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NO. 89920-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN MICKELSON,
Petitioner,

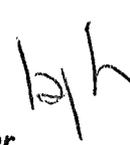
JOEL ERNEST LEWIS,
Defendant.

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

AMICI CURIAE BRIEF OF THE WASHINGTON DEFENDER
ASSOCIATION

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Filed 
Washington State Supreme Court

AUG 19 2014 

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A. INTRODUCTION

When this Court reversed the convictions in *State v. Monday* because of the prosecutor's misconduct, Justice Chambers wrote "if justice is not equal for all, it is not justice." *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). King County Prosecuting Attorney Dan Satterberg, whose office had defended the prosecutor's remarks in the appellate courts, immediately stated that he "agree[d] with Justice Chambers' observations that, "Theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial." See Statement of King County Prosecuting Attorney Dan Satterberg on the State Supreme Court opinion reversing the case of *State v. Kevin L. Monday*, available at <http://seattletimes.nwsourc.com/ABPub/2011/06/09/2015274613.pdf> (June 9, 2011).

Unfortunately, the rationale of *Monday* and sentiments affirmed by the King County Prosecuting Attorney's Office have not discouraged improper arguments or tactics by some prosecutors urging convictions based on biases and stereotypes. Since *Monday*, appellate courts have been presented with numerous cases involving stereotypes used to secure a conviction. See, e.g., *State v. Embry*, 171 Wn.App. 714, 754, 287 P.3d 648 (2013) review denied, 171 Wn.2d 1005, 300 P.3d 416 (2013) (prosecutor

referred to defendants as a “pack of wolves”); *In re Gossett*, 180 Wn.App. 1018 (2014)¹ (prosecutor discredited defendants by calling them “vindictive people” and witnesses by referring to them as “churchy friends”); *State v. Fitzgerald*, No. 43987-5-II, 2014 WL 2802902, at *2 (Wash. Ct. App. June 17, 2014) (prosecutor improperly diluted the requirements of accomplice liability by arguing “birds of a feather flock together” in manufactured photograph handcuffed co-defendants). The disappointing reality is that this Court must once again, in the strongest terms possible, condemn this type of misconduct.

This case was argued to the jury 11 months after *Monday* and makes clear that belittling the accused person as an inherently untrustworthy type of person remains a tactic used to secure a conviction. The State’s unwillingness or inability to understand *Monday* is demonstrated by the appellate prosecutor’s response brief, which insisted that the trial prosecutor’s conduct was perfectly permissible:

He was explaining why the jury should consider their [the defendants’] lifestyle in determining their credibility. People who live the lifestyle of the people residing in the Stage Street address would be likely to do the things the State alleged the defendants did. People who live a more mainstream lifestyle, presumably that lived by the jurors, would not behave in such a manner.

Brief of Respondent at 8 (2012).

¹ This unpublished decision is not cited as authority, but rather as an example of recent cases raising issues of impermissible statements in closing arguments by prosecutors. *See* GR 14.1.

Both the trial and appellate prosecutors believe they may legitimately urge the jurors to convict the defendant – not on the evidence – but because he or she “is not like us.”² Although perhaps more refined than the argument in *Monday*, it is an appeal to juror bias and prejudice. This type of argument should not be tolerated by this Court. When confronted by this type of misconduct, it should be the rare case where this Court does not reverse.

B. IDENTITY AND INTEREST OF AMICI

The identity and interest of *Amici* is detailed in the motion of the amicus parties to accept this brief.

C. STATEMENT OF THE CASE

Amici adopt the statement of the case from the petition for review.

D. ARGUMENT

This Court should find that the prosecutorial misconduct that was committed here is grounds for reversal because it was both improper and prejudicial. It is a rare case where the court should not find misconduct where a prosecutor plays upon the prejudice of a jury by making repeated use of language that distinguishes a defendant from a “more mainstream lifestyle” and describes them as the “underbelly of society.” *State v. Lewis*,

² This case involved repeated reference to the defendants’ economic status, alleged alcoholism, violent behavior, and lack of respect for police. *Lewis*, 178 Wn.App. at *3.

178 Wn.App. 1045 at *2 (2014) *review granted*, 180 Wn.2d 1013, 327 P.3d 55 (2014). Where a prosecutor uses explicit or implicit language to play upon the biases of jurors, this Court should find that reversal is warranted.

- 1. The prosecutor's arguments to the jury that the defendants were the "underbelly of society" who are not "like us" were improper appeals to inflame juror bias and was designed to convict the defendants based upon prejudice rather than the presented evidence**

The Court of Appeals appropriately termed many of the prosecutor's arguments improper. *Lewis*, 178 Wn.App. at *3. Telling the jury that the defendants belong to the "underbelly of society," which is a "side of society" that prosecutors see "all the time," which were not facts in the record and made plain the prosecutor's personal opinion that the defendants were not credible witnesses "because of the 'type of people' they are." *Id.* The Court of Appeals acknowledged the insulting nature of the remarks, calling the prosecutor's description of the defendants as part of the "underbelly of society" an improper "epithetical reference." *Id.* at *4.

