

FILED

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Court of Appeals
Division III
State of Washington

34206-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON MICHAEL CATLING, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State committed prosecutorial misconduct by vouching for the credibility of an officer witness.
2. An award of costs on appeal against the defendant would be improper.

II. ISSUES PRESENTED

1. Whether a prosecutor commits misconduct or improperly vouches for a witness when, during closing argument, she merely states that a witness testified under penalty of perjury at trial?
2. Whether the defendant has the ability to pay costs if he is unsuccessful on appeal?

III. STATEMENT OF THE CASE

The defendant was charged in Spokane County Superior Court by amended information with one count of possession of a controlled substance and one count of possession of stolen property/access device. CP 11. His matter proceeded to trial on February 3, 2016. RP 1.

On September 26, 2013, Spokane County detectives and other members of law enforcement executed a search warrant for a residence located at 17406 East Fifth Avenue in Spokane County, Washington. RP 76, 103. The defendant, Jason Catling, and his girlfriend, Amy Kempe, were in the bedroom of the trailer at the time the officers arrived. RP 77.

Mr. Catling rented the trailer from his mother, and had lived there for a number of years. RP 113, 134. The defendant and his girlfriend were detained while the officers searched the residence. RP 78.

During the search of the bedroom, the officers discovered two containers in which they located methamphetamine.¹ RP 78, 81, 85, 129-130. Officers also located a stolen REI credit card belonging to Katherine Denenny.² RP 70-71, 99.

Detective Whapeles testified to the statements made by Mr. Catling while officers were executing the search warrant on his trailer. Mr. Catling told Detective Whapeles that he gives people heroin “every once in a while”

¹ Mr. Catling disagreed with the officers’ testimony that law enforcement searched his home. Instead, he testified that law enforcement required him to conduct a search of his own home, and that he found the containers of methamphetamine. RP 173. “They had [him] go in the house, and [he] found the stuff. Everything that [he] could find for them, [he] brought outside to the cops on the porch.” RP 143. However, he also testified that law enforcement was in his home, conducting this search for “a couple of hours. They were calling in everything. They didn’t find nothing.” RP 138.

Detective Whapeles testified that at no point did he allow Mr. Catling to go back into the house by himself because there were weapons inside the home, and that at no time did the defendant ever bring any items out of the home for the detectives. RP 194, 196.

² At trial, Mr. Catling testified that “every time [he] come[s] across a [credit] card, he would just stick it in the wallet in the briefcase, and [he doesn’t] know why.” RP 159. He further testified that he did not steal Ms. Denenny’s REI card, but that he did not remember how he came to possess it. RP 161.

when they are going through withdrawals. RP 114. Mr. Catling stated that “sometimes people just leave items at the house, and then [he] give[s] them heroin,” although he denied that he gave heroin in exchange for anything. RP 115. Defendant also admitted that he had suspicions that the items that other people left at his home were stolen. RP 115. Mr. Catling told law enforcement that the containers in which the metamphetamine was located were “both his and Kempe’s.” RP 116. He also admitted to having used some of the methamphetamine that was located in one of the containers. RP 116. When asked about why he had other people’s identification cards, Mr. Catling said he could not remember who gave him the cards, and that he was working for the secret service and was under its direction to collect items that people brought to him.³ RP 117.

The jury convicted the defendant as charged. CP 53-54. On February 17, 2016, the court sentenced the defendant to 30 days on each count, to be served in partial confinement by electronic monitoring. CP 82-83. The defendant was also ordered to serve 12 months of community custody. CP 83. The court imposed mandatory legal financial obligations totaling \$800. CP 85. The defendant timely appealed.

³ Detective Whapeles confirmed with the Secret Service that Mr. Catling had never been used as an informant by that agency. RP 118.

IV. ARGUMENT

A. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT OR VOUCH FOR A LAW ENFORCEMENT WITNESS WHEN SHE ARGUED, IN CLOSING, THAT THE OFFICER'S STATEMENTS WERE MADE UNDER PENALTY OF PERJURY.

