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JUN 11 2009

King County Prosecutor  
Appellate Unit

NO. 61777-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

AMARJEET SOHAL,

Appellant.

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Kimberley Prochnau, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did appellant's counsel provide ineffective assistance by failing to object to improper opinion testimony by police officers concerning the veracity of two witnesses, where the improper testimony undercut the defense and bolstered the state's case?

C. STATEMENT OF THE CASE

1. The Assault

Following a jury trial in King County Superior Court, Amarjeet Sohal was acquitted of first-degree assault, but convicted of the lesser offense of second-degree assault. CP 74, 75, 80-86. By special verdict, the jury found that Sohal was not armed with a deadly weapon at the time of the assault. CP 73. The charges stemmed from incidents allegedly occurring on January 23, 2008. On that date, Harjap Singh, Sohal's friend of

many years, was stabbed twice in the chest and abdomen.<sup>1</sup> CP 10-11; 7RP 27.

Singh testified Sohal did not stab him. 7RP 30. Singh had known Sohal as a friend for 25-30 years, had lived with Sohal's family, and occasionally worked for Sohal. 7RP 17-21. Singh went to Sohal's house the day of the stabbing, and let himself in with a key hidden outside the house. 7RP 23-24. Sohal was not home at the time. 7RP 23-24. Later, Munish Raj, a friend of Sohal's and an acquaintance of Singh's, arrived at the house. 7RP 24; 4RP 7-9, 11. Raj left to pick up another man, Ajay Kumar, and returned to the house, where the three men drank whiskey together. 7RP 24-25. Kumar and Raj left to buy pizza. 7RP 27. Singh went outside to smoke. 7RP 27.

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<sup>1</sup> The Reports of Proceedings (RP) referenced in this brief are as follows:

1RP = 4/15/2008  
2RP = 4/16/2008  
3RP = 4/17/2008  
4RP = 4/21/2008 A.M.  
5RP = 4/21/2008 P.M.  
6RP = 4/22/2008  
7RP = 4/24/2008  
8RP = 5/6/2008.

4RP and 8RP are bound together in a single binder.

Singh testified he was outside smoking when two men he did not recognize emerged from a car that pulled up in front of the house. 7RP 27. One of the men stabbed Singh with a knife. 7RP 27. The men ran back to the car and sped away. 7RP 27. Singh went in the house and garage looking for his cell phone, which he was unable to find. 7RP 28. Raj and Kumar returned shortly thereafter and called 911. 7RP 28-29.

Jason Ellis, the first officer to respond to the 911 calls, arrived and saw Raj waving his arms to get his attention. 2RP 16; 3RP 7-8. Raj led him to the driveway, where Ellis saw Singh sitting with his back against the house holding his stomach and bleeding. 2RP 16-17. Kumar stood nearby. 2RP 16; 3RP 9, 12. Ellis saw blood drops "up and down the driveway," and called medics. 2RP 17, 25-26. Ellis attempted to find out what happened, but found Singh had trouble speaking, appeared to be going into shock, and was reportedly "evasive." 2RP 26-27. Singh was treated at the scene by a paramedic, and was taken to the hospital, where his injuries were further treated. 6RP 9-17; 3RP 111-12, 119-121, 129-134.

Janet Welch, who lives in a house near Sohal's, testified that she and her brother were watching the front of Sohal's house from a window in their home on the night of the stabbing. 7RP 55-58. She first saw four men chasing a black car as it drove off, down the cul-de-sac in front of Sohal's house. 7RP 63-65. Then, she watched the four men walk into Sohal's house through the front door. 7RP

58, 66. About five minutes later, the garage door opened and the four men emerged. 7RP 58. She heard an argument in front of the house "in a language [she] didn't understand." RP 57, 66-67. She saw two men arguing, and saw one or two other men holding one of the arguing men back. 7RP 58, 59. She heard more yelling, then saw the men go back inside the house through the garage, turn out the lights, and exit through the front door. 7RP 58. She claimed the men left by car. 7RP 60.

