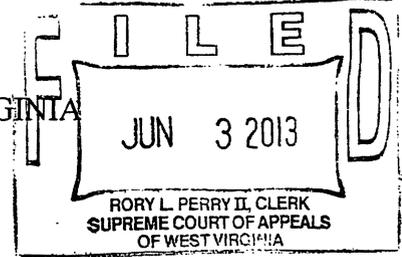


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,
Plaintiff Below,

Respondent,

v.

Supreme Court No. 12-1487

Circuit Court No. 12-F-87
(Fayette County)

THOMAS L. FITZWATER,
Defendant Below,

Petitioner.

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

Instead of arguing the evidence in this typical drug case, the prosecutor used his initial closing argument to tell the jury how bad the drug problem is in West Virginia, how sick he is of it, and that the only way to combat the problem rested with the jury. This prosecutorial misconduct, asking the jury to find Petitioner Thomas Fitzwater (Mr. Fitzwater) guilty to protect the safety of the community, denied Mr. Fitzwater his due process rights to a fair trial.

On January 13, 2012, Mr. Fitzwater was stopped by Deputy William Callison, Fayette County Sheriff's Office, when the latter noticed in his rearview mirror Mr. Fitzwater's third brake light in his window was not working, after Mr. Fitzwater passed him. (A.R. Vol. II, 51, 53).¹ Deputy Callison was patrolling in the Meadow Bridge area as part of "saturation patrols" in which several deputies patrolled the area to try to solve two home invasion crimes which had occurred. (A.R. Vol. II, 52). Deputy Callison testified that during these patrols they would initiate a traffic stop on any vehicle they could find probable cause, to obtain information to help solve these crimes. (A.R. Vol. II, 52).

After stopping Mr. Fitzwater, Deputy Callison said Sergeant Gray advised him he (Sergeant Gray) had "intelligence" on Mr. Fitzwater. (A.R. Vol. II, 54-55). Deputy Callison had his trained drug dog "Boss" circle Mr. Fitzwater's car and the dog gave a positive indication on the passenger door for the presence of narcotics. (A.R. Vol. II, 56-58). Deputy Callison searched the car and found behind the passenger seat 100 blue pills and 50 red pills in a plastic baggie inside a brown paper bag. (A.R. Vol. II, 58-59, 65). According to Deputy Callison, Mr. Fitzwater said the pills were ibuprofen and Viagra pills. (A.R. Vol. II, 59). When the pills were

¹ Pages in the Appendix Record, which was agreed to by the parties, will be cited as: A.R. Vol. #, Page #.

tested by a State Police chemist, they were determined to be oxycodone, a Schedule II narcotic. (A.R. Vol. II, 76).

Mr. Fitzwater was indicted for two counts of possession with intent to deliver a Schedule II narcotic controlled substance. (A.R. Vol. I, 1). However, because one of the counts of the indictment alleged the substance was oxycontin, a derivative of oxycodone, the trial court dismissed that count before trial because oxycontin is not listed as a Schedule II drug.

At Mr. Fitzwater's jury trial in the Fayette County Circuit Court, the State presented the above evidence to prove Mr. Fitzwater possessed the oxycodone pills with intent to deliver. Besides Mr. Fitzwater's possession of the pills, the State did not present any other evidence to show he had an intent to deliver the pills to other people, such as possession of cash, A.R. Vol. II, 65, scales or measuring devices, baggies used for distribution, business records or other paraphernalia customarily used in the packaging and delivery of controlled substance. Defense counsel moved for acquittal due to the absence of such evidence, but the motion was denied. (A.R. II, Vol. 94-97).

During the State's initial closing argument, the prosecutor told the jury:

MR. HARRAH: Ladies and gentlemen, there's a black cloud over the State of West Virginia. We see it every single day. Every day. With our family members, our close friends, we see it every single day. This black cloud has traveled across the State of West Virginia where we live, it's dark. It's dark.

It's dark, and it's more powerful than any storm that we experienced here in West Virginia in early July and late June. Those storms don't - - they didn't kill people. This storm that we battle every single day in this state kills people. It kills our families, it kills our friends, it kills the folks we went to high school with. I'm sick of it.

