

FILED  
November 30, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 30892-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ROSE MARIE FAIRLEY,

Appellant.

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

The Honorable Salvatore F. Cozza, Judge

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BRIEF OF APPELLANT

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ANDREW P. ZINNER  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct denied the appellant, Rose Marie Fairley, a fair trial.

Issue Pertaining to Assignment of Error

At one point during closing argument, the prosecutor declared, "I, as a representative of the State, say it is probably reasonable" for jurors to believe Fairley entered a church with the intent to commit a crime therein. Did the prosecutor deprive Fairley of a fair trial by placing the prestige of his position behind his argument?

B. STATEMENT OF THE CASE

Pastor Colin Dunbar received a call notifying him his Spokane church's burglar alarm had been activated. 2RP 52.<sup>1</sup> Thinking a church member may have tripped the alarm, Dunbar drove to the church to investigate rather than immediately calling the police. 2RP 53-54. He went inside the ground level of the building and called out several times that he was ready to help and asking who had come inside. 2RP 54-57. Meanwhile, the alarm, which Dunbar described as "deafening," continued to blare. 2RP 54-55.

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<sup>1</sup> "1RP" is the transcript of the April 6, 2012 proceedings. "2RP" is the transcript of the proceedings held May 7-9, 2012.

Getting no response, Dunbar entered the basement and again loudly called out to announce his presence and offer assistance. 2RP 57-60, 62. After calling out about six times, Dunbar heard a sound that led him to believe whoever had entered was still there. 2RP 60-62. Dunbar immediately called police. 2RP 60, 65.

Officers arrived within minutes, one with a police dog. 2RP 26-27, 41-42, 65. Dunbar told them he heard a noise in the basement and described the layout of the church building. 2RP 27. From the main entry, the dog handling officer announced his presence and warned if anyone inside did not come out, the dog would be sent in. 2RP 27. After doing that twice, the officer received no response. By then it was about 2:30 a.m. The dog went into the building and found the appellant, Rose Marie Fairley, and a male companion. Each was arrested and escorted out of the church. 2RP 28-29, 42-43, 45.

Dunbar showed the officers that an alarm box and panel for the sprinkler system were damaged and wires were pulled out. 2RP 29-32, 62-64, 69. The circuit breaker panel had also been opened and some of the breakers had improperly been turned off. 2RP 63-64, 67-68. Church officials reported total damage worth about \$250.

Fairley explained to the arresting officer that she met her male associate at a Spokane bus stop. She was stranded from Walla Walla and looking for money to get back home. She had heard churches often provide assistance to the needy and believed a church could help her. She and the man were walking through the neighborhood and came upon the church. She went around the side of the building, tried a door handle, found the door to be unlocked, and proceeded inside with the man. They planned to stay in the basement until the pastor arrived in the morning so she could speak with him. 2RP 43-44.

According to Fairley, the alarm had been activated but her companion did something to the alarm box to make it go off. 2RP 44. She told the officer she had no permission to be inside the building and knew no one at the church. 2RP 44. Fairley was not hesitant to speak with the officer; she told him everything. 2RP 48. The officer did not ask her whether she had heard anyone yelling in the building before the police arrived. 2RP 50-51.

The State charged Fairley with second degree burglary. CP 1. The prosecutor argued Fairley entered the church intending to help herself by committing theft or, at minimum, malicious mischief. 2RP 93-95. The prosecutor noted that the trial court instructed the jury that a person who

enters or remains unlawfully in a building may be inferred to have done so with the intent to commit a crime against a person or property. 2RP 95-100. See CP 14 (instruction 7, which mirrors WPIC 60.05).

The prosecutor asserted the facts support a reasonable belief that Fairley's intent was to commit theft. He declared,

I, as a representative of the State, say it is probably reasonable because she had so many opportunities to say, Okay, I am here; this is the reason I am here. Instead, she was hiding, because she knew that they got interrupted doing a burglary.

2RP 101.

Defense counsel did not object to any of the prosecutor's comments. The jury found Fairley guilty as charged. CP 24. The trial court imposed a standard range sentence. CP 29-39.

C. ARGUMENT

THE PROSECUTOR IMPROPERLY OPINED THAT FAIRLEY WAS GUILTY OF SECOND DEGREE BURGLARY AS CHARGED.

The prosecutor during closing argument at Fairley's trial not only improperly expressed his personal opinion that Fairley was guilty of burglary, but vouched for himself by informing jurors he spoke as "a representative of the State." The prosecutor's comments were misconduct, and because they could not have been cured by an instruction, trial

counsel's failure to object has not waived this issue. Reversal is warranted.

To establish prosecutorial misconduct, the accused must show the prosecutor's comments were improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). Prosecutors have wide latitude to make arguments and draw inferences from the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). It is generally improper, however, for the prosecutor to express a personal opinion about the accused's guilt. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). It must be "clear and unmistakable" that counsel is expressing a personal opinion rather than arguing an inference from the evidence. State v. Price, 126 Wn. App. 617, 653, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005). Courts review challenged comments in the context of the entire argument. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

As a "quasi-judicial officer," a prosecutor's trial conduct "must be worthy of the position he holds." State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). A prosecutor may not use his or her position of power and prestige to influence the jury. In re Personal Restraint of

Glasmann, \_\_\_ Wn.2d \_\_\_, 286 P.3d 673, 679 (2012). Put another way, the prosecutor may not "throw the prestige of his public office and the expression of his own opinion of guilt into the scales against the accused." State v. Adams, 76 Wn.2d 650, 660, 458 P.2d 558 (1969), reversed on other grounds, 403 U.S. 947 (1971). This is so because a prosecutor's improper suggestions, insinuations, and expressions of personal knowledge "carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).

