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Court of Appeals
Division III
State of Washington

No. 32318-8-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

WILLIAM P. MCBRIDE,
Defendant/Appellant.

APPEAL FROM THE WHITMAN COUNTY SUPERIOR COURT
Honorable David Frazier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in permitting witness testimony about a prior crime for false statement that went beyond the scope of ER 609(a) by giving more information than the fact of conviction, type of crime, and punishment imposed.

2. The prosecutor committed prosecutorial misconduct by eliciting testimony from an officer witness as to the credibility of another witness.

3. The prosecutor committed prosecutorial misconduct by giving his personal opinion as to the credibility of the defendant¹ and three different witnesses during closing and rebuttal arguments.

4. Mr. McBride was denied his constitutional right to effective assistance of counsel when his attorney failed to object during closing and rebuttal closing arguments to the prosecutor's improper statements regarding the credibility of the defendant and three different witnesses.

5. Mr. McBride was denied his constitutional right to effective assistance of counsel when his attorney failed to object to the testimony from an officer witness as to the credibility of another witness.

6. The trial court erred by imposing a DNA collection fee.

¹ Mr. McBride did not testify. RP 3, 61, 251.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion by allowing the prosecutor to elicit testimony from Ms. Baird regarding the details of her prior conviction for false statement because the line of questioning went beyond the fact of conviction, type of crime, and punishment imposed?

2. Was the prosecutor's misconduct reversible error for (1) improperly eliciting opinion testimony from an officer witness as to the credibility of an accomplice informant and (2) by vouching for and directly commenting on the credibility of the defendant and three witnesses during his closing and rebuttal closing arguments?

3. Was defense counsel ineffective for (1) failing to object to improper opinion testimony from an officer witness and (2) failing to object to prosecution's vouching for and commenting on witnesses' credibility during closing and rebuttal arguments?

4. Were there so many errors at trial that this case requires reversal and remand for a new trial under the cumulative error doctrine?

5. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, is a subsequent submission required?

C. STATEMENT OF THE CASE

A jury found Mr. McBride guilty of theft of a motor vehicle and second degree burglary in February 2014. CP 10-12, 40-41; RP 299.

Dominic Petrovich testified two motorcycles were taken from his carport, but he did not see who took them. RP 64-66, 68-69, 72. Kenneth Himes testified he stole Petrovich's motorcycles to pay for drugs. RP 77-78. Himes said he took one of the motorcycles on his own but enlisted Mr. McBride's help in taking the second one. RP 78-80.

Deputy Jordan questioned Himes. RP 104-07, 183-84. In his initial interview Himes did not tell law enforcement that Mr. McBride helped him take a motorcycle. RP 107, 198-200. Law enforcement promised Himes that if he told the truth he would only be charged with two counts of possession of stolen property. RP 107, 185. Soon after, Himes recorded a second statement with law enforcement. In exchange for doing so, he was not charged with multiple burglaries. RP 107-09, 184-85. Himes acknowledged being confused about the details of other crimes he had committed. RP 109-11. Deputy Jordan stated the criminal investigation reached a "dead end" until Himes agreed to talk. RP 185.

Deputy Jordan testified he was able to "verify" what Himes said about other criminal activity in the area, that he believed Himes had given

“real truthful information regarding the crimes that had happened and the people involved,” and that he learned through his investigation that Mr. McBride was involved. RP 187. The deputy contacted Mr. McBride and asked about the missing motorcycles. RP 189. Mr. McBride responded by stating he helped Himes work on some motorcycles. RP 190.

On cross-examination, Deputy Jordan admitted Himes was the only person to implicate Mr. McBride in the theft of a motorcycle. RP 203. The deputy helped Himes fill “in a lot of blanks” due to Himes’ confusion and inconsistencies. RP 204.

