RP 29. Indeed, Klemme said, the number of charges involved affects the booking process by making it far more time-consuming when there were more charges. RP 26.

Klemme admitted that, when someone came into booking and did not want to give officers the information they wanted, that was called “failed booking” and the person would be put into a holding cell until they were ready to comply. RP 30.

On May 29, 2009, Klemme was on duty at about 8:30 a.m., when Forgey was brought in for booking. RP 27. Klemme did not recall how Forgey came to be in custody and did not recall how long it took for booking. RP 28. Klemme said the information in the system indicated something about Forgey being arrested at the jail, either after turning himself in or because he was brought to them after already being in custody. RP 34. Klemme said that he asked Forgey for his name, date of birth, address, employer, “all of that information” as part of the “standard process,” not with the intent of assisting an investigation in any way. RP 28-29.

At the time Klemme booked Forgey into custody and asked all of the questions, Klemme was aware that Forgey was charged with failing to

register as a sex offender. RP 29.

Klemme said that he did not specifically remember what the address was that he elicited from Forgey but recalled it was a far away town with a “nice sounding” name. RP 31. The printout of the booking form indicated that the address Forgey had given in the questioning was 1213 Hillcrest Loop in Kettle Falls, Washington. RP 33.

Klemme admitted that he sometimes made mistakes when recording information. RP 35. The information he typed out included two phone numbers, one for Forgey and a different one for his grandmother. RP 35-36. Klemme conceded that he “typically” does not explain to someone why he is asking for their address. RP 37.

After Klemme’s testimony, the prosecutor argued that Forgey’s statements made during booking should be admitted at trial. RP 42. After first conceding that Forgey was in custody, the prosecutor then said that, because the questions asked in booking were part of “standard procedure” and there was “nothing atypical” about what was asked, it was irrelevant whether “the statement could be termed incriminating” and Miranda warnings did not have to be given. RP 43. She also argued that the charge that Forgey was facing was completely irrelevant and the officers were not required to change their procedures in booking “just because the charge happened to be Failure to Register As a Sex Offender[.]” RP 44. She also said the state should not be punished by exclusion of the evidence because it was not the state’s “fault” that the information happened to be incriminating. RP 48.

Counsel pointed out that the address of the defendant “is a critical

factor” in a case where the failure to register as a sex offender is the charge - which was why the prosecutor wanted to use it against Forgey. RP 45. Counsel stated that, while an address was not something that “would incriminate someone” in most cases, in this case it was clear that the answer could be incriminating because Forgey was being arrested on a charge of failure to register. RP 45. Because the booking officer knew that Forgey was facing that charge, counsel noted, the officer knew that asking Forgey to give his address was asking for potentially incriminating information and Miranda warnings were thus required before that questioning could properly occur. RP 45-49.

In ruling that the statements were admissible, the trial court stated that “routine questions asked during the booking process” may not be interrogation and the relevant question was whether the “questioning party” should have known that the question was reasonably likely to elicit an incriminating response, especially in light of the charged crime. RP 49. The court then held:

Here we have a unique situation where one of the most basic questions involved in booking, which is the defendant’s address, is also an element of the crime. I’m going to rule that the statement is admissible under the routine question [theory] because it is such a basic question. I think name, address and date of birth are the minimum items that the jail would need for booking. So I believe it falls under the routine question exception.

RP 49. The court also focused on the fact that the question was “standard,” that it was asked in the “standard process” and that the officer, while aware of the charge, “never threatened the defendant or promised him anything or in any other way coerced the defendant into responding.” RP 50. The court later entered written findings and conclusions in support

warnings before the statements were made. Denney, 152 Wn. App. at 670. It is the nature of the question and not the procedure during which it is asked, which is “decisive,” and, while the intent of the officer is relevant, it is not conclusive. State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992).

Further, “[t]he relationship between the question asked and the crime suspected is highly relevant.” Denney, 152 Wn. App. at 671-72.

