

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

2015 APR 27 PM 1:18

STATE OF WASHINGTON

BY JW
DEPUTY

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 Bryce E. Smiley)
 (your name))
)
 Appellant.)

No. 40511-6-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, BRYCE E. SMILEY, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Prosecutorial Misconduct (cumulative effect)

Additional Ground 2

INEFFECTIVE ASSISTANCE OF COUNSEL

If there are additional grounds, a brief summary is attached to this statement.

Date: 16 APR 2015

Signature: [Signature]

Form 23

CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of SAGE
to C. R. Prinske, H+U
& K. Prator, DPH
4/29/15
Date Signed JW

STATEMENT OF ADDITIONAL GROUNDS

Assignments of Error

1. The trial was unfair thus unconstitutional due to improper arguments, phrasing, and testimony.

2. Failure of counsel to object timely or to ask for any curative instructions from the court to the jury.

Issues pertaining to Assignments of Error.

1. The prosecution argued with improper phrasing, inferences, and generally outside the rules of professional conduct.

2. The assistance of counsel fell well below the standards of effectiveness, and failed to object in a timely manner or failed to object at all together.

ARGUMENTS

1. The prosecution abused its position, and violated the defendant's right to a fair trial. 5th and 14th AMENDMENT U.S.C.A. by using improper opinion testimony, along with inferences of guilt and the cumulative effect is manifest error.

2. Defense counsel erred by omission of effective representation when he showed a clear lack of participation in the adversarial process by not objecting to prosecution's violations of defendant's right to a fair trial. 6th Amendment U.S.C.A.

Prosecution Committed Misconduct When in closing she stated "The point is, when you are weighing JEFF Smiley's testimony about, again, any information he had about the defendant, his son, coming over to the house, Et cetera, when you are weighing his, Jeff Smiley's credibility to determine how much information he has and if it's really all that accurate, what's not okay is that he came in here and he testified for you, and he didn't -- he wasn't entirely truthful."

4RP 474 15-23. It is impermissible for a prosecutor to express a personal opinion as to the ~~guilt~~ credibility of a witness or the guilt of a defendant. (STATE V. REED, 102 WASH.2D 140, 145, 684 P.2D 699 (1984)) (Citing AM. BAR ASS'N, MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, § DR 7406 (C)(4) (1980)). It constitutes misconduct, *id.*, and violates the advocate witness rule, which "prohibits an attorney from appearing as both a witness and an advocate in the same litigation." (Pratt, 764 F.2d at 552-53.) IN FACT prosecution throughout her closing and rebuttal closing constantly made statements that violated this rule (4RP 438, 10, 439-440, 22, and 4RP 474 9-25, 475 1-6.) These errors by prosecution removed the fact finding aspect of the jury by forcing the jury to see Jeff Smiley's as well as the defendant's testimonies in a light they may not of come to without prosecution's error. (STATE V. DAVENPORT 100 WASH.2D 757, 762, 675 P.2D 1213 (1984), (STATE V. CASE 49 WASH.2D 66, 71, 298 P.2D 500 (1956) - CANONS OF PROFESSIONAL ETHICS Rule 15.

Prosecution also committed misconduct when she compared the reasonable doubt standard to

Baking a batch of brownies and finding some missing.

"Another example, you batch -- you cook -- bake a batch of brownies. You leave them to cool on your kitchen counter. You walk out of the kitchen, and in doing so you see that your five-year-old is sitting there staring at the brownies on the counter. You leave the room, you come back ~~and~~ 10 minutes later, your child is not in the kitchen, but there's several brownies missing, it's quite clear. You go into the living room, and there's your five-year-old sitting on the couch, fingers are sticky, the remote control is kind of gooey with chocolate, might be a little bit of chocolate on the face. You didn't see him do anything, you didn't actually see him eat the brownies, but you have direct evidence that the brownies are missing. You have got chocolate on his fingers, the reasonable inference, again, based on your common sense, based on your common experience, is that he ate brownies." (4RP 416, 9-25, 417, 1) "When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role." ANDERSON, 153 WASH. APP. at 431, 220 P.3d 1273; see also STATE V. WALKER, 164 WASH. APP. 724, 732, 265 P.3d 191 (2011); STATE V. JOHNSON, 158 WASH. APP. 677, 684, 243 P.3d 936 (2010), review denied, 171 WASH. 2d 1013, 249 P.3d 1029 (2011).

EVEN under the more stringent standard for determining prejudice, the results would be the SAME. IN in re Personal restraint petition OF GLASSMAN, despite the defendants failure to object, "The misconduct... was so pervasive that it could not have been cured by an instruction." 175 Wash.2d 696, 707, 286 P.3d 673 (2012). HERE, AS in GLASSMAN, "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions CAN ERASE their combined prejudicial EFFECT." I.d. (Alteration in original.) (quoting STATE V. WALKER, 164 WASH. APP. 724, 737, 265 P.3d 191 (2011)). Moreover, federal courts have held that comments at the ~~the~~ end of a prosecutors rebuttal closing are more likely to CAUSE prejudice. E.G., United STATES V. SANCHEZ, 659 F.3d 1252, 1259 (9th cir. 2011) (Significant that prosecutor made improper statement "At the end of his closing rebuttal argument, after which the jury commenced its deliberations"); United STATES V. CARTER, 236 F.3d 777, 788 (6th cir. 2001) (Significant that "prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations") HERE, The prosecutor MADE Several of her improper comments, including the "I submit to you, ~~defendant~~ ^{HE} has ^{the} ~~att~~ biggest ~~the~~ motive to lie." and calling upon another witness to say Jeff Smiley was during her rebuttal closing, increasing their prejudicial effect.

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INEFFECTIVE ASSISTANCE OF COUNSEL

DEFENSE counsel representing Smiley in this case WAS ineffective due to failing to object to all except one error when JENNIFER Smiley stated "AND then the NEXT day, I realized she had been cutting herself. 2RP 193 2-3." to which MR. TREYZ objected due to the statement being against an already ruled on motion in limine. Counsel also fell below the standard of EFFECTIVE representation when he failed to request a mistrial after the conclusion of PROSECUTIONS closing/rebuttal closing arguments. Counsel showed a clear lack of participation in the adversarial process. Counsel also failed to request suppression of MANY STATE witnesses who merely reiterated what A.B. told them and in doing so allowed the state to play upon the emotions of the jury to have them reach a verdict in the states favor. Counsel also failed to present competent expert testimony to rebut state's expert witness testimony.

Conclusion

DUE to the cumulative effect of the prosecutions flagrant and ill intentioned statements in closing and rebuttal closing AS well as the reference to the reasonable doubt standard to BAKING A BATCH OF Brownies and finding some missing and Prosecution stating that the defendant's father WAS not above twisting the truth to protect his son and stating defendant has the biggest motive to lie. ~~this~~ AS well AS ineffective assistance of counsel when he failed to object to any and all of prosecutions errors as well AS failure to request suppression of many of states witnesses along with a failure of a request for a mistrial prejudiced and violated smiley's right to a fair trial and competent representation. This Court should reverse smiley's convictions and remand for a new trial.