

NO. 74231-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW WONG,

Appellant.

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FILED  
Jun 23, 2016  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Richard McDermott, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed prejudicial misconduct by giving improper personal opinion when he argued appellant's statements were "made up," "nonsense," and "bologna."

2. The prosecutor's misconduct deprived appellant of a fair trial when the prosecutor trivialized the jury's decision by arguing there may be no downside to conviction and the burden of proof beyond a reasonable doubt is akin to knowing the refrigerator light turns off when the door is closed.

3. Appellant's constitutional right to effective assistance of counsel was violated when his attorney failed to object to prosecutorial misconduct that trivialized the burden of proof.

Issues Pertaining to Assignments of Error

1. A prosecutor may not offer personal opinions on the credibility or guilt of a defendant. Such improper comments require reversal when there is a substantial likelihood they affected the verdict. Must appellant's conviction for possession of a stolen car be reversed when the prosecutor referred to appellant's statements on arrest as "nonsense," "made up," and "bologna"?

2. A prosecutor may not trivialize the burden of proof beyond a reasonable doubt or the seriousness of the jury's decision. Was

appellant's trial rendered unfair when the prosecutor told the jury there may be no downside to conviction and the level of certainty necessary to convict was the same as the certainty that the light in a refrigerator turns off when the door is closed?

3. All those accused of a crime enjoy the right to constitutionally effective assistance of counsel. Was appellant deprived of this right when his attorney failed to object to prosecutorial argument that trivialized the burden of proof and the jury's decision?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Andrew Wong with one count of possession of a stolen vehicle. CP 1. The jury found Wong guilty as charged, and the court imposed a first-time offender waiver, no jail time, and six months of probation with the condition that Wong obtain a mental health evaluation as well as any recommended treatment. CP 49, 53. Notice of appeal was timely filed. CP 57.

2. Substantive Facts

a. *Wong was confused when Officer Luce drew his gun and arrested him in front of a 7-11 store.*

Wong was arrested in front of a 7-11 store in Renton. RP 182. Officer Tyler Luce claimed Wong was the same person he saw driving a

stolen car a few minutes earlier. RP 212-14. He drew his gun and ordered Wong to get on the ground. RP 207. Wong seemed confused and, at first, stared at Luce without responding. RP 207. At the second command, Wong did as requested. RP 207. Wong cooperated and never asked for an attorney. RP 207-08.

Luce told Wong he was under arrest for possession of a stolen vehicle and asked Wong what he was doing there. RP 185-86. Wong said he was an automotive technician and he was there to visit a friend. RP 185-86. When Luce asked why he was in a stolen car, Wong repeated he was an automotive technician. RP 186. Back at the station, Wong told the detective he had been dropped off at the 7-11 by his good friend Chris, whose last name he could not recall. RP 145-46

- b. *Officer Luce had seen a 30-something Asian or Hispanic male with a black jacket driving a stolen car.*

Luce had first noticed the car, a Honda civic, because it was parked across several spaces in a grocery store parking lot. RP 172-73. When he called in the license plate number, he learned the car had been reported stolen. RP 174. Since he had no backup, Luce kept his distance, and tried to keep his eye on it as best he could. RP 177. The car passed about 20 feet from Luce, who claimed that, in ambient light of the parking lot, he could

see that the driver was a Hispanic or Asian male with black hair, about 20 to 30 years of age with a black leather-style jacket. RP 175-76.

The car then drove towards the drive-through line for a nearby McDonalds restaurant. RP 177. There were several cars in the line, and as the car passed around the far side of the restaurant, Luce lost sight of it. RP 201. The next thing he noticed was a man, who appeared similar to the driver, running away from the car towards the street to the south. RP 179. Luce did not see the driver get out of the car, but when he looked, he saw the still in the drive-through line with the door open, the lights on, and the driver gone. RP 179. Luce drove past the car and verified it was empty and still running. RP 181.

Luce then lost sight of the running pedestrian, but assumed he had crossed the street to the south where there were other businesses. RP 181. But by the time Luce waited for the traffic to clear so he could cross, he did not see anyone. RP 181. He decided to go back across the street towards the 7-11. RP 181-82. While waiting for the light to change, he saw Wong standing outside the 7-11 store. RP 182. Wong was not out of breath or sweating. RP 208. He seemed calm. RP 208.

