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STATE OF WASHINGTON
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No. 34698-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Frank C. Mendoza,

Appellant.

Grays Harbor Superior Court

Cause No. 05-1-00722-5

The Honorable Judge Gordon Godfrey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The prosecuting attorney committed misconduct by eliciting information about Mr. Mendoza's prior arrests, unrelated offenses, and contacts with law enforcement.

2. Mr. Mendoza was denied the effective assistance of counsel by his attorney's failure to object to testimony about his prior arrests, unrelated offenses, and contacts with law enforcement.

3. Mr. Mendoza was denied the effective assistance of counsel when his attorney inadvertently elicited the fact that he was required to register his address with law enforcement.

4. Mr. Mendoza was denied the effective assistance of counsel when his attorney inadvertently elicited the fact that he had failed to register his address with law enforcement, and thus was committing another crime on the date of the charged offense.

5. The trial court erred by failing to properly determine Mr. Mendoza's criminal history.

6. The trial court erred by failing to properly determine Mr. Mendoza's offender score.

7. The trial court erred by adopting Finding No. 2.2, which purported to list Mr. Mendoza's criminal history as follows:

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J	TYPE OF CRIME
Child Molestation 1		Jefferson 96-8-23-1	12/15/95	J	Felony
Child Molestation 1		Clallam 96-8-223-7	3/4/96	J	Felony
Intimidating a Witness		Clallam 98-8-505-4	12/4/98	J	Felony

Failure to Register		Clallam 00-8-35-3		J	Felony
Malicious Mischief 2		Clallam 00-1-182-6	5/27/00	A	Felony
Failure to Register		01-1-390-1	6/9/00	A	Felony
Failure to Register		02-1-164-8		A	Felony
Failure to Register		02-1-461-2		A	Felony
Failure to Register		03-1-257-0		A	Felony
Failure to Register		05-1-471-4		A	Felony
Failure to Register		00-1-212-1		A	Felony
Possess. Marijuana		Aberdeen Municipal	2002		
Poss. Drug Para.		Aberdeen Municipal	2002		
Obstructing		Aberdeen Municipal	2004		
Unlawful Display of a Weapon		Aberdeen Municipal	2004		
False Reporting		Aberdeen Municipal	2003		
False Reporting		Aberdeen Municipal	2005		
Obstructing		Aberdeen Municipal	2005		

Assault 4		GHC District Court I	2002		
Coercion		GHC District Court I	2002		
False Reporting		Aberdeen Municipal	2002		
Resisting Arrest		Aberdeen Municipal	2002		
Obstructing		Aberdeen Municipal	2001		

CP 5.

8. The trial court erred by adopting Finding of Fact No. 2.3, which reads as follows:

Count No.	Offender Score	Seriousness Level	Plus Enhance-ments*	Total Standard Range (including enhancements)	Maximum Term
1	9	IV		63 to 84 months	10 yrs/$20,000 fine
2	9	III		51 to 60 months	5 years/$10,000 fine

CP 6.

9. The trial court erred by sentencing Mr. Mendoza with an offender score of 9.

10. The trial court erred by sentencing Mr. Mendoza to 84 months confinement.

11. The trial court violated Mr. Mendoza's constitutional right to a jury trial by finding that he had criminal history without submitting the issue to a jury or obtaining a waiver of the right to a jury trial.

12. The trial court erred by using a preponderance of the evidence standard in determining that Mr. Mendoza had criminal history.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Frank Mendoza was charged with Robbery in the Second Degree and Kidnapping. During trial, the prosecuting attorney elicited testimony that Mr. Mendoza had been arrested before, was wanted for an unrelated crime at the time of his arrest, and was well-known to members of the Aberdeen Police Department. Defense counsel did not object to the testimony.

On cross-examination, defense counsel inadvertently elicited testimony that Mr. Mendoza was required to register his address with the police, and that he was guilty of failing to register (as of the day of the robbery). Defense counsel did not seek a curative instruction for this testimony. Mr. Mendoza's attorney also elicited testimony regarding prior contacts between Mr. Mendoza and law enforcement.

1. Did the prosecuting attorney commit misconduct that was flagrant and ill-intentioned? Assignment of Error No. 1.

2. Was Mr. Mendoza denied the effective assistance of counsel when his attorney failed to object to inadmissible evidence? Assignment of Error Nos. 1, 2, 3, 4.

3. Was Mr. Mendoza denied the effective assistance of counsel when his attorney inadvertently elicited testimony that he was required to register his address with law enforcement? Assignment of Error Nos. 1, 2, 3, 4.

