

No. 89920-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN MICKELSON,  
Petitioner.

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ON DISCRETIONARY REVIEW FROM THE  
COURT OF APPEALS

Court of Appeals Cause No. 43748-1-II  
Consolidated with Cause No. 43658-2-II

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RESPONDENT'S ANSWER TO BRIEF OF *AMICI CURIAE*  
WASHINGTON DEFENDER ASSOCIATION

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Washington State Supreme Court

AUG 26 2014 *lah*

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ORIGINAL

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## A. INTRODUCTION.

The Washington Defender Association (WDA) has filed an *amici curiae* brief in this matter, urging the Court to reverse the conviction of this defendant. WDA identifies a pattern of prosecutorial misconduct by naming three cases—two of them unpublished and none of them reversed—to support its contention. Brief of *amici* at 1-2. WDA is, understandably, concerned with a broader issue than simply the case at bar. But this Court is deciding this case, not cases which are not before it. While the Court is always mindful of the impact a decision will have on future cases, the focus should be on the facts of this case.

## B. STATEMENT OF THE CASE.

The substantive facts of the case are summarized in the unpublished opinion of the Court of Appeals. State v. Lewis, COA NO. 43658-2-II (Jan. 14, 2014), slip op. at 2-3.

## C. ARGUMENT.

### 1. This case is not State v. Monday.

WDA relies heavily on State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), to support its argument that certain statements made by the prosecutor in rebuttal argument were so prejudicial that they constitute reversible error. It appears from *amici's* brief

that the entire portion of the argument which it finds to be error is the following:

Here're some questions. And these are, I think, the rudimentary questions that you should consider in this case. Why did these three people go over there at 12:00 a.m.? Counsel has just said that I must be disparaging these people because they don't have jobs and they live in Tenino. Is that what I was doing? That's for you to decide.

But what I am attempting to show you is that these people don't live under the same rules of society, the same way that most of us live. They don't think the same way that a citizen that you probably interact with a lot lives. This is kind of the underbelly of society. I don't mean that in a bad way. It's just a side of society that I'd suspect that most of you don't see very often. We see it all the time, but you don't. So I'm trying to present the evidence to you so that you understand.

These are people that don't have jobs. They work under the table. They live hand to mouth. They are engaged in drinking all day. They get upset with one another. They fight. That is the type of people that we're talking about.

Why did Mickelson, Lewis, Hadley he run (sic) when Mr. Lewis said "The cops are coming"? I mean, if I heard—if I was just run over and heard "The cops are coming," what are you going to do. Hoorah. Yes. I'm saved. I'm going to wait. Let's see what happens.

The other part of that could be—and I won't quarrel with this now—is that that part of society doesn't like the cops. I don't like the cops no matter what. And that's this part of society.

RP 1477-78.

a. The holding in Monday was limited to racial arguments.

WDA argues that Monday should not be construed as limited to expressions of “racial animus.” Brief of *amici* at 9. But this Court did so limit it. “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.” Monday, 171 Wn.2d at 680. The concurring opinion by Justice Madsen particularly emphasized the Court’s focus on the issue of racism. Id. at 682-85.

More than two years later, this Court said, “Our recent decision in [*Monday*] makes it clear, however, that when a party shows prosecutorial misconduct based on racial bias, it is the state’s burden to show harmlessness beyond a reasonable doubt.” In re Pers. Restraint of Gentry, 179 Wn.2d 614, 618, 316 P.3d 1020 (2014). The Court of Appeals has understood Monday to be limited to racially-related misconduct. “Unlike *Monday*, here, the State never tied the ‘code of the street’ to a particular race. Therefore, the State’s comments do not carry the same flagrance and ill intent

of *Monday*.” *State v. Embry*, 171 Wn. App. 714, 752, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005, 300 P.3d 416 (2013).

The Court in *Monday* disapproved of “insidious and subtle references” to race, *Monday*, 171 Wn.2d at 678, but there is not even that in Mickelson’s case. There was not even a hint of racial bias. *Monday* is not a foundation upon which to reverse this conviction.

b. There was no pervasive misconduct.

WDA asks this Court to reverse Mickelson’s conviction based on the portion of the State’s rebuttal argument set forth above. That covered just over one page of the transcript of the rebuttal, which ran 16 pages. RP 1470-1486. The prosecutor’s initial closing argument took up 30 pages. RP 1376-1401, 1406-10.

