70811-2

70811-2

NO. 70811-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CU TRUONG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Did the prosecutor commit such egregious misconduct in closing argument that the defendant's complete failure to raise an objection should be excused, and his murder conviction reversed?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged in count I with first-degree murder, with a firearm sentencing enhancement, and in count II with first-degree unlawful possession of a firearm. CP 9-10. A jury found the defendant guilty as charged of first-degree murder while armed with a firearm. CP 134-35. The defendant waived his right to a jury trial on count II and the court found him guilty of first-degree unlawful possession of a firearm.[1] 21RP[2] 7; CP 120, 138-40. With six prior felony convictions, including three convictions for first-degree robbery, the defendant received a sentence of 608 months. CP 150-58.

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[1] Count II is not a subject of this appeal.

[2] The 24 volume verbatim report of proceedings is cited as follows: 1RP—3/12/13, 2RP—3/13/13, 3RP—3/14/13, 4RP—3/18/13, 5RP—4/29/13, 6RP—5/2/13, 7RP—5/20/13, 8RP—5/21/13, 9RP—5/22/13, 10RP—5/23/13, 11RP—5/28/13, 12RP—5/29/13, 13RP—5/30/13, 14RP—6/3/13, 15RP—6/4/13, 16RP—6/5/13, 17RP—6/6/13, 18RP—6/1013, 19RP—6/11/13, 20RP—6/12/13, 21RP—6/12/13 (morning), 22RP—6/12/13 (afternoon), 23RP—6/16/13, and 24RP—8/23/13.

2. SUBSTANTIVE FACTS

Cu Truong (the defendant), Jason Saechao, Ilyan Vang, Houng "Wayne" Duong, Karla Diocales, Randall "Randy" Gonzalez, Silitoth "Sneak" Soukasone, Chip and Nene (last names unknown), were all friends or acquaintances drawn together by a common thread, meth addiction. 14RP 12-18, 119-20; 16RP 40. Ultimately, the defendant would shoot and kill Jason Saechao. This fact was not in dispute. In his opening statement, defense counsel told the jury, "The question during this trial is not going to be did Cu Truong shoot Jason Saechao. This is not an issue in this trial. The issue in this trial is going to be why did Cu Truong shoot Jason Saechao." 9RP 89. Defense counsel would claim that his client was justified in shooting Saechao, i.e., that he shot Saechao in self-defense. 9RP 106.

In the early morning hours of December 28, 2011, the defendant shot Jason Saechao four times at the Seattle Roll Bakery, a place where all of the friends would occasionally meet, hang out, and smoke meth. 9RP 111-12; 14RP 18. Saechao was shot at close range. 18RP 18-34. One shot entered Saechao's left arm near the elbow, passed through his arm and entered his abdomen, with the bullet coming to rest in his left buttock. 12RP

100-05. A second shot entered his right abdomen and exited through his right thigh. 12RP 100-05. A third shot entered the left side of his neck and exited through the right side of his neck, without hitting any major artery or structure of the neck. 12RP 108. This shot showed signs of stippling indicating that it was a very close range shot, likely within two feet. 12RP 108-09. These first three shots would not likely have been fatal had Saechao received medical treatment. 12RP 110, 116. However, the fourth shot entered Saechao from the very top of his head, with the bullet travelling downward through his brain and coming to rest at the base of his skull. 12RP 111, 114. The evidence showed that this shot was a contact wound, meaning that the barrel of the gun was pressed against the skin when the gun was fired. 12RP 111-13.

Four shell casings were recovered from the scene. 9RP 23; 12RP 45-62; 13RP 116-19. All of the casings were 9mm casings, and all were shown to have been fired from the same gun. 17RP 154-58. Two bullets were removed from the victim's body, another was found on the ground under the victim, and bullet fragments were found on the ground and embedded in a piece of wood. 12RP 45-62, 106, 114; 13RP 116-19. No firearm was ever recovered. 10RP 163; 11RP 36-37; 12RP 75.

The defendant would testify at trial that he disposed of his gun, a 9mm, in a dumpster after fleeing the scene. 18RP 152, 180. With no gun to test fire, and with some of the bullets having been damaged, forensic testing could confirm only that all of the bullets and fragments were likely of the same caliber, .38 caliber class, consistent with having been fired from a 9mm. 17RP 161-66; 18RP 9-15.

Twenty-two year old Ilyan Vang has a four-year-old daughter with Saechao. 14RP 103-04. The two dated off and on for approximately eight years. 14RP 110. There were times during their relationship that Saechao was emotionally and physically abusive towards Vang. 14RP 115. In fact, shortly before his death, Saechao was in jail for a period of time on a probation violation resulting from a domestic violence case. 14RP 110, 115, 15RP 33. During the few months Saechao was in jail, Vang had sex with Duong and with the defendant. 14RP 115. Vang still loved Saechao but she was tired of the abuse and his constantly being in and out of jail. 14RP 115-16.

