No. 44710-0-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAYMOND S. REYNOLDSON

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 06-1-01238-2

REPLY BRIEF OF APPELLANT

BRETT A. PURTZER
WSB #17283
CASEY M. ARBENZ
WSB #40581

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

Table of Contents

TABLE OF AUTHORITIES

Cases

Other Authorities

I. STATEMENT OF THE CASE

Mr. Reynoldson relies on the facts set-forth in his opening brief.

II. ARGUMENT

1. *Mr. Reynoldson was subjected to at least 12 instances of prosecutorial misconduct during closing argument.*

In In re the Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673, 675 (2012) our Supreme Court stated:

> The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 22 of the Washington State Constitution. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'"

Id. At 677 (internal citations omitted).

More recently, in State v. Lindsay, Docket # 88437-4 (5/08/2014), our Supreme Court emphasized a prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id (citing State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

As has been shown, in its closing argument during Mr. Reynoldson's trial, the state made the following remarks:

- "I would like to go back through at least we are all on the same page on what it is that *the State believes* that the information that was elicited from these witnesses." RP (9/29/10) 1044.
- "He tries to pull her back into the house. And *thank God* for the neighbor Deborah Tarnecki." RP (9/29/10) 1056.
- "She [the alleged victim] *told the truth.*" RP (9/29/10) 1063.

- "She [the alleged victim] *told the truth* as she told you the events that took place on that day while she was seated in that box for you to be able to witness and see how her demeanor as she described those events to you." RP (9/29/10) 1064.

- "So the defendant is guilty – *we believe* that we have proven each of these elements beyond a reasonable doubt." RP (9/29/10) 1084.

- "At a minimum the rape in the – the Attempted Rape in the Third Degree, but *we believe* that we have proven the Attempted Rape in the First Degree." Id.

- "Once you do, *we believe* that you should be or should have an abiding belief in the truth of the charge." RP (9/29/10) 1088.

- "What I would submit to you is that when [the alleged victim] testified to you, *she was honest*." RP (9/29/10) 1089.

- "She [police officer] got up there and *looked honest*." RP (9/29/10) 1090.

- "These [the state's witnesses] are *credible people*." RP (9/29/10) 1091.

- "[The alleged victim] *can be believed*." RP (9/29/10) 1123.

- "She [the alleged victim] didn't come in here with any false pretenses. *She told you like it was*."

RP (9/29/10) 1125.

Respondent has attempted to dissect each of these remarks and trivialize their value – repeatedly contending that Mr. Reynoldson cannot prove the remarks were flagrant or ill intentioned. BOR at 15-25. Respondent then latches on to Mr. Reynoldson's assertion that the trial hinged on the credibility of the witnesses and launches into several pages of its version of the facts in this case. BOR at 11-15. Respectfully, respondent misses the point.

There can be no doubt that each of the twelve remarks – to varying degrees – "thr[ew] the prestige of [the prosecutor's] public office … and the expression of [the prosecutor's] *own belief of guilt into the scales* against the accused." Glasmann, 175 Wn.2d at 677 (emphasis added). In Glasmann, the Court took special exception where the prosecutor expressed his personal views. Specifically, the Court cited the commentary on the *American Bar Association Standards for Criminal Justice* std. 3-5.8, which emphasizes:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

Glasmann, 286 P.3d at 679 (*quoting American Bar Association Standards for Criminal Justice* std. 3-5.8).

Our Supreme Court again cited this ABA standard in its recent decision in State v. Lindsay, Docket # 88437-4 (5/08/2014), holding that a prosecutor's expression of personal opinion as to the credibility or guilt of the accused constitutes misconduct and violates the advocate-witness rule, which 'prohibits an attorney from appearing as both a witness and an advocate in the same litigation.

Lindsay, at 16 (internal quotations and citations omitted).

Arguendo, it is conceivable that one or two of the above remarks could be offset or ignored; perhaps the product of a mistake or misstatement. However, this Court cannot, respectfully, find that the *twelve* instances of misconduct in this case did not suggest that the prosecutor and her office *believed* the defendant was guilty and wanted the jury to know just that. That the office has inherent prestige that is directly mentioned in the ABA standard set-forth above and presumed "fact-finding facilities" available to the office further tips the balance in such a manner so as to deny Mr. Reynoldson a fair trial.

Respondent repeatedly contends that Mr. Reynoldson cannot show the remarks were "flagrant and ill-intentioned." However, as pointed out above, while one or two remarks might be mistakes, twelve remarks cannot be considered anything but flagrant and intentional. If the remarks were intentional then they were ill-intentioned given the above stated standards for prosecutors within our criminal justice system as set-forth by the ABA.