By "epithetical reference" the Court of Appeals presumably meant that the prosecutor used "disparaging or abusive" words. *See Webster's Third New International Dictionary, Unabridged*, 766-77 (1993). The prosecutor did not merely allude to the defendants' uncivilized character

in an isolated remark, but methodically explained to the jury that the defendants lack respect for society by virtue of their lifestyle. He repeatedly referred to the defendants' economic status ("These are people that don't have jobs. They work under the table. They live hand to mouth."), alleged alcoholism ("They are engaged in drinking all day"), routine violent behavior ("They get upset with one another. They fight."), and lack of respect for police ("that part of society doesn't like cops. I don't like the cops no matter what. And that's part of this society"). *Lewis*, 178 Wn.App. at *3.

Despite the plainly odious insinuations at the root of the prosecutor's argument – that the defendants are not worthy of belief because they do not have full-time jobs, they are the type of people who fight as a matter of routine, and are poor degenerate drunks who are not part of the civilized world – the Court of Appeals believed that the error could have been cured had the attorneys asked the court to instruct the jury "to disregard the prosecutor's personal opinions." *Id.* at *4.

The Court of Appeals is wrong for several reasons. First, the Court of Appeals did not acknowledge that the credibility of the defendants was one of the crucial issues in the case. They testified that they acted in self-defense. The State's argument was explicitly targeted at undermining this defense through innuendo, allusion to facts not in evidence, and

condemning the defendants based on the type of people that they are.

Second, the Court of Appeals did not acknowledge the harmful effect of drawing on jurors' biases as a means to secure a conviction. Setting up an "us versus them" dynamic has long been recognized as an impermissible tactic. In *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699, (1984), this Court held improper statements "calculated to align the jury with the prosecutor" and against the defendant. The misconduct in *Reed* involved arguing that the "defense witnesses should not be believed because they were from out of town and drove fancy cars." *Id.* at 146.

When the "us versus them" argument is predicated on derogatory stereotypes, the impropriety is far more troubling. In *Monday*, the prosecutor argued to the jury "the code is black folk don't testify against black folk. You don't snitch to the police." *Monday*, 171 Wn.2d at 674. This argument "functioned as an attempt to discount several witnesses' testimony on the basis of race alone." *Id.* at 678. This Court recognized that appeals to prejudice do not need to be blatant to affect the trial. "Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." *Id.*

Commentators agree that jurors are even more persuaded by "subtle manipulations" of defendant's background than explicit references to race. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L.

Rev. 1124, 1144 (2012). While a jury member will be more “careful and thoughtful” about their own opinions when a prosecutor references race, they are not as careful with code. *Id.* at 1143-44. Prosecutors also reinforce implicit biases because their statements carry “the [weight] of the government.” Kathleen M. Ridolfi, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997 – 2009*, Book 2 at 27 (2010). Where the state described the defendants as the “underbelly of society”, it triggered bias in a way that is “more effective but just as insidious” as blatant appeals. *Monday*, 171 Wn.2d at 678. This Court must send the message that this tactic cannot be allowed.

2. Prosecutors continue using prejudicial language to secure convictions despite this Court’s clear directive that it is improper to do so

This Court must once again, in the strongest terms possible, condemn this type of misconduct. In *Monday* this Court prohibited references to race holding 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.” *Monday*, 171 Wn.2d at 680. Prosecutorial misconduct is grounds for reversal if “the prosecuting attorney’s conduct was both improper and prejudicial.” *Id.* at 675-76 (*citing State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). The

Court examines the effect [the prejudice] of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence presented, "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Where prosecutors use the race, ethnic or socio-economic status of the defendant as part of an appeal to the jury to disbelieve the defense, they violate the principles this Court laid out in *Monday*. It is the rare case that should not be reversed when prosecutors rely upon bias and prejudice to secure a conviction.

- a. Prosecutors continue to make improper references to personal characteristics of the defendant and defense witnesses in recent cases despite this Court's clear condemnation of such behavior in *Monday*

Prosecutors have not stopped making references to irrelevant personal characteristics of a defendant since this Court condemned the practice in 2011. Rather than the overt language used in *Monday*, prosecutors appear to have shifted to using references and code words to persuade the jury that defendants are guilty because of their status. See *State v. Embry*, 171 Wn.App. 714, 754, 287 P.3d 648 (Wash. App. 2012) review denied, 171 Wn.2d 1005, 300 P.3d 416 (2013) (state referred to defendants as a "pack of wolves"); *In re Gossett*, 180 Wn.App. 1018

(2014) (state called defendants “vindictive people” and defense witnesses “churchy friends”); *State v. Fitzgerald*, No. 43987-5-II, 2014 WL 2802902, at *2 (Wash. Ct. App. June 17, 2014) (state said defendants were “birds of a feather”).

