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No. 51415-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM SAMUEL SCHMIDT,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The prosecutor in opening statement told the jury William Schmidt placed his penis on J.M.F., a fact for which no evidence was presented at trial. This inflammatory statement constituted incurable misconduct and deprived Mr. Schmidt of his right to a fair trial. When Mr. Schmidt moved for a mistrial at the close of the prosecutor's opening statement, then asked for a new trial upon conviction, the court should have granted Mr. Schmidt's motions.

In addition, in closing argument, the prosecutor presented Powerpoint slides that were designed to inflame the passion and prejudice of the jury as well as present his personal opinion regarding Mr. Schmidt's guilt. Because this was incurable misconduct as well, this Court must reverse Mr. Schmidt's convictions.

B. ASSIGNMENTS OF ERROR

1. Inflammatory and improper comments during the prosecutor's opening statement violated Mr. Schmidt's right to a fair trial.

2. The trial court erred in denying a new trial based upon the inflammatory and improper comments by the prosecutor during his opening statement.

3. In the absence of substantial evidence, the trial court erred in entering Finding of Fact RE: Denial of New Trial Motion III, finding the prosecutor's statements were

based on a reasonable understanding of information contained in transcripts of pretrial interviews, evidence provided in pretrial discovery, and pretrial testimony.

CP 352.

4. Statements by the prosecutor expressing his opinion regarding Mr. Schmidt's guilt and using an altered version of admitted evidence in closing argument violated Mr. Schmidt's right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprives an accused person of his fundamental right to a fair trial under both the federal and Washington state constitutions. Arguments made in opening statements by the prosecutor claiming serious allegations of misconduct, with no evidence presented on the issue, denies an accused person a fair trial. Where the prosecutor in a child molestation case in opening statement claimed the defendant placed his penis on the child and never presented any evidence to substantiate this claim, did the misconduct require the court to order a mistrial or a new trial when requested by the defense?

2. Prosecutorial misconduct in closing argument, which prejudices the defendant, violates the right to a fair trial and requires reversal of a conviction. Here, over Mr. Schmidt's repeated objections, the prosecutor appealed to the jury's passion and prejudice and rendered his personal opinion regarding Mr. Schmidt's guilt. Was the prosecutor's argument prejudicial misconduct requiring reversal of Mr. Schmidt's convictions?

3. Did cumulative prosecutorial misconduct require reversal of Mr. Schmidt's convictions and remand for a new trial?

D. STATEMENT OF THE CASE

J.M.F. and her mother move in with William Schmidt.

William Schmidt and Crystal Fitzgerald met while in the Army, became romantically involved, and a few months later decided to move in together. RP 1116-17. Ms. Fitzgerald had previously been married and had a daughter, J.M.F. RP 1103. Shortly after becoming involved with Mr. Schmidt, Ms. Fitzgerald introduced him to J.M.F. RP 1117. Five year old J.M.F. and Mr. Schmidt immediately hit it off, with no hint of tension or awkwardness. RP 1118. The two would go bowling, play miniature golf, and wrestle. RP 1321-22. Ms. Fitzgerald described her daughter at this time as happy, silly, and goofy. RP 1129.

The same year Mr. Schmidt and Ms. Fitzgerald moved in together, the couple welcomed a son and a year later a daughter. RP 1120-22.¹ After the daughter's birth, Ms. Fitzgerald noticed a change in J.M.F.'s behavior. RP 1130. J.M.F. became more resistant, refusing to eat her food, take a shower, or clean her room. RP 1130. Ms. Fitzgerald also claimed there was a growing tension between Mr. Schmidt and J.M.F. RP 1134.

Mr. Schmidt noted that after the birth of his son, he did not connect to J.M.F. like he did his son. RP 1862-63. As a result, Mr. Schmidt admittedly grew more distant from J.M.F. RP 1863. Apparently in response, he noticed J.M.F. became more defiant. RP 1863.

On one afternoon, according to Ms. Fitzgerald, Mr. Schmidt and J.M.F. were wrestling. J.M.F. told her mother that Mr. Schmidt touched her "private area." RP 1135-36. Mr. Schmidt immediately denied the touching and Ms. Fitzgerald told the two to stop wrestling. RP 1137.

J.M.F.'s allegations.

