

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

STATE OF WASHINGTON,	)	No. 67362-9-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
ADELE EVELYN EWING,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: December 19, 2011
	)	

Ellington, J. — In 2007, a jury convicted Adele Ewing of delivery of a controlled substance, methamphetamine, and by special verdict found that the delivery occurred within 1,000 feet of a school bus stop. Ewing appeals the judgment and sentence, contending (1) prosecutorial misconduct during closing argument violated her right to a fair trial, (2) her attorney provided ineffective assistance by failing to object during closing argument, and (3) the court erred by denying her request for a drug offender sentencing alternative (DOSAs). For the first time in a supplemental brief, Ewing claims that under State v. Bashaw, the court erred by instructing the jury that it must be unanimous for purposes of the special verdict finding.<sup>1</sup> We affirm Ewing's conviction, but remand for vacation of the school bus enhancement.

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<sup>1</sup> 169 Wn.2d 133, 234 P.3d 195 (2010).

FACTS

In 2006, after he was arrested for selling drugs, Ryan Greer entered into an agreement to make four controlled drug buys for the Lewis County Sheriff's Department. In exchange, the prosecutor agreed to not file charges against him.

Greer contacted Adele Ewing through a mutual friend to arrange a meeting to purchase methamphetamines from her. Before meeting Ewing at her house, Officer Steven Dawes and Detective Neil Hoium strip-searched Greer and searched his minivan. The officers gave Greer \$350 to purchase the drugs and followed him as he drove to Ewing's house. Officers Mary Humphrey and Christie Fitzgerald also drove to Ewing's house and parked nearby. The officers watched as Greer parked his minivan in front of the house.

Ewing met Greer at the front door and let him in. Shane Bonagofski was sitting on the couch. Greer had recently met Bonagofski while in jail. Ewing led Greer and Bonagofski to her bedroom. Greer testified that Ewing asked him how much money he had to purchase the methamphetamines. Greer told her he had \$350. After Greer gave Ewing the money, she left the room. When Ewing returned, she asked Greer and Bonagofski to go outside. Greer and Bonagofski went outside on the back porch and smoked a cigarette. A few minutes later, Ewing called out to Greer and Bonagofski to come back to her bedroom. When they were in the bedroom, Ewing handed a small plastic bag to Bonagofski, who handed the bag to Greer.

Greer left Ewing's house and gave the bag to the police. The officers searched Greer and his minivan. A field test showed the bag contained methamphetamines.

The State charged Ewing with delivery of a controlled substance, methamphetamine, in violation of RCW 69.50.401(1) and (2)(b). The State also alleged that the drug transaction occurred within 1,000 feet of a school bus route stop in violation of RCW 69.50.435.

The State called Greer and Officers Dawes, Hoium, and Humphrey to testify at trial. The State also called a forensic expert and witnesses to establish that Ewing's house was located within 1,000 feet of a school bus stop.

Bonagofski and Ewing testified on behalf of the defense. Bonagofski said that Greer handed the money to Ewing. But Bonagofski testified that he had the bag "the whole time" and he gave the bag of methamphetamines to Greer.<sup>2</sup> Ewing admitted that she was in the room with Greer and Bonagofski but said she was not involved in the transaction. Ewing said after Greer dropped the money, she picked up the money.

[Ewing]: [W]e were just talking or whatever, or they were talking and [Bonagofski] asked [Greer] if he had any money or where's the money, and [Greer] had gotten up and went to go hand it and it just kind of like dropped in between us.

[Counsel]: Okay. And then what did you do?

[Ewing]: Well, it was like closer to me, so I just kind of like picked it up and gave it to him. I didn't even know what was going on really.<sup>3</sup>

Ewing said Bonagofski gave the bag of methamphetamines to Greer.

The jury found Ewing guilty of delivery of a controlled substance. By special verdict, the jury found that the drug transaction took place within 1,000 feet of a

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<sup>2</sup> Report of Proceedings (RP) (June 13, 2007) at 185.

