Supreme Court No. 97443-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

GREGG A. LOUGHBOM
Petitioner

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Court of Appeals, No 35668-0-III
Lincoln County, No 17-1-00028-8

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

WASHINGTON CONSTITUTION, STATUTES AND COURT RULES

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GREGG . LOUGHBOM, Petitioner.	Supreme Court No. 97443-8 Court of Appeals # 35668-0-III Lincoln County # 17-1-00028-8 **RESPONDENT'S ANSWER TO PETITION FOR REVIEW**

COMES NOW, the Respondent, State of Washington, by and through Adam Walser, Special Deputy Prosecuting Attorney for Lincoln County, and respectfully submits this brief.

I. STATEMENT OF THE CASE

Petitioner was charged by the Lincoln County Prosecutor, on May 18, 2017, with the following three offenses: Count I: Delivery of a Controlled Substance, to wit Acetaminophen and Hydrocodone; Count II: Delivery of a Controlled Substance, to wit Methamphetamine; Count III: Conspiracy to Deliver a Controlled Substance, to wit Methamphetamine, Acetaminophen, and Hydrocodone. CP 1-2. On 17 October, 2017, the

Court granted a State's motion to amend the charges of 18 May, 2017, to include a School Zone Enhancement under RCW 69.50.435. Verbatim Report of Proceedings 8-9 (Hereinafter "VRP").

On 18 October, 2017, the matter was tried before a Jury in the Superior Court of Lincoln County Washington. VRP 21. While conducting voir dire of the jury, the Prosecution's final line of inquiry centered on juror bias regarding drug decriminalization policy within Washington State. VRP 52-56. In beginning this inquiry, the Prosecution asked the jury "whether any among you believe that we have a drug problem in Lincoln County?" VRP 53. This question represented the entirety of the Prosecution's reference to any "drug problem" during voir dire and no objection was made by the Defense. VRP 53. The Prosecution followed this statement with an extended period of questioning testing the jury pool's opinions toward decriminalization of specific drugs, decriminalization of drugs in general, and the presence of drugs near school zones. VRP 53-56.

During his opening statement, the Prosecution described the subject matter at issue as "another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole." VRP 87. This

was the sole reference to the "War on Drugs" during the Prosecution's opening statement. VRP 87-89. No objection was made to this statement. VRP 87.

During direct examination of Detective Roland Singer, the Prosecution asked the witness "How do you usually recruit confidential informants?" VRP 103. In response, Detective Singer discussed several means by which law enforcement enlist the services of a confidential informant; these included persons seeking to mitigate criminal charges against them as well as persons volunteering to assist law enforcement out of an interest in combatting "the drug problem" that exists in their community. VRP 103. No objection was made to this response by Detective Singer. VRP 103.

A failure of the recording equipment used at Defendant's trial resulted in 103 minutes of trial audio failing to be recorded. VRP 167. The portion of trial which was not recorded included the latter half of the Prosecution's direct examination of Jayne Elizabeth Wilhelm, a Supervising Forensic Scientist for the Washington State Patrol Crime Laboratory, the Prosecution's entire closing argument and a significant portion of the Defense Counsel's closing argument. VRP 167. A Narrative

Report of Proceedings (hereinafter "NRP") was constructed, which included a summary of the State's closing argument. NRP 183-185. No similar summary was made of the missing portions of Defense Counsel's closing argument.

The Prosecution's closing argument, according to the NRP, began with the statement "The case before you represented another battle in the ongoing war on drugs throughout our state and the nation as a whole." NRP 183. The NRP indicates that there was no Defense objection made to the Prosecution's argument. NRP 183-185.

In its rebuttal, the Prosecution argued that "law enforcement cannot simply pick and choose their CIs to be the golden children of our society to go through and try and complete these transactions as they go forward in the ... ongoing war on drugs in this community and across the nation." VRP 168. Additionally, the Prosecution included the following statement in the rebuttal argument:

> "[F]inally, Gregg Loughbom didn't deny anything. Ms. Iverson had stated that Gregg Loughbom denied being any part of this or denied being at these locations. That's not true. Gregg Loughbom didn't deny anything. He didn't

testify and there was no evidence that he ever denied -- no evidence presented that he ever denied anything.

Now, I'm not suggesting that you can use his silence against him. Of course not. There's an instruction against that. I'm merely suggesting that at no time did Gregg Loughbom ever deny that as she has presented in her arguments." VRP 170.

The precise arguments made by Defense Counsel in their closing argument, which the Prosecution was rebutting were not recorded, due to the audio malfunction. VRP 167. Additionally, no reconstruction of the missing portions of the Defense Counsel's closing argument was created in the narrative report of proceedings. NRP 183-185. No objection was made to the Prosecution's reference to either the war on drugs, or the Prosecutions rebuttal of Defendant's alleged denial. VRP 168, 170 & NRP 183.

Petitioner was found guilty of counts II & III and was sentenced to 40 months in prison, 12 months of community custody as well as legal and financial obligations. CP 76-78. Petitioner filed an appeal, which alleged

the following (1) flagrant and ill-intentioned misconduct on behalf of the Prosecutor through statements made at trial concerning the "war on drugs"; (2) improper references by the Prosecutor to Petitioner executing his right to remain silent; (3) failure of Petitioner's trial counsel to object to the Prosecutor's statements amounted to ineffective assistance of counsel; (4) failure of Petitioner's trial counsel object to allegedly hearsay statements by Detective Singer amounted to ineffective assistance of counsel; (5) denial of right to a fair trial on the basis of cumulative errors; and (6) that the evidence presented by the State at trial was insufficient to support conviction of the Petitioner. The Court of Appeals affirmed Petitioner's convictions in a majority opinion.

