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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has the defendant carried his burden to prove that the prosecutor clearly and unmistakably made a flagrant and ill-intentioned statement of personal belief that evinced a resulting prejudice which could not have been neutralized by a curative instruction?

B. STATEMENT OF THE CASE.

1. Procedure

On August 14, 2008, Ricky Dean Davis, “defendant,” was charged with residential burglary and two counts of theft in the second degree in Pierce County Cause No. 08-1-01805-1. CP 1-2. The defendant’s case proceeded to jury trial before the Honorable James Orlando. RP 3. After hearing the evidence, the jury found the defendant guilty as charged. CP 23-49; 192-223. The court imposed a low end sentence of 63 months. RP 262.

2. Facts from Trial Testimony

On April 11, 2008, Angela Powell went next door to her then hospitalized mother’s home in order to check on the family cat. RP 26, 27, 29, 31. She walked through the back yard to see if she could view the cat through the rear sliding-glass door; as she approached, she found the

door unexpectedly open and caught her first glimpse of a woman whom she initially mistook for her sister. RP 31, 32, 47. Ms. Powell called out several times, but the woman did not respond. RP 31. Confused, Ms. Powell ventured farther into the home until she abruptly realized that that the woman was not her sister, but an intruder; a person later identified as Dawn Stephenson, the defendant's codefendant¹ and wife. CP 1; RP 6, 29, 111, 112, 139.

Unnoticed, Ms. Powell paused to watch Stephenson rifle through a pile of her mother's mail as the defendant stood at a nearby street-facing window "like a lookout," "staring out the window looking back and forth paranoid...." RP 31, 33, 50, 111, 112. When Ms. Powell finally announced her presence, the defendant and Stephenson turned to stare at her for a second looking shocked, then fled out the front door without saying a word. RP 34, 35. Ms. Powell called the police; responding officers quickly apprehended the defendant and Stephenson a few blocks from the home. RP 36, 110. Following the encounter, a closer inspection of the home revealed financial documents, mail, and personal effects had been rummaged through and cast about on the floor. RP 38, 39, 53, 69, 70.

An eventual search of Stephenson resulted in the recovery of credit cards, financial statements, and five rings, all belonging to Ms. Powell's mother, Cynthia Stahl. RP 74-84, 130-131. Stephenson claimed that she

¹ Stephenson pled guilty prior to the defendant's trial. RP 11.

had been given the rings but was forced to take the credit cards so she could open fraudulent accounts. RP 135.

Stephenson took the stand as the defendant's only witness. RP 104, 138. After identifying the defendant as her husband, Stephenson recounted meeting the defendant at work release and briefly described her "colorful life," which included a thirty-year history of drug use. RP 139, 140.

Stephenson then summarized the events leading up to the incident. RP 142-166. Here, Stephenson claimed that while the defendant was away at inpatient treatment, she arranged a meeting between two drug dealers, Dana Wolesley and Curtis Kelly that ended with Wolesley robbing Kelly at gun point; Kelly in turn held Stephenson responsible for his resulting loss. RP 142-144.

Stephenson next testified about the day of the incident. RP 144. She explained that Wolesley—the drug dealer who committed the robbery—subsequently offered to help her repay Kelly—the drug dealer robbed—by putting her in touch with a man named Paul Knox. RP 146. Stephenson accepted the offer, inviting Knox to her motel room at a time when the defendant was away. RP 144. Stephenson testified that Knox arrived and made some telephone calls while she ingested a gram of methamphetamine. RP 141, 147. After a while, Knox learned of some credit cards they could use to make money and instructed Stephenson to go into the back door of a nearby apartment to retrieve them. RP 148.

Thereafter, Stephenson and the defendant walked to the targeted apartment; although, according to Stephenson, the defendant was misinformed about the nature of their trip. RP 148, 152. Stephenson testified that when they arrived, she had the defendant wait for her at the front door while she went around back to let him in. RP 154. Once the defendant was standing by inside, Stephenson went to work shuffling through a basket of mail near the front door until interrupted by Ms. Powell. RP 34, 35, 154, 166. Stephenson testified that she and the defendant fled out the front door, first toward the woods, then toward the back streets where they were apprehended by police. RP 155, 166.

