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Supreme Court No. 83308-7
Court of Appeals No. 36562-6-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Nathaniel Ish
Appellant/Petitioner

Pierce County Superior Court
Cause No. 05-1-01516-2

The Honorable Judge Thomas J. Felnagle

PETITIONER'S SUPPLEMENTAL BRIEF

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STATEMENT OF ISSUE

Does evidence implying that the prosecutor has verified a witness's story violate an accused person's Fourteenth Amendment right to due process?

INTRODUCTION AND SUMMARY OF ARGUMENT

A prosecutor should not be allowed to bolster a witness's testimony by implying that the government can guarantee the witness's veracity. Such vouching occurs whenever the evidence highlights the prosecutor's promise to reduce a witness's charges in return for truthful testimony. Evidence of this sort implies that the prosecutor can test the truthfulness of the witness's testimony by independent means, and invites the jury to base its verdict on "facts" that are not in evidence.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A. Nathaniel Ish was charged with second-degree felony murder. Nathaniel Ish was charged with second-degree felony murder, following the death of his girlfriend Katy Hall.¹ CP 50-51. The Information alleged, *inter alia*, that Mr. Ish, "while committing or attempting to commit the crime of assault in the second degree, and in the

course of and in furtherance of said crime or in immediate flight therefrom, did beat Katy Hall, and thereby causing [sic] the death of Katy Hall...” CP 50-51. At trial, the prosecution sought to prove the charge by establishing that Mr. Ish “intentionally assaulted Katy Hall [and] thereby recklessly inflicted substantial bodily harm on Katy Hall,” causing her death. Instructions Nos. 30-31, Court’s Instructions to the Jury, Supp. CP 175-175.

The evidence showed that police officers arrested Mr. Ish following a standoff and a struggle on the front porch of the residence he shared with Ms. Hall and her mother; they subsequently found Ms. Hall dead on the hallway floor. RP (5/2/07) 382-387; RP (5/3/07) 412-418. Blood surrounded her body and covered the walls. RP (5/2/07) 386-387; RP (5/3/07) 418, 420, 423; RP (5/7/07) 603, 641, 651, 660-661; RP (5/9/07) 904-905, 954, 1011. An autopsy revealed that Ms. Hall died from multiple blunt force injuries. RP (5/8/07) 870-871.

Mr. Ish admitted that he intentionally assaulted Ms. Hall, but denied that he was reckless in the infliction of substantial bodily harm. RP (5/21/07) 1463. Thus the primary issue for the jury on the trial of the

¹ Companion charges of first-degree premeditated murder (Count I) and Possession of a Controlled Substance (Count III) are not implicated by this appeal. CP 51.

felony murder charge was whether or not the state had proved Mr. Ish's recklessness beyond a reasonable doubt. RP (5/21/07) 1385, 1463.

B. Both parties introduced circumstantial evidence bearing on Mr. Ish's mental state at the time of the assault.

To show that Mr. Ish acted recklessly during the intentional assault on Ms. Hall, the state introduced evidence showing that he hit her many times, and broke her neck and several ribs. RP (5/8/07) 836-871. The prosecutor also introduced a recording made by a medical alert service around the time of Ms. Hall's death; on the recording, Mr. Ish's speech seemed calm and rational. RP (5/16/07) 1340, Exhibit 128.

This recording contrasted with other circumstantial evidence of Mr. Ish's mental state on that day. Although he was generally known as a polite, respectful, quiet, friendly, and nice person, he was described on that day as incoherent, rambling, nonsensical, crazy, out-of-touch with reality, and generally bizarre. RP (7/10/06) 34; RP (4/16/07) 27-28; RP (5/2/07) 261, 299, 305, 357; RP (5/3/07) 443-445, 466. When Ms. Hall's grown children arrived at the scene, Mr. Ish told them repeatedly that he had killed Ms. Hall. RP (5/2/07) 274, 279, 286, 297-298, 308, 330-331, 334, 347. He reiterated this to other relatives at the scene, and threatened to kill them as well. RP (5/2/07) 282, 336; RP (5/3/07) 472-473, 476, 493, 495-496.

When the police arrived, Mr. Ish refused to cooperate, engaging instead in a superhuman struggle with five officers and submitting only after multiple tasings. RP (4/16/07) 14-15, 34-35; RP (4/17/07) 97; RP (5/3/07) 410-416. He spoke nonsense, chanted incoherently, and talked about Jesus Christ killing people; after his arrest he addressed Ms. Hall and spoke to another person who wasn't present. RP (4/16/07) 12-13, 30-31; RP (4/17/07) 96, 103-104; RP (5/3/07) 542-543, 615.

