

NO. 46287-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LOUIS PATTERSON,

Appellant.

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

The Honorable Michael Evans, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor's clear and unmistakable expression of personal opinion during closing argument denied appellant a fair trial.

2. Trial counsel's failure to object to the prosecutor's prejudicial remarks denied appellant effective representation.

Issues pertaining to assignments of error

1. Appellant was charged with attempted residential burglary. He admitted trespassing but testified he did not intend to enter the residence or commit a crime inside. During closing argument, the prosecutor repeatedly told the jury that he believed appellant had in fact planned a burglary and was guilty. Did the prosecutor's expression of personal opinion as to appellant's credibility and guilt deny appellant a fair trial?

2. Where there was no legitimate tactical reason not to object to the prosecutor's improper comments or to allow the jury to consider the prosecutor's personal opinions during deliberations, does trial counsel's failure to object and request a curative instruction constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On January 21, 2014, the Cowlitz County Prosecuting Attorney charged appellant Louis Patterson with attempted residential burglary. CP 1-2; RCW 9A.52.025; RCW 9A.28.020(1). The case proceeded to jury trial before the Honorable Michael Evans, and the jury returned a guilty verdict. CP 55. The court imposed a prison-based Drug Offender Sentencing Alternative with 27.5 months confinement. CP 65. Patterson filed this appeal. CP 72.

2. Substantive Facts

Louis Patterson was charged with attempted residential burglary after he climbed on the roof of a house on Grandview Terrace in Longview, Washington. He stipulated that he was found on the roof of the house on December 14, 2013; he was not licensed, invited, or otherwise privileged to be on the premises; he was not hired or contracted to do any jobs on the premises; and he knew he was unlawfully on the premises. CP 23-24; 144-45. While he admitted that he was trespassing, Patterson testified that he had no intent to enter the house to commit any crime. RP 199, 207.

Patterson explained that his friend Desiree Westerbee had called him that morning asking for a ride to her car. He picked her up and asked

for gas money. As they were waiting for another friend to meet them to provide some money, Westerbee asked Patterson if he wanted to look at the view from some empty houses. Patterson was new to the area and had not seen the view before, so he agreed. RP 187-88.

When they pulled into the driveway of the house on Grandview Terrace, Patterson noticed a For Sale sign with contact information on it. He had done roofing and construction work before and thought that if he saw any needed repairs, he could call the contact number and offer his services. RP 189, 205-06, 214. After walking around the house to look at the view with Westerbee, Patterson moved his truck in front of the garage and used it to climb onto the roof. RP 189, 192, 200. Patterson noticed that the roof needed some repairs, and he was checking around a window for leaks when two cars pulled into the driveway. RP 194, 196.

Charles Brandenburg got out of one of the cars and walked toward the house. He asked Patterson if he was a roofer, and Patterson told him he was. RP 199. Brandenburg said he was just moving in and did not know if the roof needed to be repaired. When he turned down Patterson's offer of help with the moving, Patterson and Westerbee left. RP 201.

Brandenburg testified that some friends owned the house and had been trying to sell it for some time. RP 55, 64. He was planning to live at the house until it sold, and he was moving in on the morning he

encountered Patterson. RP 55-56, 60, 71. Brandenburg had walked through the property with the owner the night before, and, as he was leaving, he made sure that all the doors and windows were locked. RP 56-57. The owner had mentioned that the roof might need to be repaired before she could sell the house, so when Brandenburg arrived that morning and saw Patterson on the roof, he thought the owner might have hired Patterson. RP 71. Brandenburg saw Patterson looking in the window where he was checking for leaks. RP 71.

Patterson came down from the roof to talk to Brandenburg. RP 72. Brandenburg asked Patterson if he was a roofer, and Patterson responded that he had done roofing work before. RP 74. Patterson also mentioned that he had noticed that the air conditioning system was frozen over. RP 76. As they were talking, Brandenburg saw Westerbee come from behind the house and get into Patterson's truck. RP 77. When they were done talking, Patterson got in the truck and drove away. RP 80. As the truck was leaving, Brandenburg asked his son to make note of the license plate number. RP 80.

After Patterson and Westerbee drove off, Brandenburg walked around the house. He discovered that the air conditioner had in fact frozen over as Patterson had said. RP 81. Brandenburg found that a back door was ajar, although nothing in the house seemed to have been disturbed.

