89920-7

NO. 43748-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RICHARD MICKELSON,

Appellant.

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

The Honorable Thomas McPhee, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant and ill-intentioned misconduct that prejudiced the fairness of the trial.

2. The prosecution impermissibly commented on the appellant's constitutional right to remain silent.

3. The appellant received ineffective assistance by due to counsel's failure to object to the prosecutor's closing argument that impermissibly commented on the appellant's constitutional right to remain silent.

4. The cumulative effect of the claimed errors materially affected the outcome of the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor commits flagrant and intentional misconduct depriving an accused person of a fair trial when he or she engages in repeated inflammatory and patently improper conduct. In closing argument, the prosecutor engaged in derogation of the criminal defendants and their witnesses. Did the prosecutor's improper conduct deprive the appellant of a fair trial, requiring reversal of the conviction? Assignment of Error No. 1.

2. Whether the prosecutor's impermissible comment during closing argument on the appellant's constitutional right to remain silent

constitutes prosecutorial misconduct that denied the appellant a fair trial? Assignment of Error No. 2.

3. Whether the appellant was prejudiced as a result of his counsel's failure to object to the prosecutor's closing argument that impermissibly commented on his constitutional right to remain silent? Assignment of Error No. 3.

4. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of the appellant's conviction. Assignment of Error No. 4.

C. STATEMENT OF THE CASE

1. Procedural facts:

Richard Mickelson was charged by information filed in Thurston County Superior Court with assault in the second degree, contrary to RCW 9A.36.021(1)(a). Clerk's Papers [CP] 4. The State alleged Mr. Mickelson, along with Joel Lewis, assaulted Nate Abbett early on December 23, 2011. CP 4. The State filed an amended information on May 31, 2012. CP 31-32.

The State also alleged the co-defendants were armed with a deadly weapon at the time of the offense, pursuant to RCW 9.94A.825 and 9.94A.533(3). CP 31-32.

The matter came on for jury trial on May 15, 2012, the Honorable Thomas McPhee presiding.

No objections were taken to the jury instructions were taken by defense counsel. 7 Report of Proceedings [RP] at 1286.[1] Counsel noted its exception to the court's initial failure to give a "no duty to retreat" instruction. 7RP at 1286. The judge subsequently agreed to give the instruction. 7RP at 1295; CP 49.

a. <u>Closing argument:</u>

To avoid repetition, the prosecutor's closing is summarized in argument 1, *infra*.

b. <u>Verdict, enhancement, and sentence:</u>

On June 7, 2012, the jury found Mr. Mickelson guilty of the charged offense. CP 55. It also answered "yes" to this question on the special verdict form: "[w]as the defendant Richard Allen Mickelson armed with a deadly weapon at the time of the commission of the crime in Count I?" CP 56.

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[1]The record of proceedings consists of eight volumes:
1RP—May 29, May 30, 2012, jury trial;
2RP—May 30, May 31, 2012, jury trial;
3RP—May 31, 2012, jury trial;
4RP—May 31, June 4, 2012, jury trial;
5RP—June 4, June 5, 2012, jury trial;
6RP –June 6, 2012, jury trial;
7RP—June 5, June 6, 2012, jury trial; and
8RP—June 6, June 7, 2012, jury trial.

The matter came on for sentencing on July 3, 2012. CP 120. The court imposed 55 months based on an offender score of "7." CP 122, 124. Based on the special verdict, the added a 12-month enhancement to the sentence, for a total of 67 months. CP 124.

Timely notice of appeal was filed July 30, 2012. This appeal follows.

2. <u>Testimony at trial</u>:

The main questions for the jury were whether the appellant acted in self-defense. Nate Abbett, Richard Mickelson and Joel Lewis had an altercation early on the morning of December 23, 2011 on Angus Drive in rural Thurston County near Tenino, Washington. 1RP at 162, 2RP at 252. An aluminum baseball bat was recovered at the scene. 1RP at 153, 2RP at 262. Police also noted a license plate, glass debris from a broken vehicle window, skid marks on the road, and a broken fence where a vehicle had gone off the road. 2RP at 256. The police determined that the license plate was from a Jeep Cherokee that belonged to Mr. Abbett. 2RP at 263.

Prior to the incident, Mr. Abbett lived with Misty Rasmussen and had two children with her. 3RP at 527. After the relationship ended in June, 2011, Ms. Rasmussen moved to a house on Stage Street in Tenino and lived with her friend, Jamie Hadley. 3RP at 529, 530. On December 22, 2011, Mr.

