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No. 88437-4  
COA No. 39103-1-II

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAMES LEROY LINDSAY and JENNIFER SARAH HOLMES,

Petitioners.

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

The Honorable Brian M. Tollefson

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SUPPLEMENTAL BRIEF OF JENNIFER HOLMES

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 ORIGINAL

A. ISSUES PERTAINING TO SUPREME COURT REVIEW:

1. Is Ms. Holmes entitled to reversal and remand where she has established that there is a sufficient likelihood that the prosecutor's repeated acts of egregious misconduct affects the jury's verdict?

B. STATEMENT OF THE CASE:

Ms. Holmes incorporated by reference the statements of the case in the opinion of the Court of Appeals, No. 39103-1-II, her opening brief in the Court of the Appeals, her supplemental brief in the Court of Appeals, and her petition for review in this case.

The prosecutor suggested that defense counsel's numerous motions for mistrial somehow "goaded the prosecutor into misconduct. The basis for these mistrial motions is set forth in the footnote to Ms. Holmes Supplemental Brief to the Court of Appeals. (footnote 1, pages 2-3).

Throughout the lengthy trial in this case the deputy prosecutor committed dozens of acts of misconduct. When called on them, the deputy prosecutor [DPA] invariably claimed that he was being "picked on" and/or demeaned by defense counsel's arguments. This is simply the typical response of this deputy's response, whose "poor me" attitude apparently is deliberately injected into the record to justify his conduct and sometimes to distract the trial court from ruling on the merits of certain

matters. *Infra*. While arguing a *Brady* motion, the DPA characterized the defense argument as “ludicrous”, “silly.” RP 731. When arguing a motion on the admissibility of the alleged victim’s use of cocaine during his relationship with Ms. Holmes, the DPA called the argument “ridiculous.” RP 756, 757. Defense counsel replied, “Well, it’s always hard to answer someone’s response when they just resort to basically belittling the argument by saying its ridiculous; it’s not.” RP 758.

When the trial court agreed to allow defense counsel to attend her civil trial against Pierce County, including the prosecutor’s office, and suggested to the DPA that it would look bad for the office if she were not allowed to be present, the DPA retorted, “You know what, Your Honor, I don’t care what it looks like for my office.” RP 1998.

When a forensic technician from the crime scene acknowledged failure to preserve a swab that had tested positive for blood and the defense moved for a mistrial based on that failure, the DPA did not want the defense to be able to make its motion properly outside the presence of the jury and asked “let’s keep this thing going” [RP 1337]; during defense counsel’s examination of the witness, the DPA objected, “...She can ask her next question by not badgering or assaulting the witness.”

The DPA accused defense counsel of professional misconduct in front of the jury: “We took a ten-minute recess so she could ask him any

kind of questions she wanted to. And instead she waits to make a claim of just absolute professional misconduct in front of a jury, knowing that she could have asked that question outside the presence of the jury, she waits until then. You know, it's because she didn't want to do it when they weren't here. Because she wants to just throw it up there and see what sticks." RP 1240. When the parties continued to argue the substance of defense counsel's objection, the DPA continued making personal attacks: "She doesn't care that it didn't happen that way. But she wants to inject that into the jury's mind because it's more fun that way. It has nothing to do with the truth." RP 1243.

When the discussion continued and the court agreed to that defense counsel could continue to examine the witness, the DPA stated, ". . . That's fine. It's only twice in that last half hour I've been accused of things that would take away my bar number." RP 1244.

On October 14, 2008, upon Ms. Holmes' motion, the court orally instructed the jury, "You are instructed that the prosecutor may not state personal opinions regarding the credibility of any witness; therefore, you must disregard any such statements, comments, or opinions." RP 2558.

On another occasion, when defense counsel, whose motion it was, replied to the DPA's response to the motion to dismiss, the DPA interrupted her argument, "She's trying to be insulting." RP 1342.

When the court offered the DPA one last chance to speak to the merits of the issue, the DPA again engaged in personal attacks: “I have nothing to add. We can go on all day. She’s saying the same thing over and over again, but I don’t see a need.” RP 1344.

When the parties were discussing what photos to admit and which showed “truer” color, especially in the depiction of bruises, defense counsel suggested that color sometimes could be manipulated to make bruises look worse. RP 1517-1518. The DPA’s immediate response was to aver that he had been personally attacked, “It’s good to know that we haven’t gone a whole day without the accusations, but that’s okay.” RP 1518.

