18CA2011 Peo v Wertz 10-07-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA2011
Jefferson County District Court No. 17CR3442
Honorable Randall C. Arp, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kirk Samuel Wertz,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE DAILEY
Dunn and Kuhn, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 7, 2021

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¶ 1 Defendant, Kirk Samuel Wertz, appeals the judgment of conviction entered on jury verdicts finding him guilty of felony menacing (two counts) and disorderly conduct. We reverse and remand the case for a new trial.

I. Background

¶ 2 The prosecution charged Wertz with four counts of felony menacing and disorderly conduct in connection with an incident in which, while driving his van, he pointed a gun at four people riding in a truck.

¶ 3 While driving his van eastbound on 80th Avenue in Arvada, Wertz heard — and then saw in his rearview mirror — a black diesel truck, emitting smoke, pull out of a parking lot behind him. According to the truck's occupants, as they went to pass Wertz, he yelled something at them. Thinking that Wertz was trying to communicate with them, they slowed down to let him catch up. As he pulled up alongside them, however, he pointed a revolver at them and said something like, "Do you want some of this?" The people in the truck then sped away.

¶ 4 Wertz pulled into a parking lot and called 911. He told the dispatcher what happened, including that he pulled his revolver,

"held it up," but didn't "point it" at the truck's occupants, in response to their using the truck "as a weapon" and nearly hitting him. Two officers responded to his call and took a report but did not issue him a citation.

¶ 5 Meanwhile, the driver of the truck dropped off one of the riders at her house and returned to the area in which they had encountered Wertz. They encountered him again and pulled into a parking lot. Wertz pulled into a parking lot across the street, watching them. Both the truck's occupants and Wertz called 911.

¶ 6 Police responded to both 911 calls and this time cited Wertz for disorderly conduct. Subsequently, the prosecution charged Wertz with menacing the four occupants of the truck with a deadly weapon.

¶ 7 At trial, three of the four occupants testified. According to them, they had done nothing to draw Wertz's ire and had come upon him the second time purely by happenstance.[1]

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[1] One of the officers, however, noted in his report that, when interviewed in the parking lot, one of the truck's occupants admitted driving around looking for Wertz after dropping off their friend.

¶ 8 Wertz, however, testified that the incident began when the truck "fishtailed" or "swerved" from the "far left lane, . . . across the middle [lane], and then into [the] far right lane[2] right behind [him]," nearly hitting him. The truck then pulled up in the middle lane beside him and Wertz could hear the truck's occupants laughing, and "yelling and saying something," including "the F word." The truck began "rock[ing] back and forth" from its lane into Wertz's lane, forcing him to move his van so far to the right that his front tire rubbed the curb.

¶ 9 Thinking he was going to wreck, Wertz slowed down. The occupants of the truck did likewise. "Then [he] sped up and then they sped up, and [he] slowed down again and then they slowed down again. [He] sped up, they sped up. There was no retreat, no escape."

¶ 10 According to Wertz, he "feared for his life" and had "no other choice" but to, as a "last resort," take his revolver from his center console and, pointing it upwards — but not at anyone — say, "What the hell is going on?" and "You want some of this?"

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[2] At that point, 80th Avenue has three eastbound lanes.

¶ 11 Wertz said he acted in self-defense. Nonetheless, the jury convicted him of disorderly conduct and two of the four counts of felony menacing.[3] The court sentenced him to a term of four years of probation.

¶ 12 On appeal, Wertz contends that the trial court erred by (1) allowing an officer to testify as to why Wertz was charged with menacing as well as to the officer's belief that Wertz was guilty of menacing; (2) allowing the prosecution to misstate the law of self-defense; and (3) instructing the jury on three evidentiarily unsupported exceptions to the defense of self-defense. We reverse based on the second of these contentions.

II. Prosecutorial Misconduct

¶ 13 Wertz contends that prosecutorial misconduct in questioning him and in closing argument deprived him of a fair trial. He asserts that the prosecutor misstated the law by effectively arguing that Wertz had a duty to retreat before he could exercise a right of self-defense. We agree, in part.

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[3] The jury found Wertz not guilty of menacing the two individuals sitting in the back of the truck, whom Wertz claimed not to have seen before reaching for his revolver.

