IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AQUARIUS TYREE WALKER, Appellant.	No. 39420-1-II UNPUBLISHED OPINION AFTER REMAND FROM SUPREME COURT

JOHANSON, A.C.J. — Our Supreme Court granted a petition for review in *State v. Walker*, 164 Wn. App. 724, 265 P.3d 191 (2011), and remanded it to us for reconsideration in light of *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012). We affirm our earlier decision, which reversed Aquarius Tyree Walker's first degree murder and two first degree assault convictions because of the cumulative effect of prosecutorial misconduct.

Walker and a group of friends went to a bar in July 2006. As Walker's group left the bar, a fight broke out between some of Walker's friends and another group. The argument escalated, and Walker retrieved a gun. He fired warning shots before apparently taking aim and firing shots at a man fighting his friend—presumably to protect his friend. One of those shots killed Walker's friend, a non-fatal shot hit another

of Walker's friends, and another non-fatal shot struck a member of the opposing group.

During closing argument at trial, the State engaged in four types of misconduct that we held deprived Walker of a fair trial. Without objection, the State (1) used the fill-in-the-blank argument and asserted that the jury needed to explain any reason it had for not finding Walker guilty; (2) compared reasonable doubt to everyday, common standards people use to make decisions; and (3) tasked the jury with declaring the truth. *Walker*, 164 Wn. App. at 729, 731-33. And (4) over defense counsel's objection, in evaluating Walker's defense-of-others claim, the State mischaracterized the law when it argued that the defense-of-others standard involves whether the jury members would have done the same as Walker, had they been in Walker's shoes on the night of the shooting. *Walker*, 164 Wn. App. at 729, 735. Visual slides accompanied these closing arguments, which occurred over two days. *Walker*, 164 Wn. App. at 729, 739 n.8. The jury convicted Walker, but we reversed, holding that the cumulative effect of these four instances of misconduct deprived *Walker* of a fair trial. *Walker*, 164 Wn. App. at 729.

Emery too involved prosecutorial misconduct. In *Emery*, the State employed the same fill-in-the-blank and declare-the-truth arguments, using visual slides. 174 Wn.2d at 750-51. Although the Supreme Court held that these two arguments were improper, it determined that these improper arguments did not warrant a new trial because defense counsel did not object at trial, and Emery could not show that the arguments were so prejudicial that the trial court could not have cured the prejudicial effect with an instruction. *Emery*, 174 Wn.2d at 765. The Supreme Court stated, "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant and ill intentioned and more on whether the resulting prejudice could have been cured." 174 Wn.2d at 762.

First, the Supreme Court analyzed whether the State's fill-in-the-blank and declare-the-truth arguments were flagrant and ill-intentioned.[1] It concluded that declare-the-truth and fill-in-the-blank arguments are not the type that our courts have traditionally found inflammatory—like arguments that appeal to racial biases and local prejudices—so these arguments lacked any possibility of inflammatory effect. *Emery*, 174 Wn.2d at 763. As a result, it held that these arguments were neither flagrant nor ill-intentioned.

Second, the Supreme Court evaluated whether an instruction could have cured the State's improper comments. Again, the court placed great emphasis on this analysis, and it reviewed the facts in *Emery* against those of *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009).

In *Warren*, the State undermined the presumption of innocence by saying, "Reasonable doubt does not mean give the defendant the benefit of the doubt, and that is clear when you read the definition." 165 Wn.2d at 24. The State also said that the "entire trial has been a search for the truth." *Warren*, 165 Wn.2d at 25. In *Warren*, however, the defense objected to these misstatements, and the trial court offered a curative instruction that *Emery* described as "imperfect." 174 Wn.2d at 764. Nevertheless, our Supreme Court held that the instruction cured the State's improper remarks so a new trial was not warranted.

Our Supreme Court relied on *Warren* in *Emery*, explaining, "Because the very similar misstatements in *Warren* were cured by an improper instruction, the misstatements here could have been cured by a proper instruction." *Emery*, 174 Wn.2d at

[1] The Supreme Court noted that Emery's trial occurred before our courts issued the most recent flurry of prosecutorial misconduct cases, *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010); *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813, *review denied*, 170 Wn.2d 1003 (2010).

764. It reasoned that, had Emery objected at trial, the trial court would have properly explained the jury's role and reiterated the correct burden of proof. An instruction would have eliminated confusion and cured any potential prejudice stemming from the State's improper remarks. *Emery*, 174 Wn.2d at 764.

