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AUG 15 2014

King County Prosecutor
Appellate Unit

NO. 70811-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CU TRUONG,

Appellant.

2014 AUG 15 PM 4:05
COURT OF APPEALS
JENNIFER J. SWEIGERT

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Repeated instances of prosecutorial misconduct deprived appellant of a fair trial.

2. Ineffective assistance of counsel in failing to object to prosecutorial misconduct violated appellant's right to a fair trial.

Issue Pertaining to Assignments of Error

A prosecutor may not offer personal opinions on the credibility of witnesses or the strength of the State's case based on information outside the evidence and must refrain from emotional appeals. Here, the prosecutor argued witnesses were told to tell the truth and "that's exactly what they did." She also told the jury "this is the best evidence you're going to get," and argued appellant was hoping the jury wouldn't care about the victim's death but "we know he's wrong." When the jury's verdict rested on the credibility of appellant's testimony he acted in self-defense, do the prosecutor's improper comments require reversal? Alternatively, was defense counsel ineffective in failing to object?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Cu Van Truong with one count of first-degree murder while armed with a firearm and one count of unlawful possession of a firearm. CP 9-10. Truong argued he acted in

self-defense. 19RP 102-06. The jury found Truong guilty of murder and found he was armed with a firearm. CP 134-35. At a bifurcated bench trial, the court found Truong guilty of unlawfully possessing a firearm. CP 138-39.

The trial court denied Truong's motion to dismiss for insufficient evidence at the close of the state's case and his motion for arrest of judgment on the same basis. CP 149; 18RP¹ 86-88. The court imposed 548 months (the high end of the standard range), the consecutive 60-month firearm sentencing enhancement, and 75 months on the unlawful possession charge to run concurrently for a total of 608 months. CP 151-53. Notice of appeal was timely filed. CP 165.

2. Substantive Facts

Truong testified he was in fear for his life when he shot Jason Saechao. 18RP 140. That fear stemmed from both the history of Truong's relationship with Saechao's girlfriend Ilyan Vang as well as from Saechao's threatening conduct on the night in question. 18RP 136, 143-46.

¹ There are 24 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 12, 2013; 2RP – Mar. 13, 2013; 3RP – Mar. 14, 2013; 4RP – Mar. 18, 2013; 5RP – Apr. 29, 2013; 6RP – May 2, 2013; 7RP – May 20, 2013; 8RP – May 21, 2013; 9RP – May 22, 2013; 10RP – May 23, 2013; 11RP – May 28, 2013; 12RP – May 29, 2013; 13RP – May 30, 2013; 14RP – June 3, 2013; 15RP – June 4, 2013; 16RP – June 5, 2013; 17RP – June 6, 2013; 18RP – June 10, 2013; 19RP – June 11, 2013; 20RP – June 12, 2013; 21RP – June 12, 2013(afternoon); 22RP – June 13, 2013; 23RP – June 16, 2013; 24RP – Aug. 23, 2013.

a. Background

Saechao and Vang had been involved for approximately eight years, since she was 13 years old, and the couple had a four-year-old daughter. 14RP 103-04, 109. The relationship was marred by Saechao's emotional and physical abuse of Vang. 15RP 44-46. Shortly before the events in this case, Saechao went to prison for violating a no-contact order prohibiting him from contacting Vang. 14RP 115. Portions of the couple's phone calls (recorded while he was incarcerated) were admitted to demonstrate Saechao's possessive and controlling relationship with Vang and his extreme concern that she might be unfaithful. RP 140-60; Exs. 99A, 101, 104-113.

Saechao's concern turned out to be well founded. Fed up with his abuse, Vang decided to leave him. 14RP 115-16; 15RP 32-33, 35. She kept her decision from him until after his release, but in the mean time, she had sexual contact with two other men. 14RP 115; 15RP 33, 35. One was Huong Duong, known as Wayne. 14RP 115. The other was Cu Truong. 14RP 115. She testified she considered her relationship with Truong to be merely a one-night stand, whereas she felt herself to be in the beginning stages of a new relationship with Duong. 14RP 125-26, 128-29; 15RP 46.

A few days before Christmas 2011, Saechao was released from jail. 15RP 31-32. On December 26, in the presence of her parents, Vang officially ended their relationship. 14RP 116; 15RP 32. She also told him

she had been unfaithful to him with both Duong and Truong. 15RP 46-47, 127-28. She claimed he was not particularly upset, except for the fact that he considered Duong to be his good friend. 14RP 117; 15RP 41-42. His subsequent conduct, however, belied Vang's claims of his equanimity.