Investigating officers found blood on the driveway and on articles of Singh's, Raj's and Kumar's clothing, and recovered a blood-stained knife on a shelf in the garage. 2RP 25-26; 3RP 40-41, 44-46, 57-60, 72, 81-83. Kari O'Neill, a lab technician, tested the blood stains on Singh's clothing, Kumar's clothing, and the knife, and determined the blood all came from Singh. 3RP 176-77. Two of the state's fingerprint experts testified no prints of comparison value were obtained from the knife. 6RP 34, 51.

## 2. Raj's and Kumar's Conflicting Accounts

Raj acknowledged he and Kumar went to Sohal's house the night Singh was stabbed, but gave conflicting accounts of what occurred. 4RP 11. At trial, Raj testified Sohal and Singh were drunk, got into an argument, and started yelling and pushing each other. 4RP 13-15. Raj claimed he took Singh out of the house and offered to drive him to his truck, while Sohal remained inside. 4RP

15. Singh refused, and started smoking. 4RP 15-16. Sohal allegedly came out of the house and began arguing with Singh again. 4RP 17. According to Raj, Sohal approached Singh, and Singh dropped to the ground, but quickly stood back up and resumed smoking. 4RP 18-19. Raj did not see Sohal stab Singh, and never saw a knife in Sohal's hand. 4RP 26.

Raj did not think anything serious occurred, so he took Sohal into the house. 4RP 20. Sohal asked to leave the house, and Raj started to drive Sohal away. 4RP 21. When Raj turned on his headlights, he saw for the first time that Singh had blood on his clothing. 4RP 19. Raj drove Sohal to an area with shops and a motel, dropped him off, and returned to the house. 4RP 22. Once at the house, he saw "much more blood" on Singh. 4RP 23. Raj called police because Singh "fainted." 4RP 24. Officers arrived quickly. 4RP 24.

Significantly, however, when Raj initially spoke to officers who arrived in response to the 911 calls, he told the officers he and Kumar were not present when the stabbing occurred. 4RP 25. At trial, Raj testified he "made up" this story because he was scared and did not want to be involved in the investigation and prosecution. 4RP 25.

Kumar's testimony was similar to Raj's. Kumar claimed when Raj drove him to Sohal's house, Sohal and Singh were already there, and were "probably drunk." 4RP 56-60. Sohal and Singh

allegedly argued about their families, schools, and money. 4RP 61-62. Kumar claimed Singh and Sohal were yelling and pushing each other. 4RP 62. At one point, Kumar and Raj separated the men, Kumar holding Sohal and Raj holding Singh. 4RP 62. While Raj took Singh outside, Kumar went to the bathroom. 4RP 63. When he came out, he found Sohal had gone outside; Kumar ran after him. 4RP 64. Kumar claimed that after a brief altercation between Sohal and Singh, Raj and Sohal left in Raj's car. 4RP 65. Kumar did not see Sohal stab Singh, and did not see Sohal with a knife. 5RP 8. He was not worried Singh was injured until Singh pulled up his shirt and showed Kumar his wounds. 4RP 82-83. Kumar called Raj's cell phone, urging Raj to come back. 4RP 65. When Raj returned, they called 911. 4RP 65.

Like Raj, however, Kumar initially told officers he and Raj were not present when Singh was stabbed. 4RP 77.

Based on Raj's and Kumar's later statements at the police station, however, officers arrested Sohal on January 24, 2008, at a motel. 5RP 25-27.

3. Officers' Opinion Testimony Regarding Kumar's and Raj's Veracity

Federal Way police officer Adam Howell testified he interviewed Kumar that night at the police station, and Kumar initially denied being present when Singh was stabbed. 5RP 58-59. Howell

testified Kumar's demeanor during this portion of the interview indicated Kumar was lying:

Q: What was Mr. Kumar's demeanor when you first met with him?

A: Initially it was real vague, somewhat evasive.

