

71929-7

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NO. 71929-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

WALLACE ROBINSON, JR.,

Appellant.

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

The Honorable Ronald Heller, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE 911 CALL WAS TESTIMONIAL BECAUSE THERE WAS NO ONGOING THREAT TO THE DECLARANT, THE POLICE, OR THE PUBLIC.

The State asserts that admission of Leslie Caldwell’s 911 call did not violate the confrontation clause, because present sense impressions are nontestimonial. Br. of Resp’t, 21. In so arguing, the State misconstrues the U.S. Supreme Court’s decisions in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and Michigan v. Bryant, __U.S.__, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).

In Bryant, the Court considered whether the “ongoing emergency” rule from Davis “extends beyond an initial victim to a potential threat to the responding police and the public at large.” 131 S. Ct. at 1156. The Court explained that Davis and its companion case, Hammon v. Indiana, “focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them*.” Id. at 1158 (emphasis in original). Thus, the Davis court applied the ongoing emergency rule only to statements made by a declarant actually in danger—i.e., the victim. The Bryant court made this clear. See id. Accordingly, the question before the Bryant court was whether the ongoing emergency rule applied in the context of “threats to public safety.” Id.

The Bryant court emphasized that the relevant inquiry in determining whether statements are testimonial focuses on the “type and scope of danger posed to the victim, the police, and the public.” Id. at 1162. Thus, Bryant does not expand the ongoing emergency rule to encompass all 911 calls that are present sense impressions. Rather, there must be a threat to public safety. For instance, the Bryant court explained that statements made during an ongoing emergency become testimonial when “what appeared to be a public threat is actually a private dispute.” Id. at 1159. Likewise, statements are testimonial if the suspect “flees with little prospect of posing a threat to the public.” Id.

In Bryant, the declarant’s statements were nontestimonial, because an armed shooter mortally wounded the declarant and fled moments before police arrived. Id. at 1164. The suspect’s “motive for and location after the shooting were unknown,” and so he posed an imminent threat to public safety. Id. Thus, the Court concluded the declarant did not have the primary purpose of establishing past events relevant to a later criminal prosecution. Id. at 1165. Similarly, in State v. McWilliams, a store clerk called 911 to report a fistfight. 177 Wn. App. 139, 157, 311 P.3d 584 (2013). During the phone call, someone fired a gun, shattering the store window and hitting another store clerk in the leg. Id. This is the same type of ongoing public threat like in Bryant.

Robinson's case is distinguishable for several reasons. Hector Aguayo, the alleged victim, did not make the 911 call. Instead, Caldwell, an eyewitness, called 911. Therefore, under Davis and Bryant, this court must consider whether Robinson posed an ongoing threat to public safety. The record demonstrates he did not. There was no evidence Robinson was armed and dangerous to the public at large. Neither Caldwell nor Aguayo saw Robinson brandish a dangerous weapon. Rather, during much of the 911 call, Aguayo chased after Robinson attempting to retrieve his cell phone. This was a private dispute between Robinson and Aguayo regarding Aguayo's phone, with no threat to public safety. Under Bryant, statements do not automatically become nontestimonial merely because a suspect has not yet been apprehended. 131 S. Ct. at 1159.

This court should reject the State's attempts to stretch Bryant so broadly that it encompasses all statements made during any 911 call describing a present sense impression. Instead, there must be an ongoing threat to the speaker, the police, or the public. A careful reading of Bryant's facts and holding demonstrate that Caldwell's 911 call was testimonial. This court should reverse Robinson's conviction and remand for a new trial, because admission of the 911 call violated the confrontation clause.

2. THE STATE'S USE OF THE PHRASE "WE KNOW" IN CLOSING IS IMPROPER AND THIS COURT SHOULD INSTRUCT THE STATE TO REFRAIN FROM USING IT.

