

ORIGINAL

NO. 84475-5

SUPREME COURT OF THE
STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

EDWARD MICHAEL GLASMANN, PETITIONER

Court of Appeals, Division II

No. 39700-5-II

Pierce County cause # 04-1-04983-2

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 MAR -7 P 3:21
BY RONALD R. CARPENTER
CLERK

SUPPLEMENTAL BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

FILED AS
ATTACHMENT TO EMAIL

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

 1. Whether the petitioner has demonstrated constitutional error, resulting in actual prejudice? 1

 2. Whether the prosecuting attorney committed misconduct in closing argument, specifically in showing a Powerpoint slide of the defendant with the word "guilty" written across it? 1

 3. Whether the petitioner has demonstrated that defense counsel's performance was deficient in failing to object to the prosecuting attorney's closing argument? 1

 4. If counsel's performance was so deficient, whether the petitioner has demonstrated that, absent this deficiency, the result of the trial would have been different? 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 3

 1. THE PETITION WAS PROPERLY DISMISSED BECAUSE IT DID NOT ESTABLISH A FUNDAMENTAL DEFECT WHICH INHERENTLY RESULTED IN A COMPLETE MISCARRIAGE OF JUSTICE..... 3

 2. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT..... 4

 3. THE PETITIONER DOES NOT DEMONSTRATE EITHER DEFICIENCY OF COUNSEL'S PERFORMANCE OR RESULTING PREJUDICE..... 8

D. CONCLUSION..... 12

Table of Authorities

State Cases

<i>In re Personal Restraint of Cook</i> , 114 Wn.2d 802, 810-11, 792 P. 2d 506 (1990).....	3
<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 670, 101 P.3d 1 (2004).....	3, 4, 9, 10
<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 717, 101 P.3d 1 (2004).....	10
<i>In re Personal Restraint of Hagler</i> , 97 Wn.2d 818 823-24, 650 P.2d 1103 (1982).....	3
<i>In re Personal Restraint of Haverty</i> , 101 Wn.2d 498, 681 P.2d 835 (1984).....	3
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	6, 7
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	9
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995).....	8
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	9
<i>State v. Case</i> , 49 Wn.2d 66, 68, 298 P. 2d 500 (1956).....	5, 7
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	9
<i>State v. Coleman</i> , 152 Wn. App. 552, 488, 216 P.3d 479 (2009).....	4
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578, 79 P. 3d 432 (2003).....	4
<i>State v. Glasmann</i> , 142 Wn. App. 1041 (2008)(2008 WL 186783) (Wn. App. #34997-3-II).....	1
<i>State v. Grier</i> , -- Wn. 2d --, -- P.3d -- (2011)(2011 WL 459466).....	8, 9
<i>State v. Henderson</i> , 100 Wn. App. 794, 804, 998 P. 2d 907 (2000).....	5
<i>State v. Hoffman</i> , 116 Wn.2d 51, 94, 804 P. 2d 747 (1994).....	10

<i>State v. Horton</i> , 116 Wn. App. 909, 921, 68 P. 3d 1145 (2003)	5
<i>State v. Huckins</i> , 66 Wn. App. 213, 219, 836 P. 2d 230 (1992)	7
<i>State v. Jungers</i> , 125 Wn. App. 895, 900, 106 P. 3d 827 (2005).....	7
<i>State v. Kennealy</i> , 151 Wn. App. 861, 892, 214 P.3d 200 (2009)	4
<i>State v. Magers</i> , 164 Wn.2d 174, 191, 189 P.3d 126 (2008)	4
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)	8, 10
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P. 3d 221 (2006)	5
<i>State v. Papadopoulos</i> , 34 Wn. App. 397, 400, 662 P.2d 59 (1983).....	5
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	5, 7
<i>State v. Russell</i> , 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)	5
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	8, 9
<i>State v. Townsend</i> , 142 Wn.2d 838, 847, 15 P.3d 145 (2001).....	10

Federal and Other Jurisdictions

<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).....	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	8, 9
<i>United States v. Necochea</i> , 986 F.2d 1273, 1281 (9th Cir.1993).....	10

Constitutional Provisions

Article 4, section 4, Washington State Constitution	3
-----------------------------------------------------------	---

A. ISSUES PERTAINING TO REVIEW OF THE DECISION.

1. Whether the petitioner has demonstrated constitutional error, resulting in actual prejudice?
2. Whether the prosecuting attorney committed misconduct in closing argument, specifically in showing a Powerpoint slide of the defendant with the word “guilty” written across it?
3. Whether the petitioner has demonstrated that defense counsel’s performance was deficient in failing to object to the prosecuting attorney’s closing argument?
4. If counsel’s performance was so deficient, whether the petitioner has demonstrated that, absent this deficiency, the result of the trial would have been different?