Q: What do you mean by evasive?

A: Wasn't very responsive to pointed direct questioning. He seemed to really stick to what I interpreted to be a prepared statement and then when he was asked questions that it didn't appear that he was ready for he would attempt to stall or concoct in the process.

5RP 58.

Howell described Kumar's physical activity during this portion of the interview, and explained it indicated Kumar was not being truthful:

He would - it was kind of like he would look at the floor, look at the ceiling, look anywhere else but at me. You would see his eyes kind of roll back in his head and when I would press him for a direct answer at one point he said hang on a second I am trying to think. And it was just pretty apparent that he was attempting to formulate a response as opposed to just recalling something from memory.

5RP 59. Sohal's counsel did not object. See 5RP 58-59.

During the interview, Howell expressly accused Kumar of lying, telling Kumar he didn't "have any time for his bullshit," that Kumar was "blowing smoke up [his] ass," and that Howell was "not

the guy to be fucking around with tonight.” 5RP 67-68. The prosecutor asked whether, when he made these remarks, it appeared Kumar “was being truthful with you?” 5RP 70. Howell answered “No.” 5RP 70. When asked to explain, Howell stated Kumar was “just being extremely evasive” and “wasn’t being very forthcoming at all.” 5RP 70. Sohal’s counsel did not object. See 5RP 70.

Howell told Kumar “we are trying to determine if you are a witness or a suspect,” and that Kumar would be arrested if Howell felt he was obstructing justice. 5RP 67-68. Howell testified Kumar changed his story after this series of challenges, and became “much stronger” and “more at ease,” maintaining eye contact, and pausing less frequently. 5RP 59-60, 68. According to Howell, Kumar began telling “the complete story,” and giving “direct answers.” 5RP 59-60, 68. Again, Sohal’s counsel failed to object. See 5RP 59-60, 68.

Howell had similar recollections of his interview with Raj. Howell claimed Raj appeared nervous while telling the “story” that he was away from the house buying pizza when Singh was stabbed:

Initially Mr. Raj was visibly nervous, visibly shaking, making, you know, furtive glances around the room, fidgeting. He clearly didn’t want to be there. And he initially told the same story that he and Kumar had left the house to go get pizza, leaving the victim there alone and when they came back they found him stabbed[. . .] [!] immediately propped him up and said, “What happened?” And he immediately started telling the complete story, corroborating most of what Mr. Kumar told us.

5RP 62.

When Raj told the “complete story,” Howell claimed, his demeanor changed, indicating he was telling the truth:

Again, his posture changed, you know. There’s a point where someone eventually becomes truthful with you where, you know, the posturing kind of goes away, where they physically submit and sit up in [their] chair where the stress is, you know, all in their shoulders. He actually seemed kind of depressed by the whole thing. He kept saying over and over and over again how they were all just friends. He didn’t want to be there in the first place and he felt like he was, you know, kind of stuck between two sides.

5RP 63 (emphasis added).

The trial court sustained Sohal’s objection and granted a motion to strike the testimony, on grounds the answer was unresponsive. 5RP 63. The trial court’s specific instruction was to “disregard the last statements from the detective with regard to what the individual said or did not say.” 5RP 63.

The prosecutor thereafter returned to the subject of Raj’s “body language,” eliciting Howell’s answer that “the candor was – our conversation might have changed a little bit, but he seemed to visibly relax as kind of a burden had been lifted off of him is the best way to describe it.” 5RP 64-65.

Officer Calhoun was also present during the interviews of Kumar and Raj. 5RP 73-77. Regarding Kumar’s interview, she described him as “hesitant answering questions” and observed that

he “would have to stop and think about answering the questions. He didn’t seem very forthcoming.” 5RP 73-74. Howell and Calhoun confronted Kumar, telling him they believed he wasn’t being truthful. 5RP 74. Calhoun also acknowledged Howell told Kumar he could be jailed if he wasn’t forthcoming. 5RP 78. Thereafter, Kumar “gave a different story about what had happened,” and “seemed more relaxed and it didn’t take him as long [to answer questions].” 5RP 75. Calhoun claimed, “What he was saying was coming more naturally.” 5RP 75. Sohal’s counsel did not object. See 5RP 75.

