



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

UNPUBLISHED OPINION

Victor L. Candelario appeals his conviction for second degree murder. We affirm.

By information filed February 26, 1996, the State charged Candelario with second degree intentional murder of his wife, Marie,¹ or in the alternative, causing her death in the course of a felonious assault.

² A jury convicted Candelario of second degree murder, finding the murder was intentional. He appealed this conviction, claiming the trial court erred by refusing to instruct on first-degree manslaughter. In an unpublished opinion, we agreed, and reversed. *State v. Candelario*, 91 Wn. App. 1041 (1998). At a second trial in December 1998, the jury found Candelario guilty of second degree felony murder. Candelario now appeals this conviction.

On February 14, 1996, after a quarrel, Candelario moved out of the apartment that he shared with his wife, Marie. They agreed he would return for his belongings on February 16, 1996. Alerted by unopened newspapers laying on the apartment doorstep and unsuccessful attempts to reach her by phone, Marie's friends asked the apartment manager to check on her. On February 21, 1996, the manager found Marie dead in the apartment and contacted the police. The police found Marie, lying across her bed, unclothed from the waist down. She had bruises on her face, throat, and shoulder. At trial, the State established that Marie died of asphyxia due to an external force applied around her neck. Although Marie suffered from epilepsy, the doctor established that it was not the cause of her death.

At trial, Detective Lopez testified about a police interview he conducted with Candelario in New York City on February 24, 1996.³ Detective Lopez and a second detective traveled there to interview Candelario after establishing that Candelario had pawned his wife's wedding rings in Washington on February 19, 1996, in order to buy a bus ticket to New York. At the interview, Candelario relayed three versions of what happened at the February 16, 1996 meeting with his wife. First, Candelario stated that he had been to their apartment to pick up his belongings, but no argument took place. Second, after Detective Lopez told Candelario that his fingerprints were found on his wife's neck (a ruse), Candelario told the detective that he went to their apartment to discuss reconciliation. While there, she got undressed, had an epileptic seizure, and fell onto the bed. Candelario stated he then massaged her neck in an effort to unblock her airways. When she turned blue, Candelario became afraid and left. He added that she had given him the wedding rings to pawn for her.

Detective Lopez then pointed out contradictions in Candelario's statements, and Candelario 'broke



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

down' and 'said he had lied about all types of things.' Candelario said he had lied about his wife giving him her wedding rings, and about watching her have a seizure. Then, Candelario relayed a third version of events. Detective Lopez testified: 'It's my belief that what he told at this final point was actually what occurred.' The trial court sustained defense counsel's objection and motion to strike; defense counsel did not request a curative instruction.

Detective Lopez then relayed Candelario's third scenario. When he had gone to their apartment, Candelario and his wife discussed getting back together. Marie wanted to have sex, began undressing from the waist down, and lay on the bed. When Candelario declined to have sex with her, she began teasing him. He told her to stop, and when she did not, he became angry and began to choke her. She turned blue, and began thrashing about in 'death throes.' Candelario choked her a little longer; she then stopped moving. Candelario stated he became afraid because he did not want people to think he had killed her intentionally. He removed her wedding rings and left. Detective Lopez added that in relaying the third scenario, Candelario displayed true emotion. Candelario then provided a taped statement, relaying this same third version of the meeting. This audio tape was admitted into evidence and played for the jury. Detective Lopez testified that Candelario seemed more monotone in the taped version than when he had first relayed version three.

Other than the stricken statement, defense counsel did not object to Detective Lopez's testimony. Neither did defense counsel object when the prosecutor referred to Detective Lopez's testimony in closing argument, stating that Candelario's lies and flight to New York indicated his guilty conscience.

I. Opinion Testimony

Candelario argues that he was denied a fair trial because Detective Lopez gave improper opinion testimony as to Candelario's guilt. Specifically, Candelario first objects to a stricken statement of Detective Lopez regarding the veracity of his third version of events. Second, Candelario argues that Detective Lopez's testimony regarding Candelario's emotional reactions during the interview amounted to an improper opinion as to his guilt, which requires reversal by this court in spite of defense counsel's failure to object.

A. Stricken Statement

Specifically, Candelario argues that the following stricken statement prejudiced him.

Q: So then did he make a third statement, a third scenario, I guess of what occurred?

A: It's my belief that what he told at this final point was actually what occurred.

