

NO. 83308-7

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NATHANIEL ISH, APPELLANT

FILED
DEC 04 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Feltnagle

No. 05-1-01516-2

SUPPLEMENTAL BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show prosecutorial error where the prosecutor properly questioned a witness about the terms of a previously admitted plea agreement and the prosecutor's questions did not vouch for the witness or invade the province of the jury?

B. STATEMENT OF THE CASE.

On March 30, 2005, the State charged defendant Nathaniel Ish with one count of murder in the first degree, and one count of murder in the second degree. (3/30/05)RP 4¹, CP 1-4. Both counts dealt with the murder of defendant's girlfriend, Katy Hall. (3/30/05)RP 4, CP 1-4.² The charges were amended on August 25, 2006, to add one count of unlawful possession of controlled substance: cocaine. (8/25/06)RP 3-4, CP 50-52.

Trial commenced on April 16, 2007, in front of the Honorable Judge Thomas Felnagle. RP 3, 9-165. The court made several rulings on several motions in limine, including the introduction of a plea agreement involving a Mr. Otterson, one of the State's witnesses. RP 174-199. The

¹ The verbatim report of proceedings will be referred to as follows:

Volumes 1-16 that start on April 16, 2007, are sequential in pagination and will be referred to as RP. Volume 17 starts over at page 1 and will be referred to as (7/6/07)RP. The preliminary proceedings will be referred to as: (3/30/05)RP, (10/20/05)RP, (3/30/06)RP, (7/10/06)RP, (8/25/06)RP.

² The substantive facts of the case are presented in the Brief of Respondent below.

court ruled the parties could not mention whether or not Mr. Otterson had taken a polygraph. RP 195-199, 1079-1082, CP 193-194.

The jury did not reach a decision on the murder in the first degree charge, but instead found defendant guilty of the lesser offense of manslaughter in the first degree. RP 1510-1511, CP 188-191. The jury also found defendant guilty of murder in the second degree and unlawful possession of a controlled substance: cocaine. RP 1511, CP 192.

The court held sentencing on July 6, 2007. (7/6/07) RP 3. The conviction on manslaughter in the first degree was vacated under the theory of double jeopardy, and the conviction for murder in the second degree was allowed to stand. (7/6/07)RP 4-12, CP 15-27. The court determined that defendant's offender score was three. (7/6/07)RP 26, CP 15-27. The court sentenced defendant to 254 months, the high end of his sentencing range, with 18 months on the unlawful possession charge to run concurrent. (7/6/07)RP 47-8, CP 15-27.

Defendant appealed his convictions. CP 28-41. Defendant appealed on five grounds: 1) that the trial court erred in admitting custodial statements made while he was under medication, 2) that the trial court violated his right to confront witnesses by limiting his cross-examination of a jailhouse informant, 3) that the prosecutor committed misconduct by vouching for the informant's credibility, 4) that trial court erred in admitting the Lifeline recording over defense objections, and 5) that his counsel was ineffective for proposing a certain jury instruction on

recklessness. *State v. Ish*, 150 Wn. App. 775, 208 P.3d 1281 (2009).

Defendant also raised several issues in his Statement of Additional Grounds (SAG). *Id.* In the decision that was published in part, the Court of Appeals found no reversible error and affirmed the defendant's convictions. *Id.*

Defendant petitioned this Court for review of all issues including those in his SAG. This court accepted review only as to whether admission of the plea agreement improperly vouched for the witness' credibility.

C. ARGUMENT.

1. THE PROSECUTOR DID NOT COMMIT ERROR OR VOUCH FOR MR. OTTERSON'S CREDIBILITY AS THE PROSECUTOR DID NOT EXPRESS A PERSONAL OPINION AND DID NOT INVADE THE PROVINCE OF THE JURY.

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The

defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed 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." *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

A prosecutor's allegedly improper questioning is reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor enjoys

reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) cert. denied, __ U.S. ___, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Defendant claims that the prosecutor committed error³ when she questioned the witness about provisions of the plea agreement that had been used by both parties. Specifically, defendant alleges that by pointing out the term in the agreement that the witness was required to testify truthfully, that the State impermissibly vouched for the witness.

In the instant case, defense counsel did not object to introducing the terms of the plea agreement, in fact, when the State indicated that they could get around using the plea agreement, defense counsel indicated he wanted to use the plea agreement in cross-examination. RP 1079-80.

³ *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007) (explaining that the term "prosecutorial impropriety" is a more appropriate term for a claim asserting improper statements by a prosecutor at trial than the traditional term of "prosecutorial misconduct"). Accord AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Eleven_A.DOC

However, the defense did not want the State to be able to point to the terms of the plea agreement that showed that Mr. Otterson was required to testify truthfully. RP 1079-81. The court ruled that the terms of the plea agreement could be pointed out so that defense could not dangle it in front of the jury that Mr. Otterson just had to provide testimony, it didn't have to be truthful. RP 1082. The State's questions to the witness were thus allowed under the court's ruling.

Mr. Otterson had violated multiple conditions of his plea agreement and also had multiple crimes of dishonesty in this past. RP 1086-7, 1105-7. Defense counsel questioned Mr. Otterson at length about these violations. RP 1114-1121, 1126-33, 1139-45, 1148. On redirect, the State asked Mr. Otterson if the agreement required him to answer truthfully. RP 1153. Mr. Otterson said yes. RP 1153. The State asked if he had testified truthfully. RP 1153. Mr. Otterson said he had. RP 1153. Defense counsel did not object to these questions, so the error is waived unless the questions are flagrant and ill-intentioned.

The questions by the State were not flagrant or ill-intentioned. The questions were in line with the court's ruling and with the testimony in this case. The prosecutor was not vouching for Mr. Otterson. The questions only related to the terms of the agreement and did not offer her personal opinion as to whether or not the witness was telling the truth. The jury had plenty of evidence before it of Mr. Otterson's wrongdoings and his failure to abide by the other parts of the plea agreement. Mr.

Otterson's assertion that he had testified truthfully was subject to be weighed by the jury against his lack of compliance with the other provisions of the plea agreement. See *State v. Kirkman*, 159 Wn.2d 918, 931, 155 P.3d 125 (2007). The jury is the sole judge of credibility and the questions by the prosecutor did not invade that role.

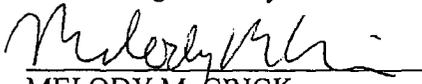
The instant case is distinguishable from *U.S. v. Roberts*, 618 F.2d 530, (9th. Cir. 1980), *cert. denied*, 452 U.S. 942, 101 S. Ct. 3088, 69 L. Ed. 2d 957 (1981), which defendant relied on in the court below. In that case, the prosecutor told the jury that a detective was in the courtroom to make sure the witness did not lie and if the witness did lie, the plea agreement would have been called off. *Id.* at 533. The court found it to be improper when the State referred to evidence outside the record to imply that the witness was testifying truthfully. *Id.* at 533-4. That is not the case here. In the instant case, the State asked a question about the admissible plea agreement that was part of the record. Also, contrary to *Roberts*, defense counsel did not object. There is no evidence of prosecutorial error or that defendant was prejudiced by these questions.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the Court of Appeals decision and to affirm the judgment and sentence entered below.

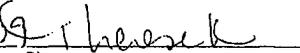
DATED: December 4, 2009

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12.4.09 
Date Signature

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Please see attached the State's Supp. Brief for the below stated matter:

St. v. Ish
No. 83308-7
Submitted by: Melody Crick
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Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to Melody Crick