IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27828-0-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
BOBBY RAY GARLAND,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Bobby Ray Garland challenges his Benton County conviction for delivery of methamphetamine, primarily arguing that the trial court erred by declining to permit him to examine the informant about a conviction for obstructing a public servant. The trial court correctly determined that it was not admissible for impeachment purposes. The conviction is affirmed.

FACTS

Michelle Galliher worked as a confidential informant in Benton County while she struggled with her methamphetamine addiction. She went to Mr. Garland's residence on

September 23, 2008, as part of a controlled buy. Officers kept her under surveillance and she wore a body wire that made an audio recording of the transaction. She returned to the police with 1.71 grams of methamphetamine that she said had been purchased from Mr. Garland.

Prosecutors filed one count of delivery of methamphetamine and alleged that the crime occurred within 1,000 feet of a school bus stop. Prior to testimony, the trial court determined that Ms. Galliher's convictions for forgery and third degree theft could be used to impeach her credibility. The trial court declined to allow the defense to impeach her with an obstructing a public servant conviction even though the underlying conduct was a lie told to the police.

In opening statement, defense counsel told jurors that the police did not trust Ms. Galliher. He attempted to elicit testimony from the officers to that effect, and did elicit testimony that she continued to use methamphetamine while working as an informant. The prosecutor elicited testimony that the officers did trust her.

The jury convicted Mr. Garland as charged and also found that the crime occurred within 1,000 feet of a school bus stop. The court imposed an 84-month sentence that included 24 months for the enhancement. Mr. Garland then timely appealed to this court.

ANALYSIS

Mr. Garland contends that the trial court erred by declining to permit use of the obstructing conviction and that the prosecutor erred in argument and by eliciting testimony that the police trusted Ms. Galliher. We will address the arguments in turn.[1]

Obstructing Conviction. Mr. Garland first argues that the trial court should have found that the obstructing conviction was *per se* admissible to impeach Ms. Galliher. We agree with the trial court that it was not.

ER 609(a)(2) permits convictions that involve dishonesty to be used to attack the credibility of a witness. A trial court has no discretion about admitting crimes of dishonesty. *State v. Ray*, 116 Wn.2d 531, 545-546, 806 P.2d 1220 (1991). Convictions for theft are considered crimes of dishonesty and are *per se* admissible under ER 609(a)(2). *Id.* at 545.[2]

In assessing whether an offense constitutes a crime of dishonesty, courts are permitted only to look at the elements of the offense, the date of the crime, and the type of crime and punishment imposed. *State v. Newton*, 109 Wn.2d 69, 71, 743 P.2d 254

[1] Mr. Garland also filed a *pro se* Statement of Additional Grounds (SAG) that claims the trial judge and his defense counsel were biased against him. The record simply does not support the claims and we will not further address them except to note that Mr. Garland on the record declined to exercise his right to file an affidavit of prejudice against the trial judge.

[2] ER 609(a)(1) gives trial courts some discretion to permit impeachment with other felony offenses. Obstructing a public servant is a gross misdemeanor offense.

(1987). An exception to the *Newton* rule was created in *State v. Schroeder*, 67 Wn. App. 110, 834 P.2d 105 (1992). At issue in *Schroeder* was whether the crime of burglary constituted a crime of dishonesty. A burglary is committed when a person enters or remains unlawfully in a building or dwelling "with intent to commit *a crime.*" RCW 9A.52.020 (first degree burglary); RCW 9A.52.025 (residential burglary); RCW 9A.52.030 (second degree burglary) (emphasis added). *Schroeder* reasoned that a burglary committed (or intended) to accomplish theft should be considered a crime of dishonesty just as a theft would be treated. 67 Wn. App. at 115-116. Not all burglaries, however, are committed to accomplish a theft. *Id.* at 116. Noting that the word "crime" in the burglary definition was ambiguous in the context of analyzing whether the offense involved "dishonesty," the court ruled that trial judges should look at the facts of a burglary case to see if theft was the intended purpose of the offense. *Id.* at 119. The court concluded with a warning:

> We intend our holding to be a narrow one, and nothing herein is meant to imply that a trial court may look to the facts underlying a prior conviction for purposes other than to clarify the word "crime" as used in RCW 9A.52.030(1).

Id.

Notwithstanding this warning, Mr. Garland argues that *Schroeder* compelled the trial court to treat the obstructing conviction in the same manner. It did not. To do so

would be to put the court in direct contradiction to the directive of *Newton.* There is nothing inherently ambiguous, from a "dishonesty" standard, about the elements of the crime of obstructing.[3] Thus, the narrow exception to *Newton* created by *Schroeder* is not implicated by the crime of obstructing a public servant. Many, if not most, criminal offenses are committed in a dishonest manner. That does not make them crimes of "dishonesty" for purposes of ER 609.

We also question how Mr. Garland was harmed by the trial court's ruling. He was able to effectively impeach Ms. Galliher with two crimes of dishonesty and her admission that she had withheld information about her drug usage from the police at a time when she had agreed to refrain from illicit behavior. The addition of a misdemeanor conviction for obstructing would not add much to the overall impeachment picture. If there was error, it was harmless here.

The trial court correctly concluded that the conviction for obstructing a public servant did not amount to a crime of dishonesty under ER 609(a)(2).