RP 82, 85. He noticed that items that had been stored under the deck had been moved, and he saw muddy footprints coming around the side of the house, where it appeared someone had used the hose. RP 82-84.

After learning that the owner had not hired anyone to look at the roof, Brandenburg called the sheriff's department and provided the license plate number of the truck. RP 84, 86. A deputy identified the registered owner and address, and the next day he made a traffic stop as Patterson was driving away from the address. RP 110, 116. As the deputy activated his lights, Patterson accelerated and drove back to his residence, where he stopped the truck and spoke to the deputy. RP 116, 130. Patterson explained that he had been on the roof of the Grandview Terrace house to see whether it needed repairs, because he does roofing work. RP 136, 140. Patterson gave the deputy permission to search the truck. He found some walkie-talkies and some small tools but no roofing materials. RP 131-32.

In addition to Patterson's testimony, the defense presented testimony from several friends and acquaintances who confirmed that Patterson does construction work, roofing, and other odd jobs. RP 147, 150, 154, 158, 162, 173. He had worked on the roofs of several houses in his neighborhood over the past year. RP 147, 158, 168.

C. ARGUMENT

1. THE PROSECUTOR’S CLEAR AND UNMISTAKABLE EXPRESSION OF PERSONAL OPINION DURING CLOSING ARGUMENT DENIED PATTERSON A FAIR TRIAL.

The prosecutor, as representative of the people, is presumed to act with impartiality. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Prosecutors are “quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” Fisher, 165 Wn.2d at 746. A prosecutor’s misconduct in closing argument may deny a defendant his right to a fair trial as guaranteed by the Sixth Amendment and Article I, Section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.” In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting Monday, 171 Wn.2d at 677 (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)));

Although the prosecutor has wide latitude to argue reasonable inferences from the evidence, “[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or

falsity of any testimony or evidence or the guilt of the defendant.” United States v. Young, 470 U.S. 1, 8, 105 S. Ct. 1038, 84 L. Ed.2d 1 (1985) (quoting American Bar Association Standards for Criminal Justice 3-5.8(b)(2d ed. 1980)); see also State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (impermissible for prosecutor to express personal opinion on credibility or guilt); State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (misconduct for prosecutor to express personal opinion regarding credibility of witness or guilt of defendant). Prejudicial error occurs when it is clear and unmistakable that counsel is expressing a personal opinion rather than arguing an inference from the evidence. State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

Several times during closing argument, the prosecutor expressed his personal opinion regarding the evidence and Patterson’s guilt. First, he suggested that there were no roofing tools in the truck when Patterson was stopped by the deputy because Patterson and Westerbee had been up to no good. Even though the Grandview Terrace house was vacant, there were still appliances inside, and “I believe that’s why this car was emptied out because of the anticipation of the big items that were being targeted for this particular day, which was the 14<sup>th</sup>.” RP 249.

The prosecutor referred to the facts Patterson had stipulated to, that he did not have any permission or business at the house. RP 250. He then

argued that Patterson was not there for the view, as Patterson testified, but to scope out how to gain access to the house. He told the jury he did not believe Paterson's explanation, saying "I believe he was there looking for a job, just not a roofing job." RP 350.

The prosecutor continued to give his personal opinion of Patterson's testimony, saying,

We don't dispute that he's done roofing jobs. We don't dispute that he does odd end jobs. I'm assuming he does, but air conditioners, heating he does. Probably anything that's related to home. I'm assuming he's pretty handy with machines and tools. So, I don't doubt the statement that he is actually a roofer, has done roofing jobs. But that's not the issue.

RP 254. The prosecutor referred to his personal assumptions again to support his argument that Patterson was guilty: "I'm assuming he didn't stop [when the deputy activated his emergency lights] because of what we call a guilty conscience. He knows that this is the day after that the police were right behind him with the lights on." RP 263.

When talking about accomplice liability stemming from Westerbee's involvement, the prosecutor again told the jury what he believed:

We know that he drove Ms. Wethersbee (sic) up to the house in question.... That was how they got to the scene. We know that they were there together. We know that, at some point, they walked around the house together, because that's what he said. At some point, various items were moved. At some point, he got on the roof and she got – she was downstairs. At some point, he was

trying to get in upstairs and she was – I believe she was trying to get in downstairs. And just as the downstairs door was unlatched, that’s when Mr. Brandenburg arrived.

RP 272-73.

