NO. 43658-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOEL E. LEWIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Wm. Thomas McPhee, Judge
Cause No. 11-1-01979-2

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 638-2106

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03. The trial court erred in failing to dismiss Lewis's conviction where the cumulative effect of the claimed errors materially affected the outcome of the trial.

04. The trial court erred in the manner set forth by Lewis's co-appellant, Mickelson, in his brief, which assignments of error applicable to Lewis are adopted and incorporated herein pursuant to RAP 10.1(g).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the prosecutor's closing argument, which commented on Lewis's constitutional right to remain silent, created a false choice, argued facts not in the record and called the jury's attention to matters it had no right to consider, constituted prosecutorial misconduct that denied Lewis a fair trial? [Assignment of Error No. 1].

02. Whether Lewis was prejudiced as a result of his counsel's failure to properly object to the prosecutor's closing argument that impermissibly commented on his constitutional right to remain silent? [Assignment of Error No. 2].

03. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Lewis's conviction? [Assignment of Error No. 3].

04. Whether the trial court erred in the manner set forth by Lewis's co-appellant, Mickelson, in his brief, which assignments of error applicable to Lewis are adopted and incorporated herein pursuant to RAP 10.1(g)? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Joel E. Lewis, was charged by first amended information filed in Thurston County Superior Court on May 31, 2012, with assault in the second degree by inflicting substantial bodily harm or, in the alternative, assault in the second degree with a deadly weapon, with each alternative including a deadly weapon enhancement, contrary to RCWs 9A.36.021(1)(a)(c), 9.94A.825 and 9.94A.533(3). [CP 26-27].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7-8]. Trial to a jury commenced on May 29th, the Honorable Wm. Thomas McPhee presiding.[1] Lewis was found guilty of assault in the second degree while armed with a deadly weapon and sentenced within his standard range. [CP 57-59]. The court denied his

[1] Lewis was tried with his co-defendant, Richard A. Mickelson.

motion for a new trial and timely notice of appeal followed. [RP 07/03/12 13-16; CP 128]. [2]

02. Substantive Facts: Trial

On Friday, December 23, 2011, at approximately 2:00 in the morning, police responded to a reported assault in Thurston County, Washington. [RP 46-49]. The alleged victim, Nathaniel Abbett, explained that after talking on the telephone with his ex-girlfriend, Misty Rasmussen, during which the two said "hurtful things to each other(,)" he went outside planning to go to a local bar [RP 539-40], at which point he observed a green Honda Civic belonging to Jaime Hadley, a friend of Rasmussen's, twice pass his house, "as if casing (the place) out." [RP 546, 548].

Abbett got into his dad's Jeep and began to follow the car. [RP 546]. When it stopped in the middle of the road, Abbett pulled the Jeep off to the side. [RP 549]. Hadley was driving the Honda, from which Lewis and Mickelson quickly exited before assaulting Abbett for no more than a minute. [RP 552, 560-61, 591]. Michelson struck Abbett on the left temple near his eye with a baseball bat through the driver's window before climbing into the Jeep and repeatedly striking him with his fists and

[2] Unless otherwise indicated, as here, all references to the Report of Proceedings are to the transcripts entitled Volumes 1-8.

biting his face. [RP 555-56, 558, 611, 620]. Near the same time, Lewis shattered the passenger's window with a bat and began using it to hit Abbett. [RP 558-60, 622-232]. The assault stopped when Lewis started yelling "that copes were coming." [RP 561]. As a result of the incident, Abbett suffered numerous lacerations to his face and "there were significant amounts of glass" in his left ear. [RP 104].

Lewis and Mickelson were arrested shortly thereafter. [RP 54-56, 170, 237, 239]. "(M)ultiple little glass shards" and "fresh blood stains" were found in the green Honda. [RP 64]. An aluminum baseball bat with glass on it was found near the scene. [RP 258, 262, 267].

Lewis presented a different version of the events, relating that Rasmussen and Abbett had an "ugly (telephone) conversation" on the evening of December 12 [RP 995], somewhere "around 9:00 or 10:00." [RP 999]. "The phone was on speaker phone, and (Abbett) … asked to talk to me." [RP 998]. "He wanted me to come over." [RP 999]. "Situations like this have happened in the past, and I have been a go-between to calm them both down." [RP 1005].

