

NO. 39013-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICKY DEAN DAVIS,

Appellant.

FILED
BY [Signature]
FEBRUARY 17
CLERK OF COURT
SUPERIOR COURT
PIERCE COUNTY

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

The Honorable James R. Orlando

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The prosecutor's assertion of his personal belief as to the credibility of a defense witness during closing argument denied appellant his constitutional right to fair trial.

Issue Pertaining to Assignment of Error

Is appellant entitled to a new trial where during closing argument, the prosecutor clearly and unmistakably asserted his personal belief as to the credibility of a defense witness and there is a substantial likelihood that his flagrant and ill-intentioned comments affected the jury's verdict?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On April 14, 2008, the State charged appellant, Ricky Dean Davis, with one count of residential burglary and two counts of theft in the second degree.² CP 1-2. Following a trial before the Honorable James R. Orlando, on December 18, 2008, a jury found Davis guilty as charged. 3RP 230; CP 47, 48, 49. On February 27, 2009, the court sentenced Davis to 76 months in confinement to be served concurrently with Cause No. 05-1-01203-1. CP 56. The court modified the sentence on May 27, 2009,

¹ There are three volumes of verbatim report of proceedings: 1RP - 09/10/08; 2RP - 12/15/08, 12/16/08; 3RP - 12/17/08, 12/18/08, 01/09/09, 01/16/09, 02/27/09, 05/27/09.

² Davis was charged as an accomplice. CP 1-2. The co-defendant, Dawn Stephenson, pled guilty. 2RP 11.

imposing a sentence of 63 months in confinement to be served consecutively to Cause No. 05-1-01203-1. Supp CP _____ (Judgment and Sentence, 05/27/09). Davis filed a timely appeal. CP 63, Supp CP _____ (Notice of Appeal, 06/22/09).

2. Substantive Facts

a. Trial Testimony for the State

On April 11, 2008, Angela Powell went next door to check on her mother's house and feed the cat while her mother was in the hospital recovering from back surgery. 2RP 26-31. As Powell approached the back of the house, she noticed that the glass sliding door was open. 2RP 31-32. Her mother usually used a stick as a wedge to secure the door because the lock was broken. 2RP 32-33. Powell had checked the house a few days earlier and the door was wide open but nothing appeared missing although "somebody had obviously gotten in there somehow." 2RP 47.

Powell entered the house and saw a woman who she thought was her sister. She called out her sister's name a couple of times and the woman "didn't even turn around, like she didn't hear me." 2RP 31-33. Powell realized the woman was not her sister when she saw a man "standing next to the front window, like a lookout, while she was digging through my mom's stuff." 2RP 31-32. Using a couple of expletives, she told them to get out of her mother's house. The man and woman turned

around and looked shocked to see her. They walked out the front door without saying anything. 2RP 34-35. She saw them for about ten seconds. 2RP 50.

Powell called 911 and reported the direction in which the man and woman were walking. Shortly thereafter, an officer arrived and drove Powell a couple of blocks to where the man and woman were detained. She identified the man and woman who were standing outside a patrol car as the same two people who were in her mother's house. 2RP 36-37. The woman was wearing her mother's rings and had her spare house key and her mother's mail in her "purse with red lips on it." 2RP 42-43. Powell returned to the house and found her mother's old purse emptied out on the couch with mail everywhere and the closet "seemed really messed up." 2RP 38-39. She identified Davis in court as the man she saw that day and a photograph of Dawn Stephenson as the woman with the man. 2RP 28-29.

On April 11, 2009, Cynthia Stahl had just been released from the hospital and was staying with her daughter, Melissa. 2RP 66-67. Her daughter Angela called to tell her that her house had been burglarized. 2RP 68. Stahl could not go home because she was recovering from back surgery. 2RP 68-69. Upon returning home after three months, she discovered that "somebody had rifled through" her large file box that was

overturned in the bedroom closet, her recent mail and passport was missing, and her jewelry box was gone. 2RP 69-73. Stahl identified five of her rings that were retrieved and admitted into evidence. 2RP 73-77. She also identified paperwork which contained her social security number and bank account number, her Mervyn's credit card, her VISA credit card, and her Moneytree cash solution card marked as exhibits. 2RP 77-85. Stahl's jewelry box was never found. 2RP 97-98.

Tacoma police officer, Scott Harris, investigated a burglary on April 11, 2009 reported by Angela Powell about 1:30 in the afternoon. 3RP 107-09. Harris arrived at a residence and after speaking with Powell, he "put out the suspect description." 3RP 110. When responding officers apprehended two suspects, Harris drove Powell to the location nearby and she identified Davis and Stephenson, who were detained in handcuffs, as the two people who were in her mother's house. 3RP 110-12, 120. The officers recovered five rings and house keys from Stephenson. 3RP 112-14. Harris returned to the house with Powell for an inspection and saw that a jewelry box "had been dumped over," and the closet had "definitely been gone through." 3RP 114-15. There were no signs of a forced entry. 3RP 125.