During defense counsel’s cross-examination of a police witness, the DPA objected to a question: “Objection, relevance. We’re well beyond – it seems like impeachment on a collateral matter and we’re into silly.” 5423.

After that witness’s testimony, defense counsel continued to make the record regarding the DPA making improper objections that denigrated defense counsel before the jury. RP 5428. The DPA’s response, again, not to the merits, was, “Could we get to the point? Can we make the motion? Because I’m losing my patience here, Your Honor . . .”RP 5429.

When defense counsel objected to the DPA discussing the property with the alleged victim during a recess in his testimony, defense objected. RP 2139-2140. During this argument, the DPA stated, “You’re making accusations that are ridiculous and you’re lucky I haven’t exploded.” RP 2140.

When defense counsel asked for a limiting instruction to inform the jury that the codefendant’s statements did not apply to Ms. Holmes under *Crawford*<sup>1</sup>, defense counsel’s response to her argument was not only that he “didn’t need the instruction” but also, when the court asked him for his response, said, “this is ridiculous.” RP 4075 The DPA’s conduct reached a point after which he called defense counsel “snotty, unprofessional, unreasonable” that the court told him to bring his checkbook with him to court [for sanctions] after the DPA threatened, “I’m telling you, if it comes again – and I’m not – I’m telling the court right now, I’m going to…” RP 8101.

Certainly trial counsel for Ms. Holmes admittedly engaged in a some acts that were deservedly criticized in the majority opinion in *State v. Lindsay*, 171 Wn. App. 808, \_\_\_ 288 P.3d 641, and dissenting opinion 171 Wn.App, \_\_\_ (2012), review granted, \_\_\_ Wn.2d \_\_\_ (July 12, 2013). However, in the context of the case, those ill-chosen comments were not

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<sup>1</sup> *Crawford v. Washington*, 541 US 36, 124 S.Ct 1354, 158 L.E.2d 177 (2004).

the subject of any cross-appeal by the State. Further, the State cannot and has not cited any authority for the proposition that these comments justified that prosecutor's conduct during the evidence portion of the trial. Moreover, the State cannot and has not cited any authority for the proposition that these comments made during the evidence portion of the trial in any way provoked the numerous and egregious acts of prosecutorial misconduct in closing argument.

The prosecutor interposed only two objections during Ms. Holmes' closing argument. First, the prosecutor objected to defense counsel's use of exhibits that were admitted for illustration purposes, which was overruled. RP 8732 -8736. The prosecutor also objected to defense counsel's reference to trial evidence that Ms. Holmes had been removed from the court via ambulance one day, causing a half day of trial. RP 8744. The trial court ruled that the jury would determine what the evidence was. RP 8744.

The opinion of the Court of Appeals and the briefs of Ms. Holmes set forth in detail the prosecutor's numerous and egregious acts of misconduct during closing argument.

C. LAW AND ARGUMENT:

1. THERE WAS A SUBSTANTIAL LIKELIHOOD THAT THE PROSECUTOR'S MISCONDUCT SO AFFECTED THE JURY VERDICTS THAT MS. HOLMES' CONVICTIONS MUST BE REVERSED.

A criminal defendant's constitutional right to counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and also article I, section 22 of the Washington State Constitution.

As ministers of justice, prosecutors owe a duty to ensure these fundamental rights. This Court has repeatedly admonished prosecutors that defendants are among the people they represent. Regrettably, this Court regularly needed to remind prosecutors that they owe a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *State v. Monday*, 171 Wn.2d 667, 257 P.3d. 551 (2011). Prosecutorial misconduct may deprive a criminal defendant of that constitutional right. *Id.*

The Second Circuit has provided a cogent explanation of the harms caused by some of the type of prosecutorial misconduct that occurred in this case. That court noted that such misconduct unfairly exploits the tremendous power and prestige of the prosecutor's office to manipulate the jury's assessment of the evidence:

The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is done. The jury knows he has prepared and presented the case and that he has complete access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the juror his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they in fact may be. "

*United States v. Modica*, 663 F.2d 1173 [2d Cir. 1981].

In this case, the prosecutor abused his position through his repeated and egregious acts of misconduct.

