

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35082-7-III

STATE OF WASHINGTON, Respondent,

v.

PEDRO HILLIARD, Appellant.

AMENDED APPELLANT'S BRIEF

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I. INTRODUCTION

The State tried Pedro Hilliard on three counts of delivering a controlled substance. Throughout the case in chief, it repeatedly referred to the interactions between its confidential informant and Hilliard as “controlled buys,” which impermissibly opined on Hilliard’s guilt. In closing argument, the State repeatedly argued to the jury that its role was to hold Hilliard accountable. Cumulatively, these errors served to inflame the jury and to obtain a verdict based on passion and prejudice, rather than impartial consideration of the evidence.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Repeated references to a confidential informant’s contacts with the defendant as “controlled buys” constituted impermissible opinion testimony on the defendant’s guilt.

ASSIGNMENT OF ERROR 2: The prosecutor’s closing argument that the purpose of the proceeding is to hold the defendant accountable constituted flagrant, ill-intentioned misconduct.

ASSIGNMENT OF ERROR 3: Cumulative error deprived Hilliard of a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Was the repeated use of the term “controlled buy” an improper comment on Hilliard’s guilt when the dispositive issue in the case was whether he delivered drugs to the State’s informant as the informant claimed?

ISSUE 2: Was the State’s argument to the jury that the case was not about the informant but about holding the defendant accountable improper, when the informant’s credibility was the central issue in the case?

ISSUE 3: Were these errors sufficiently harmful to deprive Hilliard of a fair trial, either individually or cumulatively?

IV. STATEMENT OF THE CASE

The State charged Pedro Hilliard with three counts of delivering a controlled substance. CP 1. Prior to trial, it was granted leave to amend the information over a defense objection to add enhancements to one count for delivering the substance in a public park and within 1000 feet of a school bus stop. CP 6, 11, RP (1/19/17)¹ at 4, 6. But the amended

¹ The Verbatim Reports of Proceedings herein comprise a single volume for a hearing held on January 19, 2017, and two volumes, consecutively paginated, containing the trial and sentencing proceedings. For clarity, the volume containing the January 2017 hearing

information was not filed, precluding any appellate review as to its sufficiency.

Hilliard proceeded to a jury trial. During its case in chief, the State solicited testimony from its lead detective about the process of conducting a controlled buy with a confidential informant. I RP 78-79, 82-95. It then identified Hilliard as the subject of an investigation conducted with the assistance of a confidential informant, Michael Skiles. I RP 95-97. Thereafter, the State asked the detective how many controlled buys Skiles performed with Hilliard, and the detective answered, "There were three documented controlled buys." I RP 98. Throughout its case in chief, the prosecuting attorney and its witnesses repeatedly referred to the interactions the informant had with Hilliard as "controlled buys." I RP 98-99, 106-07, 109, 114-15, 145-46, 157, 158, 165-66, 170, II RP 228, 230, 234.

The defense emphasized that because none of the officers ever witnessed an exchange between Hilliard and Skiles, the State's case was dependent upon Skiles's credibility that the exchanges occurred as he described them. I RP 136, 137, 139, 154, 163, 171, 182. As to Skiles's

will be identified by the hearing date, and the two remaining volumes will be identified by volume and page numbers.

credibility, the defense highlighted his termination as a confidential informant when he was found to have appropriated and concealed money that was supposed to be used in a drug buy, as well as his convictions for crimes of dishonesty, his taking money from his family and lying to them, and his admission to using drugs and committing crimes during the time that he was working as a confidential informant. I RP 110, 126, 128, 131-32, 178, II RP 218-19, 246, 264-65, 268, 270, 272, 276. On direct, Skiles also testified to a peculiarity in the third transaction where, after he came back into contact with law enforcement, he did not have all of the drugs he was supposed to have. II RP 238. Skiles explained that he had left them in a gas station bathroom where he later recovered them, but could not explain how or why he had removed some of the pills from the packaging in which he received them. II RP 238-39.

These themes comprised the defense closing argument that there was reasonable doubt to believe that the events occurred as Skiles described them. II RP 310-17. In response, the State argued, “This is not about Mr. Skiles. This is about holding Mr. Hilliard accountable . . . That is what we are doing here. He is holding him accountable for it.” II RP 317. She continued,

How do we hold him accountable? How do we even get to that point if we don't have anybody to even work with to

buy, to catch him doing it? It's not Mr. Skiles' accountability here. It's his. That's who we are holding accountable here right now.

II RP 318. Hilliard did not object to the argument.

