

No. 88437-4  
COA No. 39103-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAMES LEROY LINDSAY and JENNIFER SARAH HOLMES,

Petitioners.

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

The Honorable Brian M. Tollefson

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SUPPLEMENTAL BRIEF OF JAMES LINDSAY

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 ORIGINAL

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A. ISSUES ON REVIEW

1. The Court of Appeals ruled that the prosecutor here committed multiple serious acts of misconduct that were pervasive throughout the trial. Was there a substantial likelihood that these repeated and serious acts of misconduct, either alone or cumulatively, affected the jury's verdict requiring reversal of Mr. Lindsay's convictions?

2. Does the majority opinion directly conflict with this Court's decision in *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012), in using a substantial evidence test to determine whether Mr. Lindsay suffered prejudice from the prosecutor's misconduct rather than focusing on the misconduct and its impact on the jury's verdict?

B. STATEMENT OF THE CASE<sup>1</sup>

Lawrence Wilkey and Jennifer Holmes were in a seven year romantic relationship beginning in 1998. RP 1745. The two initially lived on the Key Peninsula in Pierce County, but in March 2004 moved to a home in Ponderay, Idaho. RP 1768. In the summer of 2005, Ms. Holmes opened a massage business, where she met appellant, James

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<sup>1</sup> A further factual statement can be found in the Court of Appeals decision at 171 Wn.App. at 645-50.

Lindsay. RP 1813, 6685-56. In the fall of 2005, Ms. Holmes and Mr. Lindsay's relationship soon became a romantic one. RP 6656. On October 4, 2005, Ms. Holmes told Mr. Wilkey that their relationship was over; she had met someone else, and was getting married. RP 1818.

Mr. Wilkey continued to live in the Idaho home with Ms. Holmes. On November 5, 2005, Mr. Wilkey decided to move out of the home. RP 1822. On that day Ms. Holmes, her three daughters and Mr. Lindsay went on an all day railroad trip and returned home to a virtually empty house. RP 6710-16.

Over the course of eight separate trips, Mr. Wilkey moved items he claimed were his from inside the house, as well as a vehicle and trailer, and moved them to a storage area. RP 1843-61. Beginning on November 7, 2005, Mr. Wilkey moved the items in the storage area to Lakebay in Pierce County where he had rented a single wide trailer. RP 1863-65. During January and February 2006, Mr. Wilkey collected the items in storage in Idaho and moved them to his trailer in Lakebay. RP 1871.

On October 22, 2005, Ms. Holmes called the Bonner County Sheriff and reported the loss of the items and named Mr. Wilkey as

being responsible for their loss. RP 5346-49, 6742. After investigating, the sheriff decided to not to pursue the matter. RP 6744.<sup>2</sup> Ms. Holmes contacted a private investigator, who was able to locate several addresses for Mr. Wilkey. RP 6778. Through a further investigation, Ms. Holmes narrowed the addresses down to just a few. RP 6778.

On March 26, 2006, Ms. Holmes and Mr. Lindsay drove from Idaho to Pierce County and found the trailer in which Mr. Wilkey was residing. RP 6788. Sometime between 7:30 and 8:30 p.m., Ms. Holmes and Mr. Lindsay arrived at Mr. Wilkey's trailer. RP 1897-98. Mr. Lindsay knocked on the door. RP 7059. Mr. Wilkey answered the door, then turned and ran away. RP 7061. Ms. Holmes and Mr. Lindsay entered the trailer where Mr. Lindsay and Mr. Wilkey scuffled. RP 2970, 7072-73. Mr. Lindsay admitted using zip ties to restrain Mr. Wilkey in a chair so he could not interfere. RP 2974. Ms. Holmes walked through Mr. Wilkey's trailer, and then she and Mr. Lindsay began loading items into their own trailer. RP 7074-99. The two loaded up many of the items Mr. Wilkey had taken from Ms. Holmes'

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<sup>2</sup> The Bonner County Sheriff's Department considered the matter a civil dispute because Ms. Holmes and Mr. Wilkey had lived together for six years and shared expenses. RP 5997. The Sheriff's Department urged Ms. Holmes to contact a civil attorney. RP 5983.

house, then drove back to Ponderay, Idaho. RP 2997-98. Ms. Holmes asserted she was merely using self-help to repossess her items. RP 7199.

