

No. 73306-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLE ALVIN SAND,

Appellant.

FILED
Apr 07, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The prosecutor committed reversible misconduct during closing argument by referring to prejudicial facts implicating Mr. Sand that were not admitted into evidence.

Mr. Sand preserved his objection to the prosecutor's improper comment by moving for a mistrial. State v. Lindsay, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014). Contrary to the State's argument, Lindsay does not provide that a defendant must request a curative instruction in order to preserve his right to challenge a prosecutor's improper comments on appeal. To the contrary, in Lindsay, just as in this case, defense counsel made a motion for a mistrial due to prosecutorial misconduct directly following the prosecutor's rebuttal closing argument. The Supreme Court held this was sufficient and "the issue was preserved for appellate review." Id. The court noted that, historically, the court "has stated that if the defendant fails to object *or* request a curative instruction at trial, the issue of misconduct is waived ." Id. (emphasis added). The court does not require an objection *and* a request for a curative instruction.

Moreover, the trial court's decision to overrule the objection obviated any need by counsel to request a curative instruction. When a

court overrules an objection to prosecutorial misconduct, it is pointless to request a curative instruction.

Finally, counsel's decision not to request a curative instruction was not a strategic decision to avoid drawing the jury's attention to the statement. Instead, in counsel's view, the prosecutor's comment was "so flagrant and ill-intentioned that there is no curative instruction that could remedy the prejudice." 3/06/15RP 48.

This Court should also reject the State's suggestion the prosecutor's comment was a reasonable interpretation of the evidence. The trial court specifically found otherwise. Having heard the testimony, the court agreed with Mr. Sand that the prosecutor improperly referred to facts not in evidence when he said Ms. Mattila told police she and Mr. Sand had both been inside the house. 3/06/15RP 63-64. The court would have sustained an objection had one been made at the time. 3/06/15RP 64. It would be improper for this Court to override the trial court's judgment and assessment of the evidence. This Court should reject the State's suggestion that the prosecutor's comment did *not* refer to facts not in evidence.

For the reasons provided in the opening brief, the prosecutor's comments were prejudicial and reversal is required.

2. Any request that costs be imposed on Mr. Sand for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations.

This Court has discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, ___ Wn. App. ___, 2016 WL 393719 (No. 72102-0-I, Jan. 27, 2016); RCW 10.73.160(1).

A defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 2016 WL 393719 at *6. Here, the trial court did not require Mr. Sand to pay what it deemed to be discretionary legal obligations. CP 8. The trial court found he is indigent and lacks the ability to pay any of the expenses of appellate review. Sub #113.

As this Court noted in Sinclair, RAP 15.2(f) requires that a party who has been granted such an order of indigency is required to notify the trial court of any significant improvement in financial condition. 2016 WL 393719 at *7. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. Id.; RAP 15.2(f).

As in Sinclair, there is no trial court record showing Mr. Sand's financial condition has improved or is likely to improve in the future.

Given Mr. Sand's continued indigency and the likelihood he will not be able to pay appellate costs, this Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

B. CONCLUSION

For the reasons provided above and in the opening brief, the conviction must be reversed because the prosecutor committed prejudicial misconduct during closing argument. In the alternative, Mr. Sand did not "use" a motor vehicle to commit a felony, and thus the court's order directing the Department of Licensing to revoke his driver's license must be vacated.

Respectfully submitted this 7th day of April, 2016.

/s/ Maureen M. Cyr

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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