

No. 40968-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADELE E. EWING,

Appellant.

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STATE OF WASHINGTON
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Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Is Ewing barred from raising, for the first time on appeal, prosecutorial misconduct alleged to have occurred during closing argument, when Ewing's trial counsel failed to object?
- B. Was Ewing's trial counsel ineffective for failing to object to the deputy prosecutor's comments regarding the reliability of a witness during his closing argument?
- C. Did the sentencing court fail to meaningfully consider Ewing's request to be sentenced under the special drug offender sentencing alternative?

II. STATEMENT OF THE CASE

Ewing's version of the procedural facts is adequate for purposes of this response. Except as otherwise cited in the argument below, Ewing's version of testimony of trial is adequate for purposes of responding to this appeal.

ARGUMENT

A. EWING'S FAILURE TO OBJECT TO THE PROSECUTOR'S STATEMENTS DURING CLOSING ARGUMENT PREVENTS HER FROM RAISING THE ISSUE ON APPEAL.

A claim of prosecutorial misconduct is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174

(1988). “If defense counsel fails to object to an improper remark, we will reverse only if the remark is so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.” *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.2d 553 (2009), *citing State v. Belgrade*, 110 Wn.2d at 508.

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). To prove prosecutorial misconduct, the defendant must show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003); *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). A comment is prejudicial when “there is a substantial likelihood the misconduct affected the jury's verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L.Ed.2d 322 (1998).

It is improper for a prosecutor to vouch for a witness. *State v. Ish*, 170 Wn.2d at 196. Vouching occurs when a prosecutor supports a witness's testimony with facts not in evidence or when

the prosecutor expresses their personal belief regarding the truthfulness of the witness. *Id.* (*citations omitted*). “It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” *Id.*, *citing State v. Warren*, 165 Wn.2d, 17, 30, 195 P.3d 940 (2008).

In Ewing’s case her trial counsel did not object to the deputy prosecutor’s closing argument statements that she now alleges constitute prosecutorial misconduct. Ewing’s trial counsel objected once during the deputy prosecutor’s closing argument and that was in regards to designation of a school bus stop. 4RP 226.¹

Therefore, without a showing, by Ewing, that the comments made by the deputy prosecutor were so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice, she is barred from raising this issue on appeal.

While the State does concede that the deputy prosecutor got caught up in the moment and improperly vouched for Mr. Greer, the State does not concede that his conduct was such that no curative instruction would have eliminated any resulting prejudice. 4RP 223. Ewing is asserting this case is merely a he said she said type

¹ There are numerous volumes of proceedings in Ewing’s case. They will be referred to as follows in the State’s response brief: 1RP – March 2, 2007, 2RP – June 21, 2007, 3RP – July 25, 2007, 4RP – Volume I and II of the trial transcript, 5RP - April 30, 2010 and June 24, 2010 Hearing, 6 RP – June 28, 2010 and July 1, 2010 hearings.

of scenario. Brief of Appellant 14. This is not accurate. While Mr. Greer's testimony was crucial, there was other corroborating evidence and testimony that would give a jury cause to find Ewing guilty beyond a reasonable doubt of delivery of methamphetamine. Mr. Bonagofsky's testimony was that Mr. Greer gave the money for the methamphetamine to Ewing and Mr. Bonagofsky in turn gave Mr. Greer the methamphetamine. 4RP 185, 192. Even Ewing's own testimony was that she handed Mr. Bonagofsky the money. 4RP 206-207. Ewing claimed she did not know what was going on but later testified she knew the packaged material Mr. Bonagofsky gave Mr. Greer was methamphetamine. 4RP 207, 209. Mr. Greer and Mr. Bonagofsky's testimonies are consistent with each other, both state Mr. Greer gave Ewing the money for the methamphetamine. It is highly likely the jury relied on the consistent statements of Mr. Bonagofsky and Mr. Greer in its determination of Ewing's guilt. Therefore, Ewing cannot make the requisite showing that the prosecutor's improper vouching was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. Ewing has waived raising the issue on appeal.

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B. EWING RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE TRIAL.

