72205-1

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NO. 72205-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DILTZ,

Appellant.

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

The Honorable Linda C. Krese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's mistrial motion.

2. Prosecutorial misconduct rendered appellant's trial unfair.

Issue Pertaining to Assignments of Error

Does prosecutorial misconduct require reversal of appellant's conviction when appellant shot in the direction of a police officer without injuring him and the prosecutor argued in rebuttal that appellant intended to "kill as many cops . . . as possible" and suggested his motive might have been to become a "notorious cop killer"?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County prosecutor charged appellant Kevin Diltz with first-degree assault, second-degree unlawful possession of a firearm, attempting to elude a pursuing police officer, possession of a stolen vehicle, and possession of a stolen firearm. CP 348-49. The information as amended also alleged the aggravating factors that the assault was committed while armed with a firearm and against a law enforcement officer in the performance of his duties and the attempt to elude endangered other persons than the officer and the driver. CP 348-49.

The jury acquitted Diltz of possession of a stolen firearm, but found him guilty on the remaining charges and answered, "Yes" to the special

verdicts on the aggravating factors. CP 178-86. The court found substantial and compelling reasons justified imposition of an exceptional sentence above the standard range, including that the multiple offense policy and Diltz's high offender score resulted in some offenses going unpunished. CP 31-32. The court imposed an exceptional sentence of 414 months (including the 60-month firearm sentencing enhancement) for first-degree assault, to run consecutively to an enhanced sentence of 41 months and one day for attempting to elude for a total of 455 months. CP 22-23. The court also imposed concurrent standard range sentences on the remaining offenses, 36 months of community custody, and mandatory legal financial obligations. CP 22-25. Notice of appeal was timely filed. CP 8.

2. Substantive Facts

Diltz was seen driving away from a suspected drug house in a car without a license plate. 3RP[1] 9-11; 4RP 18-21. After Officer Norris pulled him over, Diltz fled at speeds up to 95 miles per hour, passing cars on the right, running one red light and several stop signs. 4RP 24-29. Shannon Thomas testified the truck nearly struck her car, where she was parked having lunch with her mother outside Providence Hospital. 4RP 142-43.

[1] There are seven volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 15, 2014; 2RP – May 16, 2014; 3RP – June 23, 2014; 4RP – June 24, 2014; 5RP – June 25, 2014; 6RP – June 26, 2014; 7RP – June 27, 2014.

When the driveline fell out, Diltz jumped from the truck and fled on foot. 4RP 29-30. As Norris chased Diltz on foot, he noticed Diltz look behind him and then heard several gunshots. 4RP 32-33.

At trial, Diltz argued he was guilty only of second-degree assault, rather than first-degree because his gun was aimed at the ground, not at Norris, and he did not intend to cause great bodily harm. 7RP 34-36. An eyewitness to the events testified she saw the shooter with his gun aimed at the ground. 5RP 125. When she called 911, however, she told the dispatcher she could not see the gun. Ex. 253; 5RP 132. A defense expert also testified, based on the bullet strike marks in the sidewalk, that the firearm was pointed generally downwards toward the sidewalk. 6RP 89. Assuming 90 degrees to be straight down and 0 to be horizontal, the defense expert testified one shot was between 60 and 40 degrees, one was between 20 and 40, and a third was between 10 and 30 degrees. 6RP 97-99.

Norris, on the other hand, testified Diltz's hand was at approximately 75-90 degrees, where 90 degrees represented parallel to the ground aimed directly at Norris. 4RP 48. In prior interviews, Norris had both said he did not recall the angle of Diltz's arm and demonstrated the arm being at 90 degrees. 4RP 50, 51.

After a chase through the neighborhood involving several officers, Officer Nelson, who had responded to assist, saw Diltz run out from between

two houses, pointed his rifle at him, and ordered him to get on the ground. 4RP 86. Diltz continued to walk towards Nelson until Nelson threatened to shoot him, at which point Diltz dropped to the ground. 4RP 88.

When arrested, Diltz wore a large knife in a sheath at his hip, but no gun was found. 4RP 87, 89. Police searched the area, but could not find the gun. 4RP 70-71, 89, 172, 213; 5RP 140. Four shell casings were found as well as three marks in the sidewalk that appeared to have been made by a bullet striking the ground. 4RP 187, 199-205, 208-09. The strike mark closest to Norris was approximately 19 feet from where he estimated he was when he heard the gunshots. 5RP 148.

