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Court Decisions

Argument of Counsel Trial Courts Mustn't Allow Assertion That Officers Will Be Fired For Lying on Stand

A prosecutor who argues before a jury that police officers testifying for the state risk their careers if they testify falsely against the defendant commits misconduct, even if defense counsel has asserted that police officers are inclined to lie to help the state win, the New Hampshire Supreme Court held Feb. 24. The court distinguished that argument from a contention that a witness lacks any motivation to lie. (*State v. Mussey*, N.H., No. 2004-784, 2/24/06)

During closing argument in this case, defense counsel told the jury that the police witnesses for the prosecution "think it is okay to bend the rules to get a conviction" and said, "If you're not a good liar, you're not a good detective In their mind, deception helps get convictions." During the state's closing argument, the prosecutor stated that "[i]f it is determined that these officers lied and conspired together to convict an innocent man, their careers will be over."

On appeal, the defendant argued that he was entitled to a reversal because the trial court overruled his objection to the prosecutor's statements.

Other courts have come to differing conclusions as to the propriety of similar prosecutorial arguments. Some courts have found no problem with such assertions, reasoning that juries could reasonably infer from evidence presented at trial that police witnesses who perjure themselves would suffer adverse career consequences. Under that reasoning, the prosecutor's argument is not viewed as a statement of personal belief in a witness's truthfulness.

Other courts have found that such arguments do constitute improper vouching for a witness. For example, in *United States v. Weatherspoon*, 410 F.3d 1142, 1146, 77 CrL 201 (9th Cir. 2005), the court found that a defendant was denied his due process right to a fair trial by the prosecutor's statement that his witnesses "are officers that risk losin' their jobs, risk losin' their pension, risk losin' their livelihood ... [and risk] bein' prosecuted for perjury." Similarly, in *Spain v. State*, 872 A.2d 25, 28, 77 CrL 35 (Md. 2005), the court found improper the prosecutor's statement that "[t]he Officer in this case would have to engage in a lot of lying, in a lot of deception ... to come in here and tell you that what happened was not true. He would have to risk everything he has worked for." Both the Ninth Circuit and the Maryland Court of Appeals found that the arguments placed the prestige of the government behind the police witnesses and elevated the testimony of police officers above that of other witnesses.

Prosecutorial Misconduct

In an opinion by Justice James E. Duggan, the New Hampshire court joined the Ninth Circuit and Maryland's highest court to hold that the prosecutor's argument in this case was improper. It said its decision was consistent with prior caselaw holding prosecutors to a high standard when it comes to avoiding vouching for the credibility of witnesses by citing facts not in evidence.

The court characterized the argument in this case as effectively telling the jury that acquitting the defendant would yield negative career consequences for the officers who testified, even though there was no evidence as to the likelihood of such consequences. Therefore, the court said, the argument asked the jury to speculate instead of concentrating on the real evidence.

The court also saw the argument as both personally assuring the officers' credibility and placing the state's prestige behind the officers' veracity. Finally, the court made clear that it wanted to discourage prosecutors from making similar arguments in future cases.

No Invited Error

The court also rejected the contention that the defense invited the prosecutor's argument by suggesting that the officers were lying. It distinguished prior cases in which it found no problem with prosecutors' arguments that witnesses had no reason to lie. It also either distinguished or explicitly disagreed with cases in which other courts found that arguments regarding career consequences were invited by the defense.

The court concluded that

while the defendant's allegation that the police officers were lying may have justified the prosecutor's argument that the officers had no motive to lie, it did not invite the prosecutor to argue that police officers risked losing their careers if they were found to be lying. The prosecutor's statement went beyond merely countering allegations that the officers were lying by encouraging the jury to speculate on the effect the verdict might have on their careers.

Although the prosecutor's argument was improper, it did not require reversal of the defendant's conviction, the court held. It noted that the prosecutor's misconduct was not deliberate, the judge gave adequate curative instructions, and the evidence against the defendant was overwhelming.

The state was represented by Kelly A. Ayotte and Nicholas Cort, of the Office of the New Hampshire Attorney General, Concord, N.H. The defendant was represented by Ted **Lothstein**, assistant appellate defender, Concord, N.H.

Full text at <http://pub.bna.com/cl/2004784.pdf>

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