No. 80346-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRUNO MOLINA,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

After attending his friend's birthday party, Bruno Molina found himself in a difficult situation. He agreed to give Ana Pocasangre, who was drunk, a ride. When they arrived at their destination, Ms. Pocasangre made unwanted sexual advances on Mr. Molina. When Ms. Pocasangre's friends arrived, she verbally insulted Mr. Molina. Matters escalated and Ms. Pocasangre began to chase Mr. Molina. Ms. Pocasangre's friends, also drunk, encouraged her to beat Mr. Molina. After warning Ms. Pocasangre that he would defend himself, Mr. Molina hit her when she came at him. When one of Ms. Pocasangre's drunken friends also charged at Mr. Molina, he hit her. As tried to drive away, Ms. Pocasangre hit his window and yelled about getting revenge. She later alleged that Mr. Molina had digitally penetrated her vagina without her consent.

Charged with rape and two counts of assault, Mr. Molina denied the rape allegation and testified he acted in self-defense. Still, trial counsel did not argue self-defense or ask for a self-defense instruction. The jury acquitted Mr. Molina of rape, but found him guilty of the assaults.

Trial counsel's failure to seek instructions on self-defense deprived Mr. Molina of his right to effective assistance of counsel. Reversal is further warranted due to prosecutorial misconduct.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution, Mr. Molina was deprived of his right to the effective assistance of counsel.

2. Prosecutorial misconduct deprived Mr. Molina of his due process right to a fair trial under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution. The court erred by overruling Mr. Molina's objections to the prosecutor's misconduct. RP 1358-59, 1365-66.

3. The court erred by imposing the $100 DNA fee.

4. The court erred by imposing two $500 penalty assessments, one on the conviction for second degree assault and a second on the conviction for fourth degree assault.

5. The court erred by ordering, as a condition of community custody, that Mr. Molina pay supervision fees.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The failure of defense counsel to argue self-defense may constitute ineffective assistance of counsel. Mr. Molina testified he acted in self-defense in hitting Ms. Pocasangre and Ms. Williams when they charged at him. Other evidence showed the women attacked Mr. Molina and that he acted in self-defense. Self-defense was the only valid defense

theory to the assault charges, yet defense counsel did not argue self-defense or request that the jury be instructed on self-defense. Was Mr. Molina deprived of his constitutional right to the effective assistance of counsel?

2. It is misconduct for a prosecutor to misstate the evidence or cite to matters outside the evidence. Over Mr. Molina's objection, the prosecutor argued to the jury that an eye-witness corroborated Ms. Pocasangre's testimony that she fell unconscious after being hit by Mr. Molina. This was untrue. Did the prosecutor commit misconduct by arguing facts outside the evidence?

3. It is misconduct for a prosecutor to vouch for the credibility of a witness, argue the jury must find a witness is lying to reject the witness's testimony, or to appeal to the passions and prejudices of the jury. Over Mr. Molina's objection, the prosecutor vouched for Ms. Pocasangre's credibility by arguing that Ms. Pocasangre did not have a reason violate her oath and tell the jury "a story that she made up." Again over objection, the prosecutor argued Ms. Pocasangre had no reason to proceed with the case and have her "illiterate mother" testify unless she was telling the truth. Over objection, this line of argument was repeated a third time. Did the prosecutor commit misconduct by vouching for a witness, by arguing

the jury had to find Ms. Pocasangre was lying in order to reject her testimony, and by appealing to the passions and prejudices of the jury?

4. A $100 DNA collection fee should only be imposed if the state has not previously collected the person's DNA as a result of a prior conviction. The prosecution has the burden to prove that the person's DNA was not previously collected. Mr. Molina had prior convictions and, when he was sentenced before, the law required his DNA be collected. Should the $100 DNA fee be reversed because the prosecution did not prove that Mr. Molina's DNA was not previously collected?

5. A $500 penalty assessment must be imposed for criminal convictions obtained in superior court. The penalty assessment is not per each offense. Mr. Molina was convicted of two counts of assault in superior court. Did the trial court err by imposing two $500 penalty assessments rather than a single $500 penalty assessment?

6. A trial court may order that a defendant pay supervision fees as a condition of community custody. The condition is discretionary and should be waived if the defendant lacks the ability to pay. The court found that Mr. Molina did not have the ability to pay, and waived all discretionary legal financial obligations, but mistakenly ordered that Mr. Molina pay supervision fees as a condition of community custody. Should this condition be stricken?

D. STATEMENT OF THE CASE

On Tuesday evening, January 29, 2018, Bruno Molina went to his friend's birthday party. RP 1259-60. His friend, Emanuel Espana,[1] was turning 19. RP 1153. Mr. Molina was 20. RP 1283. While they had been friends since elementary school, the two were reconnecting. RP 1260-62.

Mr. Molina drove by himself to the gathering, which was at the top of a parking garage. RP 1263. When he arrived, he wished Mr. Espana happy birthday and drank a beer with him. RP 1263. There were around 15 other people at the party. RP 1262-63.