The jury returned guilty verdicts on all three charges and additionally found the enhancements to be true. CP 24-27, II RP 325-26. The trial court sentenced Hilliard to a prison-based drug offender sentence alternative and imposed only mandatory legal financial obligations. CP 73, 75, II RP 350, 351. Hilliard now appeals, and has been found indigent for that purpose. CP 54, 56.

V. ARGUMENT

I. The multiple references to the interactions between Hilliard and the confidential informant as “controlled buys” constituted impermissible opinions on Hilliard’s guilt.

From the outset of the case, the State bolstered its theory of the encounters between Hilliard and its informant by repeatedly referring to the encounters as “controlled buys” both by the prosecuting attorney and by the law enforcement witnesses. Hilliard’s defense centered around the argument that the deliveries did not occur, and that the informant was lying about what happened. Accordingly, the State’s choice of language served to communicate its opinion that Hilliard was guilty and that its

informant was telling the truth about what transpired. The multiple, repeated references to “controlled buys” throughout the case thus prejudiced Hilliard’s right to a fair trial.

An opinion on guilt, direct or by inference, is improper. *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008). Testimony constitutes an improper opinion on guilt when it goes to the ultimate factual issue in the case. *State v. Quaale*, 82 Wn.2d 191, 200, 340 P.3d 213 (2014). Whether a comment is prohibited depends upon the facts and circumstances of each case. *State v. Painter*, 27 Wn. App. 708, 717, 620 P.2d 1001 (1980) (citing *State v. Owen*, 24 Wn. App. 130, 600 P.2d 625 (1979)). Introducing such testimony invades the exclusive fact-finding province of the jury and thereby undermines the constitutional right to a jury trial under the U.S. and Washington Constitutions. *Quaale*, 82 Wn.2d at 199; *Montgomery*, 163 Wn.2d at 590.

The prosecutor and its witnesses repeated use of the term “controlled buys” communicated to the jury that in their opinion, the buys did in fact occur and their informant was truthful about them. As such, it is conclusory language similar to referring to a “victim” in a criminal case. In *State v. Alger*, 31 Wn. App. 244, 249, 640 P.2d 44 (1982), the Court of Appeals declined to find error in a single reference to the “victim” in the

entire case, but acknowledged that use of the term was “neither encouraged nor recommended.” But other courts have reached different results when the references are more pervasive and go directly to disputed issues in the case.

In *State v. Albino*, 24 A.3d 602, 617 (Conn. App. 2011), the Appellate Court of Connecticut considered the propriety of a prosecutor’s reference to “the victim” 27 times throughout the trial, including during the evidentiary phase. There, because the only question for the jury was whether the killing was justified, not whether the defendant did it, the *Albino* court held that the prosecuting attorney’s repeated use of the conclusory terms “victim,” “murder,” and “murder weapon” constituted improper opinions on the ultimate issue in the case. *Id.*

In reaching this conclusion, the *Albino* court reviewed a number of cases from other jurisdictions in which such comments were found improper. For example, in *Jackson v. State*, 600 A.2d 21, 25 (Sup. Ct. Del. 2005), the Supreme Court of Delaware considered “the prosecutor’s repeated use of the term in a case where consent was the sole defense, and the principal issue is one of credibility, to suggest to the jury, that a crime necessarily had been committed” and concluded:

In this case, if the defense of consent were accepted by the jury, no crime would have been proven and the complaining witness would not be deemed a victim. In such cases it is incompatible with the presumption of innocence for the prosecutor to refer to the complaining witness as the “victim,” just as it is to refer to the defendant as a “criminal.” In each instance, the use of a particular term assumes the commission of a crime. If there is no dispute that a crime has, in fact, occurred, there is no harm in referring to the existence of a victim. In a narrow range of cases, such as this, such use is clearly unwarranted. It is improper for a prosecutor to assume as a given, or to suggest to the jury, the existence of that which is in dispute.

(Internal citation omitted); *see also State v. Wigg*, 889 A.2d 233, 236 (Sup. Ct. Vt. 2005) (“where the commission of a crime is in dispute and the core issue is one of the complainant's credibility, it is error for a trial court to permit a police detective to refer to the complainant as the ‘victim.’”); *State v. Devey*, 138 P.3d 90, 95-96 (Ct. App. Ut. 2006) (concluding reference to “victim” when issue in dispute was consent was improper comment on evidence); *Veteto v. State*, 8 S.W.3d 805, 816-17 (Ct. App. Tx. 2000) (concluding failure to refer to victim as “alleged” when sole issue was whether assaults were committed was improper comment on evidence).