Prosecutor Error. Mr. Garland next argues that the prosecutor erred in eliciting "vouching" testimony from the officers and in her closing argument. We see no error in the testimony and any error in argument was waived.

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[3] "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1).

It is improper for one witness to testify about the credibility of another witness. *State v. Korum*, 157 Wn.2d 614, 651, 141 P.3d 13 (2006). A defendant claiming error in this regard must show that there was improper and prejudicial conduct that had a substantial likelihood of affecting the jury's verdict. *Id.* at 650. A failure to object waives the argument unless the misconduct was so flagrant as to be beyond cure by the trial court. *Id.* As alleged examples of vouching, Mr. Garland points to testimony from Detective Curtis D. Smith that he believed Ms. Galliher "in the case,"[4] and Detective Steven L. Caughey that he had not "doubted the integrity" of the case.[5] There was no objection to either statement at trial. We believe that these statements, taken in context, did not amount to vouching for the witness. Even if they did constitute vouching, they were not so prejudicial as to be beyond cure.

Detective Smith testified about how the police work with informants, the criteria under which an informant is utilized, and gave his own assessment that "part of being a criminal is not being forthright and not being honest." I Verbatim Report of Proceedings (VRP) 40. He told jurors that he was skeptical of such people and he needed to try and be as confident as he could that informants were being honest with him. In Ms. Galliher's case, he had used her before and was comfortable using her "on this series of

[4] I Verbatim Report of Proceedings (VRP) 41.
[5] II VRP 147.

cases." I VRP 41. There was no objection to this testimony. Defense counsel followed with an extended examination of the officer concerning the use of informants. I VRP 49-57. In context, Detective Smith was simply saying that his usual skepticism about informants had been overcome by Ms. Galliher's actions in this case. It was not a comment on her credibility.

The challenged testimony from Detective Caughey came in the midst of testimony concerning the occupancy of the trailer where the sale took place. We believe that the testimony was probably intended to emphasize that there was no evidence that anyone other than Mr. Garland lived there. II VRP 147. The phrasing of the question, however, was inartful enough that it could be seen as vouching for the case, if not necessarily the credibility of the witness.

This statement was not so egregious that it was beyond cure following a timely objection. Most jurors are likely to assume that a detective believes in a case that he presented to prosecutors and, in testimony, to the jury. The statement broke little new ground and could easily have been addressed by the trial court. Mr. Garland's failure to do so waives any challenge at this point.

Trial of this case focused on the credibility of Ms. Galliher. The defense attacked her credibility directly and indirectly. It is unsurprising that the prosecution therefore

elicited evidence and made arguments designed to stress Ms. Galliher's credibility. Such tactics do not amount to vouching for a witness. To the extent that the now challenged statements could have been so construed, the failure to object to the testimony waived the issue for appeal.

Mr. Garland also argues that the prosecutor erred in closing argument by referring to the defense argument as "smoke and mirrors" and referring to the case as "my charge." The prosecutor agrees that the latter statement was an error, and so do we. Personalizing a case has no place in an attorney's role in the courtroom.[6] Nonetheless, we agree that the passing remark at the conclusion of the argument was not significant error. The defense did not challenge the statement and we do not believe it was beyond cure from timely corrective action by the trial judge. For both reasons, the personalization of the case is not a basis for reversal.

Two decades ago, Division Two of this court characterized a prosecutor's statement that the defense argument was "smoke" as an "unfortunate" choice of words. *State v. Guizzotti*, 60 Wn. App. 289, 298, 803 P.2d 808, *review denied*, 116 Wn.2d 1026 (1991). The court, however, went on to state that "we find no error." *Id.* The opinion noted that the remark was a rebuttal to a defense argument that was unfounded in

[6] *See* RPC 3.4(e), which states in pertinent part: "A lawyer shall not . . . in trial . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."

evidence. *Id.*

Mr. Garland argues that the experience of two decades should lead to such arguments being declared "unacceptable." Br. of Appellant at 17. We do not agree. Attorneys should not disparage opposing counsel and those who do risk reversal of hard-fought trial victories. *E.g.*, *State v. Reed*, 102 Wn.2d 140, 143-148, 684 P.2d 699 (1984). But striking a blow at an opposing attorney is significantly different than striking at the opposing attorney's argument. Trial counsel need to persuade juries and thus are accorded significant latitude in their arguments. *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008), *cert. denied*, 173 L. Ed. 2d 1102 (2009). The efficacy of rhetorical flourishes is a debatable proposition. However, an argument that disparages the other party's argument is not a prohibited attack on counsel.

Here, the prosecutor three times in closing argument referred to "smoke and mirrors." In each instance, the argument was in rebuttal of a defense theory and was tied to lack of evidence supporting the defense argument. As the *Guizzotti* court did, we too conclude that these statements did not constitute error. We also note that none of these statements were challenged at trial. The claim of error in each instance is thus also waived. *Korum*, 157 Wn.2d at 650.

Mr. Garland has not established that the prosecutor committed prejudicial error in

her handling of the case.

The conviction is affirmed.

A majority of the panel has determined 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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Korsmo, J.

WE CONCUR:

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Brown, A.C.J.

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Sweeney, J.