

NO. 47383-6-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

RONNIE M. BATAKAN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Erik Price, Judge  
Cause No. 14-1-00602-4

---

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Batacan of his constitutional due process right to a fair trial.
02. The trial court erred in permitting Batacan to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's improper closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Batacan was denied his constitutional due process right to a fair trial where the prosecutor engaged in prejudicial misconduct during closing argument by vouching for his key witness, by shifting the burden of proof, and by minimizing the State's burden of proof? [Assignment of Error No. 1].
02. Whether Batacan was prejudiced as a result of his counsel's failure to object to the prosecutor's improper closing argument? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Ronnie M. Batacan was charged by information filed in Thurston County Superior Court April 17, 2014, with felony violation of order prohibiting contact (domestic violence), contrary to RCWs 26.50.110, 10.99.020 and 10.99.050. [CP 4] [CP 4].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7]. Trial to a jury commenced June 23, the Honorable Erik Price presiding. Batacan took neither objections nor exceptions to the jury instructions [RP 151], was found guilty, sentenced within his standard range, and timely notice of this appeal followed. [CP 56-57, 105-116].

02. Substantive Facts

According to Lacey police officer Alex Ficek, at approximately 6:00 in the morning April 14, 2014, he detained Batacan for an “unrelated reason” after observing him in a parking lot of a local college talking to a person later identified as Lori Arko while leaning against a car in which she was sitting. [RP 59, 61, 63-64, 68].<sup>1</sup> A records check revealed an active no-contact order prohibiting Batacan, who had three prior convictions for violation of a no-contact order [RP 77-83], from having any contact with Arko. [RP 67; State’s Exhibit 1].

Batacan acknowledged awareness of the no-contact order [RP 72], further telling Ficek that “Lori came to his house earlier in the evening, didn’t give a time frame, and he said that he had broke off their relationship and she was upset.”<sup>2</sup> [RP 70]. But he

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<sup>1</sup> All references to the Report of Proceedings are to the transcript entitled “Jury Trial.”

<sup>2</sup> Because of the potential of the jury considering this as an alternative means of committing the offense, the court, as proposed by Batacan, omitted the “on or about” language from the to-convict instruction. [RP 143; Court’s Instruction 9; CP 43].

denied talking to someone in the car, but he did make a statement of, "I don't know why she was talking to me," but he wouldn't say who that was that was talking to him.

[RP 65-66]. "He just denied ever being in contact with anybody...." [RP

67]. "[H]e denied it being him or being near the vehicle." [RP 71].

Arko, who was aware of the no-contact order prohibiting Batacan from contacting her, testified that she had seen Batacan, her former boyfriend, that morning around 7:00 [RP 44-45, 51, 69]:

Well, I was driving west on Pacific Avenue, and I thought I saw him on the other side of the road like he was going to cross the road, and I got all excited, because I hadn't seen him for a long time. I really wanted to see him, and I pulled into St. Martin's College and then turned around, and I hollered out his name, and he didn't acknowledge me. He didn't look, nothing.

[RP 45].

Q. At any point, did he come over to your car?

A. No, he didn't know it was me whatsoever.

[RP 46].

Q. Did you tell the officer you knew you weren't supposed to be having contact with Mr. Batacan?

A. Well, the officer started to tell me that, and I said, yes. I know that.

[RP 50].

At trial, Batacan asserted he was walking to meet a friend who was going to give him a ride to work when he briefly spoke to a “girl” in a car about “where somebody was” before noticing another car “parked cock-eyed” in a parking lot. [RP 103-04]. When asked what happened next, he responded:

I remember leaning up against the car thinking, if this is Lori’s car, what’s it doing here, because I know I have no-contact order with her, and at that time, I see a police officer cross the intersection. So I walked away thinking, okay, if that was Lori’s car, I got to get away, because I have this no-contact order, and –

[RP 104-05]. He never saw anyone in the car, saying it was empty. [RP 105]. He didn’t remember Arko coming to his residence or telling Ficek that she had. [RP 111]. “I mean she had been over to my workplace several times and was asked to leave.” [RP 111].

D. ARGUMENT

01. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT BY VOUCHING FOR HIS KEY WITNESS, BY SHIFTING THE BURDEN OF PROOF, AND BY MINIMIZING THE STATE’S BURDEN OF PROOF.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer whose duty is not merely to zealously advocate for the State, but

also to ensure the accused receives a fair trial. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where it is established that the prosecutor made improper comments, this court reviews whether those improper statements prejudiced the defendant under one of two different standards of review. State v. Emery, 174 Wn.2d 742, 7761, 278 P.3d 653 (2012).

