

**FILED**

OCT 21 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA No. 29926-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

NICHOLAS A. LIMPert, Appellant.

---

BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

A. The deputy prosecutor committed misconduct by introducing evidence vouching for the credibility of co-defendant Robert McNabb's trial testimony, thus requiring a new trial.

B. The State's evidence was insufficient to support Nicholas A. Limper's conviction for first degree criminal trespass.

### .Issues Pertaining to Assignments of Error

1. Did the deputy prosecutor commit misconduct by introducing evidence vouching for the credibility of co-defendant Mr. McNabb's trial testimony? (Assignment of Error A).

2. Was the evidence sufficient to support a finding of guilt when the State failed to prove that Mr. Limpert entered or remained in the garage unlawfully? (Assignment of Error B).

## II. STATEMENT OF THE CASE

Mr. Limpert, along with co-defendant Robert McNabb, was charged by information with one count of second degree burglary involving the garage of Scott and Stephanie Evans. (CP 9). The case proceeded to jury trial.

On February 7, 2011, Spokane Police Officers Jeremy McVay and Ryan Snider got burglary-in-progress calls for 4440 N. Cincinnati. (Trial Vol. 1 RP 33-34, 44). After a foot pursuit, Officer

McVay apprehended Mr. Limpert. (*Id.* at 34-36). Robert McNabb was also detained by another officer. (*Id.* at 41, 45). Officer Snyder talked with the victims, Scott and Stephanie Evans. (*Id.* at 44-45). Both identified Mr. Limpert as one of the men involved in the burglary. (*Id.* at 46, 61). The Evans had seen two people outside trying to get into the unattached garage. (*Id.* at 60, 76). Mr. Evans also identified Mr. McNabb. (*Id.* at 82).

Ms. Evans had told her husband someone was breaking into their garage. (Trial Vol. 1 RP 76). Mr. Evans saw two men with a long pry bar trying to get in. (*Id.*). He saw Mr. Limpert go into the garage, while the other man, Mr. McNabb, talked on a phone. (*Id.* at 79-80). Mr. Limpert came out and dropped a bag on the ground. (*Id.* at 80). As the police were arriving, Mr. Limpert jumped the fence. (*Id.* at 82). Mr. Evans said he did not know him. (*Id.* at 86). A drill was inside the dropped bag. (*Id.* at 50). Mr. Evans said the drill was his and was bought at Double Eagle Pawn around the end of January. (*Id.* at 63, 83, 84).

Pursuant to a plea deal, Mr. McNabb testified against his co-defendant, Mr. Limpert. (Trial Vol. I RP 115). He met up with him the night of February 6, 2011. (*Id.* at 115). Mr. Limpert got beat up earlier, had gone to the hospital, and got out in the early morning of

February 7. (*Id.* at 116-117). He and Mr. McNabb then smoked some meth. (*Id.*) Mr. Limpert said he was going to get a stereo system for his car. (*Id.* at 119, 120). He got gloves, pliers, and a screwdriver. (*Id.* at 120). They went over to Mr. Evans's place. (*Id.* at 121).

The two men walked by the driveway; Mr. Limpert knocked on the door. (*Id.* at 123-124). He asked Mr. McNabb to call Justin, the guy who drove them there. (*Id.* at 125). Mr. Limpert went into the garage and came out with a bag. (*Id.* at 126). Justin told Mr. McNabb the cops were there. (*Id.*) Mr. Limpert and Mr. McNabb jumped the fence. (*Id.*) Mr. McNabb ran into the police, got detained, made up a story, and said he did not know Mr. Limpert. (*Id.* at 127-128). He later changed his story, said he did know Mr. Limpert, and they were on their way to Labor Ready. (*Id.* at 128). Mr. Limpert told Mr. McNabb that Scott Evans was one of the guys who jumped him earlier. (*Id.* at 130). That was why they went to his house to retrieve Mr. Limpert's stuff. (*Id.* at 135).

