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Court of Appeals  
Division III  
State of Washington  
3/3/2020 2:44 PM

No. 36850-5-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

JOSE JORDAN MACIAS LARIOS,

Appellant

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

NO. 19-1-00275-03

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BRIEF OF RESPONDENT

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. The prosecutor did not engage in misconduct and the prosecutor's closing argument did not deprive the defendant of a fair trial.
- B. The prosecutor did not express a personal opinion regarding the defendant's credibility and guilt.
- C. The prosecutor did not improperly vouch for the victim.
- D. The prosecutor did not improperly tell jurors that portions of the defendant's testimony was "news to me."
- E. The prosecutor did not commit misconduct by stating that the defendant presented "a story that's essentially a lie to get out of this."
- F. The defense attorney did not provide ineffective assistance by failing to object to a few sentences of the prosecutor's closing argument.

## **II. STATEMENT OF FACTS**

### **The victim's version of events:**

Mirna Fuentes testified that she and the defendant dated for about one and a half years. RP at 122. On the night of February 9, 2019, they went to a bar. RP at 122, 125. He became angry with her, called her a whore, and she walked home. RP at 125-26. She went to his apartment to collect her things, including marijuana. RP at 127, 172. By this time, it

was around midnight. RP at 127. The defendant pushed her down and kicked her. RP at 128. He covered her mouth and nose so that she could not breathe. RP at 131. He also punched her multiple times. RP at 132. He threatened to cut off her head and hang her in the closet. RP at 140. He blocked her from leaving the apartment. RP at 143.

In support of this version, Ms. Fuentes took photos of herself three days later. RP at 132-33. They were admitted as Exhibits 2-7. Ms. Fuentes did not report the assault until February 22, 2019. RP at 211. At that time, Officer Peterson saw a slight bruise or discoloring on her right eye. RP at 218. Ms. Fuentes also testified that the assault on February 9-10, 2019 was a pattern of abuse by the defendant against her. RP at 155-59.

**The defendant's version of events:**

The defendant denied punching, choking, or threatening Ms. Fuentes. RP at 244, 253, 258. In fact, he claimed that she was the aggressive one, with her hitting, punching, and slapping him. RP at 251. He "brought her to the ground" in response to her aggressive acts. *Id.* When she bit him on the thigh, he slapped her on the top of her head. RP at 252. Far from blocking her from leaving the apartment, he picked her up and placed her outside the apartment. *Id.*

In support of this version, the defendant pointed to the fact that Ms. Fuentes had consensual sex with him multiple times from February 10 to

February 14, 2019. RP at 178. On February 14, the defendant refused to go to dinner with Ms. Fuentes for Valentine's Day. RP at 255. He slept with his new girlfriend, Leah Teats, on February 15, 2019, and Ms. Teats confirmed the defendant's testimony that Ms. Fuentes banged on his windows that morning and screamed at him. RP at 256, 267.

**The prosecutor's closing argument included reference to a contradiction between the defendant and the arresting officer.**

The defendant claimed that he had visible injuries when he was arrested by Officer Jeffrey Sagen on February 24, 2019. RP at 263. In fact, he claimed that he had scratches and small bruises all over his body, including on his back, and his forearms from blocking Ms. Fuentes's blows. *Id.* In addition, he had a scratch on his forehead. *Id.* Officer Sagen testified that he did not recall any visible injuries on the defendant when he arrested him and that he would have noted such injuries in his report. RP at 282.

This contradiction was the basis for the prosecutor arguing in closing, "Mr. Macias Larios got on the stand, and he told a story. A story that's essentially a lie go get out of this. He never did anything bad. He was just always the victim." RP at 309.

In the rebuttal closing the prosecutor stated:

What's equally important, when we're talking about self-defense, is that not 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. And that’s important because Officer Sagen came in and said, if he had noticed injuries, because of the nature of what had been reported, he would have documented them right away. He would have taken photographs. It would have been in his report. Well, they’re not in there.

RP at 335-36.

The defendant was found not guilty of Assault in the Second Degree and Harassment. CP 55, 57. He was found guilty of Assault in the Fourth Degree and Unlawful Imprisonment. CP 53, 59.