B. STATEMENT OF THE CASE.

Petitioner Edward Glasmann, hereinafter referred to as “petitioner” or “defendant,” is restrained pursuant to a Judgment and Sentence entered in Pierce County cause No. 04-1-04983-2. (PRP Response, Appendix A). The case facts and procedure are related in detail in the unpublished Court of Appeals’ opinion in *State v. Glasmann*, 142 Wn. App. 1041 (2008)(2008 WL 186783) (Wn. App. #34997-3-II) (Appendix B). For brevity and to avoid repetition, the State will refer the Court to this recent opinion and incorporate the facts and procedure by reference.

On August 25, 2009, the petitioner filed this Personal Restraint Petition (PRP) in the Court of Appeals. On March 25, the Court of Appeals dismissed this PRP. (*See*, Petition for Review.)

The PRP includes slides with petitioner's photograph (exhibit 89) with the word "GUILTY" in large letters. PRP Appendix H, p. 8-10. While the PRP explains that these Powerpoint slides came through a public disclosure request, the slides are not part of the record in the court file, exhibits, or VRP. Neither Mr. Hillman, the trial prosecutor; nor defense counsel specifically remembers these slides being used in closing. Declaration of counsel, PRP Response Appendix H. Mr. Hillman provided the Powerpoint slides in PRP Response Appendix G, and a declaration regarding them, *Id.*, Appendix F. Therefore, it is unknown whether those three particular slides were used. The petitioner has the burden to show that the error occurred and that he was actually and substantially prejudiced.

While the State does not concede that these slides were shown to the jury during closing argument, the State's argument assumes, for the purpose of this brief, that they were.

C. ARGUMENT.

1. THE PETITION WAS PROPERLY DISMISSED BECAUSE IT DID NOT ESTABLISH A FUNDAMENTAL DEFECT WHICH INHERENTLY RESULTED IN A COMPLETE MISCARRIAGE OF JUSTICE.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4 of the State constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. *In re Personal Restraint of Hagler*, 97 Wn.2d 818 823-24, 650 P.2d 1103 (1982).

A petitioner asserting a constitutional violation must show actual and substantial prejudice. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004); *In re Personal Restraint of Haverty*, 101 Wn.2d 498, 681 P.2d 835 (1984). A petitioner relying on non-constitutional arguments must meet an even more exacting standard: he must demonstrate a fundamental defect which inherently results in a complete miscarriage of justice. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 810-11, 792 P. 2d 506 (1990).

The petitioner in the present case demonstrates neither a constitutional violation, nor a fundamental defect. In addition, he fails to show actual prejudice from either alleged violation.

2. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

“In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (internal quotation marks omitted). Prejudice in this context means that there is a “substantial likelihood that the misconduct affected the jury's verdict.” *State v. Coleman*, 152 Wn. App. 552, 488, 216 P.3d 479 (2009). Because allegations of prosecutorial misconduct are of constitutional magnitude, in a PRP the Court examines these allegations of error under an actual prejudice standard. *See Davis*, 152 Wn.2d 670.

Where the defendant does not object at trial, the objection is waived unless the defendant can prove that the prosecutor's comments were so flagrant and ill-intentioned that a curative instruction would have been ineffective to cure the resulting prejudice. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P. 3d 432 (2003); *Coleman*, 152 Wn. App. at 488. A prosecutor has wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence in closing arguments. *State v. Kennealy*, 151 Wn. App. 861, 892, 214 P.3d 200 (2009). An appellate court reviews a prosecutor's alleged misconduct “in the context of the total argument, the issues in the case, the evidence

addressed in the argument, and the instructions given.” *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

a. Personal opinion.