Mr. Espana had another friend named Israel Hermosillo-Alvarez who attended the party. RP 784-85. Israel,[2] who was about 19 years old, got very drunk at the party. RP 781, 785, 1153.

During the party, Israel called Alexis Hernandez and invited her and a couple of other young women, Ana Pocasangre, and Nicole Williams, to join them.[3] RP 786, 869, 887-78. Israel had gone to school

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[1] Some of the witnesses knew Mr. Espana by his nickname, "Negro," and referred to him by that name. RP 795, 1135.

[2] For clarity and to avoid confusion with Israel's siblings who share the same last name, Israel is referred to by his first name.

[3]For reasons that are unclear, many (but not all) of the volumes in the transcript redact the names of these three witnesses and use their initials instead. The context, however, shows that their full names were used in the trial court.

with Ms. Hernandez, and Ms. Pocasangre was best friends with Israel's ex-girlfriend. RP 787-88, 887. He had hung out with them before. RP 786.

Ms. Pocasangre was 15 years old, and Ms. Hernandez and Ms. Williams were 14. RP 691, 869, 991. Although she would not turn 16 until May, Ms. Pocasangre testified that around this time in January, she told everyone she was 16. RP 869, 964. The three friends drank together and went to parties. RP 699, 853, 886. Ms. Pocasangre had a problem with alcohol and was in therapy. RP 888, 941; Ex. 5, p. 2. Ms. Hernandez testified that "when [Ms. Pocasangre] gets drunk she gets really aggressive." RP 717.

Ms. Hernandez had made plans with Israel to hang out that night. RP 699. While she was at Ms. Pocasangre's home with Ms. Pocasangre and Ms. Williams, Israel called Ms. Hernandez, asking the young women to come hang out. RP 880-81. They agreed and told Israel they had hard alcohol. RP 786. Israel testified he wanted to go pick them up because he wanted to drink more. RP 797.

Around 11 p.m., when Israel was already very drunk, he left the party to pick up the three young women. RP 785. Mr. Espana and Mr. Molina did not want Israel to leave because he was drunk. RP 1164. Mr. Espana also did not want Israel to bring the three girls because he did not get along with them and did not like them. RP 1138-39. Despite their

opposition, Israel drove to pick up the trio. RP 789, 796, 1138. Israel picked them up at a McDonald's that was next to Ms. Pocasangre's home, and drove back to the party. RP 879-80, 883, 885.

At the party, which lasted about one or two hours, Ms. Pocasangre drank alcohol along with the others. RP 888, 948. Ms. Hernandez brought a bottle of hard alcohol. RP 706, 790, 942, 997. Ms. Pocasangre estimated she drank about five beers at the gathering. RP 888, 948. Ms. Pocasangre recalled that she and her friends kept with their own group and did not mingle. RP 888. The three young women were very drunk. RP 1164.

Israel got even more drunk and passed out in the back seat of his car. RP 791-93, 1141, 1266-67. To get Israel and the others home, Mr. Espana drove Israel's car. RP 1140-41. Because the vehicle was full, Ms. Pocasangre's friends told Ms. Pocasangre she should she ride with Mr. Molina. RP 890. Mr. Molina agreed to give her a ride. RP 1267.

Mr. Espana told Mr. Molina to meet them at the same McDonald's where Israel had picked up the three women. RP 710, 1267. Mr. Molina recalled the plan was that they would meet Israel's cousins to drop Israel's car off. RP 1268.

Mr. Molina explained that Ms. Pocasangre was drunk and brought bottles of alcohol into his car. RP 1267. On the way to the McDonald's, Ms. Pocasangre asked him odd questions, such as whether he "hit licks" or

had been to jail before. RP 1269. Mr. Molina got to the McDonald's before Mr. Espana and parked. RP 1269-70. While in the car, Ms. Pocasangre asked Mr. Molina if he had a girlfriend. RP 1269. Mr. Molina told her he was married and had a child. RP 1269. Ms. Pocasangre said she did not believe him and tried to show him pictures of herself on her phone. RP 1270. She tried to kiss him. RP 1270.

Mr. Molina got out of the car. RP 1270. Concerned about Ms. Pocasangre spilling alcohol in the car, which he had borrowed from his mother, he tried to get Ms. Pocasangre out. RP 1262, 1720. Ms. Pocasangre did not want to get out until the others arrived. RP 1270. She called Mr. Molina "gay" and a "little bitch." RP 1271.

Mr. Espana arrived at the McDonald's about 25 minutes after Mr. Molina. RP 840, 1143, 1315. Ms. Hernandez recalled they had dropped a guy and his girlfriend off before going to meet Mr. Molina and Ms. Pocasangre at the McDonald's. RP 711.