Amy Baird testified she was Mr. McBride’s girlfriend. RP 217. On cross-examination Baird denied previously telling Deputy Jordan she believed Mr. McBride was involved in a motorcycle theft. RP 229-30. The prosecutor asked Baird whether she “only ever” told the truth and whether she would ever “lie for William McBride”. RP 234. Baird agreed that she would “lie about his name” and did so in September of 2013. RP 234. The prosecutor then asked Baird if she told the police Mr. McBride was someone else. RP 235. Baird attempted to explain she did not tell the police Mr. McBride’s name was Dan McBride. RP 235. In the middle of her explanation, defense counsel objected to the scope of this line of questioning. RP 235. Defense counsel argued that while Baird’s prior

conviction for false statement was admissible, the prosecutor's line of questioning went beyond the permissible scope of ER 609 because it included more than just "the fact of the conviction." RP 235. The trial court overruled the objection on the basis it "[s]ounded proper impeachment to me, -- as the evidence of a conviction." RP 237.

After the objection was overruled, the prosecutor continued to present evidence of Baird's prior conviction. RP 237. Baird was in Kennewick when she had contact with law enforcement. RP 237. Baird also testified Mr. McBride made a false statement to law enforcement by giving his brother's name for identification. RP 237. Baird testified she admitted to knowing Daniel "a really long time" but she never actually told law enforcement Mr. McBride's name was "Daniel." RP 238. She denied telling Deputy Jordan that Mr. McBride had been involved in the motorcycle thefts. RP 238.

In rebuttal testimony, Deputy Jordan testified Baird said "she believed that Kenny Himes and Donald Rohr (ph.) were involved in [the motorcycle theft]. She told me also to look at Bill McBride, because she said that he had been gone a lot lately at night." RP 240. The deputy noted Baird seemed unhappy with Mr. McBride and believed he was cheating on her. RP 240-41.

During closing and rebuttal closing arguments, the prosecutor made several statements about the truthfulness of various witnesses and the defendant. RP 268-69, 288, 294, 295. Defense counsel never objected. Id.

Mr. McBride's criminal history included prior felony convictions. CP 137. He was previously sentenced for second degree burglary on June 25, 2010. CP 137. The sentencing court imposed a \$100 DNA collection fee as part of the mandatory legal financial obligation (LFO) in this case. CP 140; RP 320.

This appeal followed. CP 134-144.

D. ARGUMENT

1. The trial court abused its discretion by allowing the prosecutor to elicit testimony from Ms. Baird regarding the details of her prior conviction for false statement. The line of questioning went beyond the fact of conviction, type of crime, and punishment imposed, which exceeded the permissible scope of ER 609(a).

The credibility of a witness “may be attacked by evidence that the witness has been previously convicted of a crime.” State v. Coe, 101 Wn.2d 772, 775, 684 P.2d 668 (1984) (citing ER 609(a)). “ER 609(a)(2) permits admission of evidence of a conviction to attack credibility if the

crime ‘involved dishonesty or false statement, regardless of the punishment.’” Id. Such evidence is “limited to facts contained in the record of the prior conviction: the fact of conviction, the type of crime, and the punishment imposed.” Id. at 776 (citing State v. Coles, 28 Wn. App. 563, 625 P.2d 713 (1981); State v. Brewster, 75 Wn.2d 137, 449 P.2d 685 (1968); State v. Lindsey 27 Wn.2d 186, 177 P.2d 387 (1947)). Going beyond the scope of the record of conviction would be irrelevant and likely unduly prejudicial. Coe, 101 Wn.2d. at 776 (citing Coles, 28 Wn. App. at 572-73).

The Coles court specifically addressed the admissibility and scope of prior conviction evidence. 28 Wn. App. at 572-73. The State in that case argued ER 609(a) permitted admission of all information contained in the criminal court file including “specific testimony from the transcript of trial in the prior proceeding.” Id. at 572. However the appellate court disagreed, stating the State’s position was an “overly broad interpretation of the ‘record’ . . . [which] is not supported by case law in this state” Id. In holding such evidence was inadmissible, the court specified the following scope of ER 609(a) evidence:

[Q]uestions designed to show a record of criminal misconduct for purposes of affecting credibility are limited to the fact of the conviction, the type of crime the witness was convicted of and the punishment imposed. . . .

