

NO. 39103-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER HOLMES, APPELLANT
JAMES LEROY LINDSAY, SR., APPELLANT
(consolidated)

Appeal from the Superior Court of Pierce County
The Honorable Judge Name

No. 06-1-01432-6

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING.

1. Should this court require the defendants to show that the prosecutor's actions were both improper and prejudicial because the constitutional harmless error standard set forth in *State v. Monday* only applies to cases where the prosecutor has interjected racial bias into the trial?
2. Have the defendants failed to meet their burden to prove that the prosecutor's conduct was improper and resulted in prejudice, which is the standard of review for prosecutorial misconduct as determined by *State v. Thorgerson*?

B. STATEMENT OF THE CASE.

1. Procedure

The procedural posture of this case is set forth in the State's response brief.

On December 2, 2011, the parties appeared before this court to present oral argument. The court indicated it wished oral argument to focus on the prosecutorial misconduct allegations and the double jeopardy claims. Defendant Lindsay indicated to the court that he wished to join in defendant Holmes's arguments regarding prosecutorial misconduct.

On December 6, 2011, defendant Lindsay filed a joinder to defendant Holmes's issues on appeal. The State filed a motion to strike,

which was denied by this court in an order dated December 20, 2011. The court also required supplemental briefing from all parties on the application of *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), and any other additional authority or argument, on the issue of prosecutorial misconduct and constitutional harmless error.

2. Facts

The court is referred to the respondent's brief for a statement of the case. Additional cites to the record, relevant to the issues in this supplemental brief, shall be provided in the argument section below.

C. ARGUMENT.

1. THE CONSTITUTIONAL HARMLESS ERROR STANDARD SET FORTH IN *STATE V. MONDAY* DOES NOT APPLY TO THE ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN THIS CASE AS THE PROSECUTOR NEVER INSERTED ANY SUGGESTION OF RACIAL BIAS IN THE CASE.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks are both improper and prejudiced the defense. *State v. 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); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Prejudice is established only if there is a substantial likelihood

that the instances of misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

In one instance, the Washington Supreme Court held that the defendant was not required to prove prejudice by a substantial likelihood, but that the State must show constitutional harmless error for the behavior of a prosecutor. See *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011). In *Monday*, the prosecutor injected racial bias into the trial by referring to the police as "polecce" to an African American witness, and arguing in closing that the witnesses were not credible because "the code is black folk don't testify against black folk." 171 Wn.2d at 673-74. The prosecutor also argued that, in the course of his career was the tenet that "the word of a criminal defendant is inherently unreliable." *Id.* at 673. The Court held that the established standard for prosecutorial misconduct did not apply in *Monday* because:

The notion that the State's representative in a criminal trial, the prosecutor, should seek to achieve a conviction by resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained. The Bill of Rights sought to guarantee certain fundamental rights, including the right to a fair and impartial trial. The constitutional promise of an "impartial jury trial" commands jury indifference to race. If justice is not equal for all, it is not justice. The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless. Because appeals by a prosecutor to racial bias necessarily seek to single out one racial minority for different treatment, it

fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct. If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.

Id. at 680. The Court instead imposed¹ a constitutional harmless error test. The Court held “that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant’s credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury’s verdict.” *Id.* at 680 (emphasis added). The burden of proving constitutional harmless error is on the State. *Id.* at 680.

Here, *Monday’s* standard of constitutional harmless error in prosecutorial misconduct does not apply. The *Monday* Court specifically limited its holding to flagrant or intentional appeals to racial bias. Defendant Holmes claimed that the prosecutor committed misconduct by denigrating defense counsel, misstating the burden of proof, expressing his personal opinion of witness credibility and defendants’ guilt, shifting the burden of proof, misstating the law, and arguing evidence not admitted at

¹ The majority imposed a constitutional harmless error test. Three justices concurred in the majority opinion, but stated that in cases where the prosecutor engaged in racial bias, that there could be no harmless error test and that the behavior warranted automatic reversal. *See Monday*, 171 Wn.2d at 685 (Madsen, C.J., concurring).

trial. *See* Brief of Appellant (Holmes) at 39-53. Defendant Lindsay joined in these issues at oral argument. Neither defendant raised an issue claiming the prosecutor injected racial bias into the trial. There is nothing in the record that suggests the prosecutor made any comments, suggestions, inferences, or other arguments regarding race. The record is silent as to the race of any of the witnesses or defendants and race² was never made an issue in the case. Because the current case does not contain a prosecutor's appeal to racial bias, the well-established standard of requiring the defendant to bear the burden of demonstrating prosecutorial misconduct and prejudice is the proper standard of review.

2. THE DEFENDANTS HAVE FAILED TO SHOW THAT THE PROSECUTOR'S STATEMENTS OR CONDUCT WERE IMPROPER OR THAT THEY HAD A SUBSTANTIAL LIKLIHOOD OF AFFECTING THE VERDICT.