A. Facts

¶ 14 During direct examination, Wertz testified as follows:

- "[Two times] I slowed down and then they slowed down. Then I sped up and then they sped up . . . . There was no retreat, no escape."
- "I feared for my life. I had no other choice. I cannot speed people down the road and endanger other lives. And by Colorado law, I don't have to flee."
- He pulled his revolver out of the console because "I had no other choice. That's the last resort, and I've been trained as such. I feared for my life. I could not get away. There was no other option."
- He pointed the gun straight up "not to scare anyone. I drew it because I feared for my life and I thought I had no other choice and I thought I was going to have to use it."
- And, he thought of calling 911: "that's what I — was totally on my mind even before I drew, but I couldn't get away. I couldn't get out of harm's way."

¶ 15 On cross-examination, the prosecutor challenged Wertz's testimony that he pulled his revolver because he "had no [other]

choice," or "no way to escape." Initially, the prosecutor did so by asking him, "So at any point you could have pulled off to the side of the road or taken a right turn, correct?" and inasmuch as he wasn't boxed in by cars, "you had options, didn't you?"

¶ 16 When Wertz denied having a choice, a way of escape, or other options, the prosecutor had him review a map of the area, which showed at least five points along the road at which Wertz could have turned.

¶ 17 At the end of cross-examination, the prosecutor asked Wertz whether he pulled his revolver more for intimidation than self-defense:

> PROSECUTOR: . . . [Y]ou pulled it, to scare them, didn't you?
>
> WERTZ: No, sir. I told you I feared for my life. I had no other choice, no other choice. Either you have self-preservation or you don't. And when you don't, you've got a problem.
>
> . . . .
>
> PROSECUTOR: Are you trained to avoid situations?
>
> WERTZ: Yes, sir.
>
> PROSECUTOR: You didn't avoid this situation, did you?

WERTZ: I didn't cause it.

PROSECUTOR: You never hit you brakes, did you?

. . . .

WERTZ: I tried to slow down. They slowed down. I sped up. They sped up. That happened twice. I did all I could to avoid anything, the conflict, which I didn't create. I was driving down the road after church minding my own business

. . . .

PROSECUTOR: You had a million other options that night, didn't you?

. . . .

WERTZ: No, sir, a million other options.

PROSECUTOR: . . . You pulled that gun because you had it on you, didn't you?

WERTZ: I pulled my gun, again, because I feared for my life and I had no other choice, no way of escape. I tried everything. And I don't have to flee, again, but I did everything I could legally to avoid any other situation, conflict.

¶ 18 During closing arguments, the prosecution argued that, rather than being in fear for his life, Wertz was "looking for [a] confrontation." In support of this theory, the prosecutor said, among other things:

[B]y his own admission he pulled out that gun. He never slowed down. He never turned right. He didn't take any evasive measures. He pulled the gun.

. . . .

The defendant says, you know, it was light traffic. There was some traffic, but I couldn't turn right or left; I was boxed in. You know, he can't have it both ways, where he can be boxed in but he can't turn right or left. It makes no sense.

Think about what we discussed in jury selection, all the steps that people who discussed road rage accidents took in order to avoid them; stopping, slowing down, keep on going. He took none of those. Move one, two, or three was to reach the big gun. And he reached for the gun, again, because he has law enforcement fantasies.

It's not illegal to drive around with that gun. I'm not saying that. It's not illegal to drive around with that gun loaded. But I want you to think of all the reasonable responses in jury selection as to how you avoid road rage. He took none of them, and he seemed indignant that he took none of them in his trial testimony: I couldn't turn right.

Look at all the businesses, look at your exhibits. If you know that area, look at the businesses in that area. There are right turns. Look at the maps. There are right turns. They will jump out at you. He had a million options. He wanted to go for his gun.

