

716 31-0

71631-0

NO. 71631-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS GAUTHIER,

Appellant.

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

The Honorable Douglass North, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

2018 FEB 20 PM 4:19
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
KING COUNTY

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. INFLAMMATORY CLOSING ARGUMENT RENDERED GAUTHIER’S TRIAL UNFAIR.	1
a. <u>Characterizing the Defense as Calling T.A. a “Slut” Who “Had it Coming” and as the “Reason Why People Don’t Report” Was an Inflammatory Emotional Appeal.</u> ..	1
b. <u>The Inflammatory Emotional Appeal Was Likely to Influence the Jury Regardless of Any Instruction.</u>	3
2. STATE V. ERVIN MANDATES EXCLUSION OF GAUTHIER’S PRIOR CONVICTION FROM HIS OFFENDER SCORE	4
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	2
<u>State v. Bautista–Caldera</u> 56 Wn. App. 186, 783 P.2d 116 (1989).....	2
<u>State v. Crawford</u> 159 Wn.2d 86, 147 P.3d 1288 (2006).....	4
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	4
<u>State v. Ervin</u> 169 Wn.2d 815, 239 P.3d 354 (2010).....	4, 5, 6
<u>State v. Fuller</u> 169 Wn. App. 797, 282 P.3d 126 (2012) <u>review denied</u> , 176 Wn.2d 1006 (2013)	2
<u>State v. Gauthier</u> 174 Wn. App. 257, 298 P.3d 126 (2013).....	5
<u>State v. Padilla</u> 69 Wn. App. 295, 846 P.2d 564 (1993).....	4
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	3

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.525	4
---------------------	---

A. ARGUMENT IN REPLY

1. INFLAMMATORY CLOSING ARGUMENT RENDERED GAUTHIER'S TRIAL UNFAIR.

a. Characterizing the Defense as Calling T.A. a "Slut" Who "Had it Coming" and as the "Reason Why People Don't Report" Was an Inflammatory Emotional Appeal.

Gauthier's theory of the case was that he engaged in a consensual prostitution transaction, as he frequently does, but that the transaction went bad when he recognized the woman in question as someone who had stolen from him in the past and he resolved not to pay her. In the instant appeal, Gauthier does not complain of arguments pointing to evidence that could be deemed inconsistent with this theory. But the prosecutor did not limit herself to reasonable inferences from the evidence. She careened across the line from proper argument into misconduct when she urged the jury to reject Gauthier's defense not because it was legally invalid or unsupported by the evidence, but because it was emotionally distasteful.

The prosecutor used emotionally-charged and inflammatory terms such as "slut" and "she had it coming" to misconstrue the nature of Gauthier's defense and inspire the jury's outrage. The term "slut" evokes a derogatory attitude towards female sexuality that Gauthier did not display. He did not fault T.A. for working as a prostitute; he faulted her for being a

thief. It was the prosecutor that introduced the inflammatory and misogynistic language.

The jury's job was to decide, based on the evidence, whether or not there was a reasonable doubt about whether T.A. was working as a prostitute that night and agreed to have oral sex with Gauthier. Accusing Gauthier of calling T.A. a "slut," (when he did not) or asserting that because she was out on the street at night she "had it coming" (which he did not) is not a response to the defense theory because it has nothing to do with whether the defense theory was, on this occasion, true. The only purpose of this argument, and the inflammatory language used, was to inspire revulsion at Gauthier's story without regard for whether it was supported by the evidence.

A prosecutor's response to the defense theory must be limited to the law and the evidence. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Arguments that ask the jury to convict based on their emotions, by contrast, are misconduct. State v. Fuller, 169 Wn. App. 797, 821, 282 P.3d 126 (2012) review denied, 176 Wn.2d 1006 (2013) (citing State v. Bautista-Caldera, 56 Wn. App. 186, 194-95, 783 P.2d 116 (1989)). The fact that other parts of the prosecutor's argument were proper inferences from the evidence and the law does not diminish the impact of the improper and inflammatory aspects of the closing argument. Three times the prosecutor referred to T.A. as a "slut." 15RP 607. Twice she told the jury

she “had it coming.” Id. She told the jury “This is why people don’t report.” Id. This emotional appeal urged the jury to render a verdict based on passion and prejudice, rather than the evidence. It was misconduct.

b. The Inflammatory Emotional Appeal Was Likely to Influence the Jury Regardless of Any Instruction.

