

NO. 48259-2-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

ELMER APAEZ-MEDINA,

Appellant.

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

The Honorable Daniel L. Goodell, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The prosecutor committed misconduct by calling the defense argument “ridiculous” in rebuttal.

2. The prosecutor committed misconduct by referring to facts not in evidence in rebuttal argument.

3. Denial of appellant's motion for a mistrial based on prosecutorial misconduct denied him a fair trial.

4. The cumulative effect of the prosecutor's multiple acts of misconduct deprived Mr. Apaez-Medina of his constitutionally guaranteed right to a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. During closing argument the prosecutor expressed his personal belief in the truthfulness of the alleged victim's testimony and called the appellant's defense “ridiculous.” Did this improper argument deny the appellant a fair trial? Assignment of Error 1.

2. Did the prosecutor commit reversible misconduct during rebuttal when he referred to facts not in evidence to bolster his assertion that the alleged victim was telling the truth? Assignment of Error 2.

3. During closing argument the prosecutor expressed his

personal belief in the complaining witness's testimony, called appellant's argument "ridiculous," and started to read a letter by the complaining witness that was not in evidence. Did the court err in denying appellant's motion for a mistrial? Assignment of Error 3.

4. Did the cumulative effect of the acts of misconduct by the prosecutor require reversal where the misconduct permeated the entire closing argument? Assignment of Error 4.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural facts:**

Elmer Apaez-Medina was charged in Mason County Superior Court by information with second degree assault, alleged to be a "domestic violence incident" against a family or household member. RCW 9A.36.021(1)(a); RCW 10.99.020. Clerk's Papers (CP) 120-21.

The case came for on jury trial on October 14 and 15, 2015, before the Honorable Daniel L. Goodell. Report of Proceedings (RP)<sup>1</sup> at 22-123.

#### **2. Closing argument, motion for mistrial, and sentencing:**

In rebuttal argument, the State argued, "[defense counsel] Mr. Jones

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<sup>1</sup> The record consists of the following consecutively paginated verbatim report of proceedings: June 22, 2015, July 6, 2015, September 22, 2015, October 6, 2015, October 13, 2015, October 14, 2015 (jury trial, day 1), December 15, 2015 (jury trial, day 2),

now is trying to suggest to you that somehow that means she don't—she didn't know how she broke her nose, and that, plain and simple, is one of the most ridiculous ar—.” Mr. Jones objected and moved for mistrial. The court instructed the jury to disregard the comment by the prosecutor. RP at 107. The prosecutor continued with his argument and almost immediately stated:

The letter that Mr. Jones referred to. You saw Ms. Homan up on the stand, her testimony, and you heard her say she loves the defendant still. Obviously, those feelings overcome, but she got up there and she told the truth. What possible motive would she have to not tell the truth, to say—or to tell the truth she loves the defendant. I mean, why would she—why wouldn't she just say, oh, nothing happened? Of course that's what she would say. But she's telling the truth even though she loves him.

RP at 108-09.

The prosecution then stated:

She doesn't want to have him prosecuted, but that's not up to you. The State was the one who filed these charges. Ms. Homan didn't file these charges. The State was the one who did based upon all the evidence.

I, Donna Homan, would like for the court to accept my statement. I hereby now write—I ask for any and all—

RP at 109.

Defense counsel objected to the State's reference to Ms. Homan's letter, asking that Mr. Apaez-Medina not be prosecuted, which was not

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October 26, 2015 (motion for mistrial and sentencing), and November 11, 2015 (motion for mistrial and sentencing).

admitted into evidence. RP at 109. The court sustained the objection. RP at 109.

Counsel subsequently moved for mistrial, arguing, *inter alia*, that the state committed prosecutorial misconduct by describing the defense argument as “ridiculous” during rebuttal. RP at 107. The court reserved ruling on the defense motion and permitted the jury to complete deliberations. RP at 113. The jury subsequently found Mr. Apaez-Medina guilty as charged. RP at 119; CP 59.

Defense counsel filed a memorandum for “new trial”<sup>2</sup> on October 21, 2015, which was heard October 26, 2015. RP at 123; CP 48-52. After hearing argument, the court denied the motion for mistrial, finding that the objection was appropriate but that the court had provided a curative instruction. RP at 134, 137. The court also noted that the prosecutor’s statement was not misconduct. RP at 134. The trial court also found that the speculation of an officer who contacted Mr. Apaez-Medina later that day that he was on methamphetamine when contacted, and the prosecutor’s reference to Ms. Homan’s letter during rebuttal, did not affect the jury’s verdict. RP at 137.