In this case, in making its decision, the trial court first declared the proper standard but then failed to apply it. Instead, the court relied solely on the fact that the questions were “routine” and asked as part of booking without the express purpose of investigation, as if that was the only issue. RP 49-50. Indeed, the court specifically cited its belief that “information such as an individual’s name, date of birth and address are basic questions reasonably required for the booking process.” CP 93. And the court declared that the state had met its burden by having “established by a preponderance of the evidence that the questions posed” by the officer “were part of the Pierce County Jail’s routine booking procedure and thus Miranda warnings were not required.” CP 93.

But it is not enough that questions are part of a routine booking procedure. Instead, even if they are part of such procedures, if the officer knew or reasonably should have known the information sought was relevant to the charges and thus likely to be incriminating, then Miranda warnings were required. Denney, 152 Wn. App. at 672; see Wheeler, 108 Wn.2d at 238-39. This is because of the “potential for abuse” by law enforcement officers who could ask a “neutral” seeming question to

deliberately elicit incriminating information. Wheeler, 108 Wn.2d at 239.

Thus, in Denney, this Court recently held that questions which were part of a “standard questionnaire” to determine if someone could be safely booked into custody should have been suppressed even though they were “routine,” because the officers knew or should have known the answers would be incriminating. 152 Wn. App. at 668. The trial court had admitted the evidence and had “emphasized the routine nature and practical purposes of” the booking questionnaire in holding that the “booking” exception to Miranda applied. 152 Wn. App. at 669.

On appeal, this Court found the trial court’s determination that the booking procedure and bail questionnaire were not “interrogation” was “clearly erroneous.” 152 Wn. App. at 673-74. The officers knew that the defendant had been arrested for morphine possession, this Court noted, so that they knew or should have known the questions about whether she had taken drugs recently were “reasonably likely to produce an incriminating response.” 152 Wn. App. at 673-74.

Indeed, this Court pointed out, the questions of police “invited an answer that would be a direct admission of guilt,” and thus were clearly questions which did not meet the “booking” exception. Id.

Notably, this Court specifically rejected the prosecution’s arguments which placed “great emphasis on the legitimate purposes of the questionnaires and the good faith” of the people administering them. 152 Wn. App. at 673. Regardless whether there were important purposes served by the questioning, this Court held, and even if there was no indication of a specific, malicious intent to elicit an incriminating

response, “[a] legitimate question, asked with good intentions, will still violate a defendant’s Miranda rights if it is reasonably likely to produce an incriminating response.” Id.

Here, just as in Denney, the booking officer knew that the defendant had been arrested for a specific offense. And like in Denney, the officer knew or should have known that the questions Forgey was being asked were reasonably likely to produce an incriminating response. The officer knew he was booking Forgey on a charge of failing to register as a sex offender. See CP 91-92. The fundamental question in such a case is whether the offender was living at the address where he was registered. See RCW 9A.44.130(1)(a); see e.g., State v. Castillo, 144 Wn. App. 584, 587, 183 P.3d 355 (2008). It is difficult to conceive of a situation in which a defendant’s address is more likely to be extremely relevant to the crime. Indeed, the very answer sought by the police could well amount to an admission of guilt if the address is different than that on the registry.

Thus, asking the defendant for his address when the charge is failing to register is clearly asking something reasonably likely to produce an incriminating response. Any officer would know - or should know - that fact.

As a result, the trial court erred in failing to suppress the statements regarding Forgey’s address.

Reversal is required. The erroneous admission of a statement in violation of Miranda compels reversal unless the prosecution can meet the heavy burden of proving the error harmless under the constitutional

harmless error standard. See State v. Ng, 110 Wn.2d 32, 38, 750 P.2d 632 (1988). That standard requires the prosecution to prove, beyond a reasonable doubt, that every reasonable jury would have reached the same result, absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that only occurs if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

