

Supreme Court No. _____
(COA No. 74824-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANTE PIGGEE,

Petitioner.

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

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE..... 1

E. ARGUMENT..... 3

1. Prosecutorial misconduct deprives persons of their right to a fair trial. 4

2. The prosecutor committed misconduct when she argued in her opening statement Mr. Piggee possessed a dealer’s amount of heroin...... 5

3. The prosecutor’s misconduct in opening statements deprived Mr. Piggee of his right to a fair trial...... 7

F. CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)	4
<i>Estelle v. Williams</i> , 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)	4
<i>State v Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976)	6
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005).....	4
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984), <i>cert. den'd</i> , 471 U.S. 1094.....	5
<i>State v. Echevarria</i> , 71 Wn. App. 595, 860 P.2d 420 (1993).....	6, 7
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1075 (1996).....	8
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010)	5
<i>State v. Kroll</i> , 87 Wn.2d 829, 558 P.2d 173 (1976)	5, 8
<i>State v. O'Donnell</i> , 191 Wn. 511, 71 P.2d 571 (1937).....	6, 8
<i>State v. Powell</i> , 62 Wn. App. 914, 816 P.2d 86 (1991), <i>review den'd</i> , 118 Wn.2d 1013	7
<i>State v. Ranicke</i> , 3 Wn. App. 892, 479 P.2d 135 (1970)	6
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011)	4
<i>State v. Trickel</i> , 16 Wn. App 18, 553 P.2d 139 (1976).....	7
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	4
<i>Wheat v. United States</i> , 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)	4

Rules

RAP 13.3.....	1
RAP 13.4.....	passim

Constitutional Provisions

Const. art. I, § 22	4
Const. art. I, § 3	4
U.S. Const. amend XIV	4
U.S. Const. amend. VI.....	4

A. IDENTITY OF PETITIONER

Dante Piggee, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Piggee seeks review of the Court of Appeals decision dated June 19, 2017, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Was Mr. Piggee deprived of his right to a fair trial when the prosecutor committed misconduct by arguing uncharged and more serious charges in her opening statement?

D. STATEMENT OF THE CASE

The police stopped Dante Piggee in downtown Seattle because they could not clearly see his car's license plate. RP 225, 66. Mr. Piggee was not involved in any illegal conduct prior to being pulled over. RP 21. The police were not looking for him or his vehicle. RP 44. The only reason Mr. Piggee was stopped was because of the license plate. RP 21.

Mr. Piggee cooperated with the police, but gave them a driver's license that did not belong to him. RP 24-25, 72. When the police discovered the discrepancy, Mr. Piggee was removed from his car and put into handcuffs. RP 25, 72. Mr. Piggee's own license was suspended. RP 55. He was searched by the police, who discovered heroin in his pocket. RP 267.

Mr. Piggee was charged with possession of a controlled substance, driving with a suspended license in the first degree and identity theft. CP 7-8. At no time prior to his trial did the government allege Mr. Piggee was engaged in delivery of heroin.

When the prosecutor made its opening statement, the prosecutor argued Mr. Piggee was not only guilty of simple possession of a controlled substance, but of possession with intent to deliver. RP 225.

The prosecutor argued:

And it's not just a small amount, not just a user amount, it's about 350 grams of heroin.

RP 225.

Mr. Piggee moved for a mistrial when the prosecutor completed her opening statement. RP 227. The prosecutor argued against the mistrial, stating it was proper argument because Mr. Piggee could have been charged with the greater crime. RP 228.

The court denied Mr. Piggee's motion for a mistrial. RP 230. Mr. Piggee did not ask for an instruction to disregard the prosecutor's argument, on the fear it would draw the jurors attention back to the issue. RP 231.

The jury found Mr. Piggee guilty of possession of a controlled substance and driving while license suspended in the first degree. RP 444. They were unable to reach a verdict on identity theft. RP 444.

E. ARGUMENT

The Court of Appeals found the prosecutor did not commit misconduct when she argued Mr. Piggee's was not deprived of his right to a fair trial by the prosecutor's argument in opening statements that he possessed an amount of heroin beyond what a user would possess. Slip. Op. at 7. The Court also found Mr. Piggee was not prejudiced by the prosecutor's argument. *Id.*

The Court of Appeals decision is in conflict with decisions of this Court and the Court of Appeals, as will be detailed below. RAP 13.4(b). In addition, the right to a fair trial and the avoidance of misconduct are significant questions under the state and federal constitutions. *Id.* Finally, the right to a fair trial involves an issues of substantial public interest that should be determined by the Supreme

Court. *Id.* As such, RAP 13.4(b) is satisfied and Mr. Piggee asks this Court to accept review.