On December 22, 2011, Saechao was released from jail. 15RP 33. Sometime after his release, but before Christmas, Vang told Saechao that she wanted to end their relationship. 14RP 117;

15RP 47. Vang testified that Saechao did not want her to leave him, but that he accepted it. 14RP 117. Vang also informed Saechao that she had slept with the defendant and with Duong. 14RP 130; 15RP 43.

The night before the defendant shot Saechao, Saechao had summoned Duong over to his house to talk about Duong having slept with Vang. 16RP 46, 144. Duong knew that he had caused Saechao great pain by what he had done. 16RP 46. He already owed Saechao money for drugs, so he suggested that when his tax refund came in, he would give it to Saechao to repay his debt and for having slept with Vang. 16RP 46-47, 93. 148. As collateral until Duong's tax refund came in, Saechao said that he wanted to take an expensive Buddha necklace that Duong was wearing. 16RP 46, 148. Duong handed the necklace over to Saechao. 16RP 46-47.

In the afternoon prior to Saechao's murder, Vang was picked up at Southcenter by Karla Diocales and her mother. 14RP 120-21. Diocales dropped her mother off at home and then Diocales and Vang drove around town and smoked some meth. 14RP 122, 126. They then went to an Asian restaurant where they met up with Duong and the defendant. 14RP 122; 16RP 43. The defendant

wanted to score some meth so Vang started calling her connections trying to help him out. 14RP 122.

After about an hour, Duong and Diocales left the restaurant. 14RP 124. Vang stayed behind, got into the defendant's white BMW and asked him if he still wanted to buy some meth. 14RP 124. The two then drove to Alki where the defendant drove to a house under construction and told Vang that this was the house where the two of them would live together. 14RP 124-25. Vang was confused by this because she had only slept with the defendant the one time, she did not want a relationship with him, and they had never talked about being in a relationship -- or even dating. 14RP 125.

The defendant then drove the two of them to the Roxbury Casino in West Seattle where the defendant proceeded to gamble. 14RP 126. After a short time, Vang called Diocales to come pick her up. 14RP 126-27. Before leaving the casino, she told the defendant to meet her at the bakery when he was done gambling in order to obtain his meth. 14RP 126-27.

When Diocales and Vang got to the bakery, they smoked some meth while they waited for Duong to arrive and open the

doors. 14RP 127. Duong's family owns the bakery and he works there at night. 16RP 36-37, 41.

When Duong let the girls inside, Vang and Diocales hung out while Duong began baking bread. 14RP 129. A short time later, Saechao, who had been using meth, arrived at the bakery -- a surprise to everyone because he was not expected to be there. 14RP 129; 15RP 38; 16RP 45.

When Saechao came inside, he borrowed Vang's phone to get phone numbers for her meth connections. 14RP 133. Saechao was "kind of angry" at Vang because she had not been answering his calls or texts. 14RP 133. Saechao gave the phone back to Vang whereupon she called her connection because the defendant had just shown up for his meth. 14RP 135.

The defendant arrived alone in his white BMW. 14RP 134-35. At about the same time, Chip and Nene also drove up and parked. 14RP 134.[3]

Saechao and Vang went outside to meet the defendant. 14RP 138; 15RP 81. The defendant and Saechao began to argue about something. 14RP 134; 16RP 49. The defendant, Saechao

[3] The evidence indicates that neither Chip nor Nene came inside the building or witnessed the actual shooting. 11RP 38; 14RP 165-66. Neither person testified at trial.

and Vang then walked inside, with the defendant leading the way. 14RP 144; 15RP 82.

Vang heard the defendant ask Saechao if he was "trying to set him up." 14RP 144. Saechao responded that if he was trying to set him up, he would have already done so. 14RP 144. The defendant then accused Saechao of taking his "little homie's necklace" and demanded that he give it back. 14RP 144. Saechao responded that he didn't take it, that Duong gave it to him. 14RP 144. At this point, Duong told the defendant to leave it alone. 16RP 52.

When the defendant asked about the necklace again and Saechao responded, "what are you going to do about it," the defendant pulled a 9mm handgun out of his waistband and shot Saechao four times. 14RP 144-45; 16RP 52-53. The first shot hit Saechao in the leg, the next two in his midsection. 14RP 148; 15RP 99, 101. For the last shot, the defendant said "fuck it," held the gun directly over the top of Saechao's head and pulled the trigger. 14RP 148; 16RP 12, 58-60. The defendant then threatened everyone that he would come back for them if they said anything, and he fled the scene. 16RP 66, 134.