During cross-examination Stephenson conceded that she has been involved in a romantic relationship with the defendant for about a year during which they shared their criminal past with each other. RP 158. She acknowledged her several felony convictions for identity theft in the first degree, identity theft in the second degree, theft in the first degree, and forgery. RP 159. She admitted that she “get[s] off on crime” and affirmed that she was unemployed, homeless and “a pretty dedicated drug addict” at the time of the incident. RP 160 -161. She also identified herself as a hacker that sometimes makes money selling lines of credit drawn upon fabricated identities. RP 163.

When asked about her conversation with the arresting officers, Stephenson first claimed that she was trying to be truthful with the police in order to avoid getting into trouble, but then described her statement to

police as an attempt to blame whoever she could. RP 167. Elaborating on her meaning she explained that she lied to convince the officers that the defendant was to blame for the incident. RP 168-169. Stephenson then acknowledged that she lied to the officers expecting them to believe her. RP 169. Stephenson concluded by stating that she also expected the jury to believe her. RP 169.

C. ARGUMENT.

1. THE DEFENDANT HAS NOT MET HIS BURDEN OF SHOWING AN IMPROPER EXPRESSION OF PERSONAL OPINION, LET ALONE ONE SO ILL-INTENTIONED AND FLAGRANT THAT IT COULD NOT HAVE BEEN REMEDIED BY A CURATIVE INSTRUCTION.

“In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of the witnesses and arguing inferences about credibility based on evidence in the record.” *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *State v. Knapp*, 14 Wn. App. 101, 110-11, 540 P.2d 898 *review denied*, 86 Wn.2d 1005 (1975). So while it is improper for a prosecutor to personally vouch for or disparage a witness’s credibility, “[p]rejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal

opinion.” *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). “[P]rosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another.” *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996); *see also State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558, *rev’d on other grounds by*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 858 (1971) (The prosecutor called the defendant a liar several times during closing argument, but each time referred to specific evidence, including the defendant’s own testimony, which “clearly demonstrated that in fact [the] defendant had lied.” The court held that the argument fell within the rule allowing counsel to draw and express reasonable inferences from the evidence.”).

Accordingly, where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect. *Hoffman*, 116 Wn.2d at 93. “Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury’s verdict.” *In re the Matter of the Detention of Michael R. Sease*, 140 Wn. App. 66, 81, 201 P.3d 1078 (2009). “In analyzing prejudice, [the court] do[es] not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.” *State v.*

Warren, 165 Wn.2d 17, 28, 195 P. 3d 940 (2008) citing *State v. Yates*, 161 Wn.2d 714, 744, 168 P.3d 359 (2007).

Even when present, a finding of prejudicial error, without more, need not result in reversal, for “[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request. The failure to object to a prosecuting attorney’s improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Hoffman*, 116 Wn.2d at 93; *see also Warren*, 165 Wn.2d at 28 (For juries are presumed to follow the court’s instructions.).

During the prosecutor’s closing argument, the prosecutor began by stating that the defendant’s guilt was not a fact to be gleaned from his argument, but from the jurors’ review of the evidence in light of their common sense and individual understanding. RP 192. After summarizing the case against the defendant, the prosecutor addressed Stephenson’s credibility by posing the following *question*: “Is Dawn Stephenson someone you can rely on?” RP 199. The prosecutor immediately followed the question by reminding the jury that Stephenson was “[s]omeone who, by her own admission, gets off on crimes; who is ... by her own word, [a] dedicated drug addict; someone who is a gambling addict; who admits she makes money by stealing people’s identities;

someone, by her own admission, since 2006 has been convicted of six crimes, all of which involve dishonest behavior: thefts, forgeries, identity thefts.” RP 199. The prosecutor again posed the *question*: “Is that someone that you want to believe?” RP 200.

The Defendant’s attorney failed to object to the now challenged statements at trial and thus, even if he could prove improper argument—which he cannot—the defendant is not entitled to the reversal requested because he has also failed to establish that the challenged statements are so flagrant and ill-intentioned that they were beyond the neutralizing effect of a curative instruction.

Turning first to the predicate issue of improper argument, other than offering a number of conclusory characterizations of the prosecutor’s closing remarks, and identifying several ways in which he differs on matters of interpretation, the defendant has not pointed to any evidence substantiating his claim that the challenged statements are more appropriately viewed as clear and unmistakable expressions of the prosecutor’s personal belief instead of permissible argument.

