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

STATE OF WASHINGTON, Respondent, v. NICHOLAS A. LIMPERT, Appellant.	)	No. 29926-1-III UNPUBLISHED OPINION

Sweeney, J. — A prosecutor may not vouch for the veracity of a witness. The prosecutor here questioned a witness about a provision in his plea agreement requiring that he testify "truthfully." But the prosecutor did so only on redirect, after defense counsel on cross-examination went into some detail about the witness's plea agreement, its benefits, and that it was the reason he agreed to testify. We conclude that the State had a right to talk about the plea agreement after defense counsel's examination. And we conclude that the evidence presented here easily supports the jury's verdict. We therefore affirm the conviction for first degree criminal trespass.

FACTS

Nicholas Limpert and Robert McNabb used a long pry bar to break into Scott and Stephanie Evans' detached garage. They attempted to force entry through the main door and then walked around the side of the garage and pulled off a sheet of loose plywood. Mr. Limpert entered the garage while Mr. McNabb talked on a cellular phone. Mr. Limpert came out and dropped a bag on the outside of the garage. Mr. Evans watched the two men from inside his home and called the police.

The police arrived some five minutes later. Mr. Limpert and Mr. McNabb ran and jumped over a fence. Police seized both of them. Mr. Evans identified Mr. Limpert and Mr. McNabb as the men he saw break into his garage. The officers located a bag Mr. Limpert dropped outside of the garage. The bag contained a power drill. Mr. Evans claimed he purchased the drill from Double Eagle Pawn at the end of January.

The State charged Mr. Limpert and Mr. McNabb with second degree burglary. The case proceeded to jury trial. Mr. McNabb testified against Mr. Limpert pursuant to a plea deal. The prosecutor asked Mr. McNabb about the deal on direct examination. Mr. McNabb acknowledged that in exchange for his testimony he would plead guilty to a lesser charge of second degree criminal trespass with credit given for time served. Defense counsel further questioned Mr. McNabb about the deal and specifically asked

whether the deal influenced his decision to testify. Mr. McNabb acknowledged that it did. The prosecutor then followed up on redirect:

> Q: So, Mr. McNabb, when you were offered the deal by the State for your testimony today, did I tell you that you had to testify to a certain set of facts and did I tell you to testify truthfully?
> [Defense counsel]: Objection, Your Honor. That's improper vouching.
> THE WITNESS: Truthful.
> THE COURT: Overruled.
> THE WITNESS: Truthfully.

1 Report of Proceedings (RP) at 154.

Mr. McNabb testified that he met with Mr. Limpert the night before the incident and they smoked methamphetamine. He stated that Mr. Limpert then wanted to go get some car stereo equipment. A third person drove them to Mr. Evans' residence. Mr. McNabb testified that Mr. Limpert entered the garage through a plastic covering, returned with the tool bag containing the drill, and then again re-entered the garage. At that point, the two realized that the police had arrived and they fled.

Mr. Limpert claimed that he had permission to enter the garage. He explained that the day before Mr. Evans and other members of a gang assaulted him, robbed him of his money and drugs, and stole a stereo system and tools from his car. He stated that he went to Mr. Evans' home that evening to retrieve his tools and other possessions. He claimed to have been in the garage before to buy heroin and methamphetamine from Mr. Evans. He knocked on the house door and garage

door several times before concluding he had permission to enter the garage to retrieve his things. Mr. Limpert testified that he ran from the police because he was afraid.

The court gave instructions on the lesser included offense of first degree criminal trespass. The jury found Mr. Limpert not guilty of second degree burglary, but guilty of the lesser included offense of first degree criminal trespass.

DISCUSSION

Vouching

Mr. Limpert first contends that the prosecutor improperly vouched for Mr. McNabb's truthfulness by highlighting that part of the plea agreement.

The question is whether the trial court abused its discretion by allowing the State's inquiry. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Mr. Limpert must show that the comments were improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). The State's inquiry does not rise to the level of prejudicial error if it was invited by and responded to defense counsel's inquiry. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). The State prosecutor may not express his or her personal belief as to the truthfulness of a witness. *Ish*, 170 Wn.2d at 196; *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003).

The prosecutor here established the existence and terms of the plea deal on direct

examination of Mr. McNabb, but did not ask about the provision requiring truthfulness. That questioning was proper. *See Ish*, 170 Wn.2d at 200. Defense counsel then examined Mr. McNabb on his motive for agreeing to the plea deal, specifically regarding the reduction in time he would have to serve. The prosecutor responded on redirect by eliciting that the deal required Mr. McNabb to testify "truthfully." 1 RP at 154. Like *Ish*, the prosecutor did not dwell on the provision. 170 Wn.2d at 200. And the State's follow-up inquiry was not only appropriate but to be expected given the defense questioning. She expressed no personal opinion of Mr. McNabb's truthfulness. She simply included the rest of Mr. McNabb's plea agreement for the jury.

Sufficiency of the Evidence

Mr. Limpert next contends that the evidence is not sufficient to support a conviction for first degree criminal trespass because he thought he had permission to enter the garage to retrieve his possessions.

We view the evidence in the light most favorable to the State and then decide whether a rational trier of fact could find the elements of the offense based on those facts. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Credibility is a question for the trier of fact. *State v. Camarillo*, 115

Wn.2d 60, 71, 794 P.2d 850 (1990).

"A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building." Former RCW 9A.52.070(1) (1979). A person acts "knowingly" when he is "aware of a fact, facts, or circumstances or result described by a statute defining an offense." RCW 9A.08.010(1)(b)(i). A person "enters or remains unlawfully" when he "is not then licensed, invited, or otherwise privileged to so enter or remain." Former RCW 9A.52.010(3) (2004).

The evidence here, of course, easily supports a finding that Mr. Limpert entered and remained unlawfully in Mr. Evans' garage. Mr. Evans witnessed Mr. Limpert enter his garage without permission on two occasions and take the bag containing the power drill. Mr. Limpert claimed he had been in the garage before and, thus, had permission to enter to retrieve the stolen items. He claimed that he knocked several times with no response. He denied using a pry bar, but admitted breaking a plastic covering before entering. Simply put, the jury did not believe Mr. Limpert and concluded that he knew he was acting unlawfully. The jury was privileged to do just that.

Sufficient evidence supports Mr. Limpert's first degree criminal trespass conviction.

We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Siddoway, A.C.J.

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Kulik, J.