After the defendant left, Duong handed a phone to Vang and yelled for her to call 911, but she just stood there in shock, unable to dial the phone. 14RP 156-57; 15RP 108-09. Diocales cried out that she had lots of problems and couldn't be there, so she fled from the scene. 14RP 156. Duong then grabbed the phone and called 911. 14RP 156. Vang heard Duong tell the 911 operator that a robbery/shooting by an unknown assailant had just occurred. 14RP 161-62. While on the phone with the 911 operator, Duong hid some money, although he did not know exactly why, explaining that he was still in shock of what was going on. 16RP 162.[4]

Officers arrived on the scene approximately four minutes after the 911 call was received. 9RP 111, 136, 142. Vang and Duong were standing by the front door of the bakery. 9RP 113. The responding officers placed Vang and Duong in separate patrol cars and tried to ask them what happened. 10RP 41; 16RP 69.

Patrol officers took an initial statement from Duong. 10RP 17. Duong told the officers that it was a robbery/shooting by an unknown assailant. 16RP 69. Officers were unable to take an initial statement from Vang because she was too hysterical. 10RP 41.

[4] Vang testified that she did not see Duong hide anything. 15RP 110. She said that sometime later, Duong told her that he threw some meth out. Id.

When the homicide detectives arrived, they interviewed Duong and Vang separately. During this entire time, Duong and Vang had not been allowed to communicate with each other. 11RP 18-23, 106. Detective Robin Cleary took a taped statement from Duong in the back of the patrol car and then let him go home. 11RP 5. Duong stuck with his story that it was a robbery/shooting. 16RP 70. At the same time, Detective Mike Mellis was taking a taped statement from Vang. 11RP 95-99, 151. Scared of the defendant's threat and not knowing what else to say, Vang first said it was a robbery/shooting. 14RP 163. Detective Mellis, watching Vang's body language, told her that he did not believe she was "being truthful." 11RP 152; 12RP 34. Vang then quickly told him "what really happened," blurting out while crying, "I will tell you the truth now." 11RP 152-53; 14RP 164. Based on Vang confessing that the crime was a murder, not a robbery/shooting, Duong was called back to the scene for a second interview. 11RP 21; 16RP 70, 136-38.

Detective Mellis testified that "[t]here was some clarity made that we needed the truth and so forth, and requesting him to tell the truth." 11RP 99. Duong then "came clean" and told the detectives what he told the jury, that the defendant shot and killed Saechao.

11RP 56, 58; 16RP 70. Asked why he decided to tell the detective what really happened, Duong testified that he just wanted to "do the right thing." 16RP 72.[5]

A search then began for the defendant. At approximately 9:15 a.m., Detective Mellis spotted the white BMW parked in front of the defendant's sister's residence, a possible location provided by Vang and Duong. 11RP 27-29; 101-02. Three people then exited the house, got into the car, and drove away. 11RP 104. The car was stopped a short distance away and the defendant was placed under arrest. 10RP 87-91.

The defendant protested that he did not know what was going on; that he had not done anything. 10RP 92. When advised that he was under arrest for murder, he responded, "what are you talking about, I didn't do anything." 10RP 93. The defendant did not appear to be under the influence at the time of his arrest. 10RP 95; 11RP 114.

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[5] Detective Mellis also contacted Diocales. 11RP 141. He told her point blank, "are you planning on telling me the truth or are you going to have to play a big long song and dance and go through the big, long process to get the accurate witness statement out of you?" 11RP 142. Diocales told Detective Mellis that she was going to "tell it like it is." Id. She then provided a recorded statement describing the shooting. Id.

The defendant was then interviewed by two homicide detectives. 11RP 31-32, 34; trial exhibits 55, 56 and 57.[6] The defendant repeatedly claimed that he had not been at the Seattle Roll Bakery that night and that he did not know what the detectives were talking about. Id.; 18RP 82. He told the detectives that he went over to his sister's house after he left the casino and that he then went to Randy's house. 18RP 63. He professed that he did not have a cell phone that night, although surveillance video from the Roxbury Casino would show him repeatedly using a cell phone, and when he was placed under arrest, he was talking on his cell phone. 17RP 9, 26.

At the end of the interview, the defendant's clothing was taken into evidence for forensic testing. 11RP 122-137. His sweatshirt had what appeared to be blood stains. 11RP 126. DNA testing would confirm that the blood matched that of the victim.[7]

Shortly after he was booked into jail, the defendant called

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[6] Exhibit 55 is a transcript of the entire interview. Exhibit 56 is a CD that contains the first part of the interview that was audio recorded only. Exhibit 57 is a CD that contains the second part of the interview that was both audio and video recorded. 11RP 113. The fact that the first part of the interview was recorded on audio only was due to the detective's unfamiliarity with the recording equipment. Id.

[7] The forensic scientist testified by video deposition. See 13RP 158; 14RP 8; trial exhibit 85. While the recorded deposition was played for the jury, it was not transcribed by the court reporter.

Vang. 14RP 170-73. He professed in the recorded phone call that he had not seen Vang after she left the casino. 14RP 173; trial exhibit 91 (the CD); trial exhibit 92 (a transcript of the call). He then tried to coax Vang into coming to see him at the jail. Id.