After Saechao learned of Vang's relationship with Duong, he called Duong to come see him. 15RP 129. Over the course of an hour spent sitting in Saechao's car, Duong apparently agreed to hand over his tax refund as compensation for the betrayal. 15RP 130-31; 16RP 145-46. Duong claimed this was a negotiated agreement to avoid the fistfight that would otherwise likely ensue. 16RP 146-48. He testified he willingly handed over his jade Buddha necklace, worth approximately \$2,400, as collateral until he received the tax refund. 16RP 144, 149. Saechao showed the necklace to Vang and told her Duong had given it to him as a payoff for sleeping with her. 15RP 129-31.

b. Evening of December 27, 2011

The evening of December 27, after work, Truong met Vang, Duong, and their friend Karla Diocales at a restaurant. 18RP 122. The purpose of their meeting was to find methamphetamine for Truong to purchase, but they were unsuccessful. 18RP 122. While at the restaurant, Vang told Truong that Saechao had stolen Duong's necklace because she had slept with him.

18RP 134-36. She also told Truong that Saechao knew about her liaison with Truong and that Saechao was “beefing.” 18RP 134-36.

Afterwards, Truong and Vang went to a casino. 18RP 125. Vang claimed Truong also drove her to Alki beach, showed her a house under construction, and told her it was where they would live together with her daughter in the future. 14RP 124-25. She claimed she did not respond because there were no other signs that Truong considered their relationship to be serious. 14RP 125-26. After some time, Vang left the casino to try to locate some methamphetamine for Truong. 18RP 126. Later, she called Truong, who was still at the casino, and told him to stop by Duong’s brother’s bakery (where Duong worked nights baking bread) to pick up the methamphetamine when he was ready. 18RP 127.

c. Events at the Bakery

When Truong arrived at the bakery, Saechao came outside and moved boldly towards him, looking angry. 18RP 133. He demanded Truong’s diamond earrings and his money in payment for sleeping with Vang. 18RP 138. Truong told him no, but was on edge because of Saechao’s recent treatment of Duong. 18RP 134-37. Saechao followed Truong into the bakery repeating his demands for the earrings and money. 18RP 137-38. Truong tried to ignore him. 18RP 139. Once inside, Saechao

told Truong to “give him the stuff or he’s going to cap my ass,” meaning, “he’s going to shoot me.” 18RP 139.

Truong was aware of Saechao’s extreme jealousy regarding Vang and his theft of Duong’s necklace. 18RP 146. He knew Saechao would be armed because Saechao had pulled a revolver from his waistband during a methamphetamine transaction with Truong a few months earlier. 18RP 143-44. He knew Saechao’s brutal treatment of Vang included sudden bursts of violent rage. 18RP 145. When Saechao reached into his waistband, Truong believed he was about to die. 18RP 141-42.

Truong grabbed his own gun, turned around, fired from where he stood, and continued firing as he quickly walked out the door. 18RP 146-48. He did not say anything and did not pause. 18RP 148. He noticed Saechao bending over towards him and believed he was still trying to pull his weapon. 18RP 148. As Truong moved toward the door, he brushed very close to Saechao, so he knew Saechao had been hit. 18RP 149-50. But his only intention was to escape the bakery alive. 18RP 150.

Truong drove first to his sister’s, but she was not home. 18RP 151-52. On the way to his friend Randy’s home, he threw his gun into a trash can. 18RP 152. He and Randy smoked methamphetamine together. 18RP 153. Later, Truong called his sister and asked her to pick him up. 18RP 157-58. Truong’s sister drove him in his car back to her home, where he

smoked more methamphetamine. 18RP 158. In the morning, Truong, his sister, and her boyfriend left the house and headed for his mother's home. 18RP 159.

d. Police Investigation and Interviews

Meanwhile, Duong called 911. 16RP 97. But first, he took a few moments to hide some money from the police (Vang testified Duong told her it was methamphetamine that he hid). 15RP 110; 16RP 162. Police began to arrive at the bakery just after midnight. 10RP 34-35. Duong told them the same thing he told the 911 operator: that Saechao had been shot by an unknown robber. 14RP 161. Hearing Duong lie to the police, Vang decided to do so as well. 14RP 161-62. When confronted, Vang and Duong later told an entirely different story that they claimed was the truth. 14RP 163-64; 16RP 69-70.