Importantly, in Lindsay, the prosecutor commented during closing argument that the defense counsel's closing was "a crock" and that the defendant's testimony was "funny," "disgusting," "comical" and "the most ridiculous thing I've ever heard." Id. at 16. On appeal, in a 2-1 decision filed on November 7, 2012, this Court found misconduct but declined to find prejudice. State v. Lindsay, 171 Wn.App. 808, 288 P.3d 641 (2012). The case was appealed and, in a 9-0 decision the Supreme Court agreed

that the prosecutor committed misconduct and cited Glasmann for the proposition that "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect" and that reversal is required. Lindsay at 23. The Court stated:

> Under the circumstances, there is a substantial likelihood that the prosecutor's calling the defense's closing arguments "a crock," telling the jury that defendant Holmes should not "lie," and labeling her testimony "the most ridiculous thing I've ever heard" influenced the jury's verdict.

Lindsay at 22-23.

Perhaps recognizing that this case is similar to Lindsay – and that there were far more instances of misconduct during closing argument than in Lindsay – Respondent's brief provides a lengthy recitation of its version of the "facts" of the case – apparently attempting to show that the case against Mr. Reynoldson was strong. BOR at 11-15.

However, as previously argued, there was no physical evidence or eyewitness testimony from others besides the alleged victim to support that *kidnapping, attempted rape and assault actually occurred in Mr. Reynoldson's bedroom.* There was circumstantial evidence and eyewitness testimony after the alleged victim threw herself through the window, but as it relates to direct evidence of what occurred in the bedroom, this was a "he said/she said" case that originated with agreed acts of prostitution.

In his opening brief, Mr. Reynoldson pointed out the numerous inconsistencies with the alleged victim's stories. Therefore, without independent evidence of guilt, it is clear that the state benefited from repeatedly emphasizing what it believed and its misconduct affected the jury's verdict and denied Mr. Reynoldson a fair trial.

Finally, while this Court has previously declined to consider the written statement of juror Ortiz regarding her doubts about the case, now that that note is part of the official record, this Court should take notice that the state's case did hinge on credibility and at least one juror was holding out for a not-guilty verdict until she was "bullied" by the other jurors – see below.

Because the remarks constituted clear prosecutorial misconduct and influenced the jury's verdict respectfully, reversal is required.

2. *Mr. Reynoldson did not receive effective assistance of counsel.*

Respondent makes four unsupported assertions in favor of its position that counsel was not ineffective for failing to object during the twelve improper remarks during the state's closing argument. BOR at 27. They are as follows:

1. Most, if not all of the state's comments do not constitute improper vouching of a witness and therefore an objection would not have been proper.
2. Mr. Reynoldson must demonstrate that the trial court would have sustained the objection[s].

3. One could reasonably argue that [not objecting] was a reasonable strategy or tactic.
4. Given the substantial corroborating evidence Mr. Reynoldson cannot "meaningfully support an argument" that the results of the trial would have been different but for the twelve improper statements.

BOR at 27.

Respectfully, none of these assertions actually qualify as arguments – as they are not supported by warrants, backing or any evidence. As stated, they are simply assertions. Nonetheless, Mr. Reynoldson will address them in order.

Respondent's first assertion is that "most, if not all" of the statements do not constitute improper vouching. Obviously, it is clear that respondent admits some of the statements likely did constitute improper vouching. Therefore, where counsel did not object to those remarks, he was ineffective. Further, each of the twelve remarks very obviously includes language showing what the prosecutor *believes*; i.e. what it believes was the important evidence, who it believes was telling the truth, what it believes it has proven, what it believes the jurors should believe, who it believes was honest, who it believes looks honest, who it believes is credible, who it believes can be believed, and who it believes testified "like it *was*." RP (9/29/10) 1125 (emphasis added). Respondent's assertion that these remarks were not objectionable is totally contrary to the massive

body of law cited by Mr. Reynoldson stating otherwise. It is totally contrary to the ABA standard cited in Glasmann. As such, respondent's first assertion is incorrect.

Respondent's second assertion is that Mr. Reynoldson must show that objections to the remarks would have been sustained. Respectfully, by citing the numerous cases mentioned in his opening brief and above, he has made such a showing.

Third, respondent alleges not objecting to the remarks was possibly a legitimate trial tactic. The state cites no authority for this assertion and no analysis as to what could possibly be gained by allowing the prosecutor, and the state, to use its inherent prestige and credibility to testify to the jury as to what it believes Mr. Reynoldson was guilty of. As has been pointed out, credibility is critical in this case. Because it shows no discernable strategy or tactic, respondent's third argument fails.