At trial, the defendant provided a completely different story than the version of events he gave the police. He testified that he worked that day before meeting up with Duong, Vang and Diocales at an Asian restaurant. 18RP 119-22. He said that he was the only one who ate anything because the others were too high. 18RP 122. The defendant testified that when he was at the restaurant, Vang told him that Saechao had taken Duong's Buddha necklace because he had slept with her. 18RP 135-36.

After leaving the restaurant, Vang got into his car and asked him if he wanted to obtain some meth. 18RP 124. The defendant said yes, and then the two of them drove to Alki and then to the Roxbury Casino where he proceeded to gamble. 18RP 124. Vang then left, according the defendant, to obtain a half ounce of meth for him. 18RP 126. The defendant professed that he had not used any meth that night. 18RP 126.

Sometime later, while he was still at the casino, the defendant said that Vang called him and told him to come to the

bakery to get his meth. 18RP 127. According to the defendant, when he arrived at the bakery and got out of his car, he was immediately approached by an angry Saechao. 18RP 130-33. Saechao demanded that the defendant give him his earrings and his money. 18RP 134. The defendant told Saechao "no," and then he walked into the bakery, followed by Saechao. 18RP 137.

Once inside, the defendant testified, Saechao was still "yapping his mouth" about giving him his "shit," but that he did not say anything in return. 18RP 138. The defendant claimed that Saechao then threatened to "cap my ass." 18RP 139. At this point, the defendant professed that he was in fear for his life because (1) he thought Saechao was reaching for his waistband to pull a gun on him,[8] (2) he claimed that Saechao had pulled a gun on him before, and (3) he knew Saechao had been abusive to Vang. 18 RP 140-45. The defendant then pulled out his own gun, shot Saechao once, and then continued pulling the trigger and firing at

[8] Saechao was wearing baggy pants, had no belt on, and his pants were hanging well below his waistline. 13RP 147-49; trial exhibit 86-87; 14RP 158-59. In fact, his pants were such that the first shot to his lower abdomen area passed through the top of his underwear but did not pass through his pants. Id. Vang testified that when Saechao was shot, his hands in his pockets. 14RP 158-59. The defendant admitted that he never saw Saechao actually pull out a gun, just that he thought he was going to pull a gun. 18RP 186.

Saechao as he ran out the door. 18RP 146-50. He then fled the scene in his BMW. Id. 18RP 146-50.

After leaving the scene, the defendant said that he threw his gun in a dumpster and went to Randy's house where he smoked some meth to relax his mind. 18RP 152-54. Knowing the police would be looking for him, he called his sister to come pick him up. 18RP 157. He went to her house where he says, he again smoked some meth. 18RP 158.

In talking about his arrest later that morning, the defendant claimed that he did not remember making any statements to the arresting officers about not knowing what was going on. 18RP 160. In regards to his interview with the detectives, the defendant claimed that he lied repeatedly because he was so high on meth, scared and he does not trust the police. 18RP 161.

He admitted that he lied when he told detectives he had not been to the bakery that night. 18RP 195-97. He admitted that he lied when he said he did not have a BMW and that he did not have a cellphone. 19RP 25. Finally, when asked about the recorded jail call he made to Vang after the shooting in which he professed to her that he did not know what was going on, that he had not seen her since she left the casino, the defendant testified that "I know I

was being recorded, and I don't know what kind of evidence they got against me, and I'm not going to put myself in a situation where I can't dig myself out." 19RP 27.

In testifying, the defendant also denied putting the gun to Saechao's head and shooting him. 18RP 183. Asked to explain the scientific evidence that was admitted showing that it was a contact shot to the top of Saechao's head, the defendant posited that as he was running out the door, Saechao was bent over and coming towards him and that could have been how he suffered a contact shot to the top of the head. 18RP 184. Asked why he fired more than one shot even though he knew he hit Saechao with the first shot, the defendant responded that his finger was already on the trigger and he just kept pulling it. 18RP 183.

Additional facts are included in the argument section below.

C. ARGUMENT

THE DEFENDANT HAS FAILED TO SHOW THAT MISCONDUCT OCCURRED IN HIS TRIAL AND THAT HIS MURDER CONVICTION SHOULD BE REVERSED

The defendant contends that the prosecutor committed such flagrant and egregious misconduct in closing argument that his own complete failure to object should be excused, and his murder

conviction reversed. Specifically, the defendant asserts that the prosecutor committed misconduct by vouching for the credibility of the State's witnesses, bolstering the State's case, and appealing to the passions and prejudices of the jury. The defendant's claim is without merit. Read in context, the record does not support the defendant's claim that the prosecutor committed misconduct. Further, even if this Court were to find that the prosecutor's comments were improper, the defendant can show neither prejudice nor why he should be excused from having failed to object below.

