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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

THE SUPREME COURT
IN THE STATE OF WASHINGTON

DISCRETIONARY REVIEW RAP 13.4

from the court of appeals

70811-2-I

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2015 JUL 13 AM 9:49

CU VAN TRUONG

WASHINGTON STATE PENITENTIARY
1313 N. 13th Avenue
Walla Walla, Washington
99362

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IN THE SUPREME COURT
IN THE STATE OF WASHINGTON

CU VAN TRUONG, Petitioner,) S.Ct.#
) MOTION FOR DISCRETIONARY
v.) REVIEW RAP 17.3
STATE OF WASHINGTON)
Respondent

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 JUL 13 AM 9:50

I, CU VAN TRUONG, Petitioner, pro-se, and residing
THE WASHINGTON STATE PENITENTIARY 1313 N. Walla Walla,
Washington.

DECISION OF THE COURT OF APPEALS DIVISION I.

Division I upheld the trial court's ruling, holding that
that Truong failed to show prosecutorial misconduct. op. page
1. April 27, 2015.

Truong challenges the factfinding procedure that the COA
used to make there findings concerning; The prosecutor's comments
"Prosecutor used the improper comments three times directly
and vouched for the strength of the state's case, and suggest
that a not-guilty verdict would mean the jury "didn't care"
abput Jason Saechao.

The op. facts as applied to Supreme Court Authority is in
conflict. The fact finding procedure was unreasonable in light
of the op. and its findings. Petitioner asks the Court for

1. A evidentiary hearing to expand the record on the prejudice
2. of trial counsel for not objecting and not holding the State
3. to their burden of proof on all the elements for the crimes Mr.
4. Truong was convicted of.

5. This Petitioner asks that the Substantive facts of his
6. attorney's brief be incorporate in the Appendix A.

7. The prosecutor had vouched for the credibility of witness's
8. by referring to facts outside the record. the prosecutor also
9. testified in lue of arguement. The op. is in conflict as argued
10. below inthe GROUNDS FOR REVIES.

11. **GROUNDS FOR REVIEW**

12. I. The Supreme Court Should Accept Revies and Hold that the
13. admission of Improperly Vouched of Vang's and Duong's
14. Credibility by arguing There Were Told to Tell The Truth and
15. "That's exactly What They Did," Consitutes impermissible vouching
16. and Violates an Accused Person's Fourteenth Amendment right
17. to Due Process. The Court of appeal's Decision conflicts with
18. the op. in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008).
19. And Presents a Significant question of Constitutional Law That
20. is of Substantial Public Interest and determined by the Supreme
21. Court. RAP 13.(b)(2), (3), and (4).

22. II. THE PROSECUTOR VIOLATED CU VAN TRUONG'S RIGHT TO DUE PROCESS
23. AND A FAIR TRIAL IN CLOSING ARGUEMENTS In Violation of the United
24. States Constitutional Authority, in light of unreasonable
25. procedure to apply the facts to the U.S. Authority and a
significant question of law under the Constitution and the State

1. of Washington and The United States, thus, the petition
2. involved an issue of substantial public interest that should
3. be determined by the Supreme Court.
4. Counsel On Appeal and Trial Court Counsel Was ineffective for
5. not objecting to the prejudicial evidence at Trial and Counsel
6. on appeal is ineffective for not asking for a Evidentairy Hearing
7. of Counsel and the prejudice it had at trial/. Appeal
8. Counsel forclosed a future Ineffective Counsel on Collateral
9. Attack And Raising Issues Outside the Record, Counsel forclosed
10. any Prejudice that trial counsel failed to adviocate for his
11. client. This presents a question of Constitutional Law That
12. Is of Substantial Public Interest and Determined By The Supre
13. Court. RAP 13.4(b)(2), (3) and (4).
14. The COA finding that the errors Taken Alone or Cumulatively,
15. The PROsecutor's Comments Were Likely to Impact the Jury's
16. Decision and the Prejudicial Effect could not Be Cured.
17.
18. RAP 13.4(b) sets forth the Considerations governing this Court's
19. Acceptance of Review:
20. A petition for review will be accepted by the Supreme Court
21. only: (1) If the decision of the Court of Appeals is in
22. Conflict with a decision by the Supreme Court; or (2) if
23. the decision of the Court of Appeals; or (3) If a significant
24. question of law under the Constitution of the State of Washington
25. or of the United States is involved; or (4) If the petition
involves an issue of substantial public interest that should
be determined by The Supreme Court.

1.
2. **1. THE PROSECUTOR VIOLATED CU V AN TRUONG'S**
3. **RIGHT TO DUE PROCESS AND A FAIR TRIAL IN CLOSING**
4. **ARGUMENT.**

5. The United States Supreme Court has stated that a
6. prosecuting attorney is the representative of the sovereign and
7. the community; therefore it is the prosecutor's duty to see
8. that justice is done. *Burger v. United States*, 295 U.S. 78,
9. 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes
10. an obligation to prosecute a defendant impartially and seek
11. a verdict free from prejudice and based on reason. *State v.*
12. *Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Prosecutorial
13. misconduct which deprives an individual of a fair trial violates
14. the individual's right to due process guaranteed by the
15. Fourteenth Amendment to the United States Constitution. "The
16. Touchstone of due process analysis is the fairness of the trial,
17. i.e., did the misconduct prejudice the jury thereby denying
18. the defendant a fair trial guaranteed by the process clause?"
19. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.3d
20. 78 (1982).

