

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
BY: *[Signature]*

NO. 35820-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DONALD VICTOR SCHNEIDER, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. Mr. Schneider was deprived of his right to a fair trial when the prosecutor committed prosecutorial misconduct by appealing to the passions and prejudice of the jury during closing argument.
2. Mr. Schneider was deprived of due process when he was convicted of two counts of first degree rape and one count of unlawful imprisonment without sufficient evidence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Schneider was denied a fair trial because of prosecutorial misconduct when the prosecutor appealed to the passions and prejudices of the jury by telling the jury it represented the people of Washington and had to decide if Ms. Laythe was “entitled to the protection of our laws” and to “define what [the defendant] did.”
2. Whether the verdicts are supported by sufficient evidence where the evidence presented by the State proved only that Mr. Schneider had sex with Ms. Laythe, not that he raped her or restrained her against her will.

III. STATEMENT OF THE CASE

This case arises from the alleged rape of Matilda Laythe. At the time of the rape, Ms. Laythe worked as a prostitute to support her crack habit. RP6 391-92. It was her custom to have up to six customers each day, returning home between customers to smoke crack. RP6 393, RP7 545, RP7 552.

In the afternoon of April 29, 2004, Ms. Laythe walked into the tribal police station and told police that she had been raped the night before. RP5 239-40. She denied that she was a prostitute and a heavy drug user and told police and medical staff she had not had sex at all that day except for the rape. RP6 459-60, RP7 561. The first time she admitted that she was a prostitute and a drug addict at the time of the incident was in 2006. RP7 561. She later acknowledged that these were lies. RP6 459-60, RP7 561. In fact, on the day of the alleged rape, Ms. Laythe smoked four to five rocks of cocaine, the last one a short while before her last "date." RP6 404-5. She was also prostituting that day and the day before, having sex with up to six men each day. RP6 393, RP7 545. Sometimes her customers used a condom, sometimes they did not. RP7 504.

Her last "date" was with a man who drove up in what she described as a white car resembling a Valiant and asked her to come out with him. RP6 408. She went with him willingly and agreed to a couple of hours of unspecified sexual acts in return for \$50. RP6 412-13. The location for the sex was not discussed, but she did not protest when the man drove to what she described as "Upper Park" and she willingly walked with him into the underbrush. RP6 412-13.

When they reached a stopping point, Ms. Laythe says the man pulled out a pocketknife and threatened to kill her. RP6 420. According to Ms. Laythe, he then duct taped her hands, feet and mouth and engaged in vaginal, anal, and oral sex with her. RP6 430-33. She also believes foreign objects may have been used. RP6 433. She did not feel the man ejaculate. RP7 580.

According to Ms. Laythe, when the rape was over, the man removed the tape and she helped him look for the \$50 bill and the knife. RP6 440. She found the knife and placed it in her pocket. RP6 443. Then she walked with the man back to his car. RP6 446. She told him to drop her off a block from her house, which he did. RP6 447. It was around 6:30 a.m. RP6 448.

Getting home after this alleged rape has occurred, Ms. Laythe says nothing to anyone, does not shower, but rather climbs into bed with her

boyfriend and goes to sleep. RP6 449. She woke around noon on April 29, and after talking with her housemates, went over to the police station. RP6 456-57.

Police took Ms. Laythe to the hospital for a rape exam. RP5 263. Ms. Laythe had changed her pants since the incident, so the police officer returned with her to her home and retrieved the pants and the knife she said the assailant had used. RP5 257, 263. The pants Ms. Laythe wore after the incident are important because, according to the police detective, the sample found on the pants would isolate the semen sample to that in her vagina at that time, excluding any sexual activity after the rape but before the tests. RP11 1086.

Ms. Laythe was never asked to show police where the rape occurred. Instead, for reasons unclear, the police left her in the police car while they walked to where they believed the crime scene was. RP11 1069. There, they collected a blanket, shorts and a bra, some used duct tape, and various other debris. RP5 313-14.

Eventually, police came to identify Mr. Schneider as a suspect. They assembled a photomontage and showed it to Ms. Laythe. RP10 1019. Ms. Laythe identified another man from the picture, saying: "Right there, that's him. In fact, he's got the same shirt on." RP7 620, RP10

1021. Ms. Laythe showed no uncertainty or doubt in her identification.
RP7 624, RP10 1046.

Mr. Schneider never denied that he might have had sex with Ms. Laythe around the time she claimed she was raped. However, he denied he had raped her. Ms. Laythe testified that she had sex with up to five other men on the day of the alleged rape, but she could not remember any details of these other "dates." RP7 567.

