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NO. 71929-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

WALLACE ROBINSON, JR.,

Appellant.

REC'D
SEP 22 2014
King County Prosecutor
Appellate Unit

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

The Honorable Ronald Heller, Judge

BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's Sixth Amendment right to confront the witnesses against him by admitting a 911 call from a witness who did not testify at trial.

2. The prosecutor committed misconduct in closing that denied appellant a fair trial when placed the prestige of his office in play, unfairly aligned himself with the jury against appellant, and then vouched for the credibility of a witness.

Issues Pertaining to Assignments of Error

1. The trial court admitted the 911 call of an eyewitness who did not testify at trial and who appellant never had an opportunity to cross-examine. Was appellant denied his Sixth Amendment right to confront this witness?

2. In closing rebuttal, the prosecutor told the jury, speaking about the State's key witness, "But what we do know from Mr. Aguayo's testimony -- and Mr. Aguayo has no reason to lie about this." On several other occasions, the prosecutor referred to what "we know" about the case. Did the prosecutor unfairly align himself with the jury, invite the jury to consider the prestige of his office, and then vouch for the credibility of the key witness, thereby committing misconduct and violating appellant's right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On February 5, 2014, the State charged Wallace Robinson, Jr., by amended information with second degree robbery (Count 1) and attempted second degree robbery (Count 2). CP 6-7. The information alleged that on or about October 27, 2013, Robinson took or attempted to take Hector Aguayo's cell phone. CP 6-7.

Trial commenced on April 9, 2014. RP 63. The jury found Robinson guilty on both counts. CP 13-14. On the State's motion, the trial court dismissed the attempted robbery conviction. CP 41; RP 319. The court sentenced Robinson to a standard range sentence of 25 months for second degree robbery. CP 41, 43. Robinson timely appeals. CP 50.

2. Substantive Facts

In the early morning hours of October 27, 2013, Aguayo stood near the entrance of Pike Place Market in downtown Seattle, talking on his white iPhone. RP 88-89, 107. Aguayo and his friends attended a Halloween music festival at the WaMu Theater earlier that night. RP 78-79. Aguayo's costume consisted of see-through zebra print leggings, no shirt, and a bowtie. RP 79. He also had a zebra mask, sunglasses, and white trucker hat with him. RP 98-99. Aguayo claimed he did not drink any alcohol that night. RP 80-81.

After the show ended around 3:00 a.m., Aguayo became separated from his friends. RP 82. Aguayo called his friend, Chris Steele, to ask for a ride to West Seattle, where his friends were staying for the night. RP 84-88. While Aguayo was on the phone with Steele, Robinson approached and started talking to him. RP 90-91. Aguayo could not recall exactly what Robinson said to him at first. RP 91-92. Aguayo avoided speaking with Robinson and remained on the phone with his friend. RP 92-93. He testified, though, that Robinson became increasingly aggressive and agitated. RP 92-95.

Robinson followed Aguayo as he walked through a breezeway off Second Avenue, still on the phone with his friend. RP 100-03. In the breezeway, Robinson hit Aguayo in the face. RP 104. The two then struggled and various pieces of Aguayo's costume fell to the ground. RP 105-06. Aguayo testified that Robinson had his hand on Aguayo's phone during most of the struggle. RP 105. Steele testified he heard a loud noise like Aguayo's phone hitting the ground and then the call went dead. RP 235, 239-40.

Two security cameras in the breezeway recorded the struggle. The video shows Robinson gesticulating and following Aguayo. Robinson then strikes Aguayo. The two struggle for a few moments. During the struggle, something white falls to the ground and Robinson swats it away, but does

not pick it up. Ex. 4, 10. Aguayo thought the white item could be his cell phone. RP 107, 189. Seconds later, Robinson runs away. Ex. 4, 10. One video shows a man observing the struggle at the entrance of the breezeway, some distance away. Ex. 4. The man eventually walks down the breezeway and picks up several items that fell to the ground during the struggle. Ex. 4.

Aguayo testified that Robinson struck him a second time in the breezeway and then ran. RP 107. Aguayo chased after Robinson, demanding that Robinson return his phone. RP 107-08. He testified that Robinson kept saying, "I don't have your phone. Why would you think I have it? I don't have your phone." RP 108. Aguayo said that during the chase, Robinson turned to face him and pulled out his iPhone. RP 110. Aguayo explained that he knew it was his phone, because of the distinctive Coach brand case and sticker he put on the home button. RP 110-11. He testified that Robinson took the case off, left it on a table outside Starbucks, and then walked off with the phone. RP 110.