21. It is misconduct for a prosecutor to state a personal belief
22. as to the credibility of a witness. *State v Warren*,
23. 165 Wn.2d 17, 30, 195 P.3d 940 (2008). It is clear that Counsel
24. was expressing a personal opinion, and not arguing an inference
25. from the evidence. *State v. Sargent*, 40 Wn. App. 340, 344,
698 P.2d 598 (1985).

1. The Opinion of the Court of Appeals are taylored and
2. Petitioner objects to the fact finding procedure to find that
3. there is no prejudice to Mr. Truong's trial. In light of the
4. the following misconduct was especially egregious in light of
5. the Prosecutor Misconduct that shifted the burden
6. of proof. The following constituted misconduct.

7. Ms. Diocales could not see anything from where she was sitting
8. 14RP 31, 32, 35-6, 86-87. On her way out, she told Vang not
9. to tell the police she was there. 14Rp 49.

10. Detective Robin Cleary interviewed Duong, and then let him
11. go home. 11RP 20. Mellis told Vang she was not being truthful.
12. 11RP 152-53. She then started crying and changed her story
13. entirely. 11RP 152-53. Vang recanted the robbery story she
14. had initially told police. 11RP 20-22. Duong was asked to return
15. and also gave an entirely different story. 11RP 21, 58-59.

16. In Closing Arguments, the prosecutor attempted to parse
17. out the varying accounts of what happened the night of December
18. 27, 2011 by telling the jury the following:

19. "You know, there are moments in every trial when you get
20. the purest of purest glimpses into that human element.
21. It can't be practiced, and it can't be rehearsed. We didn't
22. sit down with these witnesses and practiced, and it can't

23. there direct testimony. We didn't show them anything, other
24. than their own transcripts. And the only thing we told them
25. was come in here and tell the truth.

26. Admit your are a meth addict. Admit you were smoking
27. meth that day. And admit your initial story to the cops
28. was not true. Ms. Diocales, admit that you cowardly ran
29. off and left your friends there to deal with the cops. but
30. tell this jury exactly what happened, and don't hide from
31. anything. And that's exactly what they did.

1. 19RP 49-50 (emphasis added).

2. The prosecutor also told the jury, "I would hate to see
3. what kind of a crime scene he makes when he does intend to kill.
4. That is about the best evidence you are going to get." 19RP
5. 122-123.

6. The Prosecutor also Vouched for Vang's & Duong's Credibility
7. by argueing they were told to tell the truth and "Thats's Exactly
8. What They Did". The presecutor declared Vang and Duong told
9. the truth, not because the evidence supported that conclusion,
10. but because they had been instructed to do so by the prosecutors.
11. 19RP 49-50. This is misconduct.

12. The Prosecutor cannot be the advociate-witness in the case they
13. are litigating. This rule violation is in conflict with the
14. op. facts as applied to Federal Authority and Mr. Truong's
15. asserting a U.S. Constitutional Review by this Court. United
16. States V. Edwards, 154 F.3d 915, 921 (9th Cir. 1998); & Id.
17. at 922 (citing United States v. Prantil, 764 F.2d 548, 544 (9th
18. Cr. 1985).

19. Here, the op. findings are in conflict with the prejudice
20. this misconduct had on the jury. The prosecutor argued, "the
21. only thing we told them was come in here and tell the truth"
22. and "that's exactly what they did."

23. There credibility was in doubt because of their conflicting
24. statements to police and the fact that Duong admitted hiding
25. something before calling the police. 15RP 110; 16RP 162.

1. The prosecutor's argument is prejudicial because suggestions
2. the State had some way of verifying that the witness were telling
3. the truth, but "that's exactly what they did." 19RP 122-23.

4. The Prosecutor only adds to the prejudice standard and
5. conflicts with the standard of federal authority. Prosecutor's
6. additional opinion was based on facts outside the record when
7. she argued, "I would hate to see what kind of a crime scene
8. he makes when he does intend to kill. That is about-what is
9. about the best evidence you are going to get." 19RP 122-23.

10. This prejudicial argument was not distinguished in the COA
11. op in light of prosecutor implies a wealth of experience of
12. other cases in which defendants have been found guilty beyond
13. a reasonable doubt and suggests to the jury that there could
14. be no better evidence on which to convict.

15. The Prosecutor "Inflamed the Passions of the Jury & comments
16. are tailored to alignment of the Jury with the prosecutor against
17. the [accused]. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699
18. (1984).

19. Here, the prosecutor both aligned herself with the jury
20. and made an improper emotion appeal when she argued Truong was
21. hoping "maybe the jury won't care either," and then concluded,
22. "And he's wrong. We know he's wrong." 19RP 60. This argument
23. was rejected in the op. and the prejudice was not reached by
24. argument when it improperly suggested that an acquittal would
25. indicate that the jury, like Truong, did not care about Jason
Saechao. The prosecutors argument of sympathy for Saechao and
MOTION FOR DISCRETIONARY REVIEW PAGE 7.

