

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

No. 47932-0-II
COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

Skamania County Superior Court nos.
15-1-00001-1

STATE OF WASHINGTON,
Respondent

vs.

RICHARD BARNES,
Appellant

BRIEF OF RESPONDENT

Adam N. Kick, WSBA# 27525
Prosecuting Attorney for Respondent
Skamania County Prosecuting Attorney's Office
P.O. Box 790
Stevenson, Washington 98648
509-427-3790

TABLE OF CONTENTS

Page

I. FACTS 1

II. APPELLANT’S ASSIGNMENT OF ERROR 2

III. RESPONSE TO APPELLANT’S CLAIMS. 3

IV. ARGUMENT. 4

V. CONCLUSION. 14

TABLE OF AUTHORITIES

a. TABLE OF CASES

State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006) 4, 5

State v. Stith, 71 Wn.App. 14, 856 P.2d 415 (1993) 4

State v. Millante, 80 Wn.App. 237, 908 P.2d 374 (1995) 5

State v. Armstrong, 37 Wash. 51, 79 P. 490 (1905) 5

State v. Papadopoulos, 34 Wash.App. 397, 400, 662 P.2d 59 (1983) 5

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d.674 (1984) 8

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009) 8, 9

State v. Stanten, 60 Wn.App. 163, 802 P.2d 1384 (1991) 8

State v. McFarland, 127 Wn2d 322, 889 P.2d 1251 (1995) 9

State v. Neff, 163 wn. 2d 453, 181 P.3d 819 (2008) 9

State v. Kinard, 39 Wn.App. 871, 696 P.2d 603 (1985) 10, 11

State v. Hardy, 76 wn.app. 188, 884 P2d 8 (1994) 10

State v. Clark, 129 wn.2d 211, 916 p.2d 384 (1996) 11

State v. Black, 109 wn.2d 336, 745 P.2d 12 (1987) 11

City of Seattle v. Heatley, 70 wn.App. 573, 854 P.2d 658 (1993) 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

State v. Curry, 118 Wash.2d 911, 829 P.2d 166 (1992)

..... 12, 13

b. TABLE OF STATUES/RULES

ER 701 10

ER 704 11

RCW 10.01.160(4).....13

RCW 10.01.160(4).....13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

STATE'S RESPONSE TO
APPELLANT'S CLAIMS

SKAMANIA COUNTY PROSECUTOR
P O Box 790
240 NW Vancouver Avenue
Stevenson, WA 98648-0790
(509) 427-3796

I. FACTS

On December 31, 2014 Deputy Summer Scheyer and Deputy Jeremy Schultz, of the Skamania County Sheriff's Office, were dispatched to a Domestic Disturbance in North Bonneville, Washington located in Skamania County. Verbatim Record of Proceedings (VRP) 08/10/2015 page 20 and 33. Deputy Scheyer spoke to a witness on scene and developed probable cause for arrest of the appellant. VRP 08/10/2015 page 20-21 and 23. Deputy Schultz and Deputy Scheyer next went to a trailer where the appellant was located and Deputy Schultz knocked on the door. VRP 08/10/2015 page 34. The Appellant opened the door with a phone in his hand and with his other hand out of view of the Deputies. VRP 08/10/2015 page 21. Deputy Schultz asked to speak to the appellant and the appellant responded that he had done anything and didn't want to talk to the Deputies. VRP 08/10/2015 page 34 and 49. The appellant then turned to go back into the trailer and was seized by the Deputies and arrested based upon the probable cause for arrest developed by Deputy Scheyer. VRP 08/10/2015 23 and 34. The Appellant's demeanor during the contact was belligerent, elevated, and intoxicated. The appellant yelled multiple obscenities while being arrested. VRP 08/10/2015 page 34. The Deputies escorted the appellant, in-custody at this point, 30-50 feet to Deputy Schultz's patrol vehicle, a Chevy Tahoe, and proceeded to place the appellant in the vehicle. Deputy Schultz instructed the appellant to get in the vehicle and the appellant indicated he was not willing to get in. VRP 08/10/2015 page 36. Next Deputy Schultz physically began placing the appellant in his patrol vehicle. VRP 08/10/2015 page 37. After placing the