In 2015, Mr. Schmidt was working as a truck driver. RP 1165. On October 28, 2015, Mr. Schmidt was away driving his truck and

¹ Both children were Mr. Schmidt's. RP 1120-22. Mr. Schmidt and Ms. Fitzgerald never married. RP 1123.

would not be returning until October 30, 2015. While Mr. Schmidt was away, Ms. Fitzgerald claimed J.M.F. looked sad, and Ms. Fitzgerald began questioning her. RP 1171-72. J.M.F. told her mother that nothing was wrong, but in response to continued questioning by Ms. Fitzgerald, J.M.F. claimed Mr. Schmidt had touched her inappropriately. RP 1173.

Ms. Fitzgerald pressed on, seeking details from J.M.F. RP 1174.

At one point, Ms. Fitzgerald retrieved a stuffed animal and wanted J.M.F. to show her what had happened. RP 1174. According to Ms. Fitzgerald, J.M.F. flipped the animal over and placed her hand on the animal's rear. RP 1174.

The following day, Ms. Fitzgerald took J.M.F. to a sexual assault clinic for a physical examination, then met with the police. RP 1186-87.

Mr. Schmidt was subsequently charged with four counts of first degree child molestation. CP 123-24. At trial, J.M.F. testified, and the video of her forensic interview was admitted into evidence. CP __; RP 1438, 1538.

The State's opening statement.

On the opening day of trial, the prosecutor began his opening statement with inflammatory claims of a questionable nature:

Sexual acts can be embarrassing for anyone to talk about, but especially for an eight-year-old child who may not know precisely what's happened to them, who may be ashamed or afraid about what will happen when they come forward, who may not even have the words to express the fact that her stepfather had been *digitally penetrating her vagina over the course of the last two years and digitally -- meaning with his finger -- penetrating her anus numerous times and had taken his penis out and rubbed it outside of the clothed area of her vaginal area.*

...

Within a few months, he had moved in. He quickly moved in with the family. *Within two to three months, he had removed the door from the bedroom that belonged to [J.M.F.].*

RP 1005 (emphasis added).

As time and again he would wrestle and use this as an opportunity to touch her private parts, when he would choose to insert his finger into her vagina in her bedroom or in his bedroom, *when he took his penis out and put it on her clothed vaginal area, or he would penetrate her anus with his finger, [J.M.F.]*, who's a pretty happy, talkative kid, started to get really, really upset.

RP 1006-07 (emphasis added).

At the conclusion of the prosecutor's opening, Mr. Schmidt moved for a mistrial, on among other grounds, that there was no good faith basis for the prosecutor's claims. RP 1020. The court denied Mr. Schmidt's motion. RP 1023.

The State's closing argument.

At the conclusion of the trial, and as part of his closing argument, the prosecutor used Powerpoint slides as part of his presentation:²

And remember what she drew. This -- *this first picture is from the substantive portion of her interview where she's talking about the abuse.* Right?

MS. MOUNT-PENNER: Your Honor, I just make [sic] an objection to the alteration of the exhibit on the slide.

THE COURT: And I will overrule your objection.

MR. CUMMINGS: She says, "Two hands where boy goes pee pee. Two hands to do it. William." Indicating he used two hands, that it involved where a boy goes pee pee -- or someone's penis -- and also "Where I go pee pee," that it involved -- that it happened more than once --