The court imposed a standard range sentence. CP 27. Timely notice

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<sup>2</sup>Defense counsel’s memorandum refers to a “new trial,” but does not specifically cite CrR 7.5. The trial court considered the motion as a continuation of the motion for mistrial upon which the court had reserved ruling. RP at 113.

of appeal was filed November 3, 2015. CP 8. This appeal follows.

**2. Trial testimony:**

Elmer Apacz-Medina and Donna Homan were involved in relation and she lived with him at his house in Shelton, Washington. RP at 43. Early in the morning of June 21, 2015, she and Mr. Apacz-Medina were engaged in an argument. RP at 45-46. Ms. Homan stated that during the argument they “scuffled” and Mr. Apacz-medina, who was intoxicated, pushed her out of the garage where the argument was taking place. RP at 46, 47. She stated that after the fight she sustained a broken nose and bruises. RP at 51. After equivocating, she stated that he hit her with a pipe wrench. RP at 59. She stated that was under the influence of methamphetamine and marijuana at the time of the fight. RP at 60, 61.

Police arrived and Ms. Homan was taken to Mason General Hospital where she was treated by Dr. Mary Tran. RP at 64. Dr. Tran testified that Ms. Homan reported that she had been “beaten multiple times throughout the night by her boyfriend while she was intoxicated.” RP at 66. Dr. Tran stated that Ms. Homan had a laceration on the inside of her lower lip, and bruises on her right upper chest and collarbone, bruising on the right arm, and a broken nose. RP at 68.

Shelton Police Officer Warren Ohlson, who responded to the scene of the fight, testified that he found a pipe wrench on top of truck parked in the driveway. RP at 75. He testified that he made contact with Mr. Apaez-Medina at a house near the garage where the fight took place. RP at 75. He appeared to be intoxicated and he was transported to the hospital for medical clearance before being booked into the jail. RP at 76.

Ms. Homan testified that she still loved Mr. Apaez-Medina and wrote a letter that she was also “in the wrong” and that it would not be right if he was convicted of the offense. RP at 62.

**D. ARGUMENT**

**1. THE PROSECUTOR’S ASSERTION OF HIS PERSONAL BELIEF AS TO THE TRUTHFULNESS OF THE STATE’S KEY WITNESS AND REFERENCE TO FACTS NOT IN EVIDENCE DENIED MR. APAEZ-MEDINA HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

**a. The trial court denied Mr. Apaez-Medina's motion for mistrial.**

In his closing argument, the prosecutor told the jury that the state’s key witness—Ms. Homan— was telling the truth and did not have a reason to not tell the truth. The prosecutor argued:

You saw Ms. Homan up on the stand, her testimony, and you heard her say she loves the defendant still. Obviously, those

feelings overcome, but she got up there and she told the truth. What possible motive would she have to not tell the truth, to say—or to tell the truth when she loves the defendant? I mean, why would she—why wouldn't she just say, oh, nothing happened? Of course that's what she would say. But she's telling the truth even though she loves him.

RP at 108-09.

Defense counsel did not object to that portion of the prosecutor's improper argument. The prosecutor also called the defense “ridiculous,” at which point defense counsel objected and moved for mistrial. RP at 107. The court sustained the defense objection, but reserved on the motion for mistrial and requested briefing. RP 113. Prior to sentencing on November 3, 2015 defense counsel, relying on *State v. Lindsay*,<sup>3</sup> argued that the prosecutor's statement and reference to a letter not in evidence was prejudicial and a new trial was required. RP at 126-30. The trial court denied the motion, concluding that the prosecutor's comment and the reading of the portion of the letter was insufficient to rise to the level of requiring a mistrial. RP at 137.

**b. The prosecutor's misconduct requires reversal.**

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I,

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<sup>3</sup>180 Wn.2d 423, 326 P.3d 125 (2014).

section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct.1691, 48L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. "A "fair 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." *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *State v. Reed*, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984)). Thus, in the interest of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d at 664.

A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Belgarde*, 110 Wn.2d

504, 508, 755 P.2d 174 (1988) (citing *Reed*, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, is required. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *State v. Copeland*, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor committed misconduct in this case when he assured the jury of his personal belief in Ms. Homan's credibility and consequently, Mr. Apaez-Medina's guilt. He clearly and unmistakably expressed his opinion that Ms. Homan was telling the truth and could not have fabricated her testimony about the alleged incident. By asking the jury "what possible motive would she have to not tell the truth" and that "she got up there and she told the truth," he clearly inserted his opinion into the jury's decision-making process. It is misconduct for a prosecutor to vouch for a witness by expressing his personal belief as to the witness's truthfulness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). "Whether a witness has testified truthfully is entirely for the jury to determine." *Ish*, 170 Wn.2d at 196.

