

No. 51179-7-II

FILED
COURT OF APPEALS
DIVISION II

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IN THE
WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON
BY AP
DEPUTY

STATE OF WASHINGTON,

Respondent

v.

JAMES BITNER,

Appellant.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

JAMES BITNER
Stafford Creek Corr.Center
Unit H-1-A94U
191 Constantine Way
Aberdeen, WA 98520

P/M: 8/2/18

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I. ASSIGNMENTS OF ERROR

1. Prosecutorial Misconduct Deprived Appellant of a Fair Trial when the Prosecutor: (1) Bolstered the Credibility of Law Enforcements Investigation; (2) Argued Evidence Not Admitted at Trial.

II. ISSUES PRESENTED ON APPEAL

1. Does Prosecutorial Bolstering Occur When the Prosecution asks the Jury to Find Law Enforcements Investigation Credible?

2. Does a Prosecutor Commit Misconduct by Arguing Evidence (hearsay) Supports its Case Which Was Not Admitted a Trial?

III. Statement of the Case

(a) Relevant Facts & Procedural History

Appellant was charged and convicted in Lewis County Superior Court with 1-one Count of Unlawful Possession of a Controlled Substance with intent to Deliver. CP 34, 66 The jury also returned a special verdict that the crime was committed within a 1000 feet of a school bus stop. CP 34, 66

(b) Substantive Facts

In the interest of judicial economy appellant incorporates the statement of the case as found

in the Opening Brief of Appellant at 2-3, and other facts are developed in argument below.

IV. Argument

A. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution. Estelle v. Williams, 425 U.S. 501, 503 (1976); In Re Glassmann, 175 Wn.2d 696, 704 (2012). 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 Id., at 704.

Prosecutorial misconduct may deprive an accused of his constitutional right to a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65 (1978); State v. Case, 49 Wn.2d 66 (1956). A prosecutor as a quasi-judicial officer and representative of the state, must act impartially and in the interests of justice. Charlton, Id. State v. Huson, 73 Wn.2d 660, 663 (1968),

cert. denied, 395 U.S. ___, (1969). A prosecutor must always remember that he or she does not conduct a vendetta when trying a case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that all inadmissible evidence and improper argument be avoided. State v. Torres, 16 Wn.App. 254, 263 (1976).

The United States Supreme Court has counseled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction ... [W]hile he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935); U.S. v. Young, 470 U.S. 1, 7 (1985). Generally, the use of such methods is grounds for mistrial or reversal of a conviction if it results in an unfair trial, violating the due process clause of the Fourteenth Amendment of the U.S. Constitution.

Although, a prosecutor has wide latitude to argue all reasonable inferences from the

evidence, State v. Thorgerson, 172 Wn.2d 438, 448 (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," State v. Casteneda-Perez, 61 Wn.App. 354, 363 (1991); State v. Huson, 73 Wn.2d 660, 663 (1968).

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutors conduct was both improper and prejudicial. Thorgerson, Id., at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. Id.; State v. Ish, 170 Wn.2d 189, 195 (2010); State v. Dhaliwal, 150 Wn.2d 559, 578 (2003).

It is misconduct for a prosecutor to express a personal belief as to the credibility of a witness. State v. Allen, 57 Wn.App. 134, 142 (1990). It is also misconduct for a prosecutor to personally vouch for a witness. State v. Sargent, 40 Wn.App. 340, 343-44 (1985), affirmed

on other grounds, 111 Wn.2d 641 (1988).

Prosecutorial vouching may occur when the prosecutor either (1) places the prestige of the government behind the witness, or (2) implies that information not admitted support's the witness testimony. United States v. Wallace, 848 F.2d 1464, 1473 (9th Cir. 1988).

(i) The Prosecution Improperly Bolstered the Credibility of Law Enforcement.

During closing argument the prosecutor stated that:

So what I want to talk about is the fact that the informant isn't here, and but I want to talk to you as if she was here, and I want to tell you what I would have said if she was here. And I'm not asking you to find the informant credible. I'm asking you to find the controlled buy procedures credible.

So, again, we have the controlled buy procedures. That's what I'm asking to find credible.