Mr. Limpert's brother, Christopher, testified he knew Mr. Evans and had smoked meth with him in his garage. (Trial Vol. 2 RP 195, 197). He said the drill was his and he had not loaned it to Mr. Evans. (*Id.* at 203, 204).

Mr. Limpert testified in his own behalf. He acknowledged contact with the police in the early morning of February 7, 2011. (Trial Vol. 2 RP 214). Mr. Limpert said he had been pistol-whipped, beaten, tied up, and robbed at the Airway Express Inn the day before, February 6. (*Id.* at 214-233). Scott Evans was one of the men who did it. (*Id.* at 219, 222). The front passenger window of Mr. Limpert's car had been broken out and the inside stripped and his stuff gone, including a \$10,000 stereo system. (*Id.* at 234-235). He escaped and eventually ended up at his father's apartment around 4 or 5 a.m. on February 7 after getting medical treatment at Holy Family Hospital. (*Id.* at 232-239).

Mr. Limpert left to go to Mr. Evans' home because he knew that was where his tools and stuff were. (Trial Vol. 2 RP 239-240). He had been in the garage numerous times before. (*Id.* at 241, 242). Mr. Limpert would buy heroin and meth from Mr. Evans. (*Id.*). He went there to get his own stuff and thought it was OK to do so as he had permission to be in the garage. (*Id.* at 251, 287). Mr. Limpert ran from the cops because he was afraid of them. (*Id.*).

After the defense rested, the court held a CrR 3.5 hearing to determine the admissibility of Mr. Limpert's statements for use in the State's rebuttal. (Vol. 3 RP 322-329). The statements

essentially corroborated Mr. Limpert's testimony that he had been beaten up. (*Id.* at 324, 328). The defense agreed the statements were admissible as they were volunteered. (*Id.* at 332). On rebuttal, Officers McVay and Sandra McIntyre said Mr. Limpert had obviously been assaulted. (*Id.* at 336, 337, 342, 345).

The court gave instructions on the lesser included offense of first degree criminal trespass. (CP 89, 90). There were no exceptions to the court's instructions. (Trial Vol. 3 RP 375). The defense reminded the court that an objection to improper vouching had been lodged against the State's eliciting testimony from Mr. McNabb that he was to testify truthfully under the plea agreement and vouching should not be allowed in the State's closing. (*Id.* at 376). The State agreed there would be no such vouching in its argument. (*Id.* at 377).

The jury found Mr. Limpert not guilty of second degree burglary, but guilty of the lesser included offense of first degree criminal trespass, a gross misdemeanor. (CP 94, 95). As it can do with misdemeanors not subject to the SRA, the court sentenced Mr. Limpert to 365 days consecutive to a sentence of one year plus one day that he was already serving on another conviction. (Trial Vol. 3 RP 440-442; CP 111). This appeal follows. (CP 115).

### III. ARGUMENT

A. The deputy prosecutor committed prejudicial misconduct by introducing evidence vouching for the credibility of co-defendant Robert McNabb's trial testimony.

Due process ensures a criminal defendant's right to a fair trial. U.S. Const. amends. V, VI, XIV; Const. art. 1, §§ 3, 22. As a quasi-judicial officer, the prosecutor has the duty to act impartially in the interest only of justice and to seek a verdict free from prejudice and based on reason. *State v. Reed*, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984) (citing *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)). The defendant's constitutional right to a fair trial may be violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 664-65. 585 P.2d 142 (1978). The only fair trial is a constitutional trial. *Id.*

A prosecutor commits misconduct by vouching for the credibility of witnesses, whether by putting the prestige of the office behind the witness or suggesting information not presented to the jury supports the witness's testimony. *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011). The truthfulness of a witness is to be determined solely by the jury. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