According to Vang, she and Diocales arrived at the bakery before Duong got there, so they waited and smoked methamphetamine in the car. 14RP 127. After he arrived, they went inside and smoked some more. 14RP 129. She was surprised when Saechao arrived at the bakery because he did not usually hang out with them there. 14RP 129-30. She was nervous because of the recent break-up and her budding relationship with Duong. 14RP 129-32. She claimed Saechao was angry but not violent or threatening

and she was not afraid. 14RP 132-34. Diocales testified Saechao was angry and argued with Vang, who had been avoiding his phone calls. 14RP 78-80.

Vang testified Truong arrived a few minutes after Saechao and asked if he had any methamphetamine to sell. 14RP 138. Duong testified Saechao and Truong seemed to be arguing outside. 16RP 50, 139-40. Not wanting to draw police attention to his brother's bakery, he asked them to come inside. 16RP 50. Once inside, Vang heard Truong say, "I heard you were trying to set me up." 14RP 144. Saechao replied, "If I was, it would be done already." 14RP 144. Truong then demanded the return of Duong's necklace. 14RP 144. Saechao denied taking the necklace and told Truong, "he gave it to me." 14RP 144. According to Vang, it was at this point that Truong pulled out a gun and shot Saechao. 14RP 144.

According to Duong, he told Truong the issue was between him and Saechao, but Truong would not drop the subject. 14RP 182. Duong claimed to hear Saechao ask Truong, "What are you gonna do about it?" 16RP 182-83. He claimed Truong repeated, "What am I gonna do about it?" and then shot Saechao. 16RP 183.

Vang testified the first shot hit Saechao in the leg and he began to lean on some bakery racks. 14RP 148; 150-51. She heard a pause before the second and third shots hit Saechao somewhere in the midsection and Saechao began to hunch forward. 14RP 148-51. As he fired, she saw

Truong walk toward the entrance. 14RP 148-49. By the time of the fourth shot, Truong was side by side with Saechao, his arm a foot from Saechao's head, and Saechao fell to the ground. 14RP 148-49.

Duong described the first shot as hitting Saechao in the groin, and the second in the stomach. 16RP 54. He testified Truong walked to Saechao's side and fired a third shot into his shoulder. 16RP 54. He claimed Truong was on his way out the door when he returned, said "fuck it," pointed the gun straight down into the middle of Saechao's head and fired a fourth shot. 16RP 59-60. Before Truong left, Vang and Duong heard him say that no one had better say anything. 14RP 145; 16RP 129, 179.

Diocales could not see anything from where she was sitting. 14RP 31-32, 35-36, 86-87. She did not hear anything Truong said. 14RP 34, 36, 43, 51, 95. She merely heard three gunshots and then left because she was afraid of getting in trouble and she was already on probation. 14RP 92, 99-100. On her way out, she told Vang not to tell the police she was there. 14RP 49.

Detective Robin Cleary interviewed Duong, and then let him go home. 11RP 20. Meanwhile, Detective Mike Mellis interviewed Vang. 11RP 20. Twenty-five minutes into their interview, Mellis told Vang she was not being truthful. 11RP 152-53. She continued to explain and he again confronted her about not being forthcoming. 11RP 152-53. She then started

crying and changed her story entirely. 11RP 152-53. Roughly four hours after police had arrived, Vang recanted the robbery story she had initially told police. 11RP 20-22. Duong was asked to return and also gave an entirely different story. 11RP 21, 58-59. Cleary testified their inconsistent accounts delayed the investigation. 11RP 56-57.

e. Truong's Arrest and Interview

Mellis found Truong's white BMW parked in front of his sister's house and set up surveillance around 7 a.m. 11RP 102-03. King County Sheriff's deputies stopped the car shortly after it left around 9 a.m., and Truong was arrested approximately nine hours after the investigation began. 10RP 86, 92-93. A deputy informed Truong he was under arrest for homicide. 10RP 93. Truong responded, "What are you talking about? I didn't do anything!" 10RP 93. Detective Sampson took custody of Truong's sister, and testified she never asked why Truong was being arrested. 13RP 137.