Id. at 572-73 (citing State v. Sayward, 66 Wn.2d 698, 699, 404 P.2d 783 (1965)). The court reasoned that admission of evidence beyond those three facts was impermissible because:

. . . the only purpose of such information in a subsequent trial on an unrelated offense is to bring irrelevant evidence before the jury to insinuate that conviction of the prior offense somehow is proof of defendant's guilt in the present action.

Id. at 573 (citing State v. Lindsey, 27 Wn.2d 186, 190, 177 P.2d 387 (1947)).

A trial court's ruling under ER 609 is reviewed for abuse of discretion. State v. Bankston, 99 Wn. App. 266, 268, 992 P.2d 1041 (2000) (citing State v. Rivers, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996)). "Abuse occurs when the ruling of the trial court is manifestly unreasonable or discretion is exercised on untenable or unreasonable grounds." Id. (citations omitted). Admission of improper evidence requires reversal if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983) (quotations omitted) (citing State v. Cunningham, 93 Wn.2d. 823, 613 P.2d 1139 (1980)).

The Coles decision is also instructive. Id. at 573. After deciding evidence beyond the scope of ER 609 was inadmissible, the Coles court turned to the question of whether the prosecutor's misconduct was reversible error. Id. at 573. Though the Coles court did not make a special finding as to the improper evidence, the court strongly warned that the prosecutor's conduct in the case had been "reprehensible." Id. at 573-74. The court emphasized a prosecutor is a "quasi-judicial officer" who must "act impartially." Id. at 573; see also Lindsey, 27 Wn.2d at 186, 192 (holding prosecutor's misconduct in eliciting testimony beyond the scope of the fact of conviction and resulting sentence was reversible error).

In the present case the prosecutor went beyond the scope of the specific boundaries of ER 609(a) set forth in Coles. Over the course of several pages of transcript the prosecutor questioned Baird about her prior conviction for making a false statement. RP 234-38. While conceding the conviction was admissible, defense counsel properly objected to the scope of the testimony concerning that conviction under ER 609. RP 235-36. The trial court mistakenly overruled defense counsel's objection. RP 237-38.

The scope of the questioning regarding Baird's prior conviction was particularly insidious because it involved facts concerning Mr.

McBride as well. RP 234-38. Baird testified she had been present when Mr. McBride gave law enforcement a false name. RP 237. Her conviction was based on the fact Mr. McBride had stated his name was “Daniel” and she had not been straightforward with law enforcement regarding whether his name was “Daniel.” RP 237-38. This testimony went far beyond the fact of her conviction, type of crime, and length of sentence. See Coles, 28 Wn. App. at 572-73.

The trial court abused its discretion by overruling defense counsel’s objection and allowing the prosecutor to delve into the specific facts of Baird’s case. RP 237-38. As Coles noted, admission of details surrounding prior convictions not only brings in irrelevant evidence, but also by nature “insinuate[s] that conviction of the prior offense somehow is proof of defendant’s guilt in the present action.”² 28 Wn. App. at 573.

In fact Baird’s testimony went so beyond the scope of proper evidence allowed under ER 609 that it implicated Mr. McBride in another completely unrelated matter. RP 237. Surely the prosecutor was keen on this and wanted to bring in the fact Mr. McBride had made contact with law enforcement before and lied about his own name.³ The taint of this evidence was irrelevant and highly prejudicial—which is exactly why the

² Though the Coles court specifically addresses ER 609 evidence that was admitted for purposes of impeaching a defendant, ER 609 is applicable to all witnesses.

Coles court and others have limited the scope of ER 609. 28 Wn. App. at 573; see State v. Coe, 101 Wn.2d at 776 (commenting that testimony beyond the scope of the record of conviction would be irrelevant and likely unduly prejudicial); see also ER 403. It is not the purpose of ER 609 to allow a party to prove its case using insinuation of ongoing criminal propensities; ER 609's purpose is solely to allow a party to impeach a witness's credibility.

