NO. 43502-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAYNARD S. CHARGULAF,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Amber L. Finlay, Judge
Cause No. 11-1-00396-5

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing prosecutorial misconduct that deprived Chargualaf of his constitutional due process right to a fair trial.

02. The trial court erred in permitting Chargualaf to be represented by counsel who provided ineffective assistance by failing to object to prosecutorial misconduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Chargualaf was denied his constitutional due process right to a fair trial where the prosecutor engaged in prejudicial misconduct in vouching for four of his witnesses by improperly introducing evidence of plea agreements between the State and each witness and by wrongfully emphasizing the truthful component of each of the respective agreements? [Assignment of Error No. 1].

02. Whether Chargualaf was prejudiced by his counsel's failure to object to the prosecutor's misconduct in vouching for four of his witnesses?

C. STATEMENT OF THE CASE

01. Procedural Facts

Raynard S. Chargualaf (Chargualaf) was charged by first amended information filed in Mason County Superior Court on April 4, 2012, with burglary in the first degree (firearm enhancement), count I, robbery in the first degree (firearm enhancement), count II, four counts of

kidnapping in the first degree (firearm enhancement), counts III-VI, and unlawful possession of a firearm in the second degree, count VII, contrary to RCWs 9A.52.020, 9A.56.200(1)(a), 9A.40.020(1), 9.41.040(2)(a)(i), 9.94A.825 and 9A.08.020. [CP 87-92].

Trial to a jury commenced on April 4, the Honorable Amber L. Finlay presiding. No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Neither objections nor exceptions were taken to the jury instructions. [RP 541]. Chargualaf was found guilty as charged and sentenced within his standard range, with the court finding that count II (robbery) constituted the same criminal conduct as counts III-VI (kidnapping). [CP 5-19, 33-44].[1] Timely notice of this appeal followed. [CP 4].

02. Trial: Substantive Facts

On November 11, 2011, at approximately 5:40 p.m., police were dispatched to a reported armed robbery at a residence in Mason County. [RP 477-79]. Three suspects had fled in a full-sized pickup, which was spotted by Deputy Duain Dugan on his way to the scene. [RP 479].

> ... I saw them they saw me and subjects jumped out of the vehicle, one of them out of the bed of the truck between the bed of the truck and my car. I saw handguns in their hands

[1] Though included in the clerk`s papers, no index number was provided for count VI.

> when they did this. I yelled something on the radio, stomped on the gas trying to get out of there, because as all this was going on I heard a gunshot go off and I didn't know if they were shooting at me or what had happened and I wanted out of there.

[RP 479-80].

As the truck sped off, Chargualaf ran in front of Dugan's vehicle carrying a handgun before he was arrested shortly thereafter near the discarded gun, a loaded and operational .45 caliber semi-automatic pistol. [RP 482-85, 490, 509]. A K-9 unit apprehended the other suspect who had exited the truck, Duane Brunson, hiding in a nearby wooded area. [RP 121-22].

Individually and collectively, three of the victims related what had happened. Sharon Heim was in the kitchen when the masked and armed men entered the residence demanding money. [RP 172-74]. She was ordered at gunpoint into the living room. [RP 174, 177]. Her purse containing approximately $5,200 was taken from upstairs. [RP 150, 181, 185, 187-88]. John Heim, Sharon's husband, and Patrick McClearly came down from upstairs and were also directed into the living room, where they were held with the others at gunpoint. [RP 138-141, 177]. Mr. Heim identified Chargualaf as the person who had pointed a gun at him. [RP 156-57]. David Hiebert was confronted outside, tied up at gunpoint and

pushed to the ground. [RP 67]. He eventually freed himself and went to a neighbor's and called 911. [RP 69].

Chargualaf's four alleged accomplices pleaded guilty and testified for the State. Sierra Watts was aware that the others were going to commit an armed robbery and stayed in a vehicle near the residence where she was to serve as a lookout. [RP 318-19, 323-24]. Rosamond Watts Jr., Sierra's husband, claimed that he, Cliffton Darrow, Brunson and Chargualaf went to the Heims' residence to rob them. [RP 233-34, 281-82]. They were all masked and armed with loaded weapons. [RP 241-42, 251-52, 262].

