

NO. 71614-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PAUL HOLLINGWORTH,

Appellant.

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

The Honorable Elizabeth Berns, Judge

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON
SUPERIOR COURT
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A. ARGUMENT IN REPLY

1. WRITING “CONFESSION” ON A PIECE OF EVIDENCE SHOWN TO THE JURY CONSTITUTED REVERSIBLE PROSECUTORIAL MISCONDUCT

The State acknowledges that it is misconduct for a prosecutor to alter evidence that has been admitted at trial. Br. of Resp’t at 16. The State also recognizes the rule that prosecutors may not express a personal opinion on guilt. Br. of Resp’t at 16. Yet the State argues that writing the word “confession” on Hollingworth’s statement was not reversible error because (1) it was not as bad as the misconduct in In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 705-07, 286 P.3d 673 (2012); (2) in its view, “the statement *was* a confession,” Br. of Resp’t at 18; and (3) the trial court’s instruction cured the prejudice. The State is mistaken on all counts.

As in Glasmann, the prosecutor’s labeling of a piece of evidence with “confession” was “calculated to influence the jury’s assessment of [Hollingworth’s] guilty and veracity.” Glasmann, 175 Wn.2d at 705. Indeed, by mislabeling the evidence, the prosecutor conveyed only one message to the jury: Hollingworth must be guilty because he confessed. The prosecutor also expressed to jurors that she believed Hollingworth was guilty, stating he had confessed on a piece of admitted evidence. Cf. Glasmann, 175 Wn.2d 706-07 (prosecutors “may not express an individual

opinion of the defendant's guilt, independent of the evidence actually in the case").

Despite Glasmann's very clear and direct guidance on these issues, the State asks the court to disregard it because the prosecutor's mislabel of evidence was "not written in all capital letters and appears to have been in black type" as opposed to the all capital, red lettering in Glasmann. Br. of Resp't at 17. The State also suggests that "confession" was merely used as a title for the evidence, so it "did not obscure the written statement" in contrast to the placement of the word "GUILTY" across Glasmann's face. Br. of Resp't at 17. These are not meaningful distinctions.

Just because the lettering of the word "confession" was in black ink and smaller than the red lettering in Glasmann does not mean the prosecutor did not commit egregious misconduct. She intentionally presented evidence that had been altered to influence the jury's decision on Hollingworth's guilt. This is precisely what Glasmann prohibits in no uncertain terms. 175 Wn.2d at 705-06. The prosecutor "must be held to know that it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberations." Id. at 706. This court should hold the prosecutor to the knowledge that Glasmann imputed to her office.

The State also attempts to circumvent Glasmann by claiming its trial deputy was merely titling a piece of evidence, which was just meant to be

helpful “to distinguish the large amount of evidence that she showed the jury” Br. of Resp’t at 17-18. But improperly giving a title to a piece of evidence is perhaps the most egregious way there is for a prosecutor to alter evidence. A title attributes a clear label to evidence irrespective of the evidence’s other content. It tells jurors how and what they should think of a piece of evidence. In addition, contrary to the State’s argument, titling evidence unquestionably does “obscure the written statement,” Br. of Resp’t at 17—here, it told jurors that whatever else might be in Hollingworth’s statement is insignificant because all they needed to know was that the statement was a confession establishing Hollingworth’s guilt. The State’s argument that improperly giving a title to evidence is somehow not bad enough to constitute misconduct defies Glasmann and common sense.

The State also asserts that there was no error because “the statement *was* a confession.” Br. of Resp’t at 18. This is the first time the State makes this argument. At trial, defense counsel objected, asserting the State was mischaracterizing the evidence as a confession. RP 482. The trial court and the trial deputy agreed the trial deputy had erred and removed the word “confession” from the exhibit. RP 483-86. The State has not offered a reasoned explanation for now taking the opposite position of its trial deputy.

More importantly, Hollingworth’s defense was that he did not confess, and that a close reading of his statement demonstrated he never

believed he was communicating with a minor. RP 519-20, 540, 543, 547-50, 567-68, 570, 617-18. The State's mislabeling of evidence as a confession deprived Hollingworth of a fair opportunity to make this argument in his defense.¹ Hollingworth had a good argument he did not know he was communicating with a minor: his statement indicated he thought the Ashton Michaels/sounderchick12 persona was joking when "she" said "she" was 13 and that a lot of people say a lot of things in chat rooms on the Internet. CP 65. And when Hollingworth wrote out the statement, he was still enmeshed in Officer Rutledge's fantasy—Hollingworth had not yet been told that Ashton Michaels/sounderchick12 was pure fiction. The State's mislabeling of his statement as a confession told jurors Hollingworth was guilty and that the prosecutor believed as much, regardless of the legitimate explanations Hollingworth put forth. The prosecutor's flagrant and ill intentioned misconduct deprived Hollingworth of a fair trial.