It is important note that this Court uses a different standard and test for review of this issue than those employed when the issue on review is the sufficiency of the evidence to support a conviction. Where the question is sufficiency of the evidence, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The burden is on the defendant to prove that the evidence was so deficient that no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error “harmless,” the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Indeed, constitutional error is presumed prejudicial. Id. Rather than being deferential, the standard for constitutional harmless error, the “overwhelming evidence” test, requires

the Court to reverse unless it is convinced beyond a reasonable doubt that the constitutional error could not have had *any* effect on the fact-finder's decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a "sufficiency of the evidence" challenge, that is not enough to meet the "overwhelming evidence" test. See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 65 P.3d 1255 (2005) (evidence found sufficient to uphold the conviction was insufficient to meet the "overwhelming evidence" test). Even where there is significant evidence of guilt, where there are issues of credibility and evidence is disputed, the jury is presented "with a credibility contest" and constitutional error such as improper opinion testimony cannot be said to be "harmless." Id. Put another way, when the jury is faced with having to make a credibility determination, it is not likely the state can show that every single jury faced with such a decision would still have reached the same conclusion absent the constitutional error, i.e., could not possibly have been swayed by whatever evidence that error allowed.

Here, the prosecution cannot meet its heavy burden of proving the constitutional error of the erroneous admission of Forgey's statement "harmless," beyond a reasonable doubt. The prosecution's evidence was not overwhelming. The prosecution's own witnesses could not seem to agree on when things occurred. Further, the prosecution's case was disputed, with Forgey providing testimony that he still considered Helen's his "residence" until his arrest in May, 2009. The evidence improperly admitted went directly to the issue of where, in fact, Forgey was living. It

cannot be said that no reasonable jury would have failed to convict Forgey absent the evidence.

Under the circumstances, knowing that Forgey was being booked for failing to register as a sex offender, the officer knew or should have known that asking Forgey for his address was reasonably likely to produce an incriminating response. The trial court erred in focusing only on whether the questions were asked as part of “routine booking,” without properly analyzing whether, even if so, the officer knew or should have known that asking for Forgey’s address was reasonably likely to elicit an incriminating response, under the circumstances. The prosecution cannot prove the constitutional error harmless and this Court should reverse.

2. THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL MISCONDUCT AND COUNSEL WAS
INEFFECTIVE

It is well-recognized that, while all attorneys have duties as officers of the Court, prosecutors are further cloaked with additional duties because of their unique status as “quasi-judicial officers.” See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied sub nom Washington v. Huson, 393 U.S. 1096 (1969). Among these duties are the duty to act at trial in the interests of justice and refrain from becoming just a “heated partisan,” trying to “win.” See State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Thus, a prosecutor must seek convictions based solely upon the evidence and refrain from engaging in misconduct in an effort to “gain” a conviction. Id.

In this case, the prosecutor strayed too far from her burden and committed flagrant, prejudicial misconduct in closing argument. In

addition, in the unlikely event that the Court finds that the misconduct could have been cured by instruction, counsel was prejudicially ineffective in failing to request such instruction.

a. Misstating the jury's role and minimizing her own constitutionally mandated burden of proof

First, the prosecutor committed flagrant, prejudicial misconduct by misstating the jury's role and thus minimizing her own constitutionally mandated burden of proof.

i. Relevant facts

In closing argument, the prosecutor told jurors they had a duty to weigh testimony and determine “who is being truthful.” RP 511. She cited to “tools” the jurors could use in this task, such as whether people had eye contact with them. RP 512. She also told them they needed to use the kind of tools they “used in the past to help you determine who is being truthful.” RP 512. Then, she declared, “the officers have no motivation to be untruthful,” and “[t]he same holds true for Officer Klemme in the jail,” as well as the sheriff's department witnesses.” RP 512. She asked “[w]hat's their motivation” to lie, noting this was just a “job” for them. RP 512.

