NO. 48580-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

RODERICK KING-PICKETT,

Appellant.

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

The Honorable Suzanne Clark, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

FLAGRANT AND ILL INTENTIONED PROSECUTORIAL MISCONDUCT DEPRIVED KING-PICKETT OF A FAIR TRIAL

During closing, the State insinuated that its lead witness, Michael Freeman-Lema, was influenced by outside sources into perjuring himself with regard to his identification of King-Pickett. Contrary to the State's claim on appeal, this was not a reasonable inference based on the evidence presented at trial. No such evidence existed given that the trial court clearly excluded the State's theory and proposed evidence that Freeman-Lema was a victim of witness tampering.

The State might not like Freeman-Lema's testimony that he never could identify the intruder in his home and that he had always consistently told police he was "70 percent unsure" King-Pickett was the intruder. See Br. of Appellant at 8-9. The State also might be frustrated that Freeman-Lema testified he phoned police to correct their erroneous understanding that he had ever identified King-Pickett as the intruder. Br. of Appellant at 9. Regardless, the State was not entitled to argue that Freeman-Lema was lying at the direction of some outside influence when it presented absolutely no evidence to that effect.

The State didn't produce any evidence that could support an inference of witness tampering because the trial court expressly excluded

such evidence. Indeed, the trial court sat through the State's offer of proof where Officer Ben Taylor contracted Freeman-Lema, claiming Freeman-Lema called because "he wanted to tell me [that he was 70 percent unsure] because he had some acquaintances that were affiliated with some organizations that didn't find it kindly that he was testifying against somebody that they knew." RP 227. The trial court also heard the State's arguments that it "should be able to explain -- we think it's relevant to show why Mr. Freeman-Lema would provide a different story later[,] similar to a domestic violence case where somebody might be in fear of being harmed and then would maybe want to change their story." RP 227-28. The State also asserted that because Freeman-Lema "didn't want to testify here today," "we think it's potentially because he was in fear." RP 228.

The trial court rejected the State's evidence, given that Freeman-Lema had testified "that he wanted to correct that someone had the wrong impression. And now you're saying it's because he was threatened, and that was not his testimony on the stand." RP 228. Because Freeman-Lema's "testimony is not today that he was threatened," the trial court determined that the prejudicial effect of the State's proposed evidence outweighed its probative value especially because "there's no showing that any of this was done at the direction of the defendant." RP 229. Thus, under an ER 403 balancing test, the trial court excluded the State's proposed evidence of

witness tampering because (1) Freeman-Lema's testimony established he had not been the victim of witness tampering and (2) Officer Taylor's proposed testimony would cast unfair aspersions on King-Pickett as a witness tamperer.

In closing, the prosecutor circumvented the trial court's clear ruling. The State argued Freeman-Lema was lying about being 70 percent unsure of his identification because had been influenced by outside sources into changing his story. RP 320. This was not a reasonable inference drawn from the evidence presented to the jury, but an inflammatory suggestion that King-Pickett or his associates had improperly influenced Freeman-Lema into lying. Given that the trial court excluded all evidence of supposed witness tampering, it was flagrant and ill intentioned misconduct for the prosecutor to advance in closing an extraevidentiary theory that Freeman-Lema perjured himself because of "outside influences."

This misconduct is nearly identical to the misconduct that compelled reversal and retrial in State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2007), State v. Smith, 189 Wash. 422, 65 P.2d 1075 (1939), and State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993). In these cases, the trial court excluded certain evidence and the State nonetheless introduced or argued the very evidence that was excluded. See Br. of Appellant at 6-8 (discussing these cases). These cases compel reversal and remand for a fair trial.

The State attempts to downplay its misconduct, asserting, "The prosecutor did not introduce evidence, or tell the jury that is indeed what happened." Br. of Resp't at 19. But the prosecutor suggested to the jury that Freeman-Lema was not truthful because of "outside influences" or because of "something that happened to" him. The implication of these statements is clear enough: the prosecutor asked the jury to disbelieve Freeman-Lema's testimony that the never could and never did identify King-Pickett because King-Pickett or his associates influenced him into lying. The prosecutor's arguments invited the jury to convict King-Pickett not based on the evidence, but because of some attempted improper influence over the State's key witness. Any reasonable juror would have understood the prosecutor's statements as an insinuation that King-Pickett was responsible for improperly influencing a witness. Indeed, this is exactly how the trial court understood the State's position when it excluded the evidence. RP 229 ("Does the probative value outweigh the prejudicial effect, and there's no showing that any of this was done at the direction of the defendant. So I am going to exclude the statement." (emphasis added)). In light of the trial court's ruling, the prosecutor's inflammatory remarks were flagrant and ill intentioned, and must be presumed prejudicial. King-Pickett did not receive a fair trial.

The State also claims that even if the prosecutor committed misconduct, the evidence of King-Pickett's guilt was so overwhelming that it had no impact on the verdict. Br. of Resp't at 20-22. The State is mistaken given that no one at trial could identify King-Pickett as the intruder. The State's witnesses thought the intruder had been shot; King-Pickett had not been. Police stopped King-Pickett only because he happened to be a black man with a plastic bag. The K-9 unit did not alert on King-Pickett as the intruder, just on plastic bags nearby. See Br. of Appellant at 13-14. Although King-Pickett might have possessed stolen property, there was no definitive evidence that identified King-Pickett as the robber or burglar in Freeman-Lema's home.

Given that the State's identity evidence was flimsy, the prosecution's inflammatory suggestion that King-Pickett had influenced Freeman-Lema into altering his identification would have affected the verdict. No curative instruction could have mitigated the State's choice to implicate King-Pickett in a witness tampering scheme. This court must reverse and remand for a fair trial.

B. CONCLUSION

For the reasons stated here and in his opening brief, King-Pickett asks that this court reverse his convictions and remand for a fair trial, free of flagrant prosecutorial misconduct.

DATED this 1st day of March, 2017.

Respectfully submitted,

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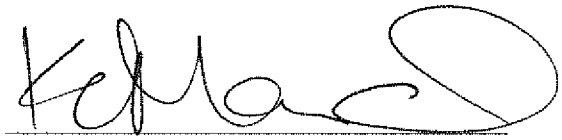

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