1. The Law Regarding Claims of Misconduct

The law governing claims of misconduct is well-settled. When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing (1) the impropriety of the prosecutor's arguments and (2) that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984).

In regards to the first prong of the test, a prosecutor is an advocate and is free to argue all reasonable inferences based upon the evidence introduced at trial, and may respond to the arguments made by defense counsel. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 24 (1994), cert. denied, 514 U.S. 1129 (1995). Considering the fluid nature and purpose of closing argument, generally greater latitude is given in closing argument than elsewhere during trial when assessing whether a particular statement constitutes misconduct. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). A prosecutor is entitled to make a fair response to the arguments of defense counsel. United States v. Hiett, 581 F.2d 1199, 1204 (5th Cir. 1978). Prejudicial error does not occur until such time as it is "*clear and unmistakable*" that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, rev. denied, 111 Wn.2d 641 (1985).

In regards to the second prong of the test, even where misconduct has occurred, a conviction will not be reversed unless the defendant can show that the misconduct actually resulted in prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Specifically, the defendant must prove that there was a

"substantial likelihood" that the challenged comments actually affected the verdict. Warren, 165 Wn.2d at 26. In making this determination, the prejudicial effect of alleged improper comments will not be determined by looking at the comments in isolation, rather, the prejudicial effect will be determined by placing the remarks in the context of the total argument, consideration of the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The court will also look at the nature of the alleged improper comments and whether the comments were of an isolated nature. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993), rev. denied, 123 Wn.2d 1030 (1994).

Finally, and of particular relevance to the case at bar, a defendant's failure to object to alleged misconduct at trial constitutes waiver of the issue on appeal unless the misconduct was "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.*" State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (emphasis added); Fisher, 165 Wn.2d at 747. In other words, even if misconduct occurred at trial, reversal is not required if the error could have been obviated by an objection

and curative instruction that the defense did not request. Russell, 125 Wn.2d at 85.

One of the reasons for placing the burden on the defense to object in the course of argument is that the defendant and defense counsel are the persons most acutely attuned to perceive the possible prejudice of the prosecutor's remarks. State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039, rev. denied, 141 Wn.2d 1005 (2000). There absence of an objection indicates that the comments did not strike trial counsel or the defendant as improper or particularly prejudicial. Klok, 99 Wn. App. at 85; State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 513 U.S. 985 (1994). On the other hand, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Swan, 114 Wn.2d at 661. As this Court has said, RAP 2.5 creates

> a relatively small category of errors that a trial judge must watch for and guard against even when the parties fail to point them out. An argument of a prosecutor does not readily fall into this category. . .Trial judges have a variety of options available to deal with prosecutorial misconduct in argument.

Klok, 99 Wn. App. at 83-84. The trial judge must be given the opportunity to remedy any alleged misconduct.

2. The Alleged Misconduct

The defendant has selected out a few specific sentences made during closing argument to argue that his conviction should be reversed. For example, he states "the prosecutor argued, 'the only thing we told them [Vang, Duong and Diocales] was come in here and tell the truth' and 'that's exactly what they did.'" Def. br. at 16. The defendant claims this constituted improper vouching for the credibility of the witnesses, expressing a personal opinion, and bolstering of the State's case. However, the few sentences selected by the defendant must be read in context, as the full passage below clearly shows:

> So let's talk about the evidence you have of intentional murder in this case. You heard from the three witnesses whose lives are forever changed by Cu Truong. We told you in opening that you would hear from a group of young people who were flout, and you did. Ms. Vang was in jail. Ms. Diocales had just gotten out of court-ordered treatment. Mr. Duong came. Stayed clean for three days waiting for his turn to testify. And they told you what happened that day.
>
> I have no doubt that in closing, defense will point out to you what they believe are some inconsistencies between these witnesses' testimony. But loud and clear each witness told detectives, told us in interviews,

> and told you in trial multiple times there was never any physical confrontation between Jason Saechao and Cu Truong. Jason Saechao never threatened to kill or cap Cu Truong. Jason Saechao didn't have a gun. He didn't display a gun and he didn't fire a gun that day...
>
> We didn't sit down with these witnesses and practice their direct testimony. We didn't show them anything other than their own transcripts. And the only thing we told them was come in here and tell the truth. Admit you are a meth addict. Admit you were smoking meth that day. And admit your initial story to the cops wasn't true. Ms. Diocales, admit that you cowardly ran off and left your friends there to deal with the cops. But tell this jury exactly what happened and don't hide from anything. And that's exactly what they did.
>
> And you see in those human moments they are not proud that they were smoking meth. They are not proud that they were out looking for drugs. And they were certainly beyond question traumatized by what they saw. Tears. Shaken up.
>
> Ms. Vang, I wish, I so wish that when Cu called me from jail, I wish I could have asked him why. You know why she wants to ask why? Because there's no good reason for what Cu Truong did that day. Mr. Duong. No, counsel, I'm not high. I'm not sitting here high. Yeah, I'm nervous. Because for the first time I'm looking at the man that shot my friend. Human moments where you get to see a demeanor, and honesty, and a rawness that can't be rehearsed, and can't be practiced, and tells you that these people came in here and told you exactly what happened that day.