Regarding Raj’s interview, Calhoun claimed once Raj backed away from his initial account of being absent during the stabbing, and began telling his account of being present at Sohal’s house, “[h]e also became more relaxed and it seemed like he was telling the truth.” 5RP 76. Again, Sohal’s counsel failed to object. See 5RP 76.

#### 4. Prosecutor’s Closing Argument

In closing, the prosecutor argued Kumar and Raj were lying when they claimed not to be present during the stabbing, but were truthful when they told police they were present, emphasizing the officers’ opinions that Kumar’s and Raj’s initial statements were lies:

Ajay and Munish weren’t so up front with the police when this first happened.

[. . .]

[W]hen the police said, "Look, guys, we know what you're telling us is not what happened. We know that you were there," they changed their stories.

[. . .]

When they started to tell the truth and told the police about what happened that night, they told the same story.

[. . .]

And their demeanor during the course of the interviews with the police also tells you that they were telling the truth when they told the story that they were at the house and there was a fight and the defendant stabbed the victim and fled the scene.

Remember what the officers told you, in the beginning of the interview when they were talking about going to get pizza, they were looking all over the place, couldn't look him straight in the eye, were really good with the easy questions that they didn't need to rehearse the answer to, but when it got a little harder, they couldn't fill in the details.

And that changed when the officers said, "Look, you need to tell us the truth." Their demeanor changed. They slumped. They looked the detectives in the eye and they answered their questions; and it was hard for them. They didn't want to see Mr. Sohal get in trouble. But they knew they needed to tell the truth and they knew that they needed to tell you the truth as they sat here in Court and testified.

7RP 78-80.

The prosecutor returned to this theme in rebuttal argument, emphasizing that the police did not believe Kumar's and Raj's initial accounts:

[Police officers] are sitting in an interview room with Ajay and Munish and it was clear by their body language and by the story that they originally were told that that wasn't the case. But they both told you what the truth was; that it was the defendant who got in a fight, got in a verbal argument with the victim, and it was the defendant who was standing right next to him when [he was stabbed].

7RP 117.

The prosecutor also argued that the officers knew "a load of crap" when they heard it:

If you're a police officer and someone is not being straight, what would you expect the officer to do? Just sit there and take a load of crap from somebody or lay it out for them? "Look, you need to be straight with me. I need to know what's going on. It's my job to find out what's happening."

7RP 119.

D. ARGUMENT

SOHAL'S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY REPEATEDLY FAILING TO OBJECT TO IMPROPER OPINION TESTIMONY THAT THE WITNESSES' INITIAL STORY, WHICH SUPPORTED THE DEFENSE CASE, WAS NOT BELIEVABLE.

The defense theory of the case was that an unknown assailant stabbed Singh. Raj and Kumar's statements to police that they were not present when Singh was stabbed supported this theory. There was also no forensic evidence specifically linking Sohal to the stabbing. In response to police interrogation, however, Kumar and Raj changed their stories and implicated Sohal in the stabbing. Without any objection from the defense, police officers

were allowed to testify over and over again about their belief that Raj and Kumar were lying when they initially said they were not with Singh when he was stabbed. However, it should have been the jury's role to determine which version of Raj's and Kumar's account was most credible, without the undue influence of the officer's personal opinions on the matter. The repeated interjections of the officers' personal opinions of the witnesses' credibility violated Sohal's right to a jury trial. Defense counsel's failure to object to the officer's improper opinion testimony was ineffective.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 686, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. Maurice, 79 Wn. App. at 552. A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland,

466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694.