In a footnote, the Supreme Court added that, even had Emery shown that the statements were incurable, he could not show a substantial likelihood that the statements affected the jury's verdict. It reasoned that the State "clearly and repeatedly stated that the State bears the burden of proof and quoted the law directly from the jury instructions." *Emery*, 174 Wn.2d at 764 n.14. It also implied that the effect of the State's improper statements was minimal because the remarks came at the end of an eight-day trial, and included just nine total sentences. Next, the Supreme Court concluded that Emery could not demonstrate that the statements affected the jury's verdict because the State's case was "very strong, probably overwhelming" and lacked conflicting testimony. *Emery*, 174 Wn.2d at 764 n.14. Lastly, the Supreme Court noted that the jury instructions properly defined reasonable doubt for the jury and directed the jurors to disregard arguments not supported by the instructions. *Emery*, 174 Wn.2d at 765 n.14.

Walker is similar to *Emery* in many ways, but it is also quite different. Like *Emery*, the *Walker* trial occurred before our courts' recent opinions involving prosecutorial misconduct. And like *Emery*, *Walker* involved the fill-in-the-blank and declare-the-truth arguments that the State presented with visual slides, and without objection. Also, as in *Emery*, Walker did not object to two improper arguments.

But the cases were also very different. In addition to the two types of misconduct that occurred in *Emery*, in *Walker* the State also improperly analogized reasonable doubt to common, everyday decisions—like deciding whether to have elective surgery or leave one's children with a new babysitter. In *Walker*, the State also misstated the law of self-defense by asking the jury members whether they would have done the same thing Walker did, if they were to defend their friends in a fight. Walker unsuccessfully objected to this argument. So *Walker* involved twice as many misconduct themes.

We distinguish *Walker* from *Emery* and affirm our earlier ruling, reversing and remanding for Walker's retrial. As an initial matter, *Emery* tells us to "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762. We note then that in *Walker*, we held that the State acted with flagrance and ill intent because of its frequent improper statements during closing arguments, to the point that the State developed these improper arguments into individual themes—and that it amplified its misconduct through slides. *Walker*, 164 Wn. App. at 738.

In *Emery*, the Supreme Court cited *Warren*, and recited two improper remarks that the trial court cured with an instruction. *Walker* involved considerably more than just two improper statements. In *Walker*, the State's closing argument occurred over two days, and during that closing, the State "repeatedly" made improper comments—with accompanying slides—involving four separate misconduct themes. The misconduct in *Warren*, as cited in *Emery*, apparently spanned two themes and two sentences; in *Emery*, just two themes over nine sentences. *Walker* involved four themes spanning at least

thirteen oral sentences, with slides containing additional improper language.[2] *Emery* directs us to focus our analysis on whether the State's misconduct and resulting prejudice could have been cured. Given the frequency of the misconduct during the two-day closing argument, and the fact that the State visualized its misconduct on its slides, the trial court could not have cured the misconduct through instruction. Moreover, any attempt to secure a curative instruction may have been futile, as the trial court overruled Walker's only objection during closing arguments—an objection that the trial court should have sustained.

More important, in distinguishing *Emery* from *Walker* to determine prejudice, we note that unlike *Emery*, with its overwhelming evidence favoring the State, *Walker* involved numerous conflicting factual issues,[3] exacerbating the potential for prejudice before the jury. Because of this conflicting evidence, we held that the State's improper statements would be so prejudicial as to not be curable by an instruction. In sum, the State committed flagrant and ill-intentioned misconduct that was so prejudicial that a curative instruction would not have remedied the misconduct. Therefore, even in light of

---

[2] *Emery* raises no concern over the use of visual imagery in its analysis. Since *Emery*, our Supreme Court has issued *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012), holding that "imagery, then, may be very difficult to overcome with an instruction. Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented." 175 Wn.2d at 707-08 (internal citation omitted). So while the imagery in *Emery* received little focus in the court's opinion, one must consider imagery now, post-*Glasmann*.

[3] Was Walker a lone gunman? Did he fire into a crowd or at specific individuals? Did he fire before or after their fight began? What level of harm was Walker's friend facing? Was Walker a first aggressor? Did Walker shoot his friend, or did someone else shoot him? *Walker*, 164 Wn. App. at 738.

Emery, we affirm our earlier *Walker* decision. The cumulative error from the many instances of misconduct warrants a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Van Deren, J.

Penoyar, J.