NO. 91623-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ANDREA MARIE RICH,

Respondent.

ANSWER TO CROSS-PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Rules and Regulations

Other Authorities

A. IDENTITY OF PETITIONER

The State of Washington is the Petitioner here and was the Respondent below. The State respectfully requests that this Court deny review as to the claim that alleged prosecutorial misconduct was reversible error. State v. Rich, No. 70711-6, slip op. at 1 (Wash. Ct. App. Div. I, March 23, 2015). There is no conflict in the appellate courts on that issue. Should this Court consider Rich's argument that error was reversible, however, the State respectfully asks that the Court also consider whether the prosecutor's argument was error at all.

B. ISSUES PRESENTED FOR CROSS-REVIEW

1) Has Rich failed to show a conflict in appellate decisions on the standard for reversing a conviction where an unpreserved claim of prosecutorial misconduct is alleged?

2) Did the prosecutor appropriately point out in closing argument that the defendant's story was fundamentally irreconcilable with the testimony of the other witnesses, so that in order to believe her the jury would have to conclude that the State's witnesses were lying?

C. STATEMENT OF THE CASE

The State described the relevant background facts in its petition for review. Only the facts relevant to the cross-claim of prosecutorial misconduct will be summarized here.

As to whether the car Rich was driving was stolen, and as to whether Rich knowingly possessed the vehicle, the State presented testimony from the car's owner who said his car was stolen in Seattle one night while he was out with some friends, that he did not know Rich, and he did not give her or anyone else permission to drive his car. RP 90-96. Rich testified, however, that she knew the car owner because he was a bus driver in her area and she frequently rode his bus. She said she had socialized with him in the past, including having drinks with him, and that he had given her gifts. She said he had given her permission to keep the car for a few weeks, so she believed it was not stolen. RP 186-89, 195.

As to Rich's driving that day, a King County Sheriff's deputy witnessed Andrea Rich driving her car down a public roadway. When he determined that she was driving a stolen car, he followed her for about four blocks until she pulled into the parking lot of an apartment building, where the deputy sheriff activated his emergency lights. RP 73-78. He left his marked patrol car, saw

that Rich was the driver, and directed her to remain in her car until backup officers arrived. RP 78-79. Already seated in the car with Rich was her young nephew. RP 79. The deputy kept the car in his sight this entire time, and he overheard Rich telling her nephew to lie to the officer about how they came to be in the car. Id. Multiple witnesses testified that Rich was quite intoxicated, and she had a BAC level of .18 *See, e.g.*, RP 108-18, 177.

Rich testified that she had emerged from an apartment at the complex, that she had not been driving the car at all, that she had drunk only a single shot of alcohol (although she later admitted to also drinking some hard lemonade), that the arresting officer had pulled into the parking lot immediately after she entered the car, and that her nephew climbed into the car after the officer activated his lights. RP 184-91.[1]

In closing argument, the prosecutor walked through the evidence and pointed out numerous inconsistencies between the defendant's testimony and the other evidence. RP 214-26. The prosecutor concluded her argument with the following statement:

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[1] Regarding similar pretrial testimony, the trial court observed: "The defendant's testimony was internally inconsistent, inconsistent with her prior statements, and not credible." CP 19.

> You get to decide the facts based upon the credible sworn testimony that you heard, the evidence presented at trial, and the instructions that Judge Spearman read to you. I think when you examine the defendant's testimony, you will not find it credible. She gave a preposterous story. You heard the defendant. You have to believe that all the other witnesses came in here and lied.

2RP 226. The court of appeals held that this statement was misconduct but not reversible, since there had been no objection at trial and it was not flagrant and ill-intentioned. State v. Rich, No. 70711-6, slip op. at 1 (Wash. Ct. App. Div. I, March 23, 2015).

D. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

RAP 13.4(d) provides that an answer to a cross-petition be limited to the new issue raised in the cross-petition. The State of Washington respectfully asks this Court to deny review of the claim of alleged prosecutorial error raised in Rich's cross-petition.