Not harmless error. Here, given that witness testimony was so crucial to the State's case, it is within reasonable probability that the outcome of the trial was materially affected by the admission of evidence beyond the scope contemplated in ER 609(a). This was particularly true as to the crime of theft of a motor vehicle, where evidence of that charge was particularly meager. Only Himes' testimony could directly link Mr. McBride to the theft of a motorcycle. RP 80-85, 89-104, 203. The improperly admitted testimony was so prejudicial it tainted the jury by insinuating Mr. McBride's prior criminal actions were also proof of his guilt in the current case. Coles, 28 Wn. App. at 573. It is highly likely the improperly admitted evidence materially affected the trial outcome by confusing and misleading the jury. ER 403.

³ Mr. McBride did not testify at trial. RP 3, 61, 251.

2. The prosecutor committed misconduct by (1) improperly eliciting opinion testimony from an officer witness as to the credibility of an accomplice informant, and (2) vouching for and directly commenting on the credibility of the defendant and three witnesses during closing and rebuttal arguments.⁴

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

If the defendant fails to object “at the time the misconduct occurred, he must establish that no curative instruction would have obviated any prejudicial effect on the jury...” and that “prejudice resulted that had a substantial likelihood of affecting the jury verdict.” *Id.* at 455; see also State v. O'Donnell, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007).

⁴ Assignments of Error #2 and #3.

- a. The prosecutor committed misconduct by eliciting officer witness testimony as to the credibility of another witness.

In general, a witness may not offer opinion testimony regarding the guilt or veracity of the defendant. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); see also State v. Rafay, 168 Wn. App. 734, 805, 285 P.3d 83 (2012). “Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” Id. (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). “Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” Id.; see also Wash. Const. art. I, § 22; U.S. Const. amend. VI.

“To determine whether a statement constitutes improper opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.” Rafay, 168 Wn. App. at 805-06 (citing State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); see also State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). “Testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a

special aura of reliability.” Kirkman, 159 Wn.2d at 928-29 (citing Demery, 144 Wn.2d at 765); see also State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). However, “testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt.” Rafay, 168 Wn. App. at 806.

Not all constitutional claims may be raised for the first time on appeal. Kirkman, 159 Wn.2d at 934 (citing RAP 2.5(a)(3); other citations omitted). A claim must be of “manifest” constitutional magnitude. Id. To constitute “manifest error” there must be “a nearly explicit statement by the witness that the witness believed the accusing victim.” Id. at 936.

Here, the prosecutor committed misconduct by asking Deputy Jordan if he believed the statements of the witness informant, Himes, were truthful. RP 187. The deputy answered affirmatively that he believed Himes’ statements:

[Prosecutor]: As far as the things that Mr. Himes told you, were you able to verify a lot of it?

[Deputy Jordan]: Yes. Almost everything.

[Prosecutor]: Almost everything. Okay.

Did you believe [Himes] had given you – real truthful information regarding the crimes that had happened and the people involved?

[Deputy Jordan]: Yes, I did.

[Prosecutor]: Okay.

Who – Who did you learn was involved through your investigation?

[Deputy Jordan]: I learned that Kenneth Himes, William McBride and Sheila Evans were involved.

RP 187. The question and answer was a direct and explicit statement that Deputy Jordan believed the information another witness had given him was truthful. Leading up to this point in the testimony, the prosecutor asked the deputy about other crimes and persons involved and how Himes had consistently been correct about them. RP 184-87.

Deputy Jordan's testimony was clearly an impermissible opinion regarding the truthfulness of another witness. See Kirkman, 159 Wn.2d at 927; Rafay, 168 Wn. App. at 805. The factors set forth in Rafay indicate this. Id. at 805-06. First, Deputy Jordan is an officer which created a "special aura of reliability" and resulting prejudice. Kirkman, 159 Wn.2d. at 928-29. Second, the deputy's testimony specifically commented on the credibility of one the State's main witnesses, Himes, and indicated Himes had previously given truthful information about criminal activity of others. RP 184-87.

