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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

JASON A. DELACRUZ,

Petitioner.

NO. 43146-7-II

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

- 1. Must the petition be dismissed where the petitioner cannot show actual prejudice to a constitutional right or a fundamental defect resulting in a complete miscarriage of justice?
- 2. Whether the prosecuting attorney committed misconduct in arguing the credibility of the petitioner's testimony?

B. STATUS OF PETITIONER:

Petitioner, Jason Delacruz, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 09-1-02999-9. CP 659-672.

The State has moved that this Petition be consolidated with the petitioner's open direct appeal. The State refers the Court to the Brief of Respondent in the direct appeal,

1 and incorporates the facts and arguments already set forth there into the response to this
2 Petition.

3 C. ARGUMENT:

4 1. GENERAL PRP REQUIREMENTS.

5 A petitioner in a collateral attack asserting a constitutional violation must show
6 actual and substantial prejudice. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 810,
7 792 P.2d 506 (1990). Unless a petitioner can make such a showing of prejudice, his
8 petition will be dismissed. *Id.*, at 810. Whereas the State has the burden on direct appeal; in
9 a collateral attack the petitioner has the burden to show actual and substantial prejudice by
10 a preponderance. *In re Personal Restraint of Borrero*, 161 Wn. 2d 532, 536, 167 P. 3d
11 1106 (2007); *In re Personal Restraint of Hagler*, 97 Wn.2d 818, 826, 650 P. 2d 1103
12 (1982). The State need not show harmless error. *See, Hagler*, at 823.

13 Where the petition is based on non-constitutional grounds, the petitioner must meet
14 an especially high standard. A petitioner relying on non-constitutional arguments must
15 demonstrate a fundamental defect which inherently results in a complete miscarriage of
16 justice. *Cook*, at 811. For example, a sentence that is based upon an incorrect offender
17 score is a fundamental defect that inherently results in a miscarriage of justice. *See, State v.*
18 *Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002).

19 2. THE PETITIONER FAILS TO DEMONSTRATE CONSTITUTIONAL
20 ERROR AND ACTUAL, SUBSTANTIAL PREJUDICE RESULTING
21 FROM THE PROSECUTING ATTORNEY'S CLOSING ARGUMENT.

22 Prosecutorial misconduct raises a constitutional issue because a prosecutor owes a
23 defendant a duty to ensure the right to a fair trial is not violated. *See, State v. Monday*, 171
24 Wash.2d 667, 676, 257 P.3d 551 (2011). A defendant claiming prosecutorial misconduct
25 bears the burden of demonstrating that the remarks or conduct was improper and that it
prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing

1 *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Improper argument by a
2 prosecuting attorney may be cured by a timely objection and an appropriate instruction
3 from the court. *See, State v. Warren*, 165 Wn. 2d 17, 195 P. 3d 940 (2008).

4 The petitioner argues that the prosecutor improperly argued the credibility of the
5 witnesses by vouching, or stating a personal opinion. *Pet.*, at 8-9. A prosecutor has wide
6 latitude in closing argument to draw reasonable inferences from the evidence and may
7 freely comment on the credibility of the witnesses based on the evidence. *Stenson*, 132
8 Wash.2d at, 727. It is improper for a prosecutor to vouch for the credibility of a witness by
9 stating a personal opinion regarding the witness' credibility. *See, Warren*, at 30. However,
10 no prejudicial error arises unless counsel clearly and unmistakably expresses a personal
11 opinion as opposed to arguing an inference from the evidence. *State v. Ish*, 150 Wn. App.
12 775, 208 P.3d 1281 (2009), *aff'd* 170 Wn. 2d 189, 241 P. 3d 389 (2010).