This Court may review a decision of the Court of Appeals if that decision is in conflict with another decision of the Court of Appeals, or with cases decided by the Supreme Court. RAP 13.4(b)(2). Here, Rich simply cites two Court of Appeals

decisions and claims with no analysis that the cases conflict with the decision at bar. *See* Answer to State's Petition for Disc. Rev. and Cross-Petition, at 14 (citing State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) and State v. Miles, 139 Wn. App. 879, 889-90, 162 P.3d 1169 (2007)). These two cases apply the same test as was applied in this case. Whether improper argument was so flagrant and ill-intentioned as to require reversal is a highly fact-dependent determination, but Rich makes no effort to compare the facts of Fleming and Miles to the facts here, or to explain why reversal should have been required under those decisions. There appears to be no controversy in the appellate courts over this point, and the decision below was well within the accepted parameters of the law. Thus, Rich has not shown a conflict in appellate decision-making, so review is not warranted under RAP 13.4(b)(2).

Should this Court deem that issue worthy of review, however, it should also consider whether, under the unique facts presented, the prosecutor's argument was error at all. It is error for a prosecutor to set up a false choice for the jury by telling them that

in order to acquit it would have to find that the State's witnesses were lying. State v. Wright, 76 Wn. App. 811, 824-25, 888 P.2d 1214 (1995). A jury may acquit if it has a reasonable doubt about the truth of the charge; it need not conclude that anybody lied. Wright, 76 Wn. App. at 825. But, if "the argument made ... did not present the jury with a false choice between believing the State's witnesses or acquitting ..., [the argument is] ... not misleading." Id.

The contrast between Rich's testimony and the testimony of the State's witnesses was unusually stark. Rich said she never drove the car, whereas a deputy sheriff said he followed her for several blocks as she drove down a public street. Rich said she had imbibed minimal alcohol, whereas the State's witnesses described her as noticeably intoxicated and testing showed that she had a BAC level of .18. She testified that she had in the past socialized with the owner of the car and that he had allowed her to drive the car, whereas he said he had never met her before in his life. It is simply impossible to explain these conflicts with reference to differing perspectives or mistake. Either the defendant or the witnesses (either one or several) were lying.[2] Under such

[2] The Court of Appeals mischaracterizes the State's argument when it says that the State asserted "that in order to hold Rich 'accountable,' the jurors 'would have to believe that all the other witnesses came in here and lied.'" Slip op. at

circumstances, it is appropriate and fair for the prosecutor to suggest that to believe the defendant's story you would have to conclude that the State's witnesses were lying.

At a minimum, however, even if this argument is deemed improper, it should not be deemed "misconduct." "'Prosecutorial misconduct' is a term of art but it can be a misnomer when applied to honest mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009). Words like "misconduct" connote more than simple mistake, can have professional repercussions beyond the case at hand, and can unduly undermine the public's confidence in the criminal justice system. A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.,* State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n.2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). Both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice

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16-17. This sentence reverses the order in which the State used the quoted words, thus changing the meaning of the argument.

Section (ABA) urge courts to limit the phrase "prosecutorial misconduct" to intentional acts, rather than mere trial error.[3]

There is some ambiguity in the law regarding what a prosecutor may argue when it seems the defendant's story is flatly inconsistent with other testimony, so it is understandable that the prosecutor would make this argument under these facts. Thus, this case presents an opportunity for this Court to consider whether it should distinguish between "error" and "misconduct" when a prosecutor errs under these circumstances. Cf. State v. Ish, 170 Wn.2d 189, 195 n.6, 241 P.3d 389 (2010).

E. CONCLUSION

Whether the alleged misconduct in this case required reversal is not an issue upon which there is conflict in the appellate courts. Review is not warranted under RAP 13.4(b).

[3] *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited June 4, 2015); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf \ (last visited June 4, 2015).

If, however, review is granted as to that issue, this Court should also consider whether the closing argument was error at all.

DATED this 4th day of June, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W Lechich, the attorney for the respondent, at richard@washapp.org, containing a copy of the Answer to Cross-Petition for Review, in State v. Andrea Marie Rich, Cause No. 91623-3, in the Supreme Court, for the State of Washington.

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

Dated this 4th day of June, 2015.

Name:
Done in Seattle, Washington

OFFICE RECEPTIONIST, CLERK

To: Brame, Wynne
Cc: Whisman, Jim; richard@washapp.org; wapofficemail@washapp.org
Subject: RE: State v. Andrea Marie Rich, Supreme Court No. 91623-3

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From: Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]
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Please accept for filing the attached documents (Answer to Cross-Petition for Review) in State of Washington v. Andrea Marie Rich, Supreme Court No. 91623-3.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-477-9497), at James Whisman's direction.