The trial court sustained defense counsel's objection and motion to strike; defense counsel did not



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

request a curative instruction. The court properly struck the statement because it offered an indirect opinion as to Candelario's guilt. *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999) (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967)). Candelario argues on appeal that no curative instruction would have eliminated the prejudice because 'the damage was already done' when the court struck the testimony; the jury had already heard Officer Lopez's testimony as to his belief in the truth of Candelario's final statement. But, the court instructed the jury at both the beginning and end of trial to disregard any evidence that was not admitted or that was stricken by the court.⁴ We presume that the jury followed the trial court's curative instruction. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994) (footnote omitted). Thus, we presume that the jury disregarded the stricken statement, and that the instruction cured any remaining prejudice. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995) (citation omitted).

Recently in the case of *State v. Demery*, 2000 WL 378125, No. 23779-2- II, --Wn. App.--, 997 P.2d 432 (2000), we held that when a taped interrogation is played for the jury, it is improper for the jury to hear an accusation by the interrogating officers that the defendant is lying. We held that it is similar to admitting a live witness's inadmissible personal opinion about a defendant's guilt. *Demery* is distinguishable from the instant case because: (1) Candelario himself admitted that he had lied in his first two statements to the detective; (2) Candelario confessed to the commission of the crime in the third version of his statement; and (3) *Demery* turned primarily on the comparative credibility of the victim and the defendant whereas in the instant case there is evidence about the cause of death independent from Candelario's confession that supports his third version. *Demery* is not applicable.

We conclude that no prejudicial error occurred with regard to the stricken statement.

B. Testimony as to Candelario's Emotional Reactions and Demeanor

Candelario also argues that other testimony of Detective Lopez gave an improper opinion regarding Candelario's guilt. The issue for this court is whether this testimony indirectly improperly opined on Candelario's guilt, or whether it was admissible opinion testimony as to Candelario's emotional reactions and demeanor. Specifically, Candelario objects to the following testimony of Detective Lopez, describing his initial impressions of Candelario at the police interview:

A: We talked with him, told him that we were there to talk about the death of his wife. He got emotional at that point, stated he had been told by his aunt that his wife had died. He had found out the day before.

Q: And he was emotional about that?

A: Yeah. He cried, made some loud noises with it. I can give you my opinion on it, but--



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

Q: What did it appear to you? What was his appearance at that time?

A: Well, the way he was crying didn't seem too--you know, he would cry and he'd be loud, but it appeared to be put on to me.

Detective Lopez also testified that later in the interview, after Detective Lopez pointed out conflicts in Candelario's first two scenarios, Candelario 'broke down' and then relayed his third version. The prosecutor asked Detective Lopez to explain what he meant by 'broke down.' The detective explained:

A: It's -- well, you know, I guess it's a term, but he -- at that point it was my opinion that he started crying and it was at that point that it was real. I think he was actually feeling remorseful for what he had done or feeling some kind of actions {sic}. He really truly -- there was true, what I seen, emotion to it. He laid his head down on the table and was crying. At points before that he had just, you know, made this kind of howl and was trying to act like he was crying. That was my opinion on it.'

Additionally, Candelario objects to Detective Lopez's testimony that Candelario was more emotional when he first told the third version compared to how monotone he sounded on the taped confession. Defense counsel did not object to any of the above testimony at trial.

First, Candelario asserts that the admission of testimony opining as to the defendant's guilt is an error of constitutional magnitude, which he may raise for the first time on appeal. This is correct. An opinion as to the defendant's guilt would invade the jury's independent determination of facts and consequently violate the defendant's constitutional rights; thus, the error may be raised for the first time on appeal. RAP 2.5(a)(3); Farr- Lenzini, 93 Wn. App. at 460 (citing State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985)). See also State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994), review denied, 126 Wn.2d 1010 (1995); State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). But see State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (holding that witness's testimony that victim's behavior was 'typical of a sex abuse victim' was not manifest constitutional error), review denied, 113 Wn.2d 1002 (1989).

The State agrees that improper opinion testimony of a defendant's guilt is an error of constitutional magnitude. But, the State argues that Detective Lopez's testimony did not constitute an improper comment on Candelario's guilt. Instead, the State argues that the testimony offered a permissible lay opinion as to Candelario's manner and demeanor during the interview only, and is therefore not subject to appellate review. But, only by examining the alleged error can we answer the question of whether it was improper opinion of Candelario's guilt, or proper testimony. We choose to review the alleged error.

