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STATE OF WASHINGTON
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SUPREME COURT NO. _____ Case #: 1038755
NO. 85525-5-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MONTE PAYNE,

Petitioner.

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

The Honorable David Freeman, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER/COURT OF APPEALS DECISION</u>	1
B. <u>ISSUE PRESENTED FOR REVIEW</u>	1
C. <u>STATEMENT OF THE CASE</u>	2
1. Mr. Payne is charged with possession of controlled substances with intent to deliver	2
2. The prosecutor spends nearly his entire voir dire discussing the war on drugs and safe injection sites	6
3. The jury deliberates for nearly a day after a two- day trial but ultimately convicts Mr. Payne	14
4. The court of appeals condones the prosecutor's repeated reference to the war on drugs in voir dire	16
D. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u>	17
This Court's review is warranted under RAP 13.4(b)(1), (3), and (4), where the court of appeals condoned the prosecution's repeated reference to the war on drugs during jury selection	17
E. <u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Skone

30 Wn. App. 2d 1, 543 P.3d 842 (2024) 25

State v. Blake

197 Wn.2d 170, 481 P.3d 521 (2021) 20

State v. Loughbom

196 Wn.2d 64, 470 P.3d 499 (2020) 2, 17-19, 20-23, 26, 27

State v. Martinez

22 Wn. App. 2d 621, 512 P.3d 1 (2022)

rev'd on other grounds, 2 Wn.3d 675, 541 P.3d 970 (2024) ... 22

State v. Payne

No. 85525-5-I, filed January 21, 2025 1, 18, 22, 23, 25

State v. Zamora

199 Wn.2d 698, 512 P.3d 512 (2022) 17-19, 22, 23, 25, 27

FEDERAL CASES

Gomez v. United States

490 U.S. 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) 21

RULES, STATUTES, AND OTHER AUTHORITIES

Dan Baum

Legalize It All: How to Win the War on Drugs

HARPER'S MAGAZINE (Apr. 2016) 18

TABLE OF AUTHORITIES (CONT'D)

	Page
DRUG POLICY ALLIANCE THE DRUG WAR, MASS INCARCERATION AND RACE (June 2015)	19
GR 14.1.....	21
MICHELLE ALEXANDER THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).....	19
NAT’L INSTITUTE ON DRUG ABUSE <u>Drug Overdose Death Rates</u> (May 14, 2024).....	26
RAP 13.4.....	2, 17, 18

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Monte Payne asks this Court to grant review of the court of appeals' unpublished decision in State v. Payne, No. 85525-5-I, filed January 21, 2025 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

Mr. Payne stood trial for possession of a controlled substance with intent to deliver. There was significant conflicting evidence as to whether Mr. Payne possessed the small amount of heroin for sale or for personal use.

During jury selection, the prosecution extensively discussed the war on drugs and safe injection sites, eliciting prospective jurors' opinions of whether they were a "good thing for our society." The prosecution then used its peremptory challenges to eliminate prospective jurors who expressed sympathy about addiction or skepticism about the war on drugs.

The court of appeals found no misconduct, concluding a prosecutor's discussion of the war on drugs during voir dire is

permissible, notwithstanding this Court's decision in State v. Loughbom, 196 Wn.2d 64, 470 P.3d 499 (2020). Is review of this novel constitutional question of significant public importance warranted under RAP 13.4(b)(1), (3), and (4)?

C. STATEMENT OF THE CASE

1. **Mr. Payne is charged with possession of controlled substances with intent to deliver.**

In June of 2019, Mr. Payne was in the throes of a decade-long drug addiction. RP 299. Heroin was his drug of choice, though he used other substances as well. RP 299-300. On a typical day, Mr. Payne would wake up “kind of sick” and weigh out one half to three quarters of a gram of heroin, which he usually injected. RP 300. Mr. Payne used that amount of heroin four to five times a day to prevent “awful” withdrawal symptoms. RP 300-03. He also kept Suboxone strips on hand, in case of emergency. RP 302.

Despite his heavy heroin use, Mr. Payne was a “functioning addict,” albeit somewhat unreliable. RP 304, 313.

That spring and summer, Mr. Payne was doing an exterior remodel for his aunt, Shari Coble. RP 304. The job consisted of extensive sanding, patching, priming, and painting, and Mr. Payne often had to remove bushes near the house using a machete. RP 272-73, 304-05. Ms. Coble paid her nephew in cash and kept a ledger of her payments. RP 268-69; Ex. 13.

