IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 65563-9-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
MALCOLM JAMES FONTENOT,	)	
	)	
Appellant.	)	FILED: November 21, 2011

Grosse, J. – A prosecutor's comments during closing argument do not constitute improper vouching for witness credibility unless it is clear that the prosecutor is not arguing an inference from the evidence, but instead is expressing a personal opinion about credibility. Here, the prosecutor's comments during closing argument about the robbery victim's testimony were proper inferences drawn from the evidence presented at trial and were not improper personal opinions. The comments did not, therefore, constitute prosecutorial misconduct. Further, the issues raised in the appellant's Statement of Additional Grounds are without merit. Accordingly, we affirm.

FACTS

During the evening of July 31, 2009, two Seattle police officers were approached by an out-of-breath male, later identified as Balthazar (Walter) Aguilar, who told the officers that somebody had just stolen his chain necklace. Aguilar pointed to an individual less than 10 yards away as the person who stole the

necklace. This individual was later identified as the appellant Malcolm Fontenot.

The officers ordered Fontenot to stop. Fontenot looked over his shoulder towards the officers, said "I didn't do nothing," and took off running. One of the officers chased Fontenot for several blocks through downtown Seattle. Aguilar also chased Fontenot. The chase continued down an alley, where the officer lost sight of Fontenot, but saw Aguilar in the alley pointing towards a Dumpster. Aguilar told the officer, "He dropped the gun." The officer looked into the Dumpster and saw a black revolver sitting on the top.

About five to ten minutes after the officer saw the revolver in the Dumpster, he heard over the police radio that other officers had located a possible suspect in an alley. At the precinct, the officer identified Fontenot as the person he had been chasing. Aguilar's necklace was recovered from Fontenot's person at the precinct.

The State charged Fontenot with first degree robbery and unlawful possession of a firearm in the first degree. The jury returned a guilty verdict on both counts. The court entered judgment on the verdict and sentenced Fontenot to 108 months. Fontenot appeals.

ANALYSIS

Prosecutorial Misconduct

Fontenot argues that his conviction must be reversed because the prosecutor committed misconduct during closing argument by vouching for the credibility of Aguilar, the robbery victim. Specifically, the prosecutor stated:

> [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 all of you do. The question was asked why and he said, very straightforwardly, "Because it's the truth."
>
> Ladies and gentlemen, 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 [implying] that 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.

Fontenot claims that the comments in the last paragraph above amount to the prosecutor's improper vouching for Aguilar's credibility. Defense counsel did not object to the prosecutor's comments at trial.

Prosecutorial misconduct is grounds for reversal if the prosecutor's conduct was both improper and prejudicial.[1] We evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions.[2] A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.[3] Without a timely objection, reversal is required only if the prosecutor's conduct is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative jury instruction.[4]

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[1] State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).
[2] Monday, 171 Wn.2d at 675.
[3] Monday, 171 Wn.2d at 675.
[4] State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008), cert. denied, Warren v. Washington, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).

It is misconduct for a prosecutor to state his or her personal belief as to the credibility of a witness.[5] But, "a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence."[6] Accordingly, closing argument does not constitute improper vouching for witness credibility unless it is clear that the prosecutor is not arguing an inference from the evidence, but instead is expressing a personal opinion about credibility.[7]

In State v. Warren, the Supreme Court held that the prosecutor's statements that certain details about which the complaining witness testified were a "badge of truth" and had a "ring of truth" and that specific parts of the witness's testimony "rang out clearly with truth in it" were not improper because they were based on the evidence presented at trial rather than on the prosecutor's personal opinion.[8] In State v. Lewis, the court held that the prosecutor's comment during closing argument that the victim's testimony was credible based on specific details to which the victim testified was a proper inference from the evidence, not an improper personal opinion.[9] Similarly here, the prosecutor's comments about Aguilar's testimony were proper inferences from the evidence presented at trial, not improper personal opinions about Aguilar's credibility. Accordingly, the prosecutor's comments during closing argument did not amount to prosecutorial misconduct and

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[5] Warren, 165 Wn.2d at 30.
[6] State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010) (citing State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)).
[7] Warren, 165 Wn.2d at 30.
[8] 165 Wn.2d 17, 30, 195 P.3d 940 (2008).
[9] 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

are not grounds for reversal of Fontenot's conviction.

Statement of Additional Grounds

1. Prosecutorial Misconduct

In his Statement of Additional Grounds (SAG), Fontenot argues that other comments by the prosecutor constitute misconduct requiring reversal of his conviction. Because defense counsel did not object to any of the comments on which Fontenot bases his misconduct argument, we apply the standard of review outlined above to the claims of prosecutorial misconduct in Fontenot's SAG. Under that standard of review, Fontenot's arguments are without merit.

