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IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE SCOTT ANDRUS,

PETITIONER-APPELLANT,

vs.

STATE OF IDAHO,

RESPONDENT.

Supreme Court No. 47805-2020

Twin Falls County No. CV42-16-0720

REPLY BRIEF OF APPELLANT LAWRENCE SCOTT ANDRUS

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

HONORABLE ERIC WILDMAN
District Judge

ROBYN FYFFE, ISB#7063
Fyffe Law LLC
800 W. Main St., Ste. 1460
Boise, Idaho 83702
(208) 338-5231
robyn@fyffelaw.com
ATTORNEY FOR PETITIONER-
APPELLANT LAWRENCE SCOTT
ANDRUS

LAWRENCE G. WASDEN
Idaho Attorney General
PO Box 83720
Boise, Idaho 83720
(208) 334-4534
ecf@ag.idaho.gov
ATTORNEYS FOR RESPONDENT

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II. ARGUMENT IN REPLY

A. Counsel's Failure to Object to the Prosecutor's Prejudicial Misconduct During Closing Argument Was Objectively Unreasonable and Prejudiced Mr. Andrus

In closing argument, the prosecutor shared her opinion that Mr. Andrus was the “best” manipulator she had “ever seen” and that he was trying to manipulate the jurors, cautioning: “Don’t be manipulated. . . find the defendant guilty.” Trial Tr. p. 590, ln. 20 - p. 591, ln. 6. It was objectively unreasonable for trial counsel to fail to object to the prosecutor’s argument. This deficient performance prejudiced Mr. Andrus because an objection would have changed the trial’s result and the misconduct deprived Mr. Andrus of his constitutional right to a fair trial. The district court erred in denying Mr. Andrus’ petition.

In response, the state asserts the prosecutor’s inflammatory comments did not constitute misconduct because her opinion regarding Mr. Andrus’s manipulative ability was supported by evidence that he had been untruthful. Respondent’s Brief, p. 7-15. However, prosecutors should refrain from including personal opinions and beliefs about a witness’s credibility and should not employ inflammatory words to describe the defendant. *State v. Gross*, 146 Idaho 15, 18, 189 P.3d 477, 480 (Ct. App. 2008); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). It may be improper to label the defendant as a “liar” for testimony given in his defense and, even when the defendant admitted to lying in connection with the case, excessive labeling of the defendant as a “liar” could be viewed as an improper attempt to obtain a guilty verdict by disparaging the defendant before the jury. *See Gross*, 146 Idaho at 19, 189 P.3d at 481.

Here, the prosecutor went beyond permissible argument that Mr. Andrus' testimony was not credible and: (1) repeatedly disparaged Mr. Andrus by using the terms manipulate and manipulator; (2) advised the jury of her personal opinion that Mr. Andrus was the "best" manipulator she had seen; and (3) warned the jury it would fall victim of Mr. Andrus' manipulation unless it returned a guilty verdict. Tr. p. 590, ln. 20 - p. 591, ln. 6. A "liar" is simply "a person who tells lies" whereas a "manipulator" is an "exploiter" who controls or influences "in a clever or conniving way." The prosecutor's claim that Mr. Andrus was a very skilled manipulator manipulating the jury can only be viewed as an inflammatory tactic and was impermissible. *See also Phillips*, 144 Idaho at 87, 156 P.3d at 588.

The state also notes that in Mr. Andrus' opening brief, he cites the prosecutor's argument that Mr. Andrus "hasn't told the truth to anyone, anyone, and his story changes whenever it is convenient for him." Respondent's Brief, p. 9, n.4; Trial Tr. p. 576. The state argues that Mr. Andrus "waived" an argument that this comment was misconduct because post-conviction counsel indicated that the statement alone was not sufficiently egregious to warrant a mistrial. *Id.* However, prosecutorial conduct must be evaluated in the context of the entire trial. *State v. Severson*, 147 Idaho 694, 719, 215 P.3d 414, 439 (2009). The prosecutor's statements during her closing argument, as well as her rebuttal argument, are part of the relevant record.

The prosecutor's argument went well beyond communicating that Mr. Andrus' testimony was implausible or lacked credibility and, instead, claimed that Mr. Andrus was a conman attempting to trick the jury and that an acquittal would mean they had fallen victim to his

scheme. Such an appeal to the jury's emotion during closing argument was plainly improper and counsel was deficient in failing to object.

No one witnessed Mr. Andrus drinking or driving and whether the jury concluded that he drove under the influence was highly dependent on whether the jury believed his testimony. In such a case, the prosecutor's personal opinion that Mr. Andrus was one of the most manipulative criminals she had encountered and that his trial defense constituted his latest con was particularly harmful. Mr. Andrus proved his claim of ineffective assistance of counsel and the district court erred in denying Mr. Andrus petition for post-conviction relief.

B. Counsel's Failure to Timely Convey the Plea Offer and His Failure to File a Motion in Limine to Exclude the Breath Test Results and the Widmark Equation Were Objectively Unreasonable and Prejudiced Mr. Andrus

As explained in Mr. Andrus' opening brief, it was objectively unreasonable for trial counsel to fail to review the state's misdemeanor offer before it was revoked two days later. Had counsel timely reviewed the offer, Mr. Andrus would have taken his advice to accept it and been permitted to resolve the case as a misdemeanor. Additionally, Mr. Andrus argued that if trial counsel had moved to exclude evidence of the BAC and of the Widmark equation, those motions should have been granted and, had the jury not heard this evidence, there if a reasonable probability the jury would not have found Mr. Andrus guilty of driving under the influence.

Mr. Andrus' opening brief adequately addresses the state's responsive arguments as to these issues. Accordingly, no additional reply is required.

III. CONCLUSION

For all the reasons set forth above and in Mr. Andrus' opening brief, the district court erred in denying the petition for post-conviction relief and this Court should reverse the final judgment and remand with instruction that (i) Mr. Andrus' judgment of conviction be vacated and/or (ii) that he be given the opportunity to accept the state's initial plea offer.

Respectfully submitted this 26th day of January 2021

FYFFE LAW LLC

/s/ Robyn Fyffe
ROBYN FYFFE
Attorney for Lawrence Scott Andrus

CERTIFICATE OF SERVICE

The undersigned hereby certifies that an electronic copy was served on Criminal Law Division of the Idaho Attorney General at ecf@ag.idaho.gov on January 26, 2021.

/s/ Robyn Fyffe
ROBYN FYFFE