We apply the following rule: A lay witness may only give those opinions or inferences which are: (a) rationally based on his perception of the witness; and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. ER 701; Farr-Lenzini, 93 Wn. App. at 462



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

(citations omitted). Furthermore, 'no witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.' Black, 109 Wn.2d at 348 (citations omitted). 'Such an opinion violates the defendant's right to trial by an impartial jury and {his} right to have the jury make an independent evaluation of the facts.' State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992) (citation omitted). Despite this rule, opinion testimony as to a defendant's conduct is admissible if it is prefaced with proper foundation: personal observations of the defendant's conduct, factually recounted by the witness, which directly and logically support the conclusion. State v. Stenson, 132 Wn.2d 668, 724, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998) (citing State v. Craven, 69 Wn. App. 581, 586, 849 P.2d 681, review denied, 122 Wn.2d 1019 (1993)). See also State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988).

Candelario cites earlier cases where courts were less receptive to the admission of opinion regarding defendant's emotional reaction to distressing news. In State v. Haga, 8 Wn. App. 481, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973), the court held that it was error to admit an ambulance driver's opinion that a defendant's reaction to his wife's death was 'unusual.' In State v. Sargent, a police officer improperly testified that when the defendant denied knowing of the victim's death, the officer had the 'impression' that the defendant's statement was 'contrived.' Sargent, 40 Wn. App. 340, 350, 698 P.2d 598, reversed on other grounds, 111 Wn.2d 641 (1985). The reasoning relied upon in these two cases distinguishes their holdings from the instant case.

First, Haga and Sargent are distinguishable from this case on the same grounds relied upon by the court in State v. Allen, 50 Wn. App. 412, 417- 418, 749 P.2d 702, review denied, 110 Wn.2d 1024 (1988). In Allen, the Court of Appeals affirmed the conviction of a defendant for the first degree murder of her husband. The Allen court held that testimony by a police officer regarding the defendant's reaction on hearing the news of her husband's death was properly admitted. The officer testified that although the defendant 'appeared to be sobbing . . . her facial expression, the lack of tears, the lack of any redness in her face did not look genuine or sincere.' Allen, 50 Wn. App. at 416. The Allen court distinguished Haga by emphasizing that, in Haga, the court based its opinion on the State's attempt to qualify the ambulance driver as an expert on bereavement response; Allen properly recognized that there was no such area of expertise. Allen, 50 Wn. App. at 417. Here, there was no similar attempt by the State to suggest that Detective Lopez was an expert in observing sincerity of criminal suspects, nor an expert in the proper emotional responses of bereaved husbands. Second, the Allen court distinguished Sargent by stating that the police officer in Sargent based his opinion 'only on his unexplained, and very possibly erroneous, assumption that the defendant already knew that his wife was dead.' Allen, 50 Wn. App. at 418. The officer in Sargent had no personal knowledge of the defendant and did not base his opinion on observable facts. Sargent, 40 Wn. App. at 350-51. Here, Detective Lopez based his opinions on observable behavior of the defendant, not only on any pre-conceived assumptions.

Other cases have similarly admitted witnesses' testimony regarding a defendant's emotional reactions. In State v. Day, 51 Wn. App. at 552, the trial court properly admitted police detectives'



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

testimony that the defendant had shown 'very little emotion' when informed of his wife's death, and his reactions were 'inappropriate.' In *State v. Craven*, 69 Wn. App. at 586, the trial court properly admitted testimony that the defendant's demeanor was 'unusual' when explaining the circumstances of her child's injury, where the witness offered the opinion along with observations that the defendant was having trouble making eye contact.

Furthermore, the Supreme Court used the same two distinguishing characteristics relied upon in *Allen* when determining whether a prosecutor elicited improper opinion testimony in *Stenson*, 132 Wn.2d at 724. In *Stenson*, where the defendant was charged with killing his wife, a paramedic who had been at the crime scene testified that the defendant was calm, did not reveal any emotion, and that he was 'surprised' when he learned that the defendant was the victim's husband. *Stenson*, 132 Wn.2d at 720-722. The Supreme Court declined to apply *Haga* and *Sargent*, and held that the paramedic's testimony was not improper because the paramedic neither testified as an expert nor based upon assumptions that were unsupported by his direct observation. *Stenson*, 132 Wn.2d at 724.