> We just kind of – we all just busted out like I – but we just all busted out of the truck. Me and (Darrow) and (Chargualaf) were up front. (Brunson) was in the back, and I got out my side, (Brunson) jumped out of the back, and me and (Chargualaf) went towards the front door and (Darrow) and (Brunson) went towards the person that was working on the side of the house....

[RP 245].

After entering the house, Watts grabbed a DVD player, some pills and Ms. Heim's purse from upstairs. "... I had the purse and I just took off. Ran down the stairs and ran around the kitchen back outside to my truck." [RP 249]. "(M)e and (Darrow) and (Chargualaf) jumped in the front of my truck." [RP 252]. Brunson jumped in the back. [RP 252,

254]. They were frantic because they thought the police were on their way. [RP 252].

When Dugan later drove up behind them, "everybody just like jumped out of my truck. Like (Brunson) jumped out the back, (Chargualaf) jumped out of the side and (Darrow) went to get out of the side, and that's when (his) gun went off." [RP 254]. "I got scared and I floored it and (Darrow) climbed back up in my truck, and I seen (Chargualaf) and – I seen (Chargualaf) and – (Chargualaf) and Brunson running." [RP 254].

Darrow and Brunson corroborated Dugan's testimony, agreeing they had gone to the residence to commit a robbery, that they initially encountered and zip-tied Hiebert, that they were all armed and masked and that the inhabitants had been kept in the living room at gunpoint. [RP 383-89, 418-19, 433-36]. Darrow's gun had discharged when it fell from Watts's truck and hit the ground. [RP 395].

The parties stipulated that prior to November 11, 2011, Chargualaf, who rested without presenting evidence, was convicted of a felony. [RP 527-28].

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D. ARGUMENT

01. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT IN IN VOUCHING FOR FOUR OF HIS WITNESSES BY IMPROPERLY INTRODUCING EVIDENCE OF PLEA AGREEMENTS BETWEEN THE STATE AND EACH WITNESS AND BY WRONG-FULLY EMPHASIZING THE TRUTHFUL COMPONENT IN EACH OF THE RESPECTIVE AGREEMENTS.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor's obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

It is misconduct for a prosecutor to vouch for or bolster the credibility of a State's witness. See State v. Reed, 102 Wn.2d 140, 145, 684 P.3d 699 (1984). Evidence that a witness has entered into a plea agreement to provide "truthful testimony" is improper because it vouches for the witness's credibility. State v. Green, 119 Wn. App. 115, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035, cert. denied, 543 U.S. 1023 (2004). And this is true even if the prosecutor never exploits the testimony in closing argument and never argues that the witness was "complying with that term of the agreement." See State v. Ish, 170 Wn.2d 189, 194, 241 P.3d 389 (2010). Evidence of an agreement between the

State and a testifying witness for the witness to testify truthfully is not admissible in the State's case in chief. Green, 119 Wn. App. at 23.

The agreements between the State and Chargualaf's four alleged accomplices first came to light during the direct testimony of Mr. Watts when the prosecutor asked him if he was testifying in conjunction with a plea agreement that would result in his plea to lesser charges than those confronting Chargualaf. [RP 225-26]. During cross-examination, in response to Watts's claim that he was "trying to hold my accountability(,)" counsel for Chargualaf asked: "And you didn't hold that accountability until you got a deal from the State, correct?" [RP 282]. On redirect, the prosecutor asked and Watts responded as follows:

> Q. Okay. Now, what are your obligations in order to get that bargain?
>
> A. My obligations are just to tell the truth about what I, you know – my obligations are for me to tell the truth, you know, what happened.
>
> Q. Now you understand, do you not, that it's a part of your plea agreement that you not only cooperate and testify, but that you testify truthfully?
>
> A. Correct.
>
> Q. What's your understanding of what happens if you don't testify truthfully?
>
> A. The enhancements will be back on and it'll be back up to kidnapping one and there'll be no hundred and twenty-nine to hundred seventy-one months. I'll - -

Q. It'll be more?

A. It'll be a lot more.

[RP 290].

