

NO. 94319-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D'ANGELO A. SALOY,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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I. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

II. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Saloy, No. 72467-3-I, filed February 27, 2017 (unpublished).

III. ISSUE PRESENTED FOR REVIEW

The State asks this Court to deny Saloy's petition for review. If this Court accepts review, the State seeks cross-review of the Court of Appeals' conclusions that: (1) the prosecutor's statement during closing argument directly commented on Saloy's right not to testify, and thus the applicable harmless error standard is the "overwhelming untainted evidence" test; and (2) Saloy timely objected to the prosecutor's allegedly improper statement.

IV. INTRODUCTION AND STATEMENT OF THE CASE

Saloy committed first-degree murder and first-degree attempted murder at the age of sixteen. 7/31/14 RP 15-16. In October of 2008, fifteen-year-old Quincy Coleman was shot and killed while standing near the Garfield High School ballfields. 7/21/14 RP 69; 7/22/14 RP 23-28. Coleman's friend Demario Clark was also shot, but survived his wounds. 7/15/14 RP 33-35, 124-26; 7/22/14 RP 26.

Coleman was wearing red, the color typically associated with his Central District gang, Valley Hood Piru. 7/17/14 RP 93, 121-22, 163; 7/21/14 RP 21, 25.

The police had very little physical evidence and encountered extremely limited cooperation from those involved. See CP 296-373; Pretrial Ex. 1. Because of this, the State was unable to amass sufficient evidence to charge Saloy with Coleman's murder until he was twenty years old. Indeed, prior to Saloy's eighteenth birthday, there was no physical evidence linking him to the crime and no eyewitnesses who identified him. The only information police had that Saloy was involved in the murder was information that Saloy had bragged about the shooting to two of his associates, neither of whom were present during the crime, one of whom initially disbelieved Saloy, and the other who provided no detail by which to substantiate Saloy's alleged statements. CP 305-09; Pretrial Ex. 1, at 23, 26-27.

Later however, special agents from the Department of Homeland Security received information from the mother of one of Saloy's gang associates that her son had information about a murder. Due to pressure from those federal authorities regarding the family's immigration status, Saloy's associate ultimately agreed to be interviewed by Seattle Police detectives. CP 310; Pretrial Ex. 1, at 29. After advising the detectives that Saloy had admitted his involvement

in Coleman's murder to him, the associate agreed to participate in a judicially-authorized recording operation. CP 296-317; Pretrial Ex. 1, at 29. While being surreptitiously recorded, Saloy confessed to his associate that he had murdered Coleman and provided significant detail about the shooting and how it had occurred. Ex. 48, 49, 50, 51; Pretrial Ex. 1, at 30; 7/28/14 RP 59-68, 71-83, 87-102.

A jury found Saloy guilty of first-degree murder with a firearm enhancement for the shooting death of Coleman. CP 584-85, 678-79. The jury also convicted Saloy of first-degree attempted murder with a firearm enhancement for shooting Clark. CP 584-85, 680-81. Although both counts also included the allegation that Saloy committed the crimes for the benefit of a criminal street gang, the jury was unable to reach a unanimous verdict as to the gang aggravators. CP 584-85, 883, 685. On September 10, 2014, the trial judge imposed a standard-range sentence of 719 months imprisonment. CP 687-89.

In an unpublished decision, the Court of Appeals affirmed Saloy's convictions, but remanded for a new sentencing hearing in light of this Court's intervening decision in State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017), which concluded that juvenile defendants facing "de facto" life sentences are constitutionally entitled to an individualized sentencing hearing that fully explores the impact of the

defendant's youthfulness on the sentence rendered. See Saloy, Slip. Op. at 27-30. The State agrees that Ramos requires Saloy to be resentenced, and does not seek further review of the Court of Appeals' conclusion to that effect.

For the reasons outlined below, this Court should reject Saloy's petition for review. If the court accepts review, the State requests that the court also accept review of several of the Court of Appeals' conclusions regarding an allegedly improper statement made during the prosecutor's closing argument.

V. ARGUMENT

A. THE COURT SHOULD DENY THE PETITION FOR REVIEW.

RAP 13.4(b) governs consideration of a petition for review. It provides that a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State's briefing in the Court of Appeals adequately addresses the substantive issues presented for review. For the following reasons, review should be denied.