1 appellant's upper body into the vehicle Deputy Schultz bent down to lift the
2 appellant's legs into the vehicle. VPR 08/10/2015 page 37. After lifting the
3 appellant's legs into the vehicle Deputy Schultz attempted to "scoot" the
4 appellant into the vehicle at that point the appellant started to kick his legs and
5 struck Deputy Schultz in the face five different times. VPR 08/10/2015 page
6 38. Deputy Schultz instructed the appellant to stop kicking and eventually
7 pulled his taser from his holster and advised the appellant that if he did not stop
8 kicking he would be tased. VPR 08/10/2015 page 38. The appellant initially
9 responded by kicking at Deputy Schultz taser. VPR 08/10/2015 page 28.
10 Deputy Schultz eventually secured the appellant in his vehicle and transported
11 him to the Skamania county jail for booking. VPR 08/10/2015 page 39.
12 During the transport to the jail the appellant continued to be belligerent and
13 called Deputy Schultz a "fucking pussy", stated that he was "not afraid" of the
14 Deputy. VPR 08/10/2015 page 39. After Deputy Schultz got the appellant to
15 jail for booking the appellant stated that he was not afraid of Deputy Schultz
16 and that find the Deputy and rip his head off. VPR 08/10/2015 page 40. The
17 appellant was booked into jail and the contact was concluded.

18 **II. APPELLANT'S ASSIGNMENT OF ERROR**

- 19 1. The Prosecutor Committed Acts of Prosecutorial Misconduct Which
20 Deprived the Appellant of a Fair Trial by:
21 A. Giving personal opinion on the testimony;
22 B. Misrepresenting the role of the Jury;
23 C. Commenting on the Defendant's right to remain silent; and

- 1
2
3
4
5
6
7
8
9
10
11
- D. The Prosecutor's comments were flagrant and ill-intentioned.
2. The Defendant Was Denied a Fair Trial Due to the Ineffective Assistance of Counsel by:
- A. Failing to seek exclusion of evidence of the domestic violence allegations; and
 - B. Failing to object the Prosecutor's remarks.
3. Sheriff Deputy Scheyer improperly commented on the ultimate question of fact invading the province of the Jury.
4. The legal financial obligations Ordered are improper.

12
13
14
15
16
17
18
19
20
21
22
23
24

III. RESPONSE TO APPELLANT'S CLAIMS

1. The prosecutor's argument during the case was proper as follows:
- A. Any opinion as to guilt or innocence was based upon reasoning from the evidence;
 - B. the representation that the jury decides what facts apply to decide if the elements are met is an accurate representation of the role of the finder of fact; and
 - C. Testimony elicited regarding the appellant's unwillingness to talk to law enforcement was not in regard to an invocation of rights but represented a dismissive and belligerent demeanor of the appellant at the time of contact.
2. The appellant received effective representation of counsel by:
- A. Counsel did seek exclusion of evidence relating to the Domestic Violence Allegations; and

B. Counsel correctly did not object to the States remarks.

3. Deputy Scheyer's statement in regard to the assault was an appropriate description of what she observed and was testified to in greater detail and clarity as to what constituted what she indicated was an assault.
4. The court asked questions of the defendant and received responses which supports the order of legal financial obligations.

IV. ARGUMENT

1. The Prosecutor's Arguments During Trial Were Proper

A. Opinions on Guilt or Innocence and Comments on the Evidence

A defendant claiming prosecutorial misconduct must establish both an improper comment and the resulting prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments "calculated to appeal to the jury's passion and prejudice and encourage it to render a verdict on facts not in evidence are improper." *State v. Stith*, 71 Wn.App. 14, 18, 856 P.2d 415 (1993). The court should consider the alleged comment in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *McKenzie*, 157 Wn.2d at 52. Comments may be deemed prejudicial solely if "there is a substantial likelihood misconduct affected the jury's verdict." *Id.* "In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing

1 inferences based on evidence in the record." State v. Millante, 80 Wn.App.
2 237, 251, 908 P.2d 374 (1995). While it is improper for a prosecuting
3 attorney, in argument, to express his individual opinion that the accused is guilty,
4 independent of the testimony in the case, he may nevertheless argue from the
5 testimony that the accused is guilty, and that the testimony convinces him of that
6 fact. There is a distinction between the individual opinion of the prosecuting
7 attorney, as an independent fact, and an opinion based upon or deduced from
8 the testimony in the case. State v. Armstrong, 37 Wash. 51, 54-55, 79 P. 490
9 (1905). It is not uncommon for statements to be made in final arguments
10 which, standing alone, sound like an expression of personal opinion. However,
11 when judged in the light of the total argument, the issues in the case, the
12 evidence discussed during the argument, and the court's instructions, it is usually
13 apparent that counsel is trying to convince the jury of certain ultimate facts and
14 conclusions to be drawn from the evidence. Prejudicial error does not occur
15 until such time as it is clear and unmistakable that counsel is not arguing an
16 inference from the evidence, but is expressing a personal opinion. State v.
17 Papadopoulos, 34 Wash.App. 397, 400, 662 P.2d 59 (emphasis added),
18 review denied, 100 Wash.2d 1003 (1983).