Ms. Pocasangre went over to Mr. Espana's car and made derogatory comments about Mr. Molina to her friends, Ms. Hernandez and Ms. Williams. RP 1272-73. Mr. Molina told Mr. Espana to calm Ms. Pocasangre down. RP 1273. Mr. Molina did not leave because Mr. Espana wanted Mr. Molina to stay so he could give him a ride. RP 1272.

Mr. Molina tried to help Ms. Pocasangre back into Mr. Molina's car so she could wait inside. RP 1146, 1273. Unfortunately, Ms. Pocasangre's leg or foot got caught between the car door when Mr. Molina tried to close it, which hurt Ms. Pocasangre. RP 1146, 1177, 1273. Ms. Pocasangre became furious and started to chase Mr. Molina. RP 1146, 1273. As Ms. Williams testified, "She was trying to hit him or something like that. She was going after him." RP 1005. Ms. Williams recalled that Ms. Pocasangre was pretty drunk, and that Ms. Pocasangre and Ms. Hernandez had been doing shots. RP 1012.

As Mr. Molina ran figure eights around the cars, he initially thought the situation was humorous. RP 1273. But he soon realized that Ms. Pocasangre was serious about hitting him. RP 1273. Ms. Pocasangre's friends encouraged her to beat Mr. Molina up. RP 1186. Ms. Williams, who was in the front seat of the other car, yelled "beat his ass" and "get him." RP 1274. Mr. Molina told Ms. Pocasangre he would defend himself. RP 1279-80, 1297. Mr. Espana recalled that at some point, Ms. Pocasangre picked up a big rock and threw it at Mr. Molina. RP 1179-80. Mr. Espana tried to restrain Ms. Pocasangre, but she got away and charged at Mr. Molina. RP 1297-98. To defend himself, Mr. Molina hit Ms. Pocasangre in the face as she ran at him and she fell to the ground. RP

1275, 1279-80, 1298-99. Mr. Molina recalled that Ms. Pocasangre got right back up. RP 1275.

When Ms. Pocasangre fell, Ms. Williams got out of the car and came at Mr. Molina quickly in a fighting stance. RP 1280-81, 1293-95. Because it looked like Ms. Williams was going to try to throw a punch at him, he instinctively hit her in the face. RP 1294-97.

Mr. Molina got in his car. RP 1282. As Mr. Molina drove away, Ms. Pocasangre hit the window of Mr. Molina's car and yelled about getting revenge. RP 928, 1282. Ms. Pocasangre admitted that she told Mr. Molina he was going to pay. RP 927.

About twelve minutes elapsed between Mr. Espana and the others arriving at the McDonald's and Mr. Molina's departure. RP 840-41.

Ms. Pocasangre's version of events differed from Mr. Molina's. She testified that while she was inside Mr. Molina's car outside the McDonald's, Mr. Molina asked her to perform oral sex and that she declined. RP 895-96. She testified Mr. Molina kissed her and that she kissed him back, but stopped. RP 898. She claimed that after telling him to stop, Mr. Molina quickly put his hand inside her pants. She alleged he was able to digitally penetrate her vagina despite her pants being tight and also wearing tights and underwear. RP 900-01, 909, 914-15. She elbowed Mr. Molina and got out of the car because her mother was calling her on her

phone. RP 904-05. She claimed that after they got out of the car, Mr. Molina hit her twice and threw her to the ground. RP 911, 918. She thought she briefly lost consciousness after falling to the ground. RP 920-21.

Ms. Williams admitted she confronted Mr. Molina after she saw Ms. Pocasangre fall to the ground. RP 1003, 1020. However, she denied hitting Mr. Molina or trying to hit him. RP 1015. Ms. Pocasangre recalled that after Mr. Molina hit Ms. Williams, Ms. Williams told Mr. Molina "she could take his pussy hits." RP 958.

Israel's older brother, Josue Hermosillo-Alvarez testified that he received a call from Israel at the McDonald. RP 565. Concerned about how intoxicated his brother sounded, he got in his car with his brother Moses, and drove to the McDonald's. RP 567.

Just as he got there, Josue saw a man (Mr. Molina) and a young Hispanic woman (Ms. Pocasangre) having a physical encounter. RP 571-72, 574. He saw Mr. Molina punch the young woman. RP 572. She got back up. RP 573, 578-79. He saw a young African-American woman (Ms. Williams) "running towards [Mr. Molina] trying to fight him and another punch being thrown." RP 571, 573. Ms. Williams had her fist out and was throwing punches before Mr. Molina punched her. RP 579.

Josue decided he would drive the young women home. RP 575. Although Ms. Pocasangre's home was right next to the McDonald's, she did not go home and got in the car with the others. RP 575, 579. Josue stopped at a gas station for fuel and so that the women could use the restroom. RP 579. When the young women returned from inside the station, Josue noticed they had alcohol that they did not have before. RP 591-92. Ms. Pocasangre claimed that Ms. Hernandez bought the alcohol. RP 959. The young women, who appeared intoxicated, talked about getting revenge against Mr. Molina. RP 592-93. Josue told them karma would take care of it. RP 593.

