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Court of Appeals
Division III
State of Washington

29926-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS A. LIMPERT, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I.

APPELLANT'S 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 [sic] conviction for first-degree criminal trespass.

II.

ISSUES PRESENTED

A. Did the prosecutor introduce evidence vouching for a witness' credibility?

B. Did the defense counsel "open the door" to the issue of Mr. McNabb's plea bargain?

C. Did the State present sufficient evidence for a rational trier of fact to find the defendant guilty of first-degree criminal trespass?

III.

STATEMENT OF THE CASE

The defendant and Robert McNabb, a co-defendant were charged by information filed in Spokane County Superior Court with Second Degree Burglary. CP 9.

On February 7, 2011, Mr. Scott Evans was alerted by his wife that someone was breaking into his detached garage. RP 76. Mr. Evans looked outside and saw two men with a long pry bar trying to get into his garage. RP 76. Mr. Evans identified one of the two men as the defendant. RP 77. Unable to gain entrance to the main door the pair walked around the side of the garage and pulled off a sheet of plywood that they could pull off. RP 78. Mr. Evans watched as the defendant pulled off the plywood while his partner talked on a cell phone. RP 78. Mr. Evans recalled that the police arrived five minutes after he made a call to 911. RP 79. Mr. Evans testified that the defendant went inside the garage two different times approximately 20 seconds for the first entry and 10 seconds for the second entry. The defendant dropped a bag on the outside of the garage between the first and second entries. RP 80. It was during the second entry that the police arrived. RP 80.

When police arrived both individuals jumped over a back fence. RP 82. Mr. Evans recalled that the police took him to the location where

police had detained the two individuals and Mr. Evans was able to positively identify both persons. RP 82. Mr. Evans was informed by police that they had found a bag containing a drill. RP 83. Mr. Evans recalled purchasing that drill at the end of January. RP 84.

Mr. Robert McNabb testified that he met up with the defendant on the night before the incident and the pair were smoking methamphetamine. RP 116-117. Mr. McNabb stated that the defendant told him that he was trying to get automotive stereo equipment. RP 120. Mr. McNabb stated that a third person had driven the defendant and Mr. McNabb to Scott Evans' residence. RP 121.

According to Mr. McNabb, the defendant went to the door of the garage and knocked on the door. RP 124. The door turned out to be locked so the defendant went to an area of the garage that appeared to be easier to get into. RP 124. Mr. McNabb testified that the defendant entered the garage through some covering plastic. RP 125-26. The defendant handed the tool bag containing the drill to Mr. McNabb. RP 126. After giving the drill to Mr. McNabb the defendant returned to the garage. RP 126. At this point the pair became aware that police were arriving and they jumped over a fence. RP 126.

Mr. McNabb testified that he jumped the fence in an attempt to get away from police as he suspected he was in trouble. RP 127. Mr.

McNabb walked up to the police and made up stories regarding why he was in that area at that time of day. RP 127-128.

Mr. McNabb was charged as a co-defendant and worked out a plea negotiation with the State in which Mr. McNabb would plead guilty to Second Degree Trespass. RP 115, 154.

The defendant testified extensively regarding a number of alleged events. RP 184-291. While not presenting his version of events in a coherent fashion, the defendant did claim that Mr. Evans' and other members of a gang had assaulted the defendant and taken items from his car. Essentially, the defendant attempted to convince the jury that the stolen drill had belonged to the defendant, but the defendant presented no clear theory on how the drill ended up in Mr. Evans' garage. Likewise, the defendant presented no clear explanation for why he felt justified in entering Mr. Evans' garage.

The jury found the defendant not guilty of the charged crime of Second Degree Burglary. RP 433. However, the jury found the defendant guilty of the lesser-included crime of First Degree Criminal Trespass. RP 434.

IV.

ARGUMENT

A. THE PROSECUTOR DID NOT ENGAGE IN IMPROPER "VOUCHING" WHEN SHE ELICITED TESTIMONY THAT THE WITNESS' PLEA BARGAIN HAD INCLUDED THE REQUIREMENT FOR TRUTHFUL TESTIMONY.

There was no improper "vouching" in this case. "Vouching" was defined by the Washington State Supreme Court in *State v. Thorgerson,* 172 Wn.2d 438, 258 P.3d 43 (2011). Improper vouching occurs when the prosecutor expresses a *personal belief* in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). (emphasis added) Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact. *Id.* at 196.

At no point did the prosecutor express a personal belief regarding the witness' truthfulness. By the Washington State Supreme Court's definition, no improper vouching occurred in this case.

B. THE DEFENDANT DECISIVELY "OPENED THE DOOR" BY INQUIRING REPEATEDLY DURING CROSS EXAMINATION REGARDING THE WITNESS' PLEA BARGAIN.

The defendant claims that the prosecutor purposefully elicited "vouching" testimony from Mr. McNabb. The characterization used by

the defendant in his briefing is somewhat misleading. The defendant correctly points out that the deputy prosecutor asked Mr. McNabb whether he had been offered a "deal" for his testimony. Brf. of App. 8.

Then the defendant puts some "spin" on the facts stating that after Mr. McNabb acknowledged he was going to plead guilty to a lesser charge with credit for time served, the defendant mischaracterizes the record by claiming that the prosecutor then asked about Mr. McNabb's deal including truthful testimony. RP 8.

The defendant's brief does mention the fact that the truthfulness questioning was on *redirect*, but the defendant's brief reads as if the prosecutor asked Mr. McNabb about the plea bargain (minus any truthfulness agreement) and immediately thereafter elicited testimony from Mr. McNabb regarding truthfulness. The net effect of the defendant's brief is to make it appear the prosecutor simply elicited truthfulness testimony from the witness with no justification.

