

64304-5

64304-5

NO. 64304-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

NOLAN DENUNZIO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

BRIEF OF APPELLANT

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FILED
APR 15 2014
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant Nolan DeNunzio of a fair trial.

2. DeNunzio received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Whether the prosecutor committed prejudicial misconduct by asking DeNunzio during cross-examination, "So if you have these theft convictions, more than one, why should we believe anything you have to say today?" (Assignment of Error 1).

2. Whether the prosecutor committed prejudicial misconduct by repeatedly referring to a police officer's opinion testimony, which the trial court repeatedly held inadmissible, during closing argument, despite the trial court's ruling that such argument was improper? (Assignment of Error 1).

3. Whether DeNunzio received ineffective assistance of counsel by his counsel's failure to offer to stipulate to a prior vehicular assault conviction, and allowed the state to question him concerning prejudicial, irrelevant facts of the prior offense? (Assignment of Error 2).

B. STATEMENT OF THE CASE

1. Underlying Facts

DeNunzio appeals from his Skagit County Superior Court jury conviction for felony Driving Under the Influence (DUI). CP 53.

On the evening of June 30 and early morning of July 1, 2009, Nolan DeNunzio was enjoying himself at a casino, playing slot machines and spending time with a friend.¹ 2RP 40. While there, he consumed three or four drinks. 2RP 56-57. The drinks, he guessed, may have been “doubles,” as they were in tall glasses. 2RP 57. He was unsure, because his friend ordered and paid for the drinks. 2RP 72-73. He left the casino at 12:30 or 1:00 a.m., and went home to sleep. 2RP 40. Because he was not a regular drinker, the amount was enough to make him sick and “hung over” when he woke up the next day. 2RP 40-42. DeNunzio did not consume any alcohol after he left the casino, or after he woke up on July 1, 2009. 2RP 46, 50.

¹ The Reports of Proceedings (RP) referenced in this brief are as follows:

1RP = 9/9/2009, 9/14/2009;
2RP = 9/15/2009, 10/1/2009.

He woke up on July 1 when his sister knocked on his door, around 8:00 a.m. 2RP 42. The two walked and talked, eventually encountering DeNunzio's friend Ernie Cheer. 2RP 43. Cheer was obviously intoxicated, and was having trouble opening the front door to his apartment. 2RP 43-44. DeNunzio and his sister helped Cheer enter his apartment. 2RP 44. Once inside, Cheer and DeNunzio's sister drank vodka, while DeNunzio drank a soda pop. 2RP 44. Cheer asked DeNunzio to drive him to the store, and he agreed. 2RP 44. DeNunzio did not want either Cheer or his sister to drive, because they were too intoxicated. 2RP 45. So the three went in Cheer's van to the store, with DeNunzio driving. 2RP 46.

At the store, DeNunzio ran into a friend, Joshua Anders. Anders testified that he saw DeNunzio at the store, that DeNunzio was buying beer for someone else, and did not appear to be intoxicated. 2RP 19-20.

DeNunzio testified that Cheer asked him to take the "long way" back to Cheer's home, so they went for a 20- or 30-minute drive. 2RP 48. Cheer and DeNunzio's sister drank beer in the back of the van. 2RP 49. DeNunzio stopped the car at one point, so he could swim in the river. 2RP 48.

On the way back to Cheer's apartment, Upper Skagit Tribal Police Chief Paul Budrow stopped Cheer's van. 2RP 49-50. Earlier, Budrow received several reports that DeNunzio was driving while intoxicated. 1RP 42-43. One such report was made by Nigha Bollinger, who claimed that DeNunzio approached her earlier that day in Cheer's van, smelling of alcohol. 2RP 30. Bollinger claimed he offered her a beer, then drove off. 2RP 30-31. DeNunzio expressly denied seeing Bollinger that day. 2RP 50.

Budrow claimed he stopped the van because DeNunzio drove partially over the lane divider when coming around a curve. 1RP 44, 56. DeNunzio was driving; Cheer and DeNunzio's sister were in the back. 1RP 48-49. Budrow claimed the vehicle smelled of "intoxicants" and he could also smell alcohol on DeNunzio's person. 1RP 49.

After Budrow arrested DeNunzio, he called a Skagit County Sheriff's officer to "process" DeNunzio, because he was the only officer on duty for the reservation. 1RP 51. Sheriff's officer Daniel Nevares arrived, spoke with Budrow, and drove DeNunzio to the Sedro Woolley police department. 1RP 72.

Once there, DeNunzio voluntarily conducted a number of field sobriety tests. 1RP 73-79, 101-105. Nevares claimed

DeNunzio smelled of alcohol, but indicated that he observed only “slight” impairment, indicating it was neither “obvious” nor “extreme.” 1RP 89, 105. He was cooperative, demonstrated “good” coordination, and did not slur his speech. 1RP 102-104. DeNunzio refused a breath test, after initialing the implied consent warnings, and completed a standard DUI questionnaire. 1RP 91-92.