About midnight, Hadley agreed to drive Lewis to Abbett's, and Mickelson decided to go along to keep Hadley company. [RP 1004, 1076, 1078]. When they got there, Lewis saw "people outside of the house and … two cars that I didn't recognize." [RP 1010]. "I didn't feel like going

... over there after that." [RP 1010]. When Hadley drove to the end of the road and turned her car around to head home, a Jeep driven by Abbett pulled up and blocked her way. [RP 1002-03, 1011]. Lewis and Mickelson got out of Hadley's car to go talk with Abbett [RP 1013-14], who unexpectedly "(g)unned his jeep, accelerated it, floored his Jeep, and hit Mr. Mickelson." [RP 1015]. "(P)edal to the metal, I guess you could say." [RP 1017]. Mickelson was hanging out of the driver's side window, "half in, half out, I would say. Maybe more out than in." [1022]. Hadley corroborated this sequence of events. [RP 715-16, 721-23, 788]. Lewis approached the jeep on the passenger's side and saw Mickelson and Abbett "in a struggle." [RP 1026]. "(I)t was frantic. There was a battle going on." [RP 1026]. In an attempt to get Mickelson out of the Jeep, Lewis broke the window with his right elbow. [RP 1028]. "(I)t blew out," with glass going everywhere. [RP 1029]. "I was trying to pull (Abbett) this way so (Mickelson) would be able to exit the vehicle." [RP 1029].

> After I was able to flail out, I believe I ended up actually probably striking both of them, not intentionally or anything, but just when I was flailing out, grabbing them, they - - I was able to separate them. And I was like, "come on, let's go. Let's go." And then (Abbett) kept trying to grab (Mickelson). And I was like "cops, cops, cops," because I figured that would just diffuse the situation. I went back to the car, and a few seconds later (Mickelson) was getting into the car.
> ....
> And then we got out - - we - - we left.

[RP 1030].

When arrested, Mickelson denied any involvement in the incident and never mentioned being hit by a car. [RP 179, 181]. At trial, however, his testimony mirrored much of Lewis's, and he described being hit by Abbett's Jeep: It "revved up, came directly towards me, and hit me right here. I kind of pushed up and out of the way. I hit the ground." [RP 1187]. "I look up, and I see him on - - just a few, like ten feet away from me, revving his motor. I instantly went through the window." [RP 1188]. "I didn't really feel anything at the time." [RP 1189]. He tried to grab the car keys and bit Abbett in the face in an attempt to stop the Jeep and make sure he didn't get hit again. [RP 1188, 1191, 1193]. "It was me trying to subdue him…." [RP 1196]. Mickelson returned to Hadley's car when he heard Lewis say, "'cops.'" [RP 1198]. Like Lewis, he denied using a baseball bat to assault Abbett. [RP 1009, 1186].

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D. ARGUMENT

01. THE PROSECUTOR'S CLOSING ARGUMENT, WHICH COMMENTED ON LEWIS'S CONSTITUTIONAL RIGHT TO REMAIN SILENT, CREATED A FALSE CHOICE, ARGUED FACTS NOT IN THE RECORD AND CALLED THE JURY'S ATTENTION TO MATTERS IT HAD NO RIGHT TO CONSIDER, CONSTITUTED PROSECUTORIAL MISCONDUCT THAT DENIED LEWIS A FAIR TRIAL.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

01.1 Standards of Review

Where it is established that the prosecutor made improper comments, this court reviews whether those improper statements prejudiced the defendant under one of two different standards of review. State v. Emery, 174 Wn. 2d 742, 761, 278 P.3d 653 (2012).

Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so

flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

However, where the State's misconduct violates a defendant's constitutional rights, this court analyzes the prejudice under a different standard: the stringent constitutional harmless error standard. State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996). Under this standard, this court presumes constitutional errors are harmful and must reverse unless the State meets the heavy burden of overcoming the presumption that the error is prejudicial, Id. at 242, which requires proof that the untainted evidence overwhelmingly supports a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

A prosecutor's obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause?

Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

01.2 Improper Comment on Lewis's Right to Remain Silent

The privilege against self-incrimination, or the right to remain silent, is based upon article I, section 9 of the Washington State Constitution and the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. Miranda v. Arizona, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). In Washington, a defendant's constitutional right to silence applies in both pre- and post-arrest situations. State v. Easter, 130 Wn.2d at 243.