B. Analysis

¶ 19 In reviewing prosecutorial misconduct claims, we determine whether the prosecutor's conduct was improper, and, if so, whether that misconduct warrants reversal under the proper standard of review. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

1. The Prosecutor's Closing Argument Was Improper

¶ 20 "[A] prosecutor, while free to strike hard blows, is not at liberty to strike foul ones." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005) (quoting *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987)). Consequently, a prosecutor may use every legitimate means to bring about a just conviction, but he or she has a duty to avoid using improper methods designed to obtain an unjust result. *Id.*

¶ 21 A prosecutor may not misstate the law or "'misinterpret[] for the jury how the law should be applied to the facts' during closing argument." *People v. Monroe*, 2020 CO 67, ¶ 16 (quoting *People v. Sepeda*, 196 Colo. 13, 25, 581 P.2d 723, 732 (1978)).

¶ 22 In Colorado,

> a non-aggressor may assert self-defense without (1) considering whether a reasonable person would retreat to safety rather than

> resorting to physical force, or (2) actually retreating from an attack even if she could safely do so.
>
> Accordingly, the prosecution may not argue that a defendant is barred from acting in self-defense unless she first retreats from an encounter.

Id. at ¶¶ 19-20 (citations omitted).

¶ 23 Wertz asserts that the prosecutor's cross-examination and closing argument conveyed to the jury that he had a duty to retreat before he could exercise a right of self-defense. In our view, the prosecutor's cross-examination was not improper, but his closing argument was.

¶ 24 In his direct testimony, Wertz was adamant about having "no retreat, no escape," "no [other] choice," and "no other option" but to pull his revolver in self-defense. Consequently, the prosecutor was entitled to cross-examine him about those positions and to show that those positions were incorrect. *See People v. Liggett*, 114 P.3d 85, 87 (Colo. App. 2005) ("[A] defendant who testifies in a criminal case may be cross-examined like any other witness regarding his or her credibility."), *aff'd*, 135 P.3d 725 (Colo. 2006); *see also People v. Marion*, 941 P.2d 287, 293 (Colo. App. 1996) (Cross-examination is

permitted "on any matter germane to the direct examination."); *People v. Sallis*, 857 P.2d 572, 574 (Colo. App. 1993) (CRE 611(b) — the rule on cross-examination — "does not limit cross-examination to the same acts and facts to which a witness has testified on direct examination; rather, it must be liberally construed to permit cross-examination on any matter germane to the direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict, or rebut testimony given by the witness."); *People v. Kraemer*, 795 P.2d 1371, 1377 (Colo. App. 1990) (The "defendant addressed the subject . . . on direct examination, thus opening the door to cross-examination thereon. Therefore, the questions were not improper.") (citations omitted).

¶ 25 But in closing argument the prosecution went further than simply impeaching Wertz's position that he had "no other option." The prosecution argued, in effect, that Wertz did not really believe he was in danger or that it was reasonable for him to use force. And that is impermissible.

¶ 26 In *Monroe*, ¶ 3, the defendant argued that "the trial court should not have permitted any argument regarding her failure [to retreat], even if it was ostensibly directed at undermining the

reasonableness of her claim of self-defense." The supreme court unequivocally held that "the prosecution may not argue that a defendant acted unreasonably in self-defense because she failed to retreat from an encounter." *Id.* at ¶ 5.

> To allow the prosecution to argue that a defendant's failure to retreat undermines the reasonableness of that defendant's self-defense claim would cripple the no-duty-to-retreat rule. The only inferences a jury could draw from that line of argument are that, if retreat was possible but not pursued, a defendant must not have acted reasonably by using force or must not have actually perceived a threat, since she would have fled if she had. It thus conditions the use of defensive force on flight, so the only defendants "who would not have to retreat in the face of . . . force would be those who have no ability to retreat in the first place." *Commonwealth v. Hasch*, 421 S.W.3d 349, 361 (Ky. 2013).
>
> Further, this type of argument is of limited value to a jury. The prosecution contends that argument regarding a defendant's failure to retreat is particularly relevant to a defendant's claim that she faced an imminent use of unlawful force. But this argument is premised on a faulty assumption, since not all individuals facing a threat respond by fleeing. Thus, a defendant's decision to retreat is no more proof that she faced an imminent threat of unlawful force than a decision to remain and fight.

> There's also a significant risk that such argument would confuse a jury, which weighs against allowing its admission. Here, the prosecutors and trial court struggled to distinguish between arguments that imposed an outright duty to retreat and those that didn't. How, then, can we trust that a jury won't erroneously reject a defendant's self-defense claim simply because the defendant failed to retreat?