Aguayo continued to chase Robinson up and down the street, asking for his phone and yelling for help. RP 156, 166-68. Aguayo stated that, at one point, Robinson slid under a garbage truck to avoid him. RP 167. As the chase continued, Robinson stopped briefly and talked with another man on the street. RP 172-73. Aguayo stood close to Robinson and the other

man, demanding his phone back and asking the man to call the police. RP 173.

Around 4:20 a.m., Sergeant William Edwards received a call of a reported robbery. RP 64, 67. He spotted a man matching Robinson's description just north of Spring Street and Second Avenue. RP 69. Aguayo was still chasing after Robinson when police arrived. RP 174.

Two officers, Rene Miller and Terry Dunn, arrived shortly thereafter and took Robinson into custody. RP 73-74, 128-29, 141-43. They searched Robinson at the time of arrest. RP 133. They could not find Aguayo's cell phone anywhere on Robinson's person, in the general area where he was arrested, or on the route that Aguayo chased Robinson. RP 133, 148-50. They did, however, find Aguayo's Coach cell phone case on the table outside Starbucks, as Aguayo described. RP 149. Officer Dunn also recalled that he could smell alcohol on Aguayo's breath. RP 144.

Before trial, the State sought to admit a 911 call from Leslie Caldwell, who witnessed the incident. RP 12-13. Caldwell was a concierge at a condominium complex near the breezeway where Robinson struck Aguayo. RP 22-23; Ex. 5.¹ Caldwell can be seen standing in the background in a security video of the incident. Ex. 4; RP 20-22.

¹ Exhibit 5 is a recording of the 911 call. The 911 call is also transcribed in the record, both during the pretrial hearing on its admissibility and during Aguayo's testimony, when it was played for the jury. RP 22-28, 210-16.

The 911 call is nearly five minutes long. Ex. 5. During the call, Caldwell reported that he was “witnessing an assault” on Aguayo. RP 22. He stated that the suspect was “beating him up and stealing his phone.” RP 22-23. The 911 operator then tells the police dispatcher, “Radio, this is an assault, perhaps a robbery, being witnessed by the concierge at 1521 Second Avenue. He was in front. He witnessed a black male hitting, beating up on a Hispanic or white male; looked like he might have been stealing his phone.” RP 23. The 911 operator and radio dispatcher then ask Caldwell several questions attempting to identify and locate the suspect. RP 22-27.

Caldwell continues to describe the events, “They have now gone to Second Avenue. You can still hear them screaming. The guy is still asking back for his phone.” RP 23. He explained, “Now they’re just sort of going up and down the street.” RP 24. Caldwell told the operator that he picked up Aguayo’s hat, sunglasses, and another part of Aguayo’s costume that fell to the ground. RP 25. The security video shows Caldwell picking up items off the ground in the breezeway. Ex. 4.

Then, describing Aguayo, Caldwell tells the 911 operator, “Now the guy’s running after the other guy for it. He’s really, this guy is not going to let him get away with his phone. [Laughs.]” RP 24; Ex. 5. And, again describing Aguayo, “The guy is literally chasing him down the street . . . I

don't think that guy he was, he was not going to give up without a fight. [Laughs.]” RP 26-27; Ex. 5.

The State was unable to locate Caldwell to testify at trial. RP 12. The State argued the 911 call was nevertheless admissible hearsay, because it was both a present sense impression and an excited utterance. RP 13. Defense counsel argued, however, that admission of the 911 call violated Robinson's confrontation rights. RP 49. Defense counsel also believed that Caldwell pocketed the phone after it fell to the ground during the struggle. RP 14.

The trial court held that the 911 call was not testimonial and admitted it as a present sense impression. RP 60-62. The State subsequently played the 911 call for the jury in opening and again during Aguayo's testimony. RP 210. Aguayo agreed the recording accurately reflected his memory of the incident. RP 216.

