

## [State v. Zurick](#)

Court of Appeals of Washington, Division Three

August 4, 2011, Filed

No. 29247-9-III

### **Reporter**

2011 Wash. App. LEXIS 1858

THE STATE OF WASHINGTON, *RESPONDENT*, v. JASON MICHAEL ZURICK, *APPELLANT*.

**NOTICE:** RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

**Subsequent History:** Reported at [State v. Zurick, 2011 Wash. App. LEXIS 1906 \(Wash. Ct. App., Aug. 4, 2011\)](#)

**Prior History:** [\*1] Appeal from Grant Superior Court. Docket No: 10-1-00199-1. Judgment or order under review. Date filed: 07/29/2010. Judge signing: Honorable John Michael Antosz.

**Counsel:** Janet G. Gemberling, Jill Shumaker Reuter, Gemberling & Dooris PS, Spokane, WA, for Appellant(s).

D. Angus Lee, Grant County Prosecuting Attorney, Ephrata, WA; Ryan S. Valaas, Attorney at Law, Ephrata, WA, for Respondent(s).

**Judges:** AUTHOR: Dennis J. Sweeney, J. WE CONCUR: Stephen M. Brown, J., Laurel H. Siddoway, J.

**Opinion by:** Dennis J. Sweeney

## **Opinion**

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¶1 SWEENEY, J. —This appeal follows a conviction for third degree assault. The defendant struck a police officer in the chest with his hand. He contends that the prosecutor committed misconduct during the trial, conduct that we should characterize as flagrant and review for the first time here on appeal. We conclude that the prosecutor's statement did not amount to misconduct. The court did impose an improper community custody condition and there is a scrivener's error in the judgment and sentence. We therefore affirm the conviction and remand to correct the judgment and sentence.

### **FACTS**

¶2 In April 2010, Moses Lake Police Officers Aaron Hintz and Rick Rodriguez responded to a domestic disturbance call at the home of [\*2] Ruth and Jose Rocha. Officer Hintz entered the home and saw Jason Zurick seated in a chair in the dining room. Mr. Zurick is Ms. Rocha's brother and was temporarily staying at the home to help with vehicle repairs.

¶3 Mr. Zurick appeared intoxicated and was not wearing a shirt. Officer Hintz immediately noticed signs that a fight had taken place, including abrasions to Mr. Zurick's hand and elbow, and an upturned chair in the living room. Officer Hintz spoke with Mr. Zurick, while Officer Rodriguez spoke with Mr. and Ms. Rocha. Mr. Zurick apparently ignored questioning by Officer Hintz and attempted to listen in on the Rochas' account of what had occurred that night. At one point, Mr. Zurick began to yell over at Ms. Rocha, "That's not what happened. That's not what happened." Report of Proceedings (RP) (Jun. 9, 2010) at 43. Officer Hintz yelled back at Mr. Zurick.

¶4 Mr. Zurick then shifted his weight back in the chair, cocked his right arm back, made a fist, and starting moving onto the balls of his feet. Officer Hintz moved closer. Mr. Zurick then lunged up out of his chair and struck Officer

Hintz in the chest with his hand. Officer Hintz responded with a palm strike to Mr. Zurick's [\*3] chest. The officers placed Mr. Zurick under arrest.

¶5 The State charged Mr. Zurick with one count of third degree assault of a law enforcement officer. The case proceeded to trial. The prosecutor argued in rebuttal:

And then you've got to be asking yourselves, because I'm sort of asking myself, why would the officers make up a story like this?

RP (Jun. 10, 2010) at 118. Defense counsel did not object.

¶6 The jury found Mr. Zurick guilty as charged. The court imposed a standard range sentence, including 12 months of community custody. As a condition of community custody, the court ordered that Mr. Zurick “undergo an evaluation for, and fully comply with treatment for substance abuse.” Clerk's Papers (CP) at 49. The court also imposed legal financial obligations in the amount of \$1,400. The judgment and sentence, however, lists the \$1,400 as restitution owed, rather than as the total legal and financial obligations. The court did not impose any restitution.

## DISCUSSION

¶7 Mr. Zurick contends that the prosecutor impermissibly implied that the jurors had to find the officers were lying in order to find him not guilty.

¶8 To prevail Mr. Zurick must show that the disputed statement was both improper and prejudicial. [\*4] [State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 \(1997\)](#). But absent an objection, any claim of prosecutorial misconduct is waived unless the defendant can show that the statement was so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” that a curative instruction could not have neutralized. [State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 \(1995\)](#). We evaluate the statement in the context of “the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” [State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 \(1994\)](#).