Id. at ¶¶ 30-32 (citations omitted).

¶ 27 The People assert that the prosecutor's comments in the present case are distinguishable from those the supreme court found improper in *Monroe*, because the comments here

> were not a tacit acknowledgement that the defendant had been defending himself but could not avail himself of the affirmative defense because he had acted unreasonably. Rather, the prosecution's argument was that the defendant was not acting in self-defense reasonably or unreasonably, because he was the only aggressor during the evening, and his testimony that the victims were the aggressors was incredible.

¶ 28 We are not persuaded. Contrary to the People's assertion, the prosecutor was not arguing that Wertz was the only (and thus, necessarily, the initial) aggressor that evening. The prosecutor based his argument on the premise that something had happened to trigger a reaction from Wertz. Wertz's comments during the first

911 call, the prosecutor said, did "not sound like a person that's scared. This sounds like a person in a chase." The prosecutor described Wertz as a person with "vigilante fantasies . . . looking for a reason to use [his gun]." And in the comments at issue here, the prosecutor specifically spoke in terms of "reasonable responses . . . as to how you avoid road rage."

¶ 29 Read in context, the prosecutor's comments in this case were precisely the type found improper in *Monroe*, i.e., suggesting that "a defendant must not have acted reasonably by using force or must not have actually perceived a threat, since [he] would have fled if [he] had." *Id.* at ¶ 30.

¶ 30 The question, at this point, then, is whether reversal is required under the proper standard of review.

2. Reversal Is Warranted

¶ 31 Wertz did not object in the trial court to any of the prosecution's actions he challenges on appeal. Consequently, reversal is not warranted in the absence of plain error. Crim. P. 52(b); *People v. Munoz-Casteneda*, 2012 COA 109, ¶ 23. Plain error is error that is both "obvious" and "substantial." *Hagos v. People*, 2012 CO 63, ¶ 14.

¶ 32 An error qualifies as obvious, for plain error purposes, if a trial judge should be able to avoid it without an objection. *Scott v. People*, 2017 CO 16, ¶ 16. Ordinarily, that would involve an action that contravenes "(1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law." *Id.* (quoting *People v. Pollard*, 2013 COA 31M, ¶ 40).

¶ 33 Under present Colorado law, the time for assessing the "obviousness" of error is at the time of trial, rather than the time of appeal. *See People v. Abad*, 2021 COA 6, ¶ 47; *People v. Thompson*, 2018 COA 83, ¶ 34, *aff'd on other grounds*, 2020 CO 72; *People v. O'Connell*, 134 P.3d 460, 465 (Colo. App. 2005); *see also Maestas v. People*, 2019 CO 45, ¶¶ 32, 39 (Samour, J., concurring in the judgment) (acknowledging that as the present state of Colorado law, but indicating that he and the two other justices who joined the concurrence would assess plain error as of the time of appeal, like the United States Supreme Court does, *if* the supreme court would adopt the United States Supreme Court's plain error methodology).

¶ 34 The "no duty to retreat" rule has been a "well-settled legal principle," *see Scott*, ¶ 16, in Colorado for a long time, *see, e.g.*, *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000) ("Generally speaking, a

person does not have to try to escape before using reasonable non-deadly physical force to defend against unlawful force by an aggressor."); *see also* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4(f), Westlaw (3d ed. database updated Oct. 2020) ("The majority of American jurisdictions holds that the defender (who was not the original aggressor) need not retreat, even though he can do so safely . . . .") (footnote omitted). Argument in contravention of this principle is therefore "obviously" improper for plain error purposes.

¶ 35 But, the People assert, the error identified in the present case could not have been "obvious" at the time of Wertz's trial because, after the date of Wertz's trial,[4] the court of appeals characterized arguments similar to those made here as "arguably proper." *See People v. Monroe*, 2018 COA 110, ¶ 19 ("[W]e leave for another day the issue of whether it would ever be proper to attack the veracity of a defendant's claimed belief in the need for defensive force by highlighting an unused avenue of retreat. We will thus refer to the

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[4] Wertz's case went to trial on July 17 and 18, 2018; the court of appeals announced its decision in *People v. Monroe*, 2018 COA 110, *aff'd on other grounds*, 2020 CO 67, on August 9, 2018.

use of this argument as 'arguably proper.'"), *aff'd on other grounds*, 2020 CO 67.