19 Failure to object to an improper comment waives the error unless the
20 comment is so flagrant and ill-intentioned that it causes an enduring and resulting
21 prejudice that could not have been neutralized by a curative instruction.
22 McKenzie, 157 Wn.2d at 52.

23 Here, the appellant alleges the prosecutor commented on the evidence
24 and inserted his personal opinion of guilt and did so without arguing an

1 inference from the evidence. The first statement referred to by the appellant is
2 during the State's closing argument where the prosecutor states "I don't think
3 you have to be unduly sensitive to find it offensive being kicked in the face five
4 times while doing your job. The states argument here goes to the definition of
5 assault, as provided by the court, which provides that an assault is an unlawful
6 touching or striking which is harmful or offensive, and that a touching or striking
7 is offensive if it would offend an ordinary person who is not unduly sensitive.
8 VRP 08/11/2015 page 78-79. This element of the crime was counter posed
9 with the testimony that Deputy Schultz was kicked in the face five times. Due
10 to the lack of testimony of any long term harm the offensive component of the
11 definition needed to be addressed and the unduly sensitive exception
12 addressed. Counsels argument was based upon the evidence as testified to.

13 Appellant next brings issue with the statement of the prosecutor at
14 closing in the VPR 08/11/2015 page 92 lines 14-16. The totality of the
15 statement however is encapsulated in the paragraph ID lines 12-19 which state:

16 **Ladies and gentleman, I believe if you look at all the facts, you'll**
17 **find that you can develop an abiding belief on the charge. I think you**
18 **can find beyond a reasonable doubt there was an assault of a law**
19 **enforcement officer carrying out his duty and, if you do find that all the**
20 **elements are met beyond a reasonable doubt, ladies and gentlemen, you**
21 **have a duty to return a verdict of guilty. Thank you.**

22 The states argument is made at closing on rebuttal, and are the last
23 words after summarizing the case. The argument consists of a reiteration of the
24 burden of proof and the elements of the charge, and is a final charge to the Jury

1 carry out the jury's duty if they find the elements met beyond a reasonable
2 doubt. The argument of counsel is appropriate and does not comment on
3 personal opinion with referencing the evidence presented at trial.

4 **B. Misrepresentation of the Role of the Jury.**

5 Appellant next takes issue with the State's argument at closing as cited
6 at VRP 08/11/2015 page 82 and quoted as "deciding what occurred". Again
7 to put the argument in context a review of the State's argument starting in the
8 VPR 08/11/2015 page 80 line 22 and continuing through the beginning of page
9 83. The state is going through an analysis of the elements of the crime and the
10 testimony provided. The appellant introduced testimony that the kicks were
11 unintentional. VPR 08/10/2016 page 52. The State was properly arguing the
12 evidence presented and the duty of the jury in being the sole judge of weight
13 and credibility.

14 **C. Improper Comment on the Appellant's Right to Remain
15 Silent.**

16 Appellant argues that the state improperly commented on the
17 appellant's right to remain silent referring to testimony that the appellant at time
18 of contact indicated that he did not want to speak to law enforcement and
19 turned away from the deputies when initially contacted. VPR 08/10/2015 page
20 34 and 49. The appellant was not invoking any right to remain silent and in fact
21 was making a statement to law enforcement when refusing to come out of his
22 trailer to speak with them. The appellant testified that he refused to step
23 outside of his trailer and he did so because there was nothing to talk about and
24 then turn to go further into the trailer. VPR 08/10/2015 page 49 and 54. This

1 testimony does not comment on the appellant's right to remain silent, in fact it is
2 to the appellant's comments that are testified to, and those comments give a
3 picture of the defendant's demeanor at the time of contact. The testimony was
4 properly elicited and testified to.