You get asked in this job that I do all the time, what are we going to do? What are we going to do about this problem that is killing a generation of people? It makes them break into homes. It makes them steal. First they steal from their families, and then they steal from others, people they don't know. What are we

going to do about this problem, about this poison that's being sold to our kids, our family members and our friends? What are we going to do about it?

And I tell them it's difficult. It's not an easy fix to this problem that we have. The only way to combat this problem, to get this poison off our streets is right here with you, the twelve of you. The twelve of you. That's how we combat the problem here in the United States of America. It rests with you.

It kills every single day. You open the newspaper, you look in there and, sure enough, you're going to see somebody from the ages of --

MR. ADKINS [defense counsel]: Your Honor, may we approach?

(A.R. Vol. II, 131-32).

At that point, defense counsel objected. At a sidebar, defense counsel told the trial court the prosecutor was not arguing guilt or innocence, but making "curing societal ills" and "make an example" arguments. (A.R. Vol. II, 133). Defense counsel contended such argument is improper, constituted prosecutorial misconduct, and moved for a mistrial. Id.

Before concluding his initial closing argument, the prosecutor returned to his improper argument. The prosecutor told the jury: "This is a felony crime; 150 pills of oxycodone poison that this man intended to distribute throughout our county. Here. It starts here with the twelve of you. That's where it starts." (A.R. Vol. II, 134-35).

At the conclusion of the trial, the jury found Mr. Fitzwater guilty of possession of a Schedule II substance with intent to deliver. On October 17, 2012, Mr. Fitzwater was sentenced to two (2) to thirty (30) years in prison.²

² The 1-15 year sentence for the offense in this case was doubled because Mr. Fitzwater had a prior federal drug conviction in 1994. (A.R. Vol. III, 7-8, 10).

SUMMARY OF ARGUMENT

The trial court abused its discretion in denying defense counsel's motion for mistrial as the prosecutor's highly improper closing argument made it extremely unlikely the jury could fairly decide Mr. Fitzwater's guilt or innocence. Thus, there was a manifest necessity for discharging the jury before the verdict.

The prosecutor, as a representative of the people who can exercise great influence over jurors, has a duty to deal fairly with the accused and not become a partisan, intent solely on conviction. A prosecutor further has a duty to seek a conviction based on the evidence and not upon passion, prejudice, or issues the jury has no right to consider. Finally, the prosecutor has a duty not to assert his personal opinion as to the justness of his cause. The prosecutor in this case violated all of these duties in his closing argument.

During closing argument, the prosecutor expressed his personal opinion as to the justness of his cause by describing how terrible the drug problem is in our state, how he is sick of it, and how the jury could combat the problem with their verdict. The prosecutor's improper argument satisfies the four prong test of Syl. Pt. 6, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995), for determining whether prosecutorial comments require reversal.

First, the prosecutor's inflammatory remarks clearly prejudiced Mr. Fitzwater by misleading the jury to convict him simply because West Virginia has a terrible drug problem, and that they should combat the drug problem and protect their community with their verdict. Secondly, the prosecutor's improper comments were extensive as they consumed half of the prosecutor's initial closing argument. Thirdly, although the State's case against Mr. Fitzwater was substantial, it was not overwhelming. While the jury could infer an intent to deliver from the amount of the drug Mr. Fitzwater possessed, the jury could also possibly find reasonable

doubt regarding the intent to deliver from the pills not being packaged for distribution, and the absence of scales or measuring devices, large sums of money, and records or other paraphernalia of the drug business. Finally, there can be no question the prosecutor's improper remarks were deliberately made to direct the jury's attention to an extraneous issue the jury had no right to consider in its deliberations — the state's terrible drug problem and the need to combat it to protect the safety of the community.

By this improper, highly inflammatory argument, the prosecutor sought Mr. Fitzwater's conviction based on emotion rather than evidence.