Nevertheless, Luce decided he matched the description of the driver, drew his gun, and ordered Wong to the ground. RP 183, 207. Luce estimated the entire incident lasted less than 10 minutes. RP 182. He also

estimated that the grocery store, the McDonalds, and the 7-11 were all within several hundred yards of each other. RP 183.

Luce searched Wong incident to arrest and found a pair of black gloves and several car keys. RP 188-91. One of the keys was for an Audi, and one was unmarked but did not appear to be a Honda key. RP 192. The other two were very thin keys, generics or blanks that could be used to start multiple kinds of cars. RP 192. Luce testified that a “shaved” or “bump” key could be used to start a car, and then could be removed with the car still running. RP 193.

Rory Pesacreta testified the Honda was his and had been stolen several months earlier. RP 226. He testified the keys were not his, nor were the gloves. RP 227. He testified he did not know Wong and did not give him permission to drive the Honda or work on it. RP 228.

- c. *In closing argument, the prosecutor called Wong's statement “nonsense” and downplayed the burden of proof and the prospect of punishment.*

In closing argument, the prosecutor referred to Wong's statement that he was dropped off by his friend Chris and declared, “It's all bologna. It's a made up story, and you can know it's a made up story because it doesn't make any sense.” RP 238. Defense counsel's objection to “personal opinions and attacks” was overruled. RP 238-39. The prosecutor then continued with the theme of “nonsense”:

And you know that it's nonsense because you know what the officer saw the night before. You know that there was a car with that man in it and then all the sudden that man's not in the car anymore and it's running by itself and it's in the line to get food at McDonalds.

Now, the door is open, that man runs across and away, he follows him, he finds him. That's why you know it's nonsense.

RP 239. It was only after twice referring to Wong's version of events as "nonsense" that the prosecutor declared his argument was tied to the facts.

RP 239.

The prosecutor also explained the burden of proof beyond a reasonable doubt by referring to the certainty that the light in a refrigerator and turns off when the door is closed. RP 248. Finally, in rebuttal, the prosecutor told jurors they should not consider the downside, "if any" to a criminal conviction. RP 264.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT BY GIVING HIS PERSONAL OPINION OF THE DEFENSE AS "BOLOGNA," "MADE UP," AND "NONSENSE."

The prosecutor improperly vouched for the State's case against Wong by giving his personal opinion on the defense. RP 238-39. A prosecutor is a quasi-judicial officer who shares in the court's duty to ensure that every accused person receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); State v. Fisher, 165 Wn.2d 727, 746, 202

P.3d 937 (2009); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

A fair trial is one where the verdict is based on the evidence, the law, and reason. Fisher, 165 Wn.2d at 746-47. Therefore, prosecutors must refrain from using the prestige of their elected office to sway the jury. Monday, 171 Wn.2d at 677.

Prosecutors must not offer personal opinions on the guilt of the defendant or the credibility of witnesses. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). To do so is both misconduct and a violation of the rule prohibiting a prosecutor from appearing as both an advocate and a witness in the same proceeding. Id. (citing United States v. Prantil, 764 F.2d 548, 552-53 (9th Cir. 1985)).

A prosecutor veers into improper vouching either by placing the prestige of the government behind a State's witness or expressing a personal belief as to the witness' truthfulness. Monday, 171 Wn.2d at 677; 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)). Opinions by a prosecutor are improper when "the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation." Ish, 170 Wn.2d at 197 (quoting United States v. Roberts, 618 F.2d 530 (9th Cir. 1980)).

Here, the prosecutor repeatedly informed the jury of his opinion that Wong's statements were nonsense, bologna, and made up. RP 238-39.

These remarks improperly expressed his personal belief both as to Wong's credibility and his guilt.

