

NO. 40675-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

SANDY SCOTT SCHOEPFLIN,

Appellant.

11/17/19
STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable Rosanne Buckner

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED MISCONDUCT DURING CLOSING ARGUMENT, OR IN THE ALTERNATIVE, DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT WHERE SHE FAILED TO OBJECT TO THE PROSECUTOR'S IMPROPER ARGUMENT AND SCHOEPFLIN WAS PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE.

The State's response should be rejected because it misstates the law and disregards the facts. The State asserts that Schoepflin must show that "the prosecutor's statement was blatant, and intended to mislead the jury, and that it was incurable," citing State v. Echevarria, 71 Wn. App. 595, 597, 599, 860 P.2d 420 (1993). Brief of Respondent at 7. As recognized by Division One of this Court, absent a proper objection, prosecutorial misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that the prejudice could not have been obviated by a curative instruction. *Id.* at 597. In Echevarria, the prosecutor repeatedly made improper references to the war on drugs. The Court viewed his "extensive remarks as a blatant invitation to the jury to convict the defendant, not on basis of evidence, but, rather, on the basis of fear and repudiation of drug dealers in general." *Id.* at 598-99. Contrary to the State's claim, the Court did not hold that a prosecutor's

remarks must always rise to the level of being blatant and intended to mislead the jury to constitute misconduct.

The State asserts further that Schoepflin “argues that the prosecutor’s argument during closing argument improperly exhorted the jury to find the defendant guilty by stating, ‘[S]o ladies and gentlemen, do your duty. Go back into that jury room and find him guilty.’” Brief of Respondent at 8. The State omits the rest of Schoepflin’s argument that the prosecutor continued his find him guilty speech, directing the jury to “write guilty” on the verdict form and admonishing the jury again to “[d]o its duty” and “find the defendant guilty.” See brief of Appellant at 6-7, citing RP 111, 116, 117. Quoting only a portion of the prosecutor’s improper closing argument, the State argues that that prosecutor did not “infer that the jury’s duty was to find defendant guilty as in *Williams*.” Brief of Respondent at 12, citing Williams v. State, 789 P.3d 365 (Alaska 1990). The State presumably meant that the prosecutor did not imply that the jury’s duty was to find Schoepflin guilty. In any event, the prosecutor went beyond implying that it was the jury’s duty to find Schoepflin guilty, the prosecutor repeatedly told the jury that it had a duty to find him guilty, which was even more egregious than the argument found to be improper in Williams. Consequently, the State’s argument that the prosecutor merely intended to “help [the jury] understand the evidence and apply the

law, as closing arguments are intended to do according to jury instruction number 1, ” is simply absurd. Brief of Respondent at 9.

The State argues alternatively that defense counsel’s failure to object to the prosecutor’s improper argument was “relatively minor” and “distracts this court from the standard of review for claims of ineffective assistance of counsel.” According to the State, defense counsel performed effectively because it was enough that she made opening and closing statements, proposed and objected to jury instructions, cross-examined witnesses, and raised other objections. Brief of Respondent at 20. The State’s argument falls contrary to this Court’s recent decision in State v. Emery, WL 1402417 (April 13, 2011). Although this Court concluded that the prosecutor’s misconduct did not require reversal, the Court emphasized that “[t]his outcome does not condone the State’s continuing usage of the improper arguments in closing, nor does it ignore defense counsel’s duty to represent the defendant effectively by making a timely objection to improper argument by the State.” FN 7 at 14. (Emphasis added.)

Importantly, the State discounts the fact that the prosecutor’s repeated exhortations for the jury to do its duty and find Schoepflin guilty has long been disparaged by the courts as egregious and improper argument. State v. Coleman, 74 Wn. App. 835, 838-41, 876 P.2d 458

(1994). Contrary to the State's argument, reversal is required as in State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978), where the Washington Supreme Court reversed because the prosecutor made an improper comment during closing argument which the Court had previously held as impermissible, concluding that the comment was mindful, flagrant and ill-intentioned. *Id.* at 662-65. In reversing the conviction, the Court observed that "the safeguards which the wisdom of ages has thrown around persons accused of a crime cannot be disregarded" and reminded prosecutors that "a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims." *Id.* at 665.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Mr. Schoepflin's conviction.

DATED this 16th day of May, 2011.

Respectfully submitted,


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Attorney for Appellant, Sandy Scott Schoepflin

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.

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

DATED this 16th day of May, 2011 in Kent, Washington.


VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

11 MAY 17 2011
STATE OF WASHINGTON
BY _____
DEPUTY