Sohal's counsel's performance was deficient. Officer Howell's and officer Calhoun's testimony regarding their opinions of Kumar's and Raj's veracity when relating conflicting versions of what occurred the night Singh was stabbed was blatantly improper. It is "the exclusive function of the jury to weigh the evidence and determine credibility." State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). Generally, no witness may offer testimony in the form of an opinion regarding a witness's credibility; such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Sutherby, 138 Wn. App. 609, 158 P.3d 91 (2007). For this reason, appellate courts have reversed convictions where a prosecution witness expressed an opinion on the veracity of another witness. State v. Boehning, 127 Wn. App. 511, 523-24, 111 P.3d 899 (2005) (foster parent and police detective opined that alleged victim of child molestation was truthful). Washington courts have also uniformly recognized that the opinion of a government official, especially a police officer, may unduly influence the jury. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003).

It was not reasonable for Sohal's counsel not to object to the impermissible opinion testimony concerning Kumar's and Raj's

veracity, as it directly undercut the defense theory that Sohal was not present and did not stab Singh. Kumar and Raj's earlier statements to police were entirely consistent with this theory, and Singh's testimony was consistent with Kumar's and Raj's earlier statements. Yet Sohal's counsel allowed the officers to testify that Kumar was "evasive," was "concoct[ing]" his earlier account and was "blowing smoke up [his] ass" when he said he was not present, an account the officer also called not truthful and "bullshit." 5RP 58, 67-68, 70. By contrast, the officers testified that Kumar's and Raj's second account, placing themselves at the house and describing an altercation was "the complete story," and that Raj's second account bore the hallmarks of being "truthful." 5RP 59-60, 62-63, 76. The prosecutor repeatedly emphasized the objectionable opinion evidence in closing argument. Sohal's counsel's failure to object to this improper testimony fell below an objective standard of reasonableness, and was ineffective.

Although Sohal's counsel's objection to a portion of officer Howell's testimony was sustained,<sup>2</sup> the motion to strike and

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<sup>2</sup> Howell testified:

Again, his posture changed, you know. There's a point where someone eventually becomes truthful with you where, you know, the posturing kind of goes away, where they physically submit and sit up in [their] chair where the stress is, you know, all in their shoulders. He actually seemed kind of depressed by the whole thing. He kept saying over and over and over again how they were all just friends. He didn't want to be there in the first place and he felt like he was, you know, kind of stuck between two sides.

subsequent instruction to disregard pertained only to the Howell's repetition of statements made by Raj - not Howell's improper opinion.<sup>3</sup> 5RP 63. The trial court did not strike Howell's opinion on Raj's veracity, and did not instruct the jury to disregard that portion of Howell's testimony. 5RP 63. Sohal's counsel did not object on the basis that the officer was expressing an opinion on the veracity of Raj's statements, and the trial court's instruction did not advise the jury to disregard the officer's opinion of Raj's veracity. See 5RP 63.

Counsel's deficient performance prejudiced Sohal, and cannot be characterized as legitimate trial strategy or tactics. The officers' opinions concerning the witnesses' veracity and the truthfulness of their conflicting statements directly undercut the defense theory of the case and bolstered the prosecution theory of the case. This testimony was entirely counterproductive to Sohal's defense, because the jury's resolution of the case depended on its determination which of the competing versions of events actually occurred.

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5RP 63 (emphasis added).

<sup>3</sup> The trial court's specific instruction was to "disregard the last statements from the detective with regard to what the individual said or did not say." 5RP 63.

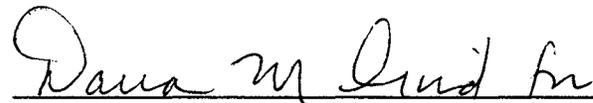
E. CONCLUSION

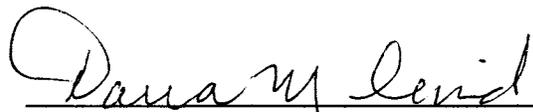
For the reasons state above, this Court should reverse  
Sohal's conviction.

DATED this 11<sup>Th</sup> day of June, 2009.

Respectfully submitted,

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