Ms. Pocasangre went to the hospital with her mother later that day. RP 605-06, 860. She alleged someone tried to force her to have oral sex and had tried to touch her vagina. RP 614.

The prosecution charged Mr. Molina with one count of third degree rape; one count of second degree assault for allegedly assaulting Ms. Pocasangre; and one of fourth degree assault for allegedly assaulting Ms. Williams. CP 9-10.

At trial, Mr. Molina testified that he did not rape Ms. Pocasangre, denying Ms. Pocasangre's allegations. RP 1282, 1270. He admitted he had hit Ms. Pocasangre and Ms. Williams, but that he had done so because he

believed it was necessary to defend himself. RP 1275, 1279-80, 1294-99. However, he regretted hitting them. RP 1282, 1303-04.

Notwithstanding the evidence showing he acted in self-defense, Mr. Molina's attorney did not argue self-defense and did not ask the court to instruct the jury on self-defense. RP 544-56, 1110-28, 1371-84. Defense counsel conceded that Mr. Molina assaulted Ms. Pocasangre and Ms. Williams, but argued for acquittal on the rape charge and to convict Mr. Molina of fourth degree assault for the assault against Ms. Pocasangre rather than second degree assault. RP 1379-80, 1383-84.

During closing arguments, the prosecutor misrepresented Josue's testimony, contending his testimony corroborated Ms. Pocasangre's claim that she became unconscious after being hit. RP 1358. Mr. Molina's objection was overruled. RP 1358. The prosecution also repeatedly made arguments vouching for Ms. Pocasangre's credibility and contended that the jury had to find Ms. Pocasangre was lying under oath to reject her testimony. Again, the court overruled but Mr. Molina's objections. RP 1365-66.

The jury found Mr. Molina not guilty on the charge of rape. CP 57. The jury, however, found Mr. Molina guilty on the two assault charges. CP 58, 60.

E. ARGUMENT

1. Mr. Molina was deprived of his right to effective assistance of counsel by his trial counsel's failure to argue self-defense and request the jury be instructed on self-defense.

a. Defendants have a constitutional right to effective assistance of counsel.

Criminal defendants have the right to effective assistance of counsel under our state and federal constitutions. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Const. art. I, § 22. That right is denied where counsel's deficient performance results in prejudice. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 226.

Counsel's failure to argue a legal theory and request a necessary instruction can constitute ineffective assistance of counsel. Thomas, 109 Wn.2d at 229. This may include the failure by counsel to argue self-defense and to request a self-defense instruction. State v. Temple, No. 34853-9-III, noted at 4 Wn. App. 2d 1006, 2018 WL 2688176, at *9-10 (2018) (unpublished).[4]

[4] Cited as persuasive authority. GR 14.1.

b. Defense counsel provided deficient performance by failing to argue self-defense and request a self-defense instruction.

Deficient performance is performance falling below an objective standard of reasonableness. Strickland, 466 U.S. at 687. When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). The presumption that counsel was effective is rebutted if there is no legitimate tactical explanation for counsel's actions. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). The "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores–Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Force used in self-defense is lawful to prevent injury of oneself. RCW 9A.16.020(3). When there is some evidence of self-defense, the defendant is entitled to instructions on self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983). The threshold burden of production for self-defense is low. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). The evidence is viewed in the light most favorable to the defendant. State v. George, 161 Wn. App. 86, 95, 249 P.3d 202 (2011).

Once some evidence is introduced, due process requires the prosecution to prove the absence of self-defense beyond a reasonable doubt and the jury must be so instructed in a manner that is unambiguous. Walden, 131 Wn.2d at 469; State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984).

In this case, the evidence supported a claim of self-defense on both charges of assault. Concerning the charged assault against Ms. Pocasangre, the evidence showed Ms. Pocasangre was drunk and, as Ms. Hernandez testified, "when [Ms. Pocasangre] gets drunk she gets really aggressive." RP 717. Consistent with Ms. Hernandez's testimony, Ms. Pocasangre was verbally hostile to Mr. Molina and insulted him. RP 1272-73. Ms. Pocasangre became furious and chased Mr. Molina after he accidently closed the passenger car door on her leg or foot. RP 1146, 1177, 1273. As Ms. Williams testified, Ms. Pocasangre "was going after him" and "was trying to hit him." RP 1005. Ms. Williams encouraged Ms. Pocasangre to "beat his ass" and "get him." RP 1274. Ms. Pocasangre may have had a large rock. RP 1179-80. Even after Mr. Molina warned Ms. Pocasangre that he would defend himself and Mr. Espana tried to hold Ms. Pocasangre back, Ms. Pocasangre charged at Mr. Molina. RP 1274, 1279-80, 1297-98.

As for Ms. Williams, she encouraged Ms. Pocasangre to assault Mr. Molina. RP 1274. Josue testified that he saw Ms. Williams charge at Mr. Molina and that she was throwing punches before Mr. Molina hit her. RP 571, 573, 579.