Mr. Wilkey was able to release himself from the restraints and made his way to a neighbor's home where he contacted the Pierce County Sheriff's Department. RP 1950. Mr. Lindsay and Ms. Holmes were subsequently arrested in Idaho at Ms. Holmes' residence by members of the Ponderay Police Department. RP 2766-70.

Ms. Holmes and Mr. Lindsay were charged in Pierce County with first degree burglary, first degree robbery, first degree kidnapping, first degree assault and four counts of theft of a firearm. CP 92-97. The defense at trial was self-help; a good faith claim of title to the items seized by Ms. Holmes and Mr. Lindsay. To that end, the trial court instructed the jury on the defense of good faith claim of title. CP 312-13.

Following an extremely lengthy jury trial, the jury found Mr. Lindsay guilty of first degree burglary and first degree robbery, the lesser degree offenses of second degree kidnapping and second degree

assault, and one count of a theft of a firearm. CP 382-85, 387, 394.<sup>3</sup>

The jury acquitted Mr. Lindsay of three of theft of a firearm counts, and refused to find Mr. Lindsay had used a firearm in the commission of the robbery, burglary, and kidnapping. CP 386, 388-89, 391-93.<sup>4</sup>

### C. COURT OF APPEALS DECISION

The majority of the Court of Appeals found the prosecutor's conduct throughout the trial to constitute serious misconduct, but concluded it was ultimately harmless. *State v. Lindsay*, 171 Wn.App. 808, 288 P.3d 641, 650-57 (2012), *review granted*, \_\_\_ Wn.2d \_\_\_ (July 12, 2013). The Court found that the prosecutor and Ms. Holmes' counsel acted unprofessionally during the trial.<sup>5</sup> But, because of the due process protections given to defendants, the prosecutor's unprofessional behavior constituted misconduct.<sup>6</sup> *Id.* at 650.

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<sup>3</sup> The Court of Appeals found the second degree kidnapping and second degree assault convictions merged with the first degree robbery conviction. *Lindsay*, 288 P.3d 661. The State did not cross-petition this issue.

<sup>4</sup> Ms. Holmes was similarly convicted of these offenses, but was convicted of the lesser offense of unlawful imprisonment. 3/6/09RP 45-49. Ms. Holmes was also acquitted of the other three theft of a firearm counts. *Id.*

<sup>5</sup> The Court of Appeals citation to the decision of the New York Supreme Court in *People v. Steinhardt*, 9 N.Y.2d 267, 213 N.Y.S.2d 434, 173 N.E.2d 871 (1961), provides an excellent analogy for what occurred here.

<sup>6</sup> "Although we strongly disapprove of both the prosecutor's and Holmes's counsel's repeated unprofessional conduct, we do not conclude that the prosecutor's misconduct prejudiced the jury." *Lindsay*, 288 P.3d. at 650

Specifically, the Court found the prosecutor denigrated counsel for Janice Homes, during closing argument misstated and trivialized the State's burden of proof, asked the jury to "speak the truth," improperly asserted his personal opinion about Ms. Holmes' credibility, and engaged in a *sotto voce* argument that only the jury could hear. *Id.* at 651-55.

While the majority of the Court of Appeals focused on the fact that there was sufficient evidence to convict Mr. Lindsay, despite the prosecutor's misconduct, in determining the misconduct was harmless, Judge Armstrong in dissent accurately pointed out that "sufficient evidence" is not the test to be applied in reviewing prosecutorial misconduct. *Lindsay*, 288 P.3d at 664 (Armstrong, J. dissenting). Rather, the dissent noted that "the 'focus must be on the misconduct and its impact, not on the evidence that [was] properly admitted.'" *Id.* (Armstrong, J. dissenting), quoting *Glasmann*, 175 Wn.2d at 711. Applying this standard, the dissent concluded that there was a substantial likelihood that the repeated acts of misconduct affected the jury's verdict:

I am satisfied that the prosecutor's personal attacks on defense counsel, labeling counsel's closing argument a "crock," and his characterization of Holmes and her testimony ("funny," "disgusting," and "comical")

engendered prejudice which infected the whole trial. I am also unwilling to gloss over the prosecutor's improper discussion of the burden of proof and reasonable doubt in closing, and his whispered comments to the jury.

*Lindsay*, 288 P.3d at 665 (Armstrong, J. dissenting).

