

FILED
Court of Appeals
Division III
State of Washington
5/11/2022 11:05 AM

No. 38515-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TODD THYSELL, SR.,

Appellant

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

The Honorable Randall C. Krog

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF THE ARGUMENT

It was the middle of the night in mid-June of 2021 when law enforcement arrived at the residence of Todd and Lisa Thysell. Pulling up in a marked vehicle, in the dark, with bright beams shining down the entrance to the property, a deputy flashed his red and blue lights for only a second as a warning before promptly turning them off. As the deputy exited the vehicle, Todd and Lisa Thysell approached from around a pickup truck. Staring out into the light that was shining directly on him, Mr. Thysell briefly raised his rifle at what he later testified he thought was an intruder. Once he realized it was law enforcement, he lowered his gun.

While the deputy was not an intruder and was called to the residence by Mrs. Thysell for a domestic dispute, Mr. Thysell explained during trial he did not initially realize who was on his property. He presented this defense at trial, but the jury still found him guilty of second degree assault with a firearm enhancement.

During closing argument, the State committed misconduct. The State appealed to the jury's passion and prejudice by inciting fear the outcome could have been much worse—the deputy could have been killed. Because the State improperly inflamed the jury with fear, misconduct occurred. The prejudice could not be cured and had a substantial likelihood of affecting the jury's verdict. The case should be reversed and remanded for a new trial.

B. ASSIGNMENTS OF ERROR

1. The State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by appealing to the passion and prejudice of the jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by appealing to the passion and prejudice of the jury.

D. STATEMENT OF THE CASE

Around midnight on June 20, 2021, Lisa¹ Thysell contacted 911. (RP 217-218). She wanted law enforcement to come to her home in Appleton, Washington, because she and her husband were engaged in a domestic dispute. (RP 218-219, 225-231, 253). Upon arriving at the residence, a sergeant pulled his vehicle up and flashed his red and blue lights. (RP 182-188). As the sergeant exited his vehicle and Lisa and Todd Thysell approached him, he noticed a loud generator running. (RP 189). As Mr. Thysell came closer with a rifle in his hand, the sergeant told Mr. Thysell to drop the gun. (RP 189). However, Mr. Thysell raised the gun; he did not shoulder it but held it at his side, pointing outwards. (RP 190, 311; State's Ex. 2 at 1:05 to 1:30). Lisa got in front of Mr. Thysell and pushed the gun down towards the ground. (RP 190). After Mr. Thysell

¹Lisa Thysell is referred to by the first name "Lisa" throughout this brief to avoid confusion. No disrespect is intended.

released the gun, law enforcement placed him in custody. (RP 190-192).

By amended information the State charged Mr. Thysell with assault in the second degree (against law enforcement) and a firearm enhancement in Count 1. (CP 52). The State also charged Mr. Thysell with fourth degree assault against a family or household member (Lisa) in Count 2, but the jury found him not guilty of this count. (CP 53, 182; RP 370).

A jury trial was held in October of 2021, and witnesses testified consistent with the facts above. (RP 178-315).

Sergeant Eric Anderson testified at trial. (RP 178-206, 313-315). He stated he was dispatched to the Thysell's home that evening for a domestic disturbance. (RP 183-184). He arrived in uniform in a fully marked police vehicle. (RP 185-186). The sergeant explained he approached the home in his vehicle on a dirt driveway in dark conditions without any apparent exterior lighting. (RP 187; State's Ex. 2). He turned down his bright high beams as he detected movement and a

flashlight at the end of the driveway. (RP 187, 201; State's Ex. 2). The sergeant believed his arrival was expected, but he turned on his red and blue lights for a second to alert others of his approach. (RP 188, 200; State's Ex. 2).