19RP 49-51 (the two sentences selected by the defendant are underlined).

This case is very akin to Swan, a child sex case wherein the following passage in closing argument describing the two child victims was challenged by the defendant:

> Between the two of them—We know that [B.A.] had no sex education from her parents. That was pretty clear. And we also know that neither child had trouble with lying. That wasn't something that came out, that there were problems with these children lying or that these were children you had to watch carefully. *These were little girls who could talk, you could trust, they told the truth.*

Swan, at 660-61 (emphasis assed). The Court found no misconduct, stating that "it is clear to us that the deputy prosecuting attorney was simply drawing a reasonable inference from the evidence." Id. at 665. The evidence at trial showed the girls were "well-behaved, normal children who did not have a problem with lying." Id.[9]

In Swan, the Court referenced anther case with approval State v. Papadopoulos,[10] a case where the credibility of two State witnesses was "strenuously attacked" by defense counsel. In closing argument, the prosecutor stated that "[the witnesses] have

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[9] The Court in Swan also stated that even if the comments were improper, they were "not of such an egregious sort that a curative instruction could not have removed any resulting prejudice," and thus Swan's failure to object would have barred review. Swan, at 665.

[10] 34 Wn. App. 397, 399, 662 P.2d 59, rev denied, 100 Wn.2d 1003 (1983).

testified honestly before you", and, "[t]he gist of what they have said has been the truth." Swan, at 664 (quoting Papadopoulos, 34 Wn. App. at 399). With approval, the Supreme Court stated, "[t]he Court of Appeals did not see those statements as an expression of personal belief on the prosecutor's part, holding that the argument viewed in context revealed that the prosecutor merely called the jury's attention to the facts and circumstances in evidence tending to support the witnesses' credibility." Swan, at 664.

Similarly here, the evidence at trial showed that each one of three witnesses either initially lied to the police or were reluctant to be involved at all. Vang and Duong both testified that they initially lied and then ultimately told the truth. At trial, for example, Vang was asked when she decided to "tell the truth," to which she responded, when Detective Mellis "confronted me that my story was BS." 15RP 167. Asked what she was told before testifying, Vang responded that the prosecutor told her "just to be honest." 15RP 163.

Additionally, the testimony showed that each of the witnesses was told by Detective Mellis to tell him the truth and each responded that they did. See e.g. 14RP 163-64 (Vang deciding to tell "what really happened"); 16RP 70 (Duong stating that he

decided to "come clean" when he spoke a second time to the detective). Each witness also, as the prosecutor stated, admitted to his or her failings, their meth addiction, their infidelity, their lying, their criminal history,[11] how Diocales fled the scene etc.

Nowhere in closing did the prosecutor argue anything about the credibility of the witnesses that was not based upon the testimony from the trial. She did not state nor argue that she personally believed the witnesses. Rather, the prosecutor appropriately argued that the witnesses were credible based upon the facts known to the jury, the things the witnesses admitted to, their demeanor and the statements they made about telling the truth. This type of argument is perfectly permissible. State v. Millante, 80 Wn. App. 237, 250-51, 908 P.2d 374, rev. denied, 129 Wn.2d 1012 (1995) (a prosecutor is free to comment on the credibility of a witness and argue inferences about credibility based on the evidence in the record). Prejudicial error does not occur

[11] Diocales admitted to having 12 prior criminal convictions, being addicted to meth and being clean at trial only because she was in a residential DOSA inpatient treatment program due to a felony conviction. 14RP 16-17. Vang admitted that she was currently in custody pending a felony trial for eluding, second-degree assault, possession of stolen property and theft. 14RP 104, 111-12. She also admitted to having multiple prior convictions and to having been addicted to meth since the age of 17. Id. Duong admitted that he had a prior conviction and was pending trial on another case. 16RP 39. He admitted to being heavily addicted to meth but professed that he was sober while he was testifying and that the prosecutor had been talking with him for two days about being clean for trial. 16RP 40, 70, 76, 175.

until such time as it is "clear and unmistakable" that counsel is not arguing an inference from the evidence but is expressing a personal opinion. See e.g., Sargent, supra (the prosecutor clearly crossed the line when he used the phrase "I believe him"); contrast, State v. Hoffman, 116 Wn.2d 51, 94, 804 P.2d 557 (1991) (despite repeated use of the phrase, "I think" or "I think the evidence shows" the court held this manner of speaking did not constitute misconduct where the points being made were supported by the evidence – the prosecutor was not expressing a personal opinion). Here, the prosecutor never crossed the line into the arena of personal vouching or bolstering.[12]

