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

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

IT WAS INFLAMMATORY, IRRELEVANT, AND UNREASONABLE TO ARGUE DILTZ INTENDED TO KILL AS MANY POLICE AS POSSIBLE WHEN HE ACTUALLY INJURED NO ONE.

"'If the evidence indicates that the defendant is a murderer or killer, it is not prejudicial to so designate him.'" State v. McKenzie, 157 Wn.2d 44, 57, 134 P.3d 221 (2006) (quoting State v. Buttry, 199 Wash. 228, 250, 90 P.2d 1026 (1939)). This case, however, presents the opposite scenario. Diltz killed no one. Yet the thrust of the State's closing argument was to suggest that the jury view him as a murderer, specifically, a "cop killer."

This is why the State's comparison to State v. Berube, 171 Wn. App. 103, 119, 286 P.3d 402 (2012), falls flat. Like Diltz, Berube was on trial for first-degree assault. Id. at 109. The prosecutor's comment about Berube's mother being sad paled in comparison to the actual facts of the case, in which a woman was shot in the leg, receiving life-threatening injuries to the femoral artery. Id. at 119.

In Diltz' trial, the prosecutor did not argue about the likely effect of the actual crime on an interested party. Instead, the prosecutor argued Diltz, charged only with assault, intended to kill as many police as

possible. 7RP[1] 50. In stark contrast to Berube, the prosecutor here left the jury with the impression Diltz intended to commit more crimes, and far more heinous ones, than the assault he was charged with.

The State's argument that the prosecutor was only focusing on the egregious facts of the case must also be rejected. Brief of Respondent at 16, 19. The State cites to State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012), a case in which a taxi cab driver was found murdered. "The evidence showed that Ahmed's throat was slashed, he was stabbed in the chest, his fingers were almost severed, and he bled to death in the cold. The evidence also showed that Ahmed emigrated from Somalia, Fuller hated foreigners for taking American jobs." Id. at 821. Because this was the evidence, it was not misconduct for the prosecutor to argue that Fuller hated foreigners, had slashed his victim's throat, stabbed him in the chest almost severed his fingers and left him to die. Id.

Here, by contrast, the prosecutor's arguments do not reflect the evidence. No officers were killed, or even injured. Yet the prosecutor argued Diltz intended to kill as many of them as possible. 7RP 50.

The State argues this was a reasonable inference from Diltz's phone call, but it is important to be precise about what Diltz actually said. On page one of the State's brief, the State claims Diltz said he "should

[1] The Report of Proceedings is referenced as described on page two of the opening Brief of Appellant.

have 'went on fuckin' blasting' more officers." Brief of Respondent at 1. This is not what Diltz said. The actual quote, correctly quoted later in the State's brief, is that he "should have just went out fuckin' blasting at 'em." CP 359.

The difference matters in two respects. Blasting "at" someone does not necessarily suggest an intent to actually hit, let alone injure or kill the target. Simply "blasting" officers, without the "at" leaves a very different impression. Second, "went on," suggests he meant to continue shooting. But that is not what Diltz said. His actual words, "went out," suggest a desire for his own death, not anyone else's.

"A trial in which irrelevant and inflammatory material is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." Berube, 171 Wn. App. at 119 (quoting State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968)). Even if it were a reasonable inference from his phone call, which Diltz does not concede, arguments that he intended to kill as many police as possible and possibly wanted to be a cop killer were irrelevant to the charge, were inflammatory, and had a natural tendency to prejudice the jury against him. The trial court unreasonably failed to appreciate the inflammatory nature of the comments, their irrelevance to the charges, and their likely effect on the

jury. Diltz' conviction should be reversed because improper closing argument deprived him of a fair trial.

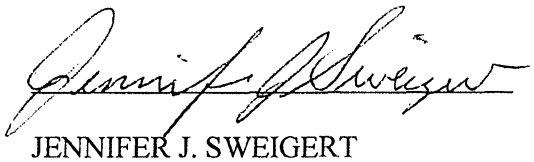
B. CONCLUSION

For the foregoing reasons, and for the reasons stated in the opening Brief of Appellant, Diltz requests this Court reverse his conviction for first-degree assault.

DATED this 19th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEVIN DILTZ
DOC NO. 825322
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF MARCH 2015.

x Patrick Mayovsky