On June 28, 2019, Ms. Coble paid her nephew \$470 in cash for his work on the house, mostly in \$100 and \$50 bills. RP 270-72. She had paid him \$500 in cash the previous week. RP 271. Mr. Payne went grocery shopping after finishing his work for the day, where he paid cash for his purchases. RP 305.

After departing the grocery store, Mr. Payne made a left turn and pulled into the farthest lane without signaling a lane change. RP 141, 305. Corporal Luke Haas pulled Mr. Payne over for the traffic violation. RP 141. Corporal Haas saw a “plethora of things” inside Mr. Payne’s car. CP 305.

Mr. Payne produced his license and registration. RP 142. While Corporal Haas ran Mr. Payne’s information through

dispatch, he saw Mr. Payne hunched over, manipulating something in front of him. RP 142. Corporal Haas walked around to the passenger side of Mr. Payne's vehicle and observed him tucking something in the plastic housing underneath the steering column. RP 142.

Corporal Haas arrested Mr. Payne for third degree driving while license suspended. RP 142. Mr. Payne consented to a search of his vehicle. RP 142-43; CP 4. Underneath the steering column was a Crown Royal bag containing Suboxone strips, as well as methamphetamine weighing 0.11 grams, a heroin and sugar mixture weighing 1.13 grams, and a small lump of heroin weighing less than four grams. RP 143, 155-60, 237-47; Ex. 7.

To the left of the driver's seat was a small tool case containing several syringes, including one loaded with a dark, tarry substance consistent with heroin. RP 144-45. A Bic pen and glass pipe were also inside the tool case, both commonly used for smoking methamphetamine, as well as cook spoon for heating up heroin. RP 144-46, 152, 173. There were also three

“dime baggies,” two unused and one with residue that appeared to be methamphetamine. RP 145, 168-69; Ex. 7.

In between the driver’s seat and center console was Mr. Payne’s machete for clearing brush. RP 144, 305. Nearby there was a digital scale with tarry residue on it, which Mr. Payne used to weigh out his heroin for personal use. RP 144, 300. Mr. Payne’s wallet was also on the passenger seat; it contained \$664 in cash, including several crisp \$100, \$50, and \$20 bills. RP 179-84; Ex. 7. Lastly, there was a police scanner radio found behind the passenger seat. RP 145. Mr. Payne explained he had forgotten the radio was even back there and it needed an adapter, which he did not have, to be used in the car. RP 303.

The prosecution charged Mr. Payne with one count of possession of heroin with intent to deliver (Count 1) and another count of possession of methamphetamine with intent to deliver (Count 2). CP 1-2.

2. The prosecutor spends nearly his entire voir dire discussing the war on drugs and safe injection sites.

Mr. Payne proceeded to a jury trial in March of 2023. RP 58. Mr. Payne stopped using two years before trial and had been participating in a methadone program for the past year. RP 299. He had picked up no new felony charges in the interim. RP 354. The key dispute at trial was whether Mr. Payne possessed the drugs for personal use or for distribution. RP 331-37.

Jury selection began on March 14 around 10:00 a.m. CP 73. The court began with some preliminary questions of the prospective jurors. RP 60-69. The parties were then given 30 minutes to ask their own questions. RP 59.

The prosecutor went first. RP 69. The prosecutor began by asking prospective jurors whether they were excited about jury duty and whether they had previously served on a jury. RP 70-77. The prosecutor then asked if any jurors held negative views about police officers. RP 77-78.

The prosecutor quickly moved on to asking, “The war on drugs, does anybody believe that we’ve lost the war on drugs, and perhaps we should scale back federal enforcement of what the DEA is doing or otherwise by a show of hands?” RP 78. Juror 2 responded, “I share some of those opinions.” RP 78. The prosecutor asked Juror 2, “Would that be that you think that enforcement should be scaled back and so that maybe some alternative to criminal penalties could be an option?” RP 79. Juror 2 responded, “Yes, and I question the distribution of money and what that money is going for versus, you know, enforcement versus drug treatment, so-to-speak.” RP 79.

The prosecutor asked the venire if anyone else agreed with Juror 2. RP 79. The prosecutor called on Juror 3, asking, “in other words scale back enforcement of federal drugs prosecutions?” RP 79. Juror 3 responded, “It’s a hard question,” explaining, “I think there needs to be options (inaudible).” RP 79. Juror 4 raised their hand, indicating they agreed with Juror 2

and Juror 3, and explaining they would “like to see a scaling back of federal drug enforcement funds.” RP 79.

