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No. 36850-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jose Jordan Macias Larios,

Appellant.

Benton County Superior Court Cause No. 19-1-00275-5

The Honorable Judge Carrie L. Runge

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived Mr. Macias Larios of his Fourteenth Amendment right to a fair trial.
2. The prosecutor improperly expressed a personal opinion regarding Mr. Macias Larios's credibility and guilt.
3. The prosecutor improperly vouched for the complaining witness.
4. The prosecutor improperly told jurors that portions of Mr. Macias Larios's testimony were "news to me" and "surprising to me."
5. The prosecutor committed misconduct by telling jurors that Mr. Macias Larios fabricated "[a] story that's essentially a lie to get out of this."
6. The prosecutor committed misconduct by contrasting "what actually happened" with "a story that the defendant wants to tell you [that is] essentially a lie."

ISSUE 1: A prosecutor may not express a personal opinion as to the accused person's credibility or guilt. Did the prosecutor commit reversible misconduct by expressing his personal opinions as to Mr. Macias Larios's credibility and guilt?

7. If the misconduct issue is not preserved, defense counsel provided ineffective assistance by failing to object.

ISSUE 2: Generally, defense counsel's failure to object to prosecutorial misconduct during closing falls below an objective standard of reasonableness. Did defense counsel provide ineffective assistance by failing to object to misconduct?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jordan Macias¹ and Mirna Fuentes had a tumultuous on and off relationship lasting over a year and a half. They fought, verbally and physically. RP 130-131, 147, 157-161, 239-264, 305. The conflict came to a head in February of 2019. Fuentes alleged that Mr. Macias strangled her, threatened to cut off her head, imprisoned her, threatened her children, and assaulted her. RP 128-147, 167-189. Mr. Macias denied all of her contentions. RP 239-265.

Based on Fuentes's claims, the state charged assault in the second degree by strangulation, felony harassment, assault in the fourth degree, and unlawful imprisonment. CP 12-14.

But after hearing from both Fuentes and Mr. Macias, the jury acquitted Mr. Macias of assault two and felony harassment. CP 55, 57. The jury only voted guilty on assault four and unlawful imprisonment.² CP 53, 59.

At the jury trial, the parties contested all of the elements of the charges. RP 121-350. During closing argument, the prosecutor said that

¹ While his legal name is Jose Jordan Macias Larios, he goes by Jordan Macias and will be referred to that way in this brief.

² The jury also endorsed "domestic relationship" findings on both. CP 54, 60.

Mr. Macias lied: “Mr. Macias Larios got on the stand, and he told a story.

A story that’s essentially a lie to get out of this.” RP 309.

The prosecuting attorney also expressed surprise at part of Mr.

Macias’s testimony³, calling it once again a lie:

...[N]ot only is this self-defense that’s being claimed here today, but, well, news to me, Mr. Macias Larios had injuries – scratches all over his body, visible on his face. Fourteen days later he said that, if the officer had seen him, that the officer would have seen those injuries. But you heard – and that’s his words. That’s his words that he said himself. And that’s surprising to me.

That was surprising to Officer Sagen because Officer Sagen got up on the stand right after that. And this is where we get into what actually happened versus a story that the defendant wants to tell you, what, as I said before, is essentially a lie to make this go away.

RP 335.

The prosecutor moved on to point out the lack of additional evidence establishing any injuries, and Mr. Macias’s attorney objected. RP 336-339. During a sidebar on the issue, the defense also objected that the state had called Mr. Macias a liar, but the court did not sustain the objection. RP 338-339.

Mr. Macias timely appealed. CP 72.

³ In response to Fuentes’s claims of injuries, Mr. Macias said he too had injuries. RP 133-139, 263.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT PREJUDICED MR. MACIAS LARIOS.

The prosecutor argued in closing that Mr. Macias Larios “told a story... that’s essentially a lie.”⁴ RP 309. He also told the jury that it was “news to me [that] Mr. Macias Larios had injuries,” and that his testimony was “surprising to me.” RP 335. By expressing his personal opinion, the prosecutor committed reversible misconduct.

A. The prosecutor improperly expressed a personal opinion as to Mr. Macias Larios’s credibility and guilt.

Prosecutorial misconduct can deprive an accused person of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amend. XIV. To determine whether misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Here, the prosecutor committed misconduct in closing. The prejudicial nature and cumulative effect of the misconduct require reversal of Mr. Macias Larios’s convictions. *Id.*

Prosecutorial misconduct during argument can be particularly prejudicial. It creates a risk that jurors will lend it special weight “not only

⁴ He repeated this statement in his rebuttal closing. RP 335.

because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A prosecutor must “seek conviction based only on probative evidence and sound reason.” *Glasmann*, 175 Wn.2d at 704. It is improper for the state’s attorney to convey a personal opinion of the accused’s guilt. *Id.* at 706-07. In deciding whether a prosecutor’s remarks amount to an expression of personal opinion, the reviewing court considers the comments in the context of the entire argument. *State v. McKenzie*, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006).

Prejudicial error occurs if it is “clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” *McKenzie*, 157 Wn.2d at 54 (emphasis omitted) (internal quotation marks and citation omitted). A prosecutor who “throw[s] the prestige of his public office... and the expression of his own belief of guilt into the scales against the accused” denies the defendant a fair trial. *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (internal quotation mark and citation omitted).