1. Prosecutorial misconduct deprives persons of their right to a fair trial.

The right to a fair trial is a fundamental liberty guaranteed by the Sixth and Fourteenth Amendments and Article I, § 3 and § 22. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Trial proceedings must not only be fair, they must “appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

Every prosecutor has the duty to ensure that an accused person receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). As quasi-judicial officers, prosecutors have a duty to act impartially in the interest “only of justice.” *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Prosecutorial misconduct violates the “fundamental fairness essential to the very concept of justice.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

Prosecutorial misconduct is established where the conduct is found to be both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Prejudice is established when the

court finds there was a substantial likelihood the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The prosecutor committed misconduct when she argued in her opening statement Mr. Piggee possessed a dealer's amount of heroin.

The Court of Appeals found the prosecutor's statement inflating the charges against Mr. Piggee was not improper. Slip Op. at 3. This is in conflict with established precedent and justifies review. RAP 13.4(b). It also involves a significant question of law under the state and federal constitutions, in addition to involving an issue of substantial public interest. *Id.*

Argument has no place in a prosecutor's opening statement. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). Instead, a prosecutor's opening statement must be "confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom." *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984), *cert. den'd*, 471 U.S. 1094.

Prosecutors may not state in their openings that a defendant is guilty of crimes not charged in the information and of a far more serious caliber constitutes misconduct. In *State v Torres*, the prosecutor maintained in opening statements that the defendant could have been

charged with burglary in addition to rape. 16 Wn. App. 254, 256, 554 P.2d 1069 (1976). The court found this statement to be improper. *Id.* at 257. In *State v. Echevarria*, the prosecutor's inflammatory arguments also justified reversal. 71 Wn. App. 595, 599, 860 P.2d 420 (1993). Likewise, in *State v. Ranicke*, the court recognized the long held principle that a defendant must be tried for crimes charged in the information and not on unfounded allegations of other charges. 3 Wn. App. 892, 895, 479 P.2d 135 (1970).

This rule is well established. In 1937, this Court held improper remarks made by a prosecutor are prejudicial. *State v. O'Donnell*, 191 Wn. 511, 519, 71 P.2d 571 (1937). They are especially harmful because they improperly place character evidence into issue and ask the jury to convict a person for specific crimes not charged. *Id.* at 513-14. When a prosecutor makes such remarks in an opening statement, it impacts the decision to testify, as it may be necessary to defend against the uncharged acts rather than whether testifying is necessary to defend against the charged crimes. *Id.*

The prosecutor's argument Mr. Piggee was engaged in drug delivery violated the basic tenets of fundamental fairness. Once the prosecutor suggested Mr. Piggee was not only in possession of the

heroin, but that he intended to deliver it, it became impossible for the jury to render a verdict free of prejudice and based upon the evidence they heard. *Echevarria*, 71 Wn. App. at 598. Mr. Piggee was denied his right to a fair trial.

3. The prosecutor's misconduct in opening statements deprived Mr. Piggee of his right to a fair trial.

When misconduct occurs for which there is no remedy, the trial court should declare a mistrial. *State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), *review den'd*, 118 Wn.2d 1013. Mr. Piggee's motion for a mistrial was timely and should have been granted. The trial court abused its discretion when it failed to grant Mr. Piggee's motion. RP 230.

The Court of Appeals found Mr. Piggee was not prejudiced by the misconduct and the court's failure to declare a mistrial. Slip Op. at 7. Because Mr. Piggee was deprived of his constitutional right to a fair trial and because this ruling is in conflict with established precedent from this Court and the Court of Appeals, RAP 13.4(b) justifies review.

For some misconduct, once the "bell" has rung, it "cannot be unrung." *State v. Trickel*, 16 Wn. App 18, 30, 553 P.2d 139 (1976). Uncharged implications of drug dealing is an example of such misconduct. *Echevarria*, 71 Wn.App. at 598. Likewise, misconduct

committed in opening statements are also frequently incurable. *Kroll*, 87 Wn.2d at 835.

