

No. 39103-1-II  
Consolidated with nos. 39113-9-II  
and 40153-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JAMES LINDSAY, SR. and JENNIFER HOLMES,

Appellants.

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

The Honorable Brian Tollefson

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SUPPLEMENTAL BRIEF OF JAMES LINDSAY, SR.

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A. ARGUMENT

**The Prosecutor's Repeated Improper Remarks  
Constituted Prejudicial Misconduct Which  
Requires Reversal**

1. The decision in *State v. Monday* compels reversal of Mr. Lindsay's convictions.<sup>1</sup>

In *State v. Monday*, the Supreme Court reversed a murder conviction where the prosecutor had injected his racial bias into the trial where the defendant had not objected and the evidence consisted of a videotape showing the murder. 171 Wn.2d 667, 675-81, 257 P.3d 551 (2011). In *Monday*, the Court held that the prosecutor had improperly injected racial prejudice into the trial by repeatedly (1) referring to an African–American “anti[-]snitch code” to discredit witnesses when there was nothing in the record that attributed this code exclusively to African-Americans; (2) using the term “ ‘po-leese’ ” to refer to police during direct examination of African–American witnesses; and (3) making “other” comments throughout the trial that were intended to “subtly, and likely deliberately, call to the jury's attention that the witness[es were] African[-]American.” *Monday*, 171 Wn.2d at 678-79. The Court

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<sup>1</sup> Mr. Lindsay relies upon the facts as stated in the Brief of Appellant filed by Jennifer Holmes at pages 9-33, 39-54 and adopts them by reference herein. RAP 10.1(g)(2).

further held that this improper prosecutorial conduct was flagrant or ill-intentioned, violated the defendant's right to a fair and impartial jury under art. I, § 22<sup>2</sup> of the Washington Constitution, and that no curative instruction could have cured the resulting prejudice.

*Monday*, 171 Wn.2d at 679-80.

In light of the State's violation of the defendant's constitutional right to an impartial jury, the Court rejected application of the "substantial likelihood that the misconduct affected the verdict" standard and instead applied the constitutional harmless error standard:

If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.

Such a test exists: constitutional harmless error. E.g., *State v. Evans*, 154 Wn.2d 438, 454, 114 P.3d 627 (2005) (citing *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002)); see also *State v. Evans*, 96 Wn.2d 1, 4, 633 P.2d 83 (1981). Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did

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<sup>2</sup> Article I, section 22 of the Washington Constitution states in relevant part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . .

not affect the verdict. We hold that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. We also hold that in such cases, the burden is on the State.

...  
In this case, we cannot say beyond a reasonable doubt that the error did not contribute to the verdicts. The prosecutor's misconduct tainted nearly every lay witness's testimony. It planted the seed in the jury's mind that most of the witnesses were, at best, shading the truth to benefit the defendant. Under the circumstances, we cannot say that the misconduct did not affect the jury's verdict.

*Id.* at 680-81 (footnote omitted).

Here, in contrast to *Monday* where there was no objection, there were numerous objections to the prosecutor's misconduct. But more importantly, the constitutional harmless error standard used in *Monday* should be applied equally here. *Monday* should not be read so narrowly as to apply only to cases where the prosecutor engaged in racial *animus*. The *Monday* decision stands for a broader proposition: where the prosecutor has engaged in flagrant and intentional misconduct which has violated a defendant's rights under the Washington Constitution, and where other attempts at deterring such conduct prove fruitless, in order to deter such misconduct, the constitutional harmless error test should

apply requiring the State to bear the burden of showing the misconduct did not affect the jury's verdict. The Court in *Monday* was concerned about stopping prosecutorial misconduct that was especially egregious; there it happened to be racist conduct. The Court did not explicitly limit its decision to only those instances where racial *animus* was introduced into the trial.

Although there was no injection of racial *animus* by the prosecutor here, the prosecutor nevertheless violated Mr. Lindsay's constitutional right under art. I, § 22 by denying him the right to a fair trial by repeatedly misstating and shifting the burden of proof, and impermissibly vouching for credibility of the State's witnesses. The prosecutor additionally denied Mr. Lindsay the right to appeal under art. I, § 22 by making *sotto voce* arguments to the jury that neither the court reporter, nor the judge, nor the other parties could hear. Applying the standard "substantial likelihood" test would do nothing to remedy the egregious conduct by the prosecutor here. Only by placing the burden on the State to prove beyond a reasonable doubt that the misconduct did not affect the jury's verdict will a clear message be sent that this Court will not tolerate such misbehavior.

The Supreme Court's subsequent decision in *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011), does not alter the analysis. The Court there was not faced with the egregious misconduct as it did in *Monday*, hence there was no need to utilize the higher standard. In fact, the Court found much of the conduct by the prosecutor not to even rise to the level of misconduct. *Id.* at 448 ("Indeed, it is a close question whether misconduct occurred at all."). Thus, *Thorgerson* does not, and should not apply here.

