DIVISION II, NO. 43502-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 90309-3

STATE OF WASHINGTON,

Respondent,

vs.

Raynard S. Chargualaf,

Petitioner.

PETITION FOR REVIEW

Raynard S. Chargualaf
Petitioner, Pro Se
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085, and the laws of the United States, pursuant to Title 28 U.S.C. § 1746, that copies of the "Petition For Review" were provided to:

Tim Higgs
Deputy Prosecuting Attorney
521 N. Fourth St.
P.O. Box 639
Shelton, WA 98584

EXECUTED ON this 26 day of May, 2014.

Respectfully submitted,

Raynard S. Chargualaf
Pro Se, Petitioner
Washington State Penitentiary
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Walla Walla, WA 99362

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A. IDENTITY OF PETITIONER

The petitioner for discretionary review is Raynard S. Chargualaf, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the opinion of the Court of Appeals, Division II, No. 43502-1-II, which was filed on May 6, 2014. See Appendix "A". No motion for reconsideration has been filed in the Court of Appeals.

C. ISSUES PRESENTED FOR REVIEW

D. STATEMENT OF THE CASE

Following Mr. Chargualaf's convictions, Mr. Chargualaf's counsel filed the Appellant's Brief challenging the above issues. Mr. Chargualaf also filed a Statement of Additional Grounds on April 28, 2013. The briefs set out the facts relevant to this petition. The briefs and all statements are incorporated herein by reference.

E. ARGUMENT

1. 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 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. Hudson, 73 W.2d 660, 663, 440 P.2d 192 (1968). Violation of his 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-intentional 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 Watt'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 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. (RP 412, 466-67).

In State v. Ish, the majority of the justices decided that the prosecutor had improperly vouched for the witness's credibility--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 recieve 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. Dhalival, 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, 71, 286 P.3d 673 (2012).

2. CHARGUALAF WAS PREJUDICE BY HIS COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCONDUCT IN VOUCHING FOR FOUR OF HIS WITNESS.

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 precludeds 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 probabiltity 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 conviction consistent with the arguments presented herein.

DATED this 26 day of May 2014.

Respectfully submitted,

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APPENDIX "A"

(Court of Appeals Decision, No. 43502-1-II)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RAYNARD SANTOS CHARGUALAF, Appellant.	No. 43502-1-II UNPUBLISHED OPINION

WORSWICK, C.J. — A jury found Raynard Chargualaf guilty of first degree burglary, first degree robbery, second degree unlawful possession of a firearm, and four counts of first degree kidnapping. Chargualaf appeals his convictions, arguing that (1) the prosecutor committed misconduct by vouching for the credibility of witnesses and (2) his counsel was ineffective for failing to object to the vouching. In a pro se statement of additional grounds, Chargualaf argues that his counsel was also ineffective for failing to request a jury instruction on second degree kidnapping as a lesser included offense. We hold that Chargualaf's prosecutorial misconduct claim is waived because he did not object at trial. Additionally we hold that his ineffective assistance of counsel claims fail. We affirm.

FACTS

Raynard Chargualaf and four codefendants—Rosamond Watts, Sierra Watts, Cliffton Darrow, and Duane Brunson—were charged for their involvement in a home invasion robbery. Each of Chargualaf's co-defendants pleaded guilty and agreed to testify for the State. Chargualaf took his case to trial.

A. *The Offenses*

Sharon Heim, John Heim, Patrick McCleary, and David Heibert lived on a residential property in Mason County near Belfair. Shortly after dark on an evening in November 2011, four masked men with guns entered the Heims' house. At gunpoint, the men moved Sharon Heim, John Heim, and McCleary into the living room. Heibert was outside before the gunmen entered; they tied him up at gunpoint and forced him to the ground outside.

From inside the house, the men took a purse containing $5,200 in cash, as well as jewelry, a DVD (digital video disk) player, and prescription medication. The mask worn by one gunman slipped down, and John Heim later identified this gunman as Chargualaf. The gunmen then left in a truck.

Meanwhile, Heibert freed himself, called 911 from a neighbor's house, and described a vehicle he believed the gunmen had driven. A nearby police officer was dispatched and saw a gold car and a pickup truck drive away from the scene. The gold car was driven by Sierra Watts, who had acted as a lookout. All four gunmen rode in the pickup truck.

When the gunmen saw the police officer, Chargualaf and Brunson exited the truck and began running. Chargualaf ran in front of the police car, carrying a handgun. The police officer pursued Chargualaf and arrested him.

The State charged Chargualaf with seven counts: first degree burglary, first degree robbery, four counts of first degree kidnapping, and second degree unlawful possession of a firearm. The State sought firearm enhancements for the first six counts.

B. *The Co-Defendants' Testimony*

The State called all four of Chargualaf's co-defendants as witnesses. At the outset of direct examination, the State (1) elicited testimony that each co-defendant testified pursuant to a plea agreement and (2) asked each co-defendant to list the charges to which he or she pleaded guilty.

With respect to the witnesses' plea agreements, Chargualaf's counsel approached cross-examination differently for each witness. During cross-examination of Rosamond Watts, Chargualaf's counsel used the plea agreement for impeachment. Chargualaf's counsel also mentioned the plea agreement during cross-examination of Sierra Watts. But Chargualaf's counsel did not mention plea agreements while cross-examining Darrow or Brunson.

Despite Chargualaf's counsel not mentioning the plea agreement during his cross-examination of Darrow or Brunson, the State, on re-direct examination of all four co-defendants, elicited further testimony that the plea agreement required each co-defendant to give truthful testimony. In addition, the State asked each witness for his or her understanding of what would happen if the testimony was not truthful; each witness stated or implied that his or her plea agreement would be revoked and the punishment would be harsher. Chargualaf's counsel did not object.