Abbett was living with his father on 3025 Angus Drive in Tenino. 3RP at 534. He stated that on December 22 he had a telephone conversation with Ms. Rasmussen and they were arguing and "saying some hurtful things" to each other. 3RP at 540. After the telephone call, Mr. Abbett had plans to go to a bar with two other people and was standing outside his father's house waiting to leave. While waiting he saw a Honda Civic slowly driving on Angus Drive. The car went by his father's house two times. 3RP at 545. Mr. Abbett then drove his Jeep Cherokee onto Angus. Once on the street, he recognized the Honda as belonging Jamie Hadley, Misty Rasmussen's friend. 3RP at 548. Both vehicles stopped and Mr. Abbett testified that Mr. Mickelson and Mr. Lewis got out of the Honda and came toward the Jeep. He stated that Mr. Mickelson was wearing a ski mask pushed up on his head. 3RP at 552. He stated that Mr. Mickelson was carrying a baseball bat that he swung at him through the Jeep's window and then crawled into the vehicle and hit and bit his face. 3RP at 555.

Following the incident, law enforcement went to 248 Stage Street North in Tenino, where Mr. Mickelson rented a room from Jaime Hadley. 1RP at 49. Mr. Lewis and Mr. Mickelson were at the house and both were detained and placed in separate patrol cars. 1RP at 54, 170. Mr. Mickelson

and Mr. Lewis were subsequently placed under arrest. 1RP at 174.

When questioned by police, Mr. Mickelson denied knowing Mr. Abbett, stated that he had not been to Angus Drive, that he had been at the house on Stage Street all night, and that he had not assaulted Mr. Abbett. 1RP at 179.

Misty Rasmussen, Mr. Abbett's former girlfriend, was also at the house. 1RP at 58, 59. Police obtained permission from Ms. Hadley to search her Honda Civic, which was parked in the driveway of the house. 1RP at 61, 63, 64. Deputies found blood stains in the back seat and small glass shards in the Honda. 1RP at 64, 131.

Police believed there was a second baseball bat involved and obtained a warrant to search Mr. Mickelson's room at the house, but did not find a bat. 1RP at 138.

Mr. Mickelson testified that he and Mr. Lewis were at Ms. Hadley's house on December 22, 2011, and that Misty Rasmussen was on the telephone with Mr. Abbett for a long period of time. 6RP at 1180. Mr. Lewis and Ms. Hadley then left to go to Mr. Abbett's house, and Mr. Mickelson went with them in Ms. Hadley's Honda. 6RP at 1182. Ms. Hadley drove the vehicle. While on Angus Drive a Jeep blocked the Honda

on the road. 6RP at 1185. Mr. Lewis got out of the car and then Mr. Mickelson got out and walked toward the Jeep. 6RP at 1187. The Jeep then accelerated and hit Mr. Mickelson, knocking him down. 6RP at 1187, 1191. He was afraid he would be killed by Mr. Abbett and got up and ran to the driver's side window to attempt to get the keys in order to disable the Jeep. 6RP at 1192. The Jeep moved backward so he jumped into the vehicle and fought with Mr. Abbett as the jeep was moving. He stated that he bit him once and hit him. 6RP at 1193. Mr. Mickelson heard Mr. Lewis say "cops," and he got out of the Jeep and got back in the Honda. 6RP at 1198. He stated that the Jeep chased the Honda and tried to force it off the road. Ms. Hadley was able to evade the Jeep by turning around. 6RP at 1200. They then returned to Ms. Hadley's house on Stage Street. 6RP at 1200.

Mr. Abbett sustained a laceration over his left eyebrow, laceration on his left check and a hairline laceration. 1RP at 104. He had glass in his ear. 1RP at 104. Mr. Abbett was hospitalized at Providence St. Peter's Hospital. 1RP at 103. Mr. Abbett told a Thurston County Sheriff that he had been assaulted by Joel Lewis and Richard Mickelson and that they had driven a Honda Civic. 1RP at 121, 123, 153.

Mr. Lewis testified that Jamie Hadley drove him over to the house on

Angus Drive in order to calm down Mr. Abbett who was upset following the telephone call with Ms. Rasmussen. 6RP at 1006. Mr. Mickelson went with them. 6RP at 1007, 1080. Mr. Lewis stated that they encountered Mr. Abbett in a Jeep, and that he and Mr. Mickelson got out of the Honda in order to talk to him. 6RP at 1014, 1015. He stated that Mr. Abbett gunned the engine and hit Mr. Mickelson with the vehicle. 6RP at 1015, 1017. Mr. Abbett's vehicle went off the road and was high-centered and unable to move. 6RP at 1023. Mr. Mickelson was stuck in the window of the Jeep and the two of them were fighting. 6RP at 1027. Mr. Lewis tried to get Mr. Mickelson out of the Jeep and broke a window in the Jeep using his elbow to free Mr. Mickelson. 6RP at 1028. He stated that Mr. Mickelson was trying to get out of the Jeep but Mr. Abbett would not let him. 6RP at 1115. Mr. Abbett continued to grab Mr. Mickelson, and he tried to separate them. 6RP at 1030. Mr. Lewis went back to the Honda and Mr. Mickelson followed him a few seconds later. 6RP at 1030. Mr. Abbett was able to get the Jeep moving again and followed the Honda for several miles. 6RP at 1032. They were able to get away from the jeep and went to Mr. Hadley's house. 6RP at 1033.