The prosecutor persisted with questions about the war on drugs: “Juror Number 36, can you tell me about how you personally stand on the war on drugs?” RP 80. Juror 36 responded, “I definitely think we need to enforce laws on drugs, but I think we need to rethink what we’re doing with it,” like cannabis laws. RP 80. The prosecutor asked, “How would you stand on a DEA enforcement operation where they took down a cartel in Mexico? Do you think that is overreaching?” RP 80. Juror 36 responded, “No, not at all.” RP 80. The prosecutor continued, “What about DEA activities where they intercept a crime ring passing drugs up and down the I-5 corridor?” RP 80. Juror 36 said, “I agree with that.” RP 80.

The prosecutor returned to Juror 3, asking, “do you agree with kind of the scaling hypotheticals I gave[?]” RP 80. Juror 3 ultimately responded, “I wouldn’t have a problem with either of

those enforcement actions.” RP 81. The prosecutor then reserved his remaining 15 minutes. RP 81.

Defense counsel began his voir dire by asking whether prospective jurors believed they could tell someone was lying. RP 81-88. Counsel inquired whether prospective jurors would view a drug addict as “more or less trustworthy than an average person.” RP 88-93. Counsel then asked whether jurors held opinions about the trustworthiness of law enforcement officers. RP 93-99. Finally, counsel asked whether jurors would expect to see evidence of a machine or device being properly calibrated. RP 99-102.

The prosecutor took over again and spent his entire remaining time discussing safe injection sites and the war on drugs, beginning:

So some of you may have heard in the news about this phenomenon that some of our states, I believe it’s currently being legalized and practiced in California, possibly New York City. I could be wrong about that, but they’re called supervised injection sites. Is there anybody who has not heard of supervised injection sites?

So essentially these are sites where people can go to a location where there is a registered nurse onsite. They can use their drug of choice or certain drugs that are allowed, and there's a medical staff onsite to provide them clean needles, swabs, and special supervise them as they ingest the drugs of their choice in a clean way, and to if they have any overdoses, to, to attend to that overdose.

RP 102. The prosecutor then engaged in a lengthy colloquy with prospective jurors about safe injection sites. RP 103-08.

Juror 8 indicated they had heard of safe injection sites. RP 103. The prosecutor asked Juror 8, "do you think they're a good thing?" RP 103. Juror 8 responded that they were "kind of impartial" and could "see both sides." RP 103. The prosecutor asked, "Would you agree or disagree that they, they further the use of illicit narcotics?" RP 103. Juror 8 agreed. RP 103. The prosecutor asked, "Do you think that's a good idea?" RP 103. Juror 8 responded, "No, that's not a good thing." RP 103.

The prosecutor asked Juror 5 whether they had "any personal beliefs" about safe injection sites. RP 103. Juror 5

responded, “Well, I assume it’s keeping people safer who might do them in a situation that’s not as safe.” RP 103.

The prosecutor returned to Juror 8, asking, “do you disagree with that? Do you think that if they further the use of narcotics, that would be a bad thing? Do you agree with that?” RP 103. Juror 8 clarified the prosecution meant “more people will now use drugs because they can go to a safe injection site.” RP 104. Juror 8 had “not thought about it in terms of increasing the numbers of drug users.” RP 104. The prosecutor expanded the hypothetical, asking Juror 8 whether it would be “a bad or a good thing inherently” for such sites to provide “individuals with state-regulated narcotics such as heroin or fentanyl, methamphetamine.” RP 104. Juror 8 answered, “Well, that seems like it becomes more of a pharmacy than help, I guess.” RP 104.

The prosecutor then opened up the question to the venire, asking whether anyone thought it “would be a good thing for our society” to have “a state-provided safe injection site, state-

provided narcotics.” RP 105. Juror 5 felt that would be a “safer, better option” because “people are going to get it either way, you know, whether it’s off the streets or in some other pharmaceutical dispensary type.” RP 105.

The prosecutor asked the same question of Juror 12, whether “that would be a good thing for our society?” RP 106. Juror 12 responded that they wanted “some more information about the facility and how it’s run,” but agreed with Juror 5 “that it will exist no matter what, and that having a safe place to do it would potentially be a benefit to society[.]” RP 106. The prosecutor confirmed Juror 12 thought “safe supervised injection sites are probably a good thing.” RP 106.