While not binding on this court, these decisions from multiple jurisdictions are well-reasoned and should be regarded as persuasive. As in these cases, the prosecuting attorney and its law enforcement witnesses

here used language that necessarily assumed the crime had occurred, when whether the crime had occurred depended upon the jury's assessment of the informant's credibility. The jury heard evidence that informants in general are often not trustworthy, that they occasionally steal or report deliveries that never actually occurred, and that this particular informant was terminated for stealing, was using drugs while he was working as an informant, and somehow lost some of the drugs he claimed to have bought from Hilliard in a gas station bathroom without remembering opening the package and removing the pills. I RP 90, 110, 131-32, 178, II RP 271, 238-39. None of the alleged transactions occurred where police could independently verify an exchange, so determining whether Hilliard delivered the drugs to the informant depended entirely upon the jury's evaluation of the informant's testimony. The State's language went directly to the dispositive issue in the case and thereby undermined Hilliard's presumption of innocence. This was improper.

Improper testimony opining that the defendant is guilty may nevertheless be regarded as harmless. *See State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159 (1973). The error is harmful when the reviewing court cannot say whether the defendant would or would not have been convicted but for the error. *State v. Mack*, 80 Wn.2d 19, 21-22, 490 P.2d 1303 (1971) (*quoting State v. Martin*, 73 Wn.2d 616, 627, 440 P.2d 429

(1968)). This is determined by evaluating whether the untainted evidence is so overwhelming as to necessarily lead to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, the State's repeated invocation of the problematic language served to tip the scale in its favor on the dispositive issue in the case. The evidence of guilt was not so overwhelming as to necessarily lead to the same conclusion, in light of the lack of independent corroboration of the exchanges, the informant's credibility problems, and the suspicious circumstances surrounding the third interaction in which the informant clearly tampered with the drugs, but could not explain how it occurred. Under these circumstances, the language served to employ the influence of the State's opinion to persuade the jury to convict. Accordingly, the error was not harmless and a new trial should be granted.

II. The prosecuting attorney's argument that the purpose of the trial was to hold Hilliard accountable was inflammatory and, under the facts of this case, constituted ill-intentioned and flagrant misconduct.

In its rebuttal argument, in response to the defense emphasizing the problems with the informant's credibility, counsel for the State informed the jury that "This is not about Mr. Skiles. This is about holding Mr. Hilliard accountable . . . That is what we are doing here. He is holding

him accountable for it.” II RP 317. The State repeated this argument again moments later, telling the jury that Skiles’s accountability was not at issue, but Hilliard’s was. II RP 318. This argument misstated the jury’s function because Skiles’s credibility was critical in determining whether Hilliard was guilty or not, and it invited the jury to return a verdict based not upon its determination of that factual question, but based upon its desire to punish Hilliard for the accusation. Because this argument was flagrant and ill-intentioned, and deprived Hilliard of a fair trial based upon dispassionate evaluation of the State’s case, the convictions should be reversed.

A claim of prosecutorial misconduct requires the defendant to show that the prosecutor’s conduct was both improper and prejudicial, considering the context of the record as a whole and the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The defendant carries the burden of establishing that the conduct is both improper and prejudicial. *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). The error is not prejudicial unless there is a substantial likelihood the misconduct affected the verdict. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). Absent a defense objection at trial, the issue is waived unless the misconduct is “so flagrant and ill-

intentioned that it evinces and enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Korum*, 157 Wn.2d at 650 (quoting *Stenson*, 132 Wn.2d at 719).

The prosecutor has broad latitude to draw reasonable inferences from the evidence and express those inferences to the jury in closing argument. *Stenson*, 132 Wn.2d at 727. However, the prosecutor may not vouch for the credibility of any witness, or express an opinion about the guilt or innocent of the accused. *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985). The injection of the prosecutor’s personal reaction to a defense theory is improper. *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993). Because a prosecuting attorney represents the people and must act with impartiality in the pursuit of justice, he “must subdue courtroom zeal for the sake of fairness to the defendant.” *Thorgerson*, 172 Wn.2d at 443 (citing *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)). He must further refrain from making “bald appeals to passion and prejudice.” *Fisher*, 165 Wn.2d at 747. Prosecuting attorneys, as representatives of the people, “have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *Id.* at 746.

A prosecutor may use the evidence to explain why the jury might want to believe one witness over another. *See Brett*, 126 Wn.2d at 175.