In this case, there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. *State v. Glassman*, 175 Wn.2d 695, 711, 286 P.3d 673 (2012). The Court in that case emphasized that the focus is on the misconduct because the impact of "powerful but unquantifiable material on the jury is exceedingly difficult to assess but substantially likely to have affected the entirety of the jury deliberations and its verdicts." *Glassman*. 175 Wn.2d at 712.

As a consequence, Ms. Holmes' credibility was the central issue at her trial. As the minority opinion correctly noted, "the jury needed to determine the intent of the defendant." 171 at 855. The minority explained, "the defendants conceded much of the conduct but denied the intent elements of the more serious crimes. Based on the prosecutorial

misconduct, I cannot say that 'the jury would not have returned verdicts for lesser offenses.' *Id.*

The majority found that the prosecutor had committed numerous acts of misconduct: (1) the prosecutor demeaned defense counsel's integrity throughout the trial, thereby severely damaging defense counsel's ability to present its case to the jury. 171 Wn. App. At 826-827. (2) The prosecutor committed misconduct when he called defense counsel's arguments "bogus," "sixth grade," and more. (3) When defense counsel was making a legal argument regarding an objection to the court, the prosecutor interrupted her, "We're into silly" and "Yeah, we all know that." 171 Wn.App. at 827.

The Court of Appeals held that the prosecutor's closing arguments were rife with misconduct.

As the minority opinion noted, the prosecutor's perhaps most outrageous comment was to refer to the defense closings as "a crock". This occurred almost immediately in the State's rebuttal and was tantamount to telling the jury to disregard everything that the defense had just argued for more than two hours. 171 Wn.App. at 855-856.

The prosecutor misstated the burden of proof. (4) The Court of Appeals held that the prosecutor trivialized the burden of proof by analyzing the decision to convict to the decision to cross and the street and

also explained the quantum of evidence of explaining to the jury how it could recognize Seattle in an incomplete puzzle with only pictures of Mount Rainier or the Space Needle in it. 171 Wn.App. at 829.

The prosecutor committed misconduct (5) by telling the jury that its job was to speak the truth and (6) then by asking themselves who wants to find the truth.

The prosecutor committed misconduct (7) by repeatedly stating his personal opinion regarding Ms. Holmes' credibility. He called her "funny", "disgusting," "comical," and "the most ridiculous thing I have ever heard." He told the jury that she should not "get up here and lie." He told the jury that her portrayal of the victim as a bully was "a crock". As the majority held, this language was "*clear and unmistakable*" expression of personal opinion. 171 Wn.App. at 833.

Perhaps the most outrageous prosecutorial conduct occurred when (8) the prosecutor approached the jury box and whispered two portions of his rebuttal argument to the jury. He did this so softly that not even the court reporter could take it down. And then he did it again. There is no way to reconstruct what the prosecutor actually said to the jury. The State, at most, speculates when it offers that the prosecutor's on the argument merely continued the previous audible argument and therefore that the whispering did not matter. Ms. Holmes submits that there is nothing in the

record to support this claim. (9) Immediately after this whispering event, the prosecutor crossed the courtroom, stood directly behind the defense, bellowed out the next portion of his closing to the laughter of the jury. Although the court of appeals was “not satisfied with the trial court’s reasoning that the trial court’s reasoning the prosecutor merely needed to repeat himself” [and there is no evidence in the record to support any factual finding that he did], the court of appeals also noted that the “prosecutor must never whisper to the jury off the record.” Ms. Holmes submits that the prosecutor’s act of whispering portions of his closing argument to the jury should in and of itself be sufficient misconduct to warrant reversal.

2. THE PROSECUTOR’S CLAIM THAT HE SOMEHOW HAD BEEN PROVOKED BY DEFENSE COUNSEL INTO COMMITTING EGREGIOUS MISCONDUCT IN CLOSING ARGUMENT IS NOT SUPPORTED BY THE RECORD. MOREOVER, EVEN ASSUMING ARGUENDO THAT DEFENSE COUNSEL AND THE PROSECUTOR HAD CONTENTIOUS EXCHANGES DURING TRIAL, THE STATE CANNOT ARGUE THAT THIS SOMEHOW EXCUSED THE PROSECUTOR’S EGREGIOUS CONDUCT IN CLOSING ARGUMENTS.