The truck Diltz drove had been reported stolen by the registered owner, Curtis Hovander. 4RP 92-93, 160-61; 6RP 24, 27. Police found it still running but with no keys in the ignition. 4RP 136-37, 161. Inside the truck was a pipe. 4RP 104-05; 6RP 54-55.

Approximately a month later, police listened to Diltz's phone calls from jail. The court admitted a call in which Diltz is heard to say, "I should have just went out fuckin' blasting at 'em like I wanted to . . . then I wouldn't be here . . . ." Supp. CP ___ (Sub no. 70 filed July 7, 2014); Ex.

254.[2] In another call, Diltz mentioned someone not digging quickly enough. 5RP 149; Ex. 254.

Using a metal detector, police then found a gun buried in about three inches of mulch in one of the backyards Diltz had entered during the chase. 5RP 68-71, 151-55. Gloves and glasses had already been found nearby. 4RP 172; 5RP 86, 140-41; 6RP 53-56. The hammer was cocked back, but the gun was "out of battery" and unable to fire. 5RP 155-57. The homeowner did not recognize the weapon and had no idea how it came to be buried in his backyard. 6RP 15.

Because the gun had been buried so long, police initially assumed no DNA would be found and sent it for firearms testing. 5RP 169-70. Later, the only DNA found on the weapon was consistent with that of the firearms examiner. 6RP 59. The firearms examiner testified all four casings found at the scene were fired from the gun found buried in the backyard. 6RP 125-27, 129-30. DNA on the pipe, glasses, and gloves matched Diltz's reference sample with a one in 3.4 quintillion chance of matching an individual chosen at random. 6RP 53-56.

In closing, defense counsel conceded the State had proved unlawful possession of a firearm, possession of a stolen vehicle, and attempting to elude a pursuing police officer. 7RP 24-26. However, he argued Diltz did

[2] A supplemental designation of clerk's papers and exhibits was filed on January 13, 2015.

not intend to hit Norris because the closest bullet hit the ground nearly 20 feet from him and the gun and Diltz's arm were both pointed down. 7RP 21, 34-36. He argued the jury should find Diltz guilty only of the lesser-included offense of second-degree assault. 7RP 36.

In rebuttal, the State distinguished motive from intent, and argued that, even if Diltz's only motive was not to be caught, his intent was still to cause great bodily harm to Norris. 7RP 44-46. The prosecutor argued several times that Diltz would rather escape arrest than let Norris go home to breathe and see his children. 7RP 5, 19, 21, 48. He argued Diltz's conduct showed "He wanted to kill as many cops, specifically Officer Norris, on that day as he could." 7RP 50. He further argued it did not matter what Diltz's motivation was, such as "[W]as he trying to become a notorious cop killer." 7RP 50.

After the jury began deliberating, defense counsel moved for a mistrial based on the prosecutor's improper arguments that Diltz wanted to "kill as many cops as possible" and wanted to "become a notorious cop killer." 7RP 55-56; CP 159-63. The court denied the motion, finding the "cop killer" statement was not improper because the prosecutor was merely illustrating a potential motivation that the State did not have to prove and the "kill as many cops as possible argument" was not improper because it was a reasonable inference from Diltz's phone call. 8RP 12-13; CP 1-4.

C. ARGUMENT

THE PROSECUTOR'S INFLAMMATORY ARGUMENTS VIOLATED DILTZ'S RIGHT TO A FAIR TRIAL.

A prosecutor is a quasi-judicial officer whose zealous advocacy must be tempered by the responsibility to ensure that every accused person receives a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) ; State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Closing arguments must, therefore, be based on reasonable inferences from the evidence, not inflammatory attempts to arouse jurors' emotions against the defendant. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); Huson, 73 Wn.2d at 663. Prosecutorial misconduct requires reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Glasmann, 175 Wn.2d at 703-04. The trial court's ruling on a mistrial motion is reviewed for abuse of discretion. State v. Henderson, 100 Wn. App. 794, 799, 998 P.2d 907 (2000).

Here, the prosecutor committed misconduct in arguing Diltz's intent was to "kill as many cops, specifically Officer Norris, on that day as he could," and speculating his motive might have been to "become a notorious cop killer." 7RP 50. These arguments are inherently inflammatory and were designed to provoke a verdict based not on reason, but on the jury's

predictable emotional reaction to a "cop killer." This was misconduct that requires reversal of Diltz's conviction.

a. The Prosecutor's Inflammatory Comments about Killing Police Were Improper Emotional Appeals.