Third, Himes' testimony had implicated Mr. McBride in the theft of a motor vehicle. Himes' testimony was the only evidence linking Mr. McBride to the crime of theft of a motor vehicle and his credibility was of

particular issue for several reasons. RP 80-85, 89-104, 203. For instance, Himes did not initially implicate Mr. McBride so his later testimony is inconsistent. Himes also had a strong motive to lie because he received lesser charges due to his testimony. Additionally, he admitted being confused due to heavy drug use. RP 89, 106-12, 184-85.

Fourth, since the defense theory in this case was to attack the credibility of the witnesses testifying against Mr. McBride, the deputy's testimony was particularly egregious. RP 277-78.

Considering the final Rafay factor, the evidence was tenuous in this case especially with regards to the theft of motor vehicle charge. Deputy Jordan's opinion testimony incurably bolstered the credibility of a key witness in the State's case. By asking an officer witness such an improper and prejudicial question at trial, the prosecutor committed prosecutorial misconduct. Defense counsel did not object (RP 187), but no curative instruction could have obviated the prejudice. The deputy's direct opinion testimony on the credibility of an informant witness was "manifest error" and was a violation of Mr. McBride's constitutional right to a jury trial.

- b. The prosecutor committed misconduct by vouching for several witnesses during closing and rebuttal arguments and directly stating the defendant lied during rebuttal argument.

Improper vouching for a witness' credibility occurs "if a prosecutor expresses his or her personal belief as to the veracity of the witness" State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citations omitted); see also State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). A prosecutor improperly vouches for the credibility of a witness by arguing that a witness is telling the truth. State v. Ramos, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011) (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they "were just telling you what they saw and they are not being anything less than 100 percent candid."). "Whether a witness has testified truthfully is entirely for the jury to determine." Ish at 196 (citing United States v. Brooks, 508 F.3d 1205, 1210 (9th Cir. 2007)). "A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated." Ramos at 333 (citing State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011)).

Throughout closing argument and rebuttal, the prosecutor made several improper and inadmissible statements vouching for and commenting on the credibility of the defendant and three witnesses. These statements were especially prejudicial since the majority of the evidence in this case hinged on the credibility of the witnesses. Defense counsel did not object to any of these statements. However, no curative instruction would have neutralized the numerous comments the prosecutor made to the jury. See Ramos at 333 (citing State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) and State v. Grerory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)).

- i. The prosecutor improperly vouched for Ms. Baird's statements.

Deputy Jones testified Baird told him she suspected Mr. McBride was involved in the motorcycle theft because he had been “gone a lot lately at night.” RP 240. Baird denied these statements. RP 238. In an attempt to cast suspicion on Mr. McBride for involvement in the theft of a motorcycle, the prosecutor opined in closing argument that because Baird was upset with Mr. McBride, her contested statements to Deputy Jordan were true:

But [Baird] was upset with [Mr. McBride] and she told them the truth.

RP 269.

A prosecutor may not argue that a witness is telling the truth. Ramos, 164 Wn. App. at 341, n. 4 (finding the prosecutor improperly vouched for a witness by stating “the truth of the matter is [the police witnesses] were just telling you what they saw and they are not being anything less than 100 percent candid”).

Here, the prosecutor improperly vouched for the credibility of Baird’s contested statements. The vouching was particularly prejudicial because the statement the prosecutor referred to was a feeble link to the motorcycle theft. The alleged statement by Baird was not direct knowledge of a crime being committed. Yet the prosecutor felt the need to bolster the supposed statement by calling it “the truth.” Such commentary is flagrantly improper as it takes away the fact-finding function of the jury. Ish, 170 Wn.2d at 196. A curative instruction would not have relieved the error.

- ii. The prosecutor improperly vouched for Deputy Jordan, an officer witness.

