

FILED
Court of Appeals
Division II
State of Washington
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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **Mr. Schmidt's motion for a mistrial preserved his challenge to the prosecutor's opening statement.**

The State contends that since Mr. Schmidt failed to object to the prosecutor's comments in opening statement, he failed to preserve his challenge. Brief of Respondent at 16-22. This Court should reject the State's argument and find Mr. Schmidt adequately preserved his challenge to the prosecutor's opening statement.

Normally, a defendant's failure to object constitutes a waiver unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). But, a timely mistrial motion preserves the issue for appeal. *State v. Lindsay*, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014).

At issue in *Lindsay* was whether defense counsel's challenge to the entire tenor of the prosecutor's argument by way a mistrial motion made at the end of the prosecutor's rebuttal argument, preserved the defendant's right to challenge the closing arguments. 180 Wn.2d at 430-31. The Court concluded that it did. *Id.* The Court noted that a motion for mistrial brought immediately after argument served the goal

of the contemporaneous objection rule because it allowed the trial court an opportunity to remedy an error by crafting a cautionary instruction. *Id.* at 441.

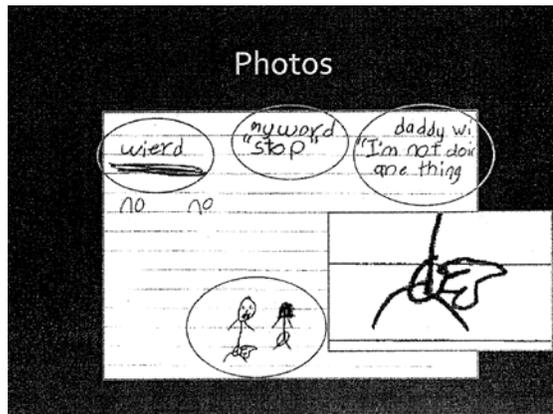
Here, Mr. Schmidt moved for a mistrial when the prosecutor mentioned Mr. Schmidt's silence when first confronted by police officers. RP 1010-13. But during the discussion between the parties and the trial court, Mr. Schmidt also objected to the prosecutor's comments about Mr. Schmidt placing his penis on J.M.F.'s clothed vagina. RP 1020-21. Following *Lindsay*, this was sufficient to preserve the issue. 180 Wn.2d at 430-31. This objection was part of the discussion regarding the mistrial motion and was made during the prosecutor's opening statement allowing the trial court an opportunity to correct the error.

This Court should find Mr. Schmidt properly preserved the issue and reject the State's argument to the contrary.

2. Mr. Schmidt's objections properly preserved his challenge to the State's closing argument.

The State contends Mr. Schmidt failed to properly object to the use of an altered slide during closing argument, thus contending he did not properly preserve a challenge to its use. Brief of Respondent at 29-38. The State apparently concedes Mr. Schmidt properly objected to the slide referencing "Justice" and "Guilty." The State's argument should be rejected as the record on review establishes Mr. Schmidt properly objected to the "altered" exhibit.

The State argues Mr. Schmidt objected the Slide 3 not Slide 4 during the prosecutor's closing argument. It is impossible based upon the record before this Court what slide is being shown on the screen to the jury. What the record *does* establish is Mr. Schmidt objected several times to the "altered" exhibit. *See e.g.* RP 1978 ("Your Honor, I just make an objection to the alteration of the exhibit on the slide."). There is no discussion on the record before this Court by either the State or Mr. Schmidt regarding the slide number being challenged. This is the only exhibit that was altered, thus, this is the slide to which the objections was made:



CP 364-66.

In addition, the prosecutor responded to Mr. Schmidt's objection by noting: "And I'll note for the record this is not an alteration but rather making clearer something that's already present." RP 1978. The prosecutor understood the slide being objected to and at no time claimed Mr. Schmidt was objecting to the wrong slide.

The State's argument should be rejected and Mr. Schmidt's objection found to be a proper preservation of the issue for appeal.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Schmidt asks this Court to reverse his convictions and remand for a new trial.

DATED this 3rd day of December 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. |) | |

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WASHINGTON APPELLATE PROJECT

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