

No. 41970-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Odies Walker,

Appellant.

Pierce County Superior Court

Cause No. 09-1-02784-8

The Honorable Judge Bryan Chushcoff

Appellant's Supplemental Brief

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SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct requiring reversal.
2. The prosecutor improperly expressed a personal opinion in closing arguments.
3. The prosecutor improperly appealed to passion, prejudice, and emotion during closing argument.
4. The prosecutor improperly showed jurors PowerPoint slides of photographic exhibits that had been altered.
5. Mr. Walker was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

SUPPLEMENTAL ISSUES

1. A prosecutor may not express a personal opinion or appeal to jurors' passion and prejudice during closing arguments. Here, the prosecutor altered a booking photograph by superimposing the words "Guilty beyond a reasonable doubt" in large print over Mr. Walker's face, showed jurors numerous other exhibits altered by the addition of text, and repeatedly expressed his personal opinion that Mr. Walker was guilty. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned, in violation of Mr. Walker's right to due process under the Fourteenth Amendment and Wash. Const. Article I Section 3?
2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to repeated instances of prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Walker denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS

The state made extensive use of a lengthy PowerPoint presentation during his closing argument in the murder trial of Odies Walker. Ex. 243. In this presentation, jurors were shown several exhibits that had been altered by adding text summarizing the prosecution's perspective on the evidence. Ex. 243.

The first slide in the presentation (after the title page) showed Mr. Walker's booking photo, with the words "Shoot the mother f*cker" partly superimposed over the image. Ex. 243, p. 1.

This photo was used in another slide, with the heading "Major participant" above and six arrows pointing inward toward the picture and listing a separate allegation regarding his participation. Ex. 243, p. 78. Near the end of the presentation, the photo appeared once again, with the phrase "Guilty beyond a reasonable doubt" superimposed over Mr. Walker's face. Ex. 243, p. 87. The penultimate slide in the presentation featured Walker's photo with the caption "We are going to beat this."

The presentation also included a photo of cash spread on a table, with the words "Money is more important than human life" superimposed over the image. Ex. 243, p. 5. Another slide near the end of the PowerPoint showed a group celebrating over a meal, with the words "This

is how you murder and rob n*ggers next time it will be more money.” Ex. 243, p. 89.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. In re Glasmann, ___ Wash.2d ___, ___, 286 P.3d 673 (2012).¹ Even absent an objection, error may be reviewed if it is “so flagrant and ill intentioned that an instruction would not have cured the prejudice.” Id. at ___.

B. The convictions must be reversed because Prosecutor Costello engaged in the same misconduct condemned by the Supreme Court in Glasmann.

The state and federal constitutions secure for an accused person the right to a fair trial. Glasmann, at ___; U.S. Const. Amend. VI; U.S.

¹ Citations are to the lead opinion in Glassman. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers “agree[d] with the lead opinion that the prosecutor’s misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct.” Glasmann, at ___ (Chambers, J., concurring). Justice Chambers wrote separately because he was “stunned” by the position taken by the prosecution. Id. Furthermore, even the dissent recognized that the prosecutor committed flagrant misconduct; the dissent’s disagreement centered on the degree of prejudice suffered by the defendant. Id. at ___ (Wiggins, J., dissenting).

Const. Amend. XIV; Wash. Const. Article I, Section 22. Prosecutorial misconduct can deprive an accused person of this right. Glasmann, at ____.

The state must seek convictions based only on probative evidence and sound reason, rather than arguments calculated to inflame the passions or prejudices of the jury. Id.

A prosecutor who, during closing argument, alters a photograph of the accused person by adding the word “Guilty” commits prejudicial misconduct that is flagrant and ill intentioned. Id. Washington courts have “repeatedly and unequivocally denounced [this] type of conduct.” Id, at ____.

Showing jurors a photograph of the accused with the added word “Guilty” is equivalent to submitting evidence that has not been admitted at trial.² Id. Showing altered photographs may influence jurors to stray from mandatory legal principles or to use less care in determining guilt. Id. Such evidence encourages jurors to rely on their feelings rather than reason in reaching a verdict. Id.

In addition, the addition of the word “Guilty” to a booking photo communicates the prosecutor’s personal belief in the accused person’s guilt. Id, at ____.

