

73009-6

FILED
July 13, 2015
Court of Appeals
Division I
State of Washington

73009-6

NO. 73009-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

IGNACIO PEREZ,

Appellant.

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

The Honorable Barbara Linde, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Jury Trial</u>	1
a. <u>Count 1</u>	1
b. <u>Count 2</u>	5
C. <u>ARGUMENT</u>	6
DETECTIVE LAZAROU'S "VOUCHING" FOR WOODWARD DEPRIVED PEREZ OF A FAIR TRIAL.....	6
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Seattle v. Heatley</u> 70 Wn. App. 573, 854 P.2d 658 (1993).....	8
<u>State v. Bourgeois</u> 133 Wn.2d 389, 945 P.2d 1120 (1997).....	11
<u>State v. Carlson</u> 80 Wn. App. 116, 906 P.2d 999 (1995).....	7
<u>State v. Chavez</u> 76 Wn.App. 293, 884 P.2d 624 (1994) <u>review denied</u> , 126 Wn.2d 1012 (1995)	8
<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	7, 8
<u>State v. Fitzgerald</u> 39 Wn. App. 652, 694 P.2d 1117 (1985).....	7
<u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993).....	11
<u>State v. King</u> 167 Wn.2d 324, 219 P.3d 642 (2009).....	1, 4, 5, 7
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	8
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	7
<u>State v. Sutherby</u> 138 Wn. App. 609, 158 P.3d 91 (2007).....	7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
U.S. Const. amend. VI	7
Const. art. I, § 22	7

A. ASSIGNMENT OF ERROR

The court erred in admitting the detective's testimony vouching for the credibility of the State's crucial witness.

Issue Pertaining to Assignment of Error

Was appellant denied his right to a fair trial where the court admitted Detective Pete Lazarou's testimony that impermissibly vouched for the credibility of Justin Woodward, the State's key witness against appellant?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Ignacio Perez by amended information filed October 10, 2014 with one count of delivering cocaine (Count 1), and one count of bail jumping (Count 2). CP 9-10. The jury found Perez guilty of both counts. CP 22-23.

The court imposed a standard range sentence of 26 months on Count 1 and 14 months on Count 2 based on an offender score of 4. CP 46-54. The sentences were ordered to run concurrent. CP 49.

2. Jury Trial

a. Count 1

On October 8, 2013, the Seattle police in conjunction with the King County Sheriff's office conducted a "buy and slide" operation in the

Pike/Pine street area of downtown Seattle. 2RP 25-26.¹ In a "buy and slide" operation, a "cooperating witness" buys drugs, a separate police team contacts and identifies the seller, and then the seller is released. 2RP 50-51. The purpose of a buy and slide operation is to identify a number of people who are selling drugs. When the operation is over charges are filed against the sellers. Id.

Justin Woodward was the police cooperating witness in the October 8, 2013 buy and slide operation. Woodward was in prison from 2006 to 2007 and again from 2009-2013. 3RP 67-68. While in prison Woodward joined a gang called the Aryan Family. 3RP 68. During his last prison term Woodward beat another inmate and spent 14 months in solitary confinement. Woodward testified that while in solitary confinement he had a change of heart. He decided that drugs, violence and gangs were bad and he wanted to give something back to the community so he quit the Aryan Family. 3RP 68-69, 111. After he made the decision to quit the Family, Woodward contacted the prison's internal investigation unit and told them what he knew about the gang. 3RP 69-70, 100-101. He was then sent to another institution. 2RP 70, 100. Despite his decision to change his life, shortly after he released from prison in 2013, he was convicted of assault. 3RP 111.

¹ The verbatim report of proceedings is referenced as follows: 1RP-11/24/2014; 2RP 11/25/2014; 3RP 12/1/2014; 4RP 1/7/2015.

On October 8, 2013, Seattle police Detective Pete Lazarou contacted Woodward and asked Woodward to meet him and Detective Edward Hagerty in downtown Seattle. 3RP 125. As the three drove around the area, Woodward recognized Perez, who was standing on the corner of 2nd and Pike, and told the detectives he believed he could buy drugs from Perez. 2RP 27-29, 3RP 133-134. They parked a couple of blocks away and Lazarou searched Woodward. Lazarou did not find any drugs, weapons or money on Woodward. 2RP 29-31, 3RP 132. Woodward was then given forty dollars to buy drugs and he left the car. 2RP 32-33 3RP 136. After Woodward crossed the street, Lazarou and Hagerty lost sight of him. 2RP 33.

Woodward testified after he left Lazarou and Hagerty he approached Perez and told Perez he needed "40" real quick. 3RP 77. Perez pulled out what Woodward believed was crack cocaine from his right pocket. The two shook hands exchanging the money and drugs. 3RP 78-79, 103-104. On cross examination, however, Woodward said that Perez put the drugs on a newspaper stand and Woodward handed Perez the money and grabbed the drugs from off the stand. 3RP 105-106.