The trial court as well as this Court has a duty to protect Mr. Fitzwater's due process right to a fair trial when the prosecuting attorney's closing argument clearly goes beyond the bounds of propriety as it did in this case. There was therefore a manifest necessity for granting defense counsel's motion for mistrial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a), Revised Rules of Appellate Procedure, criteria because the decisional process would be significantly aided by oral argument. A Rule 20 argument should be scheduled because this case involves an issue of first impression: whether a defendant is denied his due process rights to a fair trial when the prosecutor makes an improper, prejudicial plea to the jury in closing argument to combat the drug problem in this state and protect the safety of the community with their verdict? In addition, a memorandum decision would not be appropriate as this case involves a substantial question of law and this Court should disagree with the lower court's ruling.

ARGUMENT

The Prosecutor's Improper, Prejudicial Pleas To The Jury In Closing Argument, To Combat The Drug Problem In This State And Protect The Safety Of The Community With Their Verdict, Denied Mr. Fitzwater A Fair Trial And Due Process Of Law.

The prosecutor in this case improperly used his influential position as representative of the people to tell the jury West Virginia has a serious drug problem and they should join him in combating it with their verdict. This highly inappropriate argument violated every guideline this Court has espoused for prosecutorial conduct during argument. Instead of dealing fairly with Mr. Fitzwater, the prosecutor took on the role of partisan, eager to convict, and enlisted the jurors as his compatriots in a war on drugs. The prosecutor sought a conviction by asserting his personal opinion as to the justness of his cause. This argument was further inflammatory as it appealed to the passions and prejudices of the jurors. Mr. Fitzwater's motion for a mistrial as a result of this argument was denied. Mr. Fitzwater was thereby denied his due process rights to a fair trial. U.S. Const. amend. XIV; W.Va. Const. art. III, §10.

Standard of Review

“The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard.” State v. Sharp, 226 W.Va. 271, 273, 700 S.E.2d 331, 333 (2010) (quoting State v. Lowery, 222 W.Va. 284, 288, 664 S.E. 2d. 169, 173 (2008)). Accord State v. Stephens, 206 W.Va. 420, 421, 525 S.E.2d 301, 302 (1999). In addition, “[t]he decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a ‘manifest necessity’ for discharging the jury before it has rendered its verdict.” Sharp,

226 W.Va. at 273-74, 700 S.E.2d at 333-34 (quoting State v. Williams, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983) (citations omitted)).

The Duties Of The Prosecutor

The law regarding the duties of the prosecutor has a long history in this State. In syllabus points three and four of State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977), this Court said:

3. The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.
4. The standard of fair and impartial presentation required of the prosecutor may become more elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged.

Accord State v. Hively, 103 W.Va. 237, 239, 136 S.E. 862, 863 (1927); Syllabus, State v. Moose, 110 W.Va. 476, 158 S.E. 715 (1931) ("State's attorney may prosecute vigorously so long as he deals fairly with accused, but should not become partisan intent solely on conviction; it is flagrant abuse of state's attorney's position to refer in argument to material facts outside record or not fairly deducible therefrom.").

In State v. Hamrick, 216 W.Va. 477, 481, 607 S.E.2d 806, 810 (2004), the Court noted that Justice Starcher "fittingly observed that '[a] prosecuting attorney is not just an officer of the court, like every attorney, but is also a high public officer charged with representing the people of the State.'" (quoting State v. Swafford, 206 W.Va. 390, 398, 524 S.E.2d 906, 914 (1999) (Starcher, J., concurring)). The Hamrick Court further quoted Justice Starcher regarding the prosecutor's great influence on jurors and duty of fairness:

Wearing the cloak of the office, a prosecutor can therefore usually exercise great influence upon jurors. Because of this, the conduct and language of the prosecutor in a trial in which the accused's liberty is at stake should be forceful but fair, based upon the evidence, and not directed towards gaining a conviction through the aid of passion, prejudice or resentment.

Id. Accord State v. Guthrie, 194 W.Va. 657, 681 n. 32, 461 S.E. 2d 163, 187 n. 32 (1995). See State v. Moss, 180 W.Va. 363, 368, 376 S.E.2d 569, 574 (1988) (reversing conviction where prosecutor appealed to passions and prejudices of jurors).