The scope of this protection extends to comments that may be used to infer guilt from a defendant's silence, see State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Although Lewis did not object to the prosecutor's comment on his right to remain silent, he may raise this issue, which had a practical and identifiable consequence in the trial of this case, and which is a manifest error affecting a constitutional right, for the first time on appeal. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255

(2002) (citing State v. Curtis, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002); State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); RAP 2.5(a).

Even without an explicit reference to Miranda, a prosecutor may be deemed to have purposely elicited the fact of silence in the face of arrest. In the Ninth Circuit case of Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), the court held the following exchange between the prosecutor and the arresting officer was the sort of inquiry forbidden by the Supreme Court in Miranda and Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

> Q. Who arrested Mr. Douglas?
> A. I did.
> Q. Did he make any statements to you?
> A. No.

State v. Curtis, 110 Wn. App. at 14 (quoting Douglas v. Cupp, at 267.

In closing argument, the prosecutor did not refer directly to the fact that Lewis invoked his Miranda rights when arrested. He did, however, argue that he was warranted in pinning down the defendants' statements:

> (W)hy did I spend so much time with these defendants dissecting what they said. Because they never said it before. I don't have something to pin them down on, do I? I don't have a transcript to go, didn't you say that at page 3, line 12, six months ago that this happened? Did I have that ability? I didn't. Why didn't I? Because they never gave statements.

[RP 1483].

The prosecutor was plainly urging the jury to consider Lewis's failure to give a prior statement as evidence of his guilt, to infer guilt from his silence in not explaining his story when he was arrested. And whether viewed as a direct or indirect reference to Lewis's right to remain silent, it constitutes a constitutional infringement upon this right. See State v. Romero, 113 Wn. App. at 790-91. It was intended to denigrate Lewis and undermine his only defense: His version of the events. And there can only be agreement that the State exploited this during closing argument.

The effect of this had a high potential for prejudice, and represents a serious irregularity. This court should be unwilling to assume that the jury missed the State's message. In the end, this case essentially turned on whom the jury was going to believe. Lewis, as did Mickelson, denied the charges. His credibility was central to the case; it was his only defense.

The argument at issue is a direct comment on Lewis's silence, and this court cannot say the State did not exploit Lewis's exercise of his right to remain silent. Nor can it be asserted that the evidence presented was so overwhelming that it necessarily leads to a finding of guilt. This court must reverse Lewis's conviction.

01.3 False Choice

During the State's closing argument, the prosecutor

told the jury:

> … Either you folks believe that this was an Assault in the Second Degree or it was self-defense. And you shouldn't consider any other charge. Because either it happened the way that they said it happened, or it happened the way that Nate Abbett told you. There is no in between.

[RP 1392].

> If you do not believe Mr. Abbett and you believe Mr. Michelson and Mr. Lewis, that they were acting in self-defense, then you are equally obligated to find them not guilty of anything….

[RP 1485-86].

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991), it is misconduct of the most flagrant degree to minimize the burden of proof and thereby encourage the jury to convict based on something short of proof beyond a reasonable doubt, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997); State v. Davenport, 100 Wn.2d at 763. If the jury believed Abbett, it did not have to find Lewis guilty. This is a false dichotomy. An alternative would have been that it, the jury, had only to entertain a reasonable doubt as to the State's case. In this regard, to the extent that implicit in the prosecutor's closing argument is a false choice, i.e., that the jury could

find Lewis not guilty only if it did not believe Abbett, it was flagrant misconduct. State v. Miles, 139 Wn. App. 879, 889-90, 162 P.3d 1169 (2007). The jury was within its right to conclude that although it believed Abbett, it was also not satisfied beyond a reasonable doubt that Lewis was guilty of the charged offense.

There can be no question that the prosecutor's argument misstated the jury's role, and in the process misstated and minimized the prosecutor's burden of proof by implying that the jurors were to figure out who they thought was telling the "truth" and decide based upon that choice. But that is akin to tasking them with choosing "which version of events is more likely true, the government's or the defendant's." See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events they think is more likely to be true and then rely on that "preponderance" standard in rendering their verdict. Id.