Sergeant Anderson parked his vehicle and heard a loud generator running when he got out. (RP 189; State's Ex. 2). He observed Lisa and Todd Thysell walking towards him and immediately noticed the rifle Mr. Thysell was holding at his side. (RP 189; State's Ex. 2). For this reason, he told Mr. Thysell to drop the gun twice. (RP 189; State's Ex. 2). Sergeant Anderson testified Mr. Thysell did not drop the gun but rather raised the gun and aimed it directly at him. (RP 190, 315; State's Ex. 2). The sergeant drew his gun and tried to take cover, shouting at Mr. Thysell to drop his gun. (RP 190; State's Ex. 2). Lisa positioned herself in front of Mr. Thysell, and pushed the gun down towards the ground. (RP 190, 202; State's Ex. 2). Mr. Thysell eventually dropped the gun and got on the ground. (RP 191; State's Ex. 2). The sergeant and a

deputy put Mr. Thysell in custody. (RP 192, 196). He did not know Mr. Thysell was hard of hearing prior to the trial. (RP 201). The sergeant testified the recording device for audio for the State's Exhibit 2 was located on his vest. (RP 313-314).

Lisa testified at trial. (RP 207-239). On the evening in question, she was distraught and told the 911 operator that her husband hurt her, and she retaliated in response. (RP 225-227; State's Ex. 1 at 1:03 to 1:31). While she was on the call with the 911 operator, she told her husband she did not call 911. (RP 234; State's Ex. 1 at 19:55 to 20:06). However, she also testified she told her husband law enforcement was coming. (RP 238). She admitted at trial she was throwing and breaking dishes before the physical altercation with her husband began. (RP 233, 236-237).

Mr. Thysell testified. (RP 253-312). He stated he had been up early the morning of the incident, around 5:00 a.m. (RP 255-256). His wife's daughter had arrived late the night before—around midnight or 1:00 a.m., needing a place to sleep.

(RP 255). So, his stepdaughter slept in Mr. Thysell's pickup. (RP 256, 273). When Mr. Thysell got up that morning to drive her back to her vehicle, he noticed the gas caps to two of his trucks were missing. (RP 256). Mr. Thysell thought someone had taken fuel from his trucks and one of the gas tanks was four or five gallons lower on gas than it should have been. (RP 258, 274).

Mr. Thysell further testified he drove into town and picked up water and coffee, and brought it home around 8:00 a.m. (RP 258-259). He and his wife discussed grocery shopping later in the day, possibly after he returned from the rodeo. (RP 259). Mr. Thysell spent the day at the rodeo and on his way home picked up some dinner for Lisa. (RP 260-261, 276). Mr. Thysell had some beers at the rodeo, as well. (RP 261).

Mr. Thysell testified when he returned home around 8:00 p.m., he gave Lisa the food, which she threw on the floor. (RP 262). Lisa asked Mr. Thysell to go back out and get her

something to eat. (RP 263). When asked how he was feeling at this point, Mr. Thysell stated:

I was feeling that it was pretty much just this is kind of how Lisa did things. I mean, you know, I didn't make a big deal about it. I just picked everything up, like I said. She, and I figured it would be a good time to get away for a little while anyway.

(RP 263). Mr. Thysell went into town but he was unable to get anything for Lisa. (RP 264). When he returned, Lisa started breaking glass—dishes and plates—all over the floor of the motorhome. (RP 264, 276-279). He started cleaning everything up again, but yet again Lisa started breaking more glass. (RP 265, 276-279). Mr. Thysell had work the next morning, so he grabbed clothes and blankets to sleep in his pickup, also thinking he would keep an eye on his property in case anyone returned to steal gas. (RP 265). At some point, after Lisa again began breaking things and he was cleaning it up, Mr. Thysell became agitated, grabbed Lisa, and pushed her back onto the bed to keep her away from him and the glass.

(RP 266, 280-282). The couple became physical with each other, and Lisa head-butted Mr. Thysell, causing his nose to bleed. (RP 266-268). At some point Mr. Thysell realized Lisa was on the phone but did not know it was 911. (RP 269, 284, 286, 292, 305-306). Mr. Thysell testified next that he took his rifle with him towards the pickup so he could get some sleep and keep an eye out for theft. (RP 269-270, 278-279).

Mr. Thysell did not realize law enforcement was on his property when they arrived. (RP 270). He testified he did not see the red and blue lights, and he had a flashlight and the rifle when he walked outside and saw the bright lights coming up the driveway. (RP 270-271, 291, 294, 305). It was around midnight, and because he had no idea who was coming up the driveway, he decided to confront the situation. (RP 271, 291-292). He testified his wife Lisa put herself on his rifle. (RP 271). He could not hear anything—he could only hear the generator. (RP 271-272, 294, 298, 302, 304). He kept looking around and finally happened to see the faded star on the side of

the vehicle, and realized it was law enforcement. (RP 272, 300). Mr. Thysell let go of the firearm. (RP 272). He did not realize it was law enforcement until just before he let go of the rifle. (RP 299-302). Mr. Thysell admitted he resisted arrest because he did not think he had done anything wrong. (RP 272, 302, 306). He testified he did not point the gun at anyone. (RP 295, 298, 300, 310-311). Rather, he stated he was defending himself and thought someone was on his property that was not supposed to be there. (RP 307-309).