Finally, respondent contends Mr. Reynoldson can't show that the results of the trial would have been different but for counsel's failures. While this is – as previously mentioned - a somewhat ambiguous and subjective standard, it is clear that in this case the credibility of the witnesses was the determinative factor. There was no physical evidence or eyewitness testimony from others besides the alleged victim to support that kidnapping, attempted rape and assault actually occurred in Mr. Reynoldson's bedroom. There was circumstantial evidence and eyewitness testimony after the alleged victim threw herself through the

window, but as it relates to direct evidence of what occurred in the bedroom, this was a "he said/she said" case that originated with agreed acts of prostitution.

In his opening brief, Mr. Reynoldson pointed out the numerous inconsistencies with the alleged victim's stories. Therefore, without independent evidence of guilt, it is clear that the result of the trial would have been different had counsel objected to each of the instances of misconduct and not allowed the state to vouch for the credibility of its witnesses and state its belief that Mr. Reynoldson was guilty.

3. *Mr. Reynoldson was denied his right to a public trial.*

Respondent first asserts the sidebar at issue in this case "may have had to do with a drowsy juror" but then concludes that "the record is silent as to what transpired at sidebar." BOR at 28. Respectfully, it is that acknowledgment by respondent – that what transpired at sidebar is simply unknown – that triggers mandatory reversal of this case.

Respondent cites two cases dealing with attorneys making peremptory challenges during voir dire at sidebar that were not found to violate the right to a public trial. BOR at 29; State v. Dunn, (WL 1379172) Div. 2, Apr. 2014; State v. Love, 176 Wn.App. 911, 920, 309 P.3d 1209 (2013). Respectfully, these cases are distinguishable as they dealt with jury selection and the parties and public knew that jury selection was the topic of the sidebar. What was discussed during the sidebar that occurred during the state's closing argument of Mr. Reynoldson's trial is unknown.

Pursuant to State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995), the trial court here was required to make findings if it was going to allow the sidebar, and consider reasonable alternatives to its occurrence. As such, the trial court's actions during Mr. Reynoldson's trial were clearly contrary to the established body of law requiring the entirety of trials to be public and grounds for limited closure to be addressed on the record. See Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); (holding that, before ordering a closure, a trial court must render "findings specific enough that a reviewing court can determine whether the closure order was properly entered."). Because no such record exists here, respectfully, the remedy is a new trial.

4. *Where the jurors relied on extraneous information, Mr. Reynoldson's conviction should be reversed.*

As this Court is aware, in previously addressing the state's appeal of the trial court's decision to grant Mr. Reynoldson a new trial, the sole issue before this Court was whether it could "consider the juror's statement in her affidavit *that she lied when she was polled.*" CP at 376; State v. Reynoldson, 168 Wn.App. 543, 544, 277 P.3d 700 (2012), *review denied* 175 Wn.2d 1019, 290 P.3d 994 (2012). Respectfully, as that is not the issue Mr. Reynoldson has raised here, respondent's arguments relating to "relitigation" or "law of the case" are irrelevant.

The issue raised here is whether the jury relied on extraneous information in their speculation regarding "other times Mr. Reynoldson

may have done this and gotten away with it," and the "necessity of his being locked up." CP at 342. Since no evidence of Mr. Reynoldson's prior crimes was mentioned during his trial, it is obvious that extraneous information was somehow leaked to the jury.

As previously stated, Mr. Reynoldson was sentenced to life following these convictions. Such a sentence is only available if the defendant has prior convictions. It appears the jurors became aware of these convictions and considered and/or relied on them. Respectfully, reversal of Mr. Reynoldson's conviction is appropriate.

III. CONCLUSION

Based on the above cited files and authorities, respectfully, this Court should reverse Mr. Reynoldson's conviction.

DATED this 20th day of June, 2014.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

BRETT A. PURTZER
WSB #17283

CASEY M. ARBENZ
WSB #40581

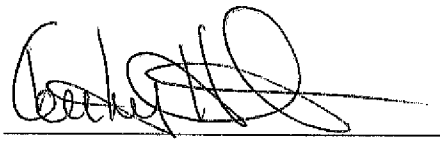
CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Avenue South, #946
Tacoma, WA 98402

Raymond Reynoldson
DOC #981414
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Signed at Tacoma, Washington this 20th day of June, 2014.



KATHY HERBSTLER

HESTER LAW OFFICES

June 20, 2014 - 3:42 PM

Transmittal Letter

Document Uploaded: 447100-Reply Brief.pdf

Case Name: State v. Reynoldson
Court of Appeals Case Number: 44710-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Kathy Herbstler - Email: kathy@hesterlawgroup.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us
leeann@hesterlawgroup.com
kathy@hesterlawgroup.com