Later, in rebuttal closing argument, the prosecutor faulted counsel for pointing out that Thaves' report was not clear about whether he talked to others at Carla's home who had said Forgey lived there on the same night that he talked to Hellerud or a different night, saying that the lack of clarity “doesn't make his testimony more or less true.” RP 541 (emphasis added).

ii. These arguments were flagrant, prejudicial misconduct

These arguments were completely improper, flagrant and ill-intentioned misconduct. It is well-settled that it is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the prosecution’s witnesses are lying. State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Indeed, this type of “false choice” argument has been roundly condemned as misstating the law, the state’s burden of proof and the jurors’ role. See State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The argument misstates the jury’s role because the jury is *not* required to determine who is telling the truth and who is lying in order to perform its duty. Id. Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn. 2d 1010 (1995).

Further, the choice presented by the argument is “false” because it improperly implies that either the state’s witnesses or defense witnesses are lying and there are no other options. Barrow, 60 Wn. App. at 876. But this is not true even if the various versions of events are inconsistent. Id. Instead:

[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.

Casteneda-Perez, 61 Wn. App. at 362-63; Wright, 76 Wn. App. at 824-26

In this case, while the prosecutor did not tell the jury that the officers had to be found to be lying in order to acquit, she nevertheless committed the same kind of misconduct. She repeatedly framed the issue before the jurors as deciding who was telling the “truth.” RP 511-12, 541. The unmistakable corollary is that someone is telling lies. And in case it was not clear, the prosecutor went through “tools” jurors could use to decide who was being “truthful,” then told jurors the officers and other state’s witnesses had “no motivation to be untruthful.” RP 512.

Thus, there can be no question that the prosecutor’s arguments misstated the jury’s role. Further, this argument misstated and minimized the prosecutor’s burden of proof by implying that the jurors were to figure out who they thought was telling the “truth” and decide based upon that choice. But that is akin to tasking them with choosing “which version of events is more likely true, the government’s or the defendant’s.” See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events they think is more likely to be true and then rely on that “preponderance” standard in rendering their verdict. Id.

The prosecutor’s arguments were flagrant misconduct and this Court should so hold.

b. Misstating the crucial law of residence

The prosecutor also committed serious, prejudicial misconduct in misstating the crucial law regarding whether Forgey had a “fixed residence.”

i. Relevant facts

At Forgey's request and over the state's objection, the court gave the jury an instruction which told the jury the definition of residence, as follows:

A residence is a temporary or permanent dwelling place, abode or habitation, to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.

CP 82; RP 487-89. In closing argument, the prosecutor started by telling the jury that the law "permits" them using their common experiences to make "logical leap[s]" about the evidence. RP 504. Then, in arguing Forgey's guilt, the prosecutor said, regarding Forgey's testimony that he kept belongings "first at Carla's, then at Helen's until the move to Kettle Falls," that "keeping belongings at a place doesn't make it your residence," as "[y]ou can keep belongings in a storage unit." RP 517. The prosecutor pointed out that Forgey also said he was "keeping a lot of stuff in his car" and that there was no evidence about "what type of mail" he was getting at Carla's and Helen's during the relevant time. RP 517. The prosecutor also said that, just because his W-2 form went to the Bonney Lake address "doesn't mean he was living there." RP 517-18.

At that point, the prosecutor argued that the "jumble" of information presented at trial meant that the jury did not know and that "[n]o one is clear where the defendant was living at any given time during this period." RP 517-18. According to the prosecutor, Forgey was "all over the place, at family, friends and associates' houses." RP 518. Indeed, she said, "[s]o what if he kept a box of clothes at Carla's house during this time? That does not mean that was his residence." RP 518.

In arguing Forgey should be found guilty, the prosecutor urged the jury to convict either because he moved to another residence and had not registered there within 72 hours or because he “ceased at some point to have a fixed residence when he stayed at all of these places and did not notify the Sex Offender Registration Unit within 48 hours and, in fact, obviously never notified them that he was transient.” RP 519. A third way she argued that the jury should find Forgey guilty was by having moved to the Kettle Falls address on June 5, 2009, but not having sent notice to Pierce County of that move. RP 519-20.