Additional evidence showed that Mr. Ish had consumed alcohol, cocaine, methamphetamine and marijuana. RP (4/16/07) 21, 63. Once at the hospital, Mr. Ish was administered a sedative. RP (4/16/07) 16-17, 36, 64; RP (4/17/07) 97-98. He awoke calm, coherent, and cooperative; an officer described him as totally different from how he had been when arrested. RP (4/16/07) 17-18, 21, 23, 37. During a police interview, Mr. Ish asked how his girlfriend was. RP (4/16/07) 20-21.

- C. The prosecutor introduced evidence that she met with jailhouse informant David Otterson prior to trial, that she agreed to reduce Otterson's pending charges in return for his truthful testimony, that she had reduced his charges by the time of trial, and that she had not revoked his plea agreement despite his failure to comply with other terms of his plea agreement.

David Otterson, who was Mr. Ish's cellmate in jail, testified on behalf of the prosecution. Otterson claimed Mr. Ish had confessed that he'd broken Ms. Hall's neck, that he'd dragged her by her head, that he'd

felt like he was “punching holes through her,” and that he planned to lie to the jury and claim that he didn’t remember anything. RP (5/9/07) 1092-1093, 1095, 1100.

The parties argued about the admissibility of certain clauses of Otterson’s plea agreement. First, Mr. Ish sought permission to cross-examine Otterson about the prosecutor’s failure to request a polygraph, as permitted by the agreement. Defense counsel suggested that the government’s failure to request a polygraph meant that the prosecutor did not believe Otterson’s testimony. RP (4/17/07) 178-184, 186-189. The court denied Mr. Ish’s request, holding that introduction of this evidence would be the equivalent of inadmissible vouching testimony. RP (4/17/07) 184-186, 188. The court went on to hold that an unredacted copy of the plea agreement—including the requirement that Otterson submit to a polygraph examination—could be admitted into evidence, but that Mr. Ish would not be permitted to ask if a polygraph had been administered.² RP (4/17/07) 195.

Second, Mr. Ish sought to exclude Otterson’s out-of-court promises to testify truthfully in return for consideration from the state. RP (5/9/07) 1079-1081. Defense counsel argued that the prosecutor’s pledge

² The parties agreed that the jury should not receive a copy of the plea agreement under these circumstances. RP (4/17/07) 196.

to reduce the charges in return for Otterson's truthful testimony implied that the prosecutor could independently verify his testimony. RP (5/9/07) 1081. The court ruled that the plea agreement—including Otterson's out-of-court promise to testify truthfully and the prosecution's reciprocal pledge—was admissible. RP (5/9/07) 1081-1082.

The evidence was admitted during the state's case in chief, before Mr. Ish had an opportunity to decide whether and how to impeach Otterson.³ RP (5/9/07) 1079-1082, 1104. Otterson testified that he'd been held in jail in 2005, on charges of Robbery in the First Degree, Assault in the Second Degree, and Theft in the Second Degree. RP (5/9/07) 1087. Because he was facing serious charges, he contacted the police to give a statement about Mr. Ish. RP (5/9/07) 1101.

Otterson testified that he met with the prosecutor and told her his story. RP (5/9/07) 1102-1103. The prosecutor agreed to reduce Otterson's charges to a single count of second-degree robbery, and to recommend a sentence of 15 months (which, with credit for time served, would result in his immediate release) instead of the ten-year sentence he'd been facing under his original charges. RP (5/9/07) 1104; RP

³ Mr. Ish had avenues for impeachment that did not reference Otterson's plea agreement. For example, Otterson acknowledged nine prior convictions for crimes of dishonesty, and admitted using his brother's name multiple times to avoid arrest. RP (5/10/07) 1115-1118; RP (5/9/07) 1086.

(5/10/07) 1128. Mr. Otterson agreed to testify truthfully, to maintain law-abiding behavior, and to keep in contact with the prosecuting attorney's office. RP (5/9/07) 1104-1106.

The prosecutor reduced Otterson's charges prior to Mr. Ish's trial: Otterson testified that he had already pled guilty to second-degree robbery and was awaiting sentencing. RP (5/9/07) 1104, 1106-1107. He reaffirmed (on cross-examination) that his agreement had not been revoked despite his failure to comply with its terms,⁴ and that he fully expected to receive the benefit of his plea bargain. RP (5/10/07) 1148, 1149. On redirect, Otterson repeated that his deal was to testify truthfully, and that he had done so. RP (5/10/07) 1153.