Despite this evidence, defense counsel did not argue self-defense and did not ask for the jury to be instructed that the prosecution bore the burden to disprove the absence of self-defense beyond a reasonable doubt. Rather, defense counsel presented a theory of general denial. RP 33-34, 544-46, 1371-84. While this was a viable defense to the charge of rape, it was not a viable defense to the assault charges because the evidence made it impossible to dispute that Mr. Molina hit Ms. Pocasangre and Ms. Williams. Even after Mr. Molina exercised his constitutional right to testify,[5] and provided additional evidence of self-defense, defense counsel failed to argue self-defense. During closing arguments, defense counsel conceded that Mr. Molina was guilty of assaulting Ms. Pocasangre and Ms. Williams, but was not guilty of raping Ms. Pocasangre.[6] RP 1379-80, 1383-84.

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[5] Const. art. I, § 22; State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

[6] As a lesser included or inferior degree offense, the jury was instructed on fourth degree assault on count two, the assault charge as to Ms. Pocasangre. CP 51-52, 55-56. Defense counsel argued the jury should convict Mr. Molina of

In light of the evidence supporting self-defense, this was deficient performance. If counsel had requested the jury be instructed on self-defense, the court would have instructed the jury that the prosecution bore the burden of disproving self-defense beyond a reasonable doubt. See 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (4th Ed). Counsel could have then used this instruction to argue for complete acquittal. And as the jury was properly instructed to consider each charge separately, there was no downside in obtaining a self-defense instruction. CP 37; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 3.03 (4th Ed).

Moreover, to the extent that conceding guilt on the charges of assault and asking for acquittal on the rape charge could be deemed strategic, it was not a legitimate strategy. Mr. Molina pleaded not guilty to the assault charges. Exercising his constitutional right to testify, he testified that he had felt his actions were necessary to defend himself. It was not for defense counsel to contradict her client on this point. "Autonomy to decide that the objective of the defense is to assert innocence" belongs to the client, not the lawyer. McCoy v. Louisiana, __ U.S. __, 138 S. Ct. 1500, 1508, 200 L. Ed. 2d 821 (2018). When one acts in lawful self-defense, that person is innocent.

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this lesser offense because the evidence did not show that Ms. Pocasangre lost consciousness or suffered a concussion. RP 1379-80.

Any suggestion that Mr. Molina was not entitled to a self-defense instruction because self-defense was not affirmatively pleaded or identified before trial should be rejected. Self-defense is not a true affirmative defense and the defense does need to be proved by a preponderance of the evidence. See State v. Wiebe, 195 Wn. App. 252, 256-257, 377 P.3d 290 (2016) (distinguishing between an "affirmative defense," which the defendant must establish by a preponderance of the evidence, and a "negating defense," which negates one or more elements of the crime and must be disproved by the State beyond a reasonable doubt). Thus, it need not be identified before trial and any failure to provide notice of self-defense does not preclude a self-defense instruction. See Temple, No. 34853-9-III, 2018 WL 2688176, at *5, *9 (reasoning that defendant would have been entitled to self-defense instruction even though self-defense was not affirmatively pleaded before trial).

For this reason, defense counsel was also deficient in failing to provide adequate responses to several of the prosecution's objections during Mr. Molina's testimony. Although Mr. Molina had already testified without objection that he felt he was going to defend himself if Ms. Pocasangre assaulted him, RP 1274, the prosecutor objected on relevance grounds to defense counsel questioning whether Mr. Molina felt justified in hitting Ms. Pocasangre RP 1275. The prosecutor explained Mr. Molina

had only identified general denial as the defense, not self-defense. Defense counsel responded that general denial remained the defense. RP 1274-75.

While initially overruling the prosecutor's objection, the court changed its ruling after prosecutor reiterated her objection and the question was repeated. RP 1276. Based on the same reasoning, the prosecutor also successfully objected and had the court strike Mr. Molina's testimony that he told Ms. Williams he was going to defend himself. RP 1279-80. Given that these occurrences were in front of the jury, the jury likely got the erroneous impression that any evidence of self-defense was irrelevant. Of course, this was false because a person acting in self-defense acts lawfully in using force, which negates the intent element of assault. Acosta, 101 Wn.2d at 617-18.

Accordingly, counsel's failure to argue self-defense and seek a self-defense was deficient performance.

c. Defense counsel's failure to argue self-defense and request a self-defense instruction prejudiced Mr. Molina, requiring reversal of the convictions.

The failure to argue self-defense and obtain a self-defense instruction was prejudicial, meaning that had the jury been instructed on self-defense there is a reasonable probability 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." Id. at 694. Proof by a preponderance that the outcome would have been altered is not the standard. Thomas, 109 Wn.2d at 226.

Under the instructions and defense counsel's arguments, the jury had little choice but to convict Mr. Molina of the two charged assaults. That he had hit Ms. Pocasangre and Ms. Williams was undisputed and established by overwhelming evidence.

