

NO. 44013-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANDREW C. STRICK,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Chris Wickham, Judge
Cause No. 12-1-00653-2

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Strick of his constitutional due process right to a fair trial.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether Strick was denied his constitutional due process right to a fair trial where the prosecutor engaged in prejudicial misconduct by using evidence ruled admissible only as evidence of motive for other improper purposes, including an attack on Strick's credibility and as evidence of his propensity to commit similar acts?

C. STATEMENT OF THE CASE

01. Procedural Facts

Andrew C. Strick (Strick) was charged by information filed in Thurston County Superior Court on May 21, 2012, with assault in the third degree, contrary to RCW 9A.36.031(1)(d). [CP 5].

The court granted Strick's motion to represent himself [RP 07/19/12 9]¹ and found his pretrial statements admissible under CrR 3.5. [RP 45; CP 97-99]. Trial to a jury commenced on August 20, the Honorable Chris Wickham presiding.

¹ Unless otherwise indicated, as here, all references to the Report of Proceedings are to the transcripts entitled Volumes I-II.

Neither objections nor exceptions were taken to the jury instructions. [RP 238]. Strick was found guilty as charged and his motion for a directed verdict denied. [CP 76; RP 09/26/12 5]. He was sentenced within his standard range and timely notice of this appeal followed. [CP 76, 120-28].

02. Substantive Facts: Trial

In the early afternoon of May 16, 2012, 66-year-old John Wilkinson drove his truck to his neighbor's to borrow a lawn mower. [RP 56, 66, 70-72]. Finding nobody home, he returned to where he had parked to discover a vehicle 15 feet behind his truck occupied by 33-year-old Strick, another neighbor of several years with whom he had a history of confrontations: Strick was restrained from contacting Wilkinson stemming from his two convictions in 2010 for felony harassment, wherein he had threatened to kill Wilkinson by burning his house down. [RP 65-67, 69-70, 74-76, 180]. An argument ensued before Strick exited his vehicle and blinded Wilkerson with pepper spray, causing him to grab his pocketknife and waive it around in an attempt to protect himself. [RP 77-80].

I kept waiving my arms, and I was kind of trying to get away from him, and he was just following me. And this took about, what seemed like forever, but it couldn't have been maybe five minutes. And then I heard some voices. I heard some people holler, and the spray stopped.

[RP 80].

Strick took off when 911 was called after two people who had witnessed the pepper spraying came to Wilkinson's assistance. [RP 94-99, 112, 115-17]. Shortly thereafter, the police contacted him at his residence, which is adjacent to Wilkinson's backyard. [RP 57, 156]. He admitted to the pepper spraying, saying he had acted in self-defense because Wilkinson was attacking him with a screwdriver. [RP 161]. He also said he was a "sworn constable with Thurston County," had received police training through ROTC, and had gone to the scene of the incident in his capacity as a private investigator for a tax attorney. [RP 159].

Strick testified that Wilkinson had come up to his car "and began yelling at me, threatening me, telling me to get out of the car, fight him and stuff like that..." [RP 179]. He had a screwdriver in his hand. [RP 205]. When he later exited his car, Wilkinson "came back with a knife in his hand, and, somewhere in here (pointing to exhibit), we met, and I got him with pepper spray." [RP 179]. "... I remember the knife being kind of in my face...." [RP 207].

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D. ARGUMENT

THE PROSECUTOR ENGAGED IN
PREJUDICIAL MISCONDUCT BY
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ADMISSIBLE ONLY AS PROOF
OF MOTIVE FOR OTHER IMPROPER
PURPOSES, INCLUDING AN ATTACK
ON STRICK'S CREDIBILITY AND AS
EVIDENCE OF HIS PROPENSITY TO
COMMIT SIMILAR ACTS.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A criminal defendant's right to a fair trial is denied where there is an unsuccessful objection to the prosecutor's improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill

intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990).

“The State’s burden to prove harmless error is heavier the more egregious the conduct is.” State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor’s obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant’s due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The court granted the prosecutor’s motion to admit evidence of Strick’s 2010 convictions for two counts of felony harassment under ER 404(b) for the limited purpose of proof of his motive to assault Wilkinson in the instant case. [RP 14-16]. That was it. In closing argument, however, the prosecutor displayed a suspect relationship with this ruling

by using the evidence for other improper purposes, including an attack on Strick's credibility and as evidence of his propensity for aggressive behavior.

In arguing "reasons why there should not be found to be credibility in what Mr. Strick has told you," the prosecutor emphasized to the jury that "Strick was convicted of committing felony harassment against Mr. Wilkinson, the threat to kill at that point in time [RP 272](,)" underscoring this with the declaration that there was a history of aggression by Strick toward Wilkinson, "and a lot of it." [RP 274].

Now, we're to believe that, despite all that history, despite the determination that there's a reason to give protection to John Wilkinson from this individual, that when we get to the situation that happens on May 16th, Mr. Strick, he's not – you know, he's not being aggressive.

[RP 273]. This was not offered as proof of motive, but rather to impeach Strick's credibility and to show his propensity to commit similar acts, like assault. See State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). The State used this evidence in such a way as to show that Strick's earlier confrontations with Wilkinson made it more likely he assaulted him on this occasion, since his current charges, like his prior convictions, are the result of his aggressive behavior. What other conclusion? The rhetorical framing of the argument made this clear: Despite Strick's prior actions against Wilkinson, we're to believe he was not aggressive on May 16?

It was improper for the prosecutor to use the circumstances of Strick's prior convictions as impeachment and propensity evidence where the trial court had ruled the evidence admissible for the sole purpose of proof of motive. A prior conviction that does not involve dishonesty is presumed inadmissible. See State v. Calegar, 133 Wn.2d 718, 947 P.2d 235 (1997). There is nothing inherent in a conviction for felony harassment to suggest the person convicted is untruthful and evidence of such was not probative of Strick's ability to tell the truth, contrary to the State's argument, which exceeded the scope and limitation of the trial court's ruling.

This case rested on whom the jury believed concerning the circumstances precipitating the physical encounter. Because the focus of the State's case was on disproving Strick's claim of self-defense, the manner in which the prosecutor used the evidence of Strick's prior convictions was not harmless, since the impeachment of Strick's credibility and showing of his propensity to commit similar acts refuted his claim of self-defense. The overwhelming message was that the jury could not trust Strick's story given his proclivity to commit similar acts of aggression. Based on this record, reversal is required, given that the prosecutor's challenged argument was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury

instruction.” See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). The prosecutor’s misconduct ensured that Strick did not receive a fair trial.

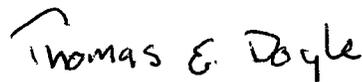
Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury’s verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient....

In re Glassman, 175 Wn.2d 696, 711, 286 P.3d 673 (2012).

E. CONCLUSION

Based on the above, Strick respectfully requests this court to reverse his conviction for assault in the third degree.

DATED this 28th day of March 2013.



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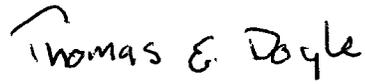
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 28th day of March 2013.

Handwritten signature of Thomas E. Doyle in black ink.

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March 28, 2013 - 3:48 PM

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