

No. 47383-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

RONNIE M. BATAKAN,

Appellant.

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

The Honorable Erik Price, Judge
Cause No. 14-1-00602-4

BRIEF OF RESPONDENT

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Sixth Amendment and Const. art. 1, § 22 3

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor, in closing argument, improperly vouched for a witness, minimized the State's burden of proof, or shifted the burden of proof to the defendant.

2. Whether defense counsel rendered ineffective assistance by failing to object to the prosecutor's closing argument.

B. STATEMENT OF THE CASE.

The State accepts Batacan's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The State's closing argument did not improperly vouch for a witness or either shift the burden of proof to the defendant or minimize the State's burden of proof.

Batacan challenges several portions of the State's closing argument, claiming that he was denied his right to a fair trial by several of the statements made by the prosecutor. Those statements, even taken out of context, do not constitute misconduct nor did they in any way prejudice the defendant.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context

of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "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." Id. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to

advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). "When the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable." State v. Miles, 139 Wn. App. 879, 890, 62 P.3d 1169 (2007).

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

A reviewing court first determines whether the challenged comments were in fact improper. If so, then the court considers whether there was a "substantial likelihood" that the jury was affected by the comments. Both the Sixth Amendment and Const. art. 1, § 22 grant defendants the right to trial by an impartial jury,

but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The concern is less with what was said or done than with the effect likely to result from what was said or done.

Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. "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?"

State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012), quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932).

Remarks that touch upon a defendant's constitutional rights are not per se incurable. The reviewing court is to consider the likely outcome had the defendant timely objected. Emery, 174 Wn.2d at 763.

a. Vouching.

Batacan cites to four statements of the prosecutor, which he claims constitute improper vouching for the credibility of the police

officer who testified on behalf of the State. Appellant's Opening

Brief at 7-8. Those are:

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 171.¹

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 or the 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.

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 A number of times and he has to get so many—you never heard anything like that.

RP 188.

Improper vouching occurs if the prosecutor expresses his or her personal belief as to the veracity of the witness or indicates that evidence not presented at trial supports the witness's testimony.

State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). There is

¹ All references to the Verbatim Report of Proceedings are to the single volume of the trial transcript.

no error unless the prosecutor clearly and expressly vouches for a witness's credibility. See State v. Kirkman, 159 Wn.2d 918, 929-30, 155 P.3d 125 (2007). To challenge alleged instances of vouching for the first time on appeal, the appellant must demonstrate that the prosecutor clearly and expressly vouched for a witness's credibility. See RAP 2.5; Kirkman, 159 Wn.2d at 920-30.

Nothing in the above-cited portions of the State's closing argument contains an expression of the prosecutor's personal beliefs or attempts to argue facts that are not in the record. He merely argued that the jury had heard no facts that would impeach the officer. That argument is entirely proper.

This was not a long or complicated trial. The State presented two witnesses, Officer Ficek and the victim. Batacan testified in his own defense. During closing argument, the prosecutor directed the jury's attention to the "to-convict" instruction as he reviewed the evidence. RP 165-67; CP 43. He then discussed the instructions defining knowingly and intentionally, listing the evidence that supported the conclusion that Batacan had acted both knowingly and intentionally. RP 167-70; CP 41-42.

Each of the three witnesses told a different account of the event forming the basis of the charge. Even though the State called the victim, she was not a cooperative witness and did her best to exculpate Batacan. RP 44-56. Even so, her version did not even remotely match the account Batacan gave on the witness stand. RP 103-43. The police officer gave yet a different account. RP 58-71; 86-89. Credibility was, therefore, of critical importance. The prosecutor quite properly discussed which witnesses had reasons to be biased and which didn't.

Look at the bias. Look at the reasons why you are hearing what you heard. [The victim], who was very, very up front with you, she wanted to see the defendant because—and the tense was important, not she “loved” him—she “loves” him, and she said point blank, she didn't want him to get in trouble.

The defendant, you can draw your own conclusions on why you're hearing what you're hearing.

What bias did you hear 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?

This is a case, I would submit to you, that revolves around that one issue. Everything else is essentially uncontested, but we have two people who have very strong, very obvious reasons for why they told you what they told you, reasons that are understandable. No one is saying anyone is malicious or evil. They are understandable, but they are reasons for why they would tell you these versions of events that you have heard. Then you have an officer right towards the end of his shift,

based on what he told you, just happens to be driving by, sees someone he recognizes.

Aside from it actually happening, what reasons does he have to tell you that? You didn't hear anything. That instruction says you are the sole judges of the credibility of each witness and the value or weight to be given to the testimony of those witnesses. I would submit to you, based upon all of the information that you have received, the only witness or the 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 170-72.

The prosecutor did not imply that there was evidence not before the jury that bolstered the officer's credibility, nor did he express his personal opinion in the officer's veracity. He only pointed to the evidence before the jury, which failed to show any bias on the part of the officer. There is no error unless the prosecutor clearly and expressly vouches for a witness's credibility. Kirkman, 159 Wn.2d at 929-30. A prosecutor has wide latitude to argue reasonable inferences from the evidence, including inferences regarding the credibility of witnesses. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009). There was no error.

b. Shifting the burden of proof.

Batacan argues that the statements of the prosecutor about the lack of evidence of bias on the part of the officer somehow shifted the burden of proof to him, and that the jury could conclude that it was his responsibility to produce evidence that the officer was biased. Appellant's Opening Brief at 9-10. That simply does not logically follow. The prosecutor's argument seems to assume that any evidence of bias would be apparent from the testimony that was offered. Batacan testified. Because he testified, the jury would not be led to conclude that he had shirked some duty to take the stand. Evidence of bias could have come from the officer himself or the victim. Even if these comments were somehow construed as implying that Batacan had failed to show bias, it would not be error.