In many of these cases the prosecutors avoided reversal because they never explicitly referenced racial, ethnic, or class groups. *See e.g. Embry*, 171 Wn.App. at 752 (the Court of Appeals Division II distinguished the case from *Monday* because the “State never tied the ‘code of the street’ to a particular race.”). But *Monday* should not be construed as limited to overt expressions of racial animus. A prosecutor encourages the same type of bias-based decision-making by using code words to proclaim that the defendants are not “like us” and do not deserve credibility due to poverty and mistrust of police. Prosecutors will not be deterred from using improper code language as long as their convictions continue to be affirmed despite misconduct.³

The prosecutor’s language in this case is the most disturbing departure from *Monday*. The Court of Appeals found the state’s description of defendants as the “underbelly of society,” references to their drinking, and the exclusion of defendants as a different “type of people”

³ In *State v. Neidigh*, 78 Wn.App. 71, 76, 895 P.2d 423 (1995), the prosecutor memorably told the Court of Appeals at oral argument that prosecutors use improper tactics because it is always found to be harmless error. Indeed, he was right because his misconduct was found harmless in that case.

improper. *State v. Lewis*, 178 Wn.App. 1045 at *2 (2014) *review granted*, 180 Wn.2d 1013, 327 P.3d 55 (2014). Still, the court affirmed the conviction. *Id.* This gives prosecutors the green light to use these coded references to race, religion, national origin, and socio-economic status. As in *Monday*, the only action that will curb this behavior is reversal and when confronted with the flagrant language used in this case, the Court should reverse.

The State's response brief filed in the Court of Appeals shows that prosecutors continue to condone derogatory language premised on prejudices. The appellate prosecutor insisted the statements made in closing argument were reasonable inferences drawn from evidence and not prejudicial. Brief of Respondent at 8. The brief characterized the trial prosecution as properly

explaining why the jury should consider [the defendants'] lifestyle in determining their credibility. People who live the lifestyle of the people residing in the Stage Street address would be very likely to do the things the State alleged the defendants did. People who live a more mainstream lifestyle, presumably that lived by the jurors, would not behave in such a manner. *Id.*

These statements of propensity based on poverty have no place in our courts and were used to inflame the jury against the defendants based on their "lifestyle," a code word for low socio-economic status. In short, both the trial and appellate prosecutors believe that the jurors should

convict the defendant – not on the evidence – but because he or she is “not like us.” Although perhaps more refined than the argument in *Monday*, it is still an appeal to the biases and prejudices of the jury.

The prosecutor repeatedly pointed to the defendant’s poverty and unemployment as an indicator of untrustworthiness. The prosecutor fanned potential biases of jurors, urging them to discount the defendants simply because of their social status. The prosecutor urged jurors to view the defendants and their companions as a group wholly different from and beneath “normal society.” This Court should make clear that where the prosecutor relies upon these types of biases to secure a conviction, that the integrity of the conviction may not be intact.

- b. The public trust in the judicial system is harmed when prosecutors resort to stereotypes to secure convictions

Condoning code words premised on poverty negatively impacts popular perceptions about the fairness of the justice system. This Court’s Minority and Justice Commission and the Washington State Center for Court Research found that non-white Washingtonians were more likely to experience mistreatment or disrespect than their white counterparts. Mark Peffley et al., *Justice in Washington State Survey*, 15 (2014), available at <http://www.courts.wa.gov/content/publicUpload/News/Justice%20in%20Washington%20Report.pdf>. Continued use of code language and

references to race, ethnicity, and socio-economic status erodes public trust in court systems. These negative experiences lead citizens to “see the entire justice system through a cynical lens.” *Id.* at 27. This increases skepticism and reduces support for police and prosecutors. *Id.* at 29-31. Affirming Mickelson’s conviction further undermines public trust in a fair and just judiciary.

- c. Reversal is required in order to allow for a fair trial in this case and is necessary to ensure fair trial in cases to come

Prosecutors in Washington continue to use references to race, religion, ethnicity, and socio-economic status with impunity because their words do not sound as “flagrant” as in *Monday*. *Monday*, 171 Wn.2d at 680. Covert references can have the same devastating impact on the defendant’s right to a fair trial and perceptions of fairness in the justice system as the overt prejudicial language in *Monday*.

This Court has supervisory powers to remedy a constitutional or statutory violation, protect judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury, or to deter future illegal conduct. *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991). Disparaging defendants based on their economic status should not be condoned. Reversing the convictions in this case is necessary both to remedy the injustice and to deter future misconduct.