In *Monday*, the Court noted that the objectionable references were not “isolated incidents” but rather “pervaded the prosecution of this case.” *Monday*, 171 Wn.2d at 678, 685 (C. J. Madsen, concurring). In addition to the prosecutor’s remarks in closing argument, he also injected racial issues into some of the questioning of witnesses. *Id.* at 671-73. In other cases in which this Court has reversed on the basis of prosecutorial misconduct, it has remarked about the pervasive nature of it.

Moreover, the conduct here was so pervasive that it could not have been cured by an instruction. “[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.”

In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012), citing to State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). This Court cited to Glasmann in State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014), when finding that the misconduct was cumulative and pervasive. Id. at 443-44.

This is not to say, however, that it is impossible for a single or brief improper statement to be reversible error. “Bald appeals to passion and prejudice constitute misconduct,” regardless of their length or pervasiveness. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009), citing to State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). However, WDA does not consider the remarks in this case to be bald; rather, it argues that the prosecutor used a “code word”—lifestyle—to invoke a bias against persons of low socio-economic status. Brief of *amici* at 10.

It is possible to think of things a prosecutor could say that would, alone, be reversible. But this is not the situation here. The Court of Appeals correctly noted that the comments were “brief and

isolated.” Lewis, COA No. 43658-2-II, slip. op. at 7. In addition, most of the challenged remarks were based on evidence presented to the jury. Id. at 5. The victim, Nathaniel Abbett, had worked in Leavenworth for two and a half months in the summer of 2011. RP 528-29. Otherwise he did not work. RP 761. Lewis worked odd jobs under the table, RP 1043, 1050, and he lived with Hadley rent-free. RP 757-58, 993-94. Lewis said that Mickelson also worked odd jobs, RP 1049. Mickelson himself said he was collecting unemployment in December of 2011. RP 1344. Neither was working at the time of the assault in December of 2011. RP 760. Lewis had previously lived rent free with Abbett and Rasmussen. RP 1060. Mickelson paid rent in the amount of \$100 to \$300 a month, or whatever he could afford. RP 1229. Hadley was collecting unemployment. RP 1049. Of the people living in the Stage Street address, only Rasmussen had a job. RP 1050.

The defendants’ social lives involved alcohol. RP 1064. Before they left the house the night of the assault Mickelson had one to one and a half beers, and Lewis drank a beer or two. RP 794, 1049. Lewis drank on a nearly-daily basis and on the 22<sup>nd</sup> of December, 2011, began drinking between 7:00 and 8:00 p.m., possibly earlier. RP 994, 1044. Mickelson testified his drinking day

began around 5:00 to 6:00 p.m., he had had two or three beers during the day, and was buzzed but not drunk on the night of the assault. RP 1233-34, 1236. Deputy Steve Hamilton, who took Mickelson to jail in the early morning hours of December 23, described him as highly intoxicated; he testified that Mickelson passed out while Hamilton was talking to him. RP 180.

The household kept unusual hours. It was not uncommon for people to stop in at Hadley's residence, where both defendants lived, at two o'clock in the morning on a Thursday. RP 816.

The altercation between Abbett, Lewis, and Mickelson ended when Lewis yelled that the cops were coming. Lewis testified that he made this statement because yelling "stop" wasn't working. RP 1162-63, 1198-99. Hadley and the defendants left the scene, RP 787, and none of them contacted the police. When the police did arrive later, Hadley not only gave false statements to the officers but declined to contact law enforcement between that time and the time of trial to give accurate information. RP 768-69, 776-77. Mickelson, who was released from prison less than ten years before trial, for second degree assault, RP 1310-11, 1317, testified that he wouldn't "necessarily" say that snitches were disliked in his

circles. RP 1315. Lewis had three felony convictions in the ten years before the trial. RP 1156-57.

There was ample evidence that the people involved had disputes. Abbett and Rasmussen clearly had their problems. RP 333, 337, 540. Lewis and Kuntz had a falling out. RP 691. Lewis and Mickelson had a major fight with Abbett, the subject of the criminal charges.

The record, therefore, supported the statements of the prosecutor. The comments here were simply not of the nature or magnitude to cause the sort of prejudice that makes a trial unfair.

c. Although the Court applied the constitutional harmless error standard in Monday, it has not abandoned the longstanding standard of requiring a defendant who did not object at trial to prove that a curative instruction would have been ineffective.