If a defendant, as here, fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). “The State’s burden to prove harmless error is heavier the more egregious the conduct is.” State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

However, where the State’s misconduct violates a defendant’s constitutional rights, this court analyzes the prejudice under a different standard: the stringent constitutional harmless error standard. State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996). Under this standard, this court presumes constitutional errors are harmful and must

reverse unless the State meets the heavy burden of overcoming the presumption that the error is prejudicial, Id. at 242, which requires proof that the untainted evidence overwhelmingly supports a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient...

In re Glassman, 175 Wn.2d 696, 711, 286 P.3d 673 (2012).

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## 01.1 Vouching

It is misconduct for a prosecutor to vouch for the credibility of a State's witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016, 245 P.3d 772 (2011). "And it is generally improper for prosecutors to bolster a police witness's good character even if the record supports such an argument." State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); See State v. Smith, 67 Wn. App. 838, 844, 841 P.2d 76 (1992) (acknowledging that prosecutor's should not bolster a police witness's good character and citing cases from other jurisdictions in accord); State v. Allen, 161 Wn. App. 727, 746, 255 P.3d 784 (2011), affd, 176 Wn.2d 611, 294 P.3d 679 (2013) (improper for prosecutor to place prestige of the government in support of witness).

During closing argument, the prosecutor improperly vouched for Officer Alex Ficek, his key witness:

What bias did you hear about by the officer? What reasons would the officer have to tell you what he told you, except the fact that that's what he saw.

[RP 171].

Aside from it actually happening, what reasons does he have to tell you that? You didn't hear anything.

[RP 171].

I would submit to you, based upon all of the information that you have received, the only witness with the most weight, I would submit, is the one who has nothing to gain, the one you heard nothing about why he would theoretically make all of this up. That's Ofc. Ficek.

[RP 171-72].

During closing, in addressing the claim of whether Officer Ficek had any kind of bias, defense counsel stated; “How much of that evidence—presumably the contents of Officer Ficek’s police report, which he referred to while testifying [RP 64]—is biased that affects your determination of credibility?” [RP 181]. In rebuttal, the prosecutor returned to his earlier theme:

Is he a law enforcement officer? Sure. Does he do that for a living? Absolutely. But does he have some magic requirement that he has to go to trial X number of times and he has to get so many - - you never heard anything like that.

[RP 188].

The prosecutor improperly vouched for and relied upon the good character of the officer to bolster his credibility, rather than properly arguing inferences from the evidence. See State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). He set it up without objection and then returned to it without objection, contending that his key witness, a police officer, was without bias and thus inherently

more reliable than either Arko or Batacan. Such flagrant and ill-intentioned misconduct requires reversal of Batacan's conviction.

#### 01.2 Shifting Burden of Proof

Due process requires the State to prove every essential element of an offense beyond a reasonable doubt. State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135, cert. denied, 513 U.S. 919, 115 S. Ct. 299, 130 L. Ed. 2d 212 (1994). And shifting the burden of proof to the defendant is improper. In re Glassman, 175 Wn.2d 696, 711, 713, 286 P.3d 673 (2012).

While vouching for Officer Ficek's credibility, the prosecutor subtly shifted the burden of proof to Batacan, arguing that Ficek should be believed because Batacan had provided no evidence to contradict his testimony:

Aside from it actually happening, what reasons does he have to tell you that? You didn't hear anything. (emphasis added).

[RP 171].

I would submit to you, based upon all of the information that you have received, the only witness with the most weight, I would submit, is the one who has nothing to gain, the one you heard nothing about why he would theoretically make all of this up. That's Ofc. Ficek. (emphasis added).

[RP 171-72].

Is he a law enforcement officer? Sure. Does he do that for a living? Absolutely. But does he have some magic requirement that he has to go to trial X number of times and he has to get so many - - you never heard anything like that.

[RP 188].

A fair reading of the above, which is duplicated from the previous section for the sole purpose of presenting the emphasized portions in context, validates the conclusion that the prosecutor's argument shifted the burden of proof to defense by implying that since Batacan hadn't presented any evidence of bias relating to Officer Ficek, the jurors could believe Ficek and convict Batacan, which they did. Problem is, while a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991), it is flagrant misconduct to shift the burden of proof to the defendant, State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), which occurred in this case, requiring reversal of Batacan's conviction. The jury was within its right to conclude that although Batacan hadn't presented any evidence of Officer Ficek's bias, it was free to discount Ficek's testimony and not be satisfied beyond a reasonable doubt that the State had carried its burden of proving beyond a reasonable doubt that Batacan was guilty of the charged offense.

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### 01.3 Minimizing Burden of Proof

It is also misconduct of the most flagrant degree to minimize the burden of proof and thereby encourage the jury to convict based on something short of proof beyond a reasonable doubt, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997); State v. Davenport, 100 Wn.2d at 763.