In rebuttal closing argument, the prosecutor again returned to the definition of “residence,” telling jurors it was not defined by statute but was given to them in their instructions, declaring:

I submit to you that just because you may intend to return someplace at some point in time because you left some stuff there, that does not make it your residence. Use your common sense about what makes a place a residence, a fixed residence, and what it means not to have a fixed residence.

RP 539. The prosecutor then talked about how often Forgey said that he would out of the residence overnight for work and that he visited others, then went on:

So if you gather up all of the times that he spent out of the house overnight for work and all of the times that he spent out overnight visiting, how many nights, really, are left that he stayed at his Aunt Carla’s house or at Helen Klinger’s house? Did he really have a fixed residence? Or was he actually transient?

I submit to you that the evidence is that he didn’t have a fixed residence. And if he did at some point stay most of the time at his Aunt Carla’s house, that ended some time in the fall of ‘08, when it became crowded because Ben Duffy and his family moved in.

RP 541-42. The prosecutor then said that Forgey had committed the

crime either by “not staying where he had registered, at the Bonney Lake address or the Spanaway address,” or by “becoming transient because he stayed all over the place and not at these two places that he registered,” or by “not sending written notice back ten days after moving to Kettle Falls, Washington,” or all three. RP 545-46

ii. The arguments were flagrant, prejudicial misstatements of the crucial law

It is misconduct for any attorney, especially a public prosecutor, to mislead the jury as to the applicable laws. See State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor’s arguments are viewed in the context of the total argument, the issues in the case, the evidence the improper argument addresses and the instructions given to the jury. See State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

The prosecutor’s arguments here were serious misstatements of the law on residence. Contrary to the prosecutor’s arguments, a person does not cease to have a fixed residence simply because they are not physically staying all the time at one place. Instead, a person still has a fixed residence even if they are not at a place all the time and do not intend to stay long-term. See State v. Pray, 96 Wn. App. 25, 980 P.2d 240, review denied, 139 Wn.2d 1010 (1999). Indeed, a person has a fixed residence even if they do not actually live or have possessions at a home, so long as it is a place where the authorities can contact the person by mail, phone or in person at times. State v. Stratton, 130 Wn. App. 760, 766, 124 P.3d 660 (2005)

Thus, in Pray, when the defendant abandoned his home in King County and stayed in Bellingham in three different places for about 10 days, and he argued that he had not established a “residence” there, the Court disagreed. 96 Wn. App. at 29. Defining “residence,” the Court said it included places a defendant was at even temporarily, so long as he intended to return to that place and had no definite plans to leave on a specific date. Id. Because the defendant knew the places he intended to stay in advance and intended to stay at each of them on the relevant days, they were “residences” under the statute. Id.

And in Stratton, the definition of “residence” went even further. In that case, the defendant had registered with the address of a home he had intended to buy but had defaulted on the loan. 130 Wn. App. at 760. He moved everything out of the home, surrendered the keys and started parking his car in the driveway and sleeping there fairly often, while still getting his mail there. Id. This Court held that the definition of “fixed residence” could include a place where a person did not actually live or even have possessions, so long as it was a place where the authorities could contact the registrant by mail, phone or in person at times. 130 Wn. App. at 764-65.

Further, this Court rejected the idea that Stratton was “transient” because of his situation. 130 Wn. App. at 766. A person only met that definition, this Court held, if they were someone who, for example, was sleeping in public parks at night, not knowing where he would be at any given point in time. 130 Wn. App. at 766. Because Stratton was “abiding” at the home on a regular basis and the place he intended to be

was not subject to change all the time, the empty home was still Stratton's "fixed residence" and he was properly registered there. Id.

Thus, contrary to what the prosecutor said in her arguments here, a person *does* have a fixed residence if he has a place where his possessions are and where he intends to return. And contrary to the prosecutor's arguments, the fact that Forgey received mail at a residence *is* relevant to whether it was his "fixed residence." Further, the fact that Forgey may have been away at work for periods of time and that he occasionally visited others did not, as the prosecutor argued, mean that he did not have a "fixed residence." The prosecutor's repeated arguments misstating the crucial law of "residence" were flagrant misconduct and this Court should so hold.

c. Reversal is required

This Court should reverse based upon the misconduct in this case. Reversal is required even where counsel failed to object if the misconduct is so flagrant and ill-intentioned that it caused an enduring prejudice no corrective instruction could fully erase. See State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d. 899 (2005). The misconduct in this case meets that standard, especially when taken together.