D. ARGUMENT

1. THE PROSECUTOR'S FLAGRANTLY IMPROPER AND ILL-INTENTIONED

COMMENTS DURING CLOSING ARGUMENT REQUIRE REVERSAL.

a. A prosecutor violates the bounds of fair conduct by aggressively deriding a defendant's credibility

A prosecuting attorney's misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22. *State v. Monday*, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011); *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. A prosecutor must always refrain from making statements that are not supported by the evidence. *Belgarde*, 110 Wn.2d at 507-08; *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970). As the Washington Supreme Court has said:

> [T]he prosecutor represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of his office, for his misconduct may deprive the defendant of a fair trial. .

> . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted.
> His zealousness should be directed to the introduction of competent evidence.

State v. Hunson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); see also *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChrisoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Prosecutorial misconduct requires reversal when the improper conduct is substantially likely to affect the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where improper statements are not objected to, reversal is still required when the misconduct is so flagrant and ill-intentioned that no jury instruction would have cured the problem. 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The prosecutor's closing argument included flagrant misconduct condemned by Washington courts. Because the errors are prejudicial, this Court should reverse the conviction.

b. The prosecutor wrongly argued the defendants and defense witnesses are "the

underbelly of society" and do not cooperate with police.

The prosecutor encouraged the jury to rely on his belief that Mr. Mickelson and defense witnesses are "the underbelly of society." The prosecutor's closing argument included the theory that the defendants and witnesses were not willing to cooperate with police. After discussing not only the defendants, but several defense witnesses, the State argued:

> But what I am attempting to show you is that these people don't live under the same rules of society, the same way that most of us live. They don't think the same way that a citizen that you probably interact with a lot of lives. This is kind of the underbelly of society. I don't mean that in a bad way. It's just a side of society that I'd suspect that most of you don't see very often. We see it all the time, but you don't. So I'm trying to present that evidence to you so that you understand. These are people that don't have jobs. They work under the table. They live hand to mouth. They are engaged in drinking all day. They get upset with one another. They fight. That is the type of people that we're talking about.
>
> Why did Mickelson, Lewis, Hadley he run when Mr. Lewis said, "The cops are coming"? I mean, if I heard—if I was just run over and heard "The cops are coming," what are you going to do? Hoorah. Yes. I'm saved. I'm going to wait. Let's see what happens.
>
> The other part of that could be—and I won't quarrel with this now—is that that part of society doesn't like cops. I don't like the cops no matter what. And that's part of this society.
>
> 8RP 1477-78.

A prosecutor's personal beliefs or extrajudicial governmental experiences have no place in a deliberating jury's assessment of whether the State met its burden of proof. See *United States v. Brooks*, 508 F.3d 1205, 1209-10 (9 Cir. 2007) (prosecutor "threatens integrity" of conviction by indicating information not presented to jury supports government's case).

The United States Supreme Court recognized long ago that a prosecutor acts improperly by giving the personal impression of the defendant's credibility even when such an impression was invited by defense counsel. *Young*, 470 U.S. at 17; see *United States v. Cannon*, 88 F.3d 1495, 1502 (8 Cir. 1996) ("Referring to defendants as 'bad people' simply does not further the aims of justice or aid in the search for truth, and is likely to inflame bias in the jury and to result in a verdict based on something other than the evidence.").

Here, the prosecutor accused Mr. Mickelson and his witnesses of belonging to a society of not wanting to cooperate with police, being unemployed, and drinking all day. 8RP at 1477.

By doing so, the prosecutor was not asking the jury to drawn upon common sense, but upon an extrajudicial opinion asserted by the prosecutor.

The prosecutor impressed upon the jury that they should dismiss out-of-hand any statements by the criminal defendant and witnesses.

c. The prosecutor's closing argument impermissibly commented on Mr. Mickelson's constructional right to remain silent and constitutes prosecutorial misconduct that denied him a fair trial.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. *State v. Hoffman*, 116 Wn.2d 51, 93,804 P.2d 577 (1991).