The jury was instructed on the lesser included offense of fourth degree assault. RP 258-59; CP 31. Robinson did not dispute that he assaulted Aguayo. RP 273-74, 286-87. Rather, in closing, defense counsel urged the jury to find Robinson guilty of fourth degree assault, but not guilty of second degree robbery or attempted robbery. RP 286-87.

The defense theory was that Robinson did not take Aguayo's cell phone, but rather it was swatted away when he and Aguayo tussled. RP 286.

Defense counsel advanced this theory by pointing out inconsistencies in Aguayo's testimony and through Aguayo's own admission that his memory of the night was hazy. RP 104, 189, 205, 208, 285.

In closing rebuttal, the prosecuting attorney stated:

What fell to the ground, whether it was the cell phone that fell to the ground or the mask -- [defense counsel] would like to believe it was the cell phone. Mr. Aguayo even speculated that it may have been his cell phone. But what we do know from Mr. Aguayo's testimony -- and Mr. Aguayo has no reason to lie about this. He has no reason -- .

RP 289. Defense counsel objected, arguing that this constituted vouching for Aguayo's credibility. RP 290. The trial court overruled the objection.

RP 290. The prosecutor then argued Aguayo had no motive to fabricate his story. RP 290. Defense counsel again objected and the trial court again overruled, stating "[t]hat's not a personal opinion." RP 290.

C. ARGUMENT

1. CALDWELL'S 911 CALL IS TESTIMONIAL HEARSAY AND ITS ADMISSION VIOLATED ROBINSON'S RIGHT TO CONFRONTATION.

The trial court erred when it admitted Caldwell's testimonial 911 call identifying Robinson and stating that Robinson stole Aguayo's cell phone. Caldwell did not testify at trial and Robinson did not have a prior opportunity to cross-examine him. Reversal is required.

A person accused of a criminal offense has the right to confront the witnesses against him.² U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The confrontation clause bars admission of testimonial statements of a witness who does not appear at trial, unless the witness is unable to testify and the accused had a prior opportunity for cross-examination. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Confrontation clause violations are reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

a. Caldwell's 911 Call Was Testimonial

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Davis, 547 U.S. at 822. By contrast, statements are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id.

Four factors assist in determining whether statements are testimonial:

(1) whether the speaker described events as they occurred or described past

² Article I, section 22 of the Washington Constitution guarantees that an accused "shall have the right . . . to meet the witnesses against him face to face." WASH. CONST. art. I, § 22. Likewise, the Sixth Amendment protects the right of the accused "to be confronted with the witnesses against him." U.S. CONST. amend. VI.

events; (2) whether a reasonable listener could conclude the speaker faced an ongoing emergency or required help; (3) the nature of information elicited by the police; and (4) the formality of the interview. State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009). The State bears the burden of proving that challenged statements are non-testimonial. Id. at 417 n.3.

In Davis, the U.S. Supreme Court held a 911 call to be non-testimonial when the caller was alone, unprotected by police, and in immediate danger from the defendant. 547 U.S. at 831-32. In a consolidated case, Hammon v. Indiana, the Court held a woman's statements to be testimonial when police responded to a report of a domestic disturbance at her and her husband's home. Id. at 819, 828. When they arrived, the woman appeared somewhat frightened, but told them nothing was the matter. Id. at 819. She was not in any immediate danger; the interrogating officer testified he had heard no arguments or crashing and saw no one throw or break anything. Id. at 829.

The State may argue Caldwell's statements are non-testimonial because he reported an ongoing emergency: Robinson assaulted Aguayo and then Aguayo chased after Robinson to retrieve his allegedly stolen phone. Caldwell described these events as they occurred. His statements are therefore a present sense impression. ER 803(a)(1). However, simply

because the 911 call is a present sense impression does not make it non-testimonial. See Koslowski, 166 Wn.2d at 420-21.

The key fact here is that at no time during the 911 call did Caldwell face an ongoing emergency or require help. The Washington Supreme Court specified in Koslowski that the relevant question is whether a reasonable listener could “conclude that the speaker was facing an ongoing emergency that required help.” Id. at 419 (emphasis added); see also id. at 425.