### III. ARGUMENT

**A. There was no prosecutorial misconduct, let alone any conduct which unfairly prejudiced the defendant.**

**1. Standard on review:**

**a. Standard on review—was the issue concerning the prosecutor’s closing argument preserved for appeal?**

Under ER 103(a)(1), an objection must be contemporaneous with the closing argument or the testimony. A defendant has a duty to object to a prosecutor’s allegedly improper argument. *State v. Emery*, 174 Wn.2d

741, 761, 278 P.3d 653 (2012). Courts have allowed an exception where the defendant moves for a mistrial based on the prosecutor's closing argument. *State v. Lindsay*, 180 Wn.2d 423, 441, 326 P.3d 125 (2014).

**b. Standard on review—was there misconduct by the prosecutor?**

The defendant has the burden of establishing prosecutorial misconduct. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Prosecutors have wide latitude during closing argument to draw inferences from the evidence. It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of the defendant. Nevertheless, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case. To determine whether the prosecutor is impermissibly expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court instructions. *In re Lui*, 188 Wn.2d 525, 560-61, 397 P.3d 90 (2017).

It is not uncommon for statements to be made in final arguments, which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the

jury of certain ultimate facts and conclusions to be drawn from the evidence.

*State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983).

**c. Standard on review—what is the standard for determining prejudice?**

A defendant also has the burden of establishing that any misconduct had a prejudicial effect. *McKenzie*, 157 Wn.2d at 52.

Comments will be deemed prejudicial only where “there is a substantial likelihood the misconduct affected the jury’s verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Also, “[p]rejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” *Papadopoulos*, 34 Wn. App. at 400.

**2. The defendant has not established that the conviction should be reversed for prosecutorial misconduct.**

**a. The error is not preserved for appeal.**

As stated in *Emery*, objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. Otherwise, a defense attorney would be encouraged to not bring potential issues with a closing argument to the trial court’s attention. If the verdict is “not guilty,” the defendant

will have won the gamble. If the verdict is “guilty,” the defendant could appeal. *Emery*, 174 Wn.2d at 762.

Here, the defense attorney acknowledged that he had not objected to the prosecutor’s comment that the defendant lied. RP at 339. It is not clear that the defense attorney ever objected to the past comments, which were at RP at 305 and 335. Rather, the defense attorney probably was requesting that going forward, the prosecutor not refer to the defendant as a liar. In any event, there was no objection to the prosecutor’s arguments when they were made.

The defendant’s citation to *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008) is not helpful to his case. In *Burke*, the defendant filed a motion for a new trial which the trial court decided on the merits although there was no objection during the trial. *Id.* at 210-11. This is consistent with the *Lindsay* court: where the trial court has the opportunity to either rule on the merits of the objection contemporaneously or in a motion for a new trial, the error is preserved. In this case, the defendant did not object contemporaneously and did not later move for a new trial based on the prosecutor’s argument.

Since the objection was not made at trial, this court should not consider the argument that the prosecutor’s closing constituted misconduct and it prejudiced the defendant.

- b. **The defendant has not established the prosecutor's arguments were misconduct because the arguments were supported by the evidence.**

**“Mr. Macias Larios got on the stand, and he told a story. A story that's essentially a lie go get out of this.”**

There is strong evidence that the defendant did lie. He claimed he had visible injuries from Ms. Fuentes attacking him when he was arrested on February 24, 2019. RP at 263. Those injuries included a scratch on his forehead. *Id.* The arresting officer did not note any scratches or visible injuries on the defendant. RP at 282. It is a reasonable inference that the defendant was lying on this point. When a prosecutor shows that other evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying. *State v. McKenzie*, 157 Wn.2d 44, 59, 134 P.3d 221 (2006). The prosecutor's argument here is similar to the prosecutor's argument in *State v. Calvin*, 176 Wn. App. 1, 316 P.3d 496 (2013). In *Calvin*, the prosecutor reviewed the defendant's inconsistent testimony along with a long list of things that did not make sense in Calvin's testimony when compared to other evidence. The prosecutor then stated that the defendant was “just trying to pull the wool over your eyes.” The trial court overruled the defendant's objection and the Court of Appeals stated the comments reflected an explanation of the evidence. *Id.* at 19.

*State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) dealt with the same issue, from another angle. The *Warren* court dealt with a challenge to a prosecutor improperly vouching for a witness, by saying the complainant had “a badge of truth” and had “the ring of truth.” The court held this was not misconduct.

The prosecutor was arguing the evidence, not his personal opinion, in stating that the defendant lied about having visible injuries when he was arrested.

**“News to me” and “surprising to me” that defendant claimed he had injuries when arrested.**

These statements are reasonable inferences from the evidence. Officer Sagen said the defendant did not have visible scratches when he was arrested. The defendant said he had visible scratches when he was arrested. Thus, it would be “news to me” or “surprising to me” that the defendant made this claim. The prosecutor was not giving his personal opinion but was explicitly referring to the evidence.