D. Mr. Ish was convicted of second-degree felony murder, and his conviction was upheld on appeal.

At the conclusion of trial, Mr. Ish was convicted of second-degree felony murder.⁵ CP 29. Mr. Ish appealed, arguing (among other things) that the trial court improperly allowed the prosecutor to vouch for Otterson's testimony. CP 28; *See* Appellant's Opening Brief, pp. 27-30.

⁴ Otterson acknowledged that he had violated the agreement by committing new crimes, by using drugs and alcohol, and by failing to maintain contact with the prosecutor. RP (5/9/07) 1106; RP (5/10/07) 1133, 1139, 1142, 1141, 1144.

⁵ The jury was unable to reach a verdict on the charge of premeditated first-degree murder, but convicted Mr. Ish of the lesser-included offense of first-degree manslaughter. CP 188,

In a part-published opinion, the Court of Appeals affirmed Mr.

Ish's conviction, holding that

While it is improper for a prosecutor to vouch for the credibility of a witness, no prejudicial error arises unless counsel clearly and unmistakably expresses a personal opinion as opposed to arguing an inference from the evidence... No such opinion was apparent here.

State v. Ish, 150 Wn.App. 775, 786, 208 P.3d 1281 (2009) (citations omitted).

The Supreme Court granted review of the vouching issue.

ARGUMENT

I. THE CONVICTION VIOLATED MR. ISH'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT WAS BASED ON "FACTS" NOT ADMITTED INTO EVIDENCE.

A. Standard of Review: alleged constitutional violations are reviewed *de novo*.

The applicability of the constitutional due process guaranty is a question of law subject to *de novo* review. *Post v. City of Tacoma*, ___ Wn.2d ___, ___, 217 P.3d 1179, 1183 (2009). The admission of evidence is generally reviewed for an abuse of discretion; "[h]owever, a court 'necessarily abuses its discretion by denying a criminal defendant's

190, 191. The trial court vacated the manslaughter conviction and sentenced Mr. Ish on the second-degree felony murder charge. CP 15-27.

constitutional rights.” *City of Auburn v. Hedlund*, 165 Wn.2d 645, 655, 201 P.3d 315 (2009); *State v. Iniguez*, ___ Wn.2d ___, ___, 217 P.3d 768, 771 (2009). Alleged constitutional violations are reviewed *de novo*. *Iniguez*, at 771.

B. Due process prohibits a prosecutor from personally vouching for a witness, or from implying that evidence not introduced at trial supports conviction.

It is improper for a prosecutor to personally vouch for the credibility of a witness. *United States v. Gracia*, 522 F.3d 597, 601 (5th Cir. 2008) (citing *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), and *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). Nor may a prosecutor suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. *State v. Magers*, 164 Wn.2d 174, 192, 189 P.3d 126 (2008); *State v. Jones*, 144 Wn.App. 284, 293, 183 P.3d 307 (2008). These two areas of impropriety overlap when the prosecutor implies that the government “has taken steps to assure the veracity of its witnesses.” *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990).

The admission of a plea agreement promising a benefit in return for a witness’s truthful testimony may constitute improper vouching. See *State v. Green*, 119 Wn.App. 15, 24, 79 P.3d 460 (2003) (“[T]he language that the intent of the agreement was to ‘secure the true and accurate

testimony’ and the provision that Cole ‘testify truthfully’ should have been redacted... These provisions were prejudicial and improperly vouched for Cole’s veracity.”) Evidence that the government has promised lenient treatment in return for truthful testimony “impl[ies] that ‘the prosecutor can verify the witness’s testimony and thereby enforce the truthfulness condition of its plea agreement.’” *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007) (quoting *United States v. Wallace*, 848 F.2d 1464, 1474 (9th Cir.1988)).

An objection may be required to preserve vouching errors of this type. *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006). In *Korum*, the defendant stipulated to the admissibility of a codefendant’s plea agreement (including a polygraph term), and defense counsel even invited the prosecutor to “argue from that document, from [the codefendant’s] testimony, any doggone thing they want to argue.” *Korum*, at 649. In light of the defendant’s stipulations, the Supreme Court couldn’t find that the admission of the plea agreement and reference to it in closing amounted to vouching:

[T]he prosecuting attorney did not express a personal belief about Mellick’s credibility. Rather, he merely elicited evidence of Mellick’s promise to tell the truth, the admissibility of which, as we noted above, was something that Korum stipulated to pretrial. Additionally, Korum failed to object during the prosecution’s closing argument, and we are not convinced that any misconduct that did

occur was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.”