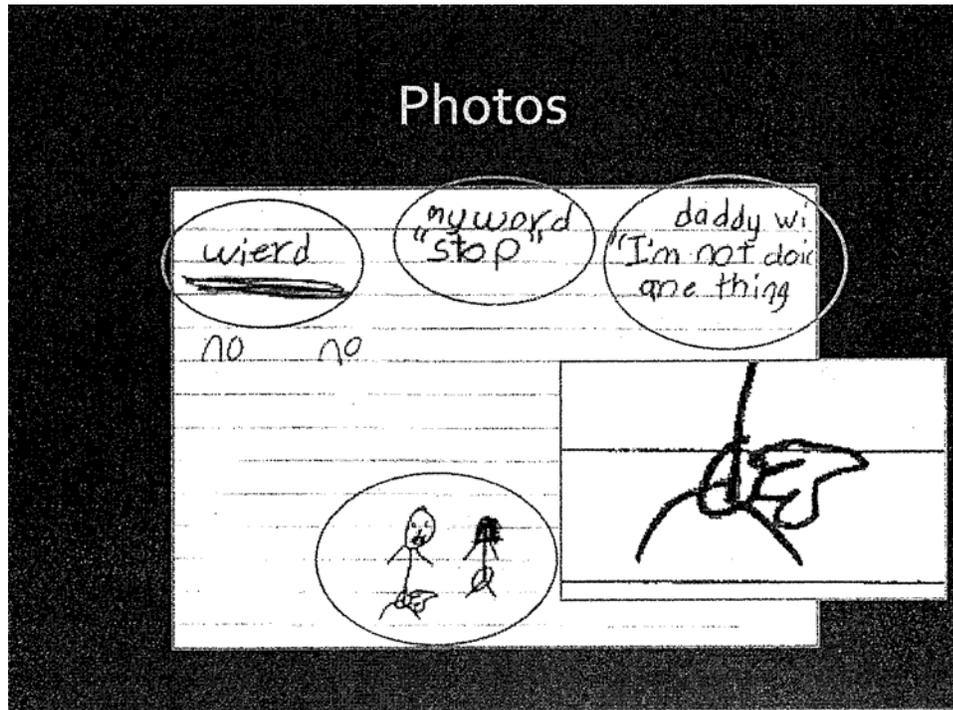
MS. MOUNT-PENNER: Your Honor, again, I would object to the alteration of that exhibit that's adding --

MR. CUMMINGS: I would note that the "more than once," Your Honor, is a combination of both what's displayed here as well as what's from the forensic interview as well as testimony.

THE COURT: All right. I'll overrule. Go ahead.

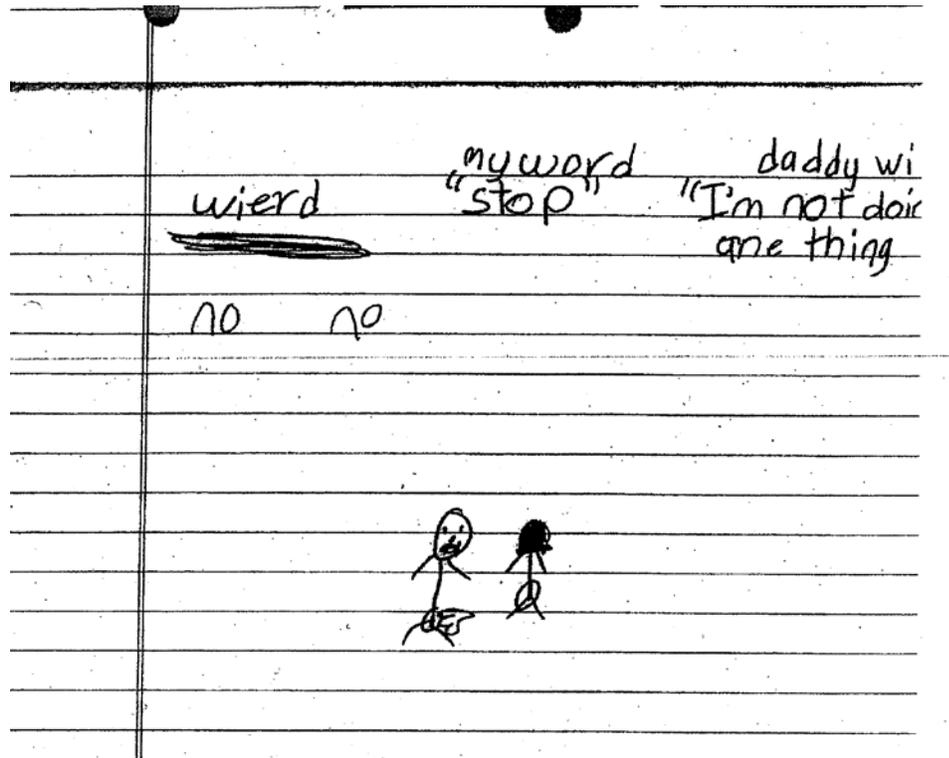
² Mr. Schmidt moved before argument to review the prosecutor's Powerpoint slides in order to lodge any objections, citing *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). RP 1959. The court refused to allow such disclosure, noting Mr. Schmidt had the opportunity to object to anything improper during the prosecutor's argument. RP 1960.

RP 1978-79 (emphasis added). While making his claims, the prosecutor was displaying this Powerpoint slide:



CP __.