Another claim of the defendant, again relying on just a few select sentences, is that the prosecutor committed misconduct when she said "I would hate to see what kind of a crime scene he makes when he does intend to kill. That is about – that is about the best evidence you are going to get." 19RP 122-23. The defendant

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[12] The defendant says the situation here is akin to what happened in State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010), wherein the Court discussed the impropriety of the jury learning that a witness had struck a plea deal to reduced charges upon agreement to provided "truthful testimony," an agreement that implied that State had the ability to know whether the witness was telling the truth or not. There were no deals in this case, nothing that indicated that the State had some sort of innate ability to determine if the witnesses were telling the truth. Ish is simply not applicable here. Additionally, the Court in Ish, while finding the introduction of the terms of the plea agreement improper, the Court held the error was harmless. Ish, 170 Wn.2d at 201.

asserts that the prosecutor was implying she had a wealth of experience in other cases where there was less evidence and that the jurors in those cases had found the defendant guilty. Def. br. at 19. But the defendant can only make this argument by taking the sentence out of context and by a bit of inventiveness.

The prosecutor took great pains to show how the forensic evidence, taken in conjunction with the nature of Saechao's wounds, proved that the defendant was not firing randomly or in fear when he shot Saechao. See 19RP 122-23. Rather, there was "perfect evidence of a contact wound," the prosecutor told the jury, with the "muzzle end of the barrel to [Saechao's] skull," demonstrating that the defendant "intended to kill Jason Saechao and nothing less." 19RP 122. The prosecutor then uttered the challenged statement above, followed by "[a]t the very least he had more than enough time, and there is more than enough evidence that that was premeditated killing when he put that gun to the back of Jason Saechao's head." 19RP 123. Rather than ***implying*** that as an experienced prosecutor she had some external knowledge about other cases, the prosecutor was ***directly*** stating that the evidence in the defendant's case very strongly supported a finding that when the defendant shot Saechao he intended to kill him.

Next, the defendant objects to the prosecutor's use of the pronoun "we," and in discussing the failings of Saechao, claiming that in a calculated manner the prosecutor was attempting to align herself with the jury in some fashion and was appealing to the passion and prejudice of the jury in seeking a verdict not based on the evidence, but on sympathy. Def. br. at 21. This assertion is not supported by the record.

First, simply using the pronoun "we" in a rhetorical manner is not misconduct. For example, the prosecutor stated, "the fourth and final shot, as we know beyond a reasonable doubt from Kathy Geil and Dr. Fusaro, that it was a contact shot." This was not an attempt to somehow garner a sense of closeness with the jury, rather, it was a way of saying what the evidence showed.

Second, when the prosecutor discussed Saechao's failings (see 19RP 60), his meth addiction, his domestic violence, his criminal convictions, the prosecutor was not attempting to garner sympathy for Saechao, rather, it is clear that the prosecutor was asking the jurors not to let the bad things about Saechao cloud their judgment. It was the very fact that the jurors might not have sympathy for Saechao that the prosecutor was trying to combat. In any event, the Supreme Court has stated, "[a] prosecutor is not

muted because the acts committed arouse natural indignation." State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (citing State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968). In Borboa, a child rape case, the Supreme Court held that it was perfectly permissible for the prosecutor to refer to the "horrible" nature of the crime and the effect of the crime on the victim. Borboa, 157 Wn.2d at 123.

Finally, the defendant asserts that the prosecutor expressed a personal opinion when she stated that the part of the defendant's testimony appeared rehearsed. The single line referred to was as follows: "And the other, oft repeated, I submit rehearsed response, I was scared for my life." 19RP 60. "I submit" is not a phrase indicative of the prosecutor expressing a personal opinion. Rather, the phrase indicates that something is being submitted to the jurors for their determination and that the evidence suggests a result. Further, whether the defendant's testimony appeared rehearsed would be based in large part on his demeanor while testifying, evidence the jury may fully consider and the prosecutor free to discuss, and something that is not part of the record. State v. Stratton, 170 Wn. 666, 673-674, 17 P.2d 621 (1932) (jury has right to consider a witnesses' demeanor upon the witness stand); State

v. Scott, 58 Wn. App. 50, 791 P.2d 559 (1990) (once a defendant testifies at trial, he is subject to having his credibility explored just like any other witness) accord, State v. Day, 51 Wn. App. 544, 551, 754 P.2d 1021, rev. denied, 11 Wn.2d 1016 (1988).

3. The Defendant's Failure to Object

A defendant's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by an instruction to the jury. Fisher, 165 Wn.2d at 747. In other words, even if misconduct occurred at trial, reversal is not required if the error could have been obviated by an objection and curative instruction that the defense did not request. Russell, 125 Wn.2d at 85.

In Swan, the defendant's challenge to the prosecutor's closing argument wherein he told the jury that the child witnesses were truthful, was waived by the defendant's failure to object at trial. Swan, 114 Wn.2d at 660-662. In Warren, the prosecutor's complete misstatement of the law regarding the burden of proof, an error constitutional magnitude, was sufficiently cured by the trial judge after the defendant raised an objection. Warren, 165 Wn.2d

at 24-28. These two cases demonstrate both the need to object and the trial court's ability to cure misconduct that does occur.