Korum, at 650-651 (citation omitted).⁶

- C. Mr. Ish’s Fourteenth Amendment right to due process was violated by the admission of Otterson’s out-of-court promise to testify truthfully in return for reduced charges, combined with testimony that Otterson had already been allowed to plead guilty to reduced charges and that the prosecutor had not revoked the agreement despite Otterson’s failure to comply with its other terms.

In this case, Otterson testified (over objection) that he’d agreed to provide truthful testimony in return for a reduction in his charges. RP (5/9/07) 1104-1107; RP (5/10/07) 1153. He acknowledged violating other terms of his agreement repeatedly, but reassured the jury that he had testified truthfully, and told them that he had already been permitted to plead guilty to reduced charges. RP (5/9/07) 1104, 1106-1107, 1153; RP (5/10/07) 1133, 1139, 1142, 1141, 1144.

The clear import of this testimony was that the prosecutor personally believed Otterson’s story. First, the prosecutor would not have permitted Otterson to plead guilty to a reduced charge if she had not

⁶ Defense counsel in *Korum* also failed to object or request a curative instruction when a detective testified that he’d verified the codefendant’s statements and thus did not believe a polygraph examination was necessary. *Korum*, at 651.

believed him.⁷ Second, in light of Otterson's spectacular failure to comply with the other terms of the agreement, the prosecutor could have easily revoked the agreement if she did not believe that he was telling the truth. In other words, the evidence unequivocally established that Otterson was "compelled by the prosecutor's threats and the government's promises to reveal the bare truth." *Brooks*, at 1210 (quoting *Wallace*, at 1474).

This bolstered Otterson's testimony in a manner that Mr. Ish could not attack. The jury was left with the idea that Mr. Ish really had confessed to Otterson, and that the prosecutor believed Otterson to be truthful.⁸ This indirect—and unassailable—vouching violated Mr. Ish's right to a fair trial.

Vouching of this sort should never be allowed at trial, even after credibility has been attacked. The effect of such testimony is to privilege the witness's testimony over all other evidence.

⁷ Otterson testified that he met with the prosecutor prior to trial, and that she offered to reduce his charges after hearing his story. RP (5/9/07) 1103-1104; RP (5/10/07) 1123-1130.

⁸ Of course, the prosecutor had no objective means of assessing Otterson's truthfulness, and did not even ask for the polygraph required by the plea agreement. RP (4/17/07) 178-189.

D. The Court of Appeals applied the wrong legal standard in evaluating Mr. Ish's vouching argument.

The improper vouching here occurred during Otterson's testimony. Despite this, the Court of Appeals mechanically applied the standard used to evaluate a prosecutor's closing argument for improper vouching: "no prejudicial error arises unless counsel clearly and unmistakably expresses a personal opinion as opposed to arguing an inference from the evidence." *Ish*, at 786 (citing *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)).

This standard was inapplicable; the vouching problem here arose from the evidence, not from closing arguments. Had the Court of Appeals applied the correct analysis, it would have reversed Mr. Ish's conviction and remanded for a new trial, with instructions to exclude Otterson's out-of-court promise to testify truthfully in return for consideration from the prosecutor.

The Court of Appeals erroneously suggested that Mr. Ish's case was similar to *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). *Ish*, at 786-787. In *Kirkman*, a detective who had interviewed a child witness told the jury that he'd asked the child to promise to tell the truth during the interview. The Supreme Court held that the testimony was "simply an account of the interview protocol..." *Kirkman*, at 931. The

Court of Appeals found the testimony in this case analogous because it “merely set the context for the jury to evaluate [Otterson’s] testimony.” *Ish*, at 787. In *Kirkman*, there was no suggestion that the detective could independently determine whether or not the child was telling the truth. Here, by contrast, the import of the testimony was that the prosecutor could assess Otterson’s truthfulness and would give him the benefit of his plea bargain if he testified truthfully. This implication—that the prosecutor could assess the truth of Otterson’s testimony—distinguishes the error here from that in *Kirkman*.

Mr. Ish’s conviction violated his Fourteenth Amendment right to due process. The conviction must be reversed and the case remanded for a new trial, with instructions to exclude Otterson’s out-of-court promise to testify truthfully in return for consideration from the prosecutor. *Brooks*, *supra*.