There is no evidence that Robinson posed a threat to Caldwell. The security video showed Caldwell standing at the end of the breezeway passively observing the struggle. Robinson then ran off and Aguayo followed, leaving Caldwell alone in the breezeway. Ex. 4. During the 911 call, Caldwell’s voice was calm. Twice during the call he laughed at Aguayo chasing after Robinson. Ex. 5. He stated at one point that Robinson and Aguayo were “so far away” that he could not see the color of Aguayo’s pants. RP 214. Caldwell was in no danger. This is entirely unlike Davis, where the caller was frantic and in immediate danger from the defendant.

Furthermore, there is no evidence that Robinson was armed and dangerous to the public at large. See Michigan v. Bryant, __U.S.__, 131 S. Ct. 1143, 1167, 179 L. Ed. 2d 93 (2011). In Bryant, the Supreme Court held the victim’s statements to be non-testimonial when police discovered him mortally wounded in a gas station parking lot and the suspect had fled with a

gun. Id. at 1150, 1167. By contrast, Caldwell did not see Robinson brandish a gun or another similarly dangerous weapon. Rather, for the majority of the 911 call, Aguayo chased after Robinson. The mere fact that a suspect is at large “is not enough to show the questions asked and answered were necessary to resolve a present emergency situation.” Koslowski, 166 Wn.2d at 426-27.

Testimony means a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Crawford, 541 U.S. at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Here, Caldwell’s 911 call is just that. It was made for the purpose of establishing Robinson’s identity, and to tell police that Robinson assaulted Aguayo and stole his cell phone. The 911 recording was an out-of-court substitute for Caldwell’s missing trial testimony.

Caldwell’s 911 call is testimonial because no reasonable listener could conclude that Caldwell faced an ongoing emergency or required help. The need for confrontation is further highlighted by defense counsel’s reasonable theory that Caldwell pocketed Aguayo’s cell phone. Therefore, the trial court admitted the 911 call in violation of Robinson’s constitutional right to confront the witnesses against him.

b. Admission of the 911 Call Prejudiced Robinson

Constitutional error requires reversal unless the State can prove beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Gauthier, 174 Wn. App. 257, 270, 298 P.3d 126 (2013). Where the error is not harmless, a new trial is required. Id. The State bears the burden of showing that a constitutional error is harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Whether an error is harmless depends on several factors, including the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradicting testimony, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. Jasper, 174 Wn.2d at 117.

The key issue at trial was whether Robinson stole or attempted to steal Aguayo's cell phone. RP 271-72, 281. Robinson did not dispute that he assaulted Aguayo. RP 273-74, 286-87. Instead, he argued he did not intend to steal Aguayo's phone, but rather batted it away when they struggled. RP 286. Robinson argued that Caldwell then pocketed the phone. RP 277-78. Aguayo's testimony is at odds with this. RP 110-11. However,

police could not locate Aguayo's phone. RP 133, 148-50. And, security footage does not contradict Robinson's version of events. Ex. 4, 10. Rather, it confirms that Robinson swats away something white during the struggle with Aguayo and does not pick it up. Ex. 4; RP 104-05. Aguayo thought this could be his cell phone. RP 107, 189.

During the 911 call, however, Caldwell stated that Robinson was beating Aguayo up "and stealing his phone right now." RP 211. The 911 operator repeats to the police dispatcher, "It looked like he might have been stealing his phone." RP 211. The operator likewise calls the incident "an assault, perhaps a robbery." RP 211. And, later Caldwell says, "And now the guy is running after the other guy for it. He's really -- he is not going to let him get away with his phone." RP 212; Ex. 5.

Caldwell's testimony in the 911 call went to the ultimate issue at trial: whether Robinson stole Aguayo's cell phone. Other than Robinson and Aguayo, Caldwell was the only eyewitness. The State needed the 911 call to corroborate Aguayo's testimony. The prejudice of Caldwell's 911 call took its full toll on Robinson during closing when the prosecutor stressed, "But we don't just have Mr. Aguayo's testimony. We had the 911 call." RP 268; see also RP 272. The prosecutor again emphasized the 911 call in rebuttal. RP 289; see State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014)

("[C]omments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice."). Caldwell was essential to the prosecution's case.

Given Robinson's theory of the case and the evidence corroborating his theory, the court's error in admitting the 911 call cannot be harmless. This court should reverse Robinson's conviction and remand for a new trial.