Here, the misconduct was all clearly flagrant and ill-intentioned. Fully 14 years ago, in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), the Court found that it was flagrant and ill-intentioned misconduct for the prosecutor to mislead the jurors into believing they had to figure out who was telling the truth and who was lying in order to do their duties because that argument had been condemned two years before. Fleming,

83 Wn. App. at 214. And the prosecutor's misstatements of the law were also flagrant, because they deliberately invited the jurors to apply a "common sense" concept of when someone has a "fixed residence" even though that concept was far different than the legal concept, which includes places where one has items and intends to return even if one is not sleeping there every night. See, Stratton, 130 Wn. App. at 760; Pray, 96 Wn. App. at 29.

Further, the misconduct was of the type not easily erased by instruction. The concept of deciding who is telling the truth and who is lying i.e., picking a "side," reflects the way jurors normally make decisions in their everyday lives. And people are willing to make decisions in their personal lives even when they have a great deal of uncertainty. State v. Anderson, 153 Wn. App. 417, 431-32, 220 P.3d 1273, review denied, ___ Wn.2d ___ (November 2010). This is why such argument effectively minimizes the prosecutor's burden of proof. See, e.g., Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954).

Similarly, the idea that a person has a "fixed residence" only if they are there most of the time and have all their stuff there reflects what an average person - one who has never experienced less than a normal lifestyle - would assume would be the case. Even with the definition of "residence," the arguments of the prosecutor, inciting the jurors to apply their "common sense" beliefs even though they were contrary to the legal standard, were the kind of arguments which were likely to resonate with and stay in the juror's minds regardless of any attempt at a "cure."

Notably, the impact of the prosecutor's misconduct cannot be overstated. The prosecutor specifically, repeatedly argued that the jury should find Forgey guilty because he had stopped having a fixed residence but had not registered as a transient. And the prosecutor specifically told the jury to apply "common sense" to the determination of when someone has a "fixed residence," arguing *against* the legally proper definition of "fixed residence" at the same time. The prosecutor's misstatements of the law on that point misled the jury into applying a far higher standard of proof for "fixed residence" than required, leading jurors to likely believe that Forgey could not be deemed to have a "fixed residence" at a place if he spent time away from it for work or on visits or slept in his car in the driveway. And into this mix, the prosecutor repeatedly threw the idea that the jurors also had to decide who was telling the truth in order to decide the case.

There is more than a reasonable probability that the misconduct affected the verdict. The evidence against Forgey was given by witnesses who disagreed with each other on important points, such as when Forgey lived where. And Forgey's witnesses supported his defense, as did his own testimony. The prosecutor's misconduct in misstating the definition of residence could well have affected the jurors' decision, as could the misstatement of their proper role. Reversal is required.

d. In the alternative, counsel was ineffective

A criminal defendant is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996);

Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Counsel is ineffective in failing to raise an objection to misconduct if the misconduct could have been cured by instruction, counsel failed to object and request such instruction, and there is no legitimate tactical reason for the failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

Here, even if the misconduct could have been cured by instruction, reversal should be granted based upon counsel's unprofessional failure to object to and request instruction on the prosecutor's misconduct. It is not as if the misconduct occurred once in passing and thus counsel's failure to object amounted to a legitimate tactical decision not to object and draw attention to an improper remark. Instead, the misconduct pervaded the closing argument and went directly to the heart of the state's case and Forgey's defense. Counsel's failures cannot be seen as legitimate "tactics" and, had she objected, the court would have erred in overruling. This Court should so hold and should reverse.