Ms. Laythe testified that not only was she high on crack when the alleged incident occurred, she has suffered from both visual and auditory hallucinations for years. RP7 508, 525-26. Crack makes her hallucinations worse. RP7 509. Further, Ms. Laythe admitted to serious problems with her short and long-term memory. RP6 402. She said: "I remember some things very well, but a lot I don't at all. I get it confused, mixed up and I think about it and I realize it wasn't right." RP7 501.

In addition, Ms. Laythe was in an abusive relationship at the time of the alleged rape. RP7 529. This abusive boyfriend, she testified, had choked her, threatened her with a knife, and caused her multiple injuries over the years. RP7 531-34.

The sample taken from Ms. Laythe revealed Mr. Schneider's DNA, as did the fabric found in the park. RP7 557, RP11 1090. Ms. Laythe did not remember if she or the man brought the fabric to the park.

RP7 557. The duct tape samples contained Ms. Laythe's hairs. RP11 1091. No physical evidence was found in Mr. Schneider's car or his apartment connecting him to a crime. RP10 916.

Mr. Schneider was eventually charged with two counts of first degree rape, one count of second degree assault, and one count of first degree kidnapping. CP 155-57. Following a jury trial, he was convicted of two counts of first degree rape and one count of unlawful imprisonment. CP 299. He was sentenced as a persistent offender to life in prison. CP 300. This appeal timely follows. CP 342.

IV. ARGUMENT

ISSUE 1: WHETHER MR. SCHNEIDER WAS DENIED A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY BY TELLING THE JURY IT REPRESENTED THE PEOPLE OF WASHINGTON AND HAD TO DECIDE IF MS. LAYTHE WAS "ENTITLED TO THE PROTECTION OF OUR LAWS" AND TO "DEFINE WHAT [THE DEFENDANT] DID".

In this case, the prosecutor violated due process when she appealed to the passions and prejudices of the jury by exhorting them to essentially send a message with their verdict that a "sad and pathetic" prostitute can be raped. The jury was not empanelled to send a message to society; it was empanelled to decide if Mr. Schneider raped Ms. Laythe. The prosecutor's argument was absolutely misconduct and it violated Mr. Schneider's right to a fair trial.

The Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 14 and 22 of the Washington Constitution guarantee a defendant's right to a fair trial. Moreover, prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Accordingly, a prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict. *Belgarde*, 110 Wn.2d 504. Likewise, inflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism are forbidden. *State v. Neidigh*, 78 Wn. App. 71, 79, 895 P.2d 423 (1995). In closing argument, a prosecuting attorney has wide latitude to draw and express reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *United States v. Garza*, 608 F.2d 659, 663 (5th Cir. 1979)).

Federal courts addressing these issues have likewise held that it is improper for a prosecutor to urge the jury "to view this case as a battle in

the war against drugs, and the defendants as enemy soldiers,” *Arrieta-Agressot v. United States*, 3 F.3d 525, 527 (1st Cir. 1993), that the constitution prohibits appeals to racial, ethnic, or religious prejudice, *United States v. Cabrera*, 222 F.3d 590, 594 (9th Cir. 2000), and that it is improper for a prosecutor to “direct the jurors’ desires to end a social problem toward convicting a particular defendant.” *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991) (reversing based on prosecutor’s call to send a message to drug dealers, notwithstanding curative instruction given by trial court).

To establish prosecutorial misconduct during closing argument, the defendant bears the burden of demonstrating that the prosecutor’s remarks were improper and that they prejudiced the defense. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986). The conduct is prejudicial where there is a substantial likelihood the misconduct affected the jury’s verdict. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998) (citing *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981)). Either an objection or a requested instruction is sufficient to preserve such error for appeal. *State v. Brown*, 74 Wn.2d 799, 803, 447 P.2d 82 (1968). *See also State v. Reed*, 102 Wn.2d 140, 144, 683 P.2d 699 (1984). Where, as here, defense counsel objected, this court must evaluate the trial court’s

ruling for abuse of discretion. *Pirtle*, 136 Wn.2d at 481-82. The allegedly improper arguments are reviewed in the context of (1) the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

This case boiled down to identity. Ms. Laythe could not identify Mr. Schneider as her rapist. In fact, she identified another man with certainty. Ms. Laythe's memory was so poor that she could not remember any of the other men she slept with the day of the alleged rape or if one of them was Mr. Schneider. Moreover, she could not deny that she may have brought the cloth containing hers and Mr. Schneider's DNA to the scene. The only evidence the State had was DNA, which proved only that Mr. Schneider had sex with Ms. Laythe.