Saloy's Privacy Act claim involves only the fact-specific question of whether the application for the one-party consent recording contained sufficient particularized information to justify authorization. In his petition for review of this issue, Saloy merely rehashes the same arguments rejected by the Court of Appeals when it concluded that the affidavit carefully described the unique difficulties the detectives had in obtaining reliable evidence in Saloy's case. The Court of Appeals did not "carve[] out an exception to the Privacy Act for gang-related cases."¹ In fact, it specifically rejected Saloy's contention that the authorizing judge "simply relied on the assumption that because the crime was gang-related, nobody would be willing to testify." Saloy, Slip Op. at 9-10. Also, based on specific detail contained in the affidavit, the Court of Appeals rejected Saloy's assertion that the State sought to obtain the recording merely to obtain an advantage at trial. Id. at 11. In sum, the Court of Appeals' holding entirely relied on the individualized statements of fact contained in the affidavit, did not alter settled law in any manner, and the issue is not one of substantial public interest.

¹ Pet. for Review at 9.

Similarly, Saloy's claims relating to: (1) alleged misrepresentations and omissions in the wire recording application; (2) the State's reasons for delay in charging; and (3) the trial court's resolution of multiple evidentiary issues are based solely on the distinct facts of Saloy's case. Because the Court of Appeals properly resolved all of these questions on the specific details involved, they do not raise any issue of substantial public interest and review should be denied.

Finally, because Saloy was twenty years old at the time he was charged with Coleman's murder and was not charged pursuant to the "automatic decline statute," this case does not present a proper vehicle for a determination of the constitutionality of RCW 13.04.030(1)(e)(v). Review should be denied.

B. IF THE COURT ACCEPTS REVIEW, THE COURT SHOULD ALSO REVIEW SEVERAL CONCLUSIONS OF THE COURT OF APPEALS RELATING TO SALOY'S CLAIM OF PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT.

The Court of Appeals concluded that the prosecutor committed misconduct in closing argument by improperly commenting on Saloy's right not to testify. Saloy, Slip Op. at 17-18. Nonetheless, the court concluded beyond a reasonable doubt that the improper comment did not affect the verdict. Id. at 18-19.

If review is accepted, the State seeks cross-review of the Court of Appeals' conclusion that the prosecutor's statement during closing argument directly commented on Saloy's right not to testify. Moreover, because the prosecutor's statement, if error, at most "touched" on a constitutional right, the Court of Appeals erroneously applied the strict constitutional harmless error standard. Finally, the Court of Appeals erred by concluding that Saloy timely objected to the prosecutor's allegedly improper statement. Should this Court accept the petition for review, it should accept review of these issues as well.

As outlined in the briefing below, the entire context of the prosecutor's argument makes clear that her statement was not intended to be a comment on Saloy's right to remain silent, and the jury would not have naturally and necessarily interpreted the statement as such. State v. Barry, 183 Wn.2d 297, 306-07, 352 P.3d 161 (2015); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Therefore, the statement was not a direct comment on the defendant's failure to testify; at most it "touched" on a constitutional right and the constitutional harmless error standard of review does not apply. State v. Emery, 174 Wn.2d 741, 757, 278 P.3d 653 (2012) (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)); State v. French, 101 Wn. App. 380, 385-86, 4 P.3d 857 (2000) (citing State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)).

Furthermore, Saloy did not raise a timely objection to the prosecutor's statement and the court had no ability to cure any error with a proper instruction. French, 101 Wn. App. at 387. Thus, the proper harmless error standard is whether the remark was so flagrant and ill-intentioned to be incurable with an instruction. State v. Klok, 99 Wn. App. 81, 84, 992 P.2d 1039 (2000).

The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the above issues relating to Saloy's claim of prosecutorial misconduct. RAP 1.2(a); RAP 13.4(d); RAP 13.7(b).


VI. CONCLUSION

For all of the above reasons, this Court should deny the petition for review. If this Court accepts review, the State seeks review of the above-outlined conclusions of the Court of Appeals relating to the prosecutor's allegedly improper statement during closing argument.

DATED this 27th day of April, 2017.

Respectfully submitted,

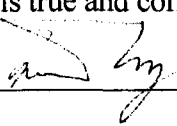
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Today I directed electronic mail addressed to the attorney for the appellant, Kathleen A. Shea, at kate@washapp.org, containing a copy of the ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION, in STATE V. D'ANGELO SALOY, Cause No. 94319-2, in the Supreme Court of 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.



Name
Done in Seattle, Washington



Date

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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Appellate Court Case Title: State of Washington v. D'Angelo Anthony Saloy
Superior Court Case Number: 12-1-05404-1

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