

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

STATE OF WASHINGTON,

Respondent,

v.

FRESNEL WILLIAMS

Appellant.

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

The Honorable Kitty Ann van Doornink, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Williams was denied his right to a fair trial when the prosecutor used the prestige of his office to argue facts not in evidence asserting that a witness identified Williams when in fact she could not do so.
2. Mr. Williams was denied his right to a fair trial by trial counsel's failure to object to the prosecutor arguing facts not in evidence which tipped the state's weak case in its favor.

Issues Presented on Appeal

1. Was Mr. Williams denied his right to a fair trial when the prosecutor used the prestige of his office to argue that witness Goodenough identified Williams' when in fact, she was completely unable to identify him, and this was a significant issue in the state's weak case?
2. Was Mr. Williams denied his right to a fair trial by trial counsel's failure to object to the prosecutor arguing facts not in evidence which tipped the state's weak case in its favor?

B. STATEMENT OF THE CASE

Fresnel Williams was charged with harassment threat to kill and with violation of a no contact order. CP 34-35. Williams was acquitted of the

harassment charge and convicted of the no contact order charge. CP. 93-100; 107-120. There were no witnesses to the harassment claim and the jury rejected the complainant's (Bethany Stevens) testimony. CP 93-100. The state introduced a witness, Valerie Goodenough to support the violation of a no contact order charge, but she did not actually see Williams. RP 94. Rather she was able to testify that she saw a dark male with short hair. RP 91. Goodenough admitted that she could only guess that Williams was the man in the clinic with Stevens because she saw thousands of people in the clinic each year and Williams was the only African American man in the court room. RP 93-94.

Goodenough did not want to write a statement for the police because she did not see anything. RP 99.

In court Ms. Stevens testified that Williams was waiting for her at the Multicare clinic, whereas, she told the police that Williams boarded the bus with her on the way to the Multicare clinic. RP 39, 48, 66. Ms. Stevens told the jury that Williams threatened to stab her but she never reported this to the police. RP 44, 52. Ms. Stevens testified that Williams assaulted her on the bus, and she testified that she told the police about the assault, but officer Lorberau who spoke with Stevens, indicated that she did not verbally or in writing, report an assault. 48, 49, 65.

This timely appeal follows. CP 121.

C. ARGUMENTS

1. WILLIAMS WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE PROSECUTOR ARGUING FACTS NOT IN EVIDENCE WHICH BOLSTERED THE CREDIBILITY OF THE COMPLAINANT WHO WAS LARGELY NOT BELIEVED CREDIBLE BY THE JURY.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Glasmann*, 175 Wn.2d 696, 704-06, 286 P.3d 673 (2012). “A [f]air trial certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011).

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn.App. 511 at 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor’s improper actions prejudice the accused person’s right to a fair trial. *Boehning, supra*, at 518; *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgeron*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must “seek convictions based only on probative evidence and sound reason,” *State v. Casteneda–Perez*, 61 Wn.App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). “The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.” American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980); *State v. Brett*, 126 Wn.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988).

To prevail on a claim of prosecutorial misconduct the standard of review requires a defendant must show the prosecutor's conduct was both improper and prejudicial. *Thorgeron*, 172 Wn.2d at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Because the defense here, failed to object to improper argument during trial, Williams must also establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Thorgeron*, 172 Wn.2d at 443; *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Here, the prosecutor reversible misconduct when in closing argument, the prosecutor argued to the jury that Ms. Goodenough testified that the man she saw had a “very striking resemblance to the defendant” when in fact, Ms. Goodenough testified that the man with Ms. Stevens looked somewhat familiar because she sees thousands of people per year in the clinic, and could only guess that Mr. Williams was that man based on the fact that he was the only African American man in the court room. RP 93-94, 110.

b. Prosecutor Argued Facts Not In Evidence To Sway Jury.

The prosecutor argued facts not in evidence by proclaiming that Ms. Goodenough basically identified Williams as the man in the clinic with Stevens, even though Goodenough testified that Williams looked familiar but she could only guess, based on William’s being the only African American man in court. RP 93-94.

The state Supreme Court in *State v. Glassman*, 175 Wn.2d 969, 286 P.3d 673 (2012), “unequivocally denounced” a prosecutor submitting evidence to the jury that has not been admitted at trial. *Glassman*, 175 Wn.2d at 704-705 (citing *State v. Pete*, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004)).