Claims of prosecutorial misconduct are reviewed under an abuse of discretion standard. Lindsay, 180 Wn.2d at 430. A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in

the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id. A defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id. “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” Jones v. Hogan, 56 Wn. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

In Monday, this Court found the racial appeals so “fundamentally opposed to our founding principles, values, and fabric of our justice system,” that it concluded a more stringent standard of review was appropriate, and adopted the constitutional harmless error test. Monday, 171 Wn.2d at 680. There the State carries the burden of showing, beyond a reasonable doubt, that the

verdict was not affected by the misconduct. Id. This was not the first time the Court had done so. State v. Emery, 174 Wn.2d 741, 757, 278 P.3d 653 (2012), citing to cases in which the prosecutor had referred in argument to a defendant's silence both pre- and post-arrest.

This Court has, however, applied the constitutional harmless error standard only in the most egregious cases. Even in Glasmann, in which the Court's outrage was apparent, it still did not put the burden on the State to prove lack of prejudice. It held that Glasmann, who did not object at trial, had proven that the misconduct was so pervasive that a curative instruction would not have removed the prejudice. Glasmann, 175 Wn.2d at 707. The court in Lindsay, where the defendant moved for a mistrial following the State's argument, followed Glasmann in finding that the misconduct was so pervasive an instruction could not have cured it. Lindsay, 180 Wn.2d at 430, 442, 443.

In State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011), the court affirmed the defendant's convictions because he did not establish any substantial likelihood that prejudice from the prosecutorial misconduct affected the verdict. Id. at 455. In his dissent in that case, Justice Chambers noted that while the Court

had recently “applied the more rigorous constitutional harmless error standard” in Monday, the prosecutor in Thorgerson did not appeal to racial bias or directly infringe on a constitutional right of the defendant, and thus the “substantial likelihood” standard was appropriate. Id. at 460, n. 9. The Court in Emery declined to apply the constitutional harmless error standard in that case, where the prosecutor had told the jury the trial was a search for the truth and had undermined the presumption of innocence, in part because “it did not involve the apparently deliberate injection of racial bias.” Emery, 174 Wn.2d at 758.

There was no argument aimed at racial bias in Mickelson’s trial. He did not object to the prosecutor’s comments, and he must now establish that the argument was so flagrant and ill-intentioned that had he objected and a curative instruction been given, it would not have eliminated the prejudice.

2. The prosecutor’s language was not inflammatory.

WDA asks this court to find the remarks made in Mickelson’s case to be so odious and prejudicial that only reversal, along with a stern lecture to prosecutors to behave themselves, will maintain public faith in our system of justice. But unflattering language does not necessarily equal prejudicial language, and a fair reading of the

prosecutor's argument in this case does not support the conclusion that the jury would be so inflamed by it that it would ignore the instructions, disregard the evidence, and abandon its common sense. As noted above, it was not pervasive, nor was it particularly egregious, and it was largely based upon the evidence.

In State v. Gregory, 158 Wn.2d 759, 863, 147 P.3d 1201 (2006), the prosecutor characterized the defendant as "evil" and a "menace to society." "The Supreme Court held, though, that the State may draw inferences from the evidence, and these inferences could have been justified given Gregory's criminal history and the facts of the case." Embry, 171 Wn. App. at 755. Even references to race, if tied to the evidence inculcating the defendant, are not prohibited. Gentry, 179 Wn.2d at 637.

In contrast, this Court did reverse in State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). In that case the prosecutor had ridiculed the defendant's attorneys and witnesses, including, "Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?" Id. at 143. There the geographic location or automotive choices of the lawyers and doctors had nothing to do

with the evidence. But in Mickelson's case, the prosecutor's argument did.

It is reasonable that the courts find racial arguments more egregious than other improper arguments. Race is protected by the 15<sup>th</sup> Amendment to the United States Constitution and it is something over which an individual has no control. Voluntary unemployment, excessive drinking, and a tendency to fight are not constitutionally protected, and they are generally within an person's control. Mickelson did not explain below, nor does WDA address, why it is unfair to argue a witness's credibility based upon his lifestyle choices. The term "underbelly of society" was a poor choice of words, and the State is not claiming that it was proper argument. But the State does maintain that it was not so flagrant and ill-intentioned that a curative instruction would not have removed any prejudice that may have resulted.

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James,

104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). “When the State’s evidence contradicts a defendant’s testimony, a prosecutor may infer that the defendant is lying or unreliable.” State v. Miles, 139 Wn. App. 879, 890, 62 P.3d 1169 (2007).

The challenged argument in this case was simply not so inflammatory as to cause the jury to reach a verdict based upon emotion rather than reason.

3. We must trust jurors to be reasonable people.

Underlying the arguments of *amici* is the assumption that jurors are extremely malleable people who respond to any “inflammatory” argument, retain only the argument they heard last, and are always aligned with the State.