In this context, the desperate prosecutor did what she could to direct the jury's attention away from the alleged victim's lack of credibility. She told the jury:

- "But the 12 of you have been chosen to represent the people of Washington." RP13 1243.

Defense objection sustained but not struck. RP13 1243.

- "Ladies and Gentlemen, you have to decide what he did to Matilda Laythe. Was that a violation of Matilda Laythe? You have to

decide whether someone, as sad and pathetic as Matilda Laythe, is entitled to the protection of our laws.” RP13 1243.

Defense objects, telling the court that this is not what they are there to decide, it is whether the State proved the case beyond a reasonable doubt. RP13 1243. The court sustains the objection but does not strike. RP13 1243.

- “And when he violated Matilda Laythe, he violated the laws of this State that says every person, regardless of wealth, education, status, color, gender, every person has a right to be free from harm. When he violated Matilda Laythe, he violated the peace and dignity of this state. And when he violated Matilda Laythe, he violated the people of the State of Washington.” RP13 1244.

Defense again objects, arguing that the prosecutor is appealing to passion and prejudice of the jury. RP13 1244. The court denies the objection. RP13 1244.

- “Your verdict will, however, define what he did. Your verdict will define what justice means and what the law represents.” RP13 1244.

The defense objection is sustained, but the court refuses to strike. RP13 1244.

This case is analogous to cases where the prosecutor told the jury

to send a message about gang violence with their verdict. In *State v. Perez-Mejia*, 134 Wn. App. 907, 143 P.3d 838 (2006), the court found that the prosecutor's closing argument was prosecutorial misconduct where the prosecutor told the jury:

Send a message to Scorpion,¹⁰ to other members of his gang ... and to all the other people who choose to dwell in the underworld of gangs. That message is we had enough. We will not tolerate it any longer. That we as citizens of the State of Washington and the United States of America, we have the right to life, liberty and the pursuit of happiness and we will no longer allow those who choose to dwell in the underworld of gangs to stifle our rights. And that message begins now.

It begins now by finding that the defendant was involved in the death of Ms. Emmitt. That message can be sent by holding the defendant responsible for his actions, for his involvement in the gang. For him being an accomplice to his other gang members in the death of Ms. Margaret Emmitt.

Perez-Mejia, at 917-18. The Court held that this argument constituted misconduct because:

This argument improperly invoked the jurors' patriotic sentiments and, having done so, cast the defendant as an oppressor of the inalienable rights listed in our nation's Declaration of Independence. These appeals to prejudice and patriotism were unquestionably improper.

Perez-Mejia, at 918, citing *Neidigh*, 78 Wn. App. at 79. Moreover, the Court held that the trial court had "augmented the argument's prejudicial impact" by overruling the objection and failing to give a curative instruction. *Perez-Mejia*, at 920.

Likewise, in this case, the prosecutor appealed to the jury's patriotic sentiment, and asked them to send a message about who is protected by our laws, telling the jury, "Your verdict will, however, define what he did. Your verdict will define what justice means and what the law represents." RP13 1244. The prosecutor in this case also asked the jury to identify with the victim, telling them that to rape her is to rape "the people of the State of Washington,"¹ and that "You have to decide whether someone, as sad and pathetic as Matilda Laythe, is entitled to the protection of our laws."²

Just as the prosecutor in this case improperly asked the jury to send a message to society, the prosecutor in *State v. Bautista-Caldera*, 56 Wn. App. 186, 783 P.2d 116 (1989), was found to have improperly told the jury:

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 enforce the law on their behalf.

56 Wn. App. at 195. The court found the prosecution's plea improper because it "in effect exhorts the jury to send a message to *society* about the general problem of child sexual abuse." *Id.*

¹ RP13 1244.

² RP13 1243.

The prosecutor in this case deprived Mr. Schneider of his right to a fair trial because of her repeated statement to the jury that their verdict was in some way a statement about who could be raped, who was protected by the law. The central issue in this case was not whether Ms. Laythe was raped or whether she should be protected from harm, it was whether Mr. Schneider had committed the crimes of which he was charged. It is clear that the prosecutor purposely attempted to inflame the patriotic passions of the jury to distract them from the shortcomings of their witness and the woeful lack of evidence. Moreover, the trial court repeatedly permitted the prosecutor to pound her message home without striking the improper argument or giving the jury a corrective instruction. This misconduct prejudiced Mr. Schneider's right to a fair trial and therefore his convictions should be reversed.