The prosecutor then called on Juror 20, who indicated they were “really torn” on the topic. RP 106. Juror 20 expressed, “Certainly, you couldn’t have it in the military.” RP 106. The prosecutor responded, “I hope not.” RP 106.

The prosecutor then talked with Juror 27 about their views on safe injection sites. RP 107. The prosecutor asked the venire

whether there was “anybody in here who thinks that supervised injection sites could lead to increased drug use,” to which Jurors 16, 21, and 24 raised their hands. RP 107. Juror 21 believed “permissiveness is not a good thing, like, for regular people,” and felt tax money “should go to school library, to parks,” not encouraging “something that shouldn’t be encouraged.” RP 107-08. The prosecutor asked a couple more jurors if they agreed safe injection sites would increase drug use. RP 108.

The prosecutor then returned to the topic of the war on drugs: “Juror Number 20, I’m going to come back to you briefly. What is your view on the war on drugs? Do you think, are you okay with the status quo? Do you think that federal enforcement should be more stringent, scaled back?” RP 109. Juror 20 preferred to tackle the root causes of addiction. RP 109. The prosecutor asked, “But you, you don’t necessarily, you’re honestly against the war on drugs, and the enforcement of drug trafficking?” Juror 20 responded, “No, I think that’s important, no.” RP 109.

The prosecutor asked a similar question of Juror 28, “can you tell me a little bit about kind of where you stand in this conversation on, you know, enforcement of drug trafficking laws and the war on drugs?” RP 110. Juror 28 expressed “it kind of goes both ways” for them. RP 110.

The parties then asked a handful of hardship questions before concluding their voir dire. RP 110-15. Defense counsel did not object to any of the prosecutor’s discussion of the war on drugs and safe injection sites. RP 78-81, 102-10.

The prosecutor exercised four peremptory challenges. CP 80. The prosecutor struck Jurors 2, 3, and 4, who all opposed federal funding for the war on drugs, as well as Juror 12, who expressed their view that safe injection sites are probably a good thing. CP 80. The jury was sworn at 11:53 a.m. CP 74.

3. The jury deliberates for nearly a day after a two-day trial but ultimately convicts Mr. Payne.

Witness testimony began at 1:55 p.m. that same day, March 14. CP 75. The prosecution had only three witnesses,

Corporal Haas, Sergeant Matthew High, who testified about the common habits of drug dealers, and Daniel Van Wyk, the forensic scientist who tested the recovered substances. RP 138, 192, 227. Mr. Payne testified on his own behalf and called his aunt, Ms. Coble, to testify. RP 268, 299. Witness testimony concluded at 2:20 p.m. the following day, March 15. CP 77.

At halftime, the trial court dismissed Count 2, possession of methamphetamine with intent to deliver, for insufficient evidence. RP 266.

Count 1 was submitted to the jury at 3:36 p.m. on March 15. CP 77. Deliberations continued into the next day, March 16. CP 78. The parties convened at 11:07 a.m. to answer a jury inquiry about the meaning of “constructive transfer.” CP 35, 78. The jury continued deliberating for several more hours, finally returning a verdict at 2:01 p.m. CP 78. The jury found Mr. Payne guilty as charged on Count 1. CP 36.

The trial court sentenced Mr. Payne to a residential drug offender sentencing alternative and stayed his sentence pending the outcome of his appeal. CP 52, 91-92.

4. The court of appeals condones the prosecutor's repeated reference to the war on drugs in voir dire.

On appeal, Mr. Payne challenged the prosecutor's repeated reference to the war on drugs and safe injection sites during voir dire as flagrant and ill-intentioned misconduct. Br. of Appellant, 21-28. Mr. Payne relied on Loughbom, where this Court held a prosecutor's remarks about the war on drugs in a drug prosecution case are improper and rise to the level of being flagrant and ill intentioned." Br. of Appellant, 21-22. Mr. Payne also relied on State v. Zamora, 199 Wn.2d 698, 712, 512 P.3d 512 (2022), where this Court held "[t]he jury is, in the voir dire phase, primed to view the prosecution through a particular prism." Br. of Appellant, 24-25. Mr. Payne emphasized the cumulative effect of the misconduct, as well as the conflicting evidence of drug dealing versus personal use. Br. of Appellant, 26-28.

