

NO. 88906-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BYRON EUGENE SCHERF,

Appellant.

BRIEF OF RESPONDENT IN ANSWER TO SUPPLEMENTAL
ASSIGNMENT OF ERROR

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I. ISSUES

1. Were the prosecutor's statements regarding the proffered mitigating factors error when in the context of the entire proceeding it was an argument regarding the weight the jury should afford those factors?

2. When the defendant did not object to any of the prosecutor's remarks in the opening statements or closing arguments of the penalty phase of the trial, has he waived an argument that those statements constituted prosecutorial error?

II. STATEMENT OF THE CASE

In his opening statements during the penalty phase of the trial the prosecutor reviewed the question that jurors were asked to answer: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" 5/31/13 RP 7003; 1 CP 119. The prosecutor also discussed the definition of a mitigating circumstance: "It is a fact about the offense or about the defendant that in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability, or which justifies a sentence of less than death." 5/13/13 RP 7003; 1 CP 120.

The prosecutor then outlined the three types of evidence the State would present that the jury was entitled to consider: information that was admitted in the guilt phase, the victim impact statement, and the defendant's criminal history. The prosecutor stated "the circumstances of this crime do not merit lenience for this defendant." 5/13/13 RP 7004. Regarding the victim impact statement the prosecutor said "and there's nothing mitigating or meriting leniency of the defendant about that." *Id.* After reciting the evidence of the defendant's criminal history the prosecutor stated "That's the defendant's criminal history. You will find nothing mitigating about that." 5/13/13 RP 7007. The defendant did not object to these statements.

In closing the prosecutor again referred to the question jurors were instructed to answer and the definition of what constituted a mitigating circumstance. 5/14/13 RP 7135. The prosecutor then discussed evidence that the defendant presented in mitigation. The defendant had introduced evidence of his educational achievements, including his placement on the president's list at Walla Walla community college. 5/13/13 RP 7032. Without objection the prosecutor argued "That's not

mitigating. This is one of the things that made him so dangerous in the first place." 5/14/13 RP 7037.

The prosecutor also discussed the defendant's education throughout the years against the backdrop of his criminal history, arguing that despite the defendant's attempts to better himself with classes, his criminal history showed the defendant engaged in increasingly violent behavior until he finally murdered Jayme Biendl. 5/14/13 RP 7139-7141. During that portion of the argument the prosecutor stated "Maybe you will conclude that these classes are mitigation. Maybe not." 5/14/13 RP 7140. The prosecutor noted the defendant has specifically taken religious education classes, but the defendant said that he did not think the sanctuary where he murdered Ms. Biendl was a sacred place. The prosecutor then argued "[a]nd after all of his study, and these documents they suggested to you as if they're mitigation, learning about the Bible, that's what we get: Killing a 34-year old woman in the sanctuary." 5/14/13 RP 7140-7141. The defendant did not object to either of these arguments.

Defense counsel argued that the defendant's confession constituted a mitigating circumstance that merited leniency. She argued that absent the defendant's confession the State would

have had no evidence to support a finding the murder was premeditated. 5/14/13 RP 7155-7156. In response the prosecutor argued “[w]e disagree about whether the State would have been able to prove this case even absent his confession, because there was proof of premeditation; and you have already found it was premeditation. It’s not a mitigating factor for you to consider in this case.” 5/14/13 RP 7164. The defendant did not object.

Defense counsel argued that the evidence showed Ms. Biendl did not suffer because she was likely unconscious during most of the assault. For that reason, and because there was no evidence of gratuitous violence or rape, she argued that the facts of the crime were a mitigating factor that merited leniency. 5/14/13 RP 7156-7158. In response the prosecutor argued “Jayme Biendl did suffer during this crime, and you guys are well aware of that at this point. When you’re talking about the crime and the evidence you have already heard, there is nothing mitigating about what the defendant did, and there’s certainly nothing deserving of leniency in the way that this crime was carried out and committed.” 7/14/13 RP 7164. The defendant did not object to this argument.

Defense counsel argued that the defendant had an irresistible compulsion that he struggled to overcome with classes

and Bible study. 5/14/13 RP 7160-7161. The prosecutor responded “[t]his man with this horrible compulsion, she says. You know there’s nothing mitigating about what took place in the crime.” 5/14/13 RP 7165. The defendant did not object.

The defense called Deputy Director Scott Frakes to testify in part to the breaches in DOC security procedures that occurred during the time the defendant committed the murder. 5/13/13 RP 7072-7077. In closing defense counsel referenced those security breaches. She argued that while the defendant was responsible for Ms. Biendl’s death, DOC was also responsible for failing to protect her. 7/14/13 RP 7147. The prosecutor responded to that argument in part by stating that Mr. Frakes’ testimony “really wasn’t about mitigating circumstances that support the defendant.” The prosecutor directly addressed the argument assigning DOC’s responsibility for Ms. Biendl’s murder by comparing it to blaming a homeowner who left his door unlocked rather than the burglar who broke in. 5/14/13 RP 7165-7166. The defendant did not object to this argument.