C. *Judgment*

The jury found Chargualaf guilty on all seven counts and further found in special verdicts that the State proved facts supporting the firearm enhancements. The trial court sentenced Chargualaf accordingly.

Chargualaf appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Chargualaf first argues that vacation of his convictions is warranted because the prosecutor committed misconduct by vouching for the credibility of the four co-defendant witnesses. We hold that Chargualaf failed to preserve this argument for review.

Prosecuting attorneys are quasi-judicial officers charged with the duty of ensuring that a defendant receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates that duty and can constitute reversible error. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); *see Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). We reverse a conviction when the defendant meets his burden of establishing that (1) the prosecutor acted improperly and (2) the prosecutor's improper act prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

A defendant who fails to object to the prosecutor's improper act at trial waives any error, unless the act was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *see State v. Case*, 49 Wn.2d 66, 76, 298 P.2d 500 (1956). In making that determination, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762. Because Chargualaf did not object to any vouching, we must consider what would have happened if he had objected. *See Emery*, 174 Wn.2d at 763.

Here, the prejudice resulting from any improper vouching could have been cured if Chargualaf had objected. References to a plea agreement requiring truthful testimony "may amount to a *mild* form of vouching." *State v. Ish*, 170 Wn.2d 189, 197, 241 P.3d 389 (2010) (lead opinion) (emphasis added). The prejudice resulting from these references could have been cured by an instruction directing the jury to disregard both the prosecutor's question and the witness's answer. *State v. Stith*, 71 Wn. App. 14, 20, 856 P.2d 415 (1993) (holding that such an instruction could have cured the prejudice occurring when a prosecutor, on cross-examination of a defendant, improperly asked whether police witnesses were lying). Because the resulting prejudice could have been cured, Chargualaf waived his claim that the prosecutor violated his right to a fair trial by vouching for the witnesses. *See Thorgerson*, 172 Wn.2d at 443.

II. Ineffective Assistance of Counsel

Chargualaf also argues that he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's vouching. We disagree.

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact, which we review de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). In reviewing claims of ineffective assistance, we begin with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

When claiming ineffective assistance of counsel, a defendant must satisfy the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, the defendant must show that counsel's performance was deficient, meaning that it fell below an

objective standard of reasonableness under all the circumstances. *Thomas*, 109 Wn.2d at 225-26. Second, the defendant must show that the deficient performance prejudiced the defendant's case. *Thomas*, 109 Wn.2d at 225. A failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Chargualaf fails to satisfy *Strickland*'s prejudice prong. Prejudice occurs if there is a reasonable probability that the result of the proceeding would have been different, had the deficient performance not occurred. *Thomas*, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Counsel's failure to object to the "truthful testimony" remarks is not sufficient to undermine confidence in the outcome of Chargualaf's trial. One of the victims identified Chargualaf as the gunman whose mask slipped off during the robbery. In addition, the police officer who arrested Chargualaf also identified Chargualaf as the man who ran in front of the police car carrying a handgun. Chargualaf did not call any witnesses, present an alibi, or argue any affirmative defenses. Although the prosecutor's references to truthful testimony were arguably improper, under the circumstances of this case counsel's failure to object does not undermine confidence in the outcome of Chargualaf's trial.[1]

Thus, Chargualaf fails to satisfy *Strickland*'s prejudice prong. Because Chargualaf has failed to show prejudice, we do not consider whether his counsel's performance was deficient. *Strickland*, 466 U.S. at 700.

[1] Both the prosecutor and Chargualaf's trial counsel made a record in anticipation of a future ineffective assistance argument. The record shows that, before the trial, Chargualaf rejected a plea agreement proposed by the State.

STATEMENT OF ADDITIONAL GROUNDS

In his pro se statement of additional grounds, Chargualaf further argues that he received ineffective assistance of counsel because his counsel failed to request a jury instruction on second degree kidnapping as a lesser offense included in first degree kidnapping. Again, we disagree.

When an ineffective assistance claim is based on counsel's failure to request a jury instruction, the claim cannot succeed unless the defendant shows that he was entitled to the instruction. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012), *review denied*, 176 Wn.2d 1023 (2013). A lesser included instruction is required only when the offenses and the evidence satisfy the two-pronged *Workman* test, consisting of a legal prong and a factual prong. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The legal prong is satisfied where, as here, each element of the lesser offense is also an element of the greater offense. *State v. Meneses*, 169 Wn.2d 586, 595, 238 P.3d 495 (2010). The factual prong is satisfied if the evidence would permit a jury to rationally find the defendant guilty of the lesser offense but acquit the defendant of the greater offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). When determining whether the evidence satisfies the factual prong, we view the evidence in the light most favorable to the party requesting the lesser included instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56.

Even viewed in the light most favorable to Chargualaf, the evidence here fails to satisfy the factual prong. When a kidnapping is done to facilitate the commission of any felony, it is a first degree kidnapping. RCW 9A.40.020(1)(b). A jury could not have rationally found that Chargualaf committed a kidnapping during this home invasion robbery unless it was done to

facilitate the commission of other felonies. Therefore Chargualaf was not entitled to the lesser included instruction. Chargualaf's claim of ineffective assistance fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Johanson, J.

Lee, J.

Raynard Chargualaf #818908
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May 26, 2014

The Court OF Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

RE: STATE V. CHARGUALAF, No. 43502-1-II

Dear Court Clerk:

Enclosed is my "Petition For Review" to Washington Supreme Court, under RAP 13.4.

Sincerely,

Raynard Chargualaf

cc: file