1. combined with the jury not wanting to seem not caring shifts
2. the real issue "whether Truong acted in self-defense. The op
3. is in conflict with this Court's authority in Reed.

4. It is also in conflict with other Divisions like in State
5. v. Gonzales, 111 Wa. App. 276 at 283, 45 P.3d 205, (2002); U.S.
6. v. Vaccaro, 115 F.3d 1211 (1997).

7. Included in this category is evidence implying that the state
8. "has taken steps to assure the veracity of its witnesses. see,
9. United States v. Siatob 901 F.2d 799 at 806 (9th Cir. 1090).,
10. Citing United States v. Roberts, Supra, and United States v.
11. Brown, 122 F.3d 1199 (9th Cir. 1983); See also United States
12. v. Rudberg 122 F.3d 1199 (9th Cir. 1997).

13. Although prosecuting attorneys have some latitude to argue
14. facts and inferences from the evidence, they are not permitted
15. to make prejudicial statements unsupported by the record. State
16. v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), Cert. denied,
17. 511 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.3d 714 (2007).

18. The prosecutor's argument was precisely the bolstering of
19. veracity the cases disdain. This Court should grant review
20. and rule counsel's argument was improper and violated Cu Van
21. Truong's constitutionally protected right to a fair trial.
22.

1.
2. THE OPINION BY THE COURT OF APPEALS DID NOT REACH THE MERITS
3. OF HARMLESS ERROR AND USED THE WRONG FACT FINDING
4. PROCEDURE TO APPLY THE FACTS TO THE U.S AUTHORITY.

5. Under the Harmless Error standard requires reversal if the
6. prosecution can prove there is not a possibility the result
7. could have been different had not the error occurred. Chapman
8. v. California, 386 U.S. 18, 24, 87 S.Ct. 324, 17 L.Ed.2d 705
9. (1967).

10. If a Constitutional error occurred, the Court must determine
11. if a Constitutional err cause actual and substantial prejudice.
12. Brecht v. Abrahamson 507 U.S. 619 (1993).

13. n A evidentiary hearing should be ordered when there is a
14. unreasonable determination of facts by the lower court. Taylor
15. v. Maddox, 366 F.3d 922, 100 (1972). The state has a monopoly
16. of the court system and a petitioner pro-se is over-whelmed
17. by the stringent court machine. Haines v. Kerner, 404 U.S.
18. 519, 520 (1972), Berridge v. Heisner, 993 F.Supp. 1136, 1141
19. (S.D. Ohio 1997).

20. Defense Counsel was Ineffective for Failing to Object to
21. Inadmissible and Prejudicial Evidence and a Hearing is Warranted
22. on this Issue.

23. In the Ninth Circuit Court of Appeals holds that Mr. Truong
24. needs to develop his factual basis for his claim. Baja v.
25. DeCharme, 187 F.3d 1075, 1078 (9th Cir. 1999), cert. denied,
120 S.Ct. 798 (2000).

1. In the 9th Circuit in Baja, applying In re Rice, Supra,
2. standard, held that the petitioner failed to develop factual
3. basis for his claims when he did not support his state argument
4. "with evidence on the record, or by demonstrating that there
5. was competent, admissible evidence with respect to facts outside
6. the record that would support his allegations ... State law
7. not only permitted but required Baja to come forward with
8. affidavits or other evidence, to the extent that his claim relied
9. on evidence outside the trial record. Baja, 187 F.3d at 1079
10. .

11. A hearing is required and Mr. Truong has made a showing
12. that warrants this issue to go further with a hearing. State
13. v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
14. The Op on page 12 in Cause No. 70811-2-1/12 is in conflict with
15. the burden of proof and the shifting of the proof by making
16. these remarks. The ADDITIONAL GROUNDS FOR REVIEW lay out more
17. prejudicial statements taken together with the one's his appeal
18. counsel raised herein rise to the level of prejudice requiring
19. relief and acceptance of review in this Court.

20. For the reasons stated herein Mr. Truong requests that the
21. Court grant this issue as if it was a motion and to supplement
22. the record with Mr. Truong's direct review.
23.
24.
25.

1. 3. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD
2. THAT DEFENSE COUNSEL PROVIDED INEFFECTIVE
3. ASSISTANCE UNDER THE SIXTH AMENDMENT BY ALLOWING
4. PROSECUTOR COMMENT AND IMPROPER ARGUMENT BY
5. PROSECUTOR THAT SHIFTED THE BURDEN OF PROOF
6. AND DID NOT HOLD THE STATE TO THE BURDEN OF
7. PROOF ON ESSENTIAL ELEMENTS OF THE CRIMES THE JURY
8. FOUND MR. TRUONG'S GUILTY.

9. The Sixth Amendment Applicable through the 14th Amendment
10. *Gideon v. Wainwright*, 372 U.S. 355, 342, 83 S.Ct. 792, 9 L.Ed.2d
11. 799 (1953); It requires counsel to act in the role of an
12. advocate, so that conviction occurs only when prosecution's
13. case survives "the crucible of meaningful adversarial testing."
14. *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039,
15. 80 L.Ed.2d 368 (1984).