In his interview with King County detectives repeatedly told Truong they knew he was present at the shooting, and asked if he was a mere bystander or if he had, perhaps, acted in self-defense. Exs. 55-57.² Truong repeatedly denied knowing anything about the shooting. 18RP 161-63; 19RP 4-5, 8; Exs. 55-57. He testified he lied because he was high on

² Exhibit 55 is the transcript of Truong's interview with the detectives. Exhibits 56 and 57 are the audio and video recordings of that interview.

methamphetamine and did not trust police after a previous bad experience. 18RP 201-03. He explained he did not believe they wanted to understand his side of the story. 19RP 18. He believed they only wanted a confession and would not believe his version of events. 18RP 201-02; 19RP 18.

From jail, Truong called Vang, pretended not to know what had happened, told her he did not see her after she left the casino, and asked her to visit him. 19RP 26-27; Ex. 91. Vang was angry and refused. 14RP 171-74.

f. Forensic Evidence

Forensic examination of Truong's sweater revealed spots of blood. 5RP 27-29. DNA analysis excluded Truong as the source of the blood, which matched a reference sample from Jason Saechao. 5RP 32-33.

The autopsy revealed Saechao was shot four times. 12RP 96-97. The medical examiner testified three of the shots, to the leg, arm, and neck, were potentially survivable. 12RP 110, 116. A fourth appeared to be a contact shot to the head and would have caused nearly instantaneous death. 12RP 111-12, 116. The autopsy revealed nothing about the order in which the injuries occurred or the position of the shooter. 12RP 118. Saechao's blood tested positive for a significant amount of methamphetamine. 12RP 149; 13RP 49-50.

The medical examiner agreed the shot to the leg was at a steep angle that could be consistent with a self-inflicted injury. 12RP 146-47. Four shell casings found at the scene were determined to have been fired from the same weapon. 17RP 158. But a bullet fragment was found that could not be conclusively linked to the bullets found in and around Saechao's body or the casings. 18RP 39. Strewn around Saechao's body were a piece of tissue, a lanyard with keys attached, a container of tic-tac mints, and a cigarette pack. 12RP 51-55. It appeared someone had gone through his pockets, but Vang, Duong, and Diocales all denied having done so. 9RP 130-31; 14RP 92, 94, 156-57; 16RP 67-68. Based on this evidence, and Duong's admission that he took the time to hide something before calling 911, Truong argued Saechao may also have been armed and fired a shot, and Duong had the opportunity to take and hide Saechao's gun. 19RP 75-79, 110-15.

g. Closing Arguments

In closing argument, the prosecutor attempted to parse out the varying accounts of what happened the night of December 27, 2011 by telling the jury the following:

You know, there are moments in every trial when you get the purest of purest glimpses into that human element. It can't be practiced, and it can't be rehearsed. We didn't sit down with these witnesses and practice their direct testimony. We didn't show them anything, other than their own transcripts. And the only thing we told them was come in here and tell the truth.

Admit you are a meth addict. Admit you were smoking meth that day. And admit your initial story to the cops wasn't true. Ms. Diocales, admit that you cowardly ran off and left your friends there to deal with the cops. But tell this jury exactly what happened, and don't hide from anything. And that's exactly what they did.

19RP 49-50 (emphasis added). The prosecutor argued Truong's responses, by contrast, were "rehearsed":

And the other, oft repeated, I submit rehearsed response, I was scared for my life. Couple of human moments that Mr. Truong couldn't avoid. From what I've learned of Jason, I was scared of my life. From what you've learned of Jason, since the time you shot him? And from what you've learned of Jason that you know the jury will hear?

19RP 60. Regarding Saechao, the prosecutor continued, "And you hope, you just hope that maybe the jury won't care either. And he's wrong. We know he's wrong." 19RP 60. In rebuttal to Truong's argument that he did not intend to kill Saechao, but was only trying to escape the bakery with his life, the prosecutor told the jury, "I would hate to see what kind of a crime scene he makes when he does intend to kill. That is about – that is about the best evidence you are going to get." 19RP 122-23.

C. ARGUMENT

TRUONG'S TRIAL WAS UNFAIR BECAUSE THE PROSECUTOR IMPROPERLY VOUCHERED FOR THE STATE'S WITNESSES, OFFERED A PERSONAL OPINION ON THE STRENGTH OF THE EVIDENCE, AND APPEALED TO THE JURY'S EMOTIONS.

A prosecutor is a quasi-judicial officer representing the people of the state in the search for justice. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). But "defendants are among the people the prosecutor represents." Id. Thus, "the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id.