The State argues this emotional appeal could have been sufficiently tamped down by a jury instruction, had counsel only objected. Brief of Respondent at 25-26. In support of this argument, the State cites State v. Warren, 165 Wn.2d 17, 25-27, 195 P.3d 940 (2008), but in Warren, the misconduct was a misstatement of the law. Jurors do not come in to a case expecting to fully understand the law. They look to the judge to explain the law to them. Thus, instruction from the court may be particularly effective in curing misconduct that simply misstates the applicable law. Jurors can be made aware of the error and the correction and can adjust their analysis accordingly.

But inflammatory arguments and emotional appeals can affect jury deliberations on a subconscious level. Jurors may not even be entirely aware of the way in which the aroused emotions are coloring their perceptions or analysis of the evidence. This type of unconscious prejudice is much more difficult to cure. That is why Washington’s Supreme Court has noted that

inflammatory arguments are generally incurable by instruction. State v. Emery, 174 Wn.2d 741, 763, 278 P.3d 653 (2012).

Moreover, the State has not disputed that this case came down to credibility. If the jury believed T.A., it would have to find Gauthier guilty of rape. If the jury believed Gauthier, it would have to acquit. Under these circumstances, emotional appeals are even more likely to taint the jury's verdict. State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993). The prosecutor's misconduct requires reversal of Gauthier's conviction.

Alternatively, if this Court concludes an instruction would have been effective in reversing the damage done to Gauthier's case by this improper argument, then there was no possible reason for Gauthier's attorney not to object and request one. The lack of any valid strategic reason for a decision that damages the defendant's case is ineffective assistance of counsel that requires reversal. State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006).

2. STATE V. ERVIN MANDATES EXCLUSION OF GAUTHIER'S PRIOR CONVICTION FROM HIS OFFENDER SCORE.

In State v. Ervin, 169 Wn.2d 815, 822, 239 P.3d 354 (2010), the court analyzed the legislative intent behind the phrase "in the community" in RCW 9.94A.525's wash-out provisions. After a thorough analysis of the canons of statutory construction, the court declared, "we discern a legislative

intent favoring Ervin's interpretation of the statute." Ervin, 169 Wn.2d at 826. Ervin's interpretation was that the statute contrasts "in the community" with "confinement ... pursuant to a felony conviction" and thus the meaning of the phrase "in the community" refers to the status of not being confined pursuant to a felony conviction. Id. at 822. Thus, Ervin stands for the proposition that a person is "in the community" for purposes of the wash-out provisions, so long as he is not confined pursuant to a felony, regardless of whether he was incarcerated for some other reason during a portion of that time. Id. at 822, 826.

Between his 2007 release and his recent conviction, Gauthier spent five years "in the community" i.e., not confined pursuant to a felony conviction because his 2011 rape conviction was reversed on appeal. A new conviction was not obtained until 2013. Therefore, his 2007 offense must not be included in his offender score. This argument merely applies Ervin.

The State argues the result is absurd because someone in Gauthier's position could delay trial, waiting for his offender score to go down. Brief of Respondent at 35. What the State neglects to mention is that the delay that resulted in the five year wash-out period applying in this case was due to the State's misconduct that, this Court concluded, violated Gauthier's constitutional rights and required reversal of his conviction. State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013). In other words, the result

the State declares “absurd” would not have occurred in this case but for the State’s misconduct. This Court should apply Ervin and remand for resentencing with an offender score of zero.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Gauthier requests this Court reverse his conviction or, in the alternative, remand for resentencing.

DATED this 4th day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 71631-0-1
)	
THOMAS GAUTHIER,)	
)	
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 4TH 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 EMAIL AND/OR BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104
paoappellateunitmail@kingcounty.gov

- [X] THOMAS GAUTHIER
DOC NO. 757736
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

STATE OF WASHINGTON
SUPERIOR COURT
2015 FEB -4 11:44 AM
19

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF FEBRUARY, 2015.

x *Patrick Mayovsky*