A prosecuting attorney may not express a personal opinion regarding the defendant’s guilt. *See State v. McKenzie*, 157 Wn.2d 44, 134 P. 3d 221 (2006). Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *McKenzie*, 157 Wn.2d at 53-54, quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). Such a violation generally occurs where the prosecuting attorney literally says “It is my personal” opinion or belief. *See, e.g., State v. Case*, 49 Wn.2d 66, 68, 298 P. 2d 500 (1956) (expressing personal opinion as to what the evidence showed); *State v. Henderson*, 100 Wn. App. 794, 804, 998 P. 2d 907 (2000) (expressing personal belief regarding characterization of evidence); *State v. Horton*, 116 Wn. App. 909, 921, 68 P. 3d 1145 (2003) (expressing personal belief in the credibility of a witness).

b. Remarks that insult the opposing party.

It is improper for a prosecuting attorney to be insulting or demeaning regarding the defendant or defense counsel. *See, State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). In *Reed*, the prosecutor called the defendant a liar, stated defense counsel didn’t have a case, and asked the

jury if they were going to let “city lawyers” make their decision. In *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988), the prosecutor compared the defendant, a native American affiliated with the American Indian Movement, to a terrorist. 110 Wn.2d at 506-507. Even if the prosecutor makes such improper remarks, the question for the Court is still whether there was a “substantial likelihood” the prosecutor’s comments affected the verdict. *Reed*, at 147.

c. The argument in this case.

In the present case, the petitioner asserts that the prosecutor used Powerpoint slides to illustrate his closing. Appendix G. The slides included a photograph of the defendant which had been admitted into evidence as Exhibit 89. Appendix G, p. 5. The other slides appended to the Petition are essentially illustrations of the court’s instructions and argument of the law and facts.

It is to be expected that a prosecuting attorney will argue in closing that a defendant is guilty. Both parties advocate for the verdict the respective parties want the jury to reach. The parties are permitted and expected to argue the law and the evidence. The jury is instructed that “The Lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law.” Appendix E, Instruction 1.

Here, the prosecutor reviewed the evidence of each element to advocate the conclusion that the defendant was guilty. For example, he begins his argument regarding assault in the first degree with a review of the evidence supporting that count. 8 RP 448. He concludes that section by saying that ‘the only true verdict in this case is guilty.’ 8 RP 460. The prosecutor proceeded to examine, or argue, each count in a similar way. His argument was always correctly based upon the evidence and the instructions. Nowhere does the record reflect, or even imply, that he is expressing his personal opinion. *Cf., State v. Case, supra.*

The prosecutor did not insult or demean the petitioner by questioning the petitioner’s credibility or by arguing that the petitioner was guilty. While the arguments in *Reed* and *Belgarde* are extreme examples, the argument here does not even approach such a flagrant and incurable act.

Many trial attorneys use illustrations in closing argument. The illustration might be a chart showing a particular jury instruction. *See, e.g., State v. Huckins*, 66 Wn. App. 213, 219, 836 P. 2d 230 (1992). It could be a summary of points of evidence written on butcher paper. *See, e.g., State v. Jungers*, 125 Wn. App. 895, 900, 106 P. 3d 827 (2005).

Powerpoint slides have become a common means of illustration. The defendant did not object to this argument because it was not improper. It was not misconduct. It did not violate due process resulting in an unfair trial.

3. THE PETITIONER DOES NOT DEMONSTRATE
EITHER DEFICIENCY OF COUNSEL'S
PERFORMANCE OR RESULTING PREJUDICE.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is 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, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

There is a strong presumption that a defendant received effective representation. *McFarland*, 127 Wn.2d at 335; *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226. This Court recently reaffirmed this strong presumption that counsel's performance was reasonable. *See State v. Grier*, -- Wn. 2d --, -- P.3d -- (2011)(2011 WL 459466).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689; *see, also Grier, supra*, at 10. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *Thomas*, 109 Wn.2d at 225-26. In a PRP asserting ineffective assistance of counsel, the petitioner must show by a preponderance of the evidence that the ineffectiveness claim is supported by a constitutional error that worked to his actual and substantial prejudice or a nonconstitutional error that resulted in a complete miscarriage of justice. *Davis*, 152 Wn.2d at 671-672. Defects in assistance that have no probable effect upon the trial's

outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. Because a prosecuting attorney has wide latitude in closing argument in drawing and expressing reasonable inferences from the evidence (*see, e.g., State v. Hoffman*, 116 Wn.2d 51, 94, 804 P. 2d 747 (1994)), “[I]awyers do not commonly object during closing argument “absent egregious misstatements.” *In re Personal Restraint of Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004)(quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir.1993)). A decision not to object during closing argument is within the wide range of permissible professional legal conduct. *Davis*, at 717.