Here, the prosecutor expressed his personal opinion that Mr. Macias Larios was not credible and that he was guilty. He told jurors that

it was “news to me” and “surprising to me” when Mr. Macias Larios testified that he had visible scratches from Ms. Fuentes. RP 335.

He also argued that Mr. Macias Larios’s testimony was “[a] story that’s essentially a lie to get out of this.” RP 309. He contrasted “what actually happened” with “a story that the defendant wants to tell you, what, as I said before, is essentially a lie.” RP 339.

It is “clear and unmistakable” that the prosecutor was expressing a personal opinion. *McKenzie*, 157 Wn.2d at 54. By telling jurors that Mr. Macias Larios fabricated a “story” that was “news to me” and “surprising to me,” the prosecutor (in effect) testified that he did not believe Mr. Macias Larios, and that he personally thought the defendant was guilty.

To prevail on a claim of prosecutorial misconduct, the accused person must show a substantial likelihood that the misconduct affected the jury verdict. *State v. Thierry*, 190 Wn. App. 680, 690, 360 P.3d 940 (2015) (citing *Glasmann*, 175 Wn.2d at 704). Here, there is a substantial likelihood the misconduct affected the verdict.

By telling jurors that Mr. Macias Larios’s testimony about his injuries was “news to me” and “surprising to me,” the prosecutor injected himself into the proceedings. RP 335. Likewise, he conveyed his personal opinion to the jury by accusing Mr. Macias Larios of creating “[a] story that’s essentially a lie to get out of this”. RP 309; *see also* RP 339.

The prosecutor threw “the prestige of his public office... and the expression of his own belief of guilt into the scales against the accused.” *Monday*, 171 Wn.2d at 677. There is a substantial likelihood that the misconduct affected the verdict.

The prosecutor committed reversible misconduct. *Glasmann*, 175 Wn.2d at 706-707. The convictions must be vacated, and the case remanded for a new trial. *Id.*

B. The error is preserved for review because defense counsel raised an appropriate objection before the case was submitted to the jury.

Defense counsel objected to the prosecutor’s improper comments during a sidebar. RP 339. The objection was not contemporaneous with the misconduct; instead it was asserted during the State’s rebuttal argument. RP 339.

But an objection need not be contemporaneous to preserve an issue for review. *State v. Burke*, 163 Wn.2d 204, 210–11, 181 P.3d 1 (2008). In *Burke*, the defendant raised an issue in a post-verdict motion for a new trial. *Id.* The trial court “decided the motion on the merits despite the lack of objection” contemporaneous with the error. *Id.*, at 211. The Supreme Court presumed the error was preserved and reached the merits of the issue, even though “there was no contemporaneous objection.” *Id.*, at 210-211.

Here, defense counsel alerted the court to the issue before the case was submitted to the jury. RP 339. He noted his own failure to object contemporaneously but pointed out that “two times [the prosecutor] made an argument that somebody lied.” RP 339. He argued that “it’s not appropriate for him to say somebody lied... he’s not able to say this person lied.”

As in *Burke*, the trial court reached the merits of the argument, overruling defense counsel’s objection. RP 339. Because the objection was made before the case was submitted to the jury and because the trial court ruled on the merits of the argument, the error is preserved. *Id.*

C. Even if the error is not preserved, reversal is required because the misconduct was flagrant and ill-intentioned.

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

Here, the misconduct was flagrant and ill-intentioned. The prosecutor had access to long-standing caselaw prohibiting him from

expressing a personal opinion in closing argument. *See Glasmann*, 175 Wn.2d at 704-711. Mr. Macias Larios’s convictions must be reversed, even if defense counsel’s objection was not sufficient to preserve the issue. *Id.*

II. IF THE ERROR IS NOT PRESERVED, MR. MACIAS LARIOS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The right to counsel includes the right to the effective assistance of counsel.⁵ U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel’s performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Failure to object to prosecutorial misconduct is objectively unreasonable under most circumstances: “At a minimum, an attorney... should request a bench conference... where he or she can lodge an appropriate objection.” *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). Here, defense counsel did raise an objection to the misconduct.

⁵ Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel’s deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland*, 466 U.S. at 687).

However, the objection was arguably insufficient to preserve the error for review.

Counsel should have made a contemporaneous objection that clearly outlined the problem with the prosecutor's argument. By expressing a personal opinion, the prosecutor violated well-established rules that should have been obvious to defense counsel.

If the misconduct issue is not preserved for review, counsel's failure to make a contemporaneous objection deprived Mr. Macias Larios of the effective assistance of counsel. The convictions must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

The prosecutor expressed a personal opinion regarding Mr. Macias Larios's guilt and credibility. There is a substantial likelihood the misconduct affected the jury's verdict. In addition, the misconduct was flagrant and ill-intentioned. If the error is not preserved for review, defense counsel deprived Mr. Macias Larios of the effective assistance of counsel.

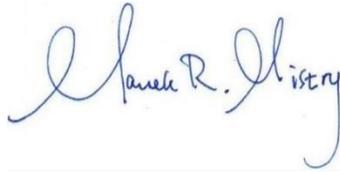
The convictions must be reversed, and the case remanded for a new trial.

Respectfully submitted on January 6, 2020,

BACKLUND AND MISTRY

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 6, 2020.



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