In *Ish*, the Supreme Court considered whether the prosecutor's reference to a witness's promise to testify truthfully amounted to prosecutorial vouching. 170 Wn.2d at 195 (citing *State v. Ish*, 167 Wn.2d 1005 (2009)). Ish defended against charges of first degree murder and second degree felony murder by claiming he had not formed the requisite mental state for either crime as shown by his taking drugs along with his bizarre behavior. 170 Wn.2d at 192. The State introduced evidence to show Ish had formed the required mental state for both crimes:

Prior to trial, the State entered into a plea agreement with Ish's jail cellmate, Otterson. Otterson had been charged with first degree robbery, second degree theft, and second degree assault in another matter. In return for Otterson's testimony at Ish's trial, the State agreed to, among other things, reduce the charges against Otterson to a single charge of second degree robbery and to recommend a reduced sentence. . . . Otterson testified that while in jail, Ish told him details he remembered about the crime but said that "he was going to just say he didn't remember anything at all that happened that night, just like it never happened." . . . Otterson's testimony was offered on the issue of Ish's state of mind when he assaulted and killed Hall. 170 Wn.2d at 192-93.

The plea agreement between the State and Otterson called for him to provide "a complete and *truthful* statement," to "testify *truthfully*," and to and to "have told the *truth*, to the best of his knowledge. 170 Wn.2d at 193 (italics by the court). Over defense

objection, the trial judge concluded the State could establish the terms of the plea agreement during direct examination, including its requirement that Otterson would tell the truth while testifying. *Id.* at 193-94. The prosecutor asked Otterson with regard to exchanging testimony in the case, what type of testimony he was offering. Otterson replied, "Truthful testimony." *Id.* at 194. The defense did not object to this questioning. *Id.*

Here, the deputy prosecutor asked Mr. McNabb, a co-defendant with Mr. Limpert in the same case, whether he had been offered a deal for his testimony. (Trial Vol. 1 RP 114-115). Mr. McNabb acknowledged he had and he was going to plead guilty to a lesser charge, second degree criminal trespass, with credit for time served. (*Id.* at 115). The prosecutor then questioned Mr. McNabb on redirect:

Q. So, Mr. McNabb, when you were offered the deal by the State for your testimony today, did I tell you that you had to testify to a certain set of facts and did I tell you to testify truthfully?

[Defense counsel]: Objection, Your Honor. That's improper vouching.

THE WITNESS: Truthful.

THE COURT: Overruled.

THE WITNESS: Truthfully. (Trial Vol. 1 RP 154).

The defense asked no further questions. (*Id.*).

As in *Ish*, Mr. Limpert contends the deputy prosecutor engaged in improper vouching when, over defense objection that was overruled by the court, she referenced the plea agreement to testify truthfully. By pointing to the agreement where Mr. McNabb promised to testify truthfully in return for the reduced charge and sentence, the prosecution was telling the jurors they should believe Mr. McNabb. The court in *Ish* held that the State should not have been allowed to ask Otterson about his promise to testify truthfully during direct examination as it was irrelevant and had the potential to prejudice the defendant by placing the prestige of the State behind Otterson's testimony. 170 Wn.2d at 199.

On cross examination of Mr. McNabb, defense counsel asked him if he was facing a sentence of 17-22 months if he were convicted and whether that was something he thought about in deciding whether to testify or not. (Trial Vol. 1 RP 134). The questioning went to his reason for accepting the plea deal, but counsel did not attack Mr. McNabb's credibility because of it. Mr. Limpert thus did not open the door for the State to point to the requirement in the agreement of giving truthful testimony. See *Ish*, 170 Wn.2d at 198-99. The deputy prosecutor committed

misconduct. *Id.* at 199; see also *State v. Green*, 119 Wn. App. 15, 23-24, 79 P.3d 460 (2003), *review denied*, 151 Wn. 2d 1035, *cert. denied*, 543 U.S. 1023 (2004).