13 Here, all of the prosecutor's argument was based upon the evidence. At no time did
14 she express a personal opinion regarding witness credibility. In closing argument, the
15 prosecuting attorney did argue the credibility of the defendant and the witnesses. 15 RP
16 796-797. In his closing argument, Delacruz' counsel immediately attacked the credibility
17 of witnesses Escalante and Marin-Andres. 15 RP 818-820. In rebuttal, the prosecutor
18 responded to this. She argued that these witnesses were credible, based upon corroborating
19 evidence. 15 RP 830. She argued that Delacruz was not credible because no evidence
20 corroborated his testimony. *Id.* Defense counsel objected, not that this was personal
21 opinion, but arguing that this was "burden shifting". *Id.* The court over-ruled the
22 objection. *Id.*

23 It is improper to imply that the defense has a duty to present corroborative
24 evidence. *See, e.g., State v. Toth*, 152 Wn. App. 610, 217 P. 3d 277 (2009). However,
25 "[W]hen a defendant takes the stand, his credibility may be impeached and his testimony

1 assailed like that of any other witness.” *State v. Martin*, 171 Wn. 2d 521, 527, 252 P. 3d
2 872 (2011). The prosecutor may comment upon the quality and quantity of evidence
3 presented by the defense. *State v. Gregory*, 158 Wn. 2d 759, 860, 147 P. 3d 1201 (2006).
4 Such an argument does not necessarily suggest that the burden of proof rests with the
5 defense. *Id.* A prosecutor may also comment on the absence of certain evidence if persons
6 other than the defendant could have testified regarding that evidence. *State v. Ashby*, 77
7 Wash.2d 33, 37-38, 459 P.2d 403 (1969).

8 Here, the prosecutor compared the evidence for conviction against the defendant’s
9 testimony. The prosecutor argued that other evidence corroborated the witnesses who were
10 present during the crimes, Escalante and Marin-Andres, who testified for the State. The
11 prosecutor pointed out that the evidence, including the testimony of these two co-
12 participants, did not support the defendant’s story. This was not error.

13 Even if this argument was improper, in a PRP the petitioner has to show actual and
14 substantial prejudice. In other words, the petitioner needs to show that if the prosecutor had
15 not made this argument, the result of the trial would have been different; he would have
16 been acquitted. In the light of all the evidence, described in detail in the State’s Response
17 Brief, he cannot make this demonstration.

18 3. THE PETITIONER FAILS TO DEMONSTRATE A FUNDAMENTAL
19 DEFECT RESULTING IN A COMPLETE MISCARRIAGE OF JUSTICE.

20 The petitioner asserts that the word “victim” was used by witnesses. Early in the
21 trial, co-defendant Rivera’s attorney requested that witnesses not use the term “victim”. 2
22 RP 21. The court agreed and approved that the victims be referred to by their names,
23 instead. *Id.*

24 Sgt. Gildenhaus did refer to the owner of the autographed Green Bay Packers jacket
25 as a victim. 10 RP 418, 419. Dep. Swettennam, one of the first responders to the burglary,

1 described the scene in the house as having been ransacked. 10 RP 453-457. After
2 describing the scene, she refers to the "victim residence" 10 RP 459.

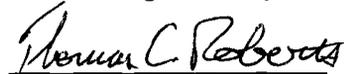
3 None of the three defense attorneys objected to this testimony or when the term
4 "victim" was used. It is their obligation to do so. The term was used only in passing or
5 after a lengthy description of the property being discussed, without using the term. There
6 was no dispute at trial that the residences had been burglarized. The question was: by
7 whom? The petitioner does not show that this is a "fundamental defect", much less that the
8 passing and inadvertent use of this term resulted in a "complete miscarriage of justice".

9 D. CONCLUSION:

10 The petitioner fails to demonstrate a constitutional error or a fundamental defect.
11 The State respectfully requests that the petition be dismissed.

12 DATED: June 22, 2012.

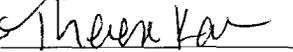
13 MARK LINDQUIST
14 Pierce County
15 Prosecuting Attorney

16 

17 Thomas C. Roberts
18 Deputy Prosecuting Attorney
19 WSB # 17442

20 Certificate of Service:

21 The undersigned certifies that on this day she delivered by U.S. mail or
22 ABC-LMI delivery to the petitioner true and correct copies of the document to
23 which this certificate is attached. This statement is certified to be true and
24 correct under penalty of perjury of the laws of the State of Washington. Signed
25 at Tacoma, Washington, on the date below.

26 6-25-12 
27 Date Signature

PIERCE COUNTY PROSECUTOR

June 25, 2012 - 10:47 AM

Transmittal Letter

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Case Name: PRP OF DELACRUZ

Court of Appeals Case Number: 43146-7

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- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
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Comments:

No Comments were entered.

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