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal of the conviction when the prosecutor's argument was improper misconduct and there is a substantial likelihood the misconduct affected the verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is more on whether the effect of the argument could be cured than on the prosecutor's mindset or intent. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) rev. denied, 175 Wn.2d 1025 (2012) (citing State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012)).

Here, the prosecutor's closing argument improperly bolstered the credibility of the State's witnesses, vouched for the strength of the evidence, and appealed to jurors' desires not to be seen as uncaring. Taken alone or separately, these improper arguments deprived Truong of a fair trial by an impartial jury. The prosecutor's comments were improper and created an effect that could not be cured. Alternatively, counsel was ineffective in failing to object.

- a. The Prosecutor Improperly Vouched for Vang's and Duong's Credibility by Arguing They Were Told to Tell the Truth and "That's Exactly What They Did."

A prosecutor may not offer a personal opinion on the credibility of the State's witnesses. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016, 245 P.3d 772 (2011). Improper vouching occurs when the prosecutor places the prestige of the government behind the witness or expresses a personal belief as to the witness' truthfulness. Id. (citing United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (citing United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007)). Although it is permissible to reason that the evidence showed a witness is truthful, it is misconduct to declare the witness truthful based on something other than the evidence. In this case, the prosecutor declared Vang and Duong told the truth, not because the evidence supported that

conclusion, but because they had been instructed to do so by the prosecutors. 19RP 49-50. This was misconduct.

“Akin to the rule against vouching is the advocate-witness rule, under which attorneys are generally prohibited from taking the witness stand to testify in a case they are litigating.” United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998). Both rules are “designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the ‘fundamental distinctions’ between advocates and witnesses.” Id. at 922 (citing United States v. Prantil, 764 F.2d 548, 554 (9th Cir. 1985)). Vouching is inappropriate because it invites the jury to assume the State’s witnesses bear a special seal of trustworthiness.

Here, the prosecutor argued, “the only thing we told them was come in here and tell the truth” and “that’s exactly what they did.” This argument improperly used the prestige of the prosecutor’s office to shore up the credibility of Vang and Duong’s testimony. Their credibility was in doubt because of their conflicting statements to police and the fact that Duong admitted hiding something before calling the police. 15RP 110; 16RP 162. The prosecutor could have permissibly argued the jury should believe their testimony based on the evidence. She could have permissibly

argued that because they admitted embarrassing facts such as their drug use, they should be believed. But it was improper to argue that she told them to come in and tell the truth and not hide anything, and so “that’s exactly what they did.”

Even if it were permissible to reference the fact that the prosecutors told the witnesses to tell the truth, the follow-up comment that “that’s exactly what they did” injected the prosecutor’s personal opinion as to the veracity of the testimony. For example, in Ish, the court was concerned that, “Evidence that a witness has promised to give “truthful testimony” in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement.” 170 Wn.2d at 198. The court held that testimony about an agreement to testify truthfully may be admissible on redirect, if the defense has previously attacked the witness’ credibility by referring to a benefit received in exchange for the testimony. Id. at 199. The court declared that even if the defense has opened the door, only the terms of the agreement are admissible. Id.

“[P]rosecutors must not be allowed to comment on the evidence, or reference facts outside of the record, that implies they are able to independently verify that the witness is in fact complying with the agreement. Id. And if there has been no relevant attack on the witness’

credibility, the agreement should be entirely excluded. Id. The court concluded the trial court had abused its discretion in admitting testimony about the plea agreement on direct examination. Id. The promise to testify truthfully “was irrelevant and had the potential to prejudice the defendant by placing the prestige of the State behind [the witness’] testimony.” Id.

Like the plea agreement in Ish, the prosecutor’s argument in this case improperly suggested the State had some way of verifying that the witnesses were telling the truth. She told the jury not only that she told them to tell the truth, but “that’s exactly what they did.” 19RP 122-23. She did not merely mention an agreement (or, in this case, an instruction) to tell the truth; she crossed the line into the territory of personal opinion that the Ish court declared must be excluded in all circumstances. 170 Wn.2d at 199 (only terms of agreement may be admissible, not assertion that witness has complied).

A prosecutor may not argue witnesses were told to tell the truth and so they did. “[T]he unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.” Id. at 197 (quoting Roberts, 618 F.2d 530). The prosecutor’s closing argument was improper.

b. The Prosecutor Improperly Bolstered the State's Evidence by Telling the Jury "That Is About the Best Evidence You Are Going to Get."