Where a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). In such a case, reversal of a conviction is required if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Belgrade*, 110 Wn.2d

504, 508-10, 755 P.2d 174 (1988). During closing argument, without objection, the prosecutor stated:

> Hadley never gave a statement. Mickelson never gave a statement. These witnesses never gave a statement to the police, either.
>
> 8RP at 1483.

It is undisputed that the State may not use a defendant's silence to imply guilt. *Miranda v. Arizona*, 384 U.S. 436, 461, 468 n.37, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). By arguing that Mr. Mickelson had failed to tell police that he had been hit by the Jeep and acted in self-defense, the State impermissibly used this to imply guilt and in the process commented on Mr. Mickelson's right to remain silent, which denied him a fair trial, especially given his defense that he intended no crime and acted in self defense. This Court should reject the possibility that even a precise objection or a carefully worded curative instruction would have cured the prejudicial effect of the prosecutor's actions. While this may have diluted the impact of the prosecutor's argument to some degree, it would not have neutralized it. The message was clear: Mr. Mickelson knew he was guilty of assault and thus did not tell his story to the police. This message, which the prosecutor exploited during closing argument, was fundamentally unfair and amounted to an

observation on Mr. Mickelson's failure to immediately proclaim his innocence when initially confronted by the police and provided an impermissible basis for an inference of guilt. The impact of the prosecutor's actions substantially affected the verdict, with the result that Mr. Mickelson was denied a fair trial.

d. Prosecutorial misconduct requires reversal.

The danger of prosecutorial misconduct is that it "may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) (citing *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956)). Though individual errors may not alone be sufficient to warrant reversal, the cumulative effect of the errors may deprive a defendant of a fair trial. *State v. Jerrels*, 83 Wn.App. 503, 508, 925 P.2d 209 (1996).

Where improper statements are not objected to, reversal is still required when the misconduct is so flagrant and ill-intentioned that no jury instruction would have cured the problem. *Belgarde*, 110 Wn.2d at 507. In the case at bar, the prosecutor engaged in instances of attempting to sway the jury based on an assertion that Mr. Mickelson was part of a subculture that would not cooperate with police, as noted supra. The comments were not

objected to, but this case presents one of those rare instances where despite the lack of objection, the prosecutor's remarks so flagrantly and intentionally disregarded well-established rules of permissible conduct, that when examined together they demonstrate an unpardonable effort to secure a conviction based on improper grounds.

A defendant has the right to have his or her guilt decided upon the evidence presented, not upon the prosecutor's opinions. Moreover, this decision-making must be made in an arena free from belittling of witnesses based on their social economic status or lack of employment. The misconduct committed by the prosecutor was flagrant and ill-intentioned. Because of its rampant nature, it could not have been cured by a limiting instruction. It undermines the integrity and fairness of the proceedings and requires a new trial.

2. MR. MICKELSON WAS PREJUDICED AS A RESULT OF HIS COUNSELS FAILURE TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT APPEALING TO BIAS AND THAT IMPERMISSIBLY COMMENTED ON HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell

below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors,

The results of the proceedings would have been different. *State v. Early,* 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court determine that counsel for Mr. Mickelson waived the issue regarding the prosecutor's misconduct in impermissibly commenting on his right to remain silent by failing to object to the argument, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to the prosecutor's closing argument.

Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A reasonable probability means a probability sufficient to undermine confidence in the outcome. *Leavitt*, 49 Wn. App. at 359. The prejudice here is self evident. Again, the suggestion that Mr. Mickelson knew he was guilty and thus did not tell his story to the police provided an impermissible basis for an inference of guilt, especially where the prosecutor exploited this during closing argument.

Counsel's performance was deficient because he failed to object to the prosecutor's argument here at issue for the reasons previously agued herein, which was highly prejudicial to Mr. Mickelson, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

3. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF MR. MICKELSON'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION.

An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Mr. Mickelson's conviction, the cumulative effect of these errors materially affected the outcome of his trial and his conviction should be reversed, even if each error examined on its own would otherwise be considered harmless. *State v. Coe*, 101 Wn.2d at 789; *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

F. CONCLUSION

Based on the above, Richard Mickelson respectfully requests this court to reverse and dismiss his conviction for assault in the second degree.

DATED: November 29, 2012.

Respectfully submitted,
THE TILLER LAW FIRM
Peter B. Tiller

PETER B. TILLER-WSBA 20835
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on November 29, 2012, this Opening Brief of Appellant was e-filed to (1) the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and (2) John Skinder, Thurston County Prosecutor, skindej@co.thurston.wa.us and a copy was mailed by first class mail to Richard Mickelson, DOC # 822928, Stafford Creek Correction Center, 191 Constantine Way, Aberdeen, WA 98520.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 29, 2012.

Peter B. Tiller

PETER B. TILLER

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