FILED
SUPREME COURT
STATE OF WASHINGTON
12/4/2023 11:57 AM
BY ERIN L. LENNON
CLERK

SUP. CT. NO. 102375-8
COA NO. 83589-1-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD CARTE, JR.,

Petitioner.

APPEAL FROM KING COUNTY SUPERIOR COURT

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

Treated as Answer to Petition for Review

LEESA MANION (she/her)
King County Prosecuting Attorney

GAVRIEL JACOBS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

1. THIS COURT SHOULD CLARIFY THE APPROPRIATE STANDARD OF REVIEW FOR IMPROPER ARGUMENTS THAT COMMENT UPON A CONSTITUTIONAL RIGHT 2

2. THIS COURT SHOULD DENY REVIEW OF THE HEARSAY ISSUE 9

D. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Aguirre, 168 Wn.2d 350,
229 P.3d 669 (2010).. 10

State v. Carte, 83589-1-I 4, 5, 9

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012)... 2, 3, 6

State v. Espey, 184 Wn. App. 360,
336 P.3d 1178 (2014)... 4, 5

State v. Finch, 137 Wn.2d 792,
975 P.2d 967 (1999).. 10

State v. Gouley, 19 Wn. App. 2d 185,
494 P.3d 458 (2021).. 9

State v. Klok, 99 Wn. App. 81,
992 P.2d 1039 (2000).. 7

State v. Pinson, 183 Wn. App. 411,
333 P.3d 528 (2014).. 4

State v. Smith, 144 Wn.2d 665,
30 P.3d 1245 (2001).. 6

State v. Teas, 10 Wn. App. 2d 111,
447 P.3d 606 (2019).. 4

State v. Tesfasilasye, No. 81247-5, 2021 WL 3287706
at *9 (2021 Unpublished), rev'd on other grounds by
200 Wn.2d 345, 518 P.3d 193 (2022)............................. 4

State v. Warren, 165 Wn.2d 17,
195 P.3d 940 (2008).. 8

Constitutional Provisions

Washington State:

CONST. art. I, § 22.. 8

Statutes

Washington State:

LAWS OF 2002, ch. 107, § 1 6

Rules and Regulations

Washington State:

RAP 2.5 .... 5, 6, 7

RAP 13.4 .... 1, 2

A. ISSUES PRESENTED

1. This Court should grant review and clarify that the "flagrant and ill-intentioned" prosecutorial misconduct standard generally applies to statements made during closing argument that improperly comment upon a defendant's constitutional right.

2. The trial court sustained the prosecutor's objection to several out-of-court statements elicited during Carte's testimony. Is review unwarranted when the trial court correctly ruled that these statements were hearsay and the right to present a defense does not extend to inadmissible evidence?

B. STATEMENT OF THE CASE

The facts are fully presented in the Brief of Respondent filed with the Court of Appeals.

C. ARGUMENT

RAP 13.4(b) governs this Court's review of Carte's petition. Accordingly, review is appropriate only under the following circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Carte appears to rely on RAP 13.4(b)(3). Brief of Pet. at 1-3.

1. THIS COURT SHOULD CLARIFY THE APPROPRIATE STANDARD OF REVIEW FOR IMPROPER ARGUMENTS THAT COMMENT UPON A CONSTITUTIONAL RIGHT.

The State does not dispute that the trial prosecutor made an improper "tailoring" argument during summation. Because Carte failed to object below, however, the Court of Appeals had to consider at the outset how this failure to object might affect the analysis.

Both parties and the Court of Appeals relied in part on State v. Emery, 174 Wn.2d 741, 757, 278 P.3d 653 (2012).

Emery suggested that the constitutional harmless error standard may apply to "direct constitutional claims involving prosecutors' improper arguments." Id. at 757. Nonetheless, Emery "declined to adopt the constitutional harmless error standard" in that case, despite the prosecutor making improper arguments that "subtly shift[ed] the burden [of proof] to the defense." Id. at 758-60.

