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No. 50533-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Luis Soriano,

Appellant.

Cowlitz County Superior Court Cause No. 16-1-01353-5

The Honorable Judge Marilyn K. Haan

Appellant's Reply Brief

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ARGUMENT

I. THE COURT COMMITTED REVERSIBLE ERROR BY IMPERMISSIBLY ALLOWING SPECULATIVE OPINION TESTIMONY THAT MR. SORIANO LOOKED AT OFC. GANN.

A. THE DEFENSE PROPERLY PRESERVED THE ISSUE FOR APPEAL BY OBJECTING ON SPECULATION GROUNDS.

In order to assure evidence is admitted in an orderly fashion and impermissible opinions are not improperly injected into the trial, certain procedures must be followed by trial advocates to lay proper foundations for opinion testimony. *State v. Montgomery*, 163 Wn.2d 577, 592, 183 P.3d 267 (2008). It is the duty of every trial advocate to prepare witnesses for trial. *See State v. Underwood*, 281 N.W.2d 337, 342 (Minn.1979) (prosecutor has duty to prepare State's witnesses for trial).

In normal conversation, people often use phrases like "I believe" or "it's possible." These phrases are likely to draw objections at trial because witnesses are generally not permitted to speculate or express their personal beliefs about the defendant's guilt or innocence. *Montgomery*, 163 Wn.2d at 592 (citing *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 417, 851 P.2d 662 (1993); *State v. McDonald*, 98 Wn.2d 521, 529, 656 P.2d 1043 (1983); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). An officer may not offer his opinion as a lay witness on the defendant's state of mind, when such an opinion is based upon

speculation. *State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d 960 (2002) (citing *State v. Farr-Lenzini*, 93 Wn. App. 453, 460–61, 970 P.2d 313 (1999)).

In the instant case, the defense’s objection to the officer’s impermissible, speculative opinion on speculation grounds is the same as the defense objecting on improper opinion grounds. Appellate courts have considered an objection on speculation grounds to be akin to an objection on improper opinion grounds. Here, as in *Farr-Lenzini*, the officer’s improper opinion invaded the province of the jury. This is because it was based on speculation as to what the officer observed. His opinion went directly to the essential elements of knowledge and willfulness. *See* RP 62 (“[T]he rider of the motorcycle looked back over his shoulder. I’m assuming that he was looking back to see if I was actually behind him”); WPIC 10.05 (“A person acts willfully [as to a particular fact] when he or she acts knowingly [as to that fact]”).

Where the opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting the opinion. *Farr-Lenzini*, 93 Wn. App. at 462–63. A defendant’s state of mind is a core issue when the charge is attempting to elude because the crime has an element of willfulness. *Id.* Here, the officer expressed that he thought Mr. Soriano was looking back to see if the officer was behind him. This

implied to the jury that Mr. Soriano had knowledge of the officer being behind him and that his subsequent actions were him willfully failing to bring his motorcycle to a stop. This invaded the province of the jury regarding the elements of willfulness and knowledge.

Given the above, the court committed reversible error by admitting Ofc. Gann's improper, speculative opinion.

II. THE COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ALLOW MR. SORIANO TO TESTIFY TO PRIOR LAW ENFORCEMENT CONTACTS.

Appellant relies on its previous briefing for this section.

III. THE STATE COMMITTED FLAGRANT PROSECUTORIAL MISCONDUCT BY STATING THAT MR. SORIANO'S TESTIMONY WAS "BALONEY".

The State's use of the term "baloney" regarding Mr. Soriano's testimony has the same prejudicial effect as calling the defendant a liar. *See State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984) (prosecutorial misconduct to call defendant a liar during closing arguments). "Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state." *Reed*, 102 Wn.2d at 146-147 (quoting *People v. Fielding* 158 N.Y. 542, 547, 53 N.E. 497, 46 L.R.A. 641 (1899)).

In other jurisdictions, courts have held that it is misconduct to accuse the defendant of lying or to call the defendant a liar. *See United States v. Drummond*, 481 F.2d 62, 63-64 (2d Cir.1973) (holding that characterization of the accused's defense as "preposterous" and calling the defendant and his witnesses "liars" was misconduct); *Williams v. State*, 803 A.2d 927, 930 (Del.2002) (holding prosecutor's remarks characterizing the defendant as lying were "patently improper"); *State v. Davis*, 275 Kan. 107, 61 P.3d 701, 710 (2003) ("It is improper for a prosecutor to accuse a defendant of lying."); *People v. Skinner*, 298 A.D.2d 625, 747 N.Y.S.2d 857, 858-59 (2002) (holding prosecutor's repeated "references to defendant being a liar" and characterization of defendant's expert "as a puppeteer with defendant as his puppet" was misconduct); *United States v. Smith*, 982 F.2d 681, 684 n. 3 (1st Cir. 1993) (government conceded that it impermissibly used pejorative language in repeatedly characterizing the testimony of the defendant and his witness as lies); *State v. Graves*, 668 N.W.2d 860, 876 (2003) (Iowa has joined those jurisdictions holding it improper to call the defendant a liar); *State v. Carey*, 695 N.W.2d 505 (2005) (prosecutor's statements that "It didn't happen the way the defendant said it did. That was a bunch of baloney." are misconduct).

It is clear from the case law cited that a prosecutor commits misconduct when they state that the defendant was a liar. The question that the appellate court needs to answer is whether the prejudicial effect could not have been cured with an instruction. The State's citations in its briefing on this issue is mostly concerned with whether prejudice had been established to that level – not whether the prosecutor's comments were improper. It would be error by the trial court to allow the prosecutor to make such impermissible comments in closing if timely objected to; however, the consequence of that impropriety on appeal depends on the level of prejudice to the defendant.

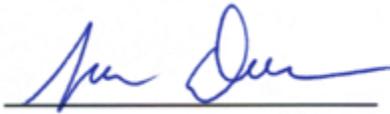
In the instant case, the prosecutor essentially called Mr. Soriano a liar during closing arguments by saying that Mr. Soriano's testimony was "baloney". This is a flagrant appeal to the passion and prejudice of the jury. This prejudice of this appeal was further compounded by the prosecutor using the dismissive personal phrase "I mean, come on" when referring to Mr. Soriano's testimony and describing what parts of Mr. Soriano's testimony the prosecutor would personally believe or not believe by stating "I'll go along with that". RP 224. The jury was irreparably prejudiced by the prosecutor's personal opinion that Mr. Soriano was not to be trusted.

Given the foregoing reasons, the State's flagrant and ill-intentioned statements in closing argument could not have been cured with an instruction. Accordingly, Mr. Soriano's conviction must be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this reverse the conviction and remand to the Superior Court for a new trial.

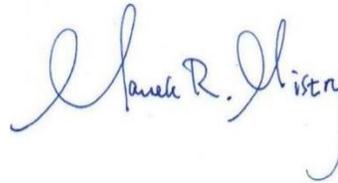
Respectfully submitted on June 11, 2018,



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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 11, 2018.



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