

67562-1

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NO. 67562-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ALLEN KNOLL,

Appellant.

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

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REPLY BRIEF

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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A. ARGUMENT

WHERE MR. KNOLL'S CONSTITUTIONAL  
RIGHT TO A FAIR TRIAL WAS VIOLATED  
BY PROSECUTORIAL MISCONDUCT,  
REVERSAL IS REQUIRED.

1. Because the prosecutor's closing argument  
improperly commented on the defendant's silence, reversal should  
be granted. A prosecutor may not comment on a defendant's silence  
or his decision not to present defense witnesses. Griffin v.  
California, 380 U.S. 609, 611, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).  
The prosecutor may not comment on the defendant's silence or  
imply that guilt may be inferred therefrom. State v. Easter, 130  
Wn.2d 228, 236, 922 P.2d 1285 (1996). To do so would be a  
violation of the Fifth Amendment. State v. Fiallo-Lopez, 78 Wn. App.  
717, 728, 899 P.2d 1294 (1995) (quoting State v. Ramirez, 49 Wn.  
App. 332, 336, 742 P.2d 726 (1987)).

Here, the prosecutor impugned Mr. Knoll's silence by referring  
to Mr. Knoll's two co-defendants, who testified for the State,

Did the other two get out of longer terms in jail?  
Yeah, they did. But they came in here and told their  
version of events.

7/20/11 RP 131 (emphasis added).

The prosecutor thus improperly drew the jury's attention to the fact that Mr. Knoll had exercised his constitutional right to silence, and also implied that had Mr. Knoll been able to testify, he, too, might have avoided a lengthy term in jail, like his co-defendants.

The State argues that the prosecutor's statement "has nothing to do with Knoll, implicitly or explicitly." Resp. Brief at 17. It is disingenuous, however, to argue that the State prosecutor may tell the jury that two participants told "their" version of events to the jury without suggesting that there is one remaining participant who chose to remain silent and who chose not to tell his "version."

The prosecutor's suggestion that Mr. Knoll has an obligation to prove his "version of events" implies that the defense has some burden to produce evidence, directly undermining the actual burden of proof and misstating the law. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); Fiallo-Lopez, 78 Wn. App. at 729. It is constitutional error to emphasize a defendant's failure to testify or to call witnesses on his own behalf, despite Mr. Knoll's lack of objection here. RAP 2.5(a).

2. The prosecutor denigrated the defense and argued his personal opinion. The prosecutor “has no right to mislead the jury.” State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955). Misleading arguments, when they are made by an attorney with the quasi-judicial authority accorded to the prosecutor’s office, are substantially likely to taint the jury’s verdict. Id.; Fleming, 83 Wn. App. at 215. Arguments that denigrate the defense are highly disfavored. See, e.g., State v. Gonzalez, 111 Wn. App. 276, 282-83, 45 P.3d 205 (2002).

Here, the prosecutor repeatedly called the defense theories “red herrings.” 7/20/11 RP 130-31, 148, 149. This particular disparaging comment is highly disfavored. See, e.g., United States v. Holmes, 413 F.3d 770, 778 (8<sup>th</sup> Cir. 2005) (reversing due to prosecutor’s remarks in rebuttal, including “red herring”).

It is also misconduct for a prosecutor to express a personal opinion as to the credibility of a witness or the strength of a case. State v. Monday, 171 Wn.2d 667, 677-78, 297 P.3d 551 (2011). (noting the State “crosses the line” when its own attorney throws the prestige of his public office ... and the expression of his own belief of guilt onto the scales against the accused); State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003); State v. Price, 126

Wn. App. 617, 653, 109 P.3d 27 (2005). Misconduct occurs when it is clear that the prosecutor is arguing his or her personal opinion rather than making an inference based upon the evidence. Price, 126 Wn. App. at 653.

The State argues that the prosecutor's comments here must be reviewed in context. Resp. Brief at 19. However, in this trial, the prosecutor emphasized his own prior personal experience as a defense attorney, as if to suggest to the jury that he had special knowledge of each "red herring" or trick with which Mr. Knoll and his attorney would try to confuse them. 7/20/11 RP 149.

Having defended many cases before I became the Prosecutor, that's another red herring. We can dole those things out, and I can throw out 20 more that they could have done. But they didn't need to.

7/20/11 RP 149 (emphasis added).

The prosecutor here called attention to his own stature as the Skagit County Prosecutor, as well as his personal background as a defense attorney. The prosecutor thus personally vouched for the credibility of his witnesses and the strength of his case. See Monday, 171 Wn.2d at 677-78. This misconduct prejudiced Mr. Knoll and was so flagrant and ill-intentioned that no curative instruction would have cured its effect.

3. The prosecutor's flagrant misconduct requires reversal. Generally, an objection to prosecutorial misconduct is waived by the failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). However, the issue may be addressed for the first time on appeal when the misconduct was so "flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect." Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). "When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's comments affected the verdict." State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (conviction reversed where prosecutor repeatedly called defendant a liar during closing argument).

Here, the only evidence of the defendant's knowledge regarding the firearm rested on the credibility of the codefendants testifying for the prosecution; thus, the prosecutor's highlighting of the defendant's failure to testify, as well as the prosecutor's

disparagement of the defense and vouching based upon his own personal knowledge are particularly troubling.

Accordingly, because Mr. Knoll's conviction resulted from prejudicial prosecutorial misconduct, it must be reversed. See Fleming, 83 Wn. App. at 216 (finding manifest constitutional error and reversing conviction, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense).

The cumulative effect of various instances of prosecutorial misconduct may violate a defendant's right to a fair trial. Reeder, 46 Wn.2d at 893-94; State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the several instances of misconduct in the closing argument during Mr. Knoll's trial, there is a substantial likelihood the cumulative effect affected the jury's verdict; thus, this Court should reverse his convictions. State v. Reed, 102 Wn.2d at 140, 146-47, 684 P.2d 699 (1984); see also Holmes, 413 F.3d at 778.

B. CONCLUSION.

For the foregoing reasons, as well as those stated in the opening brief, Mr. Knoll respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 7<sup>th</sup> day of June, 2012.

Respectfully submitted,



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*DIVISION ONE*

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **REPLY 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] RICHARD WEYRICH, DPA<br>ROSEMARY KAHOLOKULA, DPA<br>SKAGIT COUNTY PROSECUTOR'S OFFICE<br>COURTHOUSE ANNEX<br>605 S THIRD ST.<br>MOUNT VERNON, WA 98273 | (X) U.S. MAIL<br>( ) HAND DELIVERY<br>( ) _____ |
|--|---|

**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF JUNE, 2012.

X \_\_\_\_\_ *[Signature]*