DeNunzio testified in his own defense, and the prosecutor introduced evidence of prior theft convictions as impeachment. 2RP 70. Thereafter, the prosecutor argumentatively and explicitly questioned his veracity:

Q: Okay. So if you have these theft convictions, more than one, why should we believe anything that you have to say today?

Defense counsel’s immediate objection was sustained. 2RP 71.

The prosecutor also repeatedly and unsuccessfully sought to have Budrow testify that he knew DeNunzio well and could tell when he was intoxicated based on this familiarity. First, in response to the prosecutor’s question, Budrow began to testify that he knew DeNunzio well and could tell DeNunzio was intoxicated because he “gets very argumentative when he gets intoxicated,

which is another indication to me.” 1RP 49. Defense counsel objected, and the trial court sustained the objection. 1RP 49.

Later, The prosecutor returned to the theme, establishing that Budrow had seen DeNunzio “many times” when he was not under the influence of alcohol. 1RP 51. The prosecutor then asked if Budrow had also seen him under the influence:

Q: Okay. So you’re familiar with him and you’ve seen him both under the influence of intoxicants and not?

A: Various, many times.

Q: And in this case would you say he was under the influence?

1RP 51. DeNunzio’s counsel objected, arguing that the question called for an opinion on the essential element of the case. 1RP 51-52. The trial court again sustained the objection. 1RP 52.

During closing argument, however, the prosecutor repeatedly tried to re-introduce the topic of Budrow’s excluded testimony that he could tell DeNunzio was drunk based on being familiar with him. 2RP 98-99.

2. Prior Vehicular Assault Conviction.

DeNunzio was charged with a felony DUI, based on the July 1 incident and a previous conviction for vehicular assault, which the

state was required to prove as an element at trial. CP 1-2; 35. Prior to trial, his counsel moved to bifurcate the trial so that the issue of the prior conviction would only go to the jury after it concluded DeNunzio was guilty of driving under the influence. CP 14-18; 1RP 31-38. The trial court denied the motion. 1RP 37-38.

DeNunzio's counsel did not stipulate to the existence of the prior conviction. During trial, the state offered, and the trial court admitted, a certified copy of the judgment and sentence and statement of defendant on plea of guilty. Tr. Ex. 2, 5. 2RP 37.

In addition, the state questioned DeNunzio extensively about the facts underlying the prior conviction. 2RP 59-63. DeNunzio obliquely referred to the fact of his prior conviction in his testimony, stating that he would not allow his sister or Cheer to drive while intoxicated "because of my experience." 2RP 59. Seizing on this opportunity, the prosecutor asked a series of questions concerning the details of that former case, eliciting the facts that DeNunzio was "injured significantly" in a "one-car collision," that there were two other people in his car who were hospitalized. 2RP 59-61. Defense counsel did not object to these questions.

The prosecutor then asked DeNunzio to compare the amount he drank the night of the vehicular assault to the night he

was at the casino: "Would you say it was more. You had more to drink the night of this vehicular assault than the night of the casino?" Defense counsel objected, but the trial court allowed the question, stating: "He can testify to what he remembers." 2RP 62. DeNunzio answered: I don't remember, I don't recall how much I had to drink that night. But I know it was a lot." 2RP 62.

The prosecutor also asked DeNunzio about his feelings stemming from the prior incident, and the impact on the other passengers' lives:

Q: You said that it's hard to talk about this because of the opportunities that you've lost. Is it also hard to talk about it because of the opportunities that maybe those people lost too in being injured?

A: Well, no. We still talk [. . .]. And it's not like I injured them on purpose or nothing; just car wreck I got into.

Q: But it was pretty significant injuries?

A: To me it was.

Q: But you don't think it was significant to them?

A: They look pretty fine to me, no.

2RP 63. Defense counsel did not object to these questions.

C. ARGUMENT

1. REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL.

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment of the United States Constitution and Const., art. 1 § 22 (amend. 10). State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984).

To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A defendant is deprived of a fair trial when there is a "substantial likelihood" that the prosecutor's misconduct affected the verdict. Dhaliwal, 150 Wn.2d at 578; State v.

Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48).

In determining whether the misconduct warrants reversal, appellate courts consider both the prejudicial nature of the conduct and its cumulative effect. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005) (citing State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994)). Prosecutorial misconduct requires reversal even where there was no defense objection if the prosecutor's remarks were so flagrant and ill-intentioned that they produced an enduring prejudice which could not have been neutralized by a curative instruction to the jury. Belgarde, 110 Wn.2d at 507; State v. Echevarria, 71 Wn. App. 595, 597-98, 860 P.2d 420 (1993).

a. Improper Cross-Examination

The prosecutor first committed misconduct by asking DeNunzio, "So if you have these theft convictions, more than one, why should we believe anything that you have to say today?" 2RP 71. ER 609 permits impeachment of a witness' credibility based upon prior convictions for crimes of dishonesty. However, under ER 609(a), cross-examination regarding prior convictions is limited to the fact of the conviction, the type of crime, and the punishment.

