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COURT OF APPEALS
DIVISION II

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NO. 40675-6-II

CLERK OF COURT
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

SANDY SCOTT SCHOEPFLIN,

Appellant.

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

The Honorable Rosanne Buckner

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant and ill-intentioned misconduct during closing argument.

2. Appellant was denied his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Is reversal required where the prosecutor committed flagrant and ill-intentioned misconduct during closing misconduct by repeatedly exhorting the jury to do its duty and find appellant guilty and appellant was prejudiced by the misconduct?

2. Is reversal required where defense counsel's performance was deficient because she failed to object to the prosecutor's improper closing argument and appellant was prejudiced by counsel's deficient performance?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On October 16, 2010, the State charged appellant, Sandy Scott Schoepflin, with one count of domestic violence court order violation, alleging that defendant has two previous convictions for violating orders

¹ There is one volume of verbatim report of proceedings: RP - 4/13/10, 4/14/10, 4/15/10, 4/16/10, 4/23/10.

which increases the classification of the crime. CP 1. Following a trial before the Honorable Rosanne Buckner, a jury found Schoepflin guilty as charged on April 16, 2010. CP 45-46; RP 121-23. On April 23, 2010, the court sentenced Schoepflin to nine months in confinement and 12 months of community custody. CP 61-62.

Schoepflin filed this timely appeal. CP 72-84; RP 132-34.

2. Substantive Facts

a. Trial Testimony

On September 17, 2007, at approximately 11 p.m., Officer Corina Curtis responded to a dispatch call to investigate a report of a violation of a court order. RP 30-31. Curtis went to 4829 South J Street in Tacoma and spoke with Holly Williams who told her that she had a court order against “an ex-neighbor, Sandy Schoepflin.” RP 31. Williams said that Schoepflin had called her numerous times over a period of two days in violation of the order. RP 31-32. Curtis called the records division of the Tacoma Police Department and confirmed that Williams had a no-contact order against Schoepflin. RP 33-37. Curtis attempted to locate Schoepflin for questioning but could not find him. She did not check Williams’ phone records and did not know if Williams had caller I.D. RP 37-38.

On September 18, 2007, at approximately 4:30 p.m., Officer Patrick Patterson responded to another 911 call from Williams reporting a

violation of a no-contact order. RP 43-44. Williams said that Schoepflin, “an ex-roommate who had lived with her for two months” called her at 1:15 a.m. and 4:13 p.m. from a pay phone. RP 45-46, 47. Patterson could not locate Schoepflin and did not examine Williams’ phone records. RP 47-48.

Williams testified that she met Schoepflin in October 2004 when he moved into a house next door. They became romantically involved for about a year and he lived with her for six months. RP 51. In early 2006, Williams obtained a restraining order against Schoepflin that remained in effect in September 2007 when he began calling her at home and on her cell phone, sending text messages, and driving by her house yelling profanities. RP 52-55, 60-61. Williams admitted that she attempted to terminate the restraining order sometime at the end of 2007 and beginning of 2008. RP 62. She claimed that she provided the police with records of the phone calls and text messages. RP 63.

Schoepflin testified that he lived next door to Williams and they started dating in 2004. They became romantically involved and he lived with her for about a year. RP 89-91. In 2006, Williams obtained a protection order against him and he pled guilty to several violations of the order. RP 88, 92-95. After serving time in jail for the violations, Schoepflin never contacted Williams after 2006. RP 89. Schoepflin was

aware of Williams' protection order against him and did not call her on September 17th or 18th of 2007. RP 89, 96-97.

b. Closing Argument

During closing argument, the prosecutor told the jury, "So ladies and gentleman, do your duty. Go back into that jury room and find him guilty." RP 111. During rebuttal, the prosecutor referred to the jury verdict form and directed the jury "to write guilty." RP 116. At the end of his argument, the prosecutor reiterated, "Do your duty, ladies and gentlemen. Find the defendant guilty." RP 117.

Defense counsel did not object during the prosecutor's argument. RP 111, 116-17.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED MISCONDUCT DENYING SCHOEPFLIN HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Reversal is required because the prosecutor committed flagrant and ill-intentioned misconduct during closing argument denying Schoepflin his constitutional right to a fair trial.

A public prosecutor is a quasi-judicial officer who represents the state and in the interest of justice must act impartially and his behavior must be worthy of the office. State v. Huson, 73 Wn.2d 660, 663, 440

P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). “Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial.” State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Absent an objection and request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant and ill-intentioned that an instruction could not have cured the prejudice. State v. Anderson, 53 Wn. App. 417, 427, 220 P.3d 1273 (2009). Improper prosecutorial arguments are flagrant and ill-intentioned where an appellate court has previously recognized those arguments as improper in a published opinion. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996).