Compare this to *State v. Anderson*, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009). The prosecutor stated the defendant’s testimony was “made up on the fly,” “ridiculous” and “utterly and completely preposterous.” The court held these were proper arguments.

**c. The defendant has not demonstrated that any of these comments had a substantial likelihood to affect the jury's verdict.**

The jury may have concluded that this was a “he said/she said” case and discounted any testimony from Ms. Fuentes or the defendant. Therefore, the jury may have found the charges of Assault in the Second Degree and Harassment were based solely on Ms. Fuentes’s testimony and concluded that they were not proven beyond a reasonable doubt.

However, the charge of Assault in the Fourth Degree was supported by the photos of Ms. Fuentes’s bruises and Officer Peterson’s observation of a bruise around her eye even after 14 days elapsed. Nothing the prosecutor said, and nothing the defense attorney could say, could add to, or detract from, those photos and that observation.

Compare this case to others holding the prosecutor’s arguments did not cause prejudice. In *Lui*, the prosecutor argued “an innocent man would have kicked and screamed over the length of this investigation and how long it took to solve,” asked who did it, how did it happen, and “He would have wanted to know everything about the two new suspects that he was told about.” *In re Lui*, 188 Wn.2d 525, 560, 397 P.3d 90 (2017). The *Lui* court held these comments were improper. *Id.* at 561. However, the *Lui* court did not reverse because they did not find prejudice. “Lui has not proved by a reasonable probability that the result of the trial would have

been different in the absence of the prosecutor's singular reference to the behaviors of an innocent man." *Id.* at 562.

The prosecutor's arguments were based on the evidence and were not personal opinions. In addition, the defendant cannot show that they had any effect on the jury's verdict, much less a substantial likelihood that it affected the verdict.

**B. The defendant cannot demonstrate either prong of "ineffective assistance."**

**1. Standard on Review:**

The defendant's citation to *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is correct. The defendant has the burden of showing deficient performance and a reasonable probability that it affected the verdict.

**a. There was no deficient performance.**

The State incorporates the above argument that the prosecutor's closing argument was proper. In addition, the trial court took the defense attorney's comment as constituting an objection to the closing argument and overruled it. RP at 339. If the defense attorney had objected, the objection would not have been sustained and the jury would have looked at the attorney as being petty, wanting to hide the truth, or not being fair to the prosecutor.

That is why, particularly on closing arguments, defense attorneys are given a wide berth in determining to object. “Defense counsel’s decision to refrain from objecting during the prosecutor’s closing argument was not deficient performance. Lawyers do not commonly object during closing argument ‘absent egregious misstatements.’ A decision not to object during summation is within the wide range of permissible professional legal conduct.” *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004).

**b. There was no reasonable probability that it affected the verdict.**

The State incorporates the above argument that the defendant was not prejudiced by the closing argument. The defendant was convicted of Assault in the Fourth Degree and Unlawful Imprisonment possibly because the jury did not have to rely on either Ms. Fuentes or the defendant to prove the charge. Nothing the prosecutor said could change the evidence of Ms. Fuentes’s injuries as shown in the photos or Officer Peterson’s observation of a bruise around her eye 14 days after the alleged assault.

Further, the defendant is only referring to a few lines in a closing argument which covers 27 pages, counting the rebuttal argument.

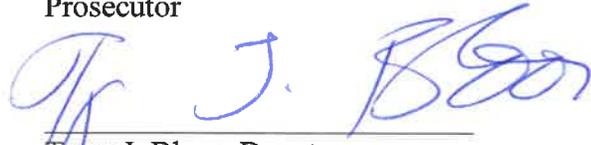
#### IV. CONCLUSION

The defendant had a fair trial; in fact, he was acquitted on the most serious offense. The prosecutor's argument was based on the evidence. That argument, and the defendant's failure to object to the argument, did not cause him to be found guilty. The conviction should be affirmed.

**RESPECTFULLY SUBMITTED** on March 3, 2020.

**ANDY MILLER**

Prosecutor



Terry J. Bloor, Deputy

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OFC ID NO. 91004

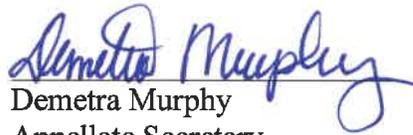
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Demetra Murphy  
Appellate Secretary

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