

NO. 46761-5-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRANDON K. DAHL,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Toni A. Sheldon, Judge
Cause No. 14-1-00249-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Dahl of his constitutional due process right to a fair trial.
02. The trial court erred in permitting Dahl to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's improper closing argument.
03. The trial court erred in imposing a community custody condition prohibiting Dahl from frequenting places whose primary business is the sale of liquor.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Dahl was denied his constitutional due process right to a fair trial where the prosecutor engaged in prejudicial misconduct during closing argument by vouching for his key witnesses, by disparaging defense counsel, and by arguing the jurors took an oath to figure out what's true and not true?
[Assignment of Error No. 1].
02. Whether Dahl was prejudiced as a result of his counsel's failure to object to the prosecutor's improper closing argument?
[Assignment of Error No. 2].
03. Whether the trial court acted without authority in ordering Dahl not to frequent places whose primary business is the sale of liquor?
[Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

Brandon K. Dahl was charged by first amended information filed in Mason County Superior Court September 17, 2014, with theft of a motor vehicle, count I, and obstructing a law enforcement officer, count II, in violation of RCWs 9A.56.065 and 9A.76.020. [CP 40-41].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 44]. Trial to a jury commenced September 17, the Honorable Toni A. Sheldon presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 171-72]. Dahl was found guilty, sentenced as a first-time offender, and timely notice of this appeal followed. [CP 2-19].

02. Substantive Facts

In the late afternoon of June 4, 2014, the police received a report of a stolen vehicle belonging to Rachael Bachtell that had been taken from the residence of Allison Clark [RP 24, 41, 42, 52, 100-01], where Dahl had been minutes earlier. [RP 22]. Bachtell had not given Dahl permission to use her car. [RP 64]. When taken into custody, Dahl claimed he had been given permission to use the car by Clark, who denied this assertion, [RP 34, 103-04, 120-21], and that after spotting a police car

he had pulled into a driveway in an attempt to hide. [RP 109]. A cell phone found in the vehicle belonged to Dahl. [RP 65, 122].

At trial, Dahl testified that Clark had given him permission to use the car [RP 129, 141] and that he had never told the police he was trying to avoid them, though he did admit to seeing a police car from an estimated distance of 500 yards while driving the alleged stolen vehicle. [RP 132, 133, 144, 146].

D. ARGUMENT

01. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT BY VOUCHING FOR HIS KEY WITNESSES, BY DISPARAGING DEFENSE COUNSEL, AND BY ARGUING THE JURORS TOOK AN OATH TO FIGURE OUT WHAT'S TRUE AND NOT TRUE.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer whose duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where it is established that the prosecutor made improper comments, this court reviews whether those improper statements prejudiced the defendant under various standards of review. State v. Emery, 174 Wn.2d 742, 7761, 278 P.3d 653 (2012).

A criminal defendant's right to a fair trial is denied where there is an unsuccessful objection to the prosecutor's improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct 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 State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

However, where the State's misconduct violates a defendant's constitutional rights, this court analyzes the prejudice under a different standard: the stringent constitutional harmless error standard. State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996). Under this standard, this court presumes constitutional errors are harmful and must reverse unless the State meets the heavy burden of overcoming the

presumption that the error is prejudicial, Id. at 242, which requires proof that the untainted evidence overwhelmingly supports a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

01.1 Vouching

It is misconduct for a prosecutor to vouch for the credibility of a State's witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016, 245 P.3d 772 (2011). "And it is generally improper for prosecutors to bolster a police witness's good character even if the record supports such an argument." State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008);

See State v. Smith, 67 Wn. App. 838, 844, 841 P.2d 76 (1992)

(acknowledging that prosecutors should not bolster a police witness's good character and citing cases from other jurisdictions in accord); State v. Allen, 161 Wn. App. 727, 746, 255 P.3d 784 (2011), affd, 176 Wn.2d 611, 294 P.3d 679 (2013) (improper for prosecutor to place prestige of the government in support of witness).

During closing argument, without objection, the prosecutor improperly vouched for his police witnesses:

He (Dahl) denied that he said these things to the Officers. What motive can you possibly imagine the officers making these up? There is no - - there is no reason for them to do that. Absolutely not one shared of reason anywhere for them to make this up. What motive does he (Dahl) have? Well, we can figure that out?

[RP 171].

The police testified that Dahl admitted he had hidden from them after spotting a patrol vehicle, and that he didn't know when he was going to return the vehicle he said he had borrowed, claims that Dahl denied.

[RP 109, 113, 121 133]. The prosecutor improperly vouched for and relied upon the good character of the officers to bolster their credibility, rather than properly arguing inferences from the evidence. See State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).

He impermissibly argued that his key witnesses, police officers, were

without bias and thus inherently more reliable than Dahl. Such flagrant and ill-intentioned misconduct requires reversal of Dahl's convictions.

01.2 Disparaging Defense Counsel

A prosecutor may not impugn the integrity of defense counsel State v. Warren, 165 Wn.2d 17, 29-30, 195 P.2d 902 (2008). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014) (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam)).