D. ARGUMENT<sup>7</sup>

THERE WAS A SUBSTANTIAL LIKELIHOOD THAT THE CUMULATIVE IMPACT OF THE PROSECUTOR'S MISCONDUCT AFFECTED THE JURY'S VERDICT REQUIRING REVERSAL OF MR. LINDSAY'S CONVICTIONS

The Court of Appeals was unanimous in finding several acts by the prosecutor to be misconduct. *Lindsay*, 171 Wn.App. at 651-55, 662-63. The State has not cross-petitioned the Court of Appeals rulings on this issue. Thus the only issue before this Court is whether Mr. Lindsay and Ms. Holmes were prejudiced by the misconduct: whether there was a substantial likelihood the repeated acts of misconduct by the prosecutor affected the jury's verdict. Mr. Lindsay submits they did, and as a result, he is entitled to reversal of his convictions and remand for a new trial.

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<sup>7</sup> Mr. Lindsay adopts by reference the arguments made by Jennifer Holmes in her Supplemental Brief. *See* RAP 10.1(g) (in consolidated cases, a party may adopt by reference any part of the brief of another party).

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution as well as article I, 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); *Glasmann*, 175 Wn.2d at 703. Prosecutors are more than mere advocates or partisans, rather, they represent the People and act in the interest of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009).

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.

*State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice the defendant must show that there was a substantial likelihood that the misconduct affected the jury verdict. *Id.*

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

*Glasmann*, 175 Wn.2d at 711(internal citations omitted).

Initially, as Judge Armstrong in dissent in *Lindsay* highlighted, the Court of Appeals used a standard in contravention of *Glasmann* in determining there was insufficient prejudice. *Lindsay*, 288 P.3d at 664.

The majority here concluded:

Regarding *Lindsay*, this conclusion is more easily reached because *Lindsay* admitted to using zip ties to restrain Wilkey so that Wilkey would not interfere as *Lindsay* and Holmes removed the property from Wilkey's home. Because the jury had *Lindsay*'s admissions as evidence before it, there is only a remote chance, not a substantial likelihood, that the jury's verdict was affected by the prosecutor's misconduct.

*Lindsay*, 288 P.3d at 655-56.

This analysis, focusing on whether there was sufficient evidence, is directly contrary to *Glasmann*. The focus emphasized by this Court in *Glasmann* is whether there was a substantial likelihood the instances of misconduct affected the jury's verdict focusing on the prosecutor's misconduct not on the quantum of evidence. 175 Wn.2d at 711-12.

But even the majority of the Court of Appeals agreed the prosecutor committed multiple acts of misconduct and “strongly disapprove[d] of the unprofessional behavior as well as the misconduct.” *Lindsay*, 288 P.3d at 655-56. However, the majority found each individual act of misconduct did not have had a substantial likelihood of affecting the jury verdict. *Id.* at 656. In addition, the majority ruled that *cumulatively* there was no prejudice as well:

Although there are multiple improper statements in this case, as discussed above, the misconduct occurred primarily outside the jury’s presence and the trial court issued curative instructions for the misconduct in the jury’s presence; therefore, the misconduct had little or no effect on the jury.

*Lindsay*, 288 P.3d at 657.

On the other hand, the dissent persuasively pointed out that the multiple acts of misconduct undoubtedly had an affect on the jury’s verdict. *Id.* at 662 (“But the misconduct in the jury’s presence does not show the extent to which the attorneys’ unrelenting misconduct and disrespect for the trial court permeated the trial.”).

Here, as in *Glasmann*, the jury needed to determine the intent of the defendant, thereby determining whether lesser included crimes were the appropriate conviction. *Glasmann*, [175 Wn.2d at 708]. The *Glasmann* court found an “especially serious danger” that the misconduct affected the jury’s verdict because “nuanced distinctions often separate the degrees of a crime.” *Glasmann*, 175

Wn.2d at 710, 286 P.3d 673. Here, as in *Glasmann*, the defendants conceded much of the conduct but denied the intent elements of the more serious crimes. Based on the prosecutorial misconduct here, I cannot say that “the jury would not have returned verdicts for lesser offenses.” *Glasmann*, 175 Wn.2d at 712, 286 P.3d 673.