The Court gave three reasons for its decision: (1) it had declined to apply the constitutional harmless error standard in similar cases; (2) the instant case did not involve racial bias; and (3) an attorney's argument is generally less prejudicial than instructional error. Id. at 757-59. This analysis provided only limited guidance to lower courts confronted with variant factual scenarios, specifically, what constitutes a "direct" as opposed to "indirect" claim was never elucidated in Emery, nor in any subsequent decision of this Court.

The Court of Appeals has extrapolated from Emery at least two different two-part tests for improper arguments that

touched upon a constitutional right but were not objected to.[1] Under Pinson and Teas, courts ask whether the error was so flagrant and ill-intentioned that no curative instruction would have sufficed. 183 Wn. App. at 419; 10 Wn. App. 2d at 122. If not, the error is "waived." Id. Teas rejected any application of the constitutional harmless error standard.[2] 10 Wn. App. 2d at 121-22. Pinson did not address constitutional harmless error at all. 183 Wn. App. at 419-20.

In Espey and Carte, the Court of Appeals first applied the typical "flagrant and ill-intentioned" prosecutorial misconduct standard, asking whether any prejudice could have been cured

---

[1] Carte, No. 83589-1 at 12; State v. Teas, 10 Wn. App. 2d 111, 121, 447 P.3d 606 (2019); State v. Espey, 184 Wn. App. 360, 366, 336 P.3d 1178 (2014); State v. Pinson, 183 Wn. App. 411, 416, 333 P.3d 528 (2014).

[2] Although Teas did not import the constitutional harmless error standard, it observed that a different panel had done so in Espey, 184 Wn. App. at 368-69. Later opinions, including the case at bar, have erroneously read Teas as adopting the two-part test from Espey. See Carte, No. 83589-1 at 12; see State v. Tesfasilasye, No. 81247-5, 2021 WL 3287706 at *9 (2021 Unpublished) (reversed on other grounds by 200 Wn.2d 345, 518 P.3d 193 (2022)).

by a timely instruction and whether "there was a substantial likelihood the misconduct led to prejudice that affected the jury verdict." Carte, No. 83589-1 at 10; Espey, 184 Wn. App. at 366. If the defendant shows incurable prejudice substantially likely to affect the jury's verdict, the error is preserved, and the court then applies the constitutional harmless error standard to determine if reversal is required. Carte, No. 83589-1 at 11-12; Espey, 184 Wn. App. at 369-70.[3]

The standard applied in Espey and Carte is unnecessarily duplicative. If the error is preserved – i.e., it could not have been cured with a timely instruction and likely *affected the verdict* – it makes little sense to then *also* ask whether it was harmless beyond a reasonable doubt.

---

[3] Espey also briefly noted, without elaborating, that "[a] defendant's failure to object to an improper remark on his constitutional right to silence does not waive the issue on appeal so long as the remark amounts to a manifest error." 184 Wn. App. at 366 (citing RAP 2.5(a)(3)).

Carte argues that the Court of Appeals misinterpreted Emery and asks for a different standard of review. Brief of Pet. at 9-10. He claims that the prosecutorial misconduct analysis only applies to errors that "touch upon" a constitutional right, whereas direct violations are reviewed under RAP 2.5(a)'s "manifest constitutional error" standard. Brief of Pet. at 10.

But Carte's proposed rule is also problematic. It requires an additional layer of litigation as to whether an error is "direct" or "indirect." The courts will then be confronted with a standard of review that shifts depending on slight variations in a prosecutor's phrasing or how an appellant chooses to frame their argument.

The prosecutorial misconduct standard should generally apply to comments made in closing argument, and this Court should reject the Court of Appeals' addition of a constitutional harmless error analysis. See State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001) (superseded by statute on unrelated grounds by LAWS OF 2002, ch. 107, § 1) ("Some improper

prosecutorial remarks can touch on a constitutional right but still be curable by a proper instruction").

The Court of Appeals has previously identified the problem with adopting Carte's approach:

> Manifest error affecting a constitutional right will be reviewed under RAP 2.5(a) despite the lack of objection below. In practice, this rule creates a relatively small category of errors that a trial judge must watch for and guard against even when the parties fail to point them out. An argument of a prosecutor does not readily fall into this category. Trial judges should not feel obligated to intervene sua sponte in every argument that might be characterized as raising a constitutional issue. Such a rule would be difficult in application and disruptive to the coherency of closing arguments. Trial judges have a variety of options available to deal with prosecutorial misconduct in argument. Sometimes it may be appropriate for the court to intervene absent objection, but not always.