The “long-standing rule” is that “consideration of any

material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.’ ” *Id.* at 555 n. 4, 98 P.3d 803 (quoting *State v. Rinkes*, 70 Wash.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted)); *see also, e.g., State v. Boggs*, 33 Wash.2d 921, 207 P.2d 743 (1949), *overruled on other grounds by State v. Parr*, 93 Wash.2d 95, 606 P.2d 263 (1980).

Glassman, 175 Wn.2d at 705. In *Pete*, the Supreme Court explained evidence that is “outside all the evidence admitted at trial, either orally or by document[]’ is improper because it is not subject to objection, cross examination, explanation or rebuttal.” *Pete*, 152 Wn.2d at 552-553 (emphasis in original) (citations omitted).

In *Glassman*, the prosecutor altered admitted evidence to influence the jury to find the defendant guilty. *Glassman*, 175 Wn.2d at 705. Specifically, the prosecutor put captions under a bloody, disheveled photographic image of Glassman that challenged his veracity. The Court held that “the prosecutor’s modification of photographs by adding captions was the equivalent of unadmitted evidence. There certainly was no photograph in evidence that asked [for example] ‘DO YOU BELIEVE HIM?’” *Glassman*, 175 Wn.2d at 706.

The Court held the altering evidence was prejudicial in the same manner as the admission of facts not in evidence because both involved the

improper use of the “prestige associated with the prosecutor's office [] [and] because of the fact-finding facilities presumably available to the office.” *Glassman*, 175 Wn.2d at 706.

In *Pete*, the prosecutor inadvertently sent to the jury, Pete’s written signed statement and a police report. *Pete*, 152 Wn.2d at 553. The report and statement were inculpatory; the police report indicated that Pete was involved in the beating; and Pete’s written statement indicated that he took property from the victim. *Pete*, 152 Wn.2d at 554. The Court reversed holding that the introduction of these two documents was prejudicial because one indicated that Pete took property which was inculpatory and the other contradicted his defense which “seriously undermined” his general denial defense by *Pete*, 152 Wn.2d at 554-555.

In *Rinkes*, 70 Wn.2d at 855, 425 P.2d 658, the prosecutor inadvertently sent a newspaper editorial and cartoon highly critical of “lenient court decisions and liberal probation policies”. *Rinkes*, 70 Wn.2d at 862-863. Although inadvertent, the court held that the material was “very likely indeed” to be prejudicial and assumed that “the requisite balance of impartiality was upset” because the material was “clearly intended to influence the readers” and “may well have evoked” “the necessity for being stricter and less careful about observing legal principles and procedure in

dealing with defendants accused of crime.” *Rinkes*, 70 Wn.2d at 862–63.

In *State v. Pierce*, 169 Wn.App. 533, 280 P.3d 1158 (2012), the prosecutor created a fictitious dialogue of what the defendant may have been thinking before and during the murders and recited it in the first person narrative during closing. *Pierce*, 169 Wn.App. at 453-54. The Court held that this argument was improper because it was based purely on the prosecutor’s speculation and not on the evidence. *Pierce*, 169 Wn.App. at 455. The defense objected to this argument but not to others that improperly appealed to passion and prejudice of the jury. The Court held that no curative instruction would have cured the invitation to the the jury to imagine themselves in the victims’ shoes. *Pierce*, 169 Wn.App. at 556.

Here, as in the cases cited herein, the prosecutor’s comments that Mr. Williams was identified as the man with Steven’s were not based on reasonable inference. Rather, the prosecutor made up facts to support a weak case where the only issue was identification, and Steven’s credibility had been significantly undermined by her extremely different statements to police, her written statements and her in court testimony. RP 91-94.

The introduction of facts not in evidence was not inadvertent, rather it was deliberate as in *Glassman* and *Pierce*. The prosecutor argued to the jury that Goodenough identified the man with Steven’s as “strikingly similar” to

Williams where no such testimony existed. The prosecutor used this made up fact to shore the weakness in its case, similar to the prosecutor in *Pierce* who fabricated a dialogue and in *Glassmsn* where the prosecutor created evidence to influence the jury to find guilt, rather than base on the state's actual evidence. The method used by the prosecutor in this case was an abuse of his office which undermined the reliability of the verdict to such an extent that it is not possible to determine the outcome would have been the same without the misconduct.