As Woodward left Perez he gave a "buy" signal. 3RP 78. Woodward was uncertain whether he signaled a buy by turning his hat to the front or the back. 3RP 78, 106-107. Woodward returned to the car

where Lazarou and Hagerty were waiting. 2RP 34. He gave them two small rocks of cocaine. 2RP 34, 162.

Lazarou and Hagerty did not see any transaction between Woodward and Perez. 3RP 137. Detective Don Waters was working as an observer but he did not see any transaction between Woodward and Perez. 2RP 124, 126.

Detective Clayton Agate, who was in a parked car, took photographs of Woodward and Perez from about a block away. 2RP 93-94, 106. Agate only saw the two speaking with each other. 2RP 116, 117.

Sergeant Andrew Zwaschka was also working as an observer. He saw Woodward contact Perez and what looked like a hand-to-hand exchange between the two but he did not actually see them exchange anything. 2RP 63, 68-73, 78. Zwaschka did not mention seeing Perez put drugs on the newspaper stand. Zwaschka watched Perez go into a restaurant. Later, Perez came out of the restaurant and was contacted by other officers. 2RP 73-76.

King County Sheriff's deputy Ed Hall stopped Perez after he left the restaurant. Perez gave Hall a Washington State Identification card. 2RP. 22-24. Hall did not arrest or search Perez. 2RP 25-26. Perez was eventually arrested about ten months later on August 25, 2014. 3RP 14-15.

The police pay Woodward for drug transactions he makes. 3RP 63. Woodward is only paid if he successfully purchases drugs. 3RP 64, 129. Woodward was paid between \$120 and \$140 for the transaction with Perez. 3RP 130.

b. Count 2

Janet Llapitan, records custodian with the King County Clerk's office, identified certified copies of the following documents:

1. Information charging Perez with violation of the uniform substance act dated November 20, 2014 (Ex. 19). 3RP 30;
2. Trial Scheduling Order dated April 9, 2014 setting the omnibus hearing for May 23, 2014 (Ex. 20); 3RP 35;
3. Conditions of Release dated April 9, 2014 (Ex. 21); 3RP 44;
4. Clerk's Minutes dated April 9, 2014 (Ex. 22); 3RP 45;
5. Clerk's Minutes dated May 23, 2014 (Ex. 23); 3RP 47;
6. Order Striking Trial Date dated May 23, 2014 (Ex. 24) 3RP 48;
7. Order for Bench Warrant dated May 23, 2014 (Ex. 25); 3RP 49.

The Bench warrant indicates it was issued because Perez failed to appear at the May 23, 2014 omnibus hearing. Ex. 25. Llapitan testified that a defendant's appearance at the omnibus hearing is generally mandatory, but it can be waived. 3RP 34, 51. She stated that if a defendant's presence at the omnibus hearing is waived there would likely

be an order reflecting the defendant's presence is not required. 3RP 51, 53. Llapitan testified it is the court's practice to provide the defendant with a copy of the trial scheduling orders but admitted she did not know if Perez was given a copy of the Trial Scheduling Order (Ex. 20), which set the date of the omnibus hearing. 3RP 52-53, 54-55. Llapitan also admitted there is nothing in the Trial Scheduling Order that states Perez's presence was required at the omnibus hearing. 3PR 56.

C. ARGUMENT

DETECTIVE LAZAROU'S "VOUCHING" FOR WOODWARD DEPRIVED PEREZ OF A FAIR TRIAL.

On direct examination the prosecutor asked Lazarou about police working with confidential or cooperating witnesses like Woodward. 3RP 125-128. Lazarou explained he introduces the person to his supervisor, and if they decide to use the person as a witness they require the person sign a contract. 3RP 126. They then have the person conduct "reliability buys." *Id.* Lazarou testified the purpose of the "reliability buys" is so "we prove him [the witness] to be reliable." *Id.* "Reliability buys" involve the witness going into an area of high drug trafficking and buying drugs from specific individuals. If the person follows directions and makes three successful buys police "deem them reliable." 3RP 127. Lazarou was

asked if Woodward went through the “reliability buys” process and Lazarou testified that he did. Id.

Perez twice objected to the prosecutor’s line of questioning on the grounds that it improperly bolstered Woodward’s credibility. 3RP 126, 127. On both occasions the court overruled the objections. 3RP 126, 127.

