

No. 68314-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

FOUAD AHMED,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON, FOR KING COUNTY

---

BRIEF OF APPELLANT

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2021/09/31 PM 4:09  
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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct deprived Fouad Ahmed his right to a fair trial in violation of the Fourteenth Amendment's Due Process Clause

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees an individual a fair trial. Where a prosecutor engages in misconduct by misstating the law, expressing his personal opinion of the defendant's credibility and guilt, and misstating the jury's role the defendant is denied a fair trial. Did the deputy prosecutor's improper argument deny Mr. Ahmed a fair trial?

C. STATEMENT OF THE CASE

Mr. Ahmed, an Ethiopian immigrant, speaks only broken English. 1/14/09 RP 116. Mr. Ahmed was sitting at a coffee shop in Downtown Seattle with several acquaintances. *Id.* at 104-05. One of those acquaintances, Said, asked to borrow \$40 dollars from Mr. Ahmed and told Mr. Ahmed he was going to go find a woman. *Id.* at 105-06. Before he left, Said left several rocks of crack on the table. *Id.*

Seattle Police Officer Jenifer Morris was undercover taking part in a buy-bust operation. 1/13/09 RP 26. Said approached her and

asked if she was looking for “fun.” *Id.* at 33. Said told her they could “get some dope and smoke it together” at her apartment. *Id.* Officer Morris told Said she was looking for “rocks.” *Id.* Said told her to follow him and the two walked the short distance back to the coffee shop stopping once along the way. *Id.* at 33-34.

When the two arrived, Said and Mr. Ahmed began speaking in Arabic, which the officer could not understand. 7/13/09 RP 35. Said asked Mr. Ahmed for his crack back. *Id.* at 108. As Mr. Ahmed was returning it to Said, the undercover officer grabbed it from Mr. Ahmed’s hand. *Id.* Officer Morris gave Mr. Ahmed \$40. 7/13/09 RP 47. Mr. Ahmed believed it to be the \$40 he had previously given Said. 7/14/09 RP 108.

Officer Morris left the coffee shop and Said followed behind. 7/13/09 RP 38-39.

Mr. Ahmed was arrested and charged with delivery of cocaine. CP 9-10.

A jury convicted him as charged. CP 27.

D. ARGUMENT

**The deputy prosecutor's flagrant misconduct in closing requires reversal of Mr. Ahmed's convictions.**

1. Prosecutorial misconduct deprives a defendant his due process right to a fair trial.

A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct.

940, 71 L. Ed. 2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

2. The prosecutor engaged in flagrant misconduct.

RCW 69.50.401(1) provides "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." This statute requires knowledge of the nature of the substance delivered. *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979); *see also*, CP 23 (Instruction 9).

The prosecutor plainly misstated the knowledge element of the offense. The prosecutor told the jury Mr. Ahmed "doesn't need to know that [sic] what was in his hand." 7/14/09 RP 133.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

*State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1018 (1996); *review denied*, 131 Wn.2d 1018 (1997). The prosecutor's misstatement was

not minor or unintended. The only element in dispute in this case was whether Mr. Ahmed knew “what was in his hand.”

Mr. Ahmed testified that he was given a piece of crack by Said to hold. 7/14/09 RP 106. When Said returned with the undercover officer, Said asked for the item back. *Id.* at 108. As Mr. Ahmed was returning it to Said, the undercover officer grabbed it from Mr. Ahmed’s hand. *Id.* Because Said and Mr. Ahmed were speaking Arabic, the undercover officer had no idea what was said between them. 7/13/09 RP 35. But she agreed she grabbed the rock of cocaine from Mr. Ahmed’s hand. *Id.* at 60. Nothing in the officer’s testimony contradicts Mr. Ahmed’s lack of knowledge.

Because it could not prove Mr. Ahmed knew the item was cocaine, the State told the jury it didn’t have to. 7/14/09 RP 133. That was a plain and flagrant misstatement of the law.

But the improper comments did not end with just misstating the law. In rebuttal, and referring to the facts of the case, the prosecutor twice told the jury “you can’t be afraid of the truth.” 7/14/09 RP 143-45. These statements are improper in two respects. First, the statements necessarily express the prosecutor’s opinion of the facts. Two, the statements misstate the jury’s role.

With respect to the first, a prosecutor's expression of his personal opinion about the defendant's guilt is improper. *State v. Dhaliwal*, 150 Wn.2d 559, 577–78, 79 P.3d 432 (2003). Such a statement is prejudicial if 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, 53-54, 134 P.3d 221 (2006) (citations omitted). The deputy prosecutor's statements were framed in terms of absolutes and not merely inferences which might be drawn. The deputy prosecutor made clear his opinion that on one side lay the truth and on the other Mr. Ahmed's testimony. Those comments were prejudicial.

But aside from improperly expressing his opinion, the deputy prosecutor's argument misstates the jury's role.

The jury's job is not to determine the truth of what happened; a jury therefore does not “speak the truth” or “declare the truth.” *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273, 1280 (2009). Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt. [*In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)].

*State v. Emery*, 174 Wn. 2d 741, 760, 278 P.3d 653, 664 (2012).

And there was still more misconduct by the deputy prosecutor.

Again in rebuttal the deputy prosecutor, referring to Mr. Ahmed's testimony, said:

. . . . Sometimes I don't know what to do, but I know what not to do. I know I don't take the stand in my defense, claim a mental defense, claim a mental injury, not provide proof.

I know that if I'm going to say that I was injured, I'm going to think about how is it I need to show that to the jury.

I know that I'm not going to question an officer, their credibility when I've struggled through my own answers . . . .

7/14/12 RP 143.

As with his opinion of Mr. Ahmed's guilt, the deputy prosecutor's opinions of Mr. Ahmed's credibility are equally irrelevant and improper. *Dhaliwal*, 150 Wn.2d at 577–78. Beyond that, expressing those views in the first person is even more prejudicial.

[i]f it is improper for the prosecutor to step into the victim's shoes and become his representative, it is *far more improper* for the prosecutor to step into the *defendant's* shoes during rebuttal and, in effect, become the *defendant's* representative.

State v. Pierce, \_ Wn. App. \_\_, 280 P.3d 1158, 1170 (2012) (emphasis in original)

3. The deputy prosecutor's misconduct requires reversal of Mr. Ahmed's conviction.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). As addressed above, because the only element in dispute was Mr. Ahmed's knowledge, and the State's evidence on that point was weak, the deputy prosecutor's flagrant misstatement of the definition of knowledge was substantially likely to have affected the verdict. So too the prosecutor's voicing his opinion of Mr. Ahmed's credibility and guilt. Such comments are prejudicial where, like here, they are a clear expression of a personal opinion. *McKenzie*, 157 Wn.2d at 53-44

E. CONCLUSION

This Court should reverse Mr. Ahmed's conviction.

Respectfully submitted this 31<sup>st</sup> day of August, 2012.



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
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Respondent,	)	
	)	NO. 68314-4-I
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	)	
FOUAD AHMED,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] FOUAD AHMED 814 COLUMBIA #12 SEATTLE, WA 98109-1959	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF AUGUST, 2012.

X \_\_\_\_\_ 

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