This argument of facts not in evidence was prejudicial because it was designed to influence the jury into believing Goodenough where Stevens credibility was minimal which prejudiced Williams because it tilted "the requisite balance of impartiality". *Rinkes*, 70 Wn.App. at 863. The arguments here similar to those found prejudicial in *Pete*, *Rinkes*, *Pierce*, as well as to those in *Glassman*, not only because they were intentional but also because they directly informed the jury that because Goodenough identified Williams, Stevens was credible. Here the balance was destroyed creating a substantial likelihood that this misconduct affected the jury verdict. *Id.*

The jury rejected Stevens testimony in support of both claims of harassment and domestic violence. Without the prosecutor's creating the identification, it is probable that the jury would have rejected the violation of

a no contact order as well as the harassment charge because it was as inconsistent and contradictory as the testimony about the harassment charge. RP 39, 44, 48, 49, 51-52, 65, 66.

Glassman like *Pete*, *Rinkes* and *Pierce*, supports reversal because the impact of the prosecutor's improper use of the prestige of his office to argue facts not in evidence destroyed the balance required for a fair trial.

b. Reversible Not Harmless Error

Pete, *Rinkes*, and *Glassman*, condemn the use of facts not in evidence to sway a jury into finding a state's witness more credible than the defendant. In *Glassman*, despite a lack of objection from trial counsel, the Court held such misconduct to be so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glassman*, 175 Wn.2d at 707.

Williams' case was based on the credibility of Stevens. Once the prosecutor tipped the balance of impartiality and swayed it toward Stevens, there was no possible way to undo this damage. Here as in *Glassman*, despite a lack of objection from trial counsel, the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glassman*, 175 Wn.2d at 707. For this reason, this Court should reverse the conviction and remand for a new trial.

2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S PREJUDICIAL MISCONDUCT IN CLOSING.

Defense counsel provided ineffective assistance of counsel by failing to object to the prosecutor's remarks during closing argument. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d, 668, 705-06, 940 P.2d 1239 (1997). To satisfy the prejudice prong, a defendant must show a "reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

There is a strong presumption that counsel provided effective assistance. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). To rebut this presumption, a defendant bears the burden of establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17. Williams meets this burden because there is nothing in the record to support the possibility of a tactical reason for failing to object

to the prosecutor fabricating corroborative evidence where the main witness was not credible. *State v. Henderson*, 129 Wn.2d 61, 79, 917 P.2d 563 (1996) (no tactical reason for failing to object to inadmissible ER 609 evidence).

Here, there was no conceivable reason not to object to the prosecutor's arguing facts not in evidence. Steven's credibility was questionable and the jury rejected her testimony regarding the harassment. The only difference between the evidence of the harassment charge and the violation of a no contact order charge was the testimony of a Goodenough. Goodenough could not identify Williams as the man with Stevens, but the prosecutor argued that she had in fact basically identified Williams which permitted the jury to convict based on the prosecutor's argument that Goodenough identified a man strikingly similar to Williams. Without this argument, the jury would likely have rejected Steven's entire testimony, not just the harassment testimony.

Under these circumstances, no attorney would have permitted the argument without an objection. If counsel had objected to the remarks during closing argument, the result of the trial would have been different.

(a). Prejudice.

Although William's failed to object to the offending remarks, the comments were too prejudicial to have been curable with an instruction

because the prosecutor used his authority to inform the jury that the witness identified Williams. Despite a lack of objection from trial counsel, such misconduct is so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glassman*, 175 Wn.2d at 707; *Evans*, 163 Wn.App. at 648 (citing, *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (court would not hesitate to reverse for prosecutor's misstatements of reasonable doubt standard if the trial court had not intervened to correct the mischaracterizations), *cert. denied*, *Warren v. Washington*, 556 U.S. 1192, 129 S.Ct. 2007, 173 L.Ed.2d 1102, (2009).

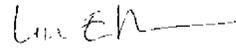
In *Evans*, this Court reversed for misconduct refusing to speculate that a curative instruction could have overcome the state's attack on Evan's presumption of innocence. *Evans*, 163 Wn.App. at 648. Here too, this Court cannot speculate that in a case where the evidence boils down to a credibility contest, that a curative instruction could have overcome the prosecutor's improper comments. Reversal and remand for a new trial is required.

D. CONCLUSION

Mr. Williams respectfully requests this Court reverse his conviction and remand for a new trial based on prosecutorial misconduct and ineffective assistance of counsel.

DATED this 9th day of January 2016

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor – pcpatcecf@co.pierce.wa.us and Fresnel Williams DOC# 757079 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362 On January, 10, 2016. Service was made electronically to the prosecutor and via U.S. postal to Mr. Williams.



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