2. PROSECUTORIAL MISCONDUCT VIOLATED ROBINSON'S RIGHT TO A FAIR TRIAL.

During rebuttal argument, the prosecutor stated, "But what we do know from Mr. Aguayo's testimony -- and Mr. Aguayo has no reason to lie about this. He has no reason -- ." RP 289. Defense counsel objected, preserving the error. By using the word "we," the prosecutor aligned himself with the jury against Robinson. He then impermissibly vouched for the key witness's credibility. This misconduct prejudiced the outcome of the trial. Accordingly, this court must reverse Robinson's conviction and remand for a new trial.

Prosecutors are officers of the court and have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When a prosecutor's comments are improper and there is a substantial likelihood that they affected the jury's verdict, the defendant's rights to a fair trial and to be tried by an impartial jury are

violated. U.S. CONST. amend. XIV; WASH. CONST. art. 1, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

a. The Prosecutor Improperly Aligned Himself with the Jury and Vouched for the Key Witness's Credibility

Prosecutors are prohibited from using the power and prestige of their office to sway the jury. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012); see also Monday, 171 Wn.2d at 677. For instance, a prosecutor may not vouch for the credibility of a witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010). Whether a witness has testified truthfully is solely for the jury to decide. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching occurs when a prosecutor places the government's prestige behind the witness. Id.

Likewise, prosecutors must refrain from making comments "calculated to align the jury with the prosecutor and against the [accused]." Reed, 102 Wn.2d at 147. For example, it is improper for the prosecutor to align himself with the jury by making continuous references to "we" and "us." See, e.g., State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006); State v. Spencer, 81 Conn. App. 320, 329 & n.6, 840 A.2d 7 (Conn. Ct. App. 2004), rev'd in part on other grounds, 275 Conn. 171, 881 A.2d 209 (Conn. 2005). Such language implies that the prosecutor and the jurors are one and the same or on the same side.

The Ninth Circuit recognized that using “we know” blurs the line between legitimate summary of evidence and improper vouching. United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005); see also United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009). The prosecutor may summarize evidence admitted at trial and draw reasonable inferences from that evidence. Younger, 398 F.3d at 1191. However, “we know” is improper “when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility.” Bentley, 561 F.3d at 812. “The question for the jury is not what a prosecutor believes to be true or what ‘we know,’ rather, the jury must decide what may be inferred from the evidence.” Younger, 398 F.3d at 1191. Thus, the Ninth Circuit admonished prosecutors to refrain from using the phrase in closing. Id.

Here, the prosecutor used “we” and “us” continually throughout closing argument and rebuttal. See, e.g., RP 263, 264, 266, 267, 268, 269, 270, 271, 287, 289. This was not simply a marshalling of evidence admitted at trial. Rather, the prosecutor used “we” and “us” to align himself with the jury against Robinson and vouch for Aguayo’s credibility.

For instance, the prosecutor stated, “We don’t know what Mr. Robinson and the evidence hasn’t been able to establish what Mr. Robinson did with his cell phone after taking the cover off and putting it on the table at

Starbucks, but what we do know from Mr. Aguayo's testimony is that at that point, Mr. Robinson had it and was fleeing with it." RP 267.

These statements lend credibility to Aguayo's testimony. By stating "what we do know," the prosecutor implied that Aguayo's testimony was fact, relieving the jury of its duty to adjudge Aguayo's credibility. Robinson argued he did not steal or attempt to steal Aguayo's cell phone. RP 286. Thus, the prosecutor aligned himself with the jury against Robinson by saying "we do know . . . Robinson had it."

Then, in a final crescendo in rebuttal, the prosecutor told the jury:

What fell to the ground, whether it was the cell phone that fell to the ground or the mask -- [defense counsel] would like to believe it was the cell phone. Mr. Aguayo even speculated that it may have been his cell phone. But what we do know from Mr. Aguayo's testimony -- and Mr. Aguayo has no reason to lie about this. He has no reason -- .

RP 289 (emphasis added). Defense counsel objected, arguing that this constituted vouching for Aguayo's credibility. RP 290. The trial court overruled the objection. RP 290. The prosecutor then proceeded to argue that Aguayo had no motive to fabricate his story. RP 290. Defense counsel again objected and the trial court again overruled, stating "[t]hat's not a personal opinion." RP 290.

This use of "we" is improper. By stating "what we do know from Mr. Aguayo's testimony," the prosecutor again aligned himself with the jury.

