No. 46865-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

THOMAS W. ASBACH,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 14-1-00580-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor committed prosecutorial misconduct by suggesting that the jury draw reasonable inferences about the credibility of witnesses based on evidence presented at trial.

2. Whether, if such suggestion was in fact prosecutorial misconduct, it constitutes a reversible error for which relief should be granted.

3. Whether Asbach's defense counsel rendered ineffective assistance by not objecting to the prosecution's closing statement.

B. STATEMENT OF THE CASE.

The State accepts Asbach's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The State did not engage in prosecutorial misconduct by suggesting that the jury make reasonable inferences about the credibility of witnesses based on evidence presented at trial.

Asbach claims that the prosecutor vouched for the credibility of State witnesses when he remarked, during closing argument, that two police officers had testified consistently with each other. RP 414.[1] In fact, the prosecutor merely stated that the testimony of Officer Finch and Lieutenant Barclift was consistent and that their

[1] All references to the Verbatim Report of Proceedings are to the three volume trial transcript.

stories supported one another, while the defendant's story was very different. RP 414. He did so to explain why he was combining the testimonies of the two officers into one version, not to tell the jury that because they were consistent they must be credible. Further, the prosecutor reminded the jurors that they were the sole judges of the credibility of each witness. Id. at 413-14.

Far more direct references have been held proper when justified by the evidence. *See, e.g.*, State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (holding the prosecutor's suggestion that a widow's testimony was more accurate than that of other witnesses because a woman would vividly remember witnessing her husband's murder was not witness vouching) (sentence vacated on other grounds by In re Pers. Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001)). The evidence in the present case supported an inference that the officers' statements are reliable, not because they are police officers or their testimony should be evaluated differently from that of other witnesses, but because their version of events is far more reasonable and consistent with other evidence.

The prosecutor followed the challenged statements with a lengthy argument explaining why the jury should believe the police officers and not the defendant. RP 414-39. He consistently referred

to the reasonableness of the defendant's testimony as compared to the testimony of the officers, the other evidence, and the common knowledge and experience of the jurors. This is not improper argument.

A prosecutor is a quasi-judicial officer who must act impartially. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). It is the duty of the prosecutor to seek a verdict based on the evidence in the case rather than appeals to passion or prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). The prosecutor in this case certainly did that. Every argument he made was tied to a piece of evidence or to common sense.

A defendant who claims prosecutorial misconduct has the burden of proving the misconduct, and its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578.

It is misconduct for a prosecutor to vouch for the credibility of a government witness. State v. Coleman 155 Wn. App. 951, 957, 231 P.3d 212 (2010), *review denied*, 170, Wn.2d 1016, 245 P.3d 772 (2011). It is generally improper for prosecutors to bolster a police witness's character, even if the record supports such an argument. State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (citing to State v. Smith, 67 Wn. App. 838, 844, 841 P.2d 76 (1992) (following a line of cases from other states holding that prosecutorial misconduct occurred where the state bolstered police witnesses with evidence of commendations, awards, or distinguished careers)). The prosecutor in this case did not address the officers' testimony in any context except to argue that it was consistent with other evidence and made more sense than the testimony of the defendant. There was no vouching for character.

The Washington Supreme Court has held that "In closing argument, the prosecuting attorney has a wide latitude in drawing and expressing reasonable inferences from the evidence." State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986); State v. Boehning, 127 Wn. App 511, 519, 111 P.3d 899 (2005). During closing argument, counsel is entitled to comment on a witness's veracity or invite the

jury to make reasonable inferences from the evidence as long as he does not express a personal opinion. State v. Rivers, 96 Wn. App. 672, 674, 981 P.2d 16 (1999).

In the present case, the prosecutor did not express his personal opinion, but instead relied on the evidence admitted during the trial to suggest that the jury draw reasonable inferences. There was no prosecutorial misconduct.

2. Even if the prosecutor's statements during closing argument were improper, they still do not constitute a reversible error because Asbach has not shown that they prejudiced the jury.

A violation of a prosecutor's duty can constitute a reversible error. Boehning, 127 Wn. App. at 518. In evaluating this, the court should consider the argument's prejudicial nature and its cumulative effect. Id. (citing to State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994)). As with the impropriety of the prosecutor's statement, Asbach bears the burden of proving its prejudicial nature. State v. Emery, 174 Wn.2d 741, 757, 278 P.3d 653 (2012); Dhaliwal, 150 Wn.2d ar 578 (citing to Pirtle, 127 Wn.2d at 672).