To prove a counsel’s failure to object constituted ineffective assistance, a defendant must show (1) the failure to object fell below prevailing professional norms; (2) the trial court would have likely sustained the objection; and (3) the result of the trial would have been different had the evidence not been admitted. *Davis*, 152 Wn.2d at 714, 101 P.3d 1 (citing *State v. Townsend*, 142 Wn.2d 838, 847, 15 P.3d 145 (2001)).

Here, the petitioner alleged that counsel failed to object to the Powerpoint slide with the petitioner’s photograph with the word “Guilty” written across it. Even if the slide was improper, the record shows defense

counsel could have a legitimate, tactical reason for failing to object to this argument.

The prosecutor's use of the Powerpoint slide in argument may have been, as the Court of Appeals described it, "melodramatic." Defense counsel could have reasonably come to the same conclusion. He may have reasoned that the jury would likewise dismiss it. It is not certain that an objection would have been helpful to the defendant's case. If defense counsel had objected to this slide, there was a risk that it would draw additional attention to it.

In this case, the defense was confronted with considerable evidence of a string of crimes occurring in rapid succession. Among other evidence, the State presented testimony and audio of the 911 call from the eyewitness to the assault, video of events at the convenience store, and photographs and medical testimony regarding the victim's injuries.

In his closing, defense counsel reviewed the evidence, count by count. His strategy was to acknowledge the evidence, but point out that it did not prove the very serious crimes the petitioner was charged with, 8 RP 494. He argued for the jury to find lesser-included crimes. 8 RP 371, 476, 493. He argued that there was no intent to assault the victim, that the evidence showed that the injuries were accidental. 8 RP 484-484. He argued that there was no evidence of a "display" of a deadly weapon, but conceded a robbery in the second degree. 8 RP 490,491. He argued that

the petitioner did not use the victim as a shield, nor tried to harm her; but conceded an unlawful imprisonment. 8 RP 493.

When viewing the entire record, and specifically the entire closing argument, it is clear that defense counsel's performance was not deficient. He was professional and pragmatic in his closing. The record demonstrates that he had a strategy that he felt would have the best result for the petitioner. It is worth noting that the jury, in fact, did return verdicts on lesser-included offenses in two of the three felonies charged. CP 86-95. The petitioner cannot demonstrate that he was deficient for failing to object to one or two Powerpoint slides, that such an objection would necessarily have been sustained, nor that the trial result would have been different if he had objected.

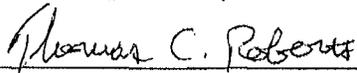
D. CONCLUSION.

The prosecuting attorney did not commit misconduct in closing argument, specifically in using a particular Powerpoint slide. The record shows that defense counsel pursued a strategy of mitigation in his closing argument. The petitioner has not shown that defense counsel's failure to object to the Powerpoint slide was deficient and prejudicial. The decision of the Court of Appeals may be affirmed without resolving the factual issue. However, this Court should not reverse the Court of Appeals or grant the petition without a reference hearing to determine what slides

were shown to the jury. The State respectfully requests that the Court of Appeals be affirmed and petition be dismissed.

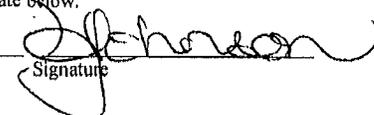
DATED: March 1, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney


THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/7/11 
Date Signature

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, March 07, 2011 3:28 PM
To: 'Heather Johnson'
Subject: RE: In re the PRP of: Edward Glassman--84475-5

Received 3/7/11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Heather Johnson [<mailto:hjohns2@co.pierce.wa.us>]
Sent: Monday, March 07, 2011 3:17 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: In re the PRP of: Edward Glassman--84475-5

Thomas C. Roberts, WSB No. 17442
(253)798-4932
trobert@co.pierce.wa.us

Attached is the State's Supplemental Brief of Respondent