In a brief analysis, the court of appeals found no misconduct and did not reach the question of prejudice. Opinion, 5-6. The court found it significant that “[t]he prosecutor’s use of the war on drugs was limited to voir dire.” Opinion, 5. The court further reasoned, “Unlike Loughbom, the prosecutor did not reference drug problems in any specific locations, in the county, or connect the war on drugs to Payne’s case as ‘another battle.’” Opinion, 5. The court also distinguished Zamora on the basis that the record did not “reflect the same irrelevant questions and implicit misconduct shown in Zamora.” Opinion, 6. The court of appeals did not mention the prosecutor’s lengthy discussion of safe injection sites. See Opinion, 2-6.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court’s review is warranted under RAP 13.4(b)(1), (3), and (4), where the court of appeals condoned the prosecution’s repeated reference to the war on drugs during jury selection.

This case presents the novel constitutional question of whether the prosecution may discuss the war on drugs in voir dire

as a means to ferret out and remove jurors skeptical of its value. RAP 13.4(b)(3). Given the devastating impact of the war on drugs on communities of color, this question is also one of substantial public interest. RAP 13.4(b)(4). The court of appeals' opinion further conflicts with this Court's decisions in Loughbom and Zamora. RAP 13.4(b)(1).

The racist animus for the war on drugs is now well known. President Richard Nixon declared the "war on drugs" in 1971. President Nixon's domestic policy chief, John Ehrlichman, admitted the purpose of the war on drugs was to "disrupt" Black communities. Dan Baum, Legalize It All: How to Win the War on Drugs, HARPER'S MAGAZINE (Apr. 2016).¹ Ehrlichman explained the war on drugs enabled them to "arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news." Id.

¹ Available at <https://harpers.org/archive/2016/04/legalize-it-all/> (last visited Feb. 18, 2025).

This purpose worked. By 2012, nearly 80 percent of people in federal prisons and 60 percent of people in state prisons for drug offenses were Black or Latinx. DRUG POLICY ALLIANCE, THE DRUG WAR, MASS INCARCERATION AND RACE 2 (June 2015).² This Court has recognized the devastating impact of our state’s simple drug possession statute “hit young men of color especially hard.” State v. Blake, 197 Wn.2d 170, 192, 481 P.3d 521 (2021). In sum, “[n]othing has contributed more to the systematic mass incarceration of people of color in the United States than the War on Drugs.” MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59 (2010).

In Loughbom, this Court condemned reference to the war on drugs in drug prosecutions. 196 Wn.2d at 71. There, this Court held the prosecutor’s three references to the war on drugs in a

² Available at https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf (last visited Feb. 18, 2025).

single-day drug prosecution trial constituted flagrant and ill-intentioned misconduct. Id. at 75-76. The multiple references—made in opening statement and closing argument—demonstrated the prosecutor did not “inadvertently utter[] the phrase war on drugs,” but rather “strategically employed” that rhetoric. Id. at 76. The Loughbom court emphasized, “We do not convict to make an example of the accused, we do not convict by appeal to a popular cause, and we do not convict by tying a prosecution to a global campaign against illegal drugs.” Id. at 70.

In Mr. Payne’s case, the prosecutor expressly referenced the war on drugs six times during voir dire—twice as many times as the prosecutor in Loughbom. RP 78, 80, 109, 110. The prosecutor also discussed at length the highly controversial, politicized issue of safe injection sites. RP 102-08. He repeatedly asked prospective jurors whether they thought safe injection sites increased narcotics use and whether that was a “good thing for our society.” RP 105.

The court of appeals nevertheless concluded the holding of Loughbom did not extend to the prosecutor's discussion of the war on drugs in voir dire. Opinion, 5. This is incorrect.

“Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, *or political prejudice*.” Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (emphasis added). Consequently, the Zamora court held it is inappropriate for the prosecution to unnecessarily politicize jury selection. 199 Wn.2d at 714; see also State v. Martinez, 22 Wn. App. 2d 621, ¶82, 512 P.3d 1 (2022) (unpublished portion, GR 14.1), rev'd on other grounds, 2 Wn.3d 675, 541 P.3d 970 (2024). Politicizing voir dire presents “problems for the fairness of the trial.” Martinez, 22 Wn. App. 2d at ¶82. Questions should therefore be framed “in narrow terms, avoiding politics.” Id.