"[T]he State commits misconduct by asking the jury to convict based on their emotions, rather than the evidence." State v. Fuller, 169 Wn. App. 797, 821, 282 P.3d 126 (2012) rev. denied, 176 Wn.2d 1006 (2013) (citing State v. Bautista–Caldera, 56 Wn. App. 186, 194-95, 783 P.2d 116 (1989). The prosecutor here raised the specter of police officers murdered in the line of duty, in a case in which no police officer was even injured. These comments were an improper emotional appeal in the form of inflammatory speculation about what might have but did not.

It is misconduct for the State to play on the jury's fear based on hypothetical scenarios. State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994). In Russell, the prosecutor argued the defendant would go to California, would find more "naïve, trusting, foolish young people," and would kill them. Id.

The court described the prosecutor's remarks as "egregious."[3] The Russell court declined to reverse because the comment was not likely to inspire revulsion under the circumstances, and defense counsel utilized the comment in his own closing argument, thereby weakening the contention that it denied him a fair trial. 125 Wn.2d at 89.

Similarly, in State v. Pierce, the court held an inflammatory appeal to the jury's emotions could not be overcome by instruction. 169 Wn. App. at 555-56. In Pierce, the prosecutor's argument speculated about what the defendant and the victims had been thinking before and during the murders. Id. at 553. A third improper argument, about whether the victims would ever have expected the murders, was not objected to: "'[n]ever in their wildest dreams . . . or in their wildest nightmare' would the Yarrs have expected to be murdered." Id. at 555 (quoting report of proceedings). Despite the lack of objection below, the court found this last argument improper and, incurable by instruction in light of the other highly inflammatory arguments. Id. at 555-56. The court concluded the argument was not relevant to guilt

[3] Other jurisdictions have also concluded that appeals to a jury's fear of "what would have happened" are improper. See United States v. Nobari, 574 F.3d 1065, 1077 (9th Cir. 2009) (court erred in not instructing jury to disregard prosecutor's reference to what would have happened if little boy had come out of McDonalds as defendants were being arrested); State v. Storey, 901 S.W.2d 886, 901-02 (Mo. 1995) (improper to refer to what brother might have done had he witnessed his sister being murdered); State v. Tyler, 346 N.C. 187, 206, 485 S.E.2d 599 (1997) (improper to refer to what defendant might have done to victim's child if child had caused a scene).

and invited the jury to place themselves in the victims' shoes, which increased the prejudice. Id. at 555.

While perhaps not as extreme as the examples in Russell and Pierce, the prosecutor here similarly appealed to the jury's fear of a hypothetical scenario in which officers were killed.

Other states have specifically concluded that references to law enforcement officers being killed in unrelated cases are improper. People v. Brooks, 214 Ill. App. 3d 531, 542, 573 N.E.2d 1306, 1313-14 (1991). In Brooks, the prosecutor argued, "They have their lives on the line. They go into a house where they know a guy's got a gun. These are brave officers doing their job. You know an officer was just killed two weeks ago." Id. The Illinois Court of Appeals held the comment was "clearly improper." Reversal was not required only because the court had sustained a timely objection and given a curative instruction to the jury. Id.

Florida has also held it is improper to "raise the specter of 'cop-killers' where none was actually present." Campbell v. State, 679 So. 2d 720, 724 (Fla. 1996). To do so unfairly exploits jurors' "natural sense of sympathy and outrage for the fallen officers and fear for their own safety." Id.

The Georgia Court of Appeals came to the same conclusion under facts remarkably similar to this case. Williams v. State, 172 Ga. App. 682, 682, 324 S.E.2d 544, 544-45 (1984). Williams escaped after firing two shots at the police officer who had pulled him over for a traffic violation. Id. During closing arguments, the prosecutor mentioned instances where police officers had been killed and told the jury "But for the grace of God, the defendant would have been on trial for just such an offense." Id. The court concluded the statements went outside the evidence, were not relevant, and "constituted improper closing argument." Id.

The trial court here deemed the comments unobjectionable because of Diltz's phone call indicating he "should have gone out blasting at 'em like I wanted to." CP 2-4; Ex. 254. This reasoning should be rejected because the prosecutor did not limit his comments to reasonable inferences from the evidence pertaining to the elements of the charge. He did not argue merely that the phone call showed intent to inflict great bodily harm on Norris. He argued it meant Diltz "intended to kill as many cops, specifically Officer Norris, as possible." 7RP 50. He followed that up with an even more inflammatory and irrelevant comment suggesting Diltz's motive may have been to "become a notorious cop killer." 7RP 50. These statements were not made to encourage the jury to draw reasonable inferences about Diltz's state of mind on the date of the

incident. They were made to arouse the jury's fear of and anger at "notorious cop killers."