He then vouched for the credibility of the State's key witness: "Mr. Aguayo had no reason to lie about this." This suggested that the jury need not even weigh the credibility of Aguayo's testimony, because "we know" he had no reason to lie. By doing so, the prosecutor guaranteed the truthfulness of Aguayo's testimony—a key issue in the case. He also implied that he had special knowledge of Aguayo's credibility. This is impermissible under Washington case law, as well as the Ninth Circuit's decision in Younger and the Eighth Circuit in Bentley.³

By repeated use of the pronoun "we," the prosecutor made clear he was part of a group that included his office, the witnesses, and the jury, but not Robinson. The prosecutor then proceeded to vouch for the credibility of the State's key witness. He used the power and prestige of his office to instruct the jury that Aguayo was credible. This was improper.

b. The Misconduct Prejudiced the Outcome of Robinson's Trial, Necessitating Retrial

When, as here, the prosecutor's statements are improper, the court "must consider whether there was a substantial likelihood the comments affected the jury verdict." State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993).

³ That defense counsel also used "we" and "us" in closing is of no moment. See, e.g., RP 274. It does not negate the prosecutor's duty to ensure Robinson's right to a fair trial and impartial jury. Nor does it mean that the prosecutor can thereafter vouch for the credibility of its key witness.

Robinson's theory at trial was that he did not take Aguayo's phone, but rather that it was batted away when he and Aguayo scuffled. RP 286. Aguayo admitted that his memory of the night was hazy after Robinson struck him the first time. RP 104, 189, 205, 208. Robinson supported his theory by pointing out several inconsistencies in Aguayo's testimony. RP 285.

For instance, Aguayo told the police at the scene that Robinson grabbed his phone out of his hand and then ran. RP 275. However, Aguayo testified at trial that his phone fell to the ground and then Robinson picked it up. RP 106-07. Exhibit 4 shows that Robinson swats away something white during the struggle with Aguayo. Ex 4; RP 104-05. Aguayo thought this was possibly his white iPhone, but could not remember. RP 107, 189. It appears from the video that Robinson did not pick up the white item again, supporting his theory of events. Ex. 4; see also Ex. 10.

Robinson identified further inconsistencies. For instance, Aguayo testified at trial that Robinson slid under a garbage truck during the chase. RP 167, 277. But, Aguayo did not tell officers this the night of the assault. RP 156-57, 277. Officer Miller also noted that Robinson walked with a limp, making it less plausible that he managed to slide under a garbage truck. RP 136-37. Aguayo likewise testified that he did not drink any alcohol that

night. RP 80-81, 278. However, Officer Dunn smelled alcohol on Aguayo's breath when he responded to the scene. RP 144, 278.

In Reed, the prosecutor's improper comments were prejudicial when they struck directly at the evidence supporting the defendant's theory. 102 Wn.2d at 147-48. The same is true here. The security videos supported both Aguayo's and Robinson's version of events. The case therefore largely hinged on Aguayo's credibility and hazy memory. It prejudiced the outcome of Robinson's trial when the prosecutor aligned himself with the jury and then vouched for Aguayo's credibility in rebuttal.

Furthermore, the trial court overruling defense counsel's objections "lent an aura of legitimacy to what was otherwise improper argument." State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984); State v. Swanson, __ Wn. App. __, 327 P.3d 67, 75 (2014). The trial court augmented the prosecutor's prejudicial conduct by putting its imprimatur on the improper remarks. State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006). Washington courts recognize that "[t]his increases the likelihood that the misconduct affected the jury's verdict." Id. When a prosecutor makes improper remarks in rebuttal, it also increases their prejudicial effect. Lindsay, 180 Wn.2d at 443.

Because Aguayo's credibility hung in the balance, there is substantial likelihood that the prosecutor's misconduct affected the jury's verdict. This

denied Robinson his right to a fair trial. As such, this court should reverse his conviction and remand for a new trial.

D. CONCLUSION

For the above reasons, this court should reverse Robinson's conviction and remand for a new trial.

DATED this 22 day of September, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71929-7-1
)	
WALLACE ROBINSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WALLACE ROBINSON
DOC NO. 882641
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF SEPTEMBER 2014.

X Patrick Mayovsky

STATE OF WASHINGTON
SEP 22 2014
CLALLAM BAY