Generally, a prosecutor cannot comment on the lack of defense evidence because the defense has no duty to present evidence. State v. Thorgerson, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). But the mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009). A

prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case. State v. Killingsworth, 166 Wn. App. 283, 291-92, 269 P.3d 1064, *review denied*, 174 Wn.2d 1007 (2012). It may be misconduct for the prosecutor to say in closing argument that the defense failed to present witnesses or explain the facts of the case, or argue that the jury should find the defendant guilty just because he did not present evidence to support his theory of the defense. State v. Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). That didn't happen in Batacan's case. It is not misconduct for the prosecutor to argue that the facts support a conclusion that a State witness was being truthful. State v. Jackson, 150 Wn. App. 877, 888, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009).

The rule announced by this court in *State v. Litzenberger*, 140 Wash. 308, 248 P. 799 (1926), that "Surely the prosecutor may comment upon the fact that certain testimony is undenied without reference to who may or may not be in a position to deny it; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his" is still good law.

State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 403 (1969).

Because Batacan failed to object to alleged burden shifting at trial, he must establish that the misconduct was so flagrant and ill

intentioned that an instruction would not have cured the prejudice. Emery, 174 Wn.2d at 760-61. The focus is on whether the prejudice could have been cured and less on whether the conduct was flagrant and ill intentioned. Id. at 762. Here, even if there had been any prejudice from the prosecutor's comments, an instruction to the jury to disregard them would easily have cured it. There was no error.

c. Minimizing the burden of proof.

Batacan challenges a portion of the State's rebuttal argument in which the prosecutor said:

There is the final instruction that tells you about reasonable doubt, doubt for which a reason exists, but it goes on to say, if you have an abiding belief in the truth of the matter asserted, then you are convinced beyond a reasonable doubt, and I made the comment during my first chance to talk to you that we defined a lot of things that you think you already know the meaning of. "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 have an abiding belief, (sic) 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? And I would submit to you, when you look back at all of the information, when you look back at the reasons you got the information you got

from each individual person, that the only information left standing after that is the information that was provided to you by Ofc. Ficek, and based on that, I ask you to find the defendant guilty. Thank you.

RP 190-91.

Batacan argues that telling the jury that being sure is the equivalent of an abiding belief constitutes prosecutorial misconduct by minimizing the State's burden of proof. He does not explain exactly how that would be. He cites to Anderson, 153 Wn. App. 417, for the proposition that it is error for the State to compare its burden of proof to everyday common decisions. However, that is not what happened in Batacan's case, and further, the Anderson court did not find the error to be reversible, given that the defendant did not object and the jury was properly instructed. Here Batacan did not object, and the jury was properly instructed on the State's burden of proof. Id. at 431-32; CP 37.

Batacan also cites to State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011). In that case the prosecutor told the jury that it had to "fill in the blank" to find reasonable doubt, to acquit it must believe the defendant, and that abiding belief was similar to discerning the subject of a partially completed puzzle. Id. at 683. The court did find those

statements to be reversible error. Id. at 686. However, that is not what happened in Batacan's case. Here the prosecutor did not attempt to quantify the level of certainty or compare it to anything, everyday decisions or otherwise. Batacan does not explain why being sure is different from having an abiding belief. There was no error.

d. Cumulative error.

Batacan argues that all of the claimed errors combined require reversal because of cumulative error. “[T]he doctrine [cumulative error] does not apply where the defendant fails to establish how claimed instances of prosecutorial misconduct affected the outcome of the trial or how combined claimed instances affected the outcome of the trial.” Thorgerson, 172 Wn.2d at 454. Were Batacan correct about any of his claims, each alone would be reversible error. But three non-errors do not equal cumulative error.

e. Harmless error.

Batacan argues that his constitutional rights were violated and the court should analyze the prosecutor's argument under the more stringent constitutional harmless error standard. Appellant's Opening Brief at 5. Washington courts, however, do not apply the

constitutional harmless error standard to improper prosecutorial arguments, even those undermining the presumption of innocence. Johnson, 158 Wn. App. at 686; Warren, 165 Wn.2d at 26 n.3.

The State is arguing that there was no error at all. However, even if any of the prosecutor's statements were error, it is most unlikely that they had any effect on the outcome of the trial. An error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 W.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

2. Defense counsel was not ineffective for failing to object to the prosecutor's closing argument.

Batacan claims that his trial attorney was ineffective for failing to object to the arguments which he now challenges for the first time on appeal.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an

objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide

range' of permissible professional legal conduct." United States v. Necochea, 986 F.2d 1273, 1281 (1993), *citing to Strickland*, 466 U.S. at 689.

Batacan argues that there could be no tactical reason for defense counsel to refrain from objecting, but the fact that the argument was not objectionable is the most likely reason he failed to do so. In addition, he quite likely was reluctant to draw the jury's attention to the implausible stories told by Batacan and the victim.

Even had counsel objected, it is unlikely the court would have sustained the objections and therefore Batacan cannot show prejudice. The bottom line is that defense counsel did not render ineffective assistance.

D. CONCLUSION.

The State's closing argument did not infringe on any constitutional right, nor was defense counsel ineffective. The State respectfully asks this court to affirm Batacan's conviction.

Respectfully submitted this 27th day of March, 2015.



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THURSTON COUNTY PROSECUTOR

March 27, 2015 - 8:40 AM

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