The State argues that its use of the phrase "we know" in closing is "permissible conduct" when tied to specific evidence introduced at trial. Br. of Resp't, 36-37. The State further characterizes use of the word "we" as a "simple rhetorical device to point to the evidence at hand." Br. of Resp't, 36-37. In doing so, the State ignores the Ninth Circuit's plain statement in United States v. Younger: "We emphasize that prosecutors should not use 'we know' statements in closing argument." 398 F.3d 1179, 1191 (9th Cir. 2005); accord United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009); cf. State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "knew" the defendant committed the crime), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

Younger and Bentley do not support the State's assertion that use of the term "we know" is proper when tied to the phrases "from the testimony" or "from the evidence." See Br. of Resp't, 33. Rather, Younger and Bentley hold that "we know" is not necessarily reversible error if the prosecutor uses it to summarize evidence actually admitted at trial. Younger, 398 F.3d at 1191; Bentley, 561 F.3d at 812. This is distinct from condoning the State's use of the phrase "we know" in closing.

Younger discouraged the use of “we know” in closing because it “readily blurs the line between improper vouching and legitimate summary.” 398 F.3d at 1191. “The question for the jury is not what a prosecutor believes to be true or what ‘we know,’ rather, the jury must decide what may be inferred from the evidence.” Id. This court should take this opportunity—as the Ninth Circuit did in Younger—to admonish the State from using “we know” in closing argument. Its continued use creates too great a risk of convictions resulting from the State’s improper alignment with the jury, which violates the accused’s right to a fair and impartial jury. See State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

3. THE PROSECUTOR IMPERMISSIBLY VOUCHER FOR A WITNESS’S CREDIBILITY BY ALIGNING HIMSELF WITH THE JURY.

This court should also reject the State’s attempt to bifurcate Robinson’s argument that the prosecutor improperly vouched for Aguayo’s credibility in closing. The State first argues the prosecutor’s use of the word “we” was not objected to, and therefore did not constitute flagrant and ill-intentioned misconduct. Br. of Resp’t, 26. The State then argues the prosecutor did not vouch for Aguayo’s credibility, asserting that Robinson “fails to explain” how the prosecutor “placed the prestige of the government behind Aguayo.” Br. of Resp’t, 41. By separating these arguments and attempting to attack them individually, the State misses the point.

Robinson's argument is that the prosecutor's use of "we" to describe Aguayo's credibility placed the State's prestige behind Aguayo's testimony. Impermissible vouching occurs when a prosecutor places the government's prestige behind a witness. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Prosecutors are further prohibited from using the power and prestige of their office to sway the jury. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). This is precisely what the prosecutor did when he said, "But what we do know from Mr. Aguayo's testimony -- and Mr. Aguayo has no reason to lie about this." RP 289.

The prosecutor's use of "we" aligned the State and the jury against Robinson. This is plain when reading closing arguments in their entirety. In closing, defense counsel attacked Aguayo's credibility, pointing out the inconsistencies in Aguayo's testimony and his hazy memory of the incident. See Br. of Appellant, 20-21. Defense counsel also provided a possible motive for Aguayo's fabrication of events—Aguayo wanted to be compensated for his missing phone. RP 283. Then, in rebuttal, the prosecutor responded by saying, essentially, "we know Aguayo had no reason to lie." Given the defense theory, this "we" clearly refers to the prosecutor and the jury—not Robinson and not "all who were present in the courtroom," as the State claims. Br. of Resp't, 29.

For the same reason, this court should reject the State's claim that Robinson failed to preserve this error by objecting on a different basis at trial. See Br. of Resp't, 25-26. Defense counsel objected to the prosecutor's improper vouching. RP 289-90. Robinson makes the same argument on appeal. The State's assertion of waiver can therefore be easily rejected. As such, Robinson does not need to show the prosecutor's vouching was flagrant and ill-intentioned misconduct. Rather, Robinson need only show there was a substantial likelihood that the improper vouching affected the jury's verdict. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993). This argument is presented in the opening brief. See Br. of Appellant, 19-22.

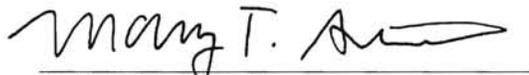
B. CONCLUSION

For the reasons articulated here and in the opening brief, this court should reverse Robinson's conviction and remand for a new trial.

DATED this 16th day of January, 2015.

Respectfully submitted,

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DIVISION ONE

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Respondent,)	
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v.)	COA NO. 71929-7-I
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WALLACE ROBINSON,)	
)	
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 16TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WALLACE ROBINSON
DOC NO. 882641
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JANUARY 2015.

x Patrick Mayovsky

2015 JAN 16 PM 4:11
STATE OF WASHINGTON
CLALLAM BAY CORRECTIONS CENTER