74110-1

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Court of Appeals
Division I
State of Washington

NO. 74110-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JUAN GARCIA-MENDEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable John H. Chun, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT WHEN SHE TOLD THE JURY THE DEFENDANT'S ACTIONS WERE "EASILY ATTEMPTED MURDER" BUT HER OFFICE MADE IT EASIER TO CONVICT BY CHARGING HIM ONLY WITH FIRST DEGREE ASSAULT.

In his opening brief, appellant Juan Garcia-Mendez asserts the prosecutor committed flagrant misconduct when she stated the following after reviewing a video tape of the incident: "Now, is this easily an attempted murder? Yeah. But we made it easy for you. Assault in the first degree." Brief of Appellant (BOA) at 8-13 (citing 2RP 1065). In response, the State admits this argument was improper, but claims the prosecutor's misconduct was not flagrant because she did not express a personal opinion on Garcia-Mendez's guilt. Brief of Respondent (BOR) at 23-24. Neither the law nor the record supports this claim.

The prosecutor's statement constituted flagrant misconduct on a number of grounds. First, it is impermissible for a prosecutor to express a personal opinion as to the defendant's guilt. See, State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). Additionally, the prosecutor cannot misuse the power of her office to sway the jury from an independent review of the evidence. See, State v. Reed, 102 Wn.2d 140, 147-48, 684 P.2d 699, 701 (1984). It is also misconduct to divert the jury

away from its duty to make a well-reasoned decision based only upon the evidence before it. See, e.g., In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 705-06, 286 P.3d 673 (2012).

The State claims the prosecutor's reference to an uncharged crime of attempted murder "was not an expression of her personal opinion that Garcia-Mendez was guilty of attempted murder, but rather an inartful attempt to discuss the intent element of the charged crime, assault in the first degree." BOR at 24. Yet, the plain language used by the prosecutor belies this. While the prosecutor never said directly that she personally believed Garcia-Mendez was guilty of attempted murder, this is exactly what was implied when she asked whether his conduct constituted attempted murder and then answered "yeah." A prosecutor does not have to say the magic words "I believe he is guilty." As this case shows, the prosecutor can unmistakably and clearly convey her opinion without using those words. When that happens it is a "grievous departure" from the fundamental notions of the role of the prosecutor in a fair trial process. Reed, 102 Wn.2d at 146-48.

The second question of whether Garcia-Mendez's actions constituted attempted murder had nothing to do with whether the evidence sufficiently proved the requisite intent for assault in the first degree. While the prosecutor's argument – that the intent element for assault had

been sufficiently proven – was not misconduct, she went well beyond this when she discussed Garcia-Mendez's acts as constituting attempted murder and then telling the jury that her office made it easy for them with the lessor charge of assault. The prosecutor essentially invited the jury to consider, as a basis for concluding that the State had proven intent, her personal opinion that Garcia-Mendez's actions constituted attempted murder and that Garcia-Mendez was lucky the state decided to file a lesser charge. As discussed in detail in appellant's opening brief, this line of argument was truly outrageous, highly prejudicial, and constituted flagrant misconduct. See, BOA at 10-13.

The State also suggests that the prosecutor's statement regarding attempted murder was not prejudicial or flagrant because it was "not clear and unmistakable that counsel [was] not arguing an inference from the evidence, but [was] expressing a personal opinion." BOR at 24 (citing State v. McKenzie, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006)). It suggests she was simply arguing inferences from what was seen in the video. However, the State fails to explain how the prosecutor's charging decision was at all a relevant inference to be made from the video. Instead, the prosecutor used the video tape contents not just to draw proper inferences – she used it as a tool to slip in her own legal conclusion regarding attempted murder and then suggested that this was a valid basis

for the jury to easily conclude that Garcia-Mendez was guilty of assault. Hence, this was not a case where the prosecutor was simply arguing proper inferences drawn from facts in evidence.

The State next suggests that the prosecutor's attempted-murder argument was not flagrant because the video "likely caused the jurors to wonder why attempted murder had not been charged." RP 24. However, juror curiosity cannot be assuaged at the cost of the defendant's right to a fair trial. Even if the prosecutor felt Garcia-Mendez's conduct merited more serious charges and that the jury might want to know why the State had decided only to pursue an assault charge, it was not her place to inject the concept of murder into this trial. The State's charging decisions were simply irrelevant to a fair determination of the charge that was actually brought against Garcia-Mendez. It was the prosecutor's job to ensure a fair trial on the charged crime and not to introduce facts that were not in evidence and opinions that were highly prejudicial.

In sum, this Court should reject the State's excuses for the prosecutor's misconduct. The prosecutor's statements were so outrageous and evocative that they can only be characterized as flagrant. There is no place for such conduct in a fair trial. Hence, this conduct standing alone – or when combined with the other misconduct detailed in appellants opening brief – supports reversal.

B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court should reverse appellant's conviction. Alternatively, it should remand for the trial court to impose a 340-month conviction, which reflects the proper standard-range sentence.

DATED this 8th day of September, 2016.

Respectfully submitted,

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