II. ARGUMENT

A. The Comments of the Prosecutor Were Neither Flagrant nor Ill-Intentioned

The Prosecutor's comments at issue in the Petitioner's brief were well within acceptable bounds of argument by a prosecutor. The decision of the Appellate Court was in keeping with the prior decision of both

itself, the other Appellate Courts and the Washington State Supreme Court. Petitioner's brief asks this Court to carve out an entirely new standard, which would effectively pronounce any utterance of the words "war on drugs" as a spring board to mandatory reversal, regardless of intent, context or prejudicial effect.

1. Legal Standard

"A defendant who alleges improper conduct on the part of a prosecutor must first establish the prosecutor's improper conduct and, second, its prejudicial effect." *State v. Dhaliwal*, 150 Wn. App. 559, 578. (2005). If an appellant is able to establish that the prosecutor's conduct was improper, "prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628 (citing *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981)).

"When alleged error can be obviated by asking the court to give a corrective instruction or admonition, the defendant has a duty to make that request." *State v. Crawford*, 21 Wn. App. 146, 152-153 (1978) (Citing *State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968); *State v. Green*, 70 Wn.2d 955 (1967); *State v. Webster*, 20 Wn. App. 128 (1978)). "Unless

prosecutorial conduct is flagrant and ill intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction." *State v. Charlton*, 90 Wn.2d 657, 661 (1978) (Citing *State v. Morris*, 70 Wn.2d 27, 33 (1966); *State v. Huson*, 73 Wn.2d 660 (1968); *State v. Music*, 79 Wn.2d 699, 489 P.2d 159 (1971)).

The Washington State Supreme Court has held that a prosecutor's comments should be reviewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *State v. Ziegler*, 114 Wn.2d 533, 540 (1990). The burden of establishing that the comments were improper is upon Appellant. *State v. Watkins*, 53 Wn. App. 264, 275 (1989).

2. In Context, the Comments Which Referenced the "War on Drugs" Were Neither Flagrant nor Ill Intentioned.

The determinative factor within the case law cited by Petitioner, is not whether a prosecutor merely stated the magic words "war on drugs." Instead, it is the intended end to which that utterance was a means. This Court has described the prohibited conduct as a Prosecutor asking the jury

to reach a verdict based upon their emotion, rather than their judgment of the evidence. see *Echevarria*, 71 Wash. App. At 598-99; *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).

As stated in the Appellate Court's ruling, the Prosecutor's statements "were imprudent, but ultimately fell short of misconduct." Petitioner's Brief Attachment A. at p. 5. When read in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions" the Prosecutor's comments were made with reasonable intentions and were well within the bounds of appropriate argument. *Ziegler*, 114 Wn.2d at 540. None was associated with a call for "inflame the jurors' emotions" or "urge them to send a message" as was the case in *Solivan*. 937 F.2d at 1153. None were made based on a desire to "urge jurors to convict … in order to protect community values, preserve civil order, or deter future lawbreaking" as was the case in *United States v Monaghan*. 239 F.2d 1434. None of the Prosecutor's statements were "a blatant invitation to the jury to convict the defendant … on the basis of fear and repudiation of drug dealers in general" as was the case in *Echevarria*. 71 Wash. App. at 598-99.

The common stain present in all cases cited by Petitioner are a

prosecutor intentionally and improperly stoking the jury's emotions. The same stain was simply not present at the trial of the Petitioner.

3. Petitioner's Brief Asks this Court to Establish a New and Extreme Precedent

Petitioner's brief presents itself as a simple request to uphold existing case law. But instead, it is a request to carve out a dramatically new, and far more restrictive, rule. As described above, the case law cited in Petitioner's brief contains a common theme. Each involves the prosecutor's "blatant invitation to the jury to convict the defendant … on the basis of fear and repudiation of drug dealers in general." *Echevarria*, at 598-99. The matter presently before this Court contained no such invitation by the Prosecutor.

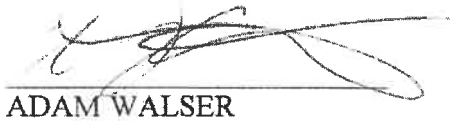
The comments by the Prosecutor in this matter, while ill advised, were exceedingly benign when compared to those in the relevant controlling case law. Granting of Petitioner's requested relief would result in a new, and far more restrictive rule. This rule would effectively declare any mention of the "war on drugs," by a prosecutor, as instantaneous grounds for reversal. Comments which relate to the "war on drugs" may be perilous ground for a prosecutor to tread, but no court cited by

Petitioner has held that this ground is universally forbidden. Petitioner's requested relief, if granted, would create just that rule.

III. CONCLUSION

The Prosecutor's remarks regarding the war on drugs were neither inflammatory or ill intentioned. The decision of the Court of Appeals was consistent with the prior decisions of the other Appellate Divisions and the Washington State Supreme Court. Consequently, Petitioner's request for discretionary review should be denied.

RESPECTFULLY SUBMITTED this 31st day of JULY, 2019



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Certificate of Mailing

I, Tami Odenrider, do hereby certify and declare that I am the administrative assistant to the Deputy Prosecuting Attorney for Lincoln County, and that I deposited in the United States Post office in the City of Davenport, Lincoln County, Washington, on the date below, a properly stamped and addressed envelope(s) directed to the appellant Mr. Corey Parker, at the address of 1275 12th Ave NW, Suite 1B, Issaquah, Washington 98027 containing a true and correct copy of: Respondent's Answer to Petition for Review.

Dated: 7/31/19

Tami Odenrider
TAMI ODENRIDER

LINCOLN COUNTY PROSECUTOR'S

July 31, 2019 - 10:12 AM

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