The State's argument forced the jury to choose between two conflicting versions of the events, thus presenting the jury with a false choice and shifting the burden of proof. It was a clear implication that in order to acquit, the jury had to believe Abbett was lying, and that they could find Lewis not guilty only if they believed his evidence. State v.

Miles, 139 Wn. App. at 890. This was reversible error, for the jury "only had to entertain a reasonable doubt as to the State's case." Id.

01.4 Facts Not in Record and Improper Considerations

It is misconduct for a prosecutor to argue facts not in the record or to call the jury's attention to matters the jury has no right to consider, see State v. Warren, 165 Wn.2d 17, 44, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009), which unfortunately happened in this case during the prosecutor's rebuttal argument when he resorted to describing the defendants and their witnesses as people who drink all day, don't have real jobs and really don't like cops. In his own words: "the underbelly of society." [RP 1478]. All of this in the performance of his duty to ensure the defendants received a fair trial.

> But what I am attempting to show you is that these people don't live under the same rules of society, the same way that most of us live. They don't think the same way that a citizen that you probably interact with a lot lives. This is kind of the underbelly of society. I don't mean that in a bad way. It's just a side of society that I'd suspect that most of you don't see very often. We see it all the time, but you don't. So I'm trying to present that evidence to you so that you understand.
>
> But these people don't have jobs. They work under the table. They live hand to mouth. They are engaged in drinking all day. They get upset with one another. They fight. That is the type of people that we're talking about.

....

> The other part of that could be - - and I won't quarrel with this now - - is that that part of society doesn't like the cops. I don't like the cops no matter what. And that's this part of society.

[RP 1477-78].

This is flat-out wrong, far more than a mere suggestion to that effect, and definitely beyond any permissible latitude in closing argument. What a prosecutor believes or the scope of his or her extrajudicial governmental experience ("We see it all the time, but you don't.") are of no concern in a jury's determination of whether the State satisfied its burden of proof. See United States v. Brooks, 508 F.3d 1205, 1209-10 (9th Cir. 2007).

> Referring to defendants as "bad people" simply does not further the aims of justice or aid in the search for truth, and is likely to inflame bias in the jury and to result in a verdict based on something other than the evidence.

United States v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996).

01.5 Conclusion

Given that the presumption of innocence is the bedrock upon which the criminal justice stands, and the fact that the evidence of Lewis's guilt was neither clear-cut nor overwhelming, the prosecutor's misconduct in this case was nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds,

thereby minimizing the State's burden of proof and in the process ensuring that Lewis did not receive a fair trial. Reversal is required.

02. LEWIS WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TO PROPERLY OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT THAT IMPERMISSIBLY COMMENTED ON LEWIS'S CONSTITUTIONAL RIGHT TO REMAIN SILENT.[3]

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

[3] While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court determine that counsel waived the issue by failing to properly object to the prosecutor's closing argument that impermissibly commented on Lewis's constitutional right to remain silent, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel would have failed to so object to this testimony for the reasons previously argued herein. Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident for the reasons set forth in the preceding section.

Counsel's performance thus was deficient because he failed to properly object to the testimony here at issue for the reasons previously

agued herein, which was highly prejudicial to Lewis, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

03. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF LEWIS'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Lewis's conviction, the cumulative effect of these errors materially affected the outcome of his trial and his conviction should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

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04. LEWIS ADOPTS AND INCORPORATES BY REFERENCE THE ARGUMENTS APPLICABLE TO HIS CASE AS RAISED BY CO-APPELLANT MICKELSON.

RAP 10.1(g) provides:

> Briefs in Consolidated Cases and in Cases Involving Multiple Parties. In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may (1) join with one or more of the other parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief of another.

[Emphasis added].

Pursuant to this rule, Lewis adopts and incorporates by reference the arguments applicable to his case as raised by co-appellant Mickelson.

E. CONCLUSION

Based on the above, Lewis respectfully requests this court to reverse and remand.

DATED this 17th day of December 2012.

Thomas E. Doyle

THOMAS E. DOYLE
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne paoappeals@co.thurston.wa.us	Joel E. Lewis #816145 S.C.C.C. 191 Constantine Way Aberdeen, WA 98520

DATED this 17th day of December 2012.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

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