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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN ALLEN WHITAKER,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

On Appeal From Snohomish County Superior Court
The Hon. Linda Krese, Presiding

NEIL M. FOX
Attorney for Appellant
WSBA No. 15277
2125 Western Ave. Suite 330
Seattle WA 98121

Phone: (206) 728-5440
Fax: (866) 422-0542
Email: nf@neilfoxlaw.com

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. The State committed reversible misconduct in closing argument when it repeatedly urged the jurors to imagine what Rachel Burkheimer was thinking in the hours before she died.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

1. Is it misconduct for the State to urge the jurors to imagine what the decedent in a murder case was thinking in the hours before she was killed?

2. Should reversal be the result even if there was no objection below?

C. SUPPLEMENTAL STATEMENT OF THE CASE

In his closing argument, the deputy prosecutor repeatedly invited the jurors to view the events of September 23, 2002, from the perspective of Rachel Burkheimer, at the garage, when she was in the back of the car and then right before Mr. Anderson killed her:

[By Mr. Okoloko] *Imagine what Rachel went through in the hours that she is in that garage. . . .*

. . . .

Imagine what Rachel is going through all that time, in the garage at that residence, hearing the voices of the people

she called friends, talking about her, talking about ransom, selling her back to her family

At this point she must have believed her family would do anything for her. She stays there, surrounded by stuffed animals, bound, hands and feet behind her on the rug in between couches, while her friends come in and out of that garage. *What is she thinking?* When she hears Kevin Jihad come in and say that bitch may have my DNA under her nails, clean out her nails, and John Anderson cleans underneath Rachel's nails. *What is she thinking?*

What is she thinking when she hears him chamber a round, Kevin Jihad, and says we should just end this right here. Pointing the gun several feet away from her. Imagine the infliction of mental anguish. She doesn't know whether that gun is going off at that point. *What is she thinking?*

When Jeff Barth comes into that garage while she lays down there, and I always asked the witnesses, if you will recall, was she conscious? Could she hear? Did it appear to you that she could hear what's going on? When he waves his gun in front of him by his groin, pretending it to be a penis, and is laughing, and walks over to where she's lying on the ground, and pokes her in the buttocks while he says we should all stick her -- *what is she thinking? What is she feeling? . .*

.

. . . .

She had been that way for hours that night. Bound. *What is she thinking?*

14 RP 2673-75 (emphasis added).

[Trissa Conner] comes in, she sees Rachel, and she freaks out, she runs and gets a knife, and she starts to cut through the ropes. *At that point Rachel must have had a glimmer of hope,*

her misery is about to come to an end. As her binds are being cut, there is some hope for her. That hope is taken away again because Trissa is thrown out of the garage. *What is she thinking? What is she feeling? What is Rachel going through?*

14 RP 2678-79 (emphasis added).

John Whitaker is in the car. Maurice sees the shovels and thinks, in the trunk, when that car is opened up -- I'm just going to use this -- where is Rachel? She is here. See how close she is to them. She is not in some far, back area of a bus or van. See the back seat? She's right here. *She can hear them discussing her death. She can hear them talk about what gun is going to be used.*

She knows she's going to die. At the hands of her friends. See where she is.

14 RP 2686 (emphasis added).

From what they're saying, from what Maurice Rivas said, he didn't hear her say anything or do anything. She is looking up, he says, into space. I said towards the sky? He says yes. What is she doing? She's praying.

She is resigned to her fate. With everything she has heard in the garage, with everything that she has heard in the car, with begging Maurice Rivas, her friend, to let her go, and she's not released, she knows she's going to die.

14 RP 2689 (emphasis added).

There was no objection to these arguments.

D. SUPPLEMENTAL ARGUMENT

1. *The Deputy Prosecutor's Argument Inviting the Jury to Imagine What Ms. Burkheimer Was Thinking in the Hours Before Mr. Anderson Killed Her Was Improper*

Repeatedly, throughout his closing argument, the deputy prosecutor invited the jurors to view the events of September 23, 2002, from the perspective of Rachel Burkheimer. On multiple occasions, the deputy prosecutor asked the jurors to imagine what Ms. Burkheimer was thinking and feeling when she was restrained at the garage, in the back of the car, and shortly before Mr. Anderson shot her. This argument constituted an appeal to the prejudice and passions of the jury and assumed facts not in evidence.

Prosecutorial misconduct in closing argument denies an accused person a fair trial, which violates both the right to a jury trial and the right to due process of law, protected by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 21 and 22 of the Washington Constitution. *See In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 637 (2012); *State v. Gregory*, 158 Wn.2d 759, 864-67, 147 P.3d 1201 (2006), *overruled on other grounds State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

In *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012), Division Two of this Court reversed two murder convictions under similar circumstances as here. In *Pierce*, the prosecutor during closing argument not only speculated on the defendant's thought-processes leading up to the crime, which was itself a basis for reversal, but also "fabricat[ed] an emotionally charged story of how the victims might have struggled with [the defendant] and pleaded for mercy." *Id.* at 537. The prosecutor said, "It was just another day," and "[n]ever in their wildest dreams" would the victims have thought that 15 hours later "they would be forced to [lie] facedown in their own kitchen in their own home to be robbed by somebody that knew them..." *Id.* at 541. The prosecutor speculated that the male victim probably did not want to do anything to put his wife in greater danger, and that the two probably looked into each other's eyes while lying on the floor just before being shot. *Id.* at 543.

