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MAR 21 2012

King County Prosecutor
Appellate Unit

NO. 67617-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

LONNIE CARTER,

Appellant.

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

The Honorable Kimberly Prochnau, Judge
The Honorable Ronald Kessler, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct in closing argument denied the appellant a fair trial.

Issues Pertaining to Assignment of Error

1. Did the prosecutor flagrantly appeal to jurors' emotions, as well as misstate the law, when she encouraged jurors during closing argument to put themselves in the shoes of the alleged harassment victim?

2. The prosecutor also encouraged the jury to believe the complaining witness, and to convict the appellant, because all correctional officers were subject to abuse by inmates. Did such argument constitute flagrant, prejudicial misconduct and thus violate the appellant's right to a fair trial?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged the appellant, Lonnie Carter, with felony harassment based on a threat to kill correctional officer Michael Harding at the King County jail. CP 1-4, 57. The court instructed the jury on the lesser crime of misdemeanor harassment, but jurors convicted Carter as

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 4/25/11; 2RP – 7/11/11; 3RP – 7/12/11; 4RP – 7/13/11; 5RP – 7/14/11; and 6RP – 7/29/11.

charged. CP 81-99, 102. The court sentenced Carter to the low end of the standard range. CP 103-10.

2. Trial testimony

Officer Harding was stationed in a part of the jail where inmates were allowed an hour out of their cells each day.² 4RP 9. Carter's scheduled time out of his cell began at 8 a.m. 4RP 18. Harding unlocked the sleeping Carter's cell and announced it was time for his "hour out." 4RP 18, 41. A few minutes later, Carter buzzed the door to the guard station and complained it was the second morning in a row he had the 8 a.m. release time. 4RP 19, 44-45. Harding showed Carter the schedule and said he was just following it. 4RP 20. An angry Carter returned to his cell and slammed the door. 4RP 20-21.

At 8:45, Harding performed a regular security check that required him to pass each cell. 4RP 23. At that time, Carter challenged Harding to unlock the cell so he could "beat [his] ass." 4RP 22. Carter called Harding a "cracker" and other colorful epithets. 4RP 22-23.

Carter continued to vocalize his displeasure with Officer Harding. 4RP 24. At the 9:45 security check, Harding urged Carter to stop because the noise was disturbing the other inmates. 4RP 26, 50.

² An inmate's "hour out" time ideally varied from day to day, such that if the "hour out" occurred in the morning one day, it should occur in the evening the next day. 4RP 19.

Carter suddenly stopped yelling and told Harding calmly, “[W]hen I get out, I’m going to look up your address on the [I]nternet, I’m going to come over to your house, cut the phone line, and I’m going to stab you and your family to death.” 4RP 26, 85. Harding was “livid” as well as “actually scared” Carter would carry out the threat at some time in the future because the threat (1) involved his family and (2) contained specifics regarding how, when, and where the threatened acts would be carried out. 4RP 27, 83. Harding acknowledged, however, that he did not feel Carter posed any immediate threat because he was locked up. 4RP 28.

When Harding returned to the guard station to report the incident, he told his supervisor, “either . . . Carter goes or I go.” 4RP 28-29, 55-56. Carter was eventually moved to another area of the jail. 4RP 29. Harding told his wife about the incident and posted a picture of Carter in his home. He had no further contact with Carter except in passing. 4RP 30, 65, 71.

Harding acknowledged no one aside from other inmates³ could have heard the threats. 4RP 59-60. Neither Harding nor the State made

³ Officer Lawrence Reis, who escorted another inmate to Harding’s unit after the incident, testified that Harding appeared agitated and was pacing back and forth. 4RP 92. Reis could hear someone cursing from one of the cells. 4RP 93.

any attempt to contact other inmates to corroborate Harding's version of events. 4RP 71, 75.