The Court has further stated that “[i]t is improper for a prosecutor in this State to ‘(A)ssert his personal opinion as to the justness of a cause, as to the credibility of a witness... or as to the guilt or innocence of the accused...’ ABA Code DR7-106 (C) (4) in part.” Syl. Pt. 3, State v. Critzer, 167 W.Va. 655, 280 S.E.2d 288 (1981). Accord Rule 3.4, West Virginia Rules of Professional Conduct; Syl. Pt. 2, Hamrick, 216 W.Va. 477, 607 S.E.2d 806.

Finally, the prosecutor has a duty not to raise issues with the jury it has no right to consider:

The privilege of addressing the jury should never be taken as a license to state, or to comment upon, or to suggest that the jury draw an inference from, facts not in evidence, or for that matter to raise issues which a jury has no right to consider—issues such as race, religion, economic status, the accused's exercise of a constitutional right, or some other issue designed to encourage jurors to act with an improper motive.

Swafford, 206 W.Va. at 398, 524 S.E.2d at 914 (Starcher, J., concurring). The prosecutor violated all of these duties during his closing argument in this case.

The Prosecutor's Prejudicial Comments Were Highly Inflammatory And An Assertion Of His Personal Opinion As To The Justness Of His Cause

During his initial closing argument, the prosecutor made a very prejudicial plea to the jury to protect the safety of the community, by joining him in combating the drug problem in this state, which clearly appealed to the passions and prejudices of the jury:

MR. HARRAH [prosecutor]: Ladies and gentlemen, there's a black cloud over the State of West Virginia. We see it every single day. Every day. With our family members, our close friends, we see it every single day. This black cloud has traveled across the State of West Virginia. When you come here to southern West Virginia where we live, it's dark. It's dark.

It's dark, and it's more powerful than any storm that we experienced here in West Virginia in early July and late June. Those storms don't – they didn't kill people. This storm that we battle every single day in this state kills people. It kills our families, it kills our friends, it kills the folks we went to high school with. I'm sick of it.

You get asked in this job that I do all the time, what are we going to do? What are we going to do about this problem? What are we going to do about this problem that is killing a generation of people? It makes them break into homes. It makes them steal. First they steal from their families, and then they steal from others, people they don't know. What are we going to do about this problem, about this poison that's being sold to our kids, our family members and our friends? What are we going to do about it?

And I tell them it's difficult. It's not an easy fix to this problem that we have. The only way to combat this problem, to get this poison off our streets is right here with you, the twelve of you. The twelve of you. That's how we combat the problem here in the United States of America. It rests with you.

It kills every single day. You open the newspaper, you look in there and, sure enough, you're going to see somebody. You're going to see somebody from the ages of—

(A.R. Vol. II, 131-32). Defense counsel objected, arguing that this was prosecutorial misconduct as the prosecutor was not arguing guilt or innocence, but instead was making a “curing societal ills” argument. (A.R. Vol. II, 133). Although the trial court sustained defense counsel's objection, the court denied counsel's motion for a mistrial. (A. R. Vol. II, 133).

After denial of the motion for mistrial, the prosecutor reiterated his theme that the jury could combat the drug problem and protect the safety of the community with their guilty verdict:

This is a felony crime. It is not a misdemeanor crime. This is a felony crime; 150 pills of oxycodone poison that this man intended to distribute throughout our county. Here. It starts here with the twelve of you. That's where it starts.

(A.R. Vol. II, 134-35).

These arguments by the prosecutor injected a highly improper factor into the jury's consideration of the evidence. The jury was effectively urged to find Mr. Fitzwater guilty to combat the drug problem and protect the safety of the community. This Court has found similar arguments impermissible. See State v. Hottinger, 194 W.Va. 716, 722, 461 S.E.2d 462, 468 (1995) (expressing confidence that kids in the community are going to be protected from incidents like this in the future by guilty verdict); State v. Smith, 190 W.Va. 374, 382, 438 S.E.2d 554, 562 (1993) (remarks about what the defendant might or might not do on some later occasion); Moss, 180 W.Va. at 368, 376 S.E.2d at 574 (asking jury to return guilty verdict so the defendant could never be released to slaughter the women and children of Kanawha County).