First, Fontenot cites the prosecutor's statement during closing, referring to Fontenot: "He's not exactly dressed to impressed [sic]; you saw the way he looked as he was sitting in that patrol car. And he is hanging there and his head is down." Fontenot claims that, by this comment, the prosecutor was arguing that Fontenot was guilty based solely on his manner of dress and/or was urging the jury to consider the fact of Fontenot's arrest in their deliberations. Evaluating this comment in light of the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions, we cannot conclude that the comment amounted to prosecutorial misconduct warranting reversal of Fontenot's conviction. We find no substantial likelihood that the comment affected the jury's verdict or that the comment was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction. The comment is not grounds for reversal of Fontenot's

conviction.

Next, Fontenot claims the prosecutor committed misconduct by stating during rebuttal closing argument:

> If you've ever played a sport or had a physical altercation with a brother or sister when you were younger you know there's this thing called adrenalin [sic]. And the way adrenalin [sic] works is at the time you're focused on something that's most important to you, be it a sports game or an altercation, you're focused on that thing so intently that any other physical pain or physical thing going on around you becomes secondary or tertiary. That's exactly what happened to Walter Aguilar in this instance.

These comments were made in response to defense counsel's argument about Aguilar's testimony that he did not notice his injury until the police officers told him he was bleeding.

Fontenot argues that the comment was improper because the State is not an expert on physical pain or adrenaline. While the State may not be an expert on physical pain or adrenaline, the prosecutor's comment was a proper dramatization of an argument based upon common experience, made in response to Fontenot's argument in which he attempted to cast doubt on Aguilar's credibility as a witness. As such, the comment does not constitute prosecutorial misconduct.[10]

Fontenot also argues that the comment was improper because, he claims, the comment references domestic violence and asked any juror who was a domestic violence victim to relive emotionally traumatizing experiences. We disagree with Fontenot's characterization of the statement as an invitation to jurors to relive past instances of domestic violence.

[10] See State v. Hartzell, 156 Wn. App. 918, 943, 237 P.3d 928 (2010).

Finally, Fontenot argues that the comments were improper because they amounted to the prosecutor's expression of a personal opinion as to "what happened" to Aguilar. Again, we disagree. Prejudicial error does not occur unless it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.[11] This standard is not met with respect to the prosecutor's comment about what happened to Aguilar. In sum, we reject each of Fontenot's arguments as to the impropriety of the prosecutor's comment and find that it did not constitute prosecutorial misconduct.

2. Ineffective Assistance of Counsel

Fontenot argues he was denied effective assistance of counsel because his counsel did not request a jury instruction on second degree robbery. We disagree.

Under Strickland v. Washington,[12] ineffective assistance of counsel is a two-part inquiry:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."[13]

As to the first prong of the Strickland inquiry, counsel's performance is

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[11] State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).
[12] 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[13] State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 687).

deficient if it falls "below an objective standard of reasonableness."[14] The threshold for this prong is high; to prevail on a claim of ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel's performance was reasonable.[15] To rebut the presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance.[16]

To meet the prejudice prong of the Strickland inquiry, the defendant must establish the existence of a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.[17]

In State v. Grier, our Supreme Court addressed whether the failure to offer jury instructions on lesser included offenses may amount to ineffective assistance of counsel.[18] Under the court's reasoning in that case, Fontenot's argument fails. The court's conclusion with respect to the defendant's claim of ineffective assistance applies here: "Although risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal."[19] Here, Fontenot's counsel argued that the State did not prove beyond a reasonable doubt that Fontenot was armed with a firearm at the time he took Aguilar's necklace. Under that theory, "acquittal was a real possibility, albeit a remote one."[20] No one saw Fontenot armed with a firearm at the time he took Aguilar's necklace, and the firearm the police recovered was found in a Dumpster, not on Fontenot's person. Fontenot's counsel could reasonably

[14] Strickland, 466 U.S. at 688.
[15] State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).
[16] State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).
[17] Kyllo, 166 Wn.2d at 862.
[18] 171 Wn.2d 17, 246 P.3d 1260 (2011).
[19] Grier, 171 Wn.2d at 42.
[20] Grier, 171 Wn.2d at 43.

have believed that an all or nothing strategy was the best approach to achieve an acquittal. "That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis."[21] Fontenot cannot meet his burden of proving deficient performance. Accordingly, his claim of ineffective assistance of counsel fails.

Affirmed.

Grosse, J.

WE CONCUR:

Becker, J.

Schindler, J.

[21] Grier, 171 Wn.2d at 43.