Indeed, in Zamora, this Court extended the principle of Loughbom to voir dire. There, the prosecutor repeatedly referenced irrelevant, politicized topics like border security, illegal

immigration, and crimes committed by undocumented immigrants during his one-hour voir dire. Zamora, 199 Wn.2d at 703, 719. The Zamora court condemned this discussion as appealing to jurors' conscious and unconscious biases against Latinx individuals like the accused. Id. at 720-21.

In reaching this conclusion, the Zamora court recognized “what occurs during voir dire is equally as important as what occurs during trial proceedings.” 199 Wn.2d at 711. This court stressed “there is an increased danger of infecting the jury with bias and prejudice when the improper conduct occurs at the jury’s introduction of the case.” Id. at 712. Citing Loughbom, the Zamora court held “[t]he jury is, in the voir dire phase, primed to view the prosecution through a particular prism.” Id.

The court of appeals nevertheless thought Zamora to be distinguishable because the record in Mr. Payne’s case did not “reflect the same irrelevant questions and implicit misconduct shown in Zamora.” Opinion, 6. Again, not so.

Contrary to the court of appeals' reasoning, the war on drugs and safe injection sites were irrelevant to the charge. The question for the jury was whether Mr. Payne possessed heroin for personal use or for distribution. The jury did not have to decide whether it condoned drug use. It did not have to decide whether the country has won or lost the war on drugs. It did not have to decide whether the prosecution against Mr. Payne was a good use of taxpayer money. Relevant concerns, instead, were whether jurors could faithfully follow the court's instructions and whether jurors had personal experiences that would make it difficult to decide the case based on reason rather than emotion.

To that end, the prosecutor's questions were not designed to evaluate prospective jurors' fitness to serve. Rather, the questions were designed to elicit jurors' political views and then eliminate all jurors sympathetic to addiction or skeptical about the war on drugs—even though such views had nothing to do with whether jurors could follow the law as provided in the court's instructions. CP 80. Indeed, the prosecutor never asked jurors whether they

could disregard their feelings about the war on drugs and apply the law as instructed. See RP 78-81, 102-10.

It is inappropriate to politicize jury selection in this way because it interferes with the accused's right to a fair trial by an impartial jury. As the court of appeals recently recognized, regarding Zamora, "by ferreting out the views of the venire members on border security, the prosecutor could better identify and choose those jurors predisposed to sympathize with law enforcement and the prosecution," which "breached the right to an impartial jury and, in turn, contravened the right to a fair trial." In re Pers. Restraint of Skone, 30 Wn. App. 2d 1, 35, 543 P.3d 842 (2024).

The court of appeals also selectively quoted from voir dire and concluded the prosecutor in Mr. Payne's case "did not reference drug problems in any specific locations, in the county, or connect the war on drugs to Payne's case as 'another battle.'" Opinion, 5. Wrong again.

For instance, the prosecutor asked Juror 36, “How would you stand on a DEA enforcement operation where they took down a cartel in Mexico? Do you think that is overreaching?” RP 80. The prosecutor likewise asked Juror 36, “What about DEA activities where they intercept a crime ring passing drugs up and down the I-5 corridor?” RP 80.

These questions carried the improper suggestion that the drugs Mr. Payne possessed were part of a larger drug trafficking ring along the I-5 corridor, even though there was zero evidence of that. To the contrary, the evidence at most suggested Mr. Payne was a small-time dealer, selling to support his own addiction. The questions further suggested the righteousness of the prosecution—an effort to eliminate drug trafficking—which was calculated to align jurors with the prosecution and against Mr. Payne. This brings the prosecutor’s conduct squarely within that condemned in Loughbom.

Regarding safe injection sites, the prosecutor repeatedly asked jurors whether they thought increased use of “illicit

narcotics” was a “good idea” or a “good thing for our society.” RP 103-08. Juror 8 gave the obvious answer, “No, that’s not a good thing.” RP 103. When one juror expressed, “[c]ertainly, you couldn’t have it in the military,” the prosecutor replied, “I hope not.” RP 106. It goes without saying that these questions and remarks were not neutral, particularly when one considers the skyrocketing opioid overdoses in recent years. NAT’L INSTITUTE ON DRUG ABUSE, Drug Overdose Death Rates (May 14, 2024) (showing opioid overdoses rose from 49,860 in 2019 to 81,806 in 2022).³ They suggested jurors would be enabling narcotics use as a “good idea” by failing to convict Mr. Payne.