The State of Washington places enormous value on juries. “The right of trial by jury shall remain inviolate, . . .”. Wash. Const. Art. I, § 21. The accused in a criminal prosecution has, among other rights, the right to an impartial jury. Wash. Const. Art. I, § 22. In some ways, Washington gives greater protection to jury trials than the federal constitution grants. State v. Williams-Walker, 167

Wn.2d 889, 896, 225 P.3d 913 (2010). We assign to juries the power to determine the facts. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). The jury must unanimously decide whether or not the defendant is guilty. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). The right to a jury trial is fundamental and rooted in the “core principles upon which this nation was founded.” It “assures governance by the people,” and is designed to prevent “potential abuses of courts and government.” State v. Evans, 154 Wn.2d 438, 445-46, 114 P.3d 627 (2005).

The jury trial is so important in Washington that it is protected even in courts of limited jurisdiction. “[N]o offense can be deemed so petty as to warrant denying a jury if it constitutes a crime.” City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982). A defendant cannot waive a jury in Superior Court without the consent of the court. CrR 6.1(a). The Supreme Court may not usurp functions which the Constitution has vested in the jury. State v. White, 60 Wn.2d 551, 572, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883, 84 S. Ct. 154, 11 L. Ed. 2d 113 (1963).

In view of this awesome responsibility, it is appropriate that we treat juries with respect and the State does not claim that it is proper to attempt to influence them with irrelevant and prejudicial

arguments. But on the other hand, we must treat jurors as intelligent and reasonable people who are able to recognize hyperbole when they hear it or disregard a phrase like “underbelly of society.” If jurors are as impressionable as *amici* suggests, it is difficult to see what value the jury system has.

[W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Pepon, 62 Wash. 635, 644, 114 P. 449 (1911).

Both parties in Mickelson’s trial accepted this jury panel. Mickelson must have believed these jurors would be fair to him. The jury was instructed that it was to consider only the testimony of the witnesses and the exhibits admitted at trial. CP 35. It was told that the lawyers’ statements were not evidence and it was to disregard any remarks not supported by the evidence or the instructions. CP 36. It was instructed that it was not to let emotion overcome the rational thought process; that it must reach its decision based upon the facts and the law, “not on sympathy, bias, or personal preference;” and that it must act impartially. CP 37. Unless the evidence indicates otherwise, jurors are presumed to be

impartial and to obey their instructions to decide on the evidence before them. State v. Latham, 100 Wn.2d 59, 67, 667 P.2d 56 (1983).

We do not second-guess jury decisions. Appellate courts must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). A jury verdict may not be impeached by reaching into the mental process of the jurors. Even evidence that “a juror misunderstood or failed to follow the court’s instructions inheres in the verdict and may not be considered.” State v. Rooth, 129 Wn. App. 761, 772, 121 P.3d 755 (2005). If a jury acquits, even for clearly improper reasons, the verdict stands.

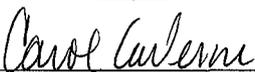
Jurors, attorneys, and judges are all human beings and human beings sometimes make mistakes. The prosecutor here made a mistake when he used the term “underbelly of society.” But this is not the kind of mistake that would cause such prejudice that requires a reversal of Mikelson’s conviction. We simply must have more faith in juries than that. “Juries are not leaves swayed by

every breath.” United States v. Garsson, 291 F. 646 (S.D. New York 1923).

D. CONCLUSION.

The challenged argument in this case was not so egregious as to warrant reversal. If we value the jury system, we must trust that jurors take their duties seriously and are not swept away by terms such as “the underbelly of society.” Although the State concedes that the argument was improper, Mickelson must still establish that it was so flagrant and ill-intentioned that a curative instruction would have been useless. He has not done that. The State respectfully asks this Court to affirm his convictions.

Respectfully submitted this 26<sup>th</sup> day of August, 2014.

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Answer to Brief of *Amici Curia* Washington Defender Association on the date below as follows:

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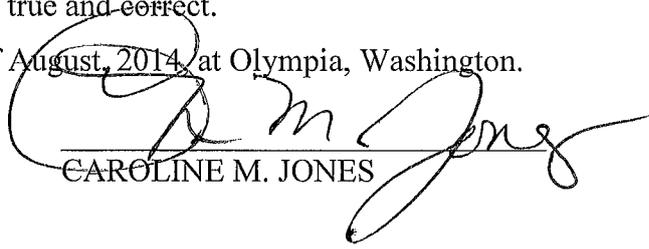
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 26 day of August, 2014, at Olympia, Washington.

  
CAROLINE M. JONES