¶ 36 But, as the supreme court pointed out in its *Monroe* decision, another division of this court had previously (and, we might add, prior to the trial in the present case) found similar comments improper:

> In [*People v. Castillo*, 2014 COA 140M, *rev'd on other grounds*, 2018 CO 62], the prosecutor made multiple comments during closing argument that implied the defendant should have retreated instead of using force. ¶ 72. The prosecution argued on appeal that such comments were meant to impeach the defendant's testimony that he couldn't physically leave the scene. *Id.* at ¶ 73. But the division noted that it was possible to interpret those comments "as stating that it was *unreasonable* for defendant to shoot . . . rather than leave." *Id.* (emphasis added). Under this interpretation, it deemed the prosecutor's comments improper, since a person using defensive force need not consider "whether a reasonable person in the situation would opt to retreat to safety rather than resorting to physical force to defend against unlawful force." *Id.* at ¶¶ 74, 77 ([citation omitted]).
>
> The comments made by the prosecutor in *Castillo* ("He could have left. He could have kept driving, but somebody said something that pissed him off," *id.* at ¶ 72), are quite similar to those made by the prosecution here

> ("Again, she did not have any duty to retreat but could have backed away, if she wanted to, if she was actually afraid."). The *Castillo* division considered such argument improper commentary on the defendant's failure to retreat. *See id.* at ¶¶ 74, 77.

Monroe, 2020 CO 67, ¶¶ 25-26.

¶ 37 Consistent with these observations, we conclude that, at the time of Wertz's trial, the law was that comments of the type made here were improper. Consequently, we conclude that the error in allowing the prosecutor to imply, if not outright express, that Wertz had options other than exhibiting his gun to the occupants of the truck was "obvious."

¶ 38 The question now is whether this "obvious" error was also "substantial." For the following reasons, we think it was.

¶ 39 For plain error purposes, to qualify as "substantial," an error must be "seriously prejudicial" — that is, it must have so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the defendant's conviction. *People v. Ujaama*, 2012 COA 36, ¶ 43; *see Hagos*, ¶ 14.

¶ 40 In making this assessment, we consider, in this context, (1) "'the specific nature of the error committed and the nature of the

prejudice or risk of prejudice associated with it,' *Crider* [*v. People*, 186 P.3d 39, 43 (Colo. 2008)]"; (2) "the pervasiveness of the misconduct"; (3) "the 'context,' including whether the improper prosecution remarks somehow were 'invited' by improper defense arguments"; and (4) the "'strength of admissible evidence supporting the verdict,' *Crider*, 186 P.3d at 43." *People v. McBride*, 228 P.3d 216, 225 (Colo. App. 2009).

¶ 41 The critical issue in the case was whether Wertz acted justifiably in self-defense. On multiple occasions in closing argument, however, the prosecutor misinterpreted for the jury how the law should be applied to the facts. This, in our view, created a "significant risk" that the jury may have convicted Wertz because "it erroneously believed that [his] failure to retreat necessarily negated the reasonableness of [his] use of force." *Monroe*, 2020 CO 67, ¶ 37.

¶ 42 Nonetheless, the People assert that the error could not cast doubt on the reliability of the jury's verdicts because Wertz's "testimony regarding self-defense was incredible; therefore, there is no probability that the jury would have acquitted him absent the prosecution's comments."

¶ 43 The People do not, however, explain why, in their view, Wertz's testimony and theory of defense were "incredible." From our review of the record, it does not appear to us that (as the People also argue) the evidence of his guilt was overwhelming, or that his testimony was necessarily "incredible."

¶ 44 True, the prosecution had three witnesses testifying to a version of events that would support a menacing conviction. But those witnesses were not what would be called "uninvolved," "uninterested," or "objective" observers: they were the alleged victims in the case. And their version of events was not unassailable. For instance, although one of these witnesses testified that they encountered Wertz the second time only by happenstance, there was evidence that witness had told an officer that the truck's occupants were looking for Wertz at the time.