- d. The use of class based arguments to secure a conviction impacts public confidence in the judicial system and the integrity of convictions

In this case, the impact of the statements made by the prosecutor which were designed to appeal to the prejudices of the jury should result in a reversal because they were both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Convictions obtained in a trial permeated by racial bias deliberately introduced by the prosecution should not stand. *Monday*, 171 Wn.2d at 682 (Madsen, concurrence). Similarly, a criminal conviction based upon the intentional injection of the notion that socio-economic status detracts from a person's credibility may also require reversal. Class based arguments by the prosecutor during closing argument are repugnant to the core principles of integrity and justice which a fundamentally fair criminal justice system must rest. Only a new trial will remove its taint.

Because the accused persons' credibility was at issue in this case and the prosecutor's class based arguments were designed against according them respect or trust for illegitimate reasons, the question of whether this error is harmless is not even close. This Court may, however, want to take this opportunity to examine whether there are ever circumstances where the intentional injection of race, ethnicity, nationality or socio-economic status unrelated to the elements of the offense is ever

appropriate. As with the right to open trials, it is often difficult to assess the effect of this kind of error. See, *State v. Wise*, 176 Wn.2d 1, 17, 288 P.3d 1113 (2012) citing *U.S. v. Marcus*, 560 U.S. 258, 263, 130 S.Ct. 2159 (2010) (alterations in original). It may be appropriate for this Court to follow Justice Madsen's concurrence in *Monday* and reverse this case to ensure the integrity of convictions and the public's confidence in the judicial process.

3. A curative instruction cannot overcome a thematic emphasis by the State that the defendants are the type of people who are not part of civilized society

The Court of Appeals was incorrect in reasoning that the potential for a "curative instruction" resolves this error. This Court stated in *Monday* that a curative instruction may simply "highlight what was said" and reinforce the prosecutor's code words. *Monday*, 171 Wn. 2d at 671. In this case the lower court agreed that an objection would have the impact of "emphasizing damaging" references. *Lewis*, 178 Wn.App. 1045 at *9. If defendants object, they highlight the code words, making the implicit explicit, but if they do not, they waive the opportunity to challenge the misconduct that undermines the fairness of their trial on appeal. *Id.* at *10. An instruction by the judge referring to the improper language is just as likely to stir juror's conscious or unconscious biases and therefore it cannot erase the impact of appeals to invidious stereotypes.

It is hard to imagine how an effective curative instruction would have sounded. Had the court told the jury to disregard the prosecutor's opinions that the defendants are part of the underbelly of society, who do not live by the rules "the same way as most of us," and they are part of a society that routinely faces criminal prosecution, the improper arguments would not have been erased from the minds of the jurors.

The taint of some types of misconduct cannot be removed by an instruction to disregard. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); *Dunn v. United States*, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk in the jury box, you cannot instruct the jury not to smell it."); *see also Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620 (1968) (recognizing courts cannot always assume juries will follow court instruction to disregard prejudicial evidence, as "the practical and human limitations of the jury system cannot be ignored.").

In this case, the defendants presented a legitimate claim of self-defense. The State urged the jury to reject this claim because the defendants are people who "don't live under the same rules of society," and because they are the "type of people" who are marginally employed and spend their days drinking and fighting. Encouraging the jury to disregard the defendant's right to defend themselves by denigrating their character is an improper tactic that taints the proceedings and detracts

from the appearance of fairness at the root of the judicial system. Reversal is required.

E. CONCLUSION

Prosecutors owe a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956); *see also* RPC 3.8 Special Responsibilities of a Prosecutor, Comment 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”). This case presents this Court with another opportunity to make clear to the State the “defendants are among the people the prosecutor represents.” *Monday*, 171 Wn.2d at 676.

This Court should find that the repeated use of language that distinguished the defendants from a “more mainstream lifestyle” and describes them as the “underbelly of society” has no place in our judicial system. Where a prosecutor uses explicit or implicit language to play upon the biases of the jurors, the message from the Court should be clear: it will not be tolerated. It is only in the rare case that reversal would not be warranted. This case is not one of those rare cases, and this conviction should be reversed.

DATED this 7th day of August, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Vandsburger', with a long horizontal flourish extending to the right.

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Subject: RE: State v. Mickelson and Lewis (#89920-7), Motion to File Amicus Brief and Amicus Brief of WDA

Dear Supreme Court Clerk:

Attached please find the Amicus Motion and Accompanying Amicus Brief of the Washington Defender Association in the case of *State v. Mickelson*, # 89920-7.

Counsel for the parties are copied on this message and a certificate of service is also attached.

Please let me know if there are any difficulties with this filing.

Regards,

Travis Stearns

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