The prosecutor gave an additional improper opinion based on facts outside the record when she argued, "I would hate to see what kind of a crime scene he makes when he does intend to kill. That is about – that is about the best evidence you are going to get." 19RP 122-23. This argument implies a wealth of experience of other cases in which defendants have been found guilty beyond a reasonable doubt and suggests to the jury that there could be no better evidence on which to convict.

A fair trial "certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused." Monday, 171 Wn.2d at 677 (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)). See, also, State v. Susan, 152 Wash. 365, 380, 278 P. 149 (1929) (improper vouching when prosecutor implies knowledge of defendant's guilt based on evidence not before the jury). Like the comment that the witnesses told the truth, the comment that this is the best evidence you are going to get improperly implies the defendant is guilty based on facts to which only the State is privy. .

The prosecutor's remark was improper vouching because it suggested that evidence not presented to the jury supported the prosecutor's personal opinion as to the strength of the State's case. In United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992), the Ninth Circuit held, "A prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus." See also, United States v. Vargas, 583 F.2d 380, 387 n.7 (7th Cir. 1978) (recognizing a prosecutor's statement carries an implicit stamp of authenticity and credibility as it is endorsed by the government).

The prosecutor's comments here amounted to a personal evaluation of the strength of the State's case by reference to her knowledge of other cases not available to the jury. This personal opinion was misconduct. Kerr, 981 F.2d at 1053.

c. The Prosecutor Improperly Appealed to Jurors' Emotions by Arguing an Acquittal Would Mean They Did Not Care About Jason Saechao's Death.

"The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." Glasmann, 175 Wn.2d at 704 (quoting American Bar Association, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980)). Moreover, comments that urge jurors to sympathize with the

victim and otherwise distract jurors from determining whether the State has proven each element of the crime are improper. People v. Littlejohn, 144 Ill. App. 3d 813, 827, 494 N.E.2d 677 (Ill. App. 1986); see also State v. Mills, 748 A.2d 318, 323-24 (Conn. App. 2000) (improper for prosecutor to tell jury not to victimize the victim again).

It is also misconduct for the prosecutor to make comments “calculated to align the jury with the prosecutor and against the [accused].” State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). This alignment may occur in an obvious manner. See id. (prosecutor argued defendant’s counsel and expert witnesses were outsiders driving expensive cars). Or it may occur by subtler, but no less effective, means.

For example, it is improper for a prosecutor to align herself with jurors by making continuous references to “we” and “us” as though jurors and the prosecutor were one and the same or on the same side. State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006); State v. Spencer, 81 Conn. App. 320, 329, 329 n.6, 840 A.2d 7 (Conn. Ct. App. 2004), reversed in part on other grounds, 275 Conn. 171, 881 A.2d 209 (Conn. 2005); People v. Johnson, 149 Ill. App. 3d 465, 468, 102 Ill. Dec. 835, 500 N.E.2d 728 (1986) (prosecutor unfairly aligned himself with jury by referring to “our job” to find the facts). Because a prosecutor is not a member of the jury, a prosecutor’s use of pronouns like “we” and “us” is inappropriate and may

be an effort to appeal to the jury's passions. Mayhorn, 720 N.W.2d at 790; Spencer, 81 Conn. App. at 329, 329 n.6. Such alignment also blurs the proper roles of neutral factfinder and zealous advocate in the adversary process.

Here, the prosecutor both aligned herself with the jury and made an improper emotion appeal when she argued Truong was hoping "maybe the jury won't care either," and then concluded, "And he's wrong. We know he's wrong." 19RP 60. This argument improperly suggested that an acquittal would indicate that the jury, like Truong, did not care about Jason Saechao. The prosecutor's argument focused the jury's attention on sympathy for Saechao and their own desire not to be seen as uncaring. It distracted the jury from the only real question before it: whether the evidence indicated Truong acted in self-defense. And it defined a group of caring people that included the prosecutor and the jury but excluded Truong. A prosecutor may not describe herself and the jury as a group of which the accused is not a part. Reed, 102 Wn.2d at 147; Mayhorn, 720 N.W.2d at 790. The prosecutor's comments aligning herself with the jury and suggesting a not-guilty verdict would mean the jury did not care about the victim were an improper emotional appeal.

d. Taken Alone or Cumulatively, the Prosecutor's Comments Were Likely to Impact the Jury's Decision and the Prejudicial Effect Could Not Have Been Cured.