¶ 45 Nor was their version of events undisputed. Indeed, Wertz testified in direct contradiction of much of what the truck's occupants said.

¶ 46 Finally, contrary to the People's suggestion, we are not in a position to assess the credibility of Wertz's testimony and theory of defense. "An appellate court is not a fact-finding body," *People v.*

Mogul, 812 P.2d 705, 712 (Colo. App. 1991), and "[c]redibility is a matter for the trier of fact." *People v. Vazquez*, 106 P.3d 1039, 1040 (Colo. 2005); *see People v. Johnson*, 2016 COA 15, ¶ 21 ("[T]he resolution of inconsistent testimony and the determination of credibility are solely within the province of the jury."); *People v. Aryee*, 2014 COA 94, ¶ 33 ("We will not invade the province of the jury by assessing the credibility of or reweighing conflicting evidence.").[5]

¶ 47 In our view, Wertz presented a plausible case of self-defense. Besides his own testimony, the record contains corroborative testimony from Wertz's son, who was on the phone with him during much of the incident. Other circumstances too are also somewhat corroborative of his defense: (1) immediately after his run-in with the truck's occupants, and again when he saw them go into a parking lot, Wertz called 911; and (2) during his first call (and his

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[5] The only time we can evaluate "credibility" is when addressing a contention that something is "incredible as a matter of law" — which is not at issue in this case. *See People v. Plancarte*, 232 P.3d 186, 192 (Colo. App. 2009) ("Testimony is incredible as a matter of law only when a witness testifies to events that he or she could not possibly have seen or are not possible under the laws of nature.").

follow-up contacts with the police), he offered that he had displayed his revolver to others as a measure of self-defense. Such actions suggest Wertz was not a wrongdoer or, at least, not conscious of any wrongdoing.

¶ 48 On the record, this appears to be a much closer case than what the People perceive. And the prosecutor's numerous improper comments may well have affected the jury's evaluation of Wertz's defense of self-defense — so much so, that the reliability of the jury's verdict is, in our view, in serious doubt. Consequently, we conclude that plain error warranting reversal occurred here.

III. Other Issues

¶ 49 Having found a sufficient ground for reversal, we need not resolve Wertz's remaining claims. We would, however, be remiss if we did not comment on yet another matter that, if it re-occurs on retrial, could inject seriously prejudicial error into the case.

¶ 50 Officer Jenkins improperly testified to (1) the role of or advice from the district attorney's office related to the charges filed in this case and (2) his personal opinion that Wertz was guilty of menacing. *See People v. Stewart*, 55 P.3d 107, 123 (Colo. 2002) (an officer who has not been endorsed as an expert cannot testify as a lay witness

to matters requiring specialized skills, training, or experience); *see also People v. Vialpando*, 2020 COA 42, ¶ 62 ("A witness may not opine that the defendant is guilty or testify that he or she believes the defendant committed the crime.") (*cert. granted* Oct. 12, 2020).

¶ 51 Officer Jenkins's testimony that "the district attorney's officer . . . , as the experts of the law, actual[ly] reevaluate and say, we need to knock this up to a felony or drop this down to a misdemeanor, and/or get rid of this altogether" implied that, because Wertz's case had not been gotten "rid of altogether," he must be guilty. *See People v. Mendenhall*, 2015 COA 107M, ¶ 62. And Officer Jenkins's testimony that he believed felony menacing had occurred "contained an added degree of prejudice" because the record suggests that Officer Jenkins was "the lead investigating officer in the case."[6] *Vialpando*, ¶ 66; *see Martinez v. State*, 761 So. 2d 1074, 1080 (Fla. 2000) ("[T]here is an increased danger of

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[6] The record indicates Officer Jenkins had the most interaction with both Wertz and the truck's occupants; it was he who informed Wertz that he was going to be charged; and, of the three officers that testified at trial, Officer Jenkins was on the stand for far longer than the other two.

prejudice when the investigating officer is allowed to express his or her opinion about the defendant's guilt.").

IV. Disposition

¶ 52 The judgment of conviction is reversed, and the case is remanded for a new trial.

JUDGE DUNN and JUDGE KUHN concur.