The jury was instructed on the self-defense instructions for use of lawful force:

It is a defense to the charges of Assault in the Second Degree . . . that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured or by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The use of force upon or toward the person of another is lawful when used in preventing or

attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

(CP 169); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02
(5th Ed).

...

A person is entitled to act on appearances in defending himself or another, if he believes in good faith and on reasonable grounds that he or another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

(CP 170); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.04
(5th Ed).

...

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be “not more than is necessary,” the law does not impose a duty to retreat. Retreat should not be considered by you as a “reasonably effective alternative.”

(CP 171); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.05
(5th Ed).

During closing argument, the State made the following remarks while addressing Mr. Thysell’s actions when law enforcement arrived at the residence:

And then, when law enforcement came, [Mr. Thysell] was gonna deal and confront that situation.

And, in confronting that situation, he committed a crime. Aimed a deadly weapon at Eric Anderson and put him in fear and apprehension of the death or serious bodily injury.

And the fact that he didn't pull the trigger only means that we're not here on a more serious charge. That's the only difference. If he'd pulled the trigger, it'd be something else. It might even be more tragic than this case already is.

(RP 351). Defense counsel did not object. (RP 351).

The jury found Mr. Thysell guilty of assault against Sergeant Anderson in the second degree with a firearm enhancement. (CP 180-181; RP 370).

Perhaps not finding Lisa's story credible or perhaps finding Mr. Thysell's use of force to defend himself against his wife was justified, the jury found Mr. Thysell not guilty of fourth degree assault against his wife. (CP 182; RP 370).

Mr. Thysell timely appealed. (CP 184-198).

E. ARGUMENT

Issue 1: Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by appealing to the passion and prejudice of the jury.

The State committed misconduct in its closing argument that was prejudicial and incurable by appealing to the passion

and prejudice of the jury. Specifically, the State committed misconduct by arguing that the situation could have been much more serious and tragic had Mr. Thysell pulled the trigger. (RP 351). The State’s argument improperly focuses on an appeal to the jury’s fears, and implies the jury should send a message by finding the defendant guilty. Mr. Thysell’s conviction should be reversed and the case remanded for a new trial.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor's statements are improper.”); *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (stating “[a]llegedly improper arguments

should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.”).

If the defendant fails to properly object to the misconduct, “a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.” *State v. O’Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761 (*quoting Thorgerson*, 172 Wn.2d at 455). “Reviewing courts should focus less on whether the prosecutor's misconduct

was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

Here, without objection from defense counsel, the State argued the following in its closing argument:

And then, when law enforcement came, [Mr. Thysell] was gonna deal and confront that situation.

And, in confronting that situation, he committed a crime. Aimed a deadly weapon at Eric Anderson and put him in fear and apprehension of the death or serious bodily injury. And the fact that he didn't pull the trigger only means that we're not here on a more serious charge. That's the only difference. If he'd pulled the trigger, it'd be something else. It might even be more tragic than this case already is.

(RP 351).

Prejudicial error occurs when it is clear the prosecutor is expressing a personal view rather than arguing an inference from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 Wn.2d 221 (2006); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

A prosecutor's arguments calculated to appeal to the jurors' passion and prejudice and encourage them to render a verdict on facts not in evidence are improper. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *see also State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (counsel may not “make prejudicial statements that are not sustained by the record.”). “[B]ald appeals to passion and prejudice constitute misconduct.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *Belgarde*, 110 Wn.2d at 507–08). “[T]he prosecutor's duty is to ensure a verdict free of prejudice and based on reason.” *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (internal citations omitted) (citing *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968)). The State “engages in misconduct when making an argument that appeals to jurors’ fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict. . . [l]ikewise, inflammatory remarks, incitements to vengeance, exhortations to join a war against

crime or dugs, or appeals to prejudice or patriotism are forbidden.” *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006). The State may draw reasonable inferences from the evidence but “a prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant not guilty.” *Id.* at 916.

