

65503-9

65503-9

NO. 65563-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

Malcolm James Fontenot,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN, JUDGE

BRIEF OF RESPONDENT

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COURT OF APPEALS  
FILED

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**A. ISSUES PRESENTED**

1. Did defense counsel waive his claim to challenge what he deemed "vouching" (prosecutorial misconduct) by not raising the issue in a timely manner?

*Answer: Yes.*

2. Should this Court find that the prosecutor vouched for the truthfulness of Mr. Walter Aguilar?

*Answer: No.*

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The King County Prosecutor charged the defendant with first degree robbery and unlawful possession of a firearm in the first degree. RP 1.<sup>1</sup> The victim's name is Walter Aguilar. RP 3 at 36. Mr. Aguilar testified at trial. RP 3 at 36-70. Officer Marlow of Seattle Police Department testified. RP 3 at 5-17. Officers Kevin Oshikawa-Clay, Camilo Depina and George Abed also testified. RP 2 at 6-39, 77, 82, 84-99. A jury found the defendant guilty based on the testimony and evidence presented as charged. RP 4 at 38.

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<sup>1</sup> RP hereinafter refers to "Case Proceeding Transcript." There are five volumes of this, which will be referred to as RP (April 20, 2010 proceeding), RP 2 (April 21, 2010 proceeding), RP 3 (April 22, 2010 proceeding), RP 4 (April 26, 2010 proceeding), and RP 5 (June 10, 2010 proceeding: sentencing) in chronological order.

## 2. SUBSTANTIVE FACTS

On July 31, 2009 at around 2035 hours officers were working in down town Seattle when a man approached them. RP2 at 9-10. He came up to them on Pine Street between 3<sup>rd</sup> and 4<sup>th</sup> Avenue, and told them someone had stolen his chain necklace by force. Id. He was out of breath and exasperated. Id. That person, Walter Aguilar, pointed out the individual who robbed him, who was still in close physical proximity to where Mr. Aguilar and the officers were. RP 2 at 10. Officers gave chase, after telling Mr. Fontenot to stop. RP 2 at 10, 11, 12. He did not stop, and a pursuit which lasted multiple city blocks occurred. Id.

Mr. Aguilar was also involved in the chase, desperate to get his prized necklace back. RP 2 at 13, 14. Mr. Fontenot attempted to get rid of the gun by dumping it by a dumpster in the alley during the chase. Id. It was recovered by Officer Oshikawa-Clay. RP 2 13-21, 30, 35-36. This gun was collected in accordance with Seattle Police Department protocol by Officer Oshikawa-Clay. RP 2 at 25-29, 33.

The stolen necklace was later recovered from Mr. Fontenot's person post booking in the King County jail. RP 2 97-99. He had shoved it up his posterior, apparently, in an attempt to hide it from Mr. Aguilar and/or the police. Id.

## ARGUMENT

### 1. FONTENOT WAIVED HIS CLAIM THAT THE PROSECUTOR VOUCHERED (COMMITTING PROSECUTORIAL MISCONDUCT) DURING CLOSING ARGUMENT BY NOT MAKING A TIMELY OBJECTION.

Fontenot claims that the prosecutor committed misconduct when discussing the testimony of witness Walter Aguilar. AB 5-6.<sup>2</sup> There was no objection to this argument at trial, and Fontenot's argument on appeal is based upon a strained interpretation of the prosecutor's comments. In the argument at issue, the prosecutor encouraged the jurors to examine the evidence and review the testimony of the witness with regard to if he had seen the defendant prior to the day of the robbery. RP 4 19. This was entirely proper argument and consistent with the jury instructions. To the extent that the argument could have been misconstrued, Fontenot's challenge on appeal is waived because any possible prejudice could have been avoided by a proper objection and a curative instruction.

There was no objection to the prosecutor's argument about Mr. Aguilar's testimony at trial during her closing argument. She referenced what Mr. Aguilar testified to in terms of facts of what occurred that day as well as evidence that was recovered which corroborated his testimony. RP 4 4-19. Fontenot now claims that the prosecutor's argument diminished the State's burden of proof by placing undue weight and credibility with

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<sup>2</sup> AB refers to the Appellant Brief filed with the court.

and on witness Walter Aguilar in a case where there was not much corroborative evidence and jurors likely relied largely on Mr. Aguilar's testimony to reach their final decision in terms of the verdict.

The law governing Fontenot's claim is well-settled. When a defendant claims prosecutorial misconduct (as he, in effect, is doing here, claiming that the prosecutor vouched for a witness), he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks '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. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

"Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense

counsel's failure to object to the remarks at the time that they are made strongly suggests to a court that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. Id., 157 Wn.2d at 53 n.2.

Fontenot has not met his burden of showing that the prosecutor's argument was improper, let alone flagrant and ill-intentioned. His claim that the prosecutor vouched for Mr. Aguilar is an incorrect characterization of the prosecutor's argument. As reflected in the transcript, the prosecutor never made such an argument. Instead, she encouraged the jurors to discuss the evidence (including the fact that Mr. Fontenot had a gun) with their fellow jurors in order to decide whether the defendant committed the crimes he was charged with. CP 14-15. There is nothing wrong with this argument. It is consistent with the law and the jury comments to ask jurors to examine the evidence and to consider what any witness has to "benefit" based on their testimony... what "interest, if any, they may have in the outcome of the trial." CP 14.