Here, the defendant failed to raise an objection or ask for a curative instruction. The defendant failed to give the trial judge the opportunity to cure any misconduct. Here, given the opportunity, the court, for example, could have admonished the prosecutor and ordered the jury to disregard the comments deemed improper. Jurors are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). There is simply nothing so egregious about the alleged misconduct in this case that could not have been easily cured or stopped by a simple objection and request for a curative instruction. Thus, the defendant's misconduct claim is waived.

4. The Failure to Prove Prejudice

A conviction will be reversed upon a claim of misconduct only upon the defendant showing that there is a substantial likelihood that the alleged misconduct affected the verdict. Russell, 125 Wn.2d at 86. Here, the defendant can prove no such thing.

To begin, the court instructed the jury, orally and in writing, that:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this

> trial...Your decisions as jurors must be made solely upon the evidence presented during these proceedings. The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict....As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 169-71. Jurors are presumed to follow the court's instructions. Lough, 125 Wn.2d at 864.

Whatever minor prejudice the defendant can ascribe to the alleged misconduct, he cannot show that the verdict was based on anything but a careful evaluation of the evidence, including the forensic and scientific evidence that supported the eyewitness testimony. This conclusion is enhanced by proof that the defendant repeatedly lied – lies he had to admit at trial, his attempt to tamper with the witnesses -- including in a recorded jail phone call, and his incredulous testimony that included his assertion that the contact wound to the top of Saechao's head could have happened as he was running out the door while still firing his 9mm handgun.

The prosecutor did not discuss evidence that had not been admitted and did not misstate the law in any way. None of the challenged comments here were of such significance or of such gravity that the defendant can prove that but for the comments, he likely would not have been found guilty.

5. A Misconduct Claim cannot be so Easily Transformed into a Claim of Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must first prove that counsel's performance was deficient, and second, he must prove that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-68, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first element is met by showing that when considering all the circumstances of trial, counsel's conduct fell below an objective standard of reasonableness. Id. The second element is met by showing that there is a reasonable probability the outcome of trial would have been different if the attorney had performed adequately. Id. If either element is not proven by the defendant, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The court begins with the strong presumption that a defendant received

effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

Likely knowing his misconduct claim has been waived, the defendant alleges that this trial counsel's failure to raise an objection below resulted in deficient performance by counsel that was so severe as to render his trial fundamentally unfair under the due process clause. However, an error that does not directly implicate a constitutional right shall not be transformed into an error of constitutional magnitude simply by claiming ineffective assistance of counsel. State v. Davis, 60 Wn. App. 813, 823, 808 P.2d 167 (1991), aff'd, 119 Wn.2d 657 (1992). See also Murray v. Carrier, 447 U.S. 478, 91 L.Ed.2d 396, 106 S.Ct. 2639 (1986) (where counsel failed to recognize a factual or legal basis for an alleged error at trial, or failed to raise the claim despite recognizing it, and where counsel is otherwise competent, review will be denied).

In addition, the failure to object is rarely sufficient to raise an ineffective assistance of counsel claim. An attorney cannot be said to be incompetent if, in the exercise of his professional talents and knowledge, he fails to object to every item of evidence to which an objection might successfully be interposed. State v. Mode, 57

Wn.2d 829, 360 P.2d 159 (1961). Defense counsel's failure to object will amount to ineffective assistance of counsel "[o]nly in egregious circumstances" where the improper conduct was central to the State's case." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). Often there are strategic reasons not to object to misconduct. Neidigh, 78 Wn. App. at 76. This may include not wanting to draw undue attention to the alleged improper argument.

Here, the alleged failure to object pertained to only a few passages closing argument. An examination of the record as a whole demonstrates that the defendant's attorney performed commendably. The defendant should not be allowed to transform a failure to object argument into an ineffective assistance claim under these facts.

In any event, the defendant suffers from the same problem under either a claim of misconduct or a claim of ineffective assistance of counsel – the failure to prove prejudice. The defendant fails to prove that but for the alleged incompetence of his attorney -- the failure to object to a few instances of alleged misconduct in closing, there is a reasonable probability that the outcome of trial would have been different. As was stated in argument section C 4, supra, the evidence against the defendant

was strong and difficult to combat, especially considering the defendant's repeated and admitted lies, the scientific and forensic evidence, his documented attempt to tamper with a witness, and his incredulous testimony as to how he fired a shot into the top of Saechao's head.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 10 day of November, 2014.

RESPECTFULLY submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jennifer Sweigert, containing a copy of the Brief of Respondent, in STATE V.TRUONG, Cause No. 70811-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

11-10-14

Date

Done in Seattle, Washington