

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.

BY: *EW*
COURT REPORTER
JULY 14 2014
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James R. Orlando

REPLY BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Petitioner

23619 55TH Place South
Kent, Washington 98032
(253) 520-2637

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR CLEARLY AND UNMISTAKABLY ASSERTED HIS PERSONAL BELIEF AS TO STEPHENSON'S CREDIBILITY AND THERE IS A SUBSTANTIAL LIKELIHOOD THAT HIS FLAGRANT AND ILL-INTENTIONED COMMENTS AFFECTED THE JURY'S VERDICT.

The State initially mischaracterizes the prosecutor's statements claiming that "the prosecutor began by stating that the defendant's guilt was not a fact to be gleaned from his argument, but from the juror's review of the evidence in light of their common sense and individual understanding." Brief of Respondent at 7. The record reflects that the prosecutor's statements were not as benign as the State asserts:

You don't need me giving you a 30 or 45-minute exposition or lecture on why the defendant is guilty. That would be kind of an insult to your intelligence. Because when you look at the evidence, when you look at common sense, when you apply your own understanding and what you know happened there, the defendant is guilty.

3RP 192.

The prosecutor never stated at any time during his summation that the jury should not rely on his closing argument. 3RP 192-203, 216-223.

The State argues that the prosecutor's statements are "plainly argument" rather than clear and unmistakable expressions of his personal belief. Brief of Respondent at 7-10. To the contrary, the prosecutor's tirade is fraught with expressions of his own opinion of Stephenson's guilt.

3RP 199-201. The prosecutor mocked the “notion that Dawn Stephenson wouldn’t get up here on the stand and lie for her husband” as “ludicrous.”

3RP 200. He told the jury to remember Stephenson’s testimony, “Remember that it’s not worth a lick.” 3RP 200-01. Arguing that if the jury believed anything Stephenson said, “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.” 3RP 201.

Citing State v. Adams, 76 Wn.2d 650, 660, 458 P.2d 558 (1969), reversed on other grounds, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 858 (1971), the State claims that “each time the prosecutor in this case called Stephenson’s credibility into question he referred to specific evidence clearly established in the record, nearly all of which came directly from Stephenson’s own testimony.” Brief of Respondent at 11. The record belies the State’s assertion. In Adams, the Washington Supreme Court concluded that the prosecutor, “in his closing argument, did refer to defendant as a liar on a number of occasions. However, each time he did so he referred to a specific portion of the evidence, including defendant’s own testimony, which clearly demonstrated that in fact defendant had lied.” Id. at 660. Unlike in Adams, the prosecutor here distorted Stephenson’s testimony. See Brief of Appellant at 10-11. The prosecutor wrongfully told the jury that Stephenson admitted she would “get off” on

committing perjury. 3RP 200. To the contrary, the record reflects that Stephenson said she would not lie to the jury having sworn an oath. 3RP 172. She explained that she had time for reflection since being drug free and came forward to testify because it was the right thing to do. 3RP 172-73. She expressed that she was now thinking very clearly. 3RP 173.

The State argues further that “[e]ven if one assumed unbridled impropriety on the part of the prosecutor, it is difficult to imagine how the prosecutor could have said anything that would cast Stephenson’s credibility in a more disparaging light than her own testimony.” Brief of Respondent at 10-12. The prosecutor’s attack on Stephenson undermines the State’s argument for if her testimony were so “implausible” as the State claims, the prosecutor would not have found it essential to relentlessly assail her credibility. “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 1076 (1996).

The record substantiates that the prosecutor’s blatantly flagrant and ill-intentioned tirade was inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. Consequently, while it is presumed that juries follow the court’s instructions, the prosecutor’s

misconduct was so prejudicial in nature that its effect upon the jury could not be cured by an instruction to disregard it. State v. Classen, 143 Wn. App. 45, 64, 176 P.3d 582 (2008), review denied, 164 Wn.2d 1016, 195 P.3d 88 (2008).

B. CONCLUSION

For the reasons stated here, and in the opening brief, this Court should reverse Mr. Davis' convictions and remand for a new and fair trial.

DATED this 22nd day of January, 2010.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

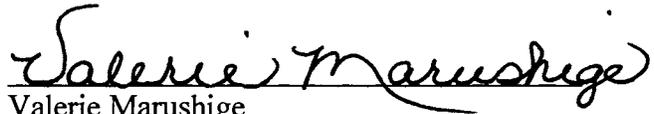
Attorney for Appellant, Ricky Dean Davis

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 Jason P. Ruyf, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 22nd day of January, 2010 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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