It is "the exclusive function of the jury to weigh the evidence and determine credibility." State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). Our courts have consistently held that a witness cannot offer opinion testimony regarding the guilt or veracity of the defendant or another witness because it unfairly prejudices the defendant by invading the jury province to determine credibility. State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009); State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Sutherby, 138 Wn. App. 609, 158 P.3d 91 (2007); State v. Carlson, 80 Wn. App. 116, 906 P.2d 999 (1995).² The State is prohibited from explicitly or indirectly vouching for a witness by eliciting testimony from an expert or a police officer concerning the credibility of a crucial

² The prohibition against opinions on guilt and veracity stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution. The Sixth Amendment of the United States Constitution provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]" Article 1, § 22 of the Washington Constitution provides in pertinent part, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]"

witness. State v. Chavez, 76 Wn.App. 293, 299, 884 P.2d 624 (1994), review denied, 126 Wn.2d 1012 (1995).

To determine whether testimony is impermissible opinion testimony, a court should consider the circumstances of the case including: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759; City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). Under these circumstances the erroneous admission of Lazarou's testimony vouching for Woodward denied Perez his right to a fair trial on the delivery charge and warrants reversal of that conviction.

Lazarou was allowed to testify that police do not use someone as a confidential or cooperating witness unless police "prove" or "deem" the person is reliable. The witness's reliability is proven if he follows police directions and makes three drug purchases. Lazarou told the jury that Woodward did just that before he was set loose to buy drugs from Perez. A law enforcement officer's opinion testimony may be especially prejudicial because it can have "a special aura of reliability." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Lazarou's testimony sent the unmistakable message to the jury that at least for the purpose of

drug transactions (the charge against Perez) it was the opinion of the police that Woodward was a proven reliable and thus credible witness.

Lazarou's testimony was also particularly prejudicial given the defense theory. Perez argued that although Woodward was searched for drugs and money before he was sent to buy drugs from Perez, the search was not thorough and Woodward had the drugs on him that he claimed he received from Perez. 3RP 190. Perez pointed out that none of the police officers involved in the operation saw Perez give the drugs to Woodward so the case against Perez hinged on Woodward's credibility. 3RP 183. Perez's defense was that Woodward's testimony that he purchased the rocks of cocaine from Perez was not believable because Woodward was a liar and a racist who targeted Perez. 3RP 186-189.

There was evidence to support the defense theory. Lazarou testified he searched Woodward before giving him the buy money, but he did not remember what Perez was wearing, he did not remember what items he may have taken out of Perez's pockets, and although he had a camera he did not record the search. 3RP 151-157, 161-162. Perez is a black man. CP 49. Woodward admitted he once belonged to the Aryan Family, but incredulously denied it promoted white supremacy. 3RP 68, 96-97. Woodward testified that he and not police targeted Perez. 3RP 110. Woodward attempted to curry favor with the jury by claiming while

in prison he decided to give up his life of drugs and violence. 3RP 68-69, 110-111. On cross examination Woodward admitted, however, that shortly after his release from prison he was convicted of an assault. 3RP 111. Woodward also testified when he shook hands with Perez the money and drugs were exchanged. 3RP 77-79. When Woodward was confronted on cross examination with his earlier statement that Perez put the drugs on a newspaper stand and Woodward grabbed the drugs from off of the stand, he agreed that was what happened contrary to his testimony on direct examination. 3RP 103-106.

The "other evidence" in this case was the testimony of the officers involved in the operation. None of the officers saw Perez give drugs to Woodward. Only one officer, Zwaschka, testified he saw what looked like Perez and Woodward shake hands, but Woodward admitted he and Perez did not make a hand-to-hand exchange but that Perez put the drugs on a newspaper stand and Woodward took the drugs from off of the stand.

To find Perez guilty the jury had to believe Woodward that the drugs he gave to police were purchased from Perez. Woodward's testimony was crucial to the State's case. Given the circumstances of this case, the erroneous admission of Lazarou's opinion testimony vouching for Woodward's reliability as a witness was prejudicial and denied Perez his right to a fair trial.

Reversal is required when the error, within reasonable probability, materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). This means the error is prejudicial unless the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

It is likely jurors would have disbelieved Woodward's testimony that he purchased the drugs from Perez but Lazarou's improper opinion testimony with its "special aura of reliability" vouching for Woodward's reliability as a witness dispelled those doubts. It is a reasonable probability that it was Lazarou's improper opinion testimony that led to the guilty verdict.

D. CONCLUSION

For the above reasons Perez's delivery conviction (Count 1) should be reversed.

DATED this 13 day of July, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN

WSBA No. 12773

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 73009-6-1
)	
IGNACIO PEREZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JULY 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] IGNACIO PEREZ
 DOC NO. 777432
 STAFFORD CREEK CORRECTIONS CENTER
 191 CONSTANTINE WAY
 ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JULY 2015.

x *Patrick Mayovsky*