The actuality of what occurred at trial is different than what the defendant presents in his appellate brief. The defendant in his characterizations skips over the defense counsel's entire cross-examination of the witness and how the defense counsel impugned Mr. McNabb's testimony and asked Mr. McNabb, not once, but twice about his plea bargains. These defense questions occurred between the

prosecutor's first mention of the plea bargain and the testimony occurring on *redirect* after the defense had attacked Mr. McNabb.

> To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

The defendant asked Mr. McNabb on two separate occasions about his plea bargain. On the first occasion defense counsel stated:

> Q. Okay. Now, we talked a little bit about your deal. And I want to talk just a little more about that. You are facing a standard range sentence in this case of 17 to 22 months in prison right?
>
> A. Yeah.
>
> Q. If convicted you would have spent 17 to 22 months in prison?
>
> A. Yep.
>
> Q. Did that weigh on you when deciding whether or not to testify against Mr. Limpert?
>
> A. I found out like, when I got in the pretrial and talked to my attorney. I found out like, a few days after that that—how much time I would be serving.

> Q. OK. But that was something that you thought about when you decided whether or not testify today, right?
>
> A. Yep.
>
> Q. And—OK. You didn't want to do 17 to 22 months in prison, right?
>
> A. No.

RP 134.

> On the second occasion the witness was asked:
>
> Q. Last part of your deal. I kind of want to go back to this. Facing prison sentence. You get credit for time served and a misdemeanor. And you were also allowed to get out of jail, go home and get dressed up for court, right?

RP 153.

So, trial defense counsel discussed Mr. McNabb's testimony but left out the part about the agreement to testify truthfully. Thus, the defense counsel placed a partial truth before the jury, leaving out an important point. The defendant had clearly opened the door to questions surrounding the witness' plea negotiation. The defendant's question on cross-examination attempted to insinuate that the witness' testimony was "shaded" by his desire not to go to prison for a lengthy stretch. The prosecutor was entitled to elicit testimony to counter the insinuations that the defense wished to leave with the jury.

It would have been highly unfair to allow trial defense counsel to cast Mr. McNabb's plea bargain as a "less than honorable" agreement and at the same time prevent the State from mentioning that the agreement for testimony was an agreement for truthful testimony.

The defendant claims that he did not open the door as the defendant did not attack Mr. McNabb's credibility. Brf. of App. 9. The defense went through what Mr. McNabb said to police and stated, "None of that's true though, right?" RP 132. Defense counsel challenged the witness regarding telling the police that the defendant carried wire cutters. RP 133. The unstated purpose of defense counsel's cross-examination of Mr. McNabb was to insinuate that Mr. McNabb would say anything to keep from going to prison for a long time.

The defendant misinterprets *State v. Ish, supra* on this issue, claiming that *Ish* applies to this case and supports the defendant's arguments on "vouching." This is incorrect. In *Ish* the State introduced testimony of a witness' plea agreement to testify truthfully, while the witness was testifying on *direct*. That did not happen in this case. The State did not address the agreement to testify truthfully until *re-direct* after defense counsel had cross-examined the witness and inquired about the witness' plea bargain with the State. Nowhere in *Ish* was there a holding that the State can *never* mention the witness' plea bargain. *Ish* is not

squarely on point. It should also be noted that under the facts in *Ish,* four justices characterized the "truthful testimony" as a "mild" form of vouching, with eight justices finding non-reversible error and only one judge finding reversible error. *State v. Ish, supra.* Contrary to the defendant's use of *Ish* in support of his arguments, *Ish* supports the State's positions as much, or perhaps more than the defendant's.

Even assuming this court rejects the State's arguments, the *Ish* opinion places the testimony in this case in the realm of non-reversible error. *Ish, supra.*

C. THE STATE SUBMITTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE ELEMENTS OF FIRST-DEGREE CRIMINAL TRESPASS.

"There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The defendant states that the only element at issue is whether the defendant knew the entry or remaining was unlawful. Brf. of App. 12. Even the defendant admitted from the stand that he had gone into the garage. RP 252.

The jury was entitled to infer from the circumstantial evidence that the defendant knew that the entering of the garage was unlawful. The owner of the garage, Mr. Evans, testified that he saw the defendant prying on the door of the garage. RP 74-75. Failing at entering through the door, the defendant went to the side of the garage and pulled off some plastic covering in order to make an entry there. RP 77. Few persons would conclude that it was legal for them to force entry into someone else's garage.

By way of direct evidence of the defendant's knowledge, the co-defendant in this case, Mr. McNabb testified that the defendant stated that he [the defendant] wanted to steal a stereo system from the garage.

RP 119-20. Jury instruction No. 12 reads: A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain. RP 386. It is not a far stretch for a rational trier of fact to find that a person entered or remained unlawfully in a garage when after attempting to pry the door open, that person then removes wood and plastic from the side of the garage in order to enter. The defendant made no pretense that he had permission to enter the garage.

By way of circumstantial evidence, the defendant took off running when police arrived. While the defendant had a double edged argument to explain why he ran from police, (he claimed he had a long history with the police), the jury could infer the defendant's state of knowledge from his actions.

Without a doubt there was a large number of conflicting statements, strange theories and drug affected testimony involved in this case. It was the jury's job to sort through the testimony and decide which parts of which testimony were going to be believed.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 3rd day of January, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 29926-1-III
v.	)	
	)	CERTIFICATE OF MAILING
NICHOLAS A. LIMPERT,	)	
	)	
Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on January 3, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Kenneth H. Kato
khkato@comcast.net

and mailed a copy to:

Nicholas A. Limpert
DOC #338607
PO Box 769
Connell, WA 99326

1/3/2012	Spokane, WA	Kathleen D. Owens
(Date)	**(Place)**	**(Signature)**