But with a self-defense instruction, the jury could have reasonably found that the prosecution did not prove the absence of self-defense beyond a reasonable doubt. See State v. W.R., Jr., 181 Wn.2d 757, 770, 336 P.3d 1134 (2014) ("Creating a reasonable doubt for the defense is far easier than proving [a] defense by a preponderance of the evidence."). Credible evidence showed that Ms. Pocasangre charged at Mr. Molina and was trying to hit him. Credible evidence also showed that Ms. Williams did the same. Further, given that the jury found reasonable doubt on the charge of rape, the jury likely did not find Ms. Pocasangre or the other young women to be particularly credible. Because this record shows a reasonable probability of a different result but for counsel's deficient performance, both convictions should be reversed. See Temple, No. 34853-9-III, 2018 WL 2688176, at *10 (reasonable jury could have acquitted defendant of assault if instructed on self-defense given evidence

that defendant did not initiate fight and punches were necessitated by other person's actions).

2. Prosecutorial misconduct during closing argument deprived Mr. Molina of his right to a fair trial.

a. It is misconduct for the prosecutor to make arguments unsupported by the evidence, vouch for the credibility of a witness, contend that the jury must find a witness is lying to reject the witness's testimony, or inflame the passions and prejudices of the jury.

"Closing argument provides an opportunity for counsel to summarize and highlight relevant evidence and argue reasonable inferences from the evidence." State v. Salas, 1 Wn. App. 2d 931, 940, 408 P.3d 383 (2018). When a prosecutor makes improper arguments, this misconduct may deprive defendants of a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). The right to a fair trial is a fundamental liberty secured by the state and federal constitutions. Id. at 703-04; U.S. Const. amend. XIV; Const. art. I, § 3.

For this reason, prosecutorial "advocacy has its limits." State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). A "prosecutor's duty is to ensure a verdict free of prejudice and based on reason." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). A "prosecutor has a duty to act impartially in the interest only of justice." State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). To ensure defendants receive a fair

trial, prosecutors must "subdue courtroom zeal," not increase it. Walker, 182 Wn.2d at 477 (internal quotation omitted).

A prosecutor commits misconduct by making arguments unsupported by the admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Such misconduct is reversible error. State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012); State v. Reeder, 46 Wn.2d 888, 892-94, 285 P.2d 884 (1955).

It is also misconduct for a prosecutor to express a personal opinion or vouch for the credibility of witness. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Additionally, it is misconduct to argue to the jury that it must find a witness is lying in order to reject the witness's testimony or to find the defendant not guilty. State v. Rich, 186 Wn. App. 632, 649, 347 P.3d 72 (2015), reversed on other grounds, 184 Wn.2d 897, 365 P.3d 746 (2016). Prosecutorial appeals to the passions and prejudices of the jury similarly constitute misconduct. Belgarde, 110 Wn.2d at 507-08.

b. The prosecutor made arguments not supported by the evidence, vouched for the credibility of the complaining witness, argued the jury had to find the complaining witness was lying in order to reject her testimony, and appealed to the passions and prejudices of the jury. Mr. Molina's objections to this misconduct were erroneously overruled.

For the prosecution to prove Mr. Molina guilty on the charge of second degree assault, the prosecution bore the burden of proving not merely that Mr. Molina intentionally assaulted Ms. Pocasangre, but that he also thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a). "'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). The prosecutor theorized that Mr. Molina had briefly knocked Ms. Pocasangre unconscious when she fell to the ground and argued to the jury that this qualified as a temporary but substantial loss or impairment of the function of Ms. Pocasangre's brain. RP 1360-62, 1387. The prosecution did not argue that Ms. Pocasangre suffered substantial disfigurement or a fracture.

During closing arguments, the prosecutor committed misconduct by misrepresenting the evidence in support of its theory that Ms. Pocasangre fell unconscious. The prosecutor argued that Josue, who

arrived just before Mr. Molina struck Ms. Pocasangre, corroborated Ms. Pocasangre's claim that she lost consciousness. Mr. Molina objected, stating that the prosecutor was asserting facts outside the evidence, but the court overruled his objection:

> [PROSECUTOR]: She told you that she fell to the ground, that she lost consciousness. Her friends corroborated that too. In fact, even Hosea [sic], whom she doesn't know very well, corroborated that.
>
> [DEFENSE COUNSEL]: Objection. Arguing facts not evidence, Your Honor.
>
> THE COURT: Overruled.

RP 1358 (emphasis added).[7]

The court erred by overruling Mr. Molina's objection. Josue did not testify that Ms. Pocasangre was knocked unconscious or that she had taken awhile to get up. RP 563-95. Rather, he testified that he saw a punch, that Ms. Pocasangre fell to the ground, and that she got back up. RP 573, 578-79. The prosecution's assertion that Josue corroborated Ms. Pocasangre's claim of being knocked unconscious was misconduct.