16. Due Process requires the state to prove each element of
17. an offense beyond a reasonable doubt. U.S. Const. Amend. XIV;
18. *In re Winship*, 397 U.S. 358, 364 S.Ct. 1068, 25 L.Ed.2d 368
19. (1970).

20. Of course, *Strickland v. Washington*, 466 U.S. 668, 687-88,
21. (1984) does not so hold. That case merely cautions reviewing
22. courts that they should not attempt to second-guess trial
23. strategy decisions by trial attorneys. At the same time in
24. presenting this issue, numerous decisions hold that a decision
25. to allow the prosecutor misconduct should not be sanctioned
as reasonable strategy. Trial counsel failing to object is
likely the result of either indolence or incompetence.

It is clear that the prosecutor engaged in improper argument
and the prosecutorial errors added up to a score that everyone

1. was in on the 'part of the calculated trial strategy' yet defense
2. counsel blushed and winked. Why else would Mr. Truong say such
3. a thing? Because, Counsel never held the state to its burden
4. of proof. Mr. Truong is not looking for someone to blame
5. for the situation life has manifested itself with. But,
6. Mr. Truong's opinion put gloss on the Strickland v. Washington,
7. 466 U.S. 668, 687-88 (1984), (Opinion of COA), standard
8. requiring the movant to present evidence from trial counsel
9. in order to rebut the presumption of trial strategy, it is clear
10. that trial counsel failure to object and other things that counsel
11. did that is yet to be raised in a PRP, was not reasonably
12. ineffective assistance of counsel. Because Washington Court
13. of Appeals misinterpreted the Strickland v. Washington, standard
14. to Mr. Truong's detriment, his conviction cannot stand. Williams
15. v. (Terry) Taylor, 529 U.S. 362 (2000).

16. APPEAL COUNSEL'S ERROR.

17. Mr. Truong raises the effective standard holding in United
18. States V. Cronig, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d
19. 657 (1984).

20. Appeal counsel never asked the court for a hearing on this
21. issue. Counsel never raised the challenges to the Instructions
22. and other ineffective issues that are entwined with Mr. Truong's
23. claim of a unconstitutional trial.

24. Counsel said it in her brief to the COA; "..., prejudice
25. requires reversal whenever the attorney's error undermines

1. ~~in the outcome.~~ That confidence is undermined here. Whether
2. Truong acted in self-defense came down to a question of whether
3. one believed his testimony or Van's and Duong's. The improper
4. vouching and emotional appeal was likely to tip the scales in
5. favor of a guilty verdict.

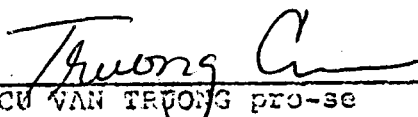
6. 4.
7. CONCLUSION

8. Mr. Truong urges The Supreme Court to accept review and
9. ORDER the relief in the Interests of Justice and/or;

10.
11. ORDER a Evidentiary Hearing and Expand the record on the amount
12. of prejudice counsel had on this cause;

13.
14. Any other relief this Court deems just.

15.
16. RESPECTFULLY SUBMITTED: July 6, 2015

17.
18. 
19. CU VAN TRUONG pro-se
20. WASHINGTON STATE PENITENTIARY
21. 1313 N. 13th Avenue
22. Walla Walla, Washington 99362

APPENDIX A. OPINION OF THE COURT OF APPEALS "ORDER"

APPENDIX E. SUBSTANTIVE FACTS OF ATTORNEY COA BRIEF

ATTACHMENT A

APPENDIX A.

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

STATE OF WASHINGTON,)	No. 70811-2-1
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
CU VAN TRUONG,)	
)	
Appellant.)	FILED: April 27, 2015

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 APR 27 AM 8:56

SCHINDLER, J. — Cu Van Truong appeals his jury conviction for murder in the first degree while armed with a firearm. Truong contends prosecutorial misconduct during closing argument deprived him of a fair trial. In the alternative, Truong argues defense counsel was ineffective by failing to object to the misconduct. Because Truong fails to show prosecutorial misconduct, we affirm.

FACTS

From November 19 until December 22, 2011, Jason Saechao was in jail for a ~~probation violation stemming from a domestic violence incident involving Ilyan Vang.~~ Saechao and Vang had been involved in a relationship for approximately eight years and had a four-year-old daughter. Saechao was often physically and emotionally abusive to Vang.

When Vang and Diocales arrived at the bakery, Duong unlocked the door. Duong began preparing loaves of bread for baking while Vang and Diocales smoked methamphetamine. Sometime thereafter, Saechao came to the bakery looking for Vang. Saechao was irritated with Vang because he had been trying to reach her to obtain the name of a "connection" and she was not answering her phone.

After Truong arrived at the bakery, Vang heard Truong and Saechao arguing. Truong told Saechao, "I heard you were trying to set me up." Saechao responded that "if I was trying to set you up it would have been done already." Truong asked Saechao about Duong's jade necklace, saying, "[D]id you take my little homie's necklace?" Truong demanded Saechao give the necklace back to Duong. Saechao insisted he had not taken the necklace and Duong had given it to him. Duong told Truong to "leave it alone." But Truong insisted Saechao give the necklace back to Duong. After Saechao said, "[W]hat are you going to do about it," Truong pulled a handgun out of his waistband and shot Saechao four times. The first shot hit Saechao in the leg. The second and third shots hit Saechao in his midsection. Truong then said, "[F]uck it," and "took the gun and pointed straight down in the middle of [Saechao's] head and shot him." Waving the gun around, Truong told Vang, Duong, and Diocales he would "come back" if they said anything, and then fled.