III. ARGUMENT

A. THE PROSECUTOR'S REMARKS DURING OPENING STATEMENTS AND CLOSING ARGUMENT IN THE PENALTY PHASE WERE PROPER.

To prevail on a claim of prosecutor error the defendant must first show that the prosecutor's comments were improper, and second that the comments were prejudicial. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), cert denied, 554 U.S. 922 (2008). The challenged comments are considered in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. Id. In re Petition of Jeffries, 110 Wn.2d 326, 344, 752 P.2d 1338, cert denied, 488 U.S. 498 (1988). A prosecutor has wide latitude to make reasonable inferences from the evidence and to express those inferences to the jury. State v. Boehning, 127 Wn. App. 511, 519, 111 P.2d 899 (2005). Even if improper, remarks that were invited or provoked by defense counsel and are in reply to her statements are not grounds for reversal unless they are so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995).

The Eighth and Fourteenth Amendment require that the sentencer "in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)¹. (emphasis in original). When considering whether a jury has been precluded from considering a mitigating factor the court has recognized that there is a distinction between arguments of counsel and court's instructions. Boyde v. California, 494 U.S. 370, 384, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). While an improper argument may have a decisive effect on the jury, it is not judged as having the same force as an instruction from the court. Id.

Nevertheless, it is error for a prosecutor to argue that an appellate court rather than the jury has the ultimate responsibility for determining the appropriateness of the death penalty. Caldwell v. Mississippi, 472 U.S. 320, 328-329, 105 S.Ct. 2633, 86 L.Ed.2d

¹ The court took no position with respect to whether the need to deter certain kinds of homicide would justify a mandatory death sentence, such as a prisoner convicted of murder while under a life sentence, the circumstance presented in this case. Lockett, 438 U.S. at 605, n. 11.

231 (1985), Jeffries, 110 Wn.2d at 342-343. It is also error for a prosecutor to urge jurors to ignore proposed mitigating factors. United States v. Bolden, 545 F.3d 609, 630 (8th Cir. 2008), cert denied, 558 U.S. 1077 (2009).

It is not improper for a prosecutor to dispute facts which the defendant relies on as mitigating the crime, and to argue that those facts should receive little or no weight. United States v. Rodriguez, 581 F.3d 775, 801 (8th Cir. 2009), cert denied, 562 U.S. 981 (2010). Thus, where the prosecutor acknowledged that the defendant had a troubled past but argued that fact had nothing to do with the murder he committed because "everyone agrees he is capable of choosing for himself" no error occurred since the prosecutor did not tell jurors to disregard consideration of that past. Id. at 799.

Similarly this court found no error from the prosecutor's argument that compassion was not a mitigating circumstance in State v. Davis, 175 Wn.2d 287, 332, 290 P.3d 43 (2012). The jury was instructed that a mitigating circumstance "was a fact about either the offense or about the defendant which in fairness or mercy may be considered as extenuating." Id. at 331. The jury was also instructed that it should not let passion, prejudice or sympathy influence them. But mercy for the defendant was a mitigating

circumstance. Id. The prosecutor drew a distinction between an unreasoned emotional response based on compassion with a reasoned decision based on the law and evidence. Id. at 332. In the context of the entire argument this court held the argument did not preclude the jury from considering mercy as a mitigating circumstance. Id. at 333-334.

Here, the court instructed jurors that a mitigating circumstance was a fact about the offense or the defendant that in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or which justified a sentence of less than death. 1 CP 120. The prosecutor's opening statements and closing arguments focused on this definition to argue that those facts did not reduce the defendant's moral culpability or justify a sentence of less than death. The arguments did not invite jurors to disregard those facts.

The prosecutors reminded jurors what facts they could consider, including the facts about the crime that had been introduced in the guilt phase of the trial. 5/13/13 RP 7003-7004. In closing the prosecutor reviewed the evidence, noting "[t]hose are the facts you may consider." 5/14/13 RP 7136. He argued "there is nothing about the facts of this case that reduce moral culpability.

There is nothing which is extenuating about the facts of this case.” 5/14/13 RP 7138. In rebuttal the prosecutor argued that “there was nothing deserving of leniency in the way that this crime was carried out and committed.” 7/14/13 RP 7164. With respect to the defendant the prosecutor argued that the defendant’s attempts to improve himself cut both ways, and therefore was not a fact that should favor leniency. 7/14/13 RP 7165. The prosecutor concluded his opening remarks by stating “[t]he facts of this case, the facts of Mr. Scherf, tell you there certainly aren’t sufficient mitigating circumstance to merit leniency for him.” 5/14/13 RP 7143.