4. Was Mr. Mendoza denied the effective assistance of counsel when his attorney didn't request a curative instruction about his failure to register? Assignment of Error Nos. 1, 2, 3, 4.

No evidence was presented during the trial or at sentencing to establish that Mr. Mendoza had any criminal history. Despite this, the trial court found that Mr. Mendoza had 7 adult felonies and 4 prior juvenile felonies, apparently using a preponderance standard. Mr. Mendoza was sentenced with an offender score of 9. The record does not indicate how the court arrived at this result.

5. Is the trial court's finding of criminal history based on insufficient evidence? Assignments of Error Nos. 5, 6, 7, 8, 9, 10, 12.

6. Did the trial court err by sentencing Mr. Mendoza with an offender score of 9? Assignments of Error Nos. 5, 6, 7, 8, 9, 10, 12.

7. Did the sentencing court's finding that Mr. Mendoza had criminal history violate his constitutional right to a jury determination of all facts used to increase his sentence? Assignments of Error No. 11.

8. Did the sentencing court's decision finding criminal history by a preponderance of the evidence violate Mr. Mendoza's constitutional right to proof beyond a reasonable doubt of all facts used to increase his sentence? Assignments of Error Nos. 5, 6, 7, 8, 9, 10, 12.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Frank Mendoza was charged by Information with Robbery in the Second Degree and Kidnapping in the Second Degree for an incident said to have occurred on August 7, 2005 in Aberdeen. CP 1-3.

At trial, Aberdeen Police Officer Timmons testified that there was probable cause to arrest Mr. Mendoza for an unrelated charge on August 7, 2005. RP (4/4/06) 103. Aberdeen Police Lieutenant Darst testified that he used a booking photo from a previous arrest to create a photomontage that included Mr. Mendoza. RP (4/4/06) 109. Corporal King (of the Aberdeen Police Department) testified that he was familiar with Mr. Mendoza because he'd had "several prior contacts" with him. RP (4/4/06) 111. Detective Kelly (of the Aberdeen Police Department) testified that he was "acquainted with the defendant prior to August 7th..." RP (4/4/06) 133. Defense counsel did not object nor request any curative or limiting instructions relating to this testimony. RP (4/4/06) 103-146.

On cross-examination, defense counsel brought out that Mr. Mendoza had been in the jail, was known by corrections staff and was segregated from others at times. RP (4/4/06) 58-59. The defense also inadvertently elicited the fact that Mr. Mendoza was required to register his address with law enforcement, had failed to do so, and was committing

the crime of Failure To Register on the date of the incident. RP (4/5/06) 147. No curative instruction was sought.

Mr. Mendoza was convicted of Robbery in the Second Degree and Unlawful Imprisonment. CP 4-11. At sentencing, the court found that the defendant had the following criminal history:

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J	TYPE OF CRIME
Child Molestation 1		Jefferson 96-8-23-1	12/15/95	J	Felony
Child Molestation 1		Clallam 96-8-223-7	3/4/96	J	Felony
Intimidating a Witness		Clallam 98-8-505-4	12/4/98	J	Felony
Failure to Register		Clallam 00-8-35-3		J	Felony
Malicious Mischief 2		Clallam 00-1-182-6	5/27/00	A	Felony
Failure to Register		01-1-390-1	6/9/00	A	Felony
Failure to Register		02-1-164-8		A	Felony
Failure to Register		02-1-461-2		A	Felony
Failure to Register		03-1-257-0		A	Felony
Failure to Register		05-1-471-4		A	Felony

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Possess. Marijuana		Aberdeen Municipal	2002		
Poss. Drug Para.		Aberdeen Municipal	2002		
Obstructing		Aberdeen Municipal	2004		
Unlawful Display of a Weapon		Aberdeen Municipal	2004		
False Reporting		Aberdeen Municipal	2003		
False Reporting		Aberdeen Municipal	2005		
Obstructing		Aberdeen Municipal	2005		
Assault 4		GHC District Court I	2002		
Coercion		GHC District Court I	2002		
False Reporting		Aberdeen Municipal	2002		
Resisting Arrest		Aberdeen Municipal	2002		
Obstructing		Aberdeen Municipal	2001		

CP 5.

The prosecution did not introduce any evidence supporting this finding of criminal history. Mr. Mendoza was sentenced to 84 months in prison. RP (4/17/06) 4-12. This timely appeal followed. CP 13-23.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

A prosecutor has a duty to act impartially and in the interest of justice. *State v. Rivers*, 96 Wn.App. 672 at 675, 981 P.2d 16 (1999). In the absence of an objection to misconduct, reversal is required if the misconduct is so flagrant and ill-intentioned that a curative instruction would not have corrected the error. *State v. Henderson*, 100 Wn.App. 794, 998 P.2d 907 (2000); *State v. Jones* 117 Wn.App. 89 at 90-91, 68 P.3d 1153 (2003). Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson, supra, at* 804-805.