This is the original illustration prepared by J.M.F. during a forensic interview:

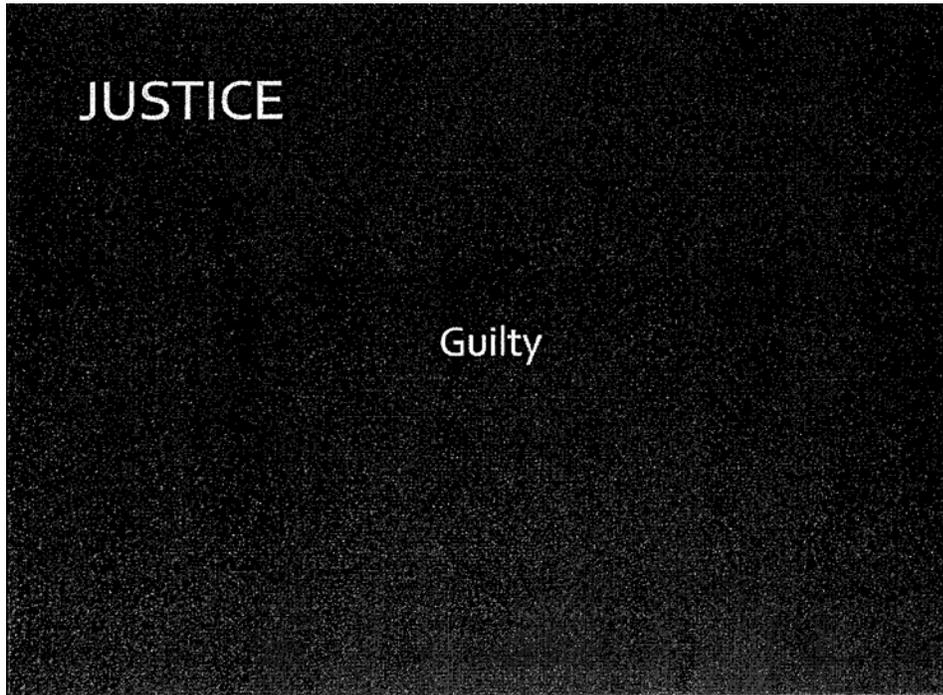


CP __.

The prosecutor closed his argument with the following plea:

For the last four years, she's been molested by the defendant who is supposed to care for her and who had a position of trust. And for those reasons, the defendant is guilty of four counts of child molestation in the first degree, and I urge you to answer yes to each of the aggravators.

RP 2011. Again, while making this argument, the prosecutor was displaying this Powerpoint slide:



CP __.

Mr. Schmidt objected to the slide which was overruled by the court. RP 2011 (“And, Your Honor, I would object to this slide, which is apparently the last slide in the presentation, which has the words “justice” in capital letters and “guilty” at the center).

Mr. Schmidt’s motion for a new trial.

Following the jury verdict, Mr. Schmidt timely moved for a new trial on the basis of the prosecutor’s inflammatory and improper opening statement. CP 161-69; RP 2064-77. In response, the State

relied on the forensic interview of J.M.F. done by Ms. Adams. CP 176-77.

At the conclusion of the hearing, the trial court denied the motion, finding the prosecutor did not commit misconduct, and even if he did, the misconduct was not prejudicial. CP 351-55; RP 2092.

E. ARGUMENT

1. The prosecutor's inflammatory and improper opening statement violated Mr. Schmidt's right to a fair trial.

- a. *Prosecutorial misconduct violates a defendant's constitutionally protected right to a fair trial.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, §§ 3 and 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a “duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). “A ‘[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011), *citing State v.*

Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). "[T]he prosecutor may strike hard blows, but not foul ones." *Berger*, 295 U.S. at 88.

Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a

case, but that justice shall be done,” his or her improper suggestions “are apt to carry much weight against the accused when they should properly carry none.” *Berger*, 295 U.S. at 88.

b. *An opening statement must not be used to “poison the jury’s mind against the defendant” or misstate the evidence to be presented.*

A prosecutor’s opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated admissible material evidence, and reasonable inferences to be drawn therefrom. *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984). A prosecutor must confine his argument to facts and inferences that he, in good faith, believes will be admitted and established at trial. *Campbell*, 103 Wn.2d at 16. “Argument and inflammatory remarks have no place in the opening statement.” *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). Appeals to the jury’s passion and prejudice are improper. *State v. Clafin*, 38 Wn.App. 847, 850, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985).