Other jurisdictions have repeatedly held it is improper for a prosecutor to use language similar to that used in this case to disparage a defendant's credibility. For example, the New Jersey appellate court has deemed it improper for the prosecutor to refer to a witness' testimony as "absolutely preposterous." State v. Acker, 265 N.J. Super. 351, 356, 627 A.2d 170 (App. Div.) (1993). The Ninth Circuit has declared, "The prosecutor committed misconduct in vouching for his witnesses, denigrating the defense as a sham." United States v. Sanchez, 176 F.3d 1214, 1225 (9th Cir. 1999). In State v. Holly, 228 N.C. App. 568, 749 S.E.2d 110 (2013), the prosecutor referred to defense counsel's arguments as "stupid," "an insult to [the jury's] intelligence," "silly," and "nonsense." Id. The appellate court deemed these comments improper because they "tended to express the prosecutor's personal belief as to the truth or falsity of defendant's evidence." Id. Florida has gone so far as to find defense counsel ineffective for failing to object to comments that the defendant's testimony was "preposterous," "nonsense," and "bologna." Ross v. State, 726 So. 2d 317, 319 (Fla. Dist. Ct. App. 1998).

The prosecutor's comments expressed a direct, personal opinion on Wong's credibility and guilt and were improper. Reversal is required under

the circumstances. Prosecutorial misconduct requires reversal of the conviction when the prosecutor's argument was improper 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). In reviewing prosecutorial misconduct, courts consider the context of the entire trial. Id. at 704. "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)).

Here, there is a substantial likelihood the prosecutor's comments affected the verdict. First, this misconduct was likely to affect the jury's verdict because the court overruled counsel's objection, giving the jury the impression this was fair argument. RP 238-39. Second, the State's case was far from overwhelming. The officer admitted he lost sight of the car's driver twice. RP 201. His description of him was vague, and the man he caught in front of the 7-11 was not out of breath or sweating as if he'd been running. RP 202, 208. Finally, the impact of the prosecutor's improper opinion must

be viewed in light of the other improper argument in this case. See, e.g., Glasmann, 175 Wn.2d at 704 (in determining prejudice from prosecutorial misconduct, courts consider “the context of the record and all the circumstances of the trial”). In addition to improperly relying on his personal opinion, the prosecutor also (as discussed below) suggested to the jury that there may be no downside to a criminal conviction and compared the burden of proof beyond a reasonable doubt to the assumption that the light in a refrigerator is off when the door is closed. RP 248, 264-65.

Without the prosecutor’s improper opinions on credibility, it is reasonably probable the jury would have found a reasonable doubt and voted to acquit. Wong’s conviction should be reversed because the prosecutor placed his personal opinion and prestige before the jury, thereby depriving Wong of a fair trial. Taken alone or together, the prosecutor’s improper comments require reversal of Wong’s conviction.

2. THE PROSECUTOR COMMITTED FURTHER MISCONDUCT BY ARGUING THERE MAY BE NO DOWNSIDE TO CONVICTION AND THE JURY’S DECISION WAS AKIN TO BELIEVING THE REFRIGERATOR LIGHT TURNS OFF WHEN THE DOOR IS CLOSED.

In addition to the objected-to comments described above, the prosecutor also engaged in two other improper lines of argument without objection by defense counsel. First, the prosecutor unfairly trivialized the

jury's decision by arguing there may be no downside to a criminal conviction. RP 264. Second, the burden of proof beyond a reasonable doubt was similarly trivialized when the prosecutor compared it to knowing that the light in the refrigerator turns off when the door is closed. RP 248.

It is well established that punishment is generally not the purview of the jury. See, e.g., State v. Rafay, 168 Wn. App. 734, 777, 285 P.3d 83 (2012) (citing State v. Hicks, 163 Wn.2d 477, 487, 181 P.3d 831(2008)) (in response to any mention of capital punishment, court should instruct jury it is not to consider sentencing). The jury is instructed in every case that it should not be concerned with punishment, "except insofar as it may tend to make you careful." CP 20-21; 11 Washington Practice, Pattern Jury Instructions – Criminal, WPIC 1.02 (3d ed. 2008). Defense counsel's closing argument hewed to this standard when he argued that the "abiding belief" language in the jury instruction defining reasonable doubt means "we don't guess people guilty." RP 262-63. He argued that an abiding belief is a permanent one and asked, "Would you bet your house on it? Would you bet your kids' future on it?" RP 263. He argued this is an important standard, one the jury should not take lightly. RP 263.

But the prosecutor's response to this argument strayed outside the bounds of permissible argument. The prosecutor began by quoting the jury instruction about being careful, but then told jurors, "You're not going to bet

your house, you're not going to bet your child's education because you're not supposed to even consider the level of downside if there is a downside to conviction." RP 264 (emphasis added).