It is misconduct for a prosecutor to attempt to elicit testimony that s/he knows (or should know) is inadmissible. *See State v. Copeland,* 130 Wn.2d 244, 922 P.2d 1304 (1996) (prosecutor committed misconduct by eliciting prejudicial information not permitted under ER 609).

Except in very limited circumstances, evidence suggesting that a person has previously been suspected, arrested, or incarcerated for crimes unrelated to the charged crime is inadmissible. *See, e.g., State v. Sanford*, 128 Wn. App. 280, 285-288, 115 P.3d 368 (2005) (introduction of a booking photo held reversible error because it created an improper

inference of past criminal conduct); *Henderson supra*, at page 803 (2000) (same); *State v. Devlin*, 145 Wash. 44, 53, 258 P. 826 (1927) (same); *State v. Clemons*, 56 Wn. App. 57 at 62, 782 P.2d 219 (1989) (being known to a police officer "may be suggestive of bad acts, [although] it is certainly not conclusive.")

In this case, the prosecutor repeatedly elicited testimony relating to Mr. Mendoza's prior contacts with the criminal justice system. Officer Timmons (of the Aberdeen Police Department) testified that he had probable cause to arrest Mr. Mendoza on an unrelated charge on August 7, 2005, and that Mr. Mendoza ran away when advised he was under arrest. RP (4/4/06) 103. Lieutenant Darst (of the Aberdeen Police Department) testified that he prepared a photomontage using a booking photo of Mr. Mendoza from a previous arrest. RP (4/4/06) 109. Corporal King (of the Aberdeen Police Department) testified that he was familiar with Mr. Mendoza because he'd had "several prior contacts" with him. RP (4/4/06) 111. The court admitted a booking photo from the August 7th arrest over defense objection, noting that "virtually every witness who has testified they've had contact with Mr. Mendoza... has had contact with him when he was incarcerated." RP (4/4/06) 118. Detective Kelly (of the Aberdeen Police Department) testified that he was "acquainted with the defendant prior to August 7th..." RP (4/4/06) 133.

This evidence portrays Mr. Mendoza as a persistent criminal, well known to the entire Aberdeen Police Department. The department's familiarity with Mr. Mendoza was not relevant to any issue in the case, nor was the fact that he had previously been arrested, nor was the fact that his August 7th arrest was for an unrelated charge. The evidence was clearly inadmissible under ER 401, ER 403, and ER 404(b), and it was misconduct for the prosecutor to elicit the testimony. *Copeland, supra.*

Defense counsel should have objected to the testimony and requested a limiting instruction.[1] *See, e.g., State v. Boehning*, 127 Wn. App. 511 at 525, 111 P.3d 899 (2005) ("[W]here, as here, the prosecutorial misconduct is so flagrant that it denies the defendant a fair trial, defense counsel should have recognized such an egregious breach.") However, even in the absence of an objection, the misconduct requires reversal because it was so flagrant and ill-intentioned that no curative instruction could have alleviated the prejudice. *Jones, supra.* The testimony presented through these witnesses suggested to the jury that Mr. Mendoza had a propensity to commit criminal acts; the prosecutor's misconduct in eliciting this testimony denied Mr. Mendoza a fair trial.

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[1] The following section deals with defense counsel's inaction.

Accordingly, the convictions must be reversed and the case remanded for a new trial. *Henderson.*

II. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INADMISSIBLE EVIDENCE, AND FOR INADVERTENTLY ELICITING THE FACT THAT MR. MENDOZA WAS REQUIRED TO REGISTER HIS ADDRESS WITH LAW ENFORCEMENT.

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right… to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel…" Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel's performance is evaluated against the entire record. *Lopez, at* 275. The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel's performance was deficient, and (2) whether this deficiency

prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), *citing Strickland, supra*. The defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Holm, supra*, at 1281.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Where a claim of ineffective assistance is based on a failure to challenge the admission of evidence, the appellant must show (1) an absence of legitimate strategy for the failure to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted.