Tacoma police officer, John Warczak, responded to a reported burglary on April 11, 2009. 3RP 127-28. Warczak and Officer Curtis

went to the location where Officer Caber was detaining Davis and Stephenson. 3RP 128-30. Stephenson was crying and nervous. 3RP 134. Curtis patted down Stephenson and found “credit cards and financial-type statements in her pocket.” 3RP 130. She also recovered five rings that Stephenson had on her fingers. 3RP 130. Curtis advised Stephenson of her *Miranda* rights and she agreed to talk to them and provided a written statement. 3RP 132-33. Stephenson said that two other females gave her the rings and “then she was forced to take the cards with the purpose of creating false identification to open up new accounts.” 3RP 135. To the best of Warczak’s knowledge, nothing was recovered when officers conducted a pat-down of Davis. 3RP 134-35.

b. Trial Testimony for the Defense

Dawn Stephenson had been married to Davis about four months before April 11, 2008. 3RP 156-57. They met “at work release” and dated for about a year. 3RP 139, 157. In February 2008, Stephenson was staying with Davis’ friend, Bill, while Davis underwent drug and alcohol treatment at an inpatient facility for 60 days. 3RP 141-42. On the day before Davis’ release from treatment, Stephenson arranged a meeting with two drug dealers, Dana Wolesley and Curtis Kelly, at Bill’s house. They came to the house and robbed Bill at gunpoint. 3RP 143. Kelly told Stephenson that she owed him \$5000.00 and threatened to kill her if she

did not pay him back. 3RP 143-44. Upon Davis' return from treatment, they moved from one motel to another to avoid Kelly because she "was scared," but Davis did not know the extent of her involvement with the drug dealers. 3RP 144-45.

On the morning of April 11, 2008, Davis and Stephenson had an argument because "Ricky was staying clean and I was continuing to use." 3RP 144. Davis ended up leaving and while he was gone, Stephenson received a call from Wolesley who offered to help her. Wolesley told her that Paul Knox could help her pay back the money she owed Kelly. 3RP Stephenson called Knox who came to the motel and they "got high." 3RP Knox made some phone calls and then gave her the address of a friend who had credit cards "that we could use to make some money." 3RP 147-48. He told her that the back door would be open, "All we had to do was go and get the stuff that we needed."

Davis returned while Knox was still in the motel room and became very angry because he thought Stephenson and Knox were having an affair. Davis and Knox got in an argument and Knox left. 3RP 149-50. Stephenson told Davis she had to leave to pick up some things at her friend's house. Davis insisted on going with her because he thought she was planning to meet Knox, "I was really angry that he was coming with me." 3RP 150-52.

When they arrived at the house, Stephenson told Davis to wait by the front door and went around the back and entered the house through an open glass sliding door. 3RP 152-53. She opened the front door to let Davis in the house. While she was sorting through the mail where Knox told her to look, a woman came through the back door and said, "What are you doing here?" 3RP 153-54. Davis asked Stephenson what was going on because she had told him it was her friend's house. 3RP 154. Stephenson told him they had to go and they went out the front door. 3RP 154. Stephenson and Davis were stopped by police officers and arrested. She gave a statement to the officers but "was panicked, really high, really freaked out" at the time and tried to get the police to blame Davis. 3RP 155, 169.

Stephenson acknowledged that she had been convicted of seven felonies involving identify theft, forgery, and theft before she met Davis. 3RP 158-60, 170. Davis knew she had a criminal past but they never discussed specifics, "I'm a very private person." 3RP 160. Stephenson admitted being addicted to drugs and gambling. 3RP 161-62. She came forward to testify because she was drug free and thinking clearly and "it's the right thing to do." 3RP 172-73.

c. Closing Argument

During closing argument, the prosecutor asserted that the “notion that Dawn Stephenson wouldn’t get up here on the stand and lie for her husband? It’s ludicrous.” 3RP 200. He avowed, “Do you really think she would bat an eye to get up on the stand and perjure herself? By her own admission she would get off on it.” 3RP 200. He told the jury that Stephenson’s testimony is “not worth a lick” and “don’t rely on her testimony.” 3RP 200-01.

C. ARGUMENT

THE PROSECUTOR’S CLEAR AND UNMISTAKEABLE ASSERTION OF HIS PERSONAL BELIEF AS TO THE CREDIBILITY OF A DEFENSE WITNESS CONSTITUTES PROSECUTORIAL MISCONDUCT BECAUSE THERE IS A SUBSTANTIAL LIKELIHOOD THAT HIS FLAGRANT AND ILL-INTENTIONED COMMENTS AFFECTED THE JURY’S VERDICT.

The prosecutor clearly and unmistakably asserted his personal belief as to the credibility of a defense witness and there is a substantial likelihood that his flagrant and ill-intentioned comments affected the jury’s verdict. Davis is entitled to a new trial because the prosecutor’s misconduct denied him his constitutional right to fair trial.