Here, the prosecutor used an inflammatory argument which appealed to the passion and prejudice of the jury, rather than the evidence presented at trial: the prosecutor argued that if Mr. Thysell pulled the trigger the case would be even more serious, which was used to send a message and provide an additional ground upon which to find him guilty. (RP 351). This was misconduct. The argument incites fear in the jury and makes the inflammatory suggestion that because this situation could have been worse, a guilty verdict is necessary. (RP 351).

While defense counsel did not object to the prosecutor’s improper statement, no curative instruction would have neutralized the comments the prosecutor made to the jury. (RP

351). The key issue at trial for the jury was whether Mr. Thysell intended to assault the sergeant despite his claim of self-defense. Under these circumstances, the prejudice from arguing the situation could have been much worse had Mr. Thysell pulled the trigger would not have been cured by an instruction.

The evidence was not overwhelming that Mr. Thysell intended to assault the sergeant. The defense theory was that Mr. Thysell was unaware law enforcement was coming to his residence and he came out with his gun to defend his property from anyone hoping to steal from him. (CP 169-171; RP 258, 265, 274, 307-309). Mr. Thysell suspected theft of gasoline from his vehicles the night before and thought someone was there to steal from him again. (RP 258, 265, 274, 307-309). The incident occurred in the dark, late at night and around midnight. (RP 187; State's Ex. 2). Mr. Thysell could not hear the sergeant's commands to drop the gun because of the running generator and his own difficulty hearing, anyway. (RP

271-272, 294, 298, 302, 304). He did not see the short flash of red and blue lights as the sergeant approached his home. (RP 270-271, 291, 294, 305). Mr. Thysell had been drinking and also was likely sleep-deprived since he had been up late and woken early to assist his step-daughter. (RP 255-256). Mr. Thysell did not realize Lisa had called 911—in fact, she told him she did not. (RP 234; State’s Ex. 1 at 19:55 to 20:06). He planned to sleep in his pickup truck and took his gun with him to keep an eye on his property. (RP 265, 269-270, 278-279). Mr. Thysell did not realize law enforcement was at the scene until he saw the star on the sergeant’s vehicle, and then he dropped the gun. (RP 272, 299-302). All these factors were supportive of Mr. Thysell’s defense: that he used lawful force to defend his property and he had a good faith belief for doing so, as he did not know law enforcement was at his home. (CP 169-171). The evidence shows Mr. Thysell was concerned about defending his property from intruders and theft. It is reasonable for a juror to conclude Mr. Thysell was lawfully

defending his property, despite there not being any actual danger. (CP 170).

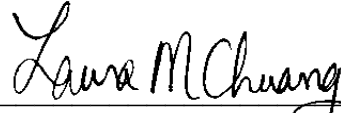
The State committed misconduct in its closing argument that was prejudicial and incurable, by arguing that Mr. Thysell could have shot and killed Sergeant Anderson, thereby improperly appealing to the jury's emotions. The misconduct had a substantial likelihood of affecting the verdict. This Court should reverse Mr. Thysell's conviction and remand the case for a new trial.

F. CONCLUSION

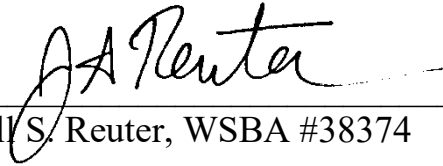
Mr. Thysell's conviction for assault in the second degree should be reversed and remanded for a new trial due to prosecutorial misconduct.

I certify this document contains 3,718 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of May, 2022.



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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
Respondent)	
vs.)	COA No. 38515-9-III
)	
ROBERT TODD THYSELL, SR.,)	
)	PROOF OF SERVICE
)	
<u>Defendant/Appellant</u>)	

I, Laura M. Chuang, of counsel to the assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 11, 2022, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant’s opening brief to:

Robert Todd Thysell, Sr. DOC No. 430278
Coyote Ridge Corrections Center
PO Box 769
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Having obtained prior permission, I also served a copy on the Respondent at paappeals@klickitatcounty.org using the Washington State Appellate Courts’ Portal.

Dated this 11th day of May, 2022.

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