Duong called 911. Duong reported an unknown assailant shot Saechao during an attempted robbery. Diocales, who had "[a] lot of other cases going on," told Vang, "I can't be here so don't tell the police that I was here or anything," and left.

Detectives took witness statements from Duong and Vang. Because Duong was afraid that Truong would retaliate against him or his family, he told the detectives that "it

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said he refused and walked away. Truong testified Saechao followed him, "still yapping his mouth," and told Truong to "give him the stuff or he's going to cap my ass." Truong said that as he "turned halfway around," he saw Saechao reach for his waistband.

Truong said that when he first met Saechao a couple of months earlier, Saechao had "pulled out a gun" and pointed it at him. Truong testified that this incident, coupled with what Vang had told him about Saechao's physical abuse of her, made him fear for his life. Truong testified that he grabbed his own gun and shot Saechao while running out of the bakery. Truong said he threw the gun in a dumpster and went to a friend's house. Truong admitted he lied to the police when he told them he had not been at the bakery that night.

The jury convicted Truong of murder in the first degree while armed with a firearm.

ANALYSIS

Truong seeks reversal of his conviction on the grounds that prosecutorial misconduct during closing argument deprived him of the right to a fair trial. In the alternative, Truong argues his attorney provided ineffective assistance of counsel by failing to object to the misconduct.

Prosecutorial Misconduct

Prosecutorial misconduct may deprive a defendant of his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359

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and Duong told the truth, not because the evidence supported that conclusion, but because they had been instructed to do so by the prosecutors.” The record does not support his argument.

It is improper for a prosecutor to vouch for the credibility of a witness because the trier of fact has sole authority to assess the credibility of witnesses. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony.

State v. Allen, 161 Wn. App. 727, 746, 255 P.3d 784 (2011).

However, a prosecutor has wide latitude to draw reasonable inferences from the evidence. Stenson, 132 Wn.2d at 727. Accordingly, it is not misconduct for a prosecutor to argue that a witness is truthful based on inferences from the evidence. State v. Rivers, 96 Wn. App. 672, 674-75, 981 P.2d 16 (1999). “ ‘Prejudicial error does not occur 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.’ ” State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006)¹ (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

The prosecutor's remarks as to Vang did not constitute vouching because they were based on the evidence. Defense counsel questioned Vang at trial about meetings with the prosecutor and the documents she had been given to review prior to testifying. In response to the prosecutor's questions on redirect, Vang testified that the prosecutor did not go over her testimony with her and did not give her copies of reports, witness

¹ Emphasis omitted.

and tells you that these people came in here and told you exactly what happened that day.^{2]}

Nonetheless, even if the remark was improper, Truong does not demonstrate that a timely instruction would not have cured any prejudice.

The case Truong relies on, Ish, is distinguishable. In Ish, the court held the State vouched for a witness's credibility by asking about a plea deal that required the witness to "testify truthfully." Ish, 170 Wn.2d at 198-99. The court concluded this was misconduct because "such testimony suggests that the witness might have been compelled to tell the truth by the prosecutor's threats and the State's promises." Ish, 170 Wn.2d at 197-99. However, the court did not "have any difficulty concluding that the error . . . was harmless" because other evidence corroborated the witness's testimony and the State did not dwell on the issue. Ish, 170 Wn.2d at 200-01.

Next, Truong contends the prosecutor committed misconduct by arguing that Truong hoped "maybe the jury won't care" about Saechao, but "[w]e know [Truong]'s wrong." Truong argues the prosecutor improperly appealed to the jury by suggesting "that an acquittal would indicate that the jury, like Truong, did not care about Jason Saechao." Truong also argues the remark, "We know [Truong]'s wrong," defined "a group of caring people that included the prosecutor and the jury but excluded Truong."

A prosecutor may not make comments designed to appeal to the passion and prejudice of the jury or to encourage a verdict based on emotion rather than evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Likewise, a prosecutor

² Emphasis added.

the best evidence you are going to get.” Truong argues this statement “implies a wealth of experience of other cases in which defendants have been found guilty beyond a reasonable doubt and suggests to the jury that there could be no better evidence on which to convict.” We disagree.

A prosecutor may argue evidence does not support a defense theory and present a fair response to defense counsel's arguments. Russell, 125 Wn.2d at 87. The prosecutor did not refer to other cases. Instead, the prosecutor's remarks were made in response to defense counsel's argument that Truong accidentally shot Saechao in the head at point-blank range because Saechao collapsed and fell forward as Truong brushed past him to flee out the door. The prosecutor pointed to the testimony of the medical examiner and the firearms expert that there was “perfect evidence of a contact wound” to demonstrate Truong “intend[ed] to kill Jason Saechao and nothing less.” The prosecutor argued that the forensic evidence and the nature of the wounds showed Truong was not firing randomly or in fear when he shot Saechao.