Carter recalled the incident differently. That morning, he was dismayed to learn his hour out began at 8 a.m. for the *third* day in a row, which prevented him from making phone calls to friends. 4RP 109-11. Contrary to Harding's story, Carter testified he left his cell to shower, but soon returned because he had no one to call. 4RP 111.

Carter was discussing the plot of a movie – in which a family is murdered by an escaped convict – with the inmate in the cell next door when Harding stepped in front of Carter's cell and accused him of threatening Harding's family. 4RP 113, 121-22. Carter tried to explain he was mistaken, but Harding was irate and told Carter he would no longer be released in two days as planned. 4RP 113-14. Harding nevertheless did not "write up" the incident, and Carter was released on schedule. 4RP 115.

Four months after the incident, the State charged Carter with felony harassment. CP 1-4, 57; RCW 9A.46.020(1), (2)(b). Carter suspected the State filed the charge in retaliation for federal lawsuits he had filed against King County jail officials alleging officer brutality. 4RP 115-16, 125.

3. Closing argument

The prosecutor argued that while jail guards like Harding had a "thankless" job, inmates should not be permitted to treat them as they wished. 4RP 139. Officers could expect inmate insults, but Carter's threats were of a different sort. Moreover,

[when Harding] went up there at the second security check and [Carter], as he's . . . making all this ruckus, all of a sudden he's really quiet, and in a very calm and normal voice tells [Harding], when I get out of here, I'm going to find your address on the [I]internet And [Harding] told you that he was positive those threats were going to be carried out. . . . *And I think when you reflect on his testimony and put yourself in his shoes, those are all the same emotions that you would feel if you were in that position. You would feel scared, you would be fearful, and you would be angry that someone would say this to you.*

4RP 141-42 (emphasis added).

Later, the prosecutor argued,

Your role as jurors is to be fair, to be impartial. What the State is asking is that you not only be fair to the defendant, but be fair to the State. Most of all, be fair and reasonable to the folks, the Department of Corrections officers to who come to work every day and deal with what they have to deal with. And when someone from their community tells you, this particular inmate made this threat to me, and I feared for my life and the life of my family, the State is asking that you hold the defendant accountable for those actions, for those threats, and find him guilty of Felony Harassment.

4RP 144.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DENIED CARTER A FAIR TRIAL.

The prosecutor appealed to jurors' emotions and misstated the law when she encouraged jurors to put themselves in Officer Harding's shoes. The prosecutor also encouraged the jury to believe the complaining witness and convict Carter because correctional officers as a group were subject to harsh conditions including verbal abuse by inmates. These arguments constituted flagrant and prejudicial misconduct, and they violated Carter's right to a fair trial.

1. Introduction to applicable law

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). When a prosecutor commits misconduct, she may deny the accused a fair trial. Id.; U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prosecutor is therefore forbidden from appealing to the passions of the jury and thereby encouraging it to render a verdict based on emotion rather

than properly admitted evidence. Viereck v. United States, 318 U.S. 236, 247-78, 63 S. Ct. 561, 87 L. Ed. 734 (1943); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

In addition, a prosecutor who misstates the law of a case commits a serious irregularity that has the potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); see also State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972) (arguments concerning questions of law must be confined to the instructions given by the court); State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011) (so holding).

Even where there is no objection to such misconduct, reversal is required when a prosecutor's remarks are so flagrant and ill intentioned they could not have been cured by instruction. Belgarde, 110 Wn.2d at 507; State v. Echevarria, 71 Wn. App. 595, 597-98, 860 P.2d 420 (1993).

2. The State's argument was an emotional appeal and a misstatement of the law.

The prosecutor urged jurors to put themselves in Harding's shoes in evaluating whether the alleged statements satisfied the elements of harassment. 4RP 141-42. Arguments that are unfairly "calculated to align the jury with the prosecutor and against the [accused]" are improper. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Similarly, comments

that urge jurors to sympathize with the complaining witness and otherwise distract jurors from deciding whether the State has proven each element of the crime are likewise improper. People v. Littlejohn, 494 N.E.2d 677, 687 (Ill. App. 1986); see also State v. Mills, 748 A.2d 318, 323-24 (Conn. App. 2000) (improper for prosecutor to tell jury not to victimize the complainant again). Moreover, "[u]rging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position," is an improper argument because it "encourages jurors to depart from neutrality and decide the case on the basis of personal interest rather than on the evidence." Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257 (1988).