State v. Klok, 99 Wn. App. 81, 83-84, 992 P.2d 1039 (2000) (citations omitted).

It is possible that prosecutorial misconduct may merit review under RAP 2.5(a)(3) in some circumstances. However,

this should encompass a limited category of obvious and egregious errors:

> This [two-part test] has long been our approach to analyzing prosecutorial misconduct. Warren urges us to apply instead a constitutional harmless error analysis because the misconduct in this case touches on constitutional rights. Perhaps if a prosecutor violated an accused's right of silence by improperly blurting out the accused had exercised his constitutional right, the constitutional harmless error standard would be appropriate…[w]e decline to reach the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right.

State v. Warren, 165 Wn.2d 17, 26, n.3, 195 P.3d 940 (2008) (internal citations omitted).

Carte had a constitutional right to attend his trial. WASH CONST. art. I, § 22. However, the State did nothing to prevent his attendance, which would have been a direct constitutional violation. Instead, the prosecutor's argument implicitly *commented* upon the right. This was error, but of the sort that

has historically been reviewed under the general prosecutorial misconduct standard. State v. Gouley, 19 Wn. App. 2d 185, 199-200, 494 P.3d 458 (2021). In any event, the intermediate appellate courts would benefit from greater clarity on this issue, and a limited grant of review would therefore be reasonable.

2. THIS COURT SHOULD DENY REVIEW OF THE HEARSAY ISSUE.

The trial court sustained several hearsay objections made when Carte attempted to admit the victim's out-of-court statements. The Court of Appeals affirmed, finding that the statements at issue were properly rejected as hearsay, and that excluding this evidence did not violate Carte's right to present a defense. Carte, No. 83589-1 at 16.

To the extent Carte claims these statements were not hearsay, he is incorrect for the same reasons discussed in the opinion below and the Brief of Respondent.

Carte further suggests that, even if the statements were hearsay, his constitutional right to present a defense supersedes the rules of evidence. Brief of Pet. at 13. However, this Court

has already held that "the scope of that right [to present a defense] does not extend to the introduction of otherwise inadmissible evidence." State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). Rather, the defendant's trial rights are "subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999).

This Court should decline to review the hearsay issue because Carte has failed to identify a significant constitutional issue meriting this Court's attention.

D. CONCLUSION

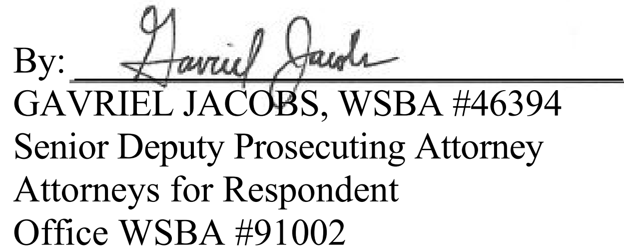
For all the foregoing reasons, the State does not object to review of the waiver issue. However, this Court should deny review of Carte's hearsay argument.

This document contains 1650 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 4th day of December, 2023.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney

By: 
GAVRIEL JACOBS, WSBA #46394
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

December 04, 2023 - 11:57 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,375-8
Appellate Court Case Title:	State of Washington v. Edward Leroy Carte Jr.

The following documents have been uploaded:

- 1023758_Answer_Reply_20231204115548SC308523_4453.pdf
  This File Contains:
  Answer/Reply - Answer to Motion for Discretionary Review
  The Original File Name was 102375-8 STATES ANSWER TO PETITIONERS MOTION FOR DISCRETIONARY REVIEW.pdf

A copy of the uploaded files will be sent to:

- chris@washapp.org
- kummerowtm@gmail.com
- wapofficemail@washapp.org

Comments:

Sender Name: Bora Ly - Email: bora.ly@kingcounty.gov
Filing on Behalf of: Gavriel Gershon Jacobs - Email: gavriel.jacobs@kingcounty.gov (Alternate Email:)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9499

Note: The Filing Id is 20231204115548SC308523