This, too, is prejudicial misconduct. Id. It is difficult to

² Conduct of this sort is improper even when the unadmitted evidence is not sent to the jury room during deliberations. Glasmann at ____.

understand why an accused person's booking photo should ever be shown to jurors (except possibly in some cases where identity is at issue); the addition of the word "Guilty" magnifies the inherent prejudice and can only be seen as an appeal to passion, prejudice, and emotion, in an attempt to sway jurors by improper means. *Id.*

In this case, the prosecutor showed jurors numerous PowerPoint slides similar to those at issue in *Glasmann*. Mr. Walker's booking photo was displayed in four slides, with four separate captions: "Shoot the mother f*cker," "Major participant" (with associated arrows),³ "Guilty beyond a reasonable doubt," and "We are going to beat this." Ex. 243, pp. 1, 78, 87, 89. The prosecutor's misconduct also included other slides, with photos captioned "Money is more important than human life," and "This is how you murder and rob n*ggers next time it will be more money." Ex. 243, pp. 5, 89.

Similarly captioned photographs were used throughout the prosecutor's closing argument in *Glasmann*. The Supreme Court found the prosecutor's use of such images violated the defendant's right to a fair trial in that case. *Glasmann*, at ____.

³ Like the word "Guilty," the layout of the slide and the use of the 6 arrows were intended to produce an emotional response rather than a rational consideration of the evidence. *Glasmann*, at ____.

Such misconduct is flagrant and ill-intentioned, and could not have been cured by an instruction had defense counsel objected. *Glasmann*, at _____. First, the improper images pervaded the entire closing argument. Second, the prosecutor accompanied his presentation with improper comments conveying his personal beliefs. See Appellant’s Opening Brief, pp. 57-79. Third, as noted in *Glasmann*, “[h]ighly prejudicial images may sway a jury in ways that words cannot.. [and thus] may be very difficult to overcome with an instruction.” *Id.*, at _____. Jurors are particularly susceptible to this sort of misconduct when it occurs during closing arguments. *Id.*, at _____.

The misconduct was especially egregious in this case. Throughout the trial, the jury became accustomed to seeing evidence on screen after it had been admitted and publication approved by the judge. Jurors may well have assumed that the judge approved the slides of altered exhibits used by the prosecutor during closing arguments here.

As in *Glasmann*, “[t]he prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts.” *Id.*, at _____.

There is a substantial likelihood that the misconduct affected the verdict. These appeals to the emotions and passions of the jury, as argued in earlier briefing, could not be cured by an instruction. The case against

Mr. Walker with respect to his accomplice liability was circumstantial regarding premeditation, and Mr. Walker did not present a defense case. By conveying personal opinions and appealing to passion, prejudice, and emotion, the prosecutor improperly and repeatedly put his thumb on the scale.

The prosecutor's efforts to manipulate jurors to convict without critically examining the evidence denied Mr. Walker a fair trial. *Id.*, at _____. Accordingly, Mr. Walker's convictions must be reversed, and the case remanded for a new trial. *Id.*

II. MR. WALKER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const.

Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22. of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996). (the state’s argument that counsel “made a tactical decision by

not objecting to the introduction of evidence of ... prior convictions has no support in the record.”)

C. Mr. Walker was denied the effective assistance of counsel by his attorney’s failure to object to repeated instances of prosecutorial misconduct that were flagrant and ill intentioned.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge v. Hurley, 426 F.3d 368, 386 (6th Circuit, 2005).

Here, defense counsel should have objected to the flagrant and ill intentioned misconduct outlined above. Just as a prosecutor “must be held to know” that the misconduct engaged in here is improper, so, too, must defense counsel be charged with knowledge that the attempt to influence deliberations through “deliberately altered” evidence constitutes objectionable misconduct. See Glasmann, at ____.

As in Glasmann, the prosecutor’s misconduct here during closing was pervasive, flagrant, and ill intentioned: he expressed his personal opinion, used the power and prestige of his office to sway jurors, relied on

appeals to emotion, passion, and prejudice rather than reason, and displayed exhibits that had been deliberately altered to manipulate jurors into voting guilty.

As the Supreme Court noted, “[t]he case law and professional standards... were available... and clearly warned against the conduct here.” *Glasmann*, at _____. Counsel’s performance thus fell below an objective standard of reasonableness: at a minimum, Mr. Walker’s lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

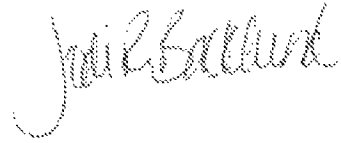
Furthermore, Mr. Walker was prejudiced by the error. The prosecutor’s improper multimedia show substantially increased the likelihood that jurors would vote guilty based on improper factors. See *Glasmann*, at _____. The failure to object deprived Mr. Walker of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, the convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on December 7, 2012.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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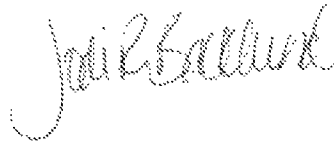
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 7, 2012.



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BACKLUND & MISTRY

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