A prosecutor’s claim that his misconduct in argument resulted from was provoked by defense counsel applies only where the alleged provocation occurred during the closing argument of defense counsel.

*State v. Weber*, 159 Wn.2d 252, 276-277; 149 P.3d 646 (2006). In *Weber*.

the court rejected defendant's argument that the prosecutor had committed misconduct during rebuttal closing argument. The court reiterated Washington law that although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements not supported by the record.

In that case, the State conceded that the prosecuting attorney's remarks in rebuttal closing argument were improper but asserted that they were unlikely to have affected the jury's verdict. This Court however held that the prosecutor's inappropriate comments about his experience with cases without eye witnesses was invited by defense counsel's comments and also unlikely to impact the jury.

However, the State argues that the prosecuting attorney's argument, although improper, was made in response to defense counsel's argument about the type of evidence that the State was required to produce. Br. of Resp't at 18. The State cites *State v. Farr-Lenzini*, 93 Wn. App. 453, 471, 970 P.2d 313 (1999), in which the prosecuting attorney responded to defense counsel's argument that the defendant did not fit the profile of an eluder by stating that Ted Bundy did not fit the profile of a mass murderer. The Court of Appeals held that the prosecuting attorney's remarks were a "rhetorical overreaction to a defense argument" but that

they did not deny the defendant a fair trial because they were addressed through the jury instructions. *Id.*

However, even improper remarks in rebuttal by the prosecutor are not grounds for reversal “if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86(citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967); *State v. Graham*, 59 Wn. App. 418, 428-29, 798 P.2d 314 (1990)).

In the instant case, the prosecuting attorney's improper arguments were not responsive to any portions of Ms. Holmes' argument. Rather the prosecutor's name-calling, expression of personal opinions, other invective was of his own making. Likewise, his misstatements of the law regarding such things as the burden of proof could not have been invited by anyone, they were simply egregious errors previously condemned by Washington courts. e.g. *State v. Walker*, 164 Wn.App 724, 726, 265 P.3d 191 (2011).

Finally, although the prosecutor throughout this case has averred that his misconduct was provoked by defense counsel, the prosecutor has made no specific arguments but rather has relied on bold assertions.

Further, the prosecutor cannot and does not link a single statement of Ms. Holmes that could have provoked the prosecutor's great number of impermissible arguments in closings.

3. THE COURT OF APPEALS MISAPPLIED THE GLASSMAN TEST.

The Court of Appeals erred when it held that the errors before the jury were "few" and therefore had little on the jury. 171 Wn.App at 838.

As noted, on at least one occasion the court orally instructed the jury, "You are instructed that the prosecutor may not state personal opinions regarding the credibility of any witness; therefore, you must disregard any such statements, comments, or opinions." RP 2558.

This occurred early in the trial on October 14, 2008, and was an issue throughout the trial. The prosecutor continued to make such comments as well as commit other acts of egregious misconduct.

Under *Glassman*, the focus for determining whether reversal is warranted is whether there is sufficient likelihood that the instances of misconduct affected the jury's verdict. 171 Wn.App. at 853.

In this case, the State's attorney repeatedly advised the jury of witnesses he believed, his opinions of the performance and integrity of opposing counsel, called defense closing arguments "a crock", whispered

parts of his closing arguments such that there will never be a record of what he said, and committed numerous other acts of misconduct.

Based on these acts, Ms. Holmes submits that she has satisfied that *Glassman* test. These acts created a “substantial likelihood that the instances of misconduct affected the jury’s verdict.” *Glassman*. 175 Wn.2d at 711.

D. CONCLUSION:

For the foregoing reasons, Ms Holmes respectfully requests this Court to find that there was a substantial likelihood the prosecutor’s repeated acts of misconduct affected the jury’s verdicts, reverse her convictions, and remand for new trial.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of September, 2013.

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CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws Of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger, a copy of this Document to: Kim DeMarco Pierce County Prosecutor’s Office, 930 Tacoma Ave So, Room 946, Tacoma, Washington 98402 and via email to Thomas Kammerow, Washington Appellate Project 1311 Third Avenue, Suite 701, Seattle, Washington 98101 and via US Mail to Jennifer Holmes, 28007 126th Ave. E. Graham, WA 98338.

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