One way a prosecutor may run afoul of these rules is to imply the government's investigatory machine is satisfied of the defendant's guilt. United States v. Smith, 962 F.2d 923, 934 (9th Cir. 1992); see United States v. Garza, 608 F.2d 659, 663 (5th Cir. 1979) ("It is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant.").

In Fairley's case, it is apparent when considering the argument as a whole that the prosecutor sought to exploit his position as the government's representative to persuade the jury that Fairley intended to commit theft inside the church. There would otherwise have been no

reason to declare that, "I, as a representative of the State, say it is probably reasonable" that Fairley wanted to commit theft. 2RP 101. The prosecutor essentially assured jurors that it was appropriate for them to find the necessary intent element because he, an expert in such things, reached that conclusion. This was improper.

Fairley did not object to the prosecutor's remark. The question, therefore, is whether the comment was so flagrant and ill-intentioned that its prejudice could not have been cured by an instruction. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). Knowledge of the rule against exploiting the position of representative of the State during closing argument must be imputed to the prosecutor. A prosecutor's disregard of a well-established rule is flagrant and ill-intentioned misconduct. Anderson, 153 Wn. App. at 433-34 (citing State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997)); cf. State v. Larios-Lopez, 156 Wn. App. 257, 261, 233 P.3d 899 (2010) (noting State's argument "did not constitute a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial").

The prosecutor's remark was not only flagrant and ill-intentioned, it was also not curable by an instruction. The instructions already

encouraged jurors to consider the lawyers' remarks when applying the law. See CP 7 (instruction 1); 2RP 23 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law.").

Further, the prosecutor did not, for example, distort the law, impugn defense counsel, or misstate the evidence. In those situations, a clarifying instruction or instruction to disregard can effectively neutralize any potential prejudice. But here, there was no misstatement to clarify or disregard. The prosecutor was, indeed, the representative of the State. The problem was the way the prosecutor used his office: to insinuate he was particularly trustworthy, knowledgeable, or wise regarding the intent element of a burglary charge. This is a difficult bell to unring and eludes the typical curative instruction.

Finally, this Court must determine whether there is a substantial likelihood the prosecutor's misconduct affected the verdict. State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). As the Supreme Court noted in Berger, a prosecutor's improper suggestions, insinuations, and expressions of personal knowledge carry great weight. 295 U.S. at 88.

And here, the prosecutor's misuse of governmental prestige involved the only disputed matter at trial. In addition to instructing the

jury as to second degree burglary, the trial court provided lesser-included offense instructions for first degree criminal trespass. CP 16-18. As the prosecutor explained, the difference between burglary and trespass is that intent to commit a crime therein is required to prove burglary but not to prove trespass. RP 99-100. It was in discussing intent that the prosecutor relied on his position as the State's representative.

Glasmann provides guidance on this aspect of the misconduct. In finding prejudice requiring reversal, the Court noted the "principal disputed matter at trial was whether Glasmann was guilty of lesser offenses rather than those charged," which turned largely on "whether the requisite mental element was established for each offense." Glasmann, 286 P.3d at 682. The Court concluded it was substantially likely the jury's verdicts were affected by the prosecutor's improper declarations that Glasmann was guilty, coupled with the prosecutor's challenges to Glasmann's veracity improperly expressed as superimposed messages over a jail booking photo. Glasmann, 286 P.3d at 682-83.

As in Glasmann, the misconduct in Fairley's case focused on the key issue at trial. There is thus a substantial likelihood the prosecutor's remark affected the jury's verdict.

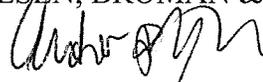
D. CONCLUSION

The prosecutor committed flagrant and ill-intentioned misconduct that could not be cured by an instruction. And the misconduct likely affected the jury's verdict. This Court should reverse Fairley's conviction and remand for a new trial.

DATED this 30 day of November, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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ANDREW P. ZINNER  
WSBA No. 18631  
Office ID No. 91051  
Attorneys for Appellant

ERIC J. NIELSEN  
ERIC BROMAN  
DAVID B. KOCH  
CHRISTOPHER H. GIBSON

OFFICE MANAGER  
JOHN SLOANE

LAW OFFICES OF  
**NIELSEN, BROMAN & KOCH, P.L.L.C.**

1908 E MADISON ST.  
SEATTLE, WASHINGTON 98122  
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT  
JAMILAH BAKER

DANA M. LIND  
JENNIFER M. WINKLER  
ANDREW P. ZINNER  
CASEY GRANNIS  
JENNIFER J. SWEIGERT

OF COUNSEL  
K. CAROLYN RAMAMURTI  
JARED B. STEED

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State v. Rose Marie Fairley

No. 30892-8-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 30<sup>th</sup> day of November, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Spokane County Prosecuting Attorney  
[kowens@spokanecounty.org](mailto:kowens@spokanecounty.org)

Rose Marie Fairley  
P.O. Box 232  
Walla Walla, WA 99362

**Signed** in Seattle, Washington this 30<sup>th</sup> day of November, 2012.

X   
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