<sup>3</sup> RP (June 14, 2007) at 206-07.

school bus route stop.

Ewing was released on her personal recognizance pending sentencing. When Ewing did not appear at sentencing, the court issued a bench warrant for her arrest. In 2010, Ewing was arrested in Colorado and extradited to Washington. Ewing requested a prison-based DOSA. The State also recommended a DOSA. The court denied the request and imposed a sentence of 114 months. Ewing appeals.

### ANALYSIS

#### *Prosecutorial Misconduct*

Ewing asserts that prosecutorial misconduct during closing argument violated her right to a fair trial. For the first time on appeal, Ewing contends that the prosecutor improperly vouched for Greer by improperly stating a personal opinion as to Greer's credibility.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's comments were improper and that the comments were prejudicial.<sup>4</sup>

Here, the prosecutor stated, "Personally I believe Mr. Greer. I believe Mr. Greer went in, made a deal with Ms. Ewing, and she handed it to Mr. Bonagofski, who handed it to Mr. Greer."<sup>5</sup> In rebuttal argument, the prosecutor further stated, "You've got Mr. Greer, who was controlled by the officers. If he doesn't testify truthfully here today, he doesn't get the benefit of his bargain. That's a hammer hanging over his head."<sup>6</sup>

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<sup>4</sup> State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

<sup>5</sup> RP (June 14, 2007) at 223.

<sup>6</sup> Id. at 245.

Ewing did not object to these statements at trial.

The State concedes that the prosecutor improperly vouched for Greer. Failure to object to an improper comment constitutes waiver of error unless the comment is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.”<sup>7</sup> Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.<sup>8</sup> We accept the concession as well taken.<sup>9</sup>

Although the State concedes the remarks were improper, the State asserts that if requested, a curative instruction would have obviated any resulting prejudice. We agree.

*Ineffective Assistance of Counsel*

In the alternative, Ewing asserts that her attorney provided ineffective assistance of counsel by failing to object to the prosecutor’s comments in closing argument.

Washington has adopted the two-prong test in Strickland v. Washington for determining whether counsel was ineffective.<sup>10</sup> To establish ineffective assistance of counsel, the defendant has the burden to show both deficient performance that falls below the objective standard of reasonableness and that, but for counsel’s errors,

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<sup>7</sup> State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

<sup>8</sup> State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

<sup>9</sup> State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (improper for a prosecutor to assert his personal opinion of the credibility of a witness).

<sup>10</sup> State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988) (citing Strickland v. Washington, 466 U.S. 668, 693-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

there is a reasonable probability that the trial's result would have been different.<sup>11</sup> If the defendant does not establish either part of the test, the inquiry goes no further.<sup>12</sup>

To establish prejudice, a defendant must show a reasonable probability that, but for the error, the result of the trial would have been different.<sup>13</sup>

Ewing cannot establish prejudice. Greer's testimony was corroborated by the defense witnesses. Bonagofski testified that Ewing was involved in the transaction and that Greer gave the money to purchase the methamphetamines to Ewing. Ewing testified that she handed Bonagofski the money and admitted that she knew the bag Bonagofski gave to Greer contained methamphetamine. Because Ewing cannot establish that the outcome of the trial would have been different, her claim of ineffective assistance of counsel fails.

#### *Special Verdict*

For the first time on appeal in a supplemental brief, Ewing argues that based on Bashaw, the court erred by instructing the jury that in order to answer the special verdict form, "all twelve of you must agree."

Jury instruction 15 states:

If you find the defendant guilty of Delivery of a Controlled Substance, it will then be your duty to determine whether or not the defendant delivered the controlled substance within one thousand feet of a school bus route stop designated by a school district. You will be furnished with a special verdict form for this purpose.

If you find the defendant not guilty of Delivery of a Controlled

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<sup>11</sup> State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001); Strickland, 466 U.S. at 694; State v. West, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999).

<sup>12</sup> State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

<sup>13</sup> State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003).