During closing, while discussing various witnesses, defense counsel argued:

None of us really know what the dynamic is between all of these people. But it's clear enough that there's something going on. When one person characterizes another as a fiancée, and the other person characterizes one as a baby daddy.

[RP 192].

During rebuttal, over objection, the prosecutor focused on this:

You know, making comments like the credibility of the – the witnesses and saying that one says fiancée and one says baby daddy, frankly, that's kind of offensive....

[RP 196].

The prosecutor's argument suggested that defense's closing argument was dishonorable and disgraceful, something that should be considered to be complete nonsense, much like referring to defense's argument as a "crook," which does constitute misconduct. State v. Lindsay, 180 Wn.2d 433-34.

The prosecutor's comment was as improper as it was irrelevant, serving no other purpose than to improperly cast aspersions on defense counsel. It had nothing to do with the case, other than to interfere with the jury's unbiased consideration of the evidence and supporting arguments, thereby creating a substantial likelihood that it affected the jury's verdict.

01.3 Search for Truth

It is also misconduct to argue that the jury's role is to search for the truth or to declare the truth. State v. Emery, 174 Wn.2d at 760. During closing, the prosecutor did just that, arguing that each juror took an oath to do his or her duty to decide the case, which included "figur(ing) out what's true and not true...." [RP 1781]. This was improper for "(t)he jury's job is not to determine the truth of what happened.... Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Id.

Dahl's defense was that he hadn't committed the offenses, testifying that he had permission to use the vehicle and didn't later try to

avoid the police. Whether the State proved to the contrary was the sole issue. And it is on this point that the prosecutor's flagrant and ill-intentioned misconduct requires reversal of Dahl's convictions.

01.4 Cumulative Effect of Misconduct

Based on this record, reversal is required, for not only is there a substantial likelihood that the prosecutor's comments affected the jury's verdict, the comments were nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, for they were "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). In deciding whether the conduct warrants reversal, this court considers its prejudicial nature and its cumulative effect. State v. Boehning, 127 Wn. App. at 518.

Not only did the prosecutor vouch for the credibility of his key witnesses, his misconduct disparaged defense counsel and misstated the jury's role in deciding the case. The cumulative effect requires reversal and remand.

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02. DAHL WAS PREJUDICED AS A
RESULT OF HIS COUNSEL'S FAILURE
TO PROPERLY OBJECT TO THE
PROSECUTOR'S CLOSING ARGUMENT.¹

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

¹ While it has been argued in the preceding section that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

While the invited error doctrine precludes review of any error initiated by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court determine that counsel waived the issue by failing to properly object to the prosecutor's closing argument as set forth in the preceding section, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel failed to object to the prosecutor's closing argument for the reasons previously argued. Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in

the outcome.” Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident for the reasons set forth in the preceding section.

Counsel’s performance was deficient because he failed to properly object to the prosecutor’s numerous instances of misconduct during closing argument for the reasons previously argued, which was highly prejudicial to Dahl, with the result that he was deprived of his constitutional right to effective assistance of counsel and is entitled to reversal of his convictions and remand for retrial.

03. THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING DAHL NOT TO FREQUENT PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF LIQUOR.

As a condition of community custody, the court ordered that Dahl:

... shall not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor;

[CP 14].

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). This court reviews whether a trial court had statutory authority to impose

community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

There was no evidence at trial that alcohol played any part in Dahl's crimes. In State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), the defendant pleaded guilty to several offenses and the court imposed conditions of community custody relating to alcohol consumption and treatment. As here, nothing in the record indicated that alcohol contributed to Jones's offenses. Id. at 207-08. This court found that although the trial court had authority to prohibit consumption of alcohol, it did not have the authority to order the defendant "to participate in alcohol counseling(,)" Id. at 208, reasoning that the legislature intended a trial court to be able "to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." Id. at 206. In contrast, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. Id. at 207-08; see also State v. McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (community custody provisions prohibiting purchasing and possession of alcohol invalid where alcohol did not play a role in the crime), reviewed denied, 163 Wn.2d 1049 (2008). And while RCW 9.94A.703(3)(e), authorizes the sentencing court to order that an offender refrain from consuming alcohol, there is no such authority forbidding an offender from frequenting places whose primary

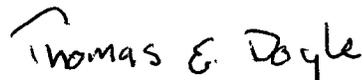
business is the sale of liquor, sans any evidence and argument that it qualifies as a crime-related prohibition under RCW 9.94A.703, which constitutes “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...” RCW 9.94A.030(10).

The condition prohibiting Dahl from frequenting places selling liquor is invalid because there was no evidence that alcohol played any part in his offense, with the result that it is not a crime-related prohibition and must be stricken.

E. CONCLUSION

Based on the above, Dahl respectfully requests this court to reverse his convictions and to remand for retrial or resentencing consistent with the arguments presented herein.

DATED this 27th day of February 2015.



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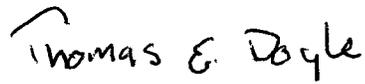
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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