The trial court instructed the jurors that "you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 17. As the Washington Supreme Court has noted, "We want juries to deliberate, not merely vote their initial impulses and move on." State v. Cross, 156 Wn.2d 580, 616, 132 P.3d 80 (2006).

Not only does Fontenot's claim of misconduct rely upon a strained interpretation of the prosecutor's argument, but his argument concerning prejudice presumes that the jury would disregard the trial court's specific instruction that each juror had to make his or her own decision on reasonable doubt. CP 18.

Prior to closing argument, the trial court instructed the jury as follows:

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 16. The court further instructed the jury to disregard any argument by counsel that was inconsistent with the court's instructions, and that their statements were not evidence. CP 15. The jury is presumed to have followed the court's instructions. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). Fontenot cannot show that he suffered any prejudice.

Moreover, in this case, because Fontenot made no objection, he must show that the prosecutor's comments were so flagrant and ill-intentioned that an instruction could not have cured any prejudice. *See State v Belgarde*, 110 Wash.2d 504, 508, 755 P.2d 174 (1988). The

Washington Supreme Court has recognized that a curative instruction can remedy the prejudice caused by an improper argument about the reasonable doubt standard.

Fontenot contends the prosecutor committed misconduct. To obtain reversal of a conviction on the basis of prosecutorial misconduct, a defendant must show the prosecutor's conduct was improper and the conduct had a prejudicial effect, which means there must be a substantial likelihood the conduct affected the verdict. State v Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert denied, 516 US 1121 (1996).

Absent an objection, a defendant cannot claim prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that a curative instruction could not have neutralized any prejudice. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

A prosecutor's 'remarks must be 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), cert denied, 523 U.S. 1007 (1998).

## **II. THE PROSECUTOR DID NOT VOUCH FOR A WITNESS AND HENCE DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL**

Appellate court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the

evidence addressed in the argument, and the jury instructions. See generally State v. Jackson, 150 Wash.App 877, 209 P.3d 553 (2009).

While courts have held that "It is improper for a prosecutor to personally vouch for a witness's credibility" Jackson at 883, they have clearly indicated that the prosecutor must make it clear that it is their personal belief for any statement to qualify as vouching. Id. Whether a witness testified truthfully is completely for the jury to determine. United States v. Brooks, 508 F3d at 1210 (quoting United States v. Ortiz, 362 F.3d 1274, 1279 (9<sup>th</sup> Cir.2004).

In this case, the prosecutor did not say "I believe" or "I think" or "I feel" that Walter Aguilar was telling the truth. Had she done so, that would have been improper. Instead, she beseeched jurors to look at the evidence and determine the credibility of the witness based on the evidence, and to determine what occurred. RP 4 14-15.

"Prosecutors may argue an inference from the evidence, and appellate court will not find prejudicial error unless it is clear and unmistakable that counsel is expressing a personal opinion." State v Brett, 126 Wash.2d at 175, 892 P.2d 29 (quoting State v Sargent, 40 Wash.App 340, 344, 698 P.2d 598 (1985). That is what the prosecutor in this case did.

For example, evidence of a weapon was recovered that was tossed by the defendant as he ran from police. As the prosecutor argued, "The

fact of the matter is, and the evidence has shown, the defendant did have a gun." She argued based on the facts presented that the elements of the crimes had been met.

Fontenot argues the prosecutor committed misconduct because she vouched for the credibility of the State's witnesses. "It is improper to vouch for a witness's credibility, but attorneys may argue credibility and draw inferences about it from the evidence." Brett, 126 Wn.2d at 175.

"A prosecutor arguing credibility only commits misconduct when it is 'clear and unmistakable' he is expressing a personal opinion rather than arguing an inference from the evidence." State v. Papadopoulos, 34 Wn.App. 397, 400, 663 P.2d 59, review denied, 100 Wn.2d 1003 (1983). In this case, the prosecutor did not express her personal opinion, never stating "I think" "I believe" or "I know." She argued from the evidence, as she referenced various pieces of testimony while discussing Mr. Aguilar's testimony. RP 4-19. No vouching occurred.

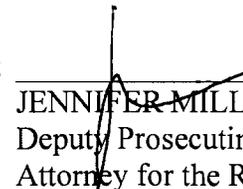
### **CONCLUSION**

For the aforementioned reasons this Court should deny counsel's assignment of error with regard to alleged vouching which is unsubstantiated, and affirm the jury's finding of guilt of Robbery First Degree and Violation Uniformed Firearms Act.

DATED this 4 day of MARCH 2011

RESPECTFULLY submitted,

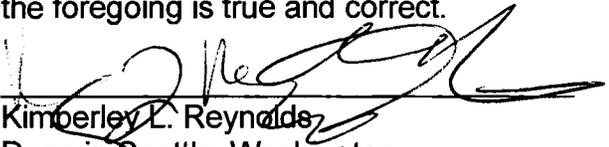
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MALCOLM FONTENOT, Cause No. 65563-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Kimberley L. Reynolds  
Done in Seattle, Washington

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