The court of appeals’ sanctioning of this conduct is highly concerning. It diminishes this Court’s holdings in Loughbom and Zamora. It condones, even encourages, prosecutors’ discussion of the war on drugs in voir dire as a tactic to remove prospective jurors skeptical of its effectiveness. Given the racist history and

³ Available at <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates> (last visited Feb. 18, 2025).

devastating effects of the war on drugs on communities of color, the prosecution has no business discussing it at all in a drug prosecution. Review is necessary to resolve this constitutional question of public importance.

E. CONCLUSION

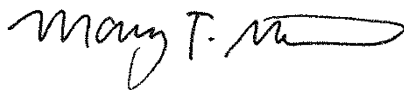
For the reasons discussed, this Court should grant review and reverse the court of appeals.

DATED this 18th day of February, 2025.

I certify this document contains 4,531 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a stylized flourish at the end.

MARY T. SWIFT, WSBA No. 45668
Attorney for Petitioner

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MONTE TYSON PAYNE,

Appellant.

No. 85525-5-I

DIVISION ONE

UNPUBLISHED OPINION

MANN, J. — Monte Payne appeals his conviction for possession of heroin with the intent to deliver. Payne argues the prosecutor committed misconduct during voir dire. Payne also challenges a community custody condition and the \$500 victim penalty assessment (VPA). We remand to strike the challenged community custody condition and the VPA. We otherwise affirm.

I

In June 2019, Bellingham police observed a vehicle changing lanes to make a right turn and failing to signal the lane change. Police stopped the vehicle and identified the driver as Payne. Police also observed Payne placing items under the steering column. After learning Payne's license was suspended, police arrested Payne and read

him Miranda¹ warnings. Payne consented to a search of his car. The search produced multiple hypodermic needles, a baggy containing a large lump of heroin, a scale with heroin residue on it, a baggy containing methamphetamine, a lump of methamphetamine, several hundred dollars, tin foil, empty unused baggies, butane torches, medical tubing, a glass pipe, and a police radio scanner.

Payne was charged with one count of possession of heroin with intent to deliver, one count of possession of methamphetamine with intent to deliver, and driving with a suspended license in the third degree. The charge for driving with a suspended license was later dropped. At the conclusion of the State's case, Payne successfully moved to dismiss the methamphetamine charge.

The jury found Payne guilty of possession of heroin with the intent to deliver. Payne was sentenced to 24 months in community custody. The trial court imposed community custody conditions including the prohibition: "do not enter drug zones." Payne was also ordered to pay a \$500 VPA.

Payne appeals.

II

Payne argues the prosecutor committed flagrant and ill-intentioned misconduct during voir dire by making multiple references to the "war on drugs." Payne relies on State v. Loughbom, 196 Wn.2d 64, 470 P.3d 499 (2020). Payne also relies on State v. Zamora, 199 Wn.2d 698, 512 P.3d 512 (2022), and argues that the State politicized the trial on a controversial and emotional issue.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In contrast, the State argues that the questions asked during voir dire were neutral and made to discover any basis for challenge for cause or to exercise a peremptory challenge. We agree with the State.

“We presume prosecutors act impartially ‘in the interest of justice.’” Loughbom, 196 Wn.2d at 69 (quoting State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011)). “At the same time, we expect prosecutors to ‘subdue courtroom zeal, not to add to it, in order to ensure the defendant receives a fair trial.’” Loughbom, 196 Wn.2d at 69 (quoting State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015)).

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecuting attorney’s conduct was both improper and prejudicial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006). If the defendant did not object at trial—as is the case here—the issue is waived unless the “prosecutor’s misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Under this heightened standard, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.” Emery, 174 Wn.2d at 761 (quoting Thorgerson, 172 Wn.2d at 455).

In Loughbom, Loughbom was charged with various drug crimes including delivery of controlled substance methamphetamine. During voir dire, the prosecutor asked whether any jurors believed there was a drug problem in the county. Loughbom, 196 Wn.2d at 67-68. The prosecutor made three references to the “ongoing war on drugs” during opening statements, rebuttal arguments, and closing arguments

throughout the one-day trial. 196 Wn.2d at 70. Our Supreme Court rejected the “war on drugs rhetoric,” and concluded that the “prosecutor’s improper framing of Loughbom’s prosecution as representing the war on drugs, and his reinforcing of this theme throughout, caused incurable prejudice.” Loughbom, 196 Wn.2d at 75. The court held that the repetitive misconduct had a cumulative effect:

By the time the prosecutor framed Loughbom’s trial as representing “yet another battle in the ongoing war on drugs” in his opening statement, he had already primed the jury to view Loughbom’s prosecution through this prism by raising the specter of the “drug problem in Lincoln County” during jury selection. Furthermore, two of the three references to the war on drugs were made in closing, and by that point it would have been too late to negate the prejudice that built up over the course of the single-day trial.