Mr. Piggee's motion for mistrial should have been granted. As this Court has recognized, this type of misconduct fundamentally changes the way Mr. Piggee could defend himself. *O'Donnell*, 191 Wn. at 513-14. Seen as a drug dealer, it impacted his decision to testify and defend himself. *Id.* It was incurable misconduct that entitled Mr. Piggee to a new trial. The Court of Appeals finding to the contrary is in error, conflicting with prior rulings of this Court and the Court of Appeals.

Trained and experienced prosecutors "do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1075 (1996). By arguing in her opening statement Mr. Piggee was a dealer, rather than in simple possession of heroin, the prosecutor committed misconduct. The trial court's decision to deny Mr. Piggee motion for mistrial deprived Mr. Piggee of his right to a fair trial. The Court of Appeals decision This Court should accept review to correct this error. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, petitioner Dante Piggee respectfully requests this that review be granted pursuant to RAP 13.4 (b).

DATED this 19 day of July, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 74824-6-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
DANTE URELL PIGGEE,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>June 19, 2017</u>
)	

Cox, J. – At issue in this appeal is whether the trial court abused its discretion in denying Dante Piggee’s motion for a mistrial based on alleged prosecutorial misconduct during opening statement at trial. Because the trial court did not abuse its discretion, we affirm.

Police stopped Piggee while he was driving in Seattle. After he gave the police another person’s driver’s license, police arrested him for driving with a revoked license. While searching his person incident to arrest, they discovered several plastic bags of heroin.

The State charged Piggee with violating the Uniform Controlled Substances Act by possessing heroin, driving with a suspended or revoked license, and identity theft.

During opening statements, the prosecutor commented on the quantity of heroin found in Piggee’s possession. The prosecutor, said that it was “not just a

small amount, not just a user amount, it's about [1]50 grams of heroin.”¹ The transcript has a typographical error where it states “350 grams,” instead of “50 grams.”²

Defense counsel moved for a mistrial, arguing that the prosecution had implied that Piggee was guilty of possessing the heroin with intent to deliver it. The trial court denied the motion but instructed the State not to ask witnesses about the quantity of heroin one would possess for personal or commercial use.

In closing argument, defense counsel conceded that some of the substance found on Piggee was heroin. The jury found Piggee guilty of violating the Uniform Controlled Substances Act and driving with a suspended or revoked license. The trial court entered its judgment and sentenced on the jury verdict.

Piggee appeals.

MISTRIAL MOTION

Piggee argues that he was denied his right to a fair trial when the prosecutor argued uncharged and more serious crimes in her opening statement. This argument is couched in terms of alleged prosecutorial misconduct that was the basis of his unsuccessful motion for mistrial below. We hold that the trial court did not abuse its discretion in denying his motion.

A trial court may grant a new trial “when it affirmatively appears that a substantial right of the defendant was materially affected . . . [by m]isconduct of

¹ Report of Proceedings (September 16, 2015) at 225.

² Brief of Respondent at 3 n.2; see also Clerk's Papers at 5; Report of Proceedings (September 16, 2015) at 228.

the prosecution.”³ We review for abuse of discretion the trial court’s order denying a new trial on the basis of prosecutorial misconduct.⁴

To show prosecutorial misconduct, the defendant must show the “prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.”⁵

Improper Argument

Piggee argues that the prosecutor made an improper argument in opening statements. We disagree.

The prosecution should confine opening statements “to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom.”⁶ In presenting this statement, the prosecutor should avoid “[a]rgument and inflammatory remarks.”⁷ The prosecutor should instead “seek a verdict free of prejudice and based on reason.”⁸

A prosecutor’s comment may be improperly inflammatory when it threatens to provoke a jury’s passion regarding drug crimes. State v. Echevarria⁹

³ CrR 7.5(a)(2).

⁴ State v. Dawkins, 71 Wn. App. 902, 906, 863 P.2d 124 (1993).

⁵ State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)).

⁶ State v. Campbell, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984).

⁷ State v. Kroll, 87 Wn.2d 829, 834-35, 558 P.2d 173 (1976).

⁸ State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

⁹ 71 Wn. App. 595, 860 P.2d 420 (1993).

is instructive. In that case, the State charged William Ramos Echevarria with delivering cocaine.¹⁰ In opening statement, the prosecutor had repeatedly referred to the war on drugs.¹¹ He “remarked that the jurors knew from the news the identities of the ‘commanders’ and ‘generals’ of the war on drugs.”¹² He spoke of how the “enlisted men” in this war “bec[a]me involved in drugs ‘for the power or the money or the greed or peer pressure.’”¹³ He made coded references to the Vietnam and Gulf Wars, stating that the latter provided “a good example of how to fight a war . . . [.] The one thing we have learned is the way to successfully fight a war is to know who your enemy is, to have a strategy and a direct approach.”¹⁴ The prosecutor implied that the anti-drug police team that investigated Echevarria had adopted such a strategy and approach.