The prosecutor's argument encouraged jurors to decide their case based on an emotional response rather than a clearheaded evaluation of the evidence. It was, accordingly, misconduct. Littlejohn, 494 N.E.2d at 687.

The prosecutor also misstated the relevant law. A person is guilty of harassment if he knowingly threatens⁴ to cause bodily injury or death to

⁴ Washington courts interpret statutes criminalizing threatening language as proscribing only "true threats," *i.e.*, statements made under circumstances that would cause a reasonable person to foresee the statements would be interpreted as a serious expression of intent to inflict bodily harm upon another. State v. Atkins, 156 Wn. App. 799, 805, 236 P.3d 897 (2010).

the person threatened. RCW 9A.46.020(1)(a)(i), (2)(b). The speaker must also place the target of the threat in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(b). The trier of fact must apply an objective standard to determine whether the fear is reasonable. State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000). The State was thus required to prove it was objectively reasonable for Harding to believe Carter would carry out his threats to kill and that Harding actually believed the threats would be carried out. State v. C.G., 150 Wn.2d 604, 609, 80 P.3d 594 2003; CP 91 (to-convict instruction).

Rather than directing jurors to objectively assess the reasonableness of Harding's fear, the prosecutor encouraged them to evaluate how *they* would feel if they were so threatened. But the question was not how an individual juror would feel, but rather what a “reasonable person” in Harding’s position would make of the statements; as well as whether Harding, a seasoned corrections employee, actually felt such fear. See Walker, 164 Wn. App. at 736 (in context of whether self-defense was warranted, it was error for prosecutor to encourage the jury to judge the events not objectively but based on their own beliefs about how they would have responded).

To summarize, the prosecutor's argument improperly urged jurors to resolve the case based on their own emotional response to the alleged

threats. The prosecutor also asked for a conviction based on the evaluation of criteria that were irrelevant to the elements of the crime.

3. The State's argument improperly urged jurors to convict Carter in order to stand up against the harsh conditions faced by the community of correctional officers.

The prosecutor began closing argument by stating Officer Harding had a “thankless” job. 4RP 138. She continued, “You can bet that the inmates don’t thank corrections officers . . . for their service. You can bet that you won’t see bumper stickers that say, have you hugged or thanked your Department of Corrections officer today.” 4RP 139.

Later, the prosecutor argued the jury should accept Harding’s testimony and “hold [Carter] accountable,” because it was the right thing to do based in part because of correctional officers' harsh employment conditions. 4RP 144. While couched in terms of “fairness,” the argument improperly directed the jury’s focus to the plight of correctional officers rather than to the facts of Carter's case. By doing so, the prosecutor committed flagrant misconduct.

Pleas to decide a case based on passion or to send a message to others engaged in similar crime are prohibited. See, e.g., United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); United States v. Kopituk, 690 F.2d 1289, 1342-43 (11th Cir. 1982); State v. Finch, 137 Wn.2d 792, 839-42, 975 P.2d 967 (1999); State v. Bautista-

Caldera, 56 Wn. App. 186, 195, 783 P.2d 118 (1989). Such argument jeopardizes the defendant's right to be tried solely on the basis of the evidence presented to the jury. Young, 470 U.S. at 18.

Courts have permitted prosecutors to call upon juries to act as "the conscience of the community" only so long as their remarks are not designed to inflame the jurors' passions. Kopituk, 690 F.2d at 1342-43; Finch, 137 Wn.2d at 841. While such appeals are not impermissible per se, they become so when the prosecutor attempts to emotionalize the process. Id.