The State finally contends that the trial court cured the prejudice by instructing the jury to disregard anything on the prosecutor's slide that was inconsistent with the admitted evidence. Br. of Resp't at 18-20. But the

¹ The State also argues that because CrR 3.5 is titled "Confession Procedure" in the criminal rules, it was somehow proper to label Hollingworth's statement as a confession. The State cites no authority for the absurd proposition that it may label evidence according to the Washington Supreme Court's chosen headings for criminal rules. And this argument illogically elevates form over substance. Several statements that are not even arguably confessions come in via CrR 3.5. This cannot and does not give the State carte blanche to call any and all of them confessions in order to improperly influence the jury's determination of guilt.

State capitalized on its misconduct during closing—it called Hollingworth’s statement a confession orally and again altered evidence by labeling Hollingworth’s statement as a confession. Ex. 17; RP 601, 607, 625. “[C]onsideration of *any material* by a jury *not properly admitted as evidence* vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.” State v. Pete, 152 Wn.2d 546, 555 n.4, 98 P.3d 803 (2004) (emphasis added) (emphasis omitted in original) (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967)). Every juror saw the State’s “confession” label on an enlarged screen as part of the State’s case. This let jurors know that the substance of Hollingworth’s statement was a confession given the prosecutor’s labeling of it as such. The State’s label conveyed the prosecutor’s opinion that Hollingworth had confessed and was guilty. The prosecutor’s illegal and repeated alteration of the evidence was flagrant, ill intentioned, and egregious misconduct designed to prejudice Hollingworth. The prosecutor’s illegal and repeated alteration of the evidence requires reversal.

2. THE PROSECUTOR IMPROPERLY ENCOURAGED JURORS TO REACH A VERDICT BASED ON THEIR EMOTIONS RATHER THAN THE EVIDENCE

The prosecutor has a quasi judicial duty to ensure a verdict based on reason, meaning that appeals to passion or prejudice are improper. State v. Gregory, 158 Wn.2d 759, 808, 149 P.3d 1201 (2006); State v. Claflin, 38

Wn. App. 847, 850, 690 P.2d 1186 (1984). The prosecutor here asked jurors to base their verdict on their emotional reactions rather than the evidence, in violation of her duty.

Taking portions of Hollingworth's police interrogation out of context, the prosecutor intended to elicit an emotional reaction of disgust toward Hollingworth, referring to his actions as "stomach turning" and "sick." RP 605. In reality, Hollingworth made these statements of disbelief when Officer Rutledge misinformed him that he had actually communicated with a minor. Ex. 6A at 64; Ex. 17 at 18. In context, they demonstrated he had no knowledge he was communicating with a minor when he chatted with make-believe Ashton Michaels/sounderchick 12 and found the notion of such communication revolting. The prosecutor perverted the true meaning of Hollingworth's statements, twisting his words into an admission that he knew he had done something "stomach turning" and "sick" at the time of the chats. This misconstrued the evidence and encouraged the jury to base its verdict on emotion and a distorted interpretation of the actual evidence. This was misconduct.

The prosecutor also invited jurors to pick which incidents constituted the crime by "decid[ing] which chats perhaps you find the most offensive and would like to have him found guilty of." RP 597. The State argues that "the prosecutor was simply acknowledging that some of Hollingworth's

actions were more egregious, i.e., words describing sex acts versus live video.” Br. of Resp’t at 22. This misconstrues the role of the jury and imposes the State’s warped sense of morality on jurors. The jurors get to decide which incidents the State has proven beyond a reasonable doubt based on the evidence, *not* on their personal feelings. Because the prosecutor invited jurors to make their decision based on emotional reactions rather than the evidence, the prosecutor committed egregious misconduct.

The prosecutor’s repeated appeals to emotion in violation of her quasi judicial duty of impartiality, the prosecutor’s repeated unlawful alteration of evidence, and the prosecutor’s expression of her opinion of guilt, taken alone or together, deprived Hollingworth of a fair trial. No instruction could have cured this prejudice. This court should reverse and remand for a new trial.

B. CONCLUSION

In light of the multiple, egregious instances of prosecutorial misconduct, Hollingworth asks that this court reverse his convictions and remand for a new trial at which the prosecutor follows the law.

DATED this 24th day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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vs.)	COA NO. 71614-0-I
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PAUL HOLLINGSWORTH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF FEBRUARY, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PAUL HOLLINGSWORTH
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KING COUNTY JAIL / RJC
620 W. JAMES STREET
KENT, WA 98032

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF FEBRUARY, 2015.

X *Patrick Mayovsky*