... I'm asking you to find these controlled buy procedures credible, ...

RP 255, 262, 275

The prosecutor's closing argument here, was flagrant and ill intentioned misconduct which undermined the

presumption of innocence, encouraging the jury to decide the case on grounds other than reasoned evaluation of the evidence, which no curative instruction could cure. See State v. Fleming, 83 Wn.App. 209, 214-16, (1997). The prosecutors' conduct also invaded the province of the jury, See State v. Walden, 69 Wn.App. 354, 360, (1991); and interjected the prosecutor's expression of his personal opinion on law enforcements credibility and truthfulness. See Case, Id.; State v. Reed, 102 Wn.2d 140, 145-46 (1984).

The comments also improperly bolstered law enforcement's credibility, implicating petitioner's right to a fair trial. Young, 470 U.S. at 18-19; ("the prosecutor's vouching for the credibility of witnesses carries with it the imprimatur of Government and may induce the jury to trust the Governments judgment rather than its own view of the evidence").

Because no curative instruction could cure the prosecution's improper bolstering of law enforcement, appellant's conviction must be reversed. See State v. Belgard, 110 Wn.2d 504 (1988)(even though not objected to, prosecutor's argument required reversal).¹

¹ Appellant's trial counsel's failure to object to the prosecutor's closing argument constitutes ineffective assistance of counsel. See Weygant v. Ducharme, 774 F.2d 191 (9th Cir. 1985).

(ii) The Prosecutor Improperly Argued Hearsay Evidence Which was not Admitted at Trial Supported its Case.

In this case, the Centralia Police Department used a confidential informant to set up the controlled buy. RP 153-154. The informant did not appear or testify at trial. RP 102-103, 153. During closing arguments the prosecutor argued:

. . . Had the informant been here and had she testified that while in the vehicle the defendant gave her the drugs, that would be direct evidence. She was there. That's something that she's observed happening.

. . . it's just as good as having the informant come in and saying, "I got the drugs from the defendant," because that's the only place she could have gotten them.

RP 261, 263.

Here, the prosecutor interjected hearsay evidence into the trial which was not only not admitted during trial, but was in fact evidence which is inadmissible. State v. Boehning, 127 Wn.App. 511 (2005)(finding improper for prosecutor to argue inadmissible hearsay

statements); U.S. v. Flores-Chapa, 48 F.3d 156, 162 (5th Cir. 1995)(plain error when prosecutor referred to excluded hearsay evidence in closing argument).

The prejudice which resulted here is obvious, the prosecutor was able to get the alleged statements of the informant into evidence, and the informant did not appear at trial. See Crawford v. Washington, 124 S.Ct. 1354 (2004), affecting appellant's Sixth Amendment right to confrontation.

Finally, the prosecutors misconduct as to both of the above issues was inherently prejudicial, so much so that it would most likely impress itself upon the minds of the jurors. After all, there was no direct evidence supporting the prosecutions case that a delivery occurred, and the informant, as noted, did not appear at trial. See State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965); State v. Davenport, 100 Wn.2d 757, 762 (1994)("[T]he question to be asked is 'whether there was a 'substantial likelihood'

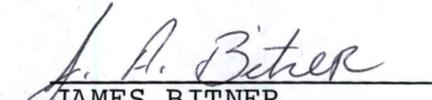
the prosecutor's comments affected the verdict.");
State v. Emery, 174 Wn.2d 741, 760-61 (2012).

V. Conclusion

For the reasons stated herein, the Court should reverse appellant's conviction and remand for a new trial.

DATED this 15th day of August, 2018

Respectfully submitted,



JAMES BITNER
Appellant

Certificate of Service

I, JAMES BITNER, declare, certify and state under penalty of perjury under the laws of the United States of America and of the State of Washington that on the 1st day of August, 2018 I deposited into the United States Mail (postage pre-paid) a copy of APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW: addressed to: LEWIS COUNTY PROSECUTING ATTORNEY, 345 W. Main Street, 2nd floor, Chehalis, WA 98532-1900.

J. A. Bitner
SIGNATURE OF PETITIONER

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STATE OF WASHINGTON
BY [Signature]
DEPUTY