Consequently, we must examine the record to determine whether Detective Lopez's testimony meets the *Stenson* test: based upon personal observations of the defendant's conduct, factually recounted by the witness, which directly and logically support the conclusion. *Stenson*, 132 Wn.2d at 724. Here, Detective Lopez based his testimony on his first-hand observation of Candelario throughout the interview. But, when Detective Lopez testified: 'it appeared to be put on to me' he did not give a detailed description of physical characteristics that he observed that led him to that conclusion. Later, however, when Detective Lopez described Candelario's demeanor while telling the third version, he recounted more factual observations. He testified that during the third story, Candelario 'laid his head down on the table and was crying' compared to before where 'he had just . . . made this kind of like howl, and was trying to act like he was crying.' When talking about the marital problems Candelario had with his wife, Detective Lopez testified that '{Candelario} would become angry and his tone would change.' Detective Lopez described Candelario's behavior supported by his direct observation. But, overall Detective Lopez's testimony was more conclusory regarding Candelario's emotional reactions than factually descriptive.

This court has recently stated that the closer the tie between the opinion and an 'ultimate issue,' the stronger the supporting factual basis must be. *Farr-Lenzini*, 93 Wn. App. at 460 (citing 1 John William Strong et al., *McCormick on Evidence* sec.12 (4th Ed. 1992)). In other words, '{w}here the opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting the opinion.' *Farr-Lenzini*, 93 Wn. App. at 462-463. But, Detective Lopez did not offer an opinion regarding a core element of the crime charged. Whether or not Candelario displayed genuine emotion on his confession tape does not go to the core of the crime charged, unlike the trooper's testimony offered in *Farr-Lenzini*. There, the defendant was charged with attempting to elude a police officer, and the state trooper testified that the defendant's driving pattern 'exhibited to {him} that the person driving that vehicle was attempting to get away from {him}. . .' *Farr-Lenzini*, 93 Wn.App. at 458. Because the specific intent to elude the police was a 'core issue' of the crime



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

charged, and 'the trooper's opinion spoke directly to that issue,' this court reversed because of the improper opinion testimony. *Farr-Lenzini*, 93 Wn. App. at 465. But, in this case, Detective Lopez did not directly comment on whether he believed Candelario committed the crime; he stated that he thought Candelario was actually crying while he recounted the third scenario -- where Candelario admitted strangling his wife. The admitted comments did not go to the truth or falsity of the statements; they described Candelario's histrionics or demeanor. Consequently, because Detective Lopez did not testify to a 'core element,' the supporting factual basis need not be particularly strong. See *Farr-Lenzini*, 93 Wn. App. at 462- 63. Detective Lopez's description of Candelario's howling, real and false tears was enough to support his conclusions as to Candelario's displays of emotions.

Also, Detective Lopez's testimony contained no direct opinion on Candelario's guilt, in contrast to *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). In *Black*, the expert testified that the victim suffered from 'rape trauma syndrome,' which automatically implied that the victim had, in fact, been raped and, thus, was an impermissible comment on the defendant's guilt. *Black*, 109 Wn.2d at 349. Here, Detective Lopez described Candelario's demeanor throughout the police interview leading up to the confession. Detective Lopez based his opinion solely on his observation of Candelario's physical appearance and actions. The evidentiary foundation 'directly and logically' supported the detective's conclusion. *Allen*, 50 Wn. App. at 418. Furthermore, Candelario himself disavowed his earlier statements, and told Detective Lopez he lied in his taped statement. Again, the admission that he had lied in the earlier two statements lends credence to Detective Lopez's testimony that Candelario's emotions in his first two versions were not true emotions.

Thus, we hold that Detective Lopez's testimony did not constitute an improper opinion on the ultimate issue of Candelario's guilt, and therefore no error occurred.

C. Harmless Error

Even if we assume manifest constitutional error above, we would next analyze whether this error was harmless. Under the 'overwhelming untainted evidence' test, we examine the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) (citing *Parker v. Randolph*, 442 U.S. 62, 70-71, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979); *Brown v. United States*, 411 U.S. 223, 231, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973), cert. denied, 475 U.S. 1020 (1986)). See also *Florczak*, 76 Wn. App. at 75 (citing *Jones*, 71 Wn. App. at 813).

