No. 43502-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

RAYNARD S. CHARGUALAF, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay

No. 11-1-00396-5

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Because the prosecutor's reference to codefendants' agreement to testify truthfully was not flagrant or ill-intentioned and because the reference was in response to Chargualaf's impeachment of the witnesses' credibility, the prosecutor's reference was not prosecutorial misconduct.

2. Because the prosecutor's reference to codefendants' agreement to testify truthfully was not improper, and because Chargualaf has not shown that the jury's verdict would have been different but for the prosecutor's reference, Chargualaf's trial attorney was not ineffective for failing to object to the prosecutors reference.

B. FACTS AND STATEMENT OF THE CASE

The State accepts Chargualaf's statement of facts but includes additional facts, as follows, and includes references to additional facts, as needed, in the relevant portions of argument in the State's response brief. RAP 10.3(b).

C. ARGUMENT

1. Because the prosecutor's reference to codefendants' agreement to testify truthfully was not flagrant or ill-intentioned and because the reference was in response to Chargualaf's impeachment of the witnesses' credibility, the prosecutor's reference was not prosecutorial misconduct.

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Chargualaf was accompanied by four codefendants when he committed the seven crimes for which he was convicted in the instant case. RP 262-63, 316, 318, 323-324, 381-83, 417-18, 426, 429-31, 435. Those four codefendants were Rosamond Watts, Jr., Sierra Watts, Cliffton Darrow, and Duane Brunson. *Id.* Each of these four codefendants testified at Chargualaf's trial after making plea agreements with the prosecution. RP 225-226, 312-13, 372, 378-79, 415-416. Each of the four plea agreements required each respective codefendant-witness to testify truthfully. RP 289-90, 361-62, 412, 466-67.

During direct examination, the prosecutor elicited testimony from each respective codefendant-witness to establish: that he or she was testifying pursuant to a plea agreement; the charges that the witness was pleading to pursuant to the agreement; and, the agreed, recommended sentence pursuant to the plea agreement. RP 225-226 (Rosamond Watts); RP 312-13 (Sierra Watts); RP 372, 378-79 (Clifford Darrow); and, RP 415-416 (Duane Brunson). No testimony was elicited or provided on direct examination about any witness's obligation to testify truthfully pursuant to their plea agreement. *Id.*

Chargualaf's cross examination of each witness regarding their plea agreements varied between the witnesses to some extent, as follows:

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a) Rosamond Watts -- On cross examination, Chargualaf emphasized that Rosamond Watts had "cut a deal" with the prosecution. RP 282.

b) Sierra Watts -- On cross examination, Chargualaf emphasized that Sierra Watts, too, had "cut [a] deal" with the prosecution and that by doing so she had "whittled ... down" her jail sentence. RP 335. Chargualaf elicited testimony to show that Sierra Watts had initially lied to the police during the investigation. RP 356-58.

c) Cliffton Darrow -- The topic of the plea agreement was not raised on cross examination of this witness, but Chargualaf elicited testimony to emphasize that Darrow lied to police during an interview. RP 400-01.

d) Duane Brunson -- The topic of the plea agreement was not directly raised on cross examination of this witness, but Chargualaf elicited testimony to emphasize that Brunson lied to the police from the beginning of the case and that he continued to lie during the investigation. RP 447-48, 451-52.

One by one, at the close of Chargualaf's cross examination of each of the codefendant-witnesses, the prosecutor then elicited testimony from each witness to establish that the terms of the plea agreement required the

witness to testify truthfully and that if the witness breached the agreement they would face a harsher sentence. RP 289-90 (Rosamond Watts); RP 361-62 (Sierra Watts); RP 412 (Cliffton Darrow); and, RP 466-67 (Duane Brunson).

Although Chargualaf did not object at trial, he now claims for the first time on appeal that the prosecutor engaged in misconduct during the trial by *vouching* for each of the four witnesses by questioning each of them about their agreements to testify *truthfully*. Because Chargualaf raises this claim for the first time on appeal, to prevail it is his burden to show that the prosecutor's conduct was both "flagrant and ill-intentioned." *State v. Smith*, 162 Wn. App. 833, 848, 262 P.3d 72 (2011) (further citations omitted). Or, put another way, to prevail on appeal Chargualaf has the burden of showing that the prosecutor's conduct was both improper and that it was prejudicial. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

Generally, vouching can occur if the prosecutor implies that there is extraneous evidence not presented at trial that supports a witness's credibility or when the prosecutor expresses a personal opinion about a witness's credibility. *Id.* at 196. "Evidence that a witness has promised to give 'truthful testimony' in exchange for reduced charges may indicate to

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a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement." *Id.* at 198.

Therefore, the *Ish* court wrote that the fact that pursuant to a plea agreement a witness has agreed to testify truthfully should not be admitted as a part of the State's case in chief, but that if the witness is impeached with the plea agreement on cross examination, then on redirect the State may bring out that the agreement requires the witness to testify truthfully. *Id.* at 198-99. In the instant case, each of the witnesses had agreed pursuant to their respective plea agreements to testify truthfully, but no testimony was elicited or provided on direct examination in regard to the obligation to testify truthfully. RP 225-26, 289-90, 312-13, 361-62, 372, 378-79, 412, 415-16 , 466-67. Because there was no mention made of the requirement to testify truthfully, it was not improper for the prosecutor to bring up the plea agreements on direct examination. *State v. Green*, 119 Wn. App. 15, 24, 79 P.3d 460 (2003), citing *State v. Bourgeois*, 133 Wn.2d. 389, 945 P.2d 1120 (1997); see also, *State v. Smith*, 162 Wn. App. 833, 262 P.3d 72 (2011) (where State anticipated that a credibility attack would occur on cross examination, it was not improper for State to elicit testimony during direct examination about a plea bargain agreement to testify truthfully).

