

No. 46082-3-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY A. ROETGER

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 12-1-00033-8

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

Mr. Roetger relies on the facts set forth in his opening brief.

II. ARGUMENT

A. Recently published authority from the Washington State Supreme Court supports Mr. Roetger's prosecutorial misconduct argument.

In January, 2015, the Washington State Supreme Court reversed a murder conviction and stated, "When the court cannot conclude with any level of confidence that a defendant's conviction was the result of a fair trial, it must reverse and remand for a new trial. *See, State v. Walker*, ___ Wn.2d ___, No. 89830-8, 2 (2015).

In *Walker*, the court reviewed a series of over 100 PowerPoint slides the prosecutor had used during closing argument. *Id.* The court found the prosecutions commentary combined with the visual impact of the PowerPoint constituted misconduct. Specifically, the court held,

We have no difficulty holding the prosecutor's conduct in this case was improper. Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to present altered versions of admitted evidence to support the State's theory of the case, to present derogatory depictions of the defendant, or to express personal opinions on the defendant's guilt. Furthermore, RPC 3.4(e) expressly prohibits a lawyer from vouching for any witness's credibility or stating a personal opinion "on the guilt or innocence of an accused." The prosecution committed serious misconduct here in the portions of its Power Point presentation discussed above-it included multiple exhibits that were altered with inflammatory captions and superimposed text; it suggested to the jury that Walker

should be convicted because he is a callous and greedy person who spent the robbery proceeds on video games and lobster; it plainly juxtaposed photographs of the victim with photographs of Walker and his family, some altered with racially inflammatory text; and it repeatedly and emphatically expressed a personal opinion on Walker's guilt.

Id. at 13-14 (citing, *State v. Glasmann*, 176 Wn.2d 696, 706-07, 712 (2012)).

The *Walker* court also addressed the issue of objecting to prosecutorial misconduct. It said, “[The] prejudicial effect could not have been cured by a timely objection, and we cannot conclude with any confidence that Walker's convictions were the result of a fair trial. Consistent with both long-standing precedent and our recent holding in *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012), we must reverse Walker's convictions and remand for a new trial.” *Walker*, at 2.

The court continues its rejection of inappropriate prosecutor zeal. Accordingly, the prosecutor’s verbiage during its argument in the present case requires reversal. *See, Opening Brief of Appellant*, at 3-5, 10-12.

B. *Walker* supports defense counsel’s ineffectiveness handling prosecutorial misconduct, but allows this court to review those instances of prosecutorial misconduct that were not preserved by the record.

As indicated in the Opening Brief of Appellant, defense counsel objected to two of the state’s instances of improper argument. *See, Opening Brief of Appellant*, at 11, FN 3,4. That leaves the court with 9 more instances to address without preservation.

In *Walker*, the court noted the following:

In reversing Walker's convictions, we do not retreat from the general rule that a defendant should contemporaneously object to improper comments. Proper and timely objections provide the trial court an opportunity to correct the misconduct and caution jurors to disregard it. It prevents abuse of the appellate process and saves the substantial time and expense of a new trial. *State v. Emery*, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012). However, the failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial. "An objection is unnecessary in cases of incurable prejudice only because 'there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.'" *Id.* at 762 (quoting *State v. Case*, 49 Wn.2d 66, 74, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899))).

State v. Walker, ___ Wn.2d ___, No. 89830-8, (2015).

The *Walker* court allows this court to do exactly what is requested in *Opening Brief of Appellant*. See, *Opening Brief of Appellant*, 12. That is, the court should reverse when no curative instruction could have obviated the prosecutorial prejudice. *Id.* The prosecuting attorney arguing the case did not stop the behavior upon the two objections the defense lodged during closing arguments. Both the content of the improper argument and the volume (11 cited by Appellant) should be considered by this court. In its final analysis, the case against Mr. Roetger should be reversed, preserved by objection or not. As noted in *Walker*, the prejudice was incurable, and a new trial is the mandatory remedy.

C. The trial court erred when it refused to allow the defense to present evidence A.K. had been previously sexually abused.

The issue remains as presented in *Opening Brief of Appellant*. See, *Opening Brief of Appellant*, 18. Mr. Roetger was denied his constitutional right to present a defense when the court excluded questioning about A.K.'s prior sexual

abuse. The court abused its discretion because the proffered evidence was certainly compelling and would have explained to the jury how A.K. would have knowledge of the type of sexual activity she described, yet denied by Mr. Roetger.

III. CONCLUSION

For the reasons cited above and in Appellant's opening briefing, this Court should now reverse the convictions.

Respectfully submitted this 12th day of February, 2015.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 12th day of February, 2015.


LEE ANN MATHEWS

HESTER LAW OFFICES

February 12, 2015 - 4:05 PM

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