

degree Criminal Trespass) given to his jury, thus persuading them to convict him of the lowest crime that was presented to them (Attempted 2nd degree Residential Burglary).

State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004).

Within this case is the discussion that: A criminal defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is an element of the offense charged and (2) the evidence supports an inference that only the lesser crime was committed.

at 249: "An instruction on the lesser included offense was therefore at little or no cost to Ward...If the jury did not believe Ward acted lawfully, but doubted whether he pointed his gun, he would have been convicted only of the misdemeanor."

This case parallels Mr. Baines' case. If the lesser included instruction would have been properly given to the jury, the probability of Mr. Baines being found guilty of only a misdemeanor, is great. For this reason, Mr. Baines' attorney is guilty of **providing ineffective assistance of counsel**, because there was no strategic reason for not requesting and providing the lesser included instruction.

For an inquiry on this subject matter, the courts view the evidence in the light most favorable to the party requesting the instruction.
State v. Fernandez-Medina, 141 Wn.2d 448,455, 6 P.3d 1150 (2000).

State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006).

at 384: "However, Pittman argues that attempted first degree criminal trespass is a lesser included offense of attempted residential burglary. He is correct."

at 386: "Viewed in the light most favorable to Pittman, the evidence of his intent to commit a crime inside Cline's home was so meager that a jury could have reasonably found he intended only to trespass."

Based upon the argument contained within these cases cited, as well as several other multiple cases that have been decided within the Washington courts, Mr. Baines' conviction needs to be reversed.

Additional Ground 2
PROSECUTORIAL MISCONDUCT
VOUCHING/COMMENTING

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984).

The Supreme Court of this State of Washington has held that (1) A prosecutor's argument to the jury may not include expressions of his personal belief as to the defendant's guilt or a witness' credibility or emotional appeals to the jury, and (2) Improper comments by a prosecutor deny the defendant a fair trial and necessitate reversal of his conviction if there is a substantial likelihood that the comments affected the jury's decision.

at 145: "Here, the prosecutor clearly violated CPR DR 7-106(C)(4) by asserting his personal opinion of the credibility of the witness and the guilt or innocence of the accused. First, he called the petitioner a liar no less than four times. Next, the prosecutor stated that the defense counsel did not have a case, and that the petitioner was clearly a 'murder two'. Finally, he implied that the defense witnesses should not be believed..."

Within the current case before this Court, the same types of misconduct have occurred. The prosecutor even added his additional belief as to the reason why Mr. Baines "accomplice" was not found.

State v. Horton, 116 Wn.App. 909, 68 P.3d 1145 (2003).

This case centers one of its arguments around the improper comments made by a prosecutor during closing arguments.

at 921: "The prosecutor told the jury: 'Then you have the defendant. The manner in which he testified, the State believes, this prosecutor believes, that he got up there and lied'."

Within the current case before the Court, contained within the Record of Proceedings, is several instances where the prosecutor is "vouching" for the State's witness, saying "he's a family man, he has no reason to lie", or "he's a business man, he has no reason to lie or make this up". Of course we know that by the prosecutor implying that, that he is "silently" implying that the defendant is lying. A definite case of "read between the lines" innuendo. This prejudices Mr. Baines and deprives him of a **fair trial** beyond the extent that undermines confidence in the outcome of his trial.

State v. Miles, 139 Wn.App. 879, 162 P.3d 1169 (2007).

at 880: "A prosecutor commits misconduct by arguing to the jury that it must choose between believing the State's witnesses or believing the defendant's witnesses, effectively telling the jury that in order to acquit the defendant it must find that the State's witnesses were lying."

at 890: "..., it is flagrant misconduct to shift the burden of proof to the defendant."

at 890: "The jury was entitled to conclude that it did not necessarily believe...but it was also not satisfied beyond a reasonable doubt..."

Again, within Mr. Baines' trial, there was multiple instances of misconduct that has been referred to within this issue.

For the reasons stated within this additional ground, it is requested that the court reverse Mr. Baines conviction.

Additional Ground 3
INEFFECTIVE ASSISTANCE OF COUNSEL

For the reasons alluded to within grounds one and two, those issues give rise to the additional claim of ineffective assistance of counsel, which enhance the reasons for this Court to reverse Mr. Baines conviction.

Additional Ground 4
INSUFFICIENCY OF EVIDENCE TO CONVICT

For the reasons stated within this Statement of Additional Grounds, issue one, that the evidence and testimony offered within the trial do not support the conviction that was procured. Reversal is warranted.

In conclusion, Mr. Baines argues that any one of these grounds requires reversal. At any rate, the cumulative effect of the multiple errors requires reversal of his conviction.

Date: 11-29-09

Signature: _____