The State maintains that such evidence is overwhelming: (1) witnesses testified to the Candelarios' marital difficulties; (2) Candelario had been observed to have a quick temper, and was jealous and possessive; (3) Candelario was emotionally distraught over the separation; (4) many witnesses substantiated that Marie and Candelario planned to meet at the apartment February 16; (5) Marie's friends tried to reach her for five days after the 16th until they sent the apartment manager to check on her; (6) the stack of unopened newspapers at Marie's door dated from the 16th; (7) no sign of



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

forced entry, although the apartment displayed signs of a struggle; (8) Marie's bruises on her neck and face indicated strangulation; (9) no sign of sexual assault; (10) Candelario pawned his wife's wedding rings in order to leave the state within days of her death; (11) Candelario went to New York to see a son he had not seen in years; (12) Marie's manner of dress and lack of sexual assault was explained by his statement; and finally, (13) Candelario's statement relaying the 'third version' of events was played for the jury.

Furthermore, although the jury heard Detective Lopez's stricken testimony as to his belief in its veracity, the taped confession is the statement that Candelario made after he was properly mirandized and to which he attested. On the tape, Candelario conceded that the first two versions of his visit to Marie's apartment were not accurate. He also admitted that he choked Marie, she turned blue and stopped breathing, and he left the apartment, leaving her motionless on the bed. Furthermore, the third version of events was consistent with the physical evidence. Therefore, even if we were to hold that Detective Lopez's testimony was improper opinion testimony, it would be harmless because of the overwhelming evidence of Candelario's guilt.

II. Prosecutorial Misconduct

Candelario next assigns error to the prosecutor's comments during closing arguments referring to the lies he initially told Detective Lopez during the New York interview. Candelario characterizes these comments as a statement of the prosecutor's belief in his guilt, supporting Detective Lopez' improper opinion. But, Candelario fails to cite the entire passage.

The prosecutor argued:

Now, what do these lies show, these initial lies show? Again, it shows guilty conscience. It's to try to minimize his involvement, because he knows what he did, and he was lying about the police about what he did.

I submit to you that the third statement is probably the closest to accurate that we heard in this case of what occurred. I say closest to accurate because I submit to you that the defendant is still minimizing what he did. As you recall, he says that he didn't mean to do this, still minimizing his involvement in this offense . . .

The prosecutor also stated that Candelario 'lied' and that these lies to the police and his subsequent flight to New York indicated a 'guilty conscience.' But, defense counsel did not object, move for mistrial, or request a curative instruction on the basis of the now-challenged remarks. Consequently, such a failure to object to the prosecuting attorney's allegedly improper remarks constitutes waiver of such error, 'unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.' Stenson, 132 Wn.2d at 719, (citing State v. Gentry 125 Wn.2d 570, 596, 888 P.2d 1105, cert. denied, 516 U.S. 843



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

(1995)). See also *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988), *aff'd*, 119 Wn.2d 1021 (1992). Generally, failure to object when the prosecutor made the comments suggests that the conduct complained of was not critically prejudicial. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991) (citations omitted). A defendant cannot remain silent, speculate on a favorable verdict, and when it is adverse, use the alleged misconduct to obtain a new trial on appeal. *Swan*, 114 Wn.2d at 661 (citations omitted).

It is improper for a prosecutor to assert a personal opinion about a witness's credibility. RPC 3.4(f); *State v. Fiallo-Lopez* 78 Wn. App. 717, 730, 899 P.2d 1294 (1995) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). But, 'the prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and express such inferences to the jury.' *Stenson*, 132 Wn.2d at 727 (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *Fiallo-Lopez*, 78 Wn. App. at 728). 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. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996) (citation omitted); *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (citation omitted), *review denied*, 100 Wn.2d 1003 (1983). We review allegedly improper arguments in the context of the total argument, issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

The prosecutor's comments were not improper in this case. First, calling the defendant a 'liar' does not automatically signify prosecutorial misconduct. The correct inquiry is whether the prosecutor bases the argument on admitted evidence, and reasonable inferences drawn therefrom. *Copeland*, 130 Wn.2d at 290-292. So long as the prosecutor draws inferences and argues from the evidence, it is not misconduct to call a witness or the defendant a 'liar.' *Copeland*, 130 Wn. 2d at 291. See also *State v. Luoma*, 88 Wn.2d 28, 40, 558 P.2d 756 (1977) (holding evidence supported prosecutor's comments in closing argument to effect that defendant was a liar and he knew the jury would have the 'guts' to do what they had to do); *State v. Jefferson*, 11 Wn. App. 566, 524 P.2d 248 (1974) (holding that prosecutor's use of word 'liar' as a comment on defendant's credibility not improper where evidence showed defendant was not truthful).