The prosecutor committed further misconduct by repeatedly vouching for Ms. Pocasangre's credibility. Mr. Molina objected but was overruled:

[7] This volume of the transcript misspells Josue's name. RP 564.

> [PROSECUTOR]: . . . Why would [Ms. Pocasangre] come in here, swear under oath and tell you a story that she made up?
>
> [DEFENSE COUNSEL]: Objection. Personal opinion as to the veracity of the witness.
>
> COURT: Overruled.
>
> [PROSECUTOR]: What would she have to gain from that. Why would [Ms. Pocasangre] come here to proceed forward with this case knowing that her illiterate mother would have to take the stand and go through what she had to go through –
>
> [DEFENSE COUNSEL]: Objection. Appealing the passions of the jury.
>
> THE COURT: Overruled.

RP 1365.

After being overruled, the prosecutor continued this line of argument over Mr. Molina's renewed objection:

> [PROSECUTOR]: . . . And then she set [sic] up here, took an oath at 16 years of age in a country and a language that she doesn't understand.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Bolstering the credibility of a witness.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: To 14 strangers and other people in the courtroom, walk us step by step to what this man did to her. What could she possibly have to gain at this point?

RP 1366.[8]

This Court's decision in State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) shows the prosecutor's arguments were improper and that Mr. Molina's objections should have been sustained. There, the prosecutor argued that a confidential informant was credible because the police officers would not have risked their careers by using an unreliable informant. Jones, 114 Wn. App. at 293. This Court held that the statements were improper because they bolstered the officer's character "by using facts not in evidence, namely that police . . . would suffer professional repercussions if they used an untrustworthy informant." Id. As in Jones, the prosecutor's argument improperly vouched for Ms. Pocasangre's credibility by arguing she had nothing to gain by testifying falsely and in support cited facts outside the evidence about Ms. Pocasangre would not have "proceed[ed] forward with this case" or subject or "illiterate mother" to testifying unless her allegations were true. See also State v. Muse, No. 77363-1-I, 2019 WL 2341274, at *6 (Wash. Ct. App. June 3, 2019) (unpublished).[9]

[8] Ms. Pocasangre was originally from El Salvador and spoke primarily Spanish. RP 875.

[9] Cited for persuasive authority. GR 14.1.

The prosecutor's line of argument was also improper because it implied to the jury that in order to find the State had not proved its case beyond a reasonable doubt, the jury had to find that Ms. Pocasangre had lied under oath. RP 1365 ("Why would [Ms. Pocasangre] come in here, swear under oath and tell you a story that she made up?"). This is misleading because a "jury does not necessarily need to resolve which, if any, of the witnesses is telling the truth in order to conclude that one version is more credible or *accurate* than another." State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995) (emphasis added). "The testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." Id. (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). For this additional reason, the prosecutor's argument was misconduct. Rich, 186 Wn. App. at 649 (misconduct for prosecutor to argue that for jury to believe defendant's testimony, jury had to conclude all the other witnesses lied under oath).

In sum, Molina's objections to the prosecutor's misconduct were erroneously overruled.

c. There is a substantial likelihood that the misconduct affected the jury's verdict on the charge of second degree assault, requiring reversal of that conviction.

Prosecutorial misconduct preserved by an objection requires reversal if there is a substantial likelihood that the misconduct affected the jury's verdicts. State v. Allen, 182 Wn.2d 364, 375, 341 P.3d 268 (2015). The focus is on the impact of the misconduct and whether it affected the jury's verdict, not on the sufficiency of the evidence. Id. at 376. The misconduct is viewed cumulatively rather than in isolation. Glasmann, 175 Wn.2d at 707.

Here, there is a substantial possibility that the prosecutor's misconduct in misrepresenting Josue's testimony affected the jury's verdict on the second degree assault charge. Josue's testimony, as the only observer of the event who was not friends with either Mr. Molina or Ms. Pocasangre, would likely be found credible by the jury.

Whether Ms. Pocasangre fell unconscious was contested. Ms. Pocasangre claimed to have lost conscious because "when somebody hits you in the face you lose consciousness." RP 920. Ms. Pocasangre's two friends (who were also drunk) provided some corroborative testimony, estimating Ms. Pocasangre was unconscious for anywhere from 7 seconds to a little under a minute. RP 761, 1006. But Mr. Molina testified that Ms. Pocasangre got right back up, meaning she did not lose consciousness. RP

1275. There a substantial likelihood that the misrepresentation of Josue's testimony made the difference.

Further, the record shows the jury may have sought to resolve the dispute by relying instead on the injuries to Ms. Pocasangre, a theory not advanced by the prosecution. During deliberations, the jury asked the court to "define what constitutes substantial" and referred to the instruction stating that substantial bodily harm included injury that resulted in "temporary but substantial disfigurement." CP 63; RP 1395-96. The court told the jury to rely on its instructions. The jury's question indicates that at least some members of the jury had doubts on the prosecution's theory that Ms. Pocasangre had been knocked unconscious.