State v. Coe, 101 Wn.2d 772, 776, 684 P.2d 668 (1984). “Cross examination exceeding these bounds is irrelevant and likely to be unduly prejudicial, hence inadmissible.” Coe, 101 Wn.2d at 776. ER 609(a) applies to all witnesses, including the defendant. Furthermore, It is misconduct for a prosecutor to express a personal belief as to the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The prosecutor's sharply derisive question was improper, as it plainly exceeded the proper bounds of impeachment, and conveyed the prosecutor's own negative view of DeNunzio's credibility.

The question was a deliberate attempt to influence the jury's perception of DeNunzio and to undermine his credibility. Our Supreme Court expressed its disapproval of a prosecutor expressing personal views of a defendant's veracity in Reed, 102 Wn.2d 140). The Reed Court found that the prosecutor's referring to the accused as a “liar” was the type of statement made “presumably to influence the jury.” 102 Wn.2d at 146. The prosecutor's derisive remark here similarly painted DeNunzio as a liar, and specifically implied that the entirety of his testimony was therefore suspect – “why should we believe anything that you have to say today?” 2RP 71.

The trial properly court sustained the objection, but did not instruct the jury to disregard it. However, the absence of a curative instruction does not end the inquiry. If misconduct is so flagrant that no instruction can cure it, “there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” Belgarde, 110 Wn.2d at 508 (quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956)).

The central pillar of DeNunzio’s defense was his testimony. He testified that he had consumed no alcohol after leaving the casino the night before his arrest. If the jury believed this testimony, they were likely to conclude he was no longer intoxicated by the time he was arrested and was not impaired when he was driving. Thus, the prosecutor’s remark was aimed at the heart of DeNunzio’s case.

Evidence suggestive of impairment was far from overwhelming. Although both officers testified DeNunzio smelled of alcohol, the state was required to prove he was *impaired* by alcohol. The evidence concerning his driving and his performance in roadside tests was similarly ambiguous as to this critical element. Officer Nevares testified, for example, that DeNunzio was cooperative, demonstrated “good” coordination, and did not slur his

speech. 1RP 102-104. Nevares also observed only “slight” impairment, indicating it was neither “obvious” nor “extreme.” 1RP 89, 105. The jury could have concluded from these facts that DeNunzio was not intoxicated.

Given these considerations, no curative instruction was capable of “un-ringing the bell” of the prosecutor’s improper remark. And the prejudice resulting from the remark must be considered in light of the other misconduct occurring during closing argument. Boehning, 127 Wn. App. at 519; Suarez-Bravo, 72 Wn. App. at 367.

b. Improper Closing Argument

During closing argument, in spite of the trial court’s rulings that such testimony was improper, the prosecutor repeatedly argued Budrow knew DeNunzio well enough to tell whether he was intoxicated. An appellate court reviews a prosecutor’s comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Dhaliwal, 150 Wn.2d at 578; State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

The prosecutor argued Budrow was “very familiar” with DeNunzio, had seen him when he was sober and “could tell” he had been drinking:

The Chief [Budrow] knows Nolan [DeNunzio]. He knows him from being on the tribe. He's familiar with him, very familiar with him. And he testified that he's seen Nolan when he's sober. He said he's a snappy dresser, and that he always looks put together, and that he notices that about him. And he said that on July 1st something was different. And he could tell he had been drinking.

2RP 98-99. DeNunzio's counsel objected, asking the trial court to strike the remark. The trial court sustained the objection. 2RP 99.

But the prosecutor immediately returned to the theme, again asking the jury to consider the inadmissible testimony, and to give weight to Budrow's opinion:

My recollection is that he testified to that. You'll have to go off your own recollection. But he's familiar with Nolan. He knows what Nolan looks like, and acts like on a normal basis. And he could tell Nolan was disheveled and unkempt from what he had seen before and he could smell the odor of alcohol from him. He's familiar with him. Don't discredit his opinion and his testimony. Think about the fact that he knows him, works up there on a daily basis and sees these same 300 individuals and maybe a few other people.

2RP 99. Defense counsel objected and the trial court again sustained the objection. 2RP 99.

Still, the prosecutor immediately thereafter emphasized that the jury should give great weight to Budrow's opinion that DeNunzio was intoxicated:

I do think that his testimony is critical, though, and his observations of Nolan, of his observations of Nolan's driving and his observation of Nolan emitting the odor of alcohol coming from his person.