3. THE SENTENCING COURT ERRED, ABDICATED ITS DUTIES AND VIOLATED DUE PROCESS IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY WHICH DELEGATED TO THE COMMUNITY CORRECTIONS OFFICER THE AUTHORITY TO DEFINE THE CONDITIONS WITH WHICH FORGEY MUST COMPLY

In addition to the other errors below, the sentencing court further erred in imposing several of the conditions of community placement /custody which violated Forgey's state and federal constitutional rights to due process, improperly delegated the court's duties to DOC and were not statutorily authorized. A sentencing court is limited to imposing only those conditions which are authorized by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Further, the due process rights guaranteed under the state and federal constitutions prohibit imposition of conditions which are unconstitutionally vague. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005).

Here, several of the conditions imposed by the court run afoul of those requirements.

As a threshold matter, these issues are properly before the Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). Further, a challenge to such a condition may be made "preenforcement" if the challenge raises primarily a legal question and no further factual development is required. Id.

The conditions in this case meet those standards, because there is no further factual development required to show their serious

constitutional infirmity. The relevant conditions, contained in the judgment and sentence, require Forgey to “[f]ollow all directions, instructions and conditions of CCO,” “participate in the following crime-related treatment and counseling services: any per CCO,” “comply with the following crime-related prohibitions: per CCO” and that other conditions may be imposed “per CCO,” as well as declaring, in Appendix F, that Forgey is subject to “[a]ny conditions imposed by CCO.” CP 103-116.

All of these conditions were improper, both because they violated Forgey’s rights to due process but also because, in ordering the conditions, the sentencing court abdicated its duties and improperly delegated them to DOC, leading to further violation of Forgey’s constitutional rights.

First, the conditions were unconstitutionally vague. A condition is vague and in violation of due process if it either is not defined with sufficient definiteness so that an ordinary person could discern what conduct was prohibited or if it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Sansone, 127 Wn. App. at 639, citing, Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). Where, as here, a condition provides that a community corrections officer “can direct what falls within the condition,” the Supreme Court has recognized that “only makes the vagueness problem more apparent,” because, with that language, the condition “virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758. Further, such conditions fail to define the prohibited conduct with “sufficient definiteness such that

ordinary people can understand what it encompasses.” Sansone, 127 Wn. App. at 639.

Notably, delegating to the CCO - the very person tasked with enforcement - the decision of what, exactly, is prohibited or mandated creates “a real danger” of arbitrary enforcement based upon the CCO’s personal beliefs about what Forgey should and should not be doing, even if those beliefs do not reflect the law. See, e.g., Sansone, 127 Wn. App. at 639. Because there is no definition of what “crime-related treatment or counseling services,” “crime-related prohibitions” or “other conditions,” there is no notice nor ascertainable standard for enforcement, and the conditions clearly violate due process mandates.

Second, the sentencing court’s delegation to the CCO to decide exactly what amounts to “crime-related” prohibitions or “crime-related” treatment, as well as the all-encompassing delegation of determining the “conditions,” was an improper abdication of judicial responsibility for setting the terms of community custody. Under former RCW 9.94A.712⁶ and former RCW 9.94A.700(5)⁷, it is the court which has the authority to order that “[t]he offender shall comply with any crime-related prohibitions” or to engage in affirmative conduct requiring him to participate in crime-related treatment or counseling services.” While a sentencing court may delegate certain administrative tasks to DOC, it is

⁶This statute was renumbered effective August 1, 2009, as RCW 9.94A.507. See Laws of 2008, ch. 231, § 56.

⁷This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

not permitted to delegate its authority to DOC in a way which “abdicates its judicial responsibility” for setting the terms of community custody. Sansone, 127 Wn. App. at 642; see, State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). Instead, it is the court’s responsibility to set forth those conditions in the judgment and sentence, leaving to DOC to handle monitoring and enforcement.

Here, by ordering that Forgey to “[f]ollow all directions, instructions and conditions of CCO,” “participate in the following crime-related treatment and counseling services: any per CCO,” and “comply with the following crime-related prohibitions: per CCO,” the trial court completely ignored its judicial responsibility for setting the conditions of community custody.