The Prosecutor's Misconduct Requires Reversal

In Syl. Pt. 6, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995), Justice Cleckley set forth the four-prong test currently used to determine whether prosecutorial comment is so egregious as to require reversal:

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Accord State v. Stephens, 206 W.Va. 420, 426-27, 525 S.E.2d 301, 307-08 (1999).

Application of the Sugg factors to this case demonstrates the prosecutor's closing arguments were egregious, prejudicial, and denied Mr. Fitzwater a fair trial. First, the prosecutor's remarks had a substantial tendency to mislead the jury and to prejudice Mr. Fitzwater. "[C]ounsel must keep within the evidence, [and] not make statements calculated to

inflare, prejudice or mislead the jury [.]” Syl. Pt. 2, State v. Kennedy, 162 W.Va. 244, 249 S.E.2d 188 (1978). Accord Syl. Pt. 7, State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988). See also Guthrie, 194 W.Va. at 681 n.32, 461 S.E.2d at 187 n.32 (“With uniform regularity, we have held that counsel should not be permitted to appeal to the jury’s passions and prejudices.”).

There can be little question the prosecutor’s dramatic remarks about the black cloud, i.e., drug problem, over West Virginia, described as poison being sold to and killing our kids, our families, and friends, were extremely inflammatory. Further appealing to the jurors’ passions and prejudices, the prosecutor implored the jury to combat the drug problem with their verdict. These comments effectively urged the jury to find Mr. Fitzwater guilty because West Virginia has a terrible drug problem and that is the only way to stop it.

In addition to being very inflammatory, these statements were also prejudicial because they violated the “strict prohibition against a prosecuting attorney interjecting his personal opinion in the trial of a case.” State v. Critzer, 167 W.Va. 655, 660, 280 S.E.2d 288, 292 (1981). It is improper for a prosecutor to “assert his personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused.” Id. Accord Syl. Pt. 2, Hamrick, 216 W.Va. 477, 607 S.E.2d 806; ABA Code DR7-106(C) (4), in part. See also England, 180 W.Va. at 351, 376 S.E.2d at 557 (“the purpose of the *Critzer* rule is to prevent the use of a prosecutor’s *status* as a means to bolster credibility.”). Likewise, a prosecutor should not be permitted to use his status to express his personal opinions about the justness of his cause, which the prosecutor did here when he said the drug problem is killing people, causing people to commit crimes, and that “I’m sick of it.” (A.R. Vol. II, 132). The prosecutor further did so when he told the jury “[t]he only way to combat this problem, to get this poison off our

streets is right here with you, the twelve of you. The twelve of you. That's how we combat the problem here in the United States of America. It rests with you." (A.R. Vol. II, 132).

This argument clearly crossed the line of fair prosecutorial argument. See Guthrie, 194 W.Va. at 679, 461 S.E.2d at 185 (“ The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury’s verdict.’ Standard 3-5.9 further advises: ‘It is unprofessional conduct for the prosecutor to intentionally to refer to or argue on the basis of facts outside the record.’” (quoting Standards 3-5.8(d) and 3-5.9, A.B.A. Standards for Criminal Justice (2nd ed. 1980)).

Other courts have condemned similar arguments by prosecutors urging jurors to combat the drug problem by finding the defendant guilty. In U.S. v. Solivan, 937 F.2d 1146, 1153-54 (6th Cir. 1991), the Sixth Circuit found such an argument “extremely prejudicial and harmful to the constitutional right to a fair trial.” Id. at 1153-54.

Here, defendant’s constitutional right to a fair trial was violated because the appeal to the community conscience in the context of the War on Drugs prejudicially impacted on her. The fear surrounding the War on Drugs undoubtedly influenced the jury by diverting its attention away from its task to weigh the evidence and submit a reasoned decision finding defendant guilty or innocent of the crimes with which she was charged. The substance of the statements made by the prosecutor in this case were designed, both in purpose and effect, to arouse passion and prejudice and to inflame the jurors’ emotions regarding the War on Drugs by urging them to send a message and strike a blow to the drug problem.