In addition to the comments included in the mistrial motion, the prosecutor made similar emotional appeals based on the risk to Norris's life throughout closing argument and rebuttal. The prosecutor argued Diltz "decided that it was more important that he get away than that Officer Norris lived . . . . It was more important that he get away with committing crimes than that Officer Norris live another day." 7RP 5. Later, the prosecutor argued, "And when Officer Norris didn't stop following him, he decided that the best way to get away is to get rid of Officer Norris," and "the worst decision he made was that Jeff Norris' life was not as important as him getting away with committing other crimes." 7RP 19, 21. In rebuttal, the prosecutor argued, "In fact, he would rather not be arrested than let Officer Norris go home to breathe, see his kids." 7RP 48.

The pervasive theme of the prosecutor's argument was that Norris could have died and Diltz wanted to kill him and other officers as well. As in Campbell, the prosecutor "raise[d] the specter of 'cop killers' where none actually existed." 679 So. 2d at 724. Given that no harm actually occurred and the only disputed issue was Diltz's intent, this focus on the potential for murder was an improper emotional appeal.

b. The Prosecutor's Inflammatory Statements About Killing Officers Caused Prejudice that Required a Mistrial.

The court erred in denying Diltz's motion for a mistrial due to prosecutorial misconduct. The prosecutor's inflammatory "cop killer" comments caused a prejudicial emotional reaction in the jury that could not be cured by an instruction.

The proper remedy for inflammatory evidence or argument that prevents the jury from rendering an unbiased decision is a mistrial. See, e.g., State v. Miles, 73 Wn.2d 67, 70-71, 436 P.2d 198 (1968) (remanding for new trial where trial court erred in denying mistrial motion based on inflammatory evidence suggesting defendants planned another robbery). In determining whether a mistrial is warranted, courts consider three factors: 1) the seriousness of the irregularity, 2) whether the evidence was cumulative of other evidence properly admitted, and 3) whether the effect on the jury could have been cured by an instruction. Id. A mistrial should be granted when a trial irregularity is so serious that it effectively deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008).

Prosecutorial misconduct is a serious irregularity because it may violate the defendant's constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Even when there was no

objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is on whether the effect of the argument could be cured. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) rev. denied, 175 Wn.2d 1025 (2012) (citing State v. Emery, 174 Wn.2d 741, 759–61, 278 P.3d 653 (2012)).

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial as a whole. Glasmann, 286 P.3d at 678. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

"The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks." State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)).

The arguments about killing as many cops as possible or becoming a notorious cop-killer were particularly calculated to inflame the jury's emotions. Emotionally inflammatory comments cannot generally be cured by instruction. Emery, 169 Wn. App. at 552.

In the context of this case, the comments were particularly likely to affect the jury, regardless of any instruction, because the prosecutor's other pervasive comments also focused the jury's attention on the fear that Norris might have been killed. 7RP 5, 19, 21, 48. Finally, because the most inflammatory comments were made in rebuttal, there was no opportunity for defense counsel to counter the inflammatory image of what might have happened.

The prosecutor inflamed the jury's emotions by framing this case as a "cop killer" case, even though no officer was even injured. The pervasive and improper comments were a serious irregularity that could not be cured by instruction and requires reversal of Diltz's first–degree assault conviction.

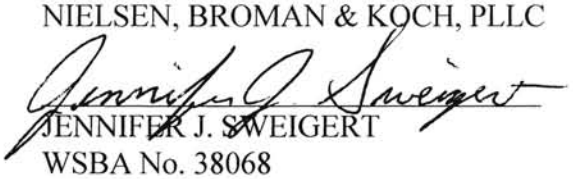
D. CONCLUSION

For the foregoing reasons, Diltz's conviction for first-degree assault should be reversed.

DATED this 15th day of January, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Certificate of Service

On January 15, 2015, I E-served and or mailed a copy of the opening brief, directed to:

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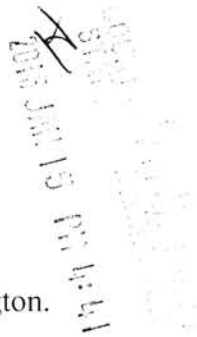

Containing, re Kevin Diltz
Cause No. 72205-1-I, in the Court of Appeals, Division I, for the state of Washington.

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

John Sloane
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01-15-2014
Date
Done in Seattle, Washington