Our courts have described improper expressions of a prosecutor’s personal belief as statements that directly place the integrity of the prosecutor in support or opposition of a witness’s credibility or otherwise personalize the prosecutor to the jury in a manner calculated to align the

jury with the prosecutor against the defense. *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984); *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968) *State v. Sargent*, 40 Wn.app 340, 344, 698 P. 2d 589 (1985) (The prosecutor improperly placed his integrity on the side of a state’s witness by stating: “I believe in him ... There was no other reason he would be testifying other than the fact that the people that called him as a witness believed what he has to say.”). *See also Huson*, 73 Wn.2d at 662 (The prosecutor improperly personalized to the jury during closing argument when he stated: “I believe in the Constitution of the State of Washington, have sworn to uphold it ... I am a church member ... [with] a family in this community... Now, I will give you my version of it....”).

Using this criteria the challenged statements are plainly argument. The prosecutor addressed the veracity of Stephenson’s testimony by first posing general *questions* about her trustworthiness (i.e., “Is Dawn Stephenson someone you can rely on?”² “Is that someone that you want to believe?”³) and then pointing to the applicable inferences from admitted facts. These questions focused the jury on the credibility determination it must decide. When considered as a whole with the prosecutor’s earlier statement that a conviction must come from the jury’s review of the

² RP 199.

³ RP 200.

evidence,⁴ the prosecutor's argument accurately conveyed that the decision about Stephenson's credibility was to be made by the jury alone.

Further, the prosecutor connected each argued inference with a fact elicited directly from Stephenson's own testimony, e.g., her multiple convictions for crimes of dishonesty (RP 159), her admitted lies to police (RP 168), her internally inconsistent account of events (RP 167), and her statement that she gets off on committing crimes (RP 160).

Having failed to show that the prosecutor made a clear and unmistakable assertion of personal belief, it necessarily follows that the defendant has also failed to prove that any such statement is so flagrant and ill-intentioned that it could not have been neutralized by an admonition to the jury. While the defendant labels the prosecutor's argument a "flagrant and ill-intentioned tirade"⁵ he provides no qualitative analysis to support his characterization. *See Warren*, 165 Wn.2d at 944 (The prosecutor's conduct described as flagrant when he made a similar improper statement three times following prompt objections.).

Even 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 have cast Stephenson's credibility in a more

⁴ RP 192.

⁵ Brief of the Appellant pg 11.

disparaging light than her own testimony. Simply put, Stephenson admitted to being a convicted thief and a liar; a person that gets off on committing crimes and makes money by using other peoples identities to create phony lines of credit. Like the prosecutor in *Adams*⁶ who called a defendant a liar during closing argument, 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.

As if the foregoing were not enough to foreclose the possibility that the prosecutor's statements had a substantial likelihood of affecting the jury's verdict, one must consider the fact that after being properly instructed that they were "the sole judges of the credibility of each witness," and that "the lawyers' statements are not evidence,"⁷ the jurors were left to considered a case in which a credible eye witness provided direct evidence that the defendant was the man standing by like a paranoid lookout in her mother's home as Stephenson, a woman the defendant knew to be a criminal addicted to drugs and gambling, rifled through a pile of mail before both fled upon discovery without saying a word. A case in which the defendant elected to answer the charges against him with

⁶ 76 Wn.2d 650, 660, 458 P.2d 558 *Rev'd on other grounds by*, 403 U.S. 947, 91 S. Ct 2273, 29 L. Ed. 2d 858 (1971),

Stephenson's implausible account of how he was conveniently absent when the burglary was planned, naively followed Stephenson into the victim's home, and was taken completely off guard when confronted by Ms. Powell; an account contradicted by Stephenson's own statement to police. Thus, to the extent the jury gave any consideration whatsoever to the dubious defense ventured by the defendant, it was likely the internal inconsistency and source of Stephenson's testimony—not the prosecutor's statements about it—that inclined his jury to convict.

D. CONCLUSION.

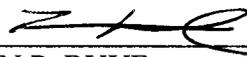
Having failed to meet his burden to prove the prosecutor clearly and unmistakably made such a flagrant and ill-intentioned comment on witness credibility that it could not have been cured by a proper jury

⁷ CP 25; RP 192.

instruction, the defendant is not entitled to the reversal requested; the jury's verdicts should be affirmed.

DATED: DECEMBER 18, 2009

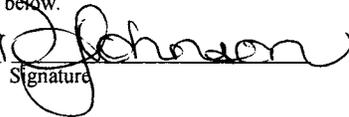
MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON P. RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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