Baird’s contested statements were a hot issue for the prosecutor. Although Baird denied making previous statements to Deputy Jordan

about Mr. McBride's involvement, the prosecutor also claimed during rebuttal she was not telling the truth according to Deputy Jordan:

And Amy Baird denied on the stand yesterday that she ever told Dep. Jordan that Bill McBride was involved. But Dep. Jordan told you that's not the truth; Amy Baird told him, "Yeah, and maybe Bill."

RP 288. The prosecutor once again instructs the jury who to believe—and this time conveys to the jury that Deputy Jordan told them what is not “the truth.” RP 288. The prosecutor vouches for the deputy in this light by telling the jury who is truthful. Again, the prosecutor improperly instructs the jury as to which witness was telling the truth, taking the determination out of the jury's hands. Ish, 170 Wn.2d at 196. The trial court would not have been able to issue an effective curative instruction.

- iii. The prosecutor improperly gave his personal opinion by stating that Mr. McBride lied.

On top of the previous statements, the prosecutor directly tells the jury during rebuttal that Mr. McBride lied to Deputy Jordan about his involvement in the theft of the motorcycle. RP 294. First the prosecutor vouches for the credibility of Himes and then he continues on to directly comment on the defendant, Mr. McBride:

[Himes] *doesn't tell lies* that can't be corroborated. He tells what actually happened and the police are able to verify some of it.

Mr. McBride *does lie* when confronted by Dep. Jordan.

RP 294 (emphasis added). The prosecutor did not argue or hint Mr. McBride's alleged statements to Deputy Jordan were false—the prosecutor directly pronounces Mr. McBride lied. RP 294. Mr. McBride never even testified. RP 3, 61, 251. This error was so prejudicial that no curative instruction would have cleansed the situation. This particular comment was prosecutorial misconduct in the worst way because it commented on the defendant's credibility by calling him a liar and also vouched for Himes in the process.

iv. The prosecutor improperly and prejudicially vouched for Mr. Himes' credibility.

The prosecutor vouched for Himes' credibility in two instances. During closing argument the prosecutor stated Himes “honestly implicate[d] Ms. Evans, and Mr. McBride, and their parts in [the crimes] as well.” RP 268. Also, during rebuttal argument and in perhaps the most brazen part of all the commentary, the prosecutor specifically declared that Himes was “honest” about his involvement in the case:

Is Ken Himes an honest man? No; he's a thief. But was he honest about what he did? Yes. Was he honest about those who helped him? Yes....

Is [Mr. Himes] telling the truth? Yeah. He's telling the truth about everything that happened.

RP 295-96. Both times the prosecutor directly and improperly stated his personal belief as to the credibility of a witness. See Ish, 170 Wn.2d at 196.

In fact, contrary to the prosecutor's claim of truthfulness, Himes' motive to lie was strong in this case. RP 107-09. Himes was the only witness to testify about Mr. McBride's assistance in the theft of a motorcycle. RP 80-85, 89-104, 203. Himes was the only witness to place Mr. McBride at the scene of the crime. Id. Himes did not mention to law enforcement Mr. McBride's involvement in the theft of a motorcycle until Himes received an offer to reduce the charges against him. RP 106-07, 185-87. Testifying against Mr. McBride allowed Himes to receive a lighter sentence. RP 106-09, 185-87. Himes also admitted to being confused and using methamphetamine, which impaired his memory. RP 89, 106-09, 110-11. The evidence against Mr. McBride for theft of a motorcycle was questionable as it hinged on the credibility of a sole witness—Himes. Thus, the prosecutor very likely felt the need to vouch for Mr. Himes.

However, it was the jury's job to determine whether it could believe Himes—not the prosecutor's. Ish, 170 Wn.2d at 196. A curative

instruction could not have cleansed the juror's minds because at this point in closing and rebuttal arguments, the prosecutor had given his opinion about the credibility of four different people including the defendant. RP 268-69, 288, 294, 295.