During the direct examination of Sierra Watts, the prosecutor asked if her testimony was also the result of a plea bargain that would result in lesser charges and consequences than those facing Chargualaf [RP 312-13], and she admitted during cross-examination to cutting a deal with the State to reduce her time. [RP 355]. On redirect, the prosecutor emphasized again that a condition of her plea agreement was that she "testify truthfully" and that she would face considerably more time if she didn't. [RP 362].

This theme continued during the testimony of Darrow and Brunson. They were both asked and both confirmed that their respective testimony was the result of a favorable plea bargain. [RP 372, 378-79, 415-16]. And while defense counsel for Chargualaf did not address the issue during the cross-examination of either witness [RP 397-410, 413, 447-463], on redirect in both cases the prosecutor again established that the respective plea agreements required both witnesses to provide truthful testimony or face more serious consequences. [412, 466-67].

In State v. Ish, the majority of the justices decided that the prosecutor had improperly vouched for the witness's credibility—Ish, 170 Wn.2d at 199-200 (plurality opinion), 206 (Sanders, J. , dissenting)—where the prosecutor (1) elicited evidence during direct that in exchange for the witness's testimony the State would reduce his charges in an unrelated matter, (2) elicited a response from the witness that he was to provide (t)ruthful testimony," (3) on redirect implied that the plea agreement would be rescinded if breached, (4) reemphasized the agreement's "truthful" component and (5) asked the witness if he had testified truthfully. Id. 170 Wn.2d at 192, 194.

> While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving, irrelevant, and may amount to vouching, particularly if admitted during the State's case in chief…

Id. 170 Wn.2d at 198.

Here, the prosecutor engaged in prejudicial misconduct in vouching for the four witnesses by improperly introducing evidence of the plea agreements between the State and each witness and by wrongfully emphasizing the truthful component in each of the respective agreements, thus constituting Ish redux and more. As demonstrated above, during its case in chief for each witness, the State introduced evidence of the plea agreements given in exchange for reduced charges; for each witness the

State elicited a response that he or she was to provide truthful testimony; for each witness the State more than implied the agreement would be rescinded if breached; for each witness the State emphasized the truthful component of the respective agreement. Collectively, this amounted to an expression of the prosecutor's personal belief, for it conveyed that he knew the truth, as set forth in United States v. Roberts, 618 F.2d 530 (9th Cir. 1980):

> A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation. (emphasis added).

Id. at 538.

Based on this record, reversal is required, especially since the verdict turned almost entirely on whether the jury believed the testimony of Chargualaf's four alleged accomplices. Moreover, the prosecutor's improper vouching was nothing short a flagrant attempt to encourage the jury to decide the case on improper grounds, for it was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147

P.3d 1201 (2006). The prosecutor's misconduct ensured that Chargualaf did not receive a fair trial.

> Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient....

In re Glassman, 175 Wn.2d 696, 711, 286 P.3d 673 (2012).

02. CHARGUALAF WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCONDUCT IN VOUCHING FOR FOUR OF HIS WITNESSES.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors,

the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

In the event this court finds that the prosecutor's misconduct was not flagrant and ill-intentioned, this court should nevertheless reverse based on counsel's ineffective assistance in failing to object to the prosecutor's misconduct in vouching for four of his witnesses.

The record does not, and could not, reveal any tactical or strategic reason why trial counsel allowed the prosecutor to vouch for his four

witnesses, which was harmful to Chargualaf and clearly inadmissible. For the reasons set forth in the preceding section, and in contemplation of the critical importance of the testimony, there is a reasonable probability that the outcome of the trial would have differed had the improper vouching been prevented.

E. CONCLUSION

Based on the above, Chargualaf respectfully requests this court to reverse his convictions consistent with the arguments presented herein.

DATED this 1st day of March 2013.

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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