To prevail on this claim of prosecutorial misconduct, Mr. Limpert must show the comments were improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). The State should not have been allowed to ask Mr. McNabb about his promise to testify truthfully when his credibility was not attacked through the plea agreement. *Ish*, 170 Wn.2d at 199. The trial court abused its discretion by overruling the defense objection. *Id.* at 195-96. In order to show the second prong of prejudice, Mr. Limpert must prove there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006).

Mr. McNabb was a co-defendant along with Mr. Limpert on the second degree burglary charge. There is no dispute they were both present at the Evans's home. Mr. Limpert said he had permission to get his stuff in the garage. Mr. McNabb testified to the contrary, which certainly contributed to the jury's convicting Mr. Limpert of first degree criminal trespass. In these circumstances, the State's misconduct in introducing evidence that his plea deal

called for him to testify truthfully had a substantial likelihood of affecting the jury's verdict. Aside from the police officers, the trial revolved around witnesses and a defendant who had self-admitted lifestyles involving drugs and crime. The State bolstered Mr. McNabb's testimony with his plea agreement promise to be truthful, which further suggested it had some independent way of ensuring he complied with the terms of the deal. *Ish*, 170 Wn.2d at 198. The misconduct cannot be characterized as harmless error and the defense timely objected. Mr. Limpert should get a new trial.

B. The evidence was insufficient to support a finding of guilt for first degree criminal trespass when the State failed to prove beyond a reasonable doubt that Mr. Limpert entered or remained in the garage unlawfully.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005). The defendant admits the truth of the

State's evidence and all reasonable inferences that can be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).

In instruction 16, the court instructed the jury that “[a] person commits the crime of criminal trespass in the first degree when he or she knowingly enters or remains unlawfully in a building. (Trial Vol. 3 RP 387; CP 89). In relevant part, instruction 17 stated:

To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements must be proved beyond a reasonable doubt:

- (1) that on or about the 7<sup>th</sup> day of February, 2011, the defendant knowingly entered or remained in a building;
- (2) that the defendant knew that the entry or remaining was unlawful; and
- (3) that this act occurred in the state of Washington.

(Trial Vol. 3 RP 387; CP 90).

The only element at issue is whether Mr. Limpert knew the entry or remaining was unlawful. RCW 9A.52.070. The court instructed the jury in instruction 14:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

(Trial Vol. 3 RP 386; CP 87).

Mr. Limpert did not know his entry or remaining in the garage was unlawful. Thus, the only way for the jury to find he acted knowingly was to decide that a reasonable person in the same situation would believe he was there unlawfully. But there is neither evidence nor a reasonable inference from it that a reasonable person would believe he was unlawfully at the garage. Mr. Limpert testified he had permission to be there. (Trial Vol. 2 RP 244, 251). He admitted knocking on the Evans's laundry room door and garage door. (*Id.* at 243, 247-48). The area was lit up by a flood light. (*Id.* at 245). The only information Mr. Limpert had was that he had permission to go to the Evans's garage and get his stuff. A reasonable person with such information would believe he had permission to be there. The State failed to prove beyond a reasonable doubt the essential element of an unlawful entering or remaining in the garage. Mr. Limpert's conviction of first degree criminal trespass must be reversed and the charge dismissed. *Green, supra.*

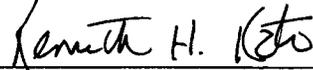
#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Limpert respectfully urges this Court to reverse his conviction of first degree

criminal trespass and dismiss the charge or, in the alternative, grant him a new trial.

DATED this 21<sup>st</sup> day of October, 2011.

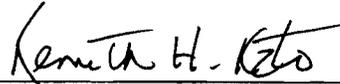
Respectfully submitted,



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#### CERTIFICATE OF SERVICE

I certify that on October 21, 2011, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Nicholas A. Limpert, #338607, PO Box 769, Connell, WA 99326, and by e-mail, as agreed between counsel, on Mark E. Lindsey at KOWens@spokanecounty.org.



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