In order to establish prosecutorial misconduct, a defendant must prove that a prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v. Thorgerson*, 172 Wn.2d 438, 442-443, 258 P.3d 43 (2011). A defendant can establish prejudice only by demonstrating a substantial likelihood that the misconduct affected the jury's verdict. *Id.*

An appellate court does not review a prosecutor's statements in isolation, but rather in the context of the overall argument, the issues in the case, the evidence that was addressed in the argument and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). If defense counsel does not object to a prosecutor's comments during closing argument, then any error is deemed waived, unless the misconduct was so flagrant and ill-intentioned that no instruction by the trial court could have cured the resulting prejudice. *Id.*, see also *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988).

It is improper for a prosecutor to personally vouch for a witness's credibility; however, prosecutors may argue an inference from the evidence,

and prejudicial error will not be found unless it is “clear and unmistakable” that the prosecutor is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

Mere elicitation of evidence regarding a witness’s promise to tell the truth does not equate to a prosecutor’s personal belief as to the witness’s credibility. *See State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). Furthermore, a prosecutor may comment on a witness’s veracity so long as the comment is not a direct or indirect statement of the prosecutor’s *own personal belief* that the witness was telling the truth. *State v. Sandoval*, 137 Wn. App. 532, 540, 154 P.3d 271 (Div. 3 2007).

Mr. Catling argues on appeal that the prosecutor improperly argued that all of Mr. Catling’s statements to law enforcement “were written down. They were testified to under penalty of perjury.” RP 233. Mr. Catling concedes his counsel did not object to this argument or request a curative instruction. Appellant’s Br. at 4, 7.

In this case, the prosecutor made clear to the jury during her closing argument that the determination of witness credibility was *solely* within its power to determine. RP 219. In fact, this was the first comment the prosecutor made to the jury during closing argument. The trial court had previously provided the jury with both written and oral instructions to the same effect. RP 209; CP 32.

The prosecutor made the allegedly improper comment at issue here during the State's rebuttal closing argument, after the defendant argued in closing the veracity of his own statements at trial, and that law enforcement incorrectly reported his statements to them:

[Mr. Catling] could have refused to answer any questions, but he was open, and he has nothing to hide. He had nothing to hide then. He has nothing to hide now.

RP 228.

What you have is primarily one officer, Sergeant Whapeles, testifying as to what Mr. Catling told him, and then you have Mr. Catling telling you his version. So you have competing statements. There are other officers there, but none of them testified to confirm or argue or basically witness what was said, just the one officer.

RP 229.

According to Sergeant Whapeles, [Mr. Catling] never said [the methamphetamine] was his. According to Sergeant Whapeles, he stated he may have smoked some of it. You have no other testimony confirming that statement, but, again, Mr. Catling is not required to prove his innocence.

RP 229.

Mr. Catling was brave when he spoke with officers on September 26, 2013, and he was brave testifying today in his own defense. Again, he has nothing to hide, and he just wants the truth to come out, and he wanted to tell his story even if it involved putting some things that he's not necessarily proud of in front of you, personal issues with medicine, even some issues with drug use unfortunately and issues with how he maintains his home.

RP 230.

The State was entitled to respond to the defendant's allegations that, because only one officer heard the defendant's statements while the search of his trailer was underway, the statements must, therefore, not be credible. And, to this end, the *only* rebuttal argument made by the prosecutor was that the officer to whom the defendant made statements on the day of his arrest testified at trial under penalty of perjury to those statements. The prosecutor did not express a *personal belief* as to the veracity of the officer, but rather to a fact witnessed by the jury: the officer was placed under oath by the trial judge, and was sworn to tell the truth at trial. RP 111.

United States v. Davis, 612 F.3d 53, 66 (1st Cir. 2010), is particularly instructive on this point. In *Davis*, the court addressed a similar challenge and determined that a prosecutor's statement that a witness testified under oath was a mere statement of fact, and was neither a personal assurance nor invoked the prestige of the government. *Id.* Such is the case here.