Truong contends that even if none of the alleged remarks alone warrant reversal, the cumulative effect of the remarks denied him a fair trial. The cumulative effect of multiple or repeated incidents of prosecutorial misconduct may be so prejudicial as to warrant reversal, even if individual instances standing alone would not. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Here, there were not multiple or repeated incidents of prosecutorial misconduct during closing argument.

Ineffective Assistance of Counsel

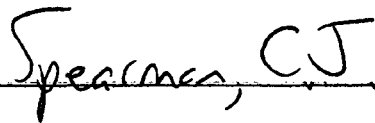
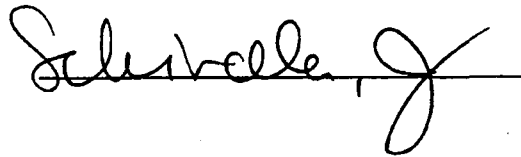
In the alternative, Truong contends his attorney provided ineffective assistance of counsel by failing to object to the prosecutor's remarks during closing argument. To

Truong also asserts it was misconduct for the prosecutor to argue Truong “thought he could pull one over on you guys.” However, “[w]here a prosecutor shows that other evidence contradicts a defendant’s testimony, the prosecutor may argue that the defendant is lying.” McKenzie, 157 Wn.2d at 59.⁴

Truong also contends the trial court violated his right to free exercise of religion under the First Amendment to the United States Constitution by requiring him to “swear” or “affirm” before testifying instead of using his own oath. To demonstrate a First Amendment violation, an individual must demonstrate that he holds a sincere religious belief and that the government excessively burdens that belief. Munns v. Martin, 131 Wn.2d 192, 199-200, 930 P.2d 318 (1997). Truong fails to make this showing.

We affirm the jury’s conviction of Truong for murder in the first degree while armed with a firearm.

WE CONCUR:



⁴ Truong’s remaining challenges to remarks made by the prosecutor lack reasoned argument or citation to relevant authority and do not merit review.

a. Background

Saechao and Vang had been involved for approximately eight years, since she was 13 years old, and the couple had a four-year-old daughter. 14RP 103-04, 109. The relationship was marred by Saechao's emotional and physical abuse of Vang. 15RP 44-46. Shortly before the events in this case, Saechao went to prison for violating a no-contact order prohibiting him from contacting Vang. 14RP 115. Portions of the couple's phone calls (recorded while he was incarcerated) were admitted to demonstrate Saechao's possessive and controlling relationship with Vang and his extreme concern that she might be unfaithful. RP 140-60; Exs. 99A, 101, 104-113.

Saechao's concern turned out to be well founded. Fed up with his abuse, Vang decided to leave him. 14RP 115-16; 15RP 32-33, 35. She kept her decision from him until after his release, but in the mean time, she had sexual contact with two other men. 14RP 115; 15RP 33, 35. One was Huong Duong, known as Wayne. 14RP 115. The other was Cu Truong. 14RP 115. She testified she considered her relationship with Truong to be merely a one-night stand, whereas she felt herself to be in the beginning stages of a new relationship with Duong. 14RP 125-26, 128-29; 15RP 46.

A few days before Christmas 2011, Saechao was released from jail. 15RP 31-32. On December 26, in the presence of her parents, Vang officially ended their relationship. 14RP 116; 15RP 32. She also told him

she had been unfaithful to him with both Duong and Truong. 15RP 46-47, 127-28. She claimed he was not particularly upset, except for the fact that he considered Duong to be his good friend. 14RP 117; 15RP 41-42. His subsequent conduct, however, belied Vang's claims of his equanimity.

After Saechao learned of Vang's relationship with Duong, he called Duong to come see him. 15RP 129. Over the course of an hour spent sitting in Saechao's car, Duong apparently agreed to hand over his tax refund as compensation for the betrayal. 15RP 130-31; 16RP 145-46. Duong claimed this was a negotiated agreement to avoid the fistfight that would otherwise likely ensue. 16RP 146-48. He testified he willingly handed over his jade Buddha necklace, worth approximately \$2,400, as collateral until he received the tax refund. 16RP 144, 149. Saechao showed the necklace to Vang and told her Duong had given it to him as a payoff for sleeping with her. 15RP 129-31.

b. Evening of December 27, 2011

The evening of December 27, after work, Truong met Vang, Duong, and their friend Karla Diocales at a restaurant. 18RP 122. The purpose of their meeting was to find methamphetamine for Truong to purchase, but they were unsuccessful. 18RP 122. While at the restaurant, Vang told Truong that Saechao had stolen Duong's necklace because she had slept with him.

18RP 134-36. She also told Truong that Saechao knew about her liaison with Truong and that Saechao was “beefing.” 18RP 134-36.