2RP 99. Later, the prosecutor again emphasized the importance of the officers' opinions:

Who better to make that determination than someone who does have that training and experience? Someone who does deal with people on a daily basis, and they do have some sort of guidelines and some sort of understanding about it.

2RP 108.

The prosecutor committed misconduct by continually attempting to argue: (1) that Budrow knew DeNunzio well enough to tell he was intoxicated in a way that another objective observer would not; and (2) that because of this familiarity, the jury should give Budrow's opinion great weight in determining whether DeNunzio was, in fact, intoxicated. But the trial court repeatedly ruled this evidence was not admissible, rulings entitled to "great deference" on appeal. State v. French, 157 Wn.2d 593, 605, 141 P.3d 54 (2006); State v. Luvene, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995).

Where a prosecutor repeats an effort to introduce evidence or subject matter previously held inadmissible by the trial court,

appellate courts have often found prejudicial misconduct. See, e.g. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993); see also, ER 103(c) (“In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements . . . in the hearing of the jury”).

The prejudice from the remarks was amplified by the fact that the theme of the remarks touched almost every aspect of the defense. The argument was that the jury could trust Budrow’s opinion that DeNunzio was intoxicated, based on his familiarity with DeNunzio. This argument urged the jurors to look past several reasons to doubt the state’s case, such as DeNunzio’s ability to perform well on roadside sobriety tests, the fact that no witness testified DeNunzio drank anything since the night before in the casino, and the absence of a breath test result. As argued above, it also encouraged jurors to believe Budrow and disbelieve DeNunzio, based on some kind of subjective “gut feeling” Budrow had concerning aspects of DeNunzio’s appearance and behavior that another observer, or a juror, would not necessarily perceive from considering objective evidence.

DeNunzio's credibility and his intoxication, or lack thereof, were the central issues in the case, the focus of most of the evidence addressed in the argument, and the critical elements on the to-convict instruction. The prosecutor's improper remarks undercutting DeNunzio's credibility during cross-examination and improper closing argument require reversal, based on the facts of this case and the issues before the jury.

2. APPELLANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO STIPULATE TO THE EXISTENCE OF THE PRIOR CONVICTION.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland v. Washington, 466 U.S. 668, 686, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn.

App. 544, 551-52, 903 P.2d 514 (1995). Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. Maurice, 79 Wn. App. at 552. A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

It was ineffective for DeNunzio's counsel to fail to stipulate to his prior vehicular assault offense that the state proved as an element of the felony DUI charge. If an element of the charged offense is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). Such evidence is often "highly prejudicial." Old Chief v. United States, 519 U.S. 172, 185, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); Roswell, 165 Wn.2d at 198, State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002); see, State v. Johnson, 90 Wn. App. 54, 61-63, 950 P.2d 981 (1998) (trial court erred in admitting a prior rape conviction to prove the element

of a past felony conviction when the defendant proffered a stipulation to that effect.).

In Old Chief, 519 U.S. 172, the United States Supreme Court recognized that a defendant may be prejudiced by evidence regarding a prior conviction and held that he may stipulate to the fact that he has a prior conviction in order to prevent the state from introducing evidence concerning details of the prior conviction to the jury. The Old Chief Court acknowledged the standard rule that:

a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense.

519 U.S. at 183. But, the prosecution's need of "evidentiary depth to tell a continuous story" has however "virtually no application" in cases, such as DeNunzio's, where the point at issue is "a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." Old Chief, 519 U.S. at 190.

Thus, had defense counsel stipulated to the admissibility of the prior offense, the trial court would have been bound to accept the stipulation. There was no valid strategic reason to fail to

stipulate where there was no real dispute regarding the existence of the prior conviction.

Furthermore, the prejudice resulting from counsel's failure to do so was magnified by counsel's failure to object to the highly prejudicial manner in which the prosecutor questioned DeNunzio about the irrelevant and damaging facts of the old conviction. That testimony was extremely prejudicial, as the facts of that crime mirrored many aspects of the state's theory of the case in this trial. In both cases, the jury learned, DeNunzio was alleged to drink large amounts of alcohol. DeNunzio admitted to driving while extremely intoxicated with two passengers in the prior incident, just as the evidence showed he drove with two passengers in this case, and the state's theory was that was likewise intoxicated in this case. While the jury would have learned of the prior conviction, there was no strategic reason for defense counsel to allow all of the highly prejudicial details of the prior case to be drawn out in front of the jury.

The state's case was far from overwhelming. DeNunzio's testimony that he was not intoxicated, the officers' testimony that he performed moderately well in various sobriety tests, the absence of a witness testifying he drank the day of July 1, and the absence of

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 64304-5-1
)	
NOLAN DeNUNZIO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF MARCH 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

- [X] NOLAN DeNUNZIO
DOC NO. 763806
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF MARCH 2010.

x *Patrick Mayovsky*