In Lindsay, the prosecutor told jury that he found the defendant’s testimony “funny,” “disgusting,” “comical,” and “the most ridiculous thing I’ve ever heard.” Lindsay, 180 Wn.2d at 438. He also commented that the defense theory was a “crook.” Id. These clear expressions of personal opinion as to the defendant’s credibility constituted misconduct. Id.

While not as crass as the prosecutor in Lindsay, the prosecutor in this case also unmistakably expressed his personal opinion of the evidence and Patterson’s guilt. Over and over he told the jury what he believed to be true and the assumptions he was making about Patterson’s intent. These expressions of personal opinion constitute misconduct.

Defense counsel did not object to the prosecutor’s impermissible argument. Even so, reversal is required if the prosecutor’s improper argument was so flagrant and ill-intentioned it could not have been cured by a jury instruction. Fisher, 165 Wn.2d at 747. The defendant establishes prejudice if there is a substantial likelihood the misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Washington courts have repeatedly denounced the type of argument made by the prosecutor in this case. It is well established that “a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant’s guilt, independent of the evidence actually in the case.” Glasmann, 175 Wn.2d at 706. A juror is likely to be impressed by what a prosecutor says given his position as representative of the State and the aura of special reliability he enjoys. State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001). In a more strongly worded opinion, the Ninth Circuit held, “A prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign’s representative, the jury may be misled into thinking his conclusions have been validated by the government’s investigatory apparatus.” United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992).

“Likewise, many cases warn of the need for a prosecutor to avoid expressing a personal opinion of guilt.” Glasmann, 175 Wn.2d at 706-07 (citing McKenzie, 157 Wn.2d at 53 (improper for a prosecuting attorney to express his individual opinion that the accused is guilty); State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (prohibiting statements of personal belief of a defendant’s guilt or innocence); State v. Stith, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993) (deeming a

prosecutor's comment in closing argument that the appellant "was just coming back and he was dealing [drugs] again" impermissible opinion "testimony"); State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (error for a prosecutor to tell the jury he "knew" the defendant committed the crime)).

This case law was available to the prosecutor in this case and clearly warned against the type of argument here. The misconduct, committed in the face of a well-established rule, constitutes a flagrant and ill-intentioned violation of the proper standards for a prosecutor's trial conduct. See Glasmann, 175 Wn.2d at 707.

At trial Patterson admitted to being on the roof without permission, but he explained that he was trespassing only to see if the roof might be in need of repair work he could offer to perform. Patterson testified that he did not intend to enter the house or commit any crime inside. The State's case, on the other hand, relied on an inference of intent to commit a crime. By expressing his personal opinion that Patterson's testimony was not credible, that Patterson intended to burglarize the house, and that Patterson was guilty, the prosecutor assured the jury that the State had met its burden. This intentional disregard of well-established rules regarding permissible argument was flagrant misconduct. Moreover, because the prosecutor interjected his opinion repeatedly throughout the argument, the

misconduct was so pervasive that it could not have been cured with an instruction. This prosecutorial misconduct denied Patterson a fair trial, and his conviction should be reversed.

2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S OPINION.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend, VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure affected the outcome of the case. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility). This makes sense because the purpose behind both the prohibition against prosecutorial misconduct and the right to

effective assistance is to protect the defendant's right to a fair and impartial trial. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); Reed, 102 Wn.2d at 145.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); see Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). In this case, there was no legitimate reason not to object to the prosecutor's expression of his personal opinion, given the prejudicial nature of the prosecutor's improper argument. Patterson derived no conceivable benefit from letting the jury consider the prosecutor's opinion that his testimony was not credible and that he planned to burglarize the house.

Further, if this Court rules that a curative instruction could have obviated the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such an instruction. No legitimate strategy justified allowing the prosecutor's personal opinion to influence the jury. There is a reasonable probability that counsel's error affected the verdict, and Patterson's conviction should be reversed.

D. CONCLUSION

The prosecutor's improper expression of personal opinion during closing argument denied Patterson a fair trial and requires reversal. Moreover, trial counsel's failure to object to the prosecutor's misconduct constitutes ineffective assistance of counsel. This Court should reverse Patterson's conviction and remand for a new trial.

DATED November 20, 2014.

Respectfully submitted,



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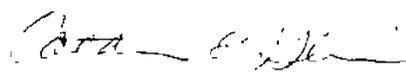
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Catherine E. Glinski  
Done in Port Orchard, WA  
November 20, 2014

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