Id. at 1153. Accord State v. Ramos, 263 P. 3d 1268, 1273, 1275 (Wash. App. 2012) (prosecutor urged jury to convict defendant to eliminate drug dealing at particular location); Hill v. State, 734 A. 2d 199, 202 (Md. 1999) (prosecutor told jurors they had responsibility to keep their community safe from people like defendant who was charged with gun and drug offenses); U.S. v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992) (prosecutor exhorted jurors to “stand as bulwark

against the continuation of what [the defendant] is doing on the street, putting this poison on the streets.") (emphasis added); State v. Holmes, 604 A.2d 987, 989 (N.J. App. 1992) (prosecutor's statements to jurors about the drug problem in this country, and in Newark, New Jersey, and the "war on drugs" were "nothing less than a call to arms which could only have been intended to promote a sense of partisanship incompatible with their duties."); Arrieta-Agressot v. U.S., 3 F.3d 525, 527 (1st Cir. 1993) (prosecutor repeatedly urged jury to view this case as a battle in the war against drugs and the defendants as enemy soldiers; and that drugs were poisoning "our children" and corrupting society). State v. Monroe, 236 N. W.2d 24, 30 (Iowa 1975) (prosecutor urged jurors to return guilty verdict to protect local children from involvement in drug culture); State v. Liberte, 521 S.E.2d 744, 746 (S.C. 1999) (prosecutor asked jurors to consider whether instructions on reasonable doubt were being used as a sword to attack law enforcement and "people who are trying to keep drugs off our streets.").

As to the second Sugg factor, the prosecutor's improper comments were quite extensive. They made up half of the prosecutor's entire initial closing argument. See A.R. Vol. II, 131-35. The prosecutor even returned to his prejudicial theme at the conclusion of his initial closing argument when he asserted: "This is a felony crime; 150 pills of oxycodone poison that this man intended to distribute throughout our county. Here. It starts here with the twelve of you. That's where it starts." (A.R. Vol. II, 134-35). Thus, the prosecutor's remarks "were neither isolated nor fortuitous and can only be viewed as a calculated strategy [.]'" Stephens, 206 W.Va. at 427, 525 S.E.2d at 308 (quoting State v. Oxier, 175 W.Va. 760, 764, 338 S.E.2d 360, 364 (1985)). Therefore, "the probable cumulative effect upon the jury cannot properly be disregarded as inconsequential." State v. Kanney, 169 W.Va. 764, 766, 289 S.E.2d 485, 487 (1982).

Regarding the third Sugg factor, absent the prosecutor's remarks, the State had a substantial case against Mr. Fitzwater, but it was by no means overwhelming. See Stephens, 206 W.Va. at 427, 525 S.E.2d at 308, where the Court made the same finding as to the strength of the State's case but still reversed the conviction due to the prosecutor's improper argument. Here, the State had evidence Mr. Fitzwater was in possession of 150 oxycodone pills, but had no other evidence he intended to distribute them to anyone. In his motion for acquittal, defense counsel argued Mr. Fitzwater had in his possession no other evidence of an intent to distribute, such as a large amount of cash, IOUs, digital scales, small plastic bags to package drugs, individual packages of drugs, or evidence of an actual transaction. (A.R. Vol. II, 94-95).

The trial court instructed the jury the State had the burden to prove beyond a reasonable doubt that Mr. Fitzwater intentionally possessed the oxycodone with intent to deliver it to another person or persons. (A.R. Vol. II, 127). The trial court further instructed the jury that the element of intent to deliver could be inferred from the following circumstances:

- (1) the manner in which the controlled substances are packaged,
- (2) the presence of weighing scales, measuring devices,
- (3) the presence of large sums of money,
- (4) the presence of business records or other paraphernalia customarily used in the packaging and delivery of controlled substances, and
- (5) the amount of the controlled substance.

(A.R. Vol. II, 127-28). See Syl. Pt. 4, State v. Drake, 170 W.Va. 169, 291 S.E.2d 484 (1982).