Copeland is directly on point. Here, the prosecutor argued from the evidence when he stated: '{Candelario} was lying to the police about what he did' to try to 'minimize his involvement.' The prosecutor's comments about the accuracy of the third scenario directly related to the evidence from Candelario's own statement to the police in the taped interview that he had lied during his initial statements. Counsel is entitled to wide latitude to draw inferences from the evidence, including references to a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). See also *State v. Johnson*, 40 Wn. App. 371, 381, 699 P.2d 221 (1985) (citations omitted). Neither were the prosecutor's arguments highly impassioned or inflammatory; the prosecutor did not repeatedly call Candelario a liar. See *Reed*, 102 Wn.2d at 145 (holding reversible error where the prosecutor called the defendant a 'liar' at least four times). Thus, the prosecutor reasonably referred to Candelario's own statement that he had lied to the police in his closing



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

argument to infer that he attempted to 'minimize his involvement.'

Second, Candelario also argues that the prosecutor gave his 'own opinion' as to his guilt to bolster Detective Lopez's 'improper opinion.' Again, counsel may comment on a witness's credibility as long as he or she does not express it as a personal opinion and does not argue facts outside the record. *State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985); *Sargent*, 40 Wn. App. at 345. Improper vouching occurs only when 'it is 'clear and unmistakable' that counsel is expressing a personal opinion.' *Brett*, 126 Wn.2d at 175 (quoting *Sargent*, 40 Wn. App. at 344).

Here, however, the prosecutor was not making a personal statement about his belief that the officers were telling the truth. Instead, he implied that Detective Lopez was truthful by referring to Candelario's own admission that he lied. That is not misconduct. See *State v. Stith*, 71 Wn. App. 14, 21, 856 P.2d 415 (1993) (citing *State v. Stover*, 67 Wn.App. 228, 232, 834 P.2d 671 (1992)), review denied, 120 Wn.2d 1025 (1993). Neither did the prosecutor express a personal opinion by inferring that the evidence indicated Candelario had a 'guilty conscience.' The prosecutor argued to the jury that Candelario's flight to New York and his lies to the police were both evidence of his 'guilty conscience.' The prosecutor did not state a personal opinion; he fairly characterized the evidence at trial and argued reasonable inferences from that evidence. It is not 'clear and unmistakable' that the prosecutor was expressing a personal opinion; no prejudicial error occurred. *Papadopoulos*, 34 Wn. App. at 401. Thus, the prosecutor's comments do not require reversal by this court. Candelario has not demonstrated how the prosecutor's remarks were so flagrant and ill intentioned that they evinced an enduring prejudice that could not have been neutralized by an admonition to the jury. Particularly in light of the taped confession, Candelario's failure to object suggests the comments were not critically prejudicial. See *Swan*, 114 Wn.2d at 661. 'A conviction must be reversed only if there is a substantial likelihood that the alleged misconduct affected the verdict.' *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citations omitted). We hold that there was no prosecutorial misconduct.

III. Ineffective Assistance of Counsel

Candelario last argues that if defense counsel's failure to object at trial precludes review of either of the above issues by this court, he had ineffective assistance of counsel. We have reviewed the issues on the merits and thus there is no ineffective assistance of counsel. We hold that there was not a deficient performance under the familiar tests announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And, because we hold that there was no error, there can be no argument that cumulative error affected the outcome of the trial. See *Russell*, 125 Wn.2d at 94.

Affirmed.

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



State v. Candelario

101 Wash.App. 1002 (2000) | Cited 0 times | Court of Appeals of Washington | June 2, 2000

Bridgewater, J.

We concur:

Armstrong, C.J.

Hunt, J.

1. The victim's full name was Juanita Marie Candelario; her friends and family called her 'Marie.' We refer to her by her first name for clarity, and intend no disrespect.
2. RCW 9A.32.050.
3. The Detectives met with Candelario at a New York City jail where Candelario was being held for an unrelated controlled substance offense out of New Jersey.
4. At the beginning of trial the court stated: 'It will be my duty to rule on the admissibility of the evidence. Please disregard any evidence which is either not admitted or which is stricken by me.' The final written jury instructions included: 'The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. . . .You will disregard any evidence that either was not admitted or that was stricken by the court.'