When reversing the convictions, this Court held, "the prosecutor committed misconduct by arguing facts not in evidence and by appealing to the passion and prejudice of the jury." *Id.* at 551. The "embellishments to the evidence were nothing more than an improper appeal to the jury's sympathy that encouraged the jury to decide the case based on the

prosecutor's heart-wrenching, though essentially fabricated, tale of how the murders occurred." *Id.* at 555. Furthermore, "the argument invited the jury to imagine themselves in the [victims'] shoes, increasing the prejudice." *Id.*¹

Inviting the jurors to place themselves in the decedent's shoes has sometimes been referred to as the "Golden Rule" argument, an argument that is improper in both the civil and criminal contexts. *See Adkins v. Aluminum Company of America*, 110 Wn.2d 128, 140, 750 P.2d 1257 (1988) ("[A]n argument in a civil case is improper which appeals to the jurors to place themselves in the position of a litigant and to decide the case based upon what they would then want under the circumstances."). *See also State v. Pierce*, 169 Wn. App. at 554 ("The first person singular rhetorical device had the dual effect of placing the prosecutor in the victim's shoes and turning the prosecutor into [the victim's] personal representative.' Such argument gave the prosecutor's opinion about the victim's thoughts before his death, which were not in evidence. Moreover, the argument was an improper

¹ *See also State v. Clafin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) ("Although reference to the heinous nature of a crime and its effect on the victim can be proper argument . . . the prosecutor's duty is to ensure a verdict free of prejudice and based on reason. . . . Here, if the State's charges were true, defendant had engaged in a pattern of repulsive sexual and physical abuse of young girls over a long period of time. In such an emotionally charged trial, the use of a poem utilizing vivid and highly inflammatory imagery in describing rape's emotional effect on its victims was nothing but an appeal to the jury's passion and prejudice.").

inflammatory appeal to the jury.”) (*quoting Hawthorne v. United States*, 476 A.2d 164, 171-73 (D.C. 1984)) (internal citations omitted); *People v. Vance*, 188 Cal. App. 4th 1182, 1188, 116 Cal. Rptr. 3d 98, 102 (2010) (“There is a tactic of advocacy, universally condemned across the nation, commonly known as ‘The Golden Rule’ argument. In its criminal variation, a prosecutor invites the jury to put itself in the victim’s position and imagine what the victim experienced. This is misconduct, because it is a blatant appeal to the jury’s natural sympathy for the victim.”).²

To be sure, in the capital context, the Supreme Court has sometimes allowed for “Golden Rule” arguments. *State v. Rice*, 110 Wn.2d 577, 606-08, 757 P.2d 889 (1988). However, this is based on the unique nature of death penalty proceedings where “the jury is not deciding an issue of guilt or innocence, but instead is deciding a sentencing issue. The jury does not decide if the elements of the crime are met, but rather weighs the nature of

² See also *Hayes v. State*, 236 Ga. App. 617, 512 S.E.2d 294, 297 (1999) (“In a classic ‘golden rule’ argument, jurors are invited to place themselves in the victim’s place in regard to the crime itself. However, any argument, regardless of nomenclature, which importunes the jury to place itself in the position of the victim for any purpose must be carefully scrutinized to ensure that no infringement of the accused’s fair trial rights has occurred. . . . Thus, in a classic ‘golden rule’ argument, the State cannot ask the jurors to put themselves in the victim’s place.”) (internal cites and quotes omitted); *State v. Carlson*, 1997 N.D. 7, 559 N.W.2d 802, 812 (1997) (“A ‘golden rule’ argument asks jurors to place themselves in the shoes of the plaintiff or the victim and is improper in both civil and criminal actions. . . . ‘Golden rule’ arguments should be avoided.”).

the criminal acts against any mitigating factors. The jury should be allowed to consider, as part of that analysis, the crime's impact on the victims, and argument on that topic is proper to the extent that it is restricted to the circumstances of the crime." *Id.* at 607.³

In contrast, in this case, the jurors were told that they were not to consider punishment except to make them careful. CP 483. The main issues to be decided by the jury were whether Mr. Whitaker was an accomplice to Mr. Anderson and whether he was a "major participant" in the acts which caused the death of Ms. Burkheimer. CP 490, 491, 495, 496. Whether Ms. Burkheimer thought she was going to die, what she was thinking or feeling when she was restrained in the garage, whether she could hear people talking in the front of the car, whether she "must have believed her family would do anything for her," 14 RP 2674, or whether she ever had "a glimmer of hope," 14 RP 2678, during various points of the saga not only were not based on evidence admitted at trial, but had nothing to do with Mr. Whitaker's

³ In *Pierce*, the Court noted that prohibitions on the "Golden Rule" argument might not apply in criminal cases and thus based its holding on the theory that such an argument improperly appeals to the jury's passion or prejudice. *State v. Pierce*, 169 Wn. App. at 555 n. 9 (citing *State v. Borboa*, 157 Wn.2d 108, 124 n.5, 135 P.3d 469 (2006)). The difference in nomenclature is immaterial as the real issue is the passion and prejudice that arises when the prosecutor asks the jurors to decide the case based, in part, on what they imagine the decedent was thinking, rather than based upon whether the defendant's actions constituted the charged offense.

culpability for the actions of Mr. Anderson. Such arguments could only be part of an emotional appeal to the jurors to decide the case based upon their conclusions as to what Ms. Burkheimer must have been feeling or thinking. Such an argument violated Mr. Whitaker's rights to a jury trial and to due process of law, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22.