Such explanations are consistent with the prosecutor's responsibility to act impartially in the public interest. But,

If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). The prosecutor's duty to act impartially derives from his or her position as a quasi-judicial officer. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). Jurors can allow neither sympathy nor prejudice to affect their verdict, and prosecutors may not argue that jurors should convict on those grounds. *See, e.g., State v. Echevarria*, 71 Wn. App. 595, 869 P.2d 420 (1993); *State v. Belgarde*, 110 Wn.2d 504, 510, 755 P.2d 174 (1988); *State v. Powell*, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991). Moreover, statements that mischaracterize the jury's role as something other than determining whether the State has proved its case beyond a reasonable

doubt are improper. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Generally, a prosecutor may not urge jurors to convict a criminal defendant in order to send a message about community morals or to deter future lawbreaking. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011). Arguments by the State asking the jury to act as “a conscience of the community” are improper if they are intended to inflame the jury.” *State v. Davis*, 141 Wn.2d 798, 873, 10 P.3d 977 (2000) (citing *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999)).

Courts should evaluate misconduct considering the effect it produced. *Emery*, 174 Wn.2d at 762 (quoting *State v. Navone*, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). The question is whether the jury has been so prejudiced or inflamed as to prevent the defendant from receiving a fair trial. *Id.* (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 434 (1932)). Moreover, although a defendant may fail to show any one statement incurable with proper instructions, the cumulative effect of multiple instances of misconduct may result in incurable prejudice. *State v. Case*, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Here, the State's argument in response to the defense's closing amounted to telling the jury its function was to disregard Skiles's credibility problems and punish Hilliard. This was improper and incorrect for multiple reasons. First, to determine whether Hilliard was guilty or not, the evidence required the jury to evaluate whether Skiles could be believed. Stating that Skiles's "accountability" played no role in the jury's deliberative process was incorrect; on the contrary, it was critical. Second, the jury's job is not to hold *anybody* accountable, it is to evaluate the State's evidence and determine whether the charge has been proven beyond a reasonable doubt. Urging the jury to hold a defendant accountable is an invitation to vindicate the State's allegation and take the State's side in the case. This argument simply asks the jury to render its verdict based on its preferences. The statements were flagrant and ill-intentioned because they injected entirely improper considerations into the jury's decision-making, disregarded the prosecutor's responsibility to seek a verdict free of passion or prejudice, and undermined the function of the jury to impartially evaluate whether the State had overcome doubts about its evidence sufficient to convict.

The argument deprived Hilliard of a fair trial in which the verdict would be based solely on the strength of the State's case. Accordingly,

the trial cannot be relied upon as having produced a just result, and the convictions should be reversed.

III. Cumulatively, these errors served to deprive Hilliard of a fair trial based solely upon the strength of the evidence.

When possible errors, standing alone, might not warrant a new trial, a court can still order a new one when the accumulation of error warrants it. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Here, even if the errors individually do not rise to the level of requiring reversal, considered together, they undermined Hilliard's presumption of innocence and distracted from the impartial evaluation of the State's case. There is a reasonable likelihood that, had these errors not have occurred, the jury would have reached a different result and found reasonable doubt to believe that Hilliard committed the charged deliveries. Accordingly, he should be granted a new trial.

IV. Hilliard requests that the court decline to impose appellate costs due to his indigence in the event he does not prevail on appeal.

Pursuant to the General Court Order dated June 10, 2016 and Title 17 of the Rules on Appeal, Hilliard respectfully requests that due to his

continued indigency, the court should decline to impose appellate costs in the event he does not prevail.

Hilliard was found indigent for purposes of appeal, based upon his declaration that he has no assets and receives only income from food stamps. CP 50-54. The presumption of indigence continues throughout review. RAP 15.2(f).

The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016). The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and equitable manner depending on the realities of the case." *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

In recognition of the hardships imposed by large appellate cost awards, the Supreme Court has recently revised RAP 14.2 to provide that unless the Commissioner receives evidence of a substantial change in the appellant's financial circumstances, the original determination that the appellant lacks the ability to pay should control.

Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs. Hilliard has complied with the court's general order, and his report as to continued indigency is filed herein. He owns no property, receives public assistance, has a dependent daughter, and a ninth grade education. The likelihood that he could afford to pay an appellate cost award is extremely low. Unless the State is able to demonstrate a substantial change in his financial circumstances consistent with RAP 14.2, costs should be denied.

VI. CONCLUSION

For the foregoing reasons, Hilliard requests that the court REVERSE his convictions and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 30 day of August, 2017.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Pedro Hilliard, DOC #398030
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And on this same day, pursuant to prior agreement of the parties, I served via e-mail a true and correct copy of the foregoing Appellant's Brief to the following:

Brian, O'Brien, Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

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

Signed this 30 day of August, 2017 in Walla Walla, Washington.


Breanna Eng

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