“The prosecutor’s opening statement should be an objective summary of the evidence reasonably expected to be produced, and the prosecutor should not use the opening statement as an opportunity to poison the jury’s mind against the defendant or to recite items of highly

questionable evidence.” *United States v. Thomas*, 114 F.3d 228, 247 (D.C.Cir.1997). Prejudicial misconduct occurs when unfair statements are injected into opening remarks by a prosecutor with knowledge that they cannot be proven. *United States v. Lavallie*, 666 F.2d 1217, 1221 (8th Cir. 1981).

An opening statement should not misstate what will be contained in the evidence. *State v. Haga*, 13 Wn.App. 630, 536 P.2d 648 (1975). It is misconduct to make arguments unsupported by the admitted evidence. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 58, 296 P.3d 872 (2013). And a prosecutor may not mislead the jury by misstating the evidence. *State v. Guizzotti*, 60 Wn.App. 289, 296, 803 P.2d 808, *review denied*, 116 Wn.2d 1026 (1991).

c. *No evidence was presented at trial regarding the prosecutor’s claim Mr. Schmidt placed his penis on J.M.F.*

The prosecutor opened his statement with an inflammatory claim that Mr. Schmidt placed his penis on J.M.F. CP 1004-05. The prosecutor never presented evidence to support this allegation at trial. Mr. Schmidt is entitled to reversal of his convictions due to this incurable misconduct.

[W]here the prosecutor informs the jury that the government will produce certain evidence to show a

defendant's guilt and then, without good cause, fails to do so, the prosecutor fails to give a proper opening statement to the jury. Otherwise, the risk to the defendant is that the jury's mindset will be tainted, resulting in an unfair trial. [citation omitted] The risk to the government is that it may have to retry the case.

Thomas, 114 F.3d at 248.³

The decision of the Georgia Supreme Court in *Alexander v. State*, is instructive. 270 Ga. 346, 509 S.E.2d 56 (1998). In *Alexander*, despite the prosecutor's detailed recital in his opening statement that the murder was part of gang activity, at trial no one identified Mr. Alexander as a member of a gang. *Id.* at 59-60. As a consequence, the Court concluded the record demonstrated that the prosecutor failed to offer evidence of a significant connection to gangs that he detailed in his opening statement. *Id.*

The Court went on to point out the opening statement was not made in good faith and prejudiced the defendant, requiring a new trial. *Id.* at 60-61. Lastly, the Court found the trial court's opening

³ Since Mr. Schmidt moved for a mistrial at the end of the prosecutor's opening, he has preserved the issue for appeal. *See State v. Lindsay*, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014) (defense counsel moved for a mistrial due to prosecutorial misconduct directly following the prosecutor's rebuttal closing argument, thus, the issue preserved for appellate review), *citing United States v. Prantil*, 764 F.2d 548, 555 n. 4 (9th Cir.1985) (mistrial motion following the prosecutor's closing is "an acceptable mechanism by which to preserve challenges to prosecutorial conduct").

instruction to the jury that the opening statement was not evidence was insufficient to cure the error. *Alexander*, 509 S.E.2d at 60.

Here, the prosecutor's claim that Mr. Schmidt touched J.M.F. with his penis is nowhere in the pretrial discovery provided by the parties at the hearing, nor in the forensic interview, or in J.M.F.'s testimony at trial. Like in *Alexander*, the prosecutor made claims about what the evidence would demonstrate but never delivered on his promise. J.M.F. did not testify about this allegation, nor did she tell this to the pediatric nurse examiner at Mary Bridge who examined her. RP 1711. No evidence was presented at trial regarding this inflammatory claim. This amounted to misconduct.

d. *The misconduct committed in the prosecutor's opening statement entitles Mr. Schmidt to a new trial.*

When a prosecutor makes inflammatory remarks before the jury has had an opportunity to hear the evidence, the appropriate remedy is to declare a mistrial. A cautionary instruction could not have cured the prejudice to Mr. Schmidt. *State v. Powell*, 62 Wn.App. 914, 919, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992). In *Alexander*, *supra*, the trial court's reliance on the general jury instruction, as the trial court did here, was insufficient to cure the prejudice suffered by the defendant. 509 S.E.2d at 60.