This was compounded by the prosecution by expressing his opinion that Mr. Apaez-Medina's proffered defense was "ridiculous," to which the

defense timely objected. RP at 107. The prosecutor communicated his opinion as to Mr. Medina's guilt; it is improper for the prosecutor to express an independent, personal opinion as to the defendant's guilt. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

The prosecutor's misconduct requires reversal despite defense counsel's partial failure to specifically object to the state's assurance that Ms. Holman was telling the truth. Even where defense counsel fails to object, reversal is required if the misconduct was so flagrant and ill-intentioned a curative instruction could not have obviated the resulting prejudice. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995); *Belgarde*, 110 Wn.2d at 507.

The prejudice resulting from the prosecutor's impermissible argument in this case could not have been cured. The prosecutor vouched for the credibility of the state's key witness. It was crucial to the state's case that the jury believe Ms. Homan. But the prosecutor's personal assurances that she was believable unfairly bolstered her credibility. The prosecutor's assurances created an enduring prejudice that could not have been neutralized by a curative instruction. *See State v. Sargent*, 40 Wn. App. 340, 345, 698 P.2d 598 (1985) (prosecutor's statement in closing argument that he believed the

state's witness could not have been cured with appropriate instruction and deprived defendant of a fair trial). The prosecutor's misconduct deprived Mr. Apaez-Medina of a fair trial, and his conviction must be reversed.

**c. The prosecutor engaged in prejudicial misconduct by referring to facts not in evidence during rebuttal argument.**

During rebuttal argument, the deputy prosecutor started reading from a letter—evidently written by Ms. Homan—that was not introduced as evidence. RP at 109. The prosecutor stated:

She doesn't want him prosecuted, but that's not up to you. Ms. Human didn't file these charged. The state was the one who did based upon all the evidence.

I, Donna Homan, would like for the courts to accept my statement. I hereby now write—I ask for any and all—.

RP at 109.

Defense counsel objected and the court instructed the jury to disregard the last portion of the reading by the prosecutor. RP at 109. The prosecutor promoted Ms. Homan's letter as a continuation of the improper argument—discussed in Section 1(b) above, that she was telling the truth, did not have a motive to lie, and in fact did not want him prosecuted.

Although a prosecutor has wide latitude to argue inferences from the evidence, a prosecutor commits reversible misconduct by urging the jury to

decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). This rule is closely related to the rule against pure appeals to passion and prejudice because appeals to the jury's passion and prejudice are often based on matters outside the record. *Id.*

To establish reversible prosecutorial misconduct, the defendant first bears the burden to establish that a prosecutor's conduct was improper. *State v. Emery*, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012). The defendant must then show that the improper comments resulted in prejudice that had a substantial likelihood of affecting the verdict. *Id.*

The Court reviews a prosecutor's purportedly improper remarks in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Where defense counsel objected to a prosecutor's remarks at trial, the Court reviews the trial court's rulings for abuse of discretion. *Id.* at 809.

Here, the prosecutor's reference to the letter was plainly improper. The apparent purpose was to bolster the improper argument that Ms. Homan was telling the truth and that she still loved Mr. Apaez-Medina and had even written a letter asking that he not be prosecuted. The prosecutor's reference

to the letter augmented the already improper argument that he believed that she was telling the truth. This argument was not only improper, but was based on facts not in evidence.

The act by the prosecutor of vouching for the witness's truthfulness, by terming the defendant's argument "ridiculous," and by referring to a letter that further implied that Ms. Homan was being truthful, was unfairly prejudicial and likely affected the outcome of the case. For these reasons, and in light of defense counsel's objection, the misconduct requires reversal of the conviction. *Emery*, 174 Wn.2d 741, 759-61

2. **THE CUMULATIVE EFFECT OF THE MISCONDUCT DEPRIVED MR. APAEZ-MEDINA OF A FAIR TRIAL.**

Under the cumulative error doctrine, reversal is required when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during *voir dire* required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and

truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); Here, even if the above trial errors do not individually require reversal, when combined, they cumulatively denied Mr. Apaez-Medina a fair trial and reversal is therefore warranted.

**E. CONCLUSION**

The trial court's refusal to declare a mistrial and the prosecutor's misconduct in closing argument denied Mr. Apaez-Medina a fair trial. This Court should reverse his conviction and remand for a new trial.

DATED: June 17, 2016.

Respectfully submitted,  
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

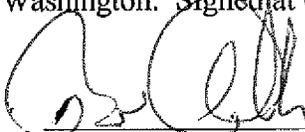
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 17, 2016.



PETER B. TILLER

**TILLER LAW OFFICE**

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