

NO. 46865-4-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS W. ASBACH,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Carol Murphy, Judge
Cause No. 14-1-00580-0

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Asbach of his constitutional due process right to a fair trial.
02. The trial court erred in permitting Asbach to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's improper closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Asbach was denied his constitutional due process right to a fair trial where the prosecutor engaged in prejudicial misconduct during closing argument by vouching for police witnesses?
[Assignment of Error No. 1].
02. Whether Asbach was prejudiced as a result of his counsel's failure to object to the prosecutor's improper closing argument?
[Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Thomas W. Asbach was charged by information filed in Thurston County Superior Court April 18, 2014, with burglary in the second degree, contrary to RCW 9A.52.030. [CP 6].

The trial court denied Asbach's pretrial motion to suppress his statements under CrR 3.5 [CP 102-04], and trial to a jury commenced September 29, the Honorable Carol Murphy presiding. Neither exceptions

nor objections were taken to the jury instructions. [RP 386].¹ Asbach was found guilty, sentenced within his standard range and timely notice of this appeal followed. [CP 97, 107-117].

02. Substantive Facts

Near 7 a.m. April 15, 2014, Tumwater Police Officer Bryant Finch responded to the report of a suspicious vehicle parked at a local residence. [RP 108-09]. Upon arrival, Finch observed a vehicle parked in the driveway and a female, later identified as Marialuz Madrigal, exiting a detached garage through a door carrying a plastic bag of clothing. [RP 113, 116, 125, 128, 132]. Shortly thereafter, Asbach exited through the same door. [RP 133]. When asked why he was on the property, Asbach, who admitted he had not been given permission to enter the garage, said he thought the property was owned by a bank and that he had taken a glucose meter from the garage for his father who is a diabetic. [RP 134-35]. Although the area near the garage door was damp with morning dew, a dry cardboard box sitting near the garage door was filed with video game controllers. [RP 135, 138]. The bottom of the box was never checked for dampness. [RP 171].

¹ All references to the Report of Proceedings are to the transcripts entitled Jury Trial – Volumes I-III.

Lieutenant Steve Barclift arrived at the scene and stayed with Asbach for approximately 10 minutes while Finch interviewed Madrigal. [RP 222, 225]. Though Barclift asked no questions, Asbach told him he had heard there were collectible albums on the property: “[H]e had described it as the Beatles White Album that had some value, and he was looking for that.” [RP 226].

After advisement and waiver of rights, Asbach told Finch he had entered the garage to look for vinyl record albums but had not found anything worth taking. [RP 149, 179]. He also said that if Madrigal were not arrested, “he would take the entire burglary charge.” [RP 148-49].

Asbach’s version of the events differed. He testified he was on the property looking for water because his vehicle had overheated, which he explained to Finch. [RP 268, 270]. He denied ever entering the garage: “Through no door did I go into the garage.” [RP 271]. He denied ever saying anything about a glucose meter or that he was looking for record albums [RP 275-76, 299]. “I didn’t tell him I had been in the garage, because I hadn’t been in the garage.” [RP 275]. In short, his conversation with Finch focused on the problems he was having with his car. [RP 300]. After being told he and Madrigal were going to jail, he did ask to be taken to jail instead of her. [RP 276].

“Well, can you take me instead of her? Because,” I said, “our child needs to go to school, and there’s nobody to take him to the bus.” And he was like, “Well, it sounds like you got a problem.”

[RP 276].

In rebuttal, Finch and Barclift testified that Asbach had never mentioned car problems [RP 342-43, 357], and a CD was played in which Asbach, while in the back of Finch’s patrol car, can be heard telling Madrigal that he had come to the property because someone had told him there were Beatle albums there. [State’s Exhibit 24].

D. ARGUMENT

01. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT BY VOUCHING FOR HIS POLICE WITNESSES.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer whose duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where it is established that the prosecutor made improper comments, this court reviews whether those improper statements

prejudiced the defendant under various standards of review. State v. Emery, 174 Wn.2d 742, 7761, 278 P.3d 653 (2012).

A criminal defendant's right to a fair trial is denied where there is an unsuccessful objection to the prosecutor's improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If a defendant, as here, fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); State v. Emery, 174 Wn.2d at 760-61. "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

It is misconduct for a prosecutor to vouch for the credibility of a State's witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016, 245 P.3d 772 (2011). "And it is generally improper for prosecutors to bolster a police witness's good character even if the record supports such an argument." State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); See State v. Smith, 67 Wn. App. 838, 844, 841 P.2d 76 (1992) (acknowledging that prosecutor's should not

bolster a police witness's good character and citing cases from other jurisdictions in accord); State v. Allen, 161 Wn. App. 727, 746, 255 P.3d 784 (2011), aff'd, 176 Wn.2d 611, 294 P.3d 679 (2013) (improper for prosecutor to place prestige of the government in support of witness). Further, a prosecutor may not ask a witness whether another witness is telling the truth. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (citing State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994)).

During closing argument, without objection, the prosecutor improperly vouched for his police witnesses:

So now, my goodness, this case presents what the State submits are two very, very different versions of the events. And I say two, because the State would submit that the officers's (sic) versions very much support each other and are consistent with each other, and so I talk about that as one version.

[RP 414].

This is more egregious than a prosecutor asking a witness whether another witness is telling the truth, given the argument was relevant only on the issue of the officers' truthfulness. Lack of consistency would suggest that the officers were either lying or at least mistaken. Consistency, on the other hand, as the prosecutor argued here, suggests that the officers were truthful and accurate. And this is the point. The consistency argument bears only on the officers' truthfulness and

reliability, it is simply an indirect way of arguing that one of the officers is saying the other is telling the truth, which is improper.

Asbach's only defense was his testimony that he hadn't entered the garage or ever said anything about a glucose meter. The prosecutor's argument improperly vouched for his police witnesses, rather than properly arguing inferences from the evidence. See State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). This is critical since an officer's testimony may be especially prejudicial since it often carries a special aura of reliability, State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001), and "may influence the fact finder and thereby deny the defendant a fair and impartial trial." State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (citing State v. Haga, 8 Wn. 481, 492, 507 P.2d 159 (1973)). Such flagrant and ill-intentioned misconduct requires reversal of Asbach's conviction.

02. ASBACH WAS PREJUDICED AS A
RESULT OF HIS COUNSEL'S FAILURE
TO PROPERLY OBJECT TO THE
PROSECUTOR'S CLOSING ARGUMENT.²

A criminal defendant claiming ineffective

² While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any error initiated by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court determine that counsel waived the issue by failing to properly object to the prosecutor's closing argument as set forth in the preceding section, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel failed to object to the prosecutor's closing argument for the reasons previously argued. Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident for the reasons set forth in the preceding section.

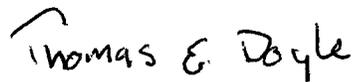
Counsel's performance was deficient because he failed to properly object to the prosecutor's misconduct during closing argument for the reasons previously argued, which was highly prejudicial to Asbach, with the result that he was deprived of his constitutional right to effective

assistance of counsel, and is entitled to reversal of his conviction and remand for retrial.

E. CONCLUSION

Based on the above, Asbach respectfully requests this court to reverse his conviction consistent with the arguments presented herein.

DATED this 30th day of April 2015.



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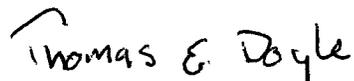
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 30th day of April 2015.



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