It is improper for a prosecutor to imply that the jury would violate its oath if it disagreed with the State’s theory of the evidence. State v. Coleman, 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994). Trying to exhort and pressure the jury to “do its job” has “no place in the administration of criminal justice” and constitutes improper conduct. United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). Warning a jury about not doing its job by implying that unless it convicted the defendant, it would violate its oath “is considered to be

among the most egregious forms of prosecutorial misconduct.” State v. Acker, 265 N.J.Super. 351, 356-57, 627 A.2d 170, cert denied, 134 N.J. 485, 634 A.2d 530 (1993). In Williams v. State, 789 P.2d 365, 369-70 (Alaska 1990), the prosecutor told the jury to “go back to the jury room and look at the evidence, and talk about the testimony, and do your job and return guilty verdicts in this case.” The court concluded that the argument was improper because it implied that the jury’s job was to return a guilty verdict. Citing Young, Aker, and Williams, the Coleman court noted that prosecutors should “take these decisions to heart” and refrain from making such argument, warning that it “cannot emphasize enough the unnecessary risk of reversal that such argument creates.” 74 Wn. App. At 840-41.

Despite the Coleman decision in 1994, during closing argument here, the prosecutor repeatedly exhorted the jury to do its duty and find Schoepflin guilty. The prosecutor argued, “Looking at the evidence, looking at the context of this case, he just couldn’t stay away. The court ordered him to have zero contact, but he couldn’t do it. So ladies and gentlemen, do your duty. Go back into that jury room and find him guilty.” RP 111 (Emphasis added). During rebuttal, the prosecutor referred to the verdict forms and directed the jury to write guilty, “One of them says, We, the jury, find the defendant, and it has a blank for guilty or

not guilty. And you are going to write guilty. Go back and talk about the evidence.” RP 116 (Emphasis added). At the end of his closing argument, the prosecutor admonished the jury again, “Do your duty, ladies and gentlemen. Find the defendant guilty.” RP 117. (Emphasis added).

The prosecutor’s repeated exhortations for the jury to do its duty and find Schoepflin guilty constitutes flagrant and ill-intentioned misconduct given the fact that such argument has long been disparaged by the courts as egregious and improper. Fleming, 83 Wn. App. at 213-14. Furthermore, the prosecutor’s final admonishment immediately before the jury began deliberations was particularly prejudicial because the bell “cannot be unring.” State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991).

Significantly, the State’s case was not overwhelming when considering the conflicting testimonies of Williams and Schoepflin. RP 52-61, 88-97. Furthermore, although Williams claimed that she provided the police with records of the phone calls and text messages, the State did not provide such evidence and the officers testified that they did not check Williams’ phone records. RP 37-38, 47-48. It is therefore evident that Schoepflin was prejudiced by the prosecutor’s flagrant and ill-intentioned misconduct because his improper remarks undermined the jury’s ability to view the evidence fairly and independently.

Reversal is required because there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

2. SHOULD THIS COURT DETERMINE THAT THE PROSECUTOR'S IMPROPER ARGUMENT DID NOT CONSTITUTE FLAGRANT AND ILL-INTENTIONED MISCONDUCT, SCHOEPFLIN WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO OBJECT TO THE PREJUDICIAL REMARKS.

Should this Court determine that the prosecutor's improper argument did not constitute flagrant and ill-intentioned misconduct, reversal is required because Schoepflin was denied his constitutional right to effective assistance of counsel where defense counsel failed to object to the prejudicial remarks.

This Court reviews claims for ineffective assistance of counsel *de novo*. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend VI; Wash. Const. art. I, section 22.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and the deficient performance resulted in prejudice. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239, cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). To show prejudice, the defendant must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335.

The record substantiates that defense counsel's performance fell below an objective standard of reasonableness where she failed to object when the prosecutor repeatedly exhorted the jury to do its duty and find Schoepflin guilty because the prosecutor's argument was improper under Coleman and defense counsel is presumed to know the law. If defense counsel had objected, any reasonable trial court would have sustained the objections because the prejudicial remarks were clearly improper. Schoepflin was prejudiced by defense counsel's deficient performance because it is evident that the prosecutor's misconduct influenced and misled the jury in light of the lack of overwhelming evidence.

There is a reasonable probability that except for defense counsel's unprofessional errors, the result of the trial would have been different. Consequently, reversal is required to "ensure a fair and just result." In re Personal Restraint of Crace, 157 Wn. App. 81, 113-14, 236 P.3d 914 (2010).

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Schoepflin's conviction because prosecutorial misconduct denied him a fair trial or in the alternative, he was denied his right to effective assistance of counsel which ensures a fair trial.²

DATED this 8th day of December, 2010.

Respectfully submitted,


VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Sandy Scott Schoepflin

² It should be noted that the trial court erred in instructing the jury that it must unanimously agree in order to answer the special verdict form but because Schoepflin testified that he and Williams lived together, which constitutes family or household members, the error was not prejudicial and consequently harmless error. CP 40. State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010).

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Sandy Scott Schoepflin, Pierce County Jail, 910 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of December, 2010 in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

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STATE OF WASHINGTON
BY _____
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