Prosecutors are more than mere advocates or partisans; they represent the people and act in the interest of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Although a prosecutor may act with a “fearless, impartial discharge of public duty,” it must be “accompanied by a spirit of fairness toward the accused.” *Warren*, 165 Wn.2d at 27, 195 P.3d 940. That spirit of fairness is missing here. I agree with the majority that this case is similar to *Steinhardt*, where the trial took on a circus atmosphere and the court gave mild reproofs from which the jury may have believed that the trial court considered the prosecution’s tactics to be necessary and proper. *People v. Steinhardt*, 9 N.Y.2d 267, 271, 213 N.Y.S.2d 434, 173 N.E.2d 871 (1961). I am satisfied that the prosecutor’s personal attacks on defense counsel, labeling counsel’s closing argument a “crock,” and his characterization of Holmes and her testimony (“funny,” “disgusting,” and “comical”) engendered prejudice which infected the whole trial. *Emery*, 174 Wn.2d at 762, 278 P.3d 653. I am also unwilling to gloss over the prosecutor’s improper discussion of the burden of proof and reasonable doubt in closing, and his whispered comments to the jury. I would reverse and remand for new trials for both Holmes and Lindsay.

*Lindsay*, 288 P.3d at 665 (Armstrong, J., dissenting).

In *Glasmann*, during closing argument, the prosecutor showed altered versions of the defendant’s booking photograph and other photographs intended to influence the jury’s assessment of his guilt by

adding captions, one of which included the words “GUILTY, GUILTY, GUILTY.” 175 Wn.2d at 678. In reversing the defendant’s conviction for prosecutorial misconduct, this Court found that there was a substantial likelihood the misconduct affected the jury’s verdict:

The prosecutor’s presentation of a slide show including alterations of Glasmann’s booking photograph by addition of highly inflammatory and prejudicial captions constituted flagrant and ill intentioned misconduct that requires reversal of his convictions and a new trial, notwithstanding his failure to object at trial. Considering the entire record and circumstances of this case, there is a substantial likelihood that this misconduct affected the jury verdict. The principal disputed matter at trial was whether Glasmann was guilty of lesser offenses rather than those charged, and this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude that the evidence established Glasmann’s guilt of each offense beyond a reasonable doubt.

It is substantially likely that the jury’s verdict were affected by the prosecutor’s improper declarations that the defendant was “GUILTY, GUILTY, GUILTY!”, together with the prosecutor’s challenges to Glasmann’s veracity improperly expressed as superimposed messages over the defendant’s bloodied face in a jail booking photograph.

*Glasmann*, 175 Wn.2d at 714. This Court in *Glasmann* also determined that the misconduct was so pervasive that it could not have been cured by a jury instruction. *Id.* at 707.

Here, as in *Glasmann*, Mr. Lindsay and Ms. Holmes admitted much of the conduct by claiming the good faith claim of title defense, thus the disputed element was the intent element. Thus, the only issue was the mental state of Mr. Lindsay and Ms. Holmes. Thus the prosecutor's misconduct may have had a substantial likelihood of affecting the jury. In addition, contrary to the majority of the Court of Appeals conclusion that the trial court's instructions to the jury cured the error, the misconduct here was so pervasive that no instruction could have cured the error.

Given the multiple acts of misconduct that occurred throughout the trial, Judge Armstrong's dissent convincingly applied this Court's jurisprudence on prejudice as applied to prosecutorial misconduct. *See State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956) (“[T]here comes a time . . . when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error.”). Thus, this Court should conclude as did Judge Armstrong, that the prosecutor's misconduct had a substantial likelihood of affecting the jury's verdict.

Finally, and more importantly to Mr. Lindsay, he was a reluctant bystander to the fireworks that occurred at trial. While Mr. Lindsay's

attorney joined in Ms. Holmes's counsel's repeated objections to the prosecutor's misconduct, counsel for Mr. Lindsay did not engage in any of the behavior that is the focus here. Even though he did not engage the prosecutor in the war of words, Mr. Lindsay paid the same price of the misconduct as Ms. Holmes in being denied a fair trial. This Court must find the prosecutor's misconduct had a substantial likelihood of affecting the jury's verdict and reverse Mr. Lindsay's convictions.

E. CONCLUSION

For the reasons stated, Mr. Lindsay respectfully requests this Court find there was a substantial likelihood the prosecutor's repeated acts of misconduct affected the jury's verdict, reverse his convictions, and remand for a new trial.

DATED this 9<sup>th</sup> day of August 2013.

Respectfully submitted,



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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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 )  
RESPONDENT, )  
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v. ) NO. 88437-4  
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### **Supplemental Brief of Petitioner**

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