During rebuttal argument, in addressing the reasonable doubt instruction [Court's Instruction 3; CP 37], the prosecutor argued to the jury:

... "An abiding belief" actually is a phrase you may not fully think you have a meaning of, because it's not something that is used in everyday language, right? That's also the phrase we don't define for you, and submit to you that that's because that's for you to decide.

There is no scale. There is no sliding range. Do you have an abiding belief, and I would submit to you, are you sure? Are you confident that, yeah, based on everything I heard, yeah, this is what happened. No, this makes absolutely no sense, why should I consider it?

[RP 190].

It was misconduct for the prosecutor to argue to the jury that if it was sure—not sure beyond a reasonable doubt, but just sure—if it was confident, that was enough for an abiding belief and thus sufficient for a verdict of guilty. This blurred the incompatibility of doubt and beyond a reasonable doubt, and in the process minimized the State's burden of proof

to a level somewhere short of the latter, with the result that Batacan's conviction must be reversed.

In State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 10902 (2010), even though the jury, as here, was correctly instructed on the State's burden of proof and that lawyers' statements are not evidence, this court, while affirming since the misconduct was not sufficiently prejudicial, held that the State committed misconduct by comparing its beyond a reasonable doubt burden of proof to everyday common decisions in which one might choose to act or refrain from acting, reasoning this was improper because it minimized the importance of the reasonable doubt standard and the jury's role in determining whether the State had met its burden. Anderson, 153 Wn. App. at 431. Similarly, in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011), where the prosecutor trivialized the State's burden of proof by arguing that an abiding belief was like knowing what a scene depicted in a puzzle looked like prior to putting in the last pieces, this court reversed, reasoning in part that the State had impermissibly quantified the level of certainty required to satisfy its burden of proof. Johnson, 158 Wn. App. at 685-86.

Given that the presumption of innocence is the bedrock upon which the criminal justice stands, and because this presumption is defined

by the reasonable doubt instruction, “it can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve(,)” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007), which is what happened in this case. Contrary to the prosecutor’s argument, wherein he quantified the level of certainty to “are you sure” or “(a)re you confident(,)” the jury was within its right to conclude that although it may have been sure or confident that Batacan was guilty, it was also not satisfied beyond a reasonable doubt that he was guilty of the charged offense.

Batacan’s defense, as articulated by counsel during closing, was singular in nature: “The element contested here is Element 3 [RP 173](,)” whether Batacan had knowingly violated the no-contact order? [Court’s Instruction 9; CP 43]. According to Arko and Batacan, there was no knowing violation; Officer Ficek testified to the contrary.

#### 01.4 Cumulative Effect of Misconduct

Based on this record, reversal is required, for there is a substantial likelihood that the prosecutor’s comments affected the jury’s verdict. Moreover, the comments were nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, for they were “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ incurable by a jury instruction.” See

State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). In deciding whether the conduct warrants reversal, this court considers its prejudicial nature and its cumulative effect. State v. Boehning, 127 Wn. App. at 518.

Not only did the prosecutor vouch for the credibility of his key witness, his misconduct shifted and minimized the State's burden of proof, where he implicitly argued the jury could believe the unchallenged and thus "unbiased" testimony of Officer Ficek and convict Batacan if it was sure or confident in its decision.

Shifting the burden of proof to the defendant is improper, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct. Due process requires the prosecution to prove beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt.

In re Glassman, 175 Wn.2d at 713 (internal citations omitted).

There is a substantial likelihood that the cumulative effect of the prosecutor's misconduct in vouching for his key witness and in shifting and minimizing the burden of proof affected the jury's verdict, for the evidence of guilt was not overwhelming. As framed by the prosecutor during closing, the case revolved around the single issue of whether the

jury found Officer Ficek more credible than Arko and Batacan. [RP 171].

That was his case.

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient....

In re Glassman, 175 Wn.2d at 711.

02. BATACAN WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT.<sup>3</sup>

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

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<sup>3</sup> While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any error initiated by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court determine that counsel waived the issue by failing to properly object to the prosecutor's closing argument as set forth in the preceding section, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel failed to object to the prosecutor's closing argument for the reasons previously argued. Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

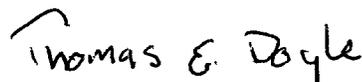
To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident for the reasons set forth in the preceding section.

Counsel's performance was deficient because he failed to properly object to the prosecutor's numerous instances of misconduct during closing argument for the reasons previously argued, which was highly prejudicial to Batacan, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction and remand for retrial.

E. CONCLUSION

Based on the above, Batacan respectfully requests this court to reverse his conviction and remand for retrial.

DATED this 30<sup>th</sup> day of January 2015.



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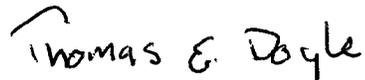
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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