¶9 In its closing, the defense reinforced the testimony of Mr. and Ms. Rocha and took issue with the testimony of the officers. On rebuttal, the prosecutor responded by attacking the credibility of Mr. and Ms. Rocha and supporting the credibility of the officers. That is not misconduct. It is a fair response to defense counsel's arguments. [Russell, 125 Wn.2d at 87](#). The prosecutor's statement, in context, was:

Now, as the judge said, because the state has the burden in a criminal case, we get the last chance to speak with you. So I'd like to take some time to point out some inconsistencies in the [\*5] defense's case, because there are some holes there, as well. To give you some things to kind of think about during your deliberations.

... .

So how much could [the Rochas] really see? The best person to observe the defendant and know what the defendant was doing was Officer Hintz.

And then you've got to be asking yourselves, because I'm sort of asking myself, *why would the officers make up a story like this?* If the defendant had really done nothing to warrant Officer Hintz's reaction, then what was the stimulus or the action that caused Officer Hintz to react? And there's really no reasonable explanation for that, except that the defendant pushed Officer Hintz and had his right fist drawn back. There's just no other reasonable explanation.

... .

And so think about those things during your deliberations. Think about the holes in the Rochas' testimony.

And real quick I'd like you to please turn with me to Instruction No. 1. And I'll make this brief. If you could look at page two of Instruction No. 1, the second paragraph starts with, you are the sole judges of the credibility of each witness. And then it continues down a few sentences there, and it states, that you can take into consideration [\*6] any personal interest that the witness might have in the outcome of the issues, and you can also consider any bias or prejudice that the witness may have shown.

So ask yourselves what biases or prejudices or personal interests do the Rochas have as witnesses in this case? Well, first of all, they're related to the defendant. They're family and blood runs thick. And then consider what biases or personal interests the defendant, Mr. Zurick has. The man is on trial. He testified he couldn't remember anything.

RP (Jun. 10, 2010) at 116-20 (emphasis added).

¶10 Taken in context, the prosecutor's statement was fair rebuttal. The prosecutor did not argue that the jury must find that the officers were lying in order to be able to acquit. Instead, the prosecutor urged the jury to consider the credibility of Mr. and Ms. Rocha in light of their familial connection with Mr. Zurick. He further questioned the credibility of Mr. Zurick in light of his current legal situation. His comments focused on why the Rochas would want to protect Mr. Zurick. The statement appealed to the jurors' duty to make credibility determinations, not their passion or prejudices. And the statements were made in response to defense [\*7] counsel's closing argument.

¶11 Mr. Zurick cites to *State v. Fleming* to support his argument that the prosecutor's statement was flagrant and ill intentioned. [83 Wn. App. 209, 213, 921 P.2d 1076 \(1996\)](#) (prosecutor told jury it could acquit only if it found witness had lied or was confused). But a prosecutor may argue inferences from the evidence, including why the jury would want to believe one witness over another. [State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 \(1996\)](#). That rule applies to the credibility of a defendant and any associated witnesses for the defense. *Id.* at 291. The prosecutor's argument here fell within this rule. The defense presented testimony and argument that contradicted each witness referred to by the prosecutor. This is not a case, then, of improper burden shifting like *Fleming*.

¶12 So, given the context of the case as one involving the Rochas' credibility versus the officer's credibility—as both testified to different versions of what happened—the prosecutor's argument was proper and appropriate. Mr. Zurick's failure to object or request a curative instruction amounts to a waiver. [Gentry, 125 Wn.2d at 596](#). The prosecutor's comments were neither flagrant nor ill [\*8] intentioned.

#### COMMUNITY CUSTODY CONDITION

¶13 As a condition of community custody, the court ordered that Mr. Zurick “undergo an evaluation for, and fully comply with treatment for substance abuse.” CP at 49. Mr. Zurick argues that the substance abuse condition is overly broad because there is no evidence that controlled substances contributed to his offense. The State agrees. Br. of Resp't at 7.

¶14 [RCW 9.94A.703\(3\)\(c\)](#) allows courts to impose “crime related” treatment or counseling service as part of community custody. Here, it is undisputed that Mr. Zurick consumed alcohol on the date of the crime charged. But, there was no evidence that he consumed anything other than alcohol on the evening of the assault. We therefore strike the provision and remand for the court to consider imposing a more narrowly worded and “crime related” provision.

#### SCRIVENER'S ERROR

¶15 The court imposed legal financial obligations in the amount of \$1,400. The obligations consist of a \$500 victim assessment, \$200 court costs, \$600 court appointed attorney fees, and a \$100 DNA<sup>1</sup> collection fee. CP at 49-50. The sum of these legal financial obligations (\$1,400) was mistakenly written on a line in the judgment and sentence

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<sup>1</sup> Deoxyribonucleic acid.

labeled [\*9] “Restitution,” instead of the line directly below it labeled “Total.” The court did not impose restitution. Mr. Zurick argues that the mistake needs to be corrected. The State agrees. Br. of Resp’t at 8. We therefore remand for correction.

¶16 We affirm the conviction and remand for correction of the judgment and sentence in accordance with this opinion.

¶17 A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to [RCW 2.06.040](#).

Brown and, Siddoway, JJ., concur.