Afterwards, Truong and Vang went to a casino. 18RP 125. Vang claimed Truong also drove her to Alki beach, showed her a house under construction, and told her it was where they would live together with her daughter in the future. 14RP 124-25. She claimed she did not respond because there were no other signs that Truong considered their relationship to be serious. 14RP 125-26. After some time, Vang left the casino to try to locate some methamphetamine for Truong. 18RP 126. Later, she called Truong, who was still at the casino, and told him to stop by Duong’s brother’s bakery (where Duong worked nights baking bread) to pick up the methamphetamine when he was ready. 18RP 127.

c. Events at the Bakery

When Truong arrived at the bakery, Saechao came outside and moved boldly towards him, looking angry. 18RP 133. He demanded Truong’s diamond earrings and his money in payment for sleeping with Vang. 18RP 138. Truong told him no, but was on edge because of Saechao’s recent treatment of Duong. 18RP 134-37. Saechao followed Truong into the bakery repeating his demands for the earrings and money. 18RP 137-38. Truong tried to ignore him. 18RP 139. Once inside, Saechao

told Truong to “give him the stuff or he’s going to cap my ass,” meaning, “he’s going to shoot me.” 18RP 139.

Truong was aware of Saechao’s extreme jealousy regarding Vang and his theft of Duong’s necklace. 18RP 146. He knew Saechao would be armed because Saechao had pulled a revolver from his waistband during a methamphetamine transaction with Truong a few months earlier. 18RP 143-44. He knew Saechao’s brutal treatment of Vang included sudden bursts of violent rage. 18RP 145. When Saechao reached into his waistband, Truong believed he was about to die. 18RP 141-42.

Truong grabbed his own gun, turned around, fired from where he stood, and continued firing as he quickly walked out the door. 18RP 146-48. He did not say anything and did not pause. 18RP 148. He noticed Saechao bending over towards him and believed he was still trying to pull his weapon. 18RP 148. As Truong moved toward the door, he brushed very close to Saechao, so he knew Saechao had been hit. 18RP 149-50. But his only intention was to escape the bakery alive. 18RP 150.

Truong drove first to his sister’s, but she was not home. 18RP 151-52. On the way to his friend Randy’s home, he threw his gun into a trash can. 18RP 152. He and Randy smoked methamphetamine together. 18RP 153. Later, Truong called his sister and asked her to pick him up. 18RP 157-58. Truong’s sister drove him in his car back to her home, where he

smoked more methamphetamine. 18RP 158. In the morning, Truong, his sister, and her boyfriend left the house and headed for his mother's home. 18RP 159.

d. Police Investigation and Interviews

Meanwhile, Duong called 911. 16RP 97. But first, he took a few moments to hide some money from the police (Vang testified Duong told her it was methamphetamine that he hid). 15RP 110; 16RP 162. Police began to arrive at the bakery just after midnight. 10RP 34-35. Duong told them the same thing he told the 911 operator: that Saechao had been shot by an unknown robber. 14RP 161. Hearing Duong lie to the police, Vang decided to do so as well. 14RP 161-62. When confronted, Vang and Duong later told an entirely different story that they claimed was the truth. 14RP 163-64; 16RP 69-70.

According to Vang, she and Diocales arrived at the bakery before Duong got there, so they waited and smoked methamphetamine in the car. 14RP 127. After he arrived, they went inside and smoked some more. 14RP 129. She was surprised when Saechao arrived at the bakery because he did not usually hang out with them there. 14RP 129-30. She was nervous because of the recent break-up and her budding relationship with Duong. 14RP 129-32. She claimed Saechao was angry but not violent or threatening

and she was not afraid. 14RP 132-34. Diocales testified Saechao was angry and argued with Vang, who had been avoiding his phone calls. 14RP 78-80.

Vang testified Truong arrived a few minutes after Saechao and asked if he had any methamphetamine to sell. 14RP 138. Duong testified Saechao and Truong seemed to be arguing outside. 16RP 50, 139-40. Not wanting to draw police attention to his brother's bakery, he asked them to come inside. 16RP 50. Once inside, Vang heard Truong say, "I heard you were trying to set me up." 14RP 144. Saechao replied, "If I was, it would be done already." 14RP 144. Truong then demanded the return of Duong's necklace. 14RP 144. Saechao denied taking the necklace and told Truong, "he gave it to me." 14RP 144. According to Vang, it was at this point that Truong pulled out a gun and shot Saechao. 14RP 144.

According to Duong, he told Truong the issue was between him and Saechao, but Truong would not drop the subject. 14RP 182. Duong claimed to hear Saechao ask Truong, "What are you gonna do about it?" 16RP 182-83. He claimed Truong repeated, "What am I gonna do about it?" and then shot Saechao. 16RP 183.

Vang testified the first shot hit Saechao in the leg and he began to lean on some bakery racks. 14RP 148; 150-51. She heard a pause before the second and third shots hit Saechao somewhere in the midsection and Saechao began to hunch forward. 14RP 148-51. As he fired, she saw

Truong walk toward the entrance. 14RP 148-49. By the time of the fourth shot, Truong was side by side with Saechao, his arm a foot from Saechao's head, and Saechao fell to the ground. 14RP 148-49.

Duong described the first shot as hitting Saechao in the groin, and the second in the stomach. 16RP 54. He testified Truong walked to Saechao's side and fired a third shot into his shoulder. 16RP 54. He claimed Truong was on his way out the door when he returned, said "fuck it," pointed the gun straight down into the middle of Saechao's head and fired a fourth shot. 16RP 59-60. Before Truong left, Vang and Duong heard him say that no one had better say anything. 14RP 145; 16RP 129, 179.