But for the misconduct, there is a substantial probability that the jury would have acquitted Mr. Molina of second degree assault and convicted him of the lesser included offense of fourth degree assault.

To be sure, the jury did not convict Mr. Molina of the rape charge. But the prosecutor's improper arguments may have tipped the scales for one or more jurors in favor of finding that Ms. Pocasangre fell unconscious when hit by Mr. Molina. Unlike the rape allegation, where Ms. Pocasangre had a motive to lie, the jury may have found Ms. Pocasangre's testimony about being knocked unconscious credible based on the prosecutor's misconduct. This is particular true given that Mr.

Molina's objections were repeatedly overruled, which likely gave the jury the impression that the prosecutor's argument was proper. Allen, 182 Wn.2d at 378 (that trial court twice overruled defendant's timely objections in the jury's presence created the possibility that the jury would have believed the prosecutor's argument was proper when it was not).

Viewed cumulatively, Mr. Molina establishes that the prosecutor's misconduct affected the jury's verdict on the conviction for second degree assault. That conviction should be reversed.

3. Remand is necessary to remedy the improper imposition of legal financial obligations.

a. The $100 DNA fee should be stricken because the prosecution failed to meet its burden to prove that Mr. Molina has not had his DNA collected as a result of a prior conviction.

When sentencing a person for a felony conviction, the trial court must impose a $100 DNA collection fee unless the state has previously collected the person's DNA as a result of a prior conviction. RCW 43.43.7541; 43.43.754(1)(a). The prosecution bears the burden of proving that a defendant has not had their DNA collected as a result of a prior conviction. State v. Houck, 9 Wn. App.2d 636, 651, 446 P.3d 646 (2019).

Mr. Molina has two prior felony convictions as a juvenile from 2014. CP 61. At that time, the law mandated collection of Mr. Molina's

DNA for these convictions. Laws of 2002, ch. 289, § 2. Presumptively, it was collected as a result of these convictions.

At sentencing, the prosecution did not meet its burden to prove that Mr. Molina's DNA was not collected as a result of his prior convictions. The prosecution simply asserted that it assumed it was not collected. RP 1444. Based on this assumption, the trial court imposed the $100 DNA fee upon Mr. Molina. CP 67.

This assumption is inadequate to meet the prosecution's burden of proof. See Houck, 9 Wn. App. 2d at 651. Given the prosecution's failure to meet its burden, this Court should order the $100 DNA fee stricken. Alternatively, remand is appropriate with instruction that the fee must be stricken unless the prosecution proves Mr. Molina's DNA was not collected. Id.

b. The court improperly imposed two $500 penalty assessments rather than a single $500 assessment.

When a person is found guilty in the superior court of committing a crime, the court must impose a $500 penalty assessment. RCW 7.68.035(1)(a).

In one case, Mr. Molina was convicted in the superior court of second degree assault and fourth degree assault. The trial court imposed two $500 penalty assessments, one in the felony judgment and sentence on

the second degree assault conviction and a second in the non-felony judgment and sentence on the fourth degree assault conviction. CP 67, 76. This was error. RCW 7.68.035(1)(a). The statute does not permit this.

The court orally stated that it did not intend to double the fee assessment, reasoning that "[i]f the felony count goes away for some reason there's a separate requirement for the [assessment] here." RP 1442. This statement, however, is not in either of the judgment and sentences. The written judgment and sentences are controlling, not the court's oral ruling. State v. Huckins, 5 Wn. App.2d 457, 469-70, 426 P.3d 797 (2018). Under these written documents, the court improperly imposed $1,000 instead of $500.

Further, the trial court's concern was unwarranted. If one conviction were reversed on appeal, but not the other, that matter is properly addressed on remand. Accordingly, the Court should remand to strike the second $500 penalty assessment.

c. Remand is necessary to strike the requirement that Mr. Molina pay supervision fees.

Mr. Molina is indigent. CP 92, 95-97. Based on this indigency, the court only imposed mandatory legal financial obligations. CP 67. Still, as a condition of community custody, the judgment and sentence orders Mr.

Molina to "pay supervision fees as determined by the Department of Corrections." CP 74.

This condition was imposed in error. The relevant statute provides that supervision fees are discretionary: "Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department." RCW 9.94A.703(2)(d) (emphasis added). Because they are discretionary, supervision fees are subject to an ability to pay inquiry. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Consistent with the trial court's intent to waive discretionary costs, this Court should strike the requirements that Mr. Molina pay supervision fees. State v. Dillon, __ Wn. App. 2d __, 456 P.3d 1199, 1209 (2020).

F. CONCLUSION

Mr. Molina was deprived of his constitutional right to effective assistance of counsel by counsel's failure to argue self-defense and obtain the necessary self-defense instruction. Prosecutorial misconduct further deprived Mr. Molina of his right to a fair trial. The convictions for assault should be reversed. Alternatively, this Court should remand to remedy the errors related to legal financial obligations.

Respectfully submitted this 6th day of May, 2020.

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