Several of the challenged arguments clearly referenced the instruction defining a mitigating fact as one that would merit leniency. 5/13/13 RP 7004 (nothing in the victim impact statement merits leniency), 5/14/13 RP 7140 (leaving it to jurors to determine if classes the defendant took were mitigation or not). While other challenged statements simply refer to facts as “not mitigation.” Those comments did not urge jurors to disregard those facts. Rather taken in context the arguments that the defendant’s intelligence, his education, his criminal history, the victim impact statement, his confession to the crime, and DOC lapses in security were not facts that in fairness or mercy extenuated or reduced the

defendant's moral culpability, and justified a sentence of less than death. Because the arguments permitted jurors to consider those facts while at the same time rejecting them as sufficient to merit leniency, the arguments were proper.

The defendant cites several cases wherein the court found a prosecutor's argument erroneously precluded the jury from considering the defendant's mitigation evidence to support his argument that the contested arguments here led jurors to disregard evidence as mitigation. None of these cases present facts similar to this case, and therefore do not support his claim.

None of the challenged arguments suggested to the jury that the death penalty decision rested with someone other than the jury as in Caldwell. Nor did the arguments attempt to introduce inflammatory information for which there was no basis in fact as occurred in Depew v. Anderson, 311 F.3d 742 (6th Cir. 2002) cert denied, 540 U.S. 888 (2003). Nor did the arguments suggest that jurors would be complicit in some as yet uncommitted murder if they failed to find for the death penalty as in Bates v. Bell, 402 F.3d 635 (6th Cir. 2004), cert denied, 546 U.S. 865 (2005).

Instead the prosecutors addressed all of the evidence before the jury. Their arguments were not inflammatory, but rather took

those facts and explained why the jury should find that they did not merit leniency. The defendant has failed to show that the challenged statements were improper.

B. WHETHER THE PROSECUTOR COMMITTED ERROR IN OPENING STATEMENTS AND CLOSING ARGUMENT DURING THE PENALTY PHASE HAS NOT BEEN PRESERVED FOR REVIEW.

The court should also reject the defendant's prosecutor error argument because that issue has been waived. The defendant did not object to any of the challenged remarks at trial. Even if the court concludes that the prosecutor's comments were error, the error is waived unless the prosecutors' conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Russell, 125 Wn.2d at 86. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The defendant bears the burden to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" Id. quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). The

determination is focused less on whether the remarks were flagrant and ill-intentioned, and more on whether the resulting prejudice could have been cured. Id.

Jurors are presumed to follow the court's instructions. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). If any of the prosecutor's arguments were improper, a timely objection could have cured any prejudice to the defendant. Moreover, a timely objection could have alerted the prosecutor that his arguments were erroneous, and allowed him the opportunity to modify his remarks. In addition, considering all of the prosecutors' arguments in context, the challenged arguments cannot be characterized as "flagrant and ill intentioned." The prosecutors' discussion concerned all the evidence, and why that did not justify a sentence less than death. Under these circumstances the court should find the defendant waived any challenge to the arguments he now contends were erroneous.

The defendant acknowledges that he failed to object to the arguments he now identifies as erroneous. He argues that the challenged remarks constitute manifest constitutional error which he may raise for the first time on appeal, citing RAP 2.5(a)(3). He cites no authority nor makes any argument why the standard under

that rule should apply here rather than the standard this court has previously applied to claims of prosecutor error. Without reasoned argument why the standard in RAP 2.5(a)(3) should apply the court should continue to apply the standard articulated in Russell. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Moreover, this court has recently applied this standard in a capital sentencing proceeding in State v. Davis, 175 Wn.2d 287, 331, 290 P.3d 43 (2012), cert denied, 134 S.Ct. 62 (2013). There the defendant claimed that the prosecutor's argument to not allow compassion to dictate the jury's decision prohibited the jury from considering mercy as a mitigating circumstance in violation of the Eighth and Fourteenth Amendments. Id. at 332. This court concluded that the comments were not flagrant or ill-intentioned, and if the prosecutor went too far, a jury instruction could have cured the error. Id. at 334. Similarly, this court should use these same considerations to determine that the defendant has waived a claim of error on the basis he asserts in this supplemental assignment of error.

IV. CONCLUSION

Taken in context the prosecutors' remarks in opening statements and closing arguments were not improper. Even if they

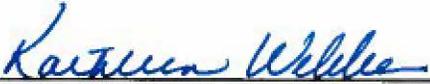
were improper, the defendant has waived a challenge to those arguments when he chose not to object at trial. For the foregoing reasons the State asks the Court to reject the defendant's supplemental assignment of error.

Respectfully submitted on January 21, 2016.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 21st day of January, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT IN ANSWER TO SUPPLEMENTAL
ASSIGNMENT OF ERROR

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Rita J. Griffith, griff1984@comcast.net; and Mark A. Larranaga, mark@jamlegal.com; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at the Snohomish County Prosecutor's Office this 21st day of January, 2016.



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