Diocales could not see anything from where she was sitting. 14RP 31-32, 35-36, 86-87. She did not hear anything Truong said. 14RP 34, 36, 43, 51, 95. She merely heard three gunshots and then left because she was afraid of getting in trouble and she was already on probation. 14RP 92, 99-100. On her way out, she told Vang not to tell the police she was there. 14RP 49.

Detective Robin Cleary interviewed Duong, and then let him go home. 11RP 20. Meanwhile, Detective Mike Mellis interviewed Vang. 11RP 20. Twenty-five minutes into their interview, Mellis told Vang she was not being truthful. 11RP 152-53. She continued to explain and he again confronted her about not being forthcoming. 11RP 152-53. She then started

crying and changed her story entirely. 11RP 152-53. Roughly four hours after police had arrived, Vang recanted the robbery story she had initially told police. 11RP 20-22. Duong was asked to return and also gave an entirely different story. 11RP 21, 58-59. Cleary testified their inconsistent accounts delayed the investigation. 11RP 56-57.

e. Truong's Arrest and Interview

Mellis found Truong's white BMW parked in front of his sister's house and set up surveillance around 7 a.m. 11RP 102-03. King County Sheriff's deputies stopped the car shortly after it left around 9 a.m., and Truong was arrested approximately nine hours after the investigation began. 10RP 86, 92-93. A deputy informed Truong he was under arrest for homicide. 10RP 93. Truong responded, "What are you talking about? I didn't do anything!" 10RP 93. Detective Sampson took custody of Truong's sister, and testified she never asked why Truong was being arrested. 13RP 137.

In his interview with King County detectives repeatedly told Truong they knew he was present at the shooting, and asked if he was a mere bystander or if he had, perhaps, acted in self-defense. Exs. 55-57.² Truong repeatedly denied knowing anything about the shooting. 18RP 161-63; 19RP 4-5, 8; Exs. 55-57. He testified he lied because he was high on

² Exhibit 55 is the transcript of Truong's interview with the detectives. Exhibits 56 and 57 are the audio and video recordings of that interview.

methamphetamine and did not trust police after a previous bad experience. 18RP 201-03. He explained he did not believe they wanted to understand his side of the story. 19RP 18. He believed they only wanted a confession and would not believe his version of events. 18RP 201-02; 19RP 18.

From jail, Truong called Vang, pretended not to know what had happened, told her he did not see her after she left the casino, and asked her to visit him. 19RP 26-27; Ex. 91. Vang was angry and refused. 14RP 171-74.

f. Forensic Evidence

Forensic examination of Truong's sweater revealed spots of blood. 5RP 27-29. DNA analysis excluded Truong as the source of the blood, which matched a reference sample from Jason Saechao. 5RP 32-33.

The autopsy revealed Saechao was shot four times. 12RP 96-97. The medical examiner testified three of the shots, to the leg, arm, and neck, were potentially survivable. 12RP 110, 116. A fourth appeared to be a contact shot to the head and would have caused nearly instantaneous death. 12RP 111-12, 116. The autopsy revealed nothing about the order in which the injuries occurred or the position of the shooter. 12RP 118. Saechao's blood tested positive for a significant amount of methamphetamine. 12RP 149; 13RP 49-50.

The medical examiner agreed the shot to the leg was at a steep angle that could be consistent with a self-inflicted injury. 12RP 146-47. Four shell casings found at the scene were determined to have been fired from the same weapon. 17RP 158. But a bullet fragment was found that could not be conclusively linked to the bullets found in and around Saechao's body or the casings. 18RP 39. Strewn around Saechao's body were a piece of tissue, a lanyard with keys attached, a container of tic-tac mints, and a cigarette pack. 12RP 51-55. It appeared someone had gone through his pockets, but Vang, Duong, and Diocales all denied having done so. 9RP 130-31; 14RP 92, 94, 156-57; 16RP 67-68. Based on this evidence, and Duong's admission that he took the time to hide something before calling 911, Truong argued Saechao may also have been armed and fired a shot, and Duong had the opportunity to take and hide Saechao's gun. 19RP 75-79, 110-15.

g. Closing Arguments

In closing argument, the prosecutor attempted to parse out the varying accounts of what happened the night of December 27, 2011 by telling the jury the following:

You know, there are moments in every trial when you get the purest of purest glimpses into that human element. It can't be practiced, and it can't be rehearsed. 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.

19RP 49-50 (emphasis added). The prosecutor argued Truong's responses, by contrast, were "rehearsed":

And the other, oft repeated, I submit rehearsed response, I was scared for my life. Couple of human moments that Mr. Truong couldn't avoid. From what I've learned of Jason, I was scared of my life. From what you've learned of Jason, since the time you shot him? And from what you've learned of Jason that you know the jury will hear?

19RP 60. Regarding Saechao, the prosecutor continued, "And you hope, you just hope that maybe the jury won't care either. And he's wrong. We know he's wrong." 19RP 60. In rebuttal to Truong's argument that he did not intend to kill Saechao, but was only trying to escape the bakery with his life, the prosecutor told the jury, "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.