Loughbom, 196 Wn.2d at 77. The court declined to “decide whether a single, inadvertent reference to the war on drugs during a longer trial would require reversal in the context of the total argument.” Loughbom, 196 Wn.2d at 77.

In Zamora, our Supreme Court concluded that the prosecutor committed race-based misconduct under the analysis established in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), because the prosecutor posed irrelevant questions to jurors during voir dire about border security and immigration and connected those questions to crime and drugs. Zamora, 199 Wn.2d at 720-21. The court explained that “what occurs during voir dire is equally as important as what occurs during trial proceedings,” and that when race-based misconduct occurs during such a significant aspect of trial, “the jury becomes infected in untraceable ways.” Zamora, 199 Wn.2d at 712.

Here, Payne has not alleged race-based misconduct so we do not use the standard established in Monday. Instead, Payne must show the prosecutor’s conduct

was so flagrant and ill intentioned that no instruction could have cured any resulting prejudice.

Payne points to several instances of the prosecutor's questions to potential jurors about their thoughts on federal drug enforcement and the war on drugs, including:

The war on drugs, does anybody believe that we've lost the war on drugs, and perhaps we should scale back federal enforcement of what the DEA is doing or otherwise by a show of hands?

* * * * *

Juror Number 36, can you tell me about how you personally stand on the war on drugs?

* * * * *

Juror Number 20 . . . what is your view on the war on drugs? Do you think, are you okay with the status quo? Do you think that federal enforcement should be more stringent, scaled back?

* * * * *

Juror Number 28, can you tell me a little bit about kind of where you stand in this conversation on, you know, enforcement of drug trafficking laws and the war on drugs?

The prosecutor's use of the war on drugs was limited to voir dire. Unlike Loughbom, the prosecutor did not reference drug problems in any specific locations, in the county, or connect the war on drugs to Payne's case as "another battle." And the prosecutor did not use war on drugs rhetoric during opening statements or closing arguments. Payne asserts that under Zamora, the holding in Loughbom is not confined to its facts and that misconduct that occurs only during voir dire, as it did here, warrants reversal. But the prosecutor posed questions to jurors to discern beliefs on drug enforcement in general. Such questions are not analogous to the specific and persistent characterization of the war on drugs that occurred in Loughbom where the prosecutor connected the war on drugs to the locality, the community, and the crime

charged. There were no such cumulative effects in this case. Nor does the record reflect the same irrelevant questions and implicit misconduct shown in Zamora.

Payne fails to establish that the prosecutor's questions about the war on drugs were so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice.

III

Payne argues the community custody condition that orders "do not enter drug zones" is unconstitutionally vague.

A community custody condition is unconstitutionally vague when it (1) fails to reasonably inform a person of ordinary intelligence what behavior is prohibited, (2) fails to provide explicit standards to prevent arbitrary and discriminatory application, or (3) places constraints on the exercise of basic First Amendment rights and leaves individuals unsure of how to comply. State v. Padilla, 190 Wn.2d 672, 679, 416 P.3d 712 (2018).

The State acknowledges that the community custody condition does not provide enough specificity for a person to reasonably know what conduct is prohibited and concedes the condition should be stricken.

We accept the State's concession and remand to strike the community custody condition.

IV

Payne argues that remand is necessary to strike the \$500 VPA. The State does not dispute Payne's indigency and does not oppose remand to strike the VPA.

In 2023, the legislature added a subsection to RCW 7.68.035 that prohibits courts from imposing a VPA on indigent defendants. LAWS OF 2023, ch. 449, § 1. Recent amendments to statutes governing legal financial obligations apply retroactively to matters pending on direct appeal. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). We accept the State's concession.

We remand to strike the challenged community custody condition and the VPA. We otherwise affirm.

Mann, J.

WE CONCUR:

Seldman, J.

Cohen, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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