To prevail on an ineffective assistance of counsel claim Ewing must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Strickland v. Washington*, 466 U.S. 688, 687, 80 L. Ed. 674, 104 S. Ct. 2052 (1984). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.6666

The State concedes that Ewing's trial counsel was deficient in his performance due to his failure to object to the prosecutor's vouching statements. Therefore, the only analysis before the court is whether Ewing was prejudiced by her trial counsel. The outcome of the trial would not have been different but for trial counsel's deficient performance. As argued above, Ewing does not make the requisite showing of prejudice because the testimony elicited at trial was sufficient for a jury to find, beyond a reasonable doubt, Ewing guilty of delivery of methamphetamine.

**C. THE SENTENCING COURT MEANINGFULLY
CONSIDERED EWING'S REQUEST FOR A DOSA
SENTENCE: THEREFORE HER SENTENCE SHOULD BE
AFFIRMED.**

A DOSA sentence is a form of a standard range sentence. *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 1214 (2003). A sentence within the standard range is generally not appealable. RCW 9.94A.585(1). The trial court's decision on whether or not to grant a DOSA is ordinarily unreviewable. *State v. Bramme*, 115 Wn. App. at 850. However, denial of a DOSA may be reviewed for abuse of discretion or legal error. *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Review is limited to circumstances where the court either relied upon an impermissible basis for its refusal, such as religion, race or gender; or the court refused to

exercise its discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Although a defendant is entitled to request at sentencing that the trial court consider a sentence below the standard range, the defendant is not entitled to have such a sentence implemented. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). If a defendant is entitled to request a sentence below the standard range one could conclude that a defendant similarly has the right to request a sentencing alternative, such as a DOSA. A sentencing judge is vested with broad discretion in deciding whether or not to grant a defendant's request for a DOSA. *Id.* A categorical refusal to consider a sentencing alternative which is authorized by statute is a failure to exercise discretion. *Id.*

Ewing does meet the statutory requirements of eligibility for DOSA consideration. RCW 9.94A.660(1). CP 42-48. Ewing argues that the trial court failed to meaningfully consider whether Ewing was statutorily eligible for a DOSA sentence. Brief of Appellant 20. Ewing is citing to the requirements set for in *Grayson*. Ewing's case is easily distinguishable from *Grayson*. In *Grayson*, the trial court denied a DOSA because, "the State no longer has the money available to treat people who go through a

DOSA program”, a categorical refusal to consider a DOSA.

Grayson, 154 Wn.2d at 337 and 342. The trial court did not categorically refuse to consider a DOSA for Ewing. 6RP 12-14.

The trial court based its sentencing decision on the fact that Ewing reportedly did not have a chemical dependency problem and she had previously left the state in an attempt to avoid being sentenced on this matter. 6RP 12-14, CP 45-46, 50-51. Ewing does not seem to understand that mere statutory eligibility does not require a trial court to grant a DOSA sentence. RCW 9.94A.660. The statute states, “[i]f the sentencing court determines that the offender is eligible for an alternative sentence under this section **and that the alternative sentence is appropriate**”, then the court shall grant a DOSA sentence. RCW 9.94A.660(3) (emphasis added). Eligibility is not the sole determining factor for whether a DOSA sentence shall be granted, the trial court has broad discretion to consider whether the sentence would be appropriate. *State v. Grayson*, 154 Wn.2d at 342. The trial court did not categorically deny Ewing’s request for a DOSA sentence, rather it used its broad discretion in determining that a DOSA was not appropriate for Ewing. This was not an abuse of discretion. The

Court should affirm the trial court's decision denying Ewing a DOSA sentence.

CONCLUSION

For the foregoing reasons, this court should affirm Ewing's conviction for VUCSA – delivery of methamphetamine. The trial court denial of a DOSA sentence was proper and this court should also affirm Ewing's sentence.

RESPECTFULLY submitted this 2nd day of March, 2011.

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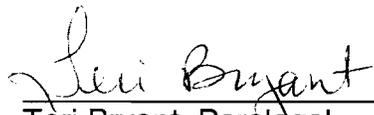
DECLARATION OF
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DATE _____
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Clerk of Court

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy
Prosecuting Attorney, declares under penalty of perjury under the
laws of the State of Washington that the following is true and
correct: On March 2, 2011, the appellant was served with
a copy of the **Respondent's Brief** by depositing same in the
United States Mail, postage pre-paid, to the attorney for Appellant
at the name and address indicated below:

Peter Tiller
PO Box 58
Centralia, WA 98531

DATED this 2nd day of 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
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