Additionally, defendant has failed to demonstrate any prejudice resulting from this unobjected-to statement by the prosecutor, and therefore, fails to demonstrate prosecutorial misconduct warranting a reversal of his conviction. First, the evidence of his guilt was overwhelming. Law enforcement located two separate caches in which methamphetamine was

hidden in the defendant's bedroom, in the trailer he has rented from his mother for years. RP 78, 81, 85, 113, 129-130, 134. The fact that he shared the bedroom with his girlfriend is of no consequence because the jury was instructed on the law of dominion and control, and was permitted to find that he controls those items within his home.⁴ CP 41. He admitted to law enforcement that the methamphetamine belonged to him (and to his girlfriend) and that he had used it at an earlier point in time. RP 116.

Defendant's mere allegation that because this case hinged on the credibility of the witnesses, the prosecutor's statement could not have been cured by an instruction from the court, is insufficient to overcome his burden to demonstrate prejudice, and fails to establish that the prosecutor's argument was ill-intentioned or flagrant, which is his burden in light of this unpreserved "error." To the contrary, if the prosecutor's argument was erroneous, the Court could have easily instructed the jury to disregard the prosecutor's statement, and that determination of the credibility of the witnesses was solely within its province.

Therefore, this court should decline to accept defendant's invitation to review this unpreserved error, where he has neither demonstrated that he was prejudiced by the statement nor that any error occurred at all.

⁴ Defendant does not challenge the sufficiency of the evidence to sustain his conviction.

B. IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY, THIS COURT SHOULD REQUIRE THE DEFENDANT AFFIRMATIVELY ESTABLISH A CLAIM OF INDIGENCY AS SET FORTH IN THIS COURT’S JUNE 10, 2016 ORDER BEFORE THIS COURT DETERMINES WHETHER TO AWARD COSTS AS AUTHORIZED IN RCW 10.73.160 AND RAP 14.2.

If the defendant is unsuccessful in this appeal, the defendant has requested this Court decline to impose the appellate costs authorized in RCW 10.73.160 and RAP 14.2.⁵ This Court should require the defendant to provide the requested information as set forth in this Court’s General Order dated June 10, 2016, regarding his claim of continued⁶ indigency. To the State’s knowledge, the defendant has not yet complied with this mandate.

V. CONCLUSION

The State respectfully requests that this court affirm the defendant’s convictions for possession of a controlled substance and possession of stolen property. The prosecutor did not improperly argue that the officer testified under oath, especially when this statement was in direct response

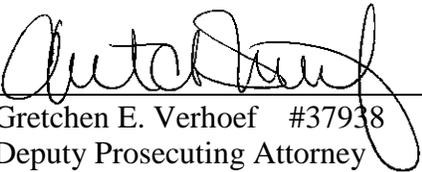
⁵ It appears this Court has addressed this issue in its General Order dated June 10, 2016, dealing with motions on costs.

⁶ Mr. Catling testified at trial that he was unemployed, received disability checks in the amount of approximately \$700, and has a number of medical issues. RP 134-135. Defendant also testified to possessing at least \$500 worth of gift cards that were given to him by his mother and grandmother, although he said he “probably” had already used them. RP 164. It is unknown whether his circumstances have changed since the time of trial.

to defendant's challenge to the veracity of the detective's trial testimony.
This statement cannot be characterized as vouching or as an opinion
personal to the prosecutor, but rather as merely a recitation of fact.

Dated this 4 day of November, 2016.

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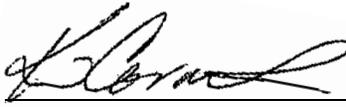
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 4, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jill S. Reuter and Kristina M. Nichols
Wa.appeals@gmail.com

11/4/2016
(Date)

Spokane, WA
(Place)



(Signature)