Outside of improper references to racial bias, the standard of review for allegations of prosecutorial misconduct has not changed. Defendants bear the burden of establishing that the conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The burden to establish prejudice requires the defendants

² In addition, there was no indication of an improper appeal to gender, religion, age, sexual preference, national origin, or disability bias that undermined the defendant's credibility or the presumption of innocence.

to prove that “there is a substantial likelihood that the instances of misconduct affected the jury’s verdict.” *Id.* at 442-43. The defendants’ burden is significant. *Id.* at 455. In *Thorgerson*, the Court held that a prosecutor’s description of the defendant’s case was “bogus” and “sleight of hand.” *Id.* at 451-52. The Court found the remarks to be improper as they impugned the defense counsel’s integrity. *Id.* at 451. Moreover, the Court found the prosecutor’s “sleight of hand” statement ill-intentioned misconduct as it had been planned in advance. *Id.* at 452. Nonetheless, the Court held that Thorgerson failed to prove that the misconduct had a substantial likelihood of altering the jury’s verdict and affirmed his conviction. *Id.* at 452.

Here, defendants bear the burden of proving improper conduct and prejudice. As argued in the State’s response brief, defendants have not made either showing. Many of the allegations of misconduct are based solely on defendant Holmes’s representations to the court that the prosecutor was engaging in inappropriate non-verbal behavior. The prosecutor addressed this complaint, by noting that just “[b]ecause [counsel] says it doesn’t make it true,” and that he was frustrated because counsel was making “absolute dishonest representations to this Court.” RP (56PM) 23-24.

The trial court’s rulings denying defendants’ motions for mistrial based on prosecutorial misconduct bear out the court’s view that the prosecutor did not engage in misconduct. *See, e.g.*, RP (51) 4371 (the

court saw no flagrant behavior like that described in the case law); RP (97) 8982 (court would have granted a mistrial had the attorneys' behavior impacted the fairness of the trial for the defendants). The court, after listening to closing arguments, determined that the prosecutor did not give his personal opinion of the defendants' guilt and that the jury had been instructed that an attorney's argument that is not supported by the law is to be disregarded. RP (95) 8895. Later, the court noted that "there were times when the attorneys were excited," but ruled that this did not rise to the level of misconduct. RP 8982-83. The court specifically stated that if the prosecutor had "done something improper, I would grant your motion." RP 8993. The court held that the prosecutor did not do anything improper. RP 8993. The court also addressed the prosecutor's voice dropping during closing argument by stating, "I did tell Mr. Sheeran to speak up and he did speak up, and I thought he repeated everything that he said in a voice that everybody could hear, and I think that's what he said

on the record.” RP 8993. Neither defendant³ challenged any of the trial court’s denials for mistrial or the denial of the motion for a new trial on appeal.

Moreover, because the constitutional harmless error standard does not apply, defendants must show that the prosecutor’s behavior had a substantial likelihood of affecting the jury’s verdict. Even if this court were to find the prosecutor engaged in misconduct, the jury demonstrated its ability to put aside any inappropriate argument during its analysis of the evidence. The jury found defendants guilty as charged of only five of the nine charges against them; acquitting defendants of four of the nine charges against them, and finding defendants guilty of a lesser-included crime on one count. The jury’s verdicts clearly indicate that they followed the trial court’s instructions, weighed the evidence presented at trial,

³ Defendant Lindsay joined defendant Holmes’s argument regarding prosecutorial misconduct at oral argument after the court indicated its interest in the issue. Defendant Lindsay did not raise any issue regarding prosecutorial misconduct in his opening brief, nor did he join in defendant Holmes’s arguments when he filed his reply brief. It should be noted that trial counsel for defendant Lindsay join in some of defendant Holmes’s motions for mistrial and the motion for new trial. RP (35) 2708; RP (44) 3841; RP 51 4306-07, 4361-62. Yet defendant Lindsay’s counsel also noted that the prosecutor’s alleged denigration of counsel was not directed at him, but was joining in the motion because his defense was tied in with that of defendant Holmes. *See* RP (56PM) 23-24; RP (97) 8970. As defendant Lindsay has not cited to any statements which denigrated his counsel or the role of defense attorneys in general, the State cannot provide a specific response to defendant Lindsay’s argument that the prosecutor engaged in denigration of counsel regarding his case.

considered each charge and each defendant separately, and held the State to its burden of proof on each count.

D. CONCLUSION.

As the prosecutor did not introduce racial bias into the trial, the constitutional harmless error standard as presented in *State v. Monday* does not apply. The defendants have failed to meet their burden of showing improper behavior and prejudice. For the reasons stated in the response brief, the State respectfully requests this court to affirm the defendants' convictions.

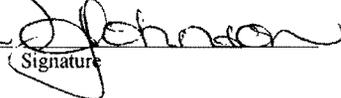
DATED: January 6, 2012

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The undersigned certifies that on this day she delivered by U.S. ~~mail~~ ^{file} 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.

1/6/12 
Date Signature

PIERCE COUNTY PROSECUTOR

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