But it is, in fact, important for the court to take that responsibility, not only because it is required to do so as part of sentencing and not only because of due process concerns but also because of the role and function of this Court and Forgey’s constitutional right to a meaningful appeal. Under Article I, § 22, Forgey is entitled to a full and fair appeal from his conviction and the resulting sentence. See, e.g., State v. Sweet, 90 Wn.2d 282, 287, 581 P.2d 579 (1978). By failing to set forth with specificity the conditions of community custody with which Forgey will have to ultimately comply, the sentencing court effectively precluded meaningful review of them. And Forgey thus is deprived of this Court’s scrutiny on direct appeal of the propriety of the conditions.

Notably, our appellate courts have repeatedly had to address the propriety of certain conditions and whether they are “crime-related,” as

even trial courts themselves have been known to overreach in impose improper conditions. See, e.g., Zimmer, 146 Wn. App. at 413. And there is a specific legal standard to define when something is “crime related” - one which sentencing courts themselves have had difficulty applying, not because of any defect in those courts but because, as this Court has noted the SRA is now “so astoundingly and needlessly complex that it cannot possibly be used both quickly and accurately.” State v. Jones, 118 Wn. App. 199, 211, 76 P.3d 258 (2003). Indeed, this Court declared, it is not only “extremely difficult to identify what statute applies to a given crime, much less to coordinate that statute with others that may be related.” Id. Since that declaration in 2003, there has been no “thoughtful simplification” of the SRA, which this Court implicitly requested in Jones. If the trial judges, with their experience and knowledge in the law, have serious difficulty determining what is proper and what is not in sentencing, it cannot be expected that DOC personnel untrained in law would fare better. The result of wholesale delegation to DOC such as occurred here is thus fraught with risks of unconstitutional or unauthorized conditions being imposed based upon the personal beliefs of the specific CCO, leaving defendants without counsel to help them address those issues and providing personal restraint petitions to this Court as their only possible means of relief.

The Legislature specifically delegated to the court the authority - and the duty - to define the conditions of community custody with which Forgey will have to comply. And the delegation was not a wholesale grant of unfettered discretion; it was a carefully - often confusingly - crafted

authority, subject to many limits under the various statutory requirements the Legislature provides. See, e.g. former RCW 9.94A.505(9)⁸ (mental health evaluation and treatment may be ordered only if reasonable grounds to believe mentally ill and “that this condition is likely to have influenced the offense”); former RCW 9.94A.715(2)(b)⁹ (ordering participation in rehabilitative programs or engaging in affirmative conduct is authorized only if the evidence shows that the defect or problem for which the programs or conduct are being ordered somehow contributed to the offense of conviction); see Jones, 118 Wn. App. at 208 (interpreting former RCW 9.94A.715(2)(b)).

The sentencing court’s improper delegation to the CCO, a DOC employee, to decide what “crime-related” treatment and prohibitions Forgey would be required to follow as conditions of his community custody failed to give him proper notice of those conditions, failed to provide sufficient standards to prevent arbitrary enforcement, precluded him from fully exercising his constitutional right to appeal and was a wholly improper abdication of the court’s responsibilities. This Court should so hold and should order that such conditions and all of the other challenged conditions either be stricken or, on retrial, not be imposed.

⁸This provision was removed from the statute in 2008. See Laws of 2008, ch. 231, § 25.

⁹This statute was repealed in 2008 and 2009. See Laws of 2008, ch. 231, § 57; Laws of 2009, ch. 28, § 42.

E. CONCLUSION

Forgey's statements to the booking officer about his address should have been suppressed. Further, the prosecutor committed flagrant, prejudicial misconduct and counsel was ineffective. Finally, the improper conditions of community custody should either be stricken or, on retrial, not be imposed.

DATED this 13th day of December, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

DATE: 12/14/10
BY: [Signature]

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage prepaid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Issac Forgey, DOC 987834, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 14th day of December, 2010.


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