In State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), the State Supreme Court noted, “Our view of a prosecutor’s responsibilities is not of recent vintage. As early as 1909, Washington courts were

characterizing it as the ‘safeguards which the wisdom of ages has thrown around persons accused of crime.’ ” 102 Wn.2d at 147 (quoting State v. Montgomery, 56 Wn. 443, 447, 105 P. 1035 (1909)). The Court emphasized that a public prosecutor “is a *quasi*-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice.” 102 Wn.2d at 147.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)(citing State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). The courts will find the error prejudicial if it is “clear and unmistakable” that a counsel is expressing a personal opinion. Brett, 126 Wn.2d at 175 (citing State v. Sargeant, 40 Wn.App. 340, 344, 698 P.2d 598 (1985)). In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses based on evidence in the record. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

When a defendant does not object at trial, he must prove that the prosecutor’s comments were so flagrant and ill-intentioned that a curative instruction would have been ineffective to cure the resulting prejudice. State v. Classen, 143 Wn. App. 45, 64, 176 P.3d 582 (2008), review denied, 164 Wn.2d 1016, 195 P.3d 88 (2008). To establish prosecutorial

misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. In re Detention of Sease, 149 Wn. App. 66, 81, 201 P.3d 1078 (2009).

During closing argument here, the prosecutor launched into a rage, personally attacking the credibility of Stephenson who testified in Davis' defense:

. . . . This is an individual that commits dishonest crimes. It reflects on her character.

She lies to the police. She lies to the police when she tells, according to her words, that Ricky hurts her and Ricky makes her do things she doesn't want to do. Then she comes on the witness stand and tells you that she was being honest with the police. But that's a lie.

She lies to you because then she comes back around and says, "Oh, but I guess I was lying to them." So she lies to the police, according to her testimony on the stand, and then she lies to you when she says she's being honest to the police. She can't keep it straight. Is that someone that you want to believe? Is that someone that you want to rely on and not applying the presumption that the defendant intended to commit a crime?

And I want to point one other thing out. The notion that Dawn Stephenson wouldn't get up here on the stand and lie for her husband? It's ludicrous. I don't need to tell you that. Remember her testimony? "I get off on committing crimes." She gets off on committing crimes.

Do you really think she would bat an eye to get up here on the stand and lie to you? Do you really think she

would bat an eye to get up on the stand and perjure herself?
By her own admission she would get off on it.

So just remember her testimony. Remember that
it's not worth a lick. If you believe anything that Dawn
Stephenson says, by gosh, she will probably have some
property to sell you in the desert. She will probably have
some beach property to sell you out in the desert. Dawn
Stephenson is not someone you can rely on, not someone
that's credible. Don't rely on her testimony.

3RP 199-201. (Emphasis added.)

It is clear and unmistakable from the record that the prosecutor asserted his personal opinion that Stephenson is a liar and his blatantly flagrant and ill-intentioned tirade would not have been cured by a jury instruction. The prosecutor misguided the jury by distorting Stephenson's testimony. He accused Stephenson of lying to the jury, contending that she said she was being honest with the police and then said she lied to them. To the contrary, Stephenson said she was trying to be truthful and did not want to lie to the officers but "I was pretty much trying to blame whoever I could" and she lied to the officers because "I was trying to get them to blame Ricky." 3RP 167-69. She explained that she was very high and not thinking rationally when she spoke with the officers. 3RP 171-72. The prosecutor's assertion that Stephenson admitted that she would "get off" on committing perjury falsifies her testimony. The record reflects that Stephenson said she would not lie under oath and that she came forward to testify because it was the right thing to do. 3RP 172-73.

Furthermore, the prosecutor misstated the law in telling the jury there is a “presumption” that the defendant intended to commit a crime.³

The prosecutor’s conduct was clearly improper and there is a substantial likelihood that the misconduct affected the jury’s verdict in light of Powell’s testimony that she only saw Stephenson and Davis for “at the most like ten seconds, maybe.” 3RP 50. Powell thought Davis appeared to be a lookout because he was staring out the window, “[I]ike he was looking out to see if anybody was coming, what he looked like he was doing.” 3RP 34. Powell also testified that someone had “obviously” been in her mother’s house a few days earlier which is consistent with Stephenson’s testimony that Knox told her about the house and assured her that the back door would be open. 2RP 47, 3RP 147-48. Furthermore, the officers did not find anything stolen when they conducted a pat-down of Davis. 3RP 134-35. It is evident that if the prosecutor had not discredited Stephenson’s testimony, Powell’s momentary encounter with Stephenson and Davis would have left reasonable doubt as to Davis’ accomplice liability.

³ A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given. Jury Instruction 12. CP 37. (Emphasis added.)

Reversal is required because the prosecutor's conduct, which constitutes an egregious dereliction of a prosecutor's responsibilities, was both improper and prejudicial in the context of the entire record and the circumstances at trial. Magers, 164 Wn.2d at 191; Reed, 102 Wn.2d at 147.

D. CONCLUSION

A prosecutor "represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial." State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981)(quoting State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968)). For the reasons stated, this Court should reverse Mr. Davis' convictions because the prosecutor's misconduct denied him a fair trial.

DATED this 19th day of October, 2009.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Ricky Dean Davis

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Ricky Dean Davis, DOC # 632353, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, Washington 99001-2049.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of October, 2009 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

STATE OF WASHINGTON
COUNTY OF PIERCE
BY  DEPUTY
OCT 20 2009
10:17 AM
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