5 **D. The Prosecution's Misconduct Was Flagrant and Ill-**
6 **intentioned**

7 All of the appellant's allegations of misconduct were not preserved by
8 objection from counsel. As outlined above the state respectfully submits that
9 the argument from the state was not improper and therefore the lack of
10 objection was proper. Beyond that position, if the argument is found to have
11 been improper the issue has not been preserved, as the arguments which the
12 appellant assigns as being in error were still based upon proper argument if in-
13 artfully put forward and were not flagrant nor ill-intentioned.

14 2. Defendant Was Afforded Effective Assistance of Counsel.

15 **A. Exclusion of Domestic Violence Allegations.**

16 A defendant possesses the right to effective assistance of counsel in
17 criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104
18 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The appellant must show that (1)
19 defense counsel's representation was deficient, falling below an objective
20 standard of reasonableness, and (2) the deficient performance prejudiced the
21 defendant. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). If
22 one prong fails, the court need not address the other prong. State v. Staten, 60
23 Wn.App. 163, 171, 802 P.2d 1384 (1991). The must presume counsel was
24 effective. State v. McFarland, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995).

1 Further, the appellant must show no legitimate strategic or tactical reason exists
2 for his trial counsel's actions. Sutherby, 165 Wn.2d at 883. Prejudice exists if
3 by a reasonable probability the outcome would be different "but for counsel's
4 unprofessional errors." State v. Neff, 163 Wn.2d 453, 466, 181 P.3d 819
5 (2008).

6 Here, appellant claims that counsel failed to seek exclusion of the
7 domestic violence allegations. During the hearing on motions in limine defense
8 counsel sought exclusion of any statements provided by the alleged victim of the
9 Domestic Violence and the further was able to secure an order from the court
10 that the prosecution would be limited and would need to be very cautious in
11 regard to testimony regarding the Domestic Violence allegations. VRP
12 07/30/2015 pages 4-8.

13 ER 404(b) does exclude evidence of other bad acts to prove
14 conformance there with in the current alleged violation. However, the evidence
15 of other bad acts may be introduced for other purposes. Here the court ruled
16 that the reason for the officer's being on scene could be testified to as a
17 foundational issue. VRP 07/30/2015 page 5. Additionally, an element of the
18 crime of Assault in the Third Degree under this fact pattern was that the law
19 enforcement officer was carrying out their duties at the time of the assault. The
20 state sought to introduce that the Deputies had developed probable cause for
21 the arrest of the appellant at th time of the contact and were carrying out the
22 duty of that arrest when the assault occurred. Deputy Scheyer did refer both to
23 Domestic Violence and specifically Assault in the Fourth Degree Domestic
24 Violence as the basis of arrest during her testimony. VPR 08/10/2015 page

1
2
3
4
5
6
7
8
9
23. In her testimony Deputy Scheyer indicated that she took the appellant arm to arrest him for Domestic Violence charges when effectuating the arrest an that she informed him that he was under arrest for Assault in the Fourth Degree Domestic Violence. The purpose of this testimony was to show the officers were working within there capacity as law enforcement at the time of the alleged Assault in the Third Degree and was properly before the Jury. Counsel properly did not object to the testimony and further in doing so would have brought more attention to the foundational testimony as why the Deputies were at the location.

10
11
C. Counsel's Lack of Objection to the States Argument at Closing

12
13
14
The Appellant brings issue to defense counsel's lack of objection to the State's arguments at closing as listed above. Again the State asserts that the argument was proper and lack of objection was correct under the law.

15
16
3. Deputy Scheyer Improperly commented on the ultimate Question of Fact.

17
18
19
20
21
22
23
ER 701 limits lay opinion to that which is "rationally based on the perception of the witness [and is] helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." The trial court has "wide discretion" under ER 701. State v. Kinard, 39 Wn.App. 871, 874, 696 P.2d 603 (1985). "[T]he rule obviously gives the trial court an abundance of discretion" and courts have upheld lay opinions about a person's identity.[2] 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice § 701.4, at 9 (5th ed. 2007); State v. Hardy, 76 Wn.App. 188, 190, 884 P.2d 8 (1994), aff'd and remanded by State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996);

Kinard, 39 Wn.App. at 874.

ER 704 provides that "[t]estimony in the form of an opinion or inferences otherwise admissible[3] is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Generally, a witness may not opine about a defendant's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). But "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." City of Seattle v. Heatley, 70 Wn.App. 573, 578, 854 P.2d 658 (1993). "[A]n eyewitness who saw the defendant commit the crime in question can so testify, and even circumstantial evidence of guilt . . . is usually admissible[;] . . ." 5B Teglend, § 704.6, at 268.

