

05503-9

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No. 65563-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

MALCOLM JAMES FONTENOT,

Appellant.

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

The Honorable Michael C. Hayden

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Mr. Fontenot's constitutionally protected right to a fair trial was violated when the prosecutor vouched for the truthfulness of the primary witness during closing argument.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment and article I, section 3 of the Washington Constitution guarantee a defendant a fair trial. Vouching for a witness, which constitutes prosecutorial misconduct during argument that prejudices the defendant, violates the defendant's right to a fair trial. The prosecutor here vouched for the truthfulness of the victim's testimony where the victim's credibility was *the* issue in the case. Does the prosecutor's misconduct require reversal of Mr. Fontenot's convictions?

C. STATEMENT OF THE CASE

Malcolm Fontenot was charged with first degree robbery of Walter Aguilar and unlawful possession of a firearm in the first degree. CP 8-9. Mr. Aguilar was the only witness to testify to the taking of his necklace by Mr. Fontenot.

During closing argument, the prosecutor stated:

[Mr. Aguilar] testified he didn't know Mr. Fontenot. He's seen him twice. Saw him once the day of the incident and once at court. Yes, he's sure it's the same guy. He has no idea why the guy did it to him. But he has no benefit. And that weighs into why his testimony should be given some credibility.

I asked him the question, "is what you said today the same as you told the officers?" And he said, yes. Actually I can't remember if it was me or defense counsel. But I remember his response, as I'm sure you all do. The question was asked why and he said, very straightforwardly, "because it's the truth."

Ladies and gentleman, *the truth is Walter Aguilar was downtown. The truth is he was waiting at a stoplight. And the truth is the defendant came up behind him, yanked his necklace, pulled it off his neck, and threatened him implicating he had a gun.* And the fact of the matter is, and the evidence has shown, the defendant did have a gun. And as a previously convicted felon the defendant is not allowed to have a gun.

4/26/2010RP 19 (emphasis added). Mr. Fontenot did not object to the prosecutor's argument.

Mr. Fontenot was subsequently convicted as charged. CP

10-11.

#### D. ARGUMENT

##### THE PROSECUTOR'S VOUCHING FOR THE TRUTHFULNESS OF THE VICTIM VIOLATED MR. FONTENOT'S CONSTITUTIONALLY PROTECTED RIGHT TO A FAIR TRIAL

1. A prosecutor must not act in a manner designed to undercut the defendant's right to a fair trial. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). See also *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969); *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005) (every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial). Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to

the United States Constitution. “The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?” *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant’s due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1996).

A defendant who fails to object to an improper remark may assert prosecutorial misconduct where the prosecutor’s argument was so “‘flagrant and ill intentioned’ that it causes enduring and resulting prejudice that a curative instruction could not have

remedied.” *Boehning*, 127 Wn.App. at 518, *quoting State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

2. The prosecutor’s argument constituted improper vouching for the credibility of Mr. Aguilar. 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); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Courts will find the error prejudicial if it is “clear and unmistakable” that counsel is expressing a personal opinion. *Brett*, 126 Wn.2d at 49; *State v. Sargent*, 40 Wn.App. 340, 344, 698 P.2d 598 (1985). “Improper prosecutorial vouching occurs when the prosecutor places the prestige of the government behind the witness by providing personal assurances of the witness’s veracity.” *United States v. Ortiz*, 362 F.3d 1274, 1278 (9th Cir.2004) (emphasis added), *quoting United States v. Smith*, 962 F.2d 923, 933 (9th Cir.1992).

No bright-line rule dictates when vouching requires reversal. *State v. Korum*, 120 Wn.App. 686, 86 P.3d 166 (2004), *reversed on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006). But, “[w]here the prosecutor during closing argument gives a personal opinion on

the credibility of witnesses, misconduct occurs.” *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996).

Here, the prosecutor began her closing argument by telling the jury that the case was one of credibility – who the jury should believe:

Now, there’s also a jury instruction that talks about credibility. And I’m going to return to credibility because really this case, just like any other case, turns on credibility in terms of the evidence that’s been presented.

4/26/2010RP 6. The prosecutor went on to note the “truthfulness” of Mr. Aguilar, repeatedly referring to his testimony about the sequence of events as “the truth.” By making this claim that Mr. Aguilar was speaking “the truth,” the prosecutor was placing the prestige of the government behind the Mr. Aguilar by providing personal assurances of his veracity, thus constituting misconduct. *Ortiz*, 362 F.3d at 1278.

Further, the prosecutor’s comments were flagrant and ill-intentioned. *Boehning*, 127 Wn.App. at 518. The prosecutor admitted at the very beginning of her closing argument that credibility would be *the* issue in the case, then went about establishing Mr. Aguilar’s credibility for telling “the truth” by making a personal assurance his testimony was the truth. Further, a

curative instruction could not have ameliorated the damage that had already been done by the prosecutor. *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976) (“a bell once rung cannot be unring”).

Thus, Mr. Fontenot has established that he may raise the issue despite counsel’s failure to object, and has established the prosecutor committed misconduct.

3. The prosecutor’s vouching prejudiced Mr. Fontenot’s right to a fair trial. In order to establish that he is entitled to a new trial due to prosecutorial misconduct, Mr. Fontenot must show that the prosecutor’s conduct was improper and prejudiced his right to a fair trial. *Boehning*, 127 Wn.App. at 518. Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting *Pirtle*, 127 Wn.2d at 672.

Once again, as the prosecutor so aptly stated in her argument, the issue before the jury was whether to believe Mr. Aguilar’s testimony. All of the other witnesses who testified only observed events occurring *after* Mr. Aguilar claimed Mr. Fontenot had taken his necklace. The prosecutor’s vouching for Mr. Aguilar’s honesty rendered the jury’s decision a moot point. Had

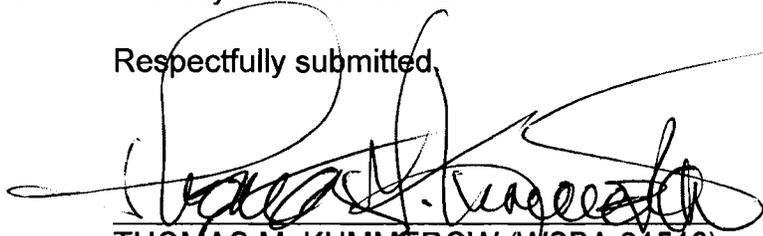
the jury been required to assess Mr. Aguilar's credibility, there is a substantial likelihood the jury would have found Mr. Aguilar not credible and the result would have been different. The prosecutor's misconduct therefore prejudiced Mr. Fontenot's right to a fair trial. Mr. Fontenot is entitled to reversal of his convictions and remand for a new trial.

E. CONCLUSION

For the reasons stated, Mr. Fontenot requests this Court reverse his convictions and remand for a new trial.

DATED this 22nd day of December 2010.

Respectfully submitted,



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DIVISION ONE**

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	)	
Appellant.	)	

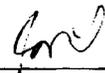
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] MALCOLM FONTENOT 875151 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF DECEMBER, 2010.

X \_\_\_\_\_ 

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