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Two of the witnesses in the instant case, Rosamond Watts and Sierra Watts, were impeached on cross-examination when Chargualaf emphasized that they had "cut a deal" with the prosecution. RP 282, 335. Thus, it was not improper for the prosecutor to elicit on redirect examination that these two witnesses had agreed, as a term of their agreements with the prosecutor, to testify truthfully. *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010); *State v. Smith*, 162 Wn. App. 833, 262 P.3d 72 (2011); See also, *United States v. Shaw*, 829 F.2d 714, 716 (9th Cir. 1987); *United States v. Tham*, 665 F.2d 855, 862 (9th Cir. 1981).

However, Chargualaf did not question Cliffton Darrow or Duane Brunson on cross examination about their plea agreements. RP 400-01, 447-48, 451-52. Chargualaf did, however, attack the credibility of Darrow and Brunson and allege that they both had lied to police during the investigation. *Id.* Thus, Chargualaf invited the prosecutor to rehabilitate Darrow and Brunson on redirect in regard to their credibility, and the prosecutor attempted to do so by pointing out that their plea agreements required them testify truthfully. Because the prosecutor's attempt at rehabilitation was in response to Chargualaf's successful impeachment, the prosecutor's conduct was not per se improper. See, e.g., *State v. Froehlich*, 96 Wn.2d 301, 305-06, 635 P.2d 127 (1981) (notwithstanding

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general rule that impeached witness may only be rehabilitated with regard to facet of character or testimony impeached, where witness's credibility was impeached, it was not improper for prosecutor to elicit evidence regarding witness's motivation to be truthful).

The prosecutor's references to the terms "truth" or "truthful" were brief and did not amount to vouching. RP 412, 466-67. The prosecutor, did not express his personal belief or invoke evidence not presented at trial. *Id.* Thus, the prosecutor did not vouch for either witness. See *Ish*, 170 Wn.2d at 196. It follows from these facts that the prosecutor's conduct was neither flagrant nor ill-intentioned.

Still more, Chargualaf cannot show that mention of the words "truth" or "truthful" caused an enduring and resulting prejudice; thus, even if error occurred, the error was harmless. See *Id.* at 200-01. Aside from the testimonies of Darrow and Brunson, other evidence showed that Chargualaf participated in planning the crimes, that he was armed with a firearm while committing the crimes, and that he provided three of the four guns that were used during the robbery. RP 262-63, 316, 318, 323-324, 381-83. Chargualaf was captured by police as he fled from the scene of the crime with a gun in his hand. RP 482-486.

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Chargualaf's jury was correctly instructed in instruction no. 4 that they were "the sole judges of credibility of each witness." RP 544-45. The jury was correctly instructed by instruction no. 8 in regard to the special scrutiny that it should pay to the testimony of an accomplice. RP 549. Jurors are presumed to follow the court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Other evidence supported Chargualaf's conviction, and the prosecutor did not dwell on the term that the witnesses testify truthfully. If error occurred, it was harmless. *Ish* at 200-01.

Finally, Chargualaf has not made the required showing that the error he alleges has affected the jury's verdict. To prevail, Chargualaf must show that "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *State v. Dixon,* 150 Wn. App. 46, 53, 207 P.3d 459 (2009), quoting *State v. Dhaliwal,* 150 Wn.2d 559, 578, 79 P.3d 432 (2003). To prevail on appeal where he has not objected to the error at trial, Chargualaf must show the prosecutor's reference to the witness's obligation to testify truthfully was so "'flagrant and ill intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *State v. Thorgerson,* 172 Wn.2d 438, 443, 258 P.3d 43 (2011), quoting *State v.*

Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Because Chargualaf has not made this showing, the issue is waived. *State v. Gregory,* 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

2. Because the prosecutor's reference to codefendants' agreement to testify truthfully was not improper, and because Chargualaf has not shown that the jury's verdict would have been different but for the prosecutor's reference, Chargualaf's trial attorney was not ineffective for failing to object to the prosecutors reference.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). To prevail on a claim of ineffective assistance, Chargualaf must show both deficient performance and resulting prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. *State v. Thomas,* 109 Wn.2d 222, 226,

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743 P.2d 816 (1987). Failure on either prong of the test defeats a claim of ineffective assistance of counsel. *Strickland,* 466 U.S. at 697.

Chargualaf fails to show a reasonable probability that, even if his trial attorney would have objected to the prosecutor's reference to the witness's agreement to testify truthfully, the result of the proceeding would have been different despite the overwhelming evidence of his guilt.

D. CONCLUSION

Because two of the four codefendants who testified against Chargualaf at trial were impeached on their plea agreements on cross examination, it was not error for the prosecutor to attempt to rehabilitate those witnesses by eliciting testimony that their plea agreements required them to testify truthfully.

Because the remaining two of the four witnesses were impeached on their credibility on cross examination, it was not error for the prosecutor to seek to rehabilitate those witnesses by eliciting testimony that their plea agreements, also, required them to testify truthfully.

Because Charagualaf did not object to the testimony at trial, it is his burden on appeal to show that the prosecutor's reference to the witnesses' agreement to testify truthfully was flagrant and ill intentioned

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and that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Chargualaf has not met his burden. Thus, the issue is waived on appeal.

Finally, because Chargualaf has not shown that the result of the trial would have been different had his attorney objected to what he now asserts was error at trial, his attorney was not ineffective for not objecting.

DATED: May 6, 2013.

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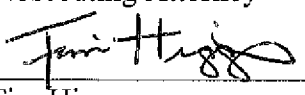

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