Here, as in *Alexander*, extremely inflammatory and prejudicial claims were made in opening statement for which no evidence was ever presented at trial. The claim was so prejudicial that no instruction could cure it. Because Mr. Schmidt's right to a fair trial was denied by the prosecutor's misconduct, this court should order a new trial.

2. The prosecutor's personal opinion of Mr. Schmidt's guilt and use of an altered version of admitted evidence in his closing argument violated Mr. Schmidt's right to a fair trial.

- a. *Prosecutorial misconduct during closing argument violates a defendant's constitutionally protected right to a fair trial.*

Closing argument provides an opportunity to draw the jury's attention to the evidence presented. *State v. Walker*, 182 Wn.2d 463, 476-77, 341 P.3d 976, *cert. denied* ___ U.S. ___, 135 S.Ct. 2844, 192 L.Ed.2d 876 (2015). To establish that a new trial is required for prosecutorial misconduct during closing argument, there must be a showing that the prosecutor's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

b. *The prosecutor's use of altered and inflammatory Powerpoint slides constituted misconduct.*

Prosecutors may use multimedia resources in closing arguments to summarize and highlight relevant evidence. *Walker*, 182 Wn.2d at 476. “[B]ut it does not give a prosecutor the right to present altered versions of admitted evidence to support the State’s theory of the case, to present derogatory depictions of the defendant, or to express personal opinions on the defendant’s guilt.” *Id.* at 478 (footnote omitted).

Here, the prosecutor’s disputed slides expressed his personal opinion regarding Mr. Schmidt’s guilt and presented an altered version of an exhibit. The slide listing “Justice” and “Guilty” was a clear expression of the prosecutor’s personal opinion regarding Mr. Schmidt’s guilt. While the prosecutor did not display Mr. Schmidt’s picture with the words “Guilty” superimposed across it as in *Glasmann*, the slide he did use effectively did the same thing; it urged the jury to find Mr. Schmidt guilty based on the prosecutor’s personal opinion that “justice” will only occur with a guilty verdict. *Glasmann*, 175 Wn.2d at 701-02.

This misconduct was further exacerbated by the alteration of the illustration by J.M.F.

[T]he potential prejudice of a slide presentation does not arise solely from the alteration of the exhibits. The broader proposition is that slide shows may not be used to inflame the passion and prejudice [of the jury].

State v. Salas, 1 Wn.App.2d 931, 944-45, 408 P.3d 383, *review denied*, 190 Wn.2d 1016 (2018). That is precisely what the Powerpoint slide here did and was designed to do; inflamed the passion and prejudice of the jury. This was misconduct.

c. *The misconduct was prejudicial and there is a substantial likelihood that it affected the jury's verdict.*

Since Mr. Schmidt objected to the misconduct, he need only show the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Allen*, 182 Wn.2d at 375.

“[D]eciding whether a prosecuting attorney commit[ed] prejudicial misconduct ‘is not a matter of whether there is sufficient evidence to justify upholding the verdicts.’” *Allen*, 182 Wn.2d at 376, *quoting Glasmann*, 175 Wn.2d at 711. “Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict.” *Glasmann*, 175 Wn.2d at 711.

“The risk of swaying a jury through use of prejudicial imagery is perhaps highest during closing argument, when jurors may be

particularly aware of, and susceptible to, the arguments presented.”

Salas, 408 P.3d at 392.

This case rested solely on the testimony of J.M.F. There was no other evidence to corroborate J.M.F.’s claims. The prosecutor’s improper use of the Powerpoint slides was designed to tilt the advantage to the State, especially the “Justice” “Guilty” slides, which expressed the prosecutor’s personal opinion that Mr. Schmidt was guilty. The misconduct was prejudicial, and Mr. Schmidt’s convictions must be reversed.

3. The cumulative effect of the errors denied Mr. Schmidt a fair trial.

It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). Thus, under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

To the extent these errors alone are not sufficiently prejudicial to warrant reversal in isolation, the cumulative nature of the errors compel reversal.

F. CONCLUSION

For the reasons stated, Mr. Schmidt asks this Court to reverse his convictions and remand for a new trial or remand for resentencing.

DATED this 27th day of July 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 51415-0-II
)	
WILLIAM SCHMIDT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JULY, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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