Applying the constitutional harmless error standard here, the State cannot prove beyond a reasonable doubt that the misconduct did not affect the jury's verdict. The entire case was built upon the credibility of Mr. Wilkey. As in *Monday*, the prosecutor tainted Ms. Holmes' testimony and improperly bolstered the testimony of Mr. Wilkey. As a result, Mr. Lindsay is entitled to reversal of his convictions.

2. Under the “substantial likelihood” standard of establishing prejudice, Mr. Lindsay is entitled to reversal.

Even if this Court disagrees that the constitutional harmless error standard should apply, Mr. Lindsay is entitled to reversal under the “substantial likelihood” standard.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. *Monday*, 171 Wn.2d at 675. Courts evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Id.* A defendant suffers prejudice where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. *Id.* A prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. *State v. Boehning*, 127 Wn.App. 511, 519, 111 P.3d 899 (2005).

Once again, the decision in *Monday* is helpful. In *Monday*, there was a substantial amount of evidence that implicated Mr. Monday in the murder, including his admissions that he was present when the shooting occurred and was wearing an easily identifiable coat. Most importantly, there was a videotape in which

the shooter appeared identical to Mr. Monday and who was wearing a coat identical to the one Mr. Monday admitted wearing that night. Nevertheless, even in light of this overwhelming evidence the Supreme Court reversed Mr. Monday's conviction.

In *State v. Brown*, this Court reversed a conviction for prosecutorial misconduct, finding a substantial likelihood that the misconduct affected the jury's verdict:

[The prosecutor] began closing argument with "this case is about . . . common sense and credibility and I submit to you that this defendant is not credible." RP (July 8, 2004) at 3–4. Then, discussing Bottoms's testimony and Brown's denial of it, the prosecutor said, "He's a liar, ladies and gentlemen, and that is what you're going to have to decide." RP (July 8, 2004) at 14. Finally, the prosecutor concluded, "He's a liar, you can't believe what he told you and after you go to the jury room, review the evidence, I believe the right verdict is that you should find him guilty [of the charged crimes]." RP (July 8, 2004) at 19. In addition, the prosecutor suggested to the jury that to acquit, the jurors would have to believe that the victims "simply threw their stuff away," a notion their testimony directly contradicted. RP (July 8, 2004) at 5–6.

Given the ample case law condemning such conduct, we find the prosecutor's comments "flagrant and ill-intentioned." And we cannot say the error is harmless. The State presented ample evidence that Brown took the property, sold some to antique dealers, and still had some. But the issue was whether Brown broke into the storage units and stole the property or simply found it, apparently abandoned near the dumpster. And on this critical issue, the jury

had to decide whether to believe Bottoms or Brown. We find a substantial likelihood that the prosecutor's improper arguments unfairly persuaded the jury to believe Bottoms. Accordingly, we must reverse and remand for a new trial.

130 Wn.App. 767, 771, 124 P.3d 663 (2005).

The prosecutor's misconduct here was substantially more egregious than the prosecutor in *Brown*. Here the prosecutor repeatedly disparaged Ms. Holmes' attorney, misstated and shifted the burden of proof, and engaged in *sotto voce* arguments which only the jury apparently heard. Each of these instances were objected to and in a few instances, a motion for a mistrial was made. All of this misconduct was geared toward bolstering the otherwise questionable credibility of Mr. Wilkey before the jury. Thus, there was a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.

Furthermore, the cumulative nature of the prosecutor's repeated instances of misconduct should also result in reversal of Mr. Lindsay's convictions. In *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956), the Supreme Court held, "[T]here comes a time . . . when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error." Here too, the collective effect of the

prosecutor's remarks was improper and too severe and frequent to be overcome by a curative instruction. The prosecutor indulged in an appeal to the jury wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice against Mr. Lindsay and Ms. Holmes. Mr. Lindsay is entitled to reversal of his convictions.

3. Mr. Lindsay adopts by reference the arguments made by Ms. Holmes

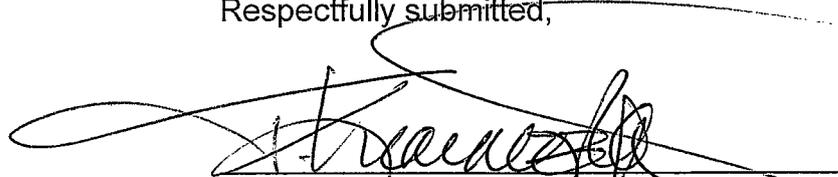
Pursuant to RAP 10.1(g)(2), Mr. Lindsay adopts by reference the arguments made Ms. Holmes in her supplemental brief requested by this Court in its December 20, 2011, order.

B. CONCLUSION

For the reasons stated, Mr. Lindsay requests this Court reverse his convictions.

DATED this 17th day of January 2012.

Respectfully submitted,



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Date: January 20, 2012

# WASHINGTON APPELLATE PROJECT

## January 20, 2012 - 4:21 PM

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