If defense counsel did not object to the prosecutor's remarks, the issue of prosecutorial misconduct cannot be raised on appeal unless "the misconduct is so flagrant and ill-intentioned that no

curative instructions could have obviated the prejudice engendered by the misconduct." State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); *see also* Emery, 174 Wn.2d at 760.

Even if it were improper for the State to point out the consistency of the officers' statements, Asbach has not shown that this prejudiced the jury. In fact, far more pointed statements by prosecutors have been held not to constitute reversible errors. *See, e.g.*, State v. McKenzie, 157 Wn.2d 44, 57, 134 P.3d 221 (2006) (referring to defendant as "guilty" did not constitute a reversible error); State v. Hunter, 35 Wn. App. 708, 715, 669 P.2d 489, *review denied*, 100 Wn.2d 1030 (1983) (referring to defendant as a "pimp" was not a reversible error).

Defense counsel did not object to the State's closing argument, most likely because it was not objectionable. Asbach has not established any misconduct at all, much less misconduct "so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered." In fact, there was no prejudice. The evidence against Asbach was very strong. There is no chance that the alleged "vouching" swayed the jury and caused them to convict on a basis other than that the State proved its case beyond a reasonable doubt.

3. Defense counsel's choice not to object to the State's closing argument did not render his assistance ineffective.

To prevail on a claim of ineffective assistance of counsel, Asbach must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Asbach cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996); State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *affirmed*, 111 Wn.2d 66, 758 P.2d 982 (1988). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was

effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. Strickland, 668 U.S. at 687. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

In the present case, the performance of defense counsel did not fall below an objective standard of reasonableness. During the course of the trial, defense counsel moved to suppress the statements of Finch and Barclift. *See* RP 1-105. He cross-examined the State's witnesses and called his own witnesses to support his theory of the case. *See generally* Id. at 107-406. He made several evidentiary objections when he believed it proper. Id. And he made a closing argument to the jury submitting several reasons why he believed they could find reasonable doubt as to the charges against his client. RP 440-53. In short, he did everything a competent defense attorney would reasonably be expected to do in order to zealously advocate for his client. Defendants have a right to effective assistance of counsel, not to successful assistance. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d

223, 225, 500 P.2d 1242 (1972) (citing to State v. Thomas, 71 Wn.2d 470, 429 P.2d 231 (1967)). The fact that defense counsel did not successfully convince the jury to reasonably doubt the State's case does not mean his assistance was ineffective.

A reasonable strategic or tactical decision by counsel cannot be considered ineffective assistance. Hendrickson, 129 Wn.2d at 77. Even assuming that defense counsel could theoretically have raised a successful objection to the State's closing argument, Asbach has presented no evidence to meet his burden of proving that it was not a strategic or tactical trial decision not to do so. Counsel's failure to make a groundless objection will not support a finding of ineffective assistance of counsel. Briggins, 11 Wn. App. at 692.

Even if this court finds that defense counsel's assistance fell below an objective standard of reasonableness, Asbach cannot show that his counsel's deficient performance prejudiced the jury. In order to find prejudice, the court must find that but for defense counsel's deficient performance, there is a reasonable probability—meaning a probability sufficient to undermine confidence in the outcome—that the result would have been different. Leavitt, 49 Wn. App. at 359 (citing to Strickland, 466 U.S. at 694).

Asbach has presented no evidence that the jury would have come to a different conclusion if defense counsel had objected. If defense counsel had raised a successful objection to the State's closing argument, this would not have changed the essential facts behind it. While the statements of Finch and Barclift were consistent and mutually supportive, the evidence in total established Asbach's guilt beyond a reasonable doubt. Even if the prosecutor's statement was improper and defense counsel failed to make an objection that he should have made, the jury still would have found the defendant guilty of second degree burglary if the statement had been objected to, based solely on the facts of the case.

In short, Asbach has not overcome the strong presumption that his counsel's assistance was effective. Therefore, the court should find that he has not met his burden.

D. CONCLUSION.

Based on the foregoing arguments and authorities, the State respectfully requests that this court affirm the conviction of Thomas Asbach for Second Degree Burglary.

Respectfully submitted this 24th day of June, 2015.

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Attorney for Respondent

THURSTON COUNTY PROSECUTOR

June 24, 2015 - 2:35 PM

Transmittal Letter

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