2. *Even Though Defense Counsel Did Not Object, the Misconduct, Especially When Considered in Conjunction with Other Errors, is Grounds for Reversal*

There was no objection to the deputy prosecutor's repeated emotional invitation to the jurors to imagine what Ms. Burkheimer was thinking. Still, the misconduct should lead to reversal.

The issue is whether "the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. We do not focus on the prosecutor's subjective intent in committing misconduct, but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection." *State v. Walker*, 182 Wn.2d 463, 477-78, 341 P.3d 976 (2015) (internal quotations and citations omitted). In *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956),

our 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, there was not just one comment to the jurors inviting them to put themselves to view events from Ms. Burkheimer’s perspective. Rather, the prosecutor repeatedly asked the jurors to consider what Ms. Burkheimer was thinking, to consider that she knew she was going to die, and to consider her listening to her friends while she was bound. While one individual remark might arguably have been curable, the collective effect of the prosecutor’s remarks were such an improper appeal to the jurors’ passions that they would have been too severe and frequent to be overcome by a curative instruction.

The prosecutor’s blatant appeal to prejudice needs to be seen within the context of his argument about the unavailability of duress as a defense to the aggravators (*see Appellant’s Opening Brief (“AOB”)* at 18-23). Moreover, as noted in the opening brief, the deputy prosecutor was part of the State’s “A” team. *AOB* at 22. Given the clear rejection of similar arguments by courts around the country, including those in the State of Washington (i.e. *State v. Pierce, supra*), the deputy prosecutor’s repeated invitations to jurors

to consider what Ms. Burkheimer was thinking can only be considered as flagrant and ill-intentioned.

Additionally, the misconduct needs to be seen in the context of a highly emotional jury trial in which jurors were needlessly exposed to gruesome and inflammatory photographs (*AOB* at 44-48) and where, as a result, some jurors violated the trial court's admonitions and, during the trial itself, discussed the possibility of killing Mr. Whitaker (*AOB* at 38-44). This is also a case where jury deliberations became so heated that the jurors had concerns about their own safety due to threats between jurors. *See AOB* at 24-38; 14 RP 2886, 2887-88. Conditions in the jury room were so emotional that the State itself asked the trial judge to make sure the jurors would not have access during deliberations to the guns and ammunition admitted as evidence. *See* 14 RP 2895, 2900, 2903, 2916.

In such a toxic atmosphere, the prejudicial impact of the State's emotional plea for the jurors to decide the case based upon what Ms. Burkheimer was supposedly thinking in her final hours cannot be underestimated. In the past, the Supreme Court has looked to specific jury questions to determine the prejudice of various forms of prosecutorial misconduct. *See State v. Allen*, 182 Wn.2d 364, 378-80, 341 P.3d 268 (2015)

(jury question about knowledge shows it was influenced by prosecutor's misstatement of the law); *State v. Davenport*, 100 Wn.2d 757, 765, 675 P.2d 1213 (1984) (reversing conviction where, among other factors, the record revealed "that the jury was influenced, if not misled, by the prosecutor's comment"). Here, the undisputed evidence of the jurors' own fragility demonstrates even more than a jury question the prejudice caused by the prosecutor's emotional play to the jurors' passions.

Accordingly, the remedy for the misconduct should be reversal.

E. CONCLUSION

For the foregoing reasons, and the reasons set out in the opening brief, the Court should reverse the judgment and remand for a new trial.

DATED this 22nd day of December 2017.

Respectfully submitted,

s/ Neil M. Fox

WSBA NO. 15277

Attorney for Appellant

Relevant Constitutional Provisions

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

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: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Declaration of Service

I hereby certify that on the 22nd day of December 2017, I electronically filed the foregoing SUPPLEMENTAL BRIEF OF APPELLANT with the Clerk of the Court using the Appellate Courts Portal which will send notification of such filing and an electronic copy to attorneys of record for the Respondent and any other party.

I further certify that on the 22nd day of December 2017, I caused a copy of this brief to be placed into the United States Mail with proper postage attached in an envelope addressed to:

John Allen Whitaker
DOC #874404
Monroe Correctional Complex
Washington State Reformatory
PO Box 777
Monroe, WA, 98272

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

Dated this 22nd day of December 2017, at Seattle, WA.

s/ Neil M. Fox

WSBA NO. 15277

LAW OFFICE OF NEIL FOX PLLC

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