- v. The prosecutor's improper vouching for three witnesses and direct commentary on the defendant's credibility undermined the jury's verdict.

The prosecutor vouched for or commented on the credibility of Baird, Deputy Jordan, Mr. McBride, and Himes during closing and rebuttal arguments. Each time the prosecutor made these direct and prejudicial remarks he chipped away at the fact-finding function of the jury. Ish, 170 Wn.2d at 196. The prosecutor did not simply imply the testimony was true or false—the comments were direct and precisely calculated to make a determination on an ultimate issue of fact. RP 268, 269, 288, 294, 295. It is prosecutorial misconduct for a prosecutor to state “a personal belief as to the credibility of witness.” Warran, 165 Wn.2d at 30. The statements in this case were so prejudicial and frequent that no curative instruction would have obviated the prejudice. Not only did the prosecutor state Mr. McBride lied, he also directly instructed the jury which witnesses were telling the truth.

Moreover, the statements were especially erroneous and improper with regards to the charge of theft of a motor vehicle. Himes was the only witness to directly link Mr. McBride to the theft of a motorcycle. RP 80-85, 89-104, 203. The credibility of Himes' testimony was crucial to the prosecution's case. Deputy Jordan said as much about the investigation itself:

[Deputy Jordan]: In this case, -- we had nowhere else to go.

[Prosecutor]: Okay.

[Deputy Jordan]: We were running out of options.

[Prosecutor]: You believed you had run into a dead end by that point?

[Deputy Jordan]: Yes.

[Prosecutor]: And, you weren't going to be able to find out who committed the burglaries unless somebody talked to you about it.

[Deputy Jordan]: Yes.

RP 185. Without Himes' allegedly credible testimony, the State had nothing on the charge of theft of a motor vehicle.

3. Defense counsel was ineffective for (1) failure to object to improper opinion testimony from an officer witness and (2) failure to object to prosecution's vouching for and commenting on witnesses' credibility during closing and rebuttal arguments.⁵

⁵ Assignments of Error 4 and 5.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

To prove the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show “that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[.]” and that the

decision was not tactical. State v. Sexsmith, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, “strategy must be based on reasoned decision-making[.]” In re Pers. Restraint of Hubert, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Here, defense counsel’s performance was deficient for failure to object to (1) improper officer witness opinion testimony and (2) the prosecutor’s improper vouching and commentary on the credibility of witnesses and the defendant during closing and rebuttal arguments.⁶

- a. Defense counsel was ineffective for failure to object to improper opinion testimony from an officer witness.

As previously argued, Deputy Jordan should not have been permitted to testify as to Himes’ veracity. RP 187; see also State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Such testimony is impermissible as it improperly bolstered the credibility of a key witness in the State’s case—Himes—and encroached upon the province of the jury’s fact-finding function. Defense counsel should have objected at trial to

⁶ See Issues Pertaining to Assignments of Error #2.

such testimony as it would have been sustained as improper. Id. The improper evidence as to Himes' credibility was particularly egregious as the testimony came from an officer and the prosecution's case against Mr. McBride was particularly reliant upon whether the State's witnesses were credible.

Further, the failure to object to such a blatant error could not be tactical nor reasonable, as the opinion testimony from Deputy Jordan was used to bolster Himes' credibility. Bolstering Himes in the eyes of the jury did not in any way assist defense counsel in defending Mr. McBride. Because the evidence in this case was based on credibility there is a reasonable probability the verdict would have been different if defense counsel had objected. See McFarland, 127 Wn.2d at 334-35 (citing Thomas, 109 Wn.2d at 225-26); see also Sexsmith, 138 Wn. App. at 509. Defense counsel's deficient performance prejudiced Mr. McBride. See McFarland, 127 Wn.2d at 334-35 (citing Thomas, 109 Wn.2d at 225-26). The evidence that Mr. McBride stole a motorcycle was not overwhelming and it was based upon the testimony of a sole witness—Himes. RP 80-85, 89-104, 203. For these reasons defense counsel's performance was deficient.