State v. Saunders, 91 Wn. App. 575 at 578, 958 P.2d 364 (1998). The same analysis applies where defense counsel elicits damaging inadmissible evidence, either intentionally or inadvertently. *Saunders, supra.*

Propensity evidence is improper and prejudicial. *Sanford, supra; State v. Trickler*, 106 Wn.App. 727 at 734, 25 P.3d 445 (2001). Evidence of even a single prior arrest may require reversal. *Sanford.*

Here, propensity evidence (outlined above) was admitted without objection through the testimony of the prosecution's witnesses. In addition, however, the most damaging testimony was inadvertently elicited during defense counsel's cross-examination of Detective Kelly:

> Q. Did he commit any crimes while standing there?
>
> A. Well, as a matter of fact, he actually was in the process of committing a crime that -- it's not observed there, but he is also required to register his address.[2]
>
> RP (4/4/06) 147.

Defense counsel did not ask for a curative instruction or move for a mistrial. RP (4/4/06 & 4/5/06) 55-189. These failures (combined with the failure to object to the inadmissible evidence brought out during the state's direct examination) denied Mr. Mendoza the effective assistance of

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[2] The court, immediately recognizing the impropriety of this testimony, interrupted and asked defense counsel to rephrase the question. RP (4/4/06) 147.

counsel. First, there was no conceivable strategic purpose served by the admission of Mr. Mendoza's prior arrests, unrelated charges, and numerous contacts with the Aberdeen Police Department. Nor was there any reason to inform the jury that Mr. Mendoza was required to register his address, and was committing a crime by having failed to do so. Second, an objection to the evidence would have been sustained under ER 401, ER 403, and ER 404(b). *See, e.g., Sanford, supra; Saunders, supra.* Third, this damaging evidence prejudiced Mr. Mendoza. The victim did not pick Mr. Mendoza out of a photomontage despite having spent considerable time with his assailant, and defense counsel successfully pointed out the unreliable nature of fingerprint testimony.[3] RP (4/4/06 36-37, 70-71, 74, 89-92. Any weaknesses in the prosecution's case were resolved against the defendant once the jury discovered he had previously been arrested, was well-known to the Aberdeen Police Department, and was among the few most dangerous criminals required to register their address with law enforcement.

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[3] Despite high profile problems such as the Brandon Mayfield case (referred to on cross-examination of Mr. Luthy), there has never been a study determining the error rate for fingerprint examiners.

Because Mr. Mendoza was denied the effective assistance of counsel, the conviction must be reversed and the case remanded for a new trial. *Sanford, supra; Saunders, supra.*

III. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. MENDOZA'S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record... Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys." RCW 9.94A.500(1).

"Criminal history" means more than just a list of prior felonies (although it is often treated as such). Instead, "criminal history" is defined to include all prior convictions and juvenile adjudications, and "shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration." RCW 9.94A.030(13). To establish criminal history, "the trial court may rely on no more information than is admitted by the plea

agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2).

In this case, no evidence was presented that Mr. Mendoza had any criminal history; nor did he admit or acknowledge any prior convictions. CP (4/17/06) 4-12. The sentencing court did not determine his criminal history or calculate his offender score on the record. CP (4/17/06) 4-12. Despite the absence of any evidence of additional criminal history, the judgment and sentence reflected a finding that Mr. Mendoza had numerous prior felony convictions and an offender score of 9. CP 4-12. There is no indication in the record as to how this finding was made.

A trial court's findings are reviewed for substantial evidence. *In re Custody of Shields*, 120 Wn.App. 108 at 120, 84 P.3d 905 (2004). Because of the absence of any evidence of criminal history, the findings in this case are completely unsupported and must be vacated. *Shields, supra.* The sentence must also be vacated, and the case remanded for resentencing.[4]

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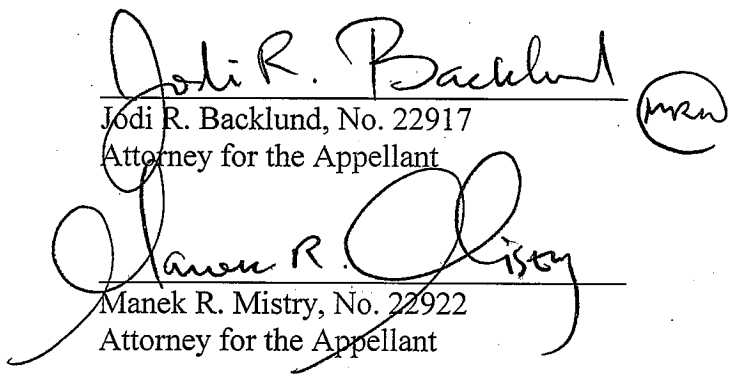
[4] As the Supreme Court said in *State v. Ford:* "Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions." *State v. Ford*, 137 Wn.2d 472 at 484, 973 P.2d 452 (1999)

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on September 5, 2006.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

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DEPUTY

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 5, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 5, 2006.

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Attorney for the Appellant