This argument was prosecutorial misconduct. State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976). In Torres, defense counsel similarly tried to focus jurors on the importance of their decision and the care that should be taken, saying, "We are dealing with a serious charge, a charge that if it results in conviction, can lead to serious consequences that would affect the liberty of my client." Id. at 261. The prosecutor responded, "Punishment, if any, in this case will be determined by Judge Stephens." Id. (emphasis added). Defense counsel's objection was sustained, but the prosecutor continued, "Judge Stephens has a lot of alternatives open to him, and he can choose anything from a deferred sentence on this--." Id. at 261-62. On appeal, the court concluded this exchange was "indicative of the penchant of the prosecutor for persisting in pursuing matters that were not properly before the jury." Id. at 262.

In this case, as in Torres, the prosecutor's rebuttal argument implied the jury's task was less vital because the result might be no punishment at all. Id.; RP 264. Despite the first-time offender waiver that was imposed in this case, it was disingenuous to suggest there may be no downside to conviction. Possession of a stolen vehicle is a class B felony. RCW

9A.56.068. Even if no other punishment is imposed, a person with a felony conviction faces a difficult road in terms of employment and housing and loses the constitutional rights to vote and bear arms. RCW 9.41.040; RCW 29A.08.520. The stigma of a conviction alone has been deemed punishment under double jeopardy principles. State v. Womac, 160 Wn.2d 643, 657-58, 160 P.3d 40 (2007). As in Torres, the prosecutor's improper argument suggesting there was no downside to a criminal conviction "added to the unfairness that permeated the trial." 16 Wn. App. at 262.

The prosecutor further trivialized the jury's decision when he argued that proof beyond a reasonable doubt was akin to knowing that the refrigerator light turns off when the door is closed. RP 248.

"[A] misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936, 940 (2010) (quoting State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)). For example, prosecutors may not compare the jury's decision to every-day life decisions; to do so trivializes the sacred duty of deciding guilt or innocence beyond a reasonable doubt. State v. Anderson, 153 Wn. App. 417, 425, 220 P.3d 1273 (2009). In Anderson, it was deemed improper to compare the jury's reasonable doubt

decision to the decision to undergo elective surgery or change lanes on the freeway. Id. Wong's conviction should be reversed because the prosecutor's argument trivialized the burden of proof beyond a reasonable doubt by analogizing it to knowing the light turns off in a refrigerator when the door is closed.

Even without objection at trial, prosecutorial misconduct warrants reversal when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. at 427. The focus of this inquiry is on whether the effect of the argument could be cured. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) (citing State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012)). "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)). Taken alone or separately, these comments minimizing and trivializing the jury's role deprived Wong of a fair trial. Moreover, they add to the prejudice caused when the court overruled defense counsel's objection to the prosecutor's personal opinions on credibility and guilt discussed above.

3. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO COMMENTS TRIVIALIZING THE BURDEN OF PROOF.

In the event this Court finds the effect of the prosecutor's improper comments could have been dispelled by a curative instruction from the judge, Wong's attorney was constitutionally ineffective in failing to request such an instruction.

Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. Crawford, 159

Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see 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).

Counsel was ineffective in failing to object or move for mistrial based on arguments that improperly trivialized the burden of proof and suggested there may be no downside to a criminal conviction. Without that argument, the jury would have been far more likely to find reasonable doubt because, as discussed above, the officer lost sight of the stolen car's driver twice. Wong's conviction should be reversed either due to prosecutorial misconduct that violated his constitutional rights or ineffective assistance of counsel.

#### 4. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Wong indigent and entitled to appointment of appellate counsel at public expense. CP 54. If Wong does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757,

789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Wong's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees and interest. RP 295; CP 48. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Wong has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the foregoing reasons, Wong requests this Court reverse his conviction.

DATED this 23<sup>rd</sup> day of June, 2016.

Respectfully submitted,

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State V. Andrew Wong

No. 74231-1-I

Certificate of Service

On June 23, 2016, I e-filed, served and or mailed directed to:

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Containing a copy of the opening brief, re Andrew Wong  
Cause No. 74231-1-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.

  
\_\_\_\_\_  
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06-23-2016  
Date  
Done in Seattle, Washington