The prosecutor's argument in this case crossed the line. By asserting that correctional officers generally faced harsh conditions, the prosecutor suggested the jury owed it to Harding to take him at his word and thus to convict Carter. This case is therefore distinguishable from Bautista-Caldera, where the prosecutor in a child-sex case urged the jury:

ladies and gentlemen, do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf.

56 Wn. App. at 195. While the Court condemned this argument as an attempt to "exhort[] the jury to send a message to society," it declined to reverse the conviction because the prosecutor's immediately preceding remarks had urged the jury to decide the case based on the evidence. Id.

Here, in contrast, the prosecutor began closing argument by reminding the jury that correctional officers had a “thankless job” and did not precede or follow the objectionable by urging jurors to decide the case on its own merits.

By encouraging the jury to punish Carter for the misdeeds of others, the prosecutor once again distracted the jury from its true task, a reasoned evaluation of the evidence. The comments were, therefore, misconduct.

4. The misconduct requires reversal.

Carter's case turned on whether the jury found Harding or Carter credible. Where there is little corroboration of the State's evidence and the credibility of witnesses is the central question in the case, prejudice based on prosecutorial misconduct is more likely to occur. State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993); see also Walker, 164 Wn. App. at 738 (finding that mostly unobjected-to prosecutorial misconduct was prejudicial, and warranted reversal, because case was “largely a credibility contest”).

The misconduct diverted the jury's focus from the evidence to the plight of corrections officers. It also invited jurors to subjectively determine whether Harding's fear was reasonable. Because there is a

substantial likelihood this misconduct affected the verdict, the conviction should be reversed.

No instruction could have cured the prejudice. “This is one of those cases of prosecutorial misconduct in which ‘[t]he bell once rung cannot be unrung.’” State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (quoting State v. Trickel, 16 Wn. App. 18, 30, 533 P.2d 139 (1976)), review denied, 118 Wn.2d 1013 (1992)

In Powell, the prosecutor concluded closing argument by telling the jury a “not guilty” verdict would send the message that children who reported sexual abuse would not be believed, thereby “declaring open season on children.” 62 Wn. App. at 918. Although the State conceded that the comments *could* have been construed as improper, it argued the claim was meritless because the defense objection was sustained and no curative instruction was sought. Id. at 919.

The appellate court disagreed, holding, “It may be that a carefully worded curative instruction could have remedied the prejudice those flagrant remarks would have engendered, but that is speculation.” Id. The Court held the argument denied Powell a fair trial. Id.; see also Echevarria, 71 Wn. App. at 598-99 (prosecutor's inflammatory references to “war on drugs” was so flagrant and prejudicial that no objection was required to preserve error).

As in Powell and Echevarria, it is unlikely that the jurors – having been urged to put themselves in the complainant’s “shoes” – could have erased from their minds that the only way to be “fair” to correctional officers was to accept Harding’s version over Carter’s. The prosecutor’s flagrant, prejudicial misconduct denied Carter a fair trial. See Walker, 164 Wn. App. at 737 (cumulative effect of multiple instances of misconduct may ensure that no instruction or series of instructions can erase the prejudicial effect).

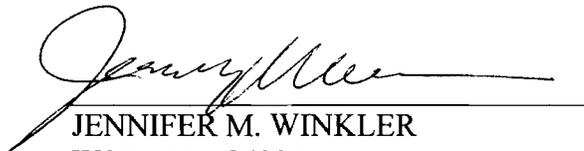
D. CONCLUSION

The prosecutor’s misconduct denied Mr. Carter a fair trial. This Court should therefore reverse his conviction.

DATED this 21ST day of March, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
OF COUNSEL
K. CAROLYN RAMAMURTI
REBECCA WOLD BOUCHEY

State V. Lonnie Carter

No. 67617-2-I

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On March 21, 2012, I deposited in the mails of the United States of America,
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Lonnie Carter 623726
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Containing a copy of the opening brief, re Lonnie Carter
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I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch

3-21-12

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Done in Seattle, Washington