II. THE IMPROPER VOUCHING PREJUDICED MR. ISH AND WAS NOT HARMLESS ERROR.

Under the due process clause, an accused person “is entitled to have his [or her] guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.” *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56

L.Ed.2d. 468 (1978); U.S. Const. Amend. XIV. Constitutional error is presumed to be prejudicial; to overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gonzales Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008).

The error here was prejudicial, and violated Mr. Ish's due process right to have his guilt determined solely on the basis of evidence introduced at trial. First, the improperly admitted evidence suggested that the prosecutor had some objective method, not admitted at trial, of verifying Otterson's testimony. Second, the evidence implied that the prosecutor personally believed Otterson's testimony—if the prosecutor did not believe the testimony, she would not have allowed him the benefit of his plea bargain, especially in light of Otterson's admitted violations of the terms of the agreement. Third, the evidence allowed the jury to conclude that Otterson's in-court oath was supplemented and enhanced by his out-of-court promise to testify truthfully. This bolstered his testimony, and privileged the evidence he provided over the other evidence introduced at trial.

The sole issue at trial was Mr. Ish's mental state. He did not deny that he caused Katy Hall's death, but instead challenged the proof that he

recklessly inflicted substantial bodily harm. Undisputed evidence showed that he was impaired by drugs, alcohol, and his own underlying mental problems. RP (5/2/07) 257, 298-299, 302-305, 354-357; RP (5/3/07) 427, 443, 451, 454, 482, 521, 542, 551-555, 560; RP (5/7/07) 615, 617; RP (5/8/07) 819, 925-926, 946. In closing, defense counsel argued that Mr. Ish intentionally assaulted Ms. Hall but did not recklessly inflict the harm she suffered. RP (5/21/07) 1463.

On this issue, the evidence was not overwhelming, but depended on the jury's assessment of Mr. Ish's subjective mental state. Otterson's testimony was a key component of the state's proof; Otterson purported to convey Mr. Ish's own unguarded description of his mental state at the time of the assault: that he'd broken Ms. Hall's neck and felt like he was "punching holes through her." RP (5/9/07) 1092-1093. If believed, this testimony severely undermined Mr. Ish's closing argument by suggesting that he was more than reckless when he inflicted substantial bodily harm. In the absence of Otterson's testimony, the state's proof consisted of weak circumstantial evidence—primarily testimony describing Mr. Ish's demeanor after the incident. RP (5/2/07) 257, 298-299, 302-305, 354-357; RP (5/3/07) 427, 443, 451, 454, 482, 521, 542, 551-555, 560; RP (5/7/07) 615, 617; RP (5/8/07) 819, 925-926, 946.

By vouching for Otterson through introduction of his plea agreement, including his out-of-court promise to testify truthfully in return for reduced charges, the prosecution suggested that jurors should believe Otterson and take Mr. Ish's purported confession seriously. This "confession" provided the only direct evidence bearing on Mr. Ish's mental state at the time of the assault.

The vouching error was not trivial, formal, or merely academic—instead, it went to the heart of Mr. Ish's defense to the charge of second-degree felony murder. The state was required to prove that Mr. Ish "intentionally assaulted Katy Hall [and] thereby recklessly inflicted substantial bodily harm..." Proof (in the form of his purported confession) that he knew he'd broken her neck and that he felt like he was punching holes through her left little doubt that he recklessly inflicted substantial bodily harm during the course of his intentional assault.

The state cannot establish beyond a reasonable doubt that the improper vouching was harmless. *Gonzales Flores, supra*. Because the error was not harmless, Mr. Ish's conviction must be reversed and the case remanded for a new trial, with instructions to exclude Otterson's out-of-court promise to testify truthfully in return for consideration from the prosecutor. *Gonzales Flores, supra*.

CONCLUSION

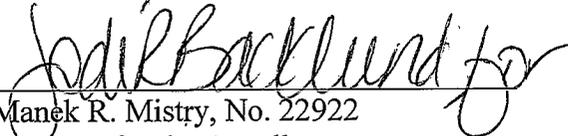
For the foregoing reasons, Mr. Ish's conviction must be reversed. The case must be remanded to the superior court for a new trial, with instructions to exclude any evidence relating to Otterson's out-of-court promise to testify truthfully.

Respectfully submitted December 4, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Supplemental Brief of Petitioner, postage pre-paid, to:

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and to:

Pierce County Prosecutor
930 Tacoma Ave., Rm. 946
Tacoma, WA 98402

And that I delivered the original and one copy to the Supreme Court,

All on December 3, 2009.

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 December 3, 2009.



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