Here, Deputy Scheyer referred to the incident that constituted the crime as an assault. The State followed the assertion by Deputy Scheyer with a question as to what it was she saw that she branded an assault. Deputy Scheyer testified that what she observed was the appellant rear back and kick Deputy Schultz in the Face. VRP 08/10/2015 page 26. Deputy Scheyer shared her observations and opinion on what she saw commensurate with ER 701 and ER 704 Deputy Scheyer's statements were appropriately before the jury.

4. The Legal Financial Obligation Ordered by the Court Are Appropriate.

The legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing mandatory legal financial obligations.

For victim restitution, victim assessments, DNA fees, and criminal filing fees,

1 the legislature has directed expressly that a defendant's ability to pay should not
2 be taken into account. See, e.g., State v. Kuster, No. 30548-1-III, 2013 WL
3 3498241 (Wash.Ct.App., July 11, 2013). And our courts have held that these
4 mandatory obligations are constitutional so long as " there are sufficient
5 safeguards in the current sentencing scheme to prevent imprisonment of indigent
6 defendants." State v. Curry, 118 Wash.2d 911, 918, 829 P.2d 166 (1992)
7 (emphasis added).

8 Unlike mandatory obligations, if a court intends on imposing
9 discretionary legal financial obligations as a sentencing condition, such as court
10 costs and fees, it must consider the defendant's present or likely future ability to
11 pay. As the Washington Supreme Court explained in Curry, the " salient
12 features of a constitutionally permissible costs and fees structure" must meet the
13 following requirements:

- 14 1. Repayment must not be mandatory;
- 15 2. Repayment may be imposed only on convicted defendants;
- 16 3. Repayment may only be ordered if the defendant is or will be able to pay;
- 17 4. The financial resources of the defendant must be taken into account;
- 18 5. A repayment obligation may not be imposed if it appears there is no
19 likelihood the defendant's indigency will end;
- 20 6. The convicted person must be permitted to petition the court for remission of
21 the payment of costs or any unpaid portion;
- 22 7. The convicted person cannot be held in contempt for failure to repay if the
23 default was not attributable to an intentional refusal to obey the court order or a
24 failure to make a good faith effort to make repayment. State v. Curry 118

1 Wash.2d at 915-16, 829 P.2d 166.

2 RCW 10.01.160, the statute codifying Washington's court costs and
3 fee structure, meets the Curry requirements. RCW 10.01.160(3) provides that
4 [t]he court shall not order a defendant to pay costs unless the defendant is or
5 will be able to pay them. In determining the amount and method of payment of
6 costs, the court shall take account of the financial resources of the defendant
7 and the nature of the burden that payment of costs will impose.
8 And RCW 10.01.160(4) allows the trial court to modify the monetary portion
9 of a sentence and reduce the costs imposed when payment will impose a
10 manifest hardship on the defendant or his family.[5] Thus, unlike other portions
11 of the judgment and sentence, these discretionary legal financial obligations are
12 subject to revision and are not final.

13 Here, the court asked the defendant specifically if he could pay \$50.00
14 a month toward the legal financial obligations and the appellant responded that
15 he had work waiting for him upon completion of his time in-custody and could
16 pay the ordered legal financial obligations. VRP 08/13/2015 page 6. Further,
17 defense counsel argued for an alternate confinement scenario so the appellant
18 could continue his employment opportunities. VRP 08/13/2015 page 3. All of
19 this preserves a basis for the court to find that the defendant has the present
20 and future ability to pay the legal financial obligations.

21 ///

22 ///

23 ///

24 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

V. CONCLUSION

The State respectfully submits that for the above reasons the appellants motion to reverse the conviction should be denied and the legal financial obligation in the this matter be found proper.

RESPECTFULLY SUBMITTED this 29th day of MARCH 2016.



DANIEL C. MCGILL, WSBA# 39129
Skamania County Deputy Prosecuting Attorney

SKAMANIA COUNTY PROSECUTOR

March 29, 2016 - 4:19 PM

Transmittal Letter

Document Uploaded: 5-479320-Respondent's Brief.pdf

Case Name: State of Washington vs. Richard Barnes

Court of Appeals Case Number: 47932-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lynda T Richart - Email: richart@co.skamania.wa.us

A copy of this document has been emailed to the following addresses:

mcgill@co.skamania.wa.us
backlundmistry@gmail.com