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial as a whole. Glasmann, 286 P.3d at 678. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

“The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks.” State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)). If this Court is unable to conclude from the record whether the jury would or would not have reached its verdict but for the misconduct, then it may not deem it harmless. Charlton, 90 Wn.2d at 664.

Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal). Repeated instances of misconduct and their cumulative effect must be considered as a whole. See State v. Walker, 164 Wn. App. 724, 738, 265 P.3d 191 (2011) (improper comments used to develop theme in closing argument impervious to curative instruction). The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 286 P.3d at 679; Case, 49 Wn.2d at 73; Walker, 164 Wn. App. at 737; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

That is what occurred here. The prosecutor's comments in this case require reversal, despite the lack of objection, because she repeatedly relied on her personal opinion and the prestige of her office and played to the jury's emotions. She made improper comments not just once or twice, but three times. She used them to bolster Vang and Duong's credibility, vouch for the strength of the State's case, and suggest that a not-guilty verdict would mean the jury "didn't care" about Jason Saechao.

The jury would likely be unable to set aside the prosecutor's vouching for the witnesses and the strength of the State's case. The

average jury has confidence the prosecutor will fulfill her duty to refrain from methods calculated to produce a wrongful result. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). “Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.” Id. What the prosecutor says, and how it is said, is likely to have significant persuasive force with the jury. Glasmann, 286 P.3d at 679. Instructing the jury to disregard could not have cured the inflammatory effect of these comments. See Emery, 174 Wn.2d at 762-63; Pierce, 169 Wn. App. at 552 (In general, arguments that have an inflammatory effect on the jury are not curable by instruction.).

Under the circumstances, these improper considerations were likely to tip the scales. The eyewitnesses Vang and Duong gave several conflicting statements, so their credibility was substantially in doubt. And there was other evidence from which a jury could have found Truong acted in self-defense. Because this Court cannot be certain these comments did not affect the jury’s deliberations, reversal is required. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

e. Alternatively, Counsel Was Ineffective in Failing to Object to the Prosecutor's Improper Argument.

Alternatively, if this Court concludes this issue was not preserved, Truong was denied his right to effective assistance of counsel when counsel failed to object to the prejudicial arguments discussed above. The federal and state constitutions guarantee accused persons the right to effective representation at trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (citing U.S. Const. amend. 6; Const. art. 1, § 22). Ineffective assistance of counsel is a constitutional error that may be considered for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The two-part test set forth in Strickland is used to determine ineffective assistance of counsel. Thomas, 109 Wn.2d at 225-26. Under the first prong, the court must determine if counsel's performance was deficient. Id. Representation is deficient when, taking into account all the circumstances, it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Under the second prong, the court must reverse if it finds a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different.” Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694).

Here, defense counsel’s performance was unreasonably deficient when he failed to object to arguments that strove to create align the jury with the prosecutor, vouched for the credibility of the State’s witnesses and the strength of the State’s case, and suggested the jury could only vote not guilty if it did not care about Jason Saechao. If this Court finds the error could have been cured by instruction to the jury, counsel was ineffective in failing to request such an instruction to ensure the jury remained impartial. Additionally, counsel was ineffective in failing to preserve the error for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel’s performance, the outcome of the trial would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice requires reversal whenever the attorney’s error undermines confidence in the outcome. Id. That confidence is undermined here. Whether Truong acted in self-defense came down to a question of whether

one believed his testimony or Vang's and Duong's. The improper vouching and emotional appeal was likely to tip the scales in favor of a guilty verdict. If the Court declines to consider Truong's prosecutorial misconduct issue, it should reverse for violation of Truong's right to effective assistance of counsel.

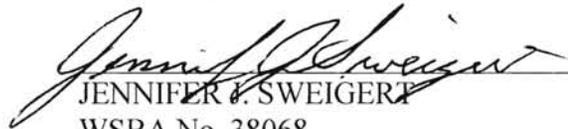
D. CONCLUSION

Because prosecutorial misconduct, or alternatively, ineffective assistance of counsel, deprived him of a fair trial, Truong requests this Court reverse his conviction.

DATED this 15th day of August, 2014.

Respectfully submitted,

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 70811-2-I
)	
CU TRUONG,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF AUGUST, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CU TRUONG
DOC NO. 895668
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF AUGUST, 2014.

X *Patrick Mayovsky*