- b. Defense counsel was ineffective for failure to object to the prosecution's persistent vouching for and commenting on the witnesses and defendant's credibility during closing and rebuttal arguments.

Defense counsel was also deficient for failing to object on numerous occasions during the prosecution's closing and rebuttal closing arguments. The prosecutor constantly referred to which witness was telling the truth, vouched for the credibility of three witnesses, and actually directly told the jury that Mr. McBride "does lie." RP 294; also RP 268, 269, 288, 295. Defense counsel never objected to any of this improper commentary, and because it was so obviously improper the trial court would have sustained the objection. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (a prosecutor may not vouch for a witness's credibility); see also Warren, 165 Wash 2d. at 30 ("It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness"). Had defense counsel objected the first time the prosecutor made improper observations, perhaps the jury would not have endured so much of it.

There is no tactical reason for failing to object to these comments as they directly bolstered the credibility of witnesses. The witness vouching and commentary on the defendant's credibility was incredibly

prejudicial. Defense counsel's failure to object resulted in deficient performance. McFarland, 127 Wn.2d at 334-35 (citing Thomas, 109 Wn.2d at 225-26); see also Sexsmith, 138 Wn. App. at 509. This failure resulted in a verdict that with reasonable probability could have been different. McFarland, 127 Wn.2d at 334-35. The evidence that Mr. McBride stole a motorcycle was weak and based only on the credibility of Himes' testimony. RP 80-85, 89-104, 203. For these reasons defense counsel's performance was deficient and that deficiency prejudiced Mr. McBride.

4. The cumulative errors in this case require reversal and remand for a new trial.

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the prejudicial errors in this case warrants reversal. See e.g. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (noting that several trial errors "standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial").

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." State v. Lopez, 95 Wn.

App. 842, 857, 980 P.2d 224 (1999). “Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence.” Id. “Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error.” Id. “Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” Id.

In this case the prosecutor’s misconduct by vouching for witnesses, telling the jury the defendant was lying, and eliciting improper opinion testimony from an officer witness was prejudicial. In addition, defense counsel was ineffective for failure to object to the improper evidence. Also prejudicial was the trial court’s failure to limit the scope of ER 609(a) evidence. The cumulative effect of these errors was exceptionally harmful given that the State’s case was dependent upon the credibility of witness testimony. This was particularly true of the charge of theft of motor vehicle, where Himes was the only person to link Mr. McBride to that particular crime. RP 80-85, 89-104, 203. These errors individually and as a whole materially affected the outcome of the trial.

5. Since the Washington State Patrol crime laboratory already had a DNA sample from Mr. McBride for a qualifying offense, a subsequent submission was not required.⁷

RCW 43.43.754 provides in pertinent part:

(1) A biological sample must be collected for purposes of DNA identification analysis from:

(a) Every adult or juvenile individual convicted of a felony, or any of the following crimes (or equivalent juvenile offenses):

...

Failure to register (RCW 9A.44.130)

...

(2) If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.

RCW 43.43.754(1) and (2). The effective date of this statute was June 12, 2008. RCW 43.43.754.

Mr. McBride's criminal history included a prior conviction for second degree burglary. CP 137. He was sentenced for this conviction after June 12, 2008. CP 137. The prior conviction of second degree burglary required collection of a biological sample for purposes of DNA identification analysis pursuant to the statute. Accordingly, under

⁷ Assignment of Error 6.

paragraph two of the statute a subsequent DNA sample was not required. Therefore, the sentencing court should not have imposed a \$100 DNA collection fee as part of the mandatory legal financial obligation (LFO). For these reasons the \$100 DNA collection fee should be stricken from the judgment and sentence.

E. CONCLUSION

For the reasons stated the court should reverse the conviction for theft of a motor vehicle or in the alternative reverse and remand for a new trial, and the \$100 DNA collection fee should be stricken from the judgment and sentence.

Respectfully submitted October 14, 2014,



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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on October 14, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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