ISSUE 2: WHETHER THE VERDICTS ARE SUPPORTED BY SUFFICIENT EVIDENCE WHERE THE EVIDENCE PRESENTED BY THE STATE PROVED ONLY THAT MR. SCHNEIDER HAD SEX WITH MS. LAYTHE, NOT THAT HE RAPED HER OR RESTRAINED HER AGAINST HER WILL.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

1. Rape in the First Degree

Mr. Schneider was convicted of two counts of first degree rape. CP 247, 248. To prove first degree rape, the State had to prove beyond a reasonable doubt that Mr. Schneider “engage[d] in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory” used or threatened use of a deadly weapon. RCW 9A.44.040(1)(a), CP 155-56, CP 261, 268.

Ms. Laythe identified another man as the one who raped her. RP10 1020. The only real evidence linking Mr. Schneider to Ms. Laythe was his DNA found inside her and on the piece of fabric found at the scene where the rape was said to have occurred. The DNA found inside Ms. Laythe proved only that Mr. Schneider had sex with her, which is a neutral fact in view of Ms. Laythe’s testimony that she had sex with up to six men each day and the fact that the DNA could have been deposited anytime in the prior 92 hours. RP9 790. Further, the DNA on the floral fabric could not be dated and Ms. Laythe testified that she may have brought the fabric with her when she went into the woods with the rapist. RP7 557. Ms. Laythe could not remember anything about her other five dates she had that day, nor the days before the rape, nor could she

remember anything about these other men she voluntarily had sex with. RP10 896. Therefore, the DNA proved only that Mr. Schneider had sex with Ms. Laythe, not that he raped her. *See* RP10 897.

The other facts argued by the State were that: (1) Mr. Schneider's mother owned a white car, which Mr. Schneider drove on occasion, RP10 1001; (2) Mr. Schneider had been treated at the same hospital the alleged rapist told Ms. Laythe he had been in, Greater Lakes Mental Health, RP6 436; and (3) Mr. Schneider had a prescription for the drugs Ms. Laythe said the rapist gave her, Seroquel, RP6 436. Ms. Laythe said her attacker drove up in a white Plymouth Valiant, a car that was last made in 1976. RP5 300, RP7 571, RP10 918. Mr. Schneider's mother owned a late-model white Toyota Corolla. RP10 1001. Thus, the only commonality between Ms. Laythe's car and Mr. Schneider's mother's car is that both were white. Likewise, the fact that Mr. Schneider had been treated at Greater Lakes in the past, RP10 1005, and had a prescription for Seroquel in the past, RP10 1002, do nothing to show that he was a rapist.

The State failed to provide sufficient facts that would have convinced a reasonable jury that Mr. Schneider was guilty of first degree rape beyond a reasonable doubt. Therefore, Mr. Schneider's convictions must be reversed.

2. *Unlawful Imprisonment*

The State charged Mr. Schneider of first degree kidnapping. CP 156. The jury instead convicted him of unlawful imprisonment. RP14 1250, CP 249. To convict Mr. Schneider of unlawful imprisonment, the jury had to find that he had “knowingly restrained Matilda Laythe” without her consent or by physical force or intimidation. RCW 9A.40.040, CP 286. As stated above, the State did not present sufficient evidence to show that Mr. Schneider was the person who restrained and raped her. Therefore, this conviction, too, must be reversed.

V. CONCLUSION

Mr. Schneider was deprived of his right to a fair trial when the prosecutor repeatedly appealed to the passions and prejudice of the jury, telling them that their verdict was in some way a statement about who could be raped, who was protected by the law, rather than deciding if Mr. Schneider was the rapist.

Further, the State failed to provide evidence sufficient to convince a reasonable jury beyond a reasonable doubt that Mr. Schneider raped Ms. Laythe. In a case like this, where the alleged victim voluntarily had sex with many men in the days before the alleged rape, Mr. Schneider’s DNA shows only that was one of those men, not that he raped her. Ms. Laythe identified another man as her rapist and could not remember any of the

other men she had sex with. Therefore, the State failed to prove that Mr. Schneider was guilty of the crimes of which he was convicted. In this context, the prosecutorial misconduct is all the more egregious, distracting the jury from their real job—looking at the facts.

Therefore, for the reasons stated above, Mr. Schneider's convictions must be reversed.

DATED: November 9, 2007

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CERTIFICATE OF SERVICE

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