This court characterized such language as “egregious misconduct.”¹⁵ As “a deliberate appeal to the jury’s passion and prejudice,” it “set the tone for the entire trial.”¹⁶ This court concluded that the statements asked the jury to convict

¹⁰ Id. at 596.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id. at 597.

¹⁵ Id. at 598.

¹⁶ Id.

“not on basis of the evidence, but, rather, on the basis of fear and repudiation of drug dealers in general.”¹⁷

It is also improper for the prosecution to reference uncharged crimes in an opening statement. The supreme court addressed such a reference at length in State v. O'Donnell.¹⁸ In that case, the State charged Joseph and John O'Donnell for murdering two police officers.¹⁹ The O'Donnells had criminal records for burglary and robbery.²⁰ The prosecutor highlighted the uncharged crimes in opening statement, stating that “in view of the other burglaries and the records that will show from the evidence, the [S]tate is going to ask you to hang these two men.”²¹

The supreme court concluded that such language violated several basic principles of our criminal justice system.²² It presented inadmissible propensity evidence, invited the jury to impose death for crimes other than those charged, and unconstitutionally required the defendants either testify or “rest under the imputation” of the other collateral crimes.²³

¹⁷ Id. at 599.

¹⁸ 191 Wash. 511, 71 P.2d 571 (1937).

¹⁹ Id. at 512.

²⁰ Id. at 513.

²¹ Id.

²² Id.

²³ Id.

Here, the prosecutor, in opening statement, characterized the heroin found on Piggee as “not just a small amount, not just a user amount, it’s about []50 grams of the heroin.”²⁴

Defense counsel moved for a mistrial. She argued that such language “suggested that Mr. Piggee committed a crime greater than that which he is charged with.”²⁵ She characterized it as “opinion testimony” suggesting that Piggee could have been charged with the greater crime of possession with intent to deliver.²⁶

The trial court denied the motion but “instruct[ed] the State not to ask any questions of witnesses regarding opinions about . . . what quantity one might possess for personal use versus what quantity one might possess for other reasons.”²⁷ But the court also stated that the prosecution witnesses could describe what “they took and they can describe how it’s packaged” so long as the jury was not led to speculate about delivery.²⁸

The prosecutor’s comment is not improper because it is unlike those in Echevarria and O’Donnell. Unlike in Echevarria, the prosecution made no inflammatory reference to the dangers of the drug trade or the character of those involved. And unlike in O’Donnell, the comment did not impute guilt for

²⁴ Report of Proceedings (September 16, 2015) at 225.

²⁵ Id. at 227.

²⁶ Id. at 229.

²⁷ Id. at 230.

²⁸ Id.

possession with intent to deliver, require Piggee to testify in response, or admit improper evidence. It was, rather, a characterization of the amount of drugs as neither “small” nor for a “user.”

This was not misconduct.

Prejudice

Piggee next argues that the prosecutor’s comment prejudiced the result at trial. We disagree.

In order to show prejudice, the defendant must show a “substantial likelihood exists that the improper statements affected the jury’s verdict.”²⁹ Piggee does not explain why the comment was prejudicial, except to state without elaboration that a “cautionary instruction could not have cured the prejudice to Mr. Piggee.”³⁰ Such a remark, without more, does not satisfy his burden.

Further, the record strongly suggests that the jury would have convicted Piggee of possession regardless of the comment. Defense counsel conceded in closing argument that “[s]omething in [bags belonging to Piggee] is heroin, but not everything in here has been established to be heroin.”³¹ The statute under which Piggee was charged requires that the defendant possess a controlled substance in any quantity.³² And the jury instructions did not require the jury to

²⁹ Magars, 164 Wn.2d at 191.

³⁰ Appellant’s Opening Brief at 7.

³¹ Report of Proceedings (September 17, 2015) at 411.

³² RCW 69.50.4013.

find that Piggee possessed a specific quantity. In sum, Piggee cannot show a substantial likelihood that the comment at issue affected his verdict.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Dyer, J.

Becker, J.

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respondent Jennifer Joseph, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[jennifer.joseph@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 19, 2017

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