Substance, do not use the special verdict form. If you find the defendant guilty, you will complete the special verdict form. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant delivered the controlled substance within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict “yes.”

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant delivered the controlled substance within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict “no.”<sup>[14]</sup>

In Bashaw, the Supreme Court held that for purposes of a special verdict, “a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.”<sup>15</sup> Here, under Bashaw, jury instruction 15 is an incorrect statement of the law.

This division has expressed two views as to the remedy in this situation. In State v. Morgan, we held that a defendant cannot challenge an erroneous jury instruction requesting unanimity on the special verdict finding for the first time on appeal.<sup>16</sup> In State v. Ryan, we held that the issue can be raised for the first time on appeal and that Bashaw requires reversal.<sup>17</sup> A majority of this panel adheres to the view expressed in Ryan, and we therefore remand for vacation of the sentencing

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<sup>14</sup> Clerk’s Papers at 31.

<sup>15</sup> Bashaw, 169 Wn.2d at 146.

<sup>16</sup> 163 Wn. App. 341, 348, 261 P.3d 167 (2011). Accordingly, we need not address Ewing’s argument that her attorney provided ineffective assistance of counsel by failing to object to the instruction.

<sup>17</sup> 160 Wn. App. 944, 948, 252 P.3d 895 (2011).

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enhancement.

*DOSA*

Ewing contends the court abused its discretion by denying her request for a DOSA. The decision to grant or deny a request for a DOSA is left to the discretion of the trial court.<sup>18</sup> A court abuses its discretion if the decision is based on untenable grounds or made for untenable reasons.<sup>19</sup>

The Department of Corrections evaluated Ewing before the sentencing hearing and determined she was eligible for a DOSA. However, the evaluation stated that Ewing did not have a chemical dependency. The court denied Ewing's request because she did not have a chemical dependency.

Court: The DOSA evaluation says, no chemical dependency, that's what it says. So how do you get to a DOSA if there is no chemical dependency?

[Counsel]: I would argue there is an untreated dependency that's currently, she's currently fought on her own at this present moment.

Court: That may be, but that's not what her evaluation says; it says there is no chemical dependency.<sup>[20]</sup>

The court also denied the request because Ewing did not appear for sentencing July 25, 2007 and fled to Colorado.

Well, I don't see any reason at all here to give a DOSA. I am shocked that the State has gone along with this. Sentence will be 114 months in Department of Corrections, credit for 105 days. The Bail Jump is 29 months concurrent.

Ms. Ewing did everything she could to thumb her nose at the system here. And to give her a sentence that would result in 57 months

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<sup>18</sup> State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005).

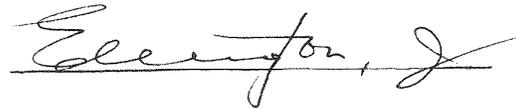
<sup>19</sup> State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

<sup>20</sup> RP (June 28, 2010) at 12.

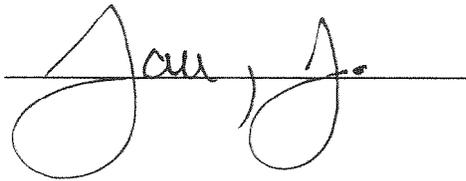
in prison after she goes to trial, turns down a similar bargain, goes to trial, gets convicted, then runs, and then the State comes in and says, oh, she's good for a prison DOSA, is shocking to me, absolutely shocking. This essentially is a reward for jerking the system around and I'm not going to put up with it.<sup>[21]</sup>

Under RCW 9.94A.660(3), the court may grant a request for a DOSA if the defendant is eligible and if the alternative sentence is "appropriate." Here, the court determined that a DOSA was not appropriate because Ewing did not have a chemical dependency and she fled to Colorado rather than appearing for sentencing in 2007. The court did not abuse its discretion in denying Ewing's request for a DOSA.

We affirm Ewing's conviction and sentence except for the school bus enhancement, which must be vacated on remand.

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WE CONCUR:

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<sup>21</sup> Id. at 13-14.