Because the State only had evidence of one of these circumstances, the amount of the controlled substance, the jury, absent the prosecutor's improper argument, may have concluded there was a reasonable doubt that Mr. Fitzwater intended to distribute the drug. In other words, due to the pills not being packaged for distribution, and the absence of any scales or measuring devices, large sums of money, and business records or other paraphernalia indicating Mr. Fitzwater was a drug dealer, the jury could have concluded, absent the prejudicial argument,

there was a reasonable doubt as to the element of an intent to distribute. See State v. Eiseman, 461 A. 2d 369, 381, 383 (R.I. 1983), *abrogated on other grounds*, Horton v. California, 496 U.S. 128, 110 S.Ct. 2301 (1990) (Rhode Island Supreme Court found that the absence of scales, diluting substances or packaging materials negated an intent to distribute over \$4000 worth of cocaine found in the defendant's possession). Cf. State v. Smith, 190 W.Va. 374, 383, 438 S.E.2d 554, 563 (1993) (finding sufficient evidence to support conviction for possession of marijuana with intent to deliver where marijuana, baggies, scales, and envelope of cash found in defendant's car). Thus, the prosecutor's inflammatory, prejudicial comments likely affected the jury's verdict.

The last Sugg factor shows the prosecutor's comments were deliberately placed before the jury to direct its attention to extraneous matters, i.e., the horrendous drug problem in West Virginia and the need to combat it and protect the safety of the community. This Court has noted:

It is important to recognize that the unfair prejudice to the defendant that is at issue in such cases is not the result of inadvertence or even neglect by the prosecution — such as a witness blurting out improper evidence. Rather, there is a choice by a prosecutor to use an argument that has been universally determined to be improper, in more than 100 years of jurisprudence. If such an argument by a prosecutor has a substantial likelihood of being considered to be readily curable or harmless, the disincentive to choose to use the tactic will be minimal. In such circumstances, for a trial court or appellate court responding to a prosecutor's use of such an argument, the balance must be struck on the side of deterring the use of this tactic, and insuring that such an argument does not infect the jury that decides a defendant's fate, even if a mistrial is the only available choice.

Stephens, 206 W.Va. at 427 n.6, 525 S.E.2d at 308 n.6. The prosecutor's inflammatory, prejudicial comments in this case concerned matters that should not have been before the jury and cannot be seen as anything other than deliberate. That is, “[t]he prosecutor's manifest purpose could only have been to influence the minds of the jury in order to gain a conviction

based on emotions rather than evidence.” Critzer, 167 W.Va. at 661, 280 S.E.2d at 292. See also State v. Summerville, 112 W.Va. 398, 404, 164 S.E. 508, 511 (1932) (“The rule of law is well-settled that an attorney through undue ardor to secure a conviction in accordance with his desires has no right to stir up the passion and prejudice of the jury by referring to matters irrelevant or facts not in proof.”).

The above analysis of the Sugg factors demonstrates there was a manifest necessity for the trial court to grant a mistrial. The trial court therefore abused its discretion in denying defense counsel’s motion. See Stephens, 206 W.Va. at 425, 525 S.E. 2d at 306 (“A judgment of conviction will be reversed because of improper remarks made by a prosecuting attorney to a jury that clearly prejudice the accused or result in manifest injustice.”). This Court has repeatedly held that the trial court has a duty to independently protect the accused’s right to a fair trial free from improper remarks by the prosecutor:

We do not say that every improper remark is a proper basis for a mistrial. However, we do not think that an improper remark should be lightly treated by a trial court. If the remark has the potential of prejudicing the defendant, a mistrial should be seriously considered by the court, and at the very least, the court, in the exercise of discretion, should do everything reasonably possible to obliterate any such prejudicial influence. (emphasis added).

Moss, 180 W.Va. 363, 368, 376 S.E.2d 569, 574 (1988) (quoting State v. Myers, 159 W.Va. 353, 362, 222 S.E.2d 300, 306 (1976)). This Court has further stated that “when a prosecuting attorney’s closing argument clearly goes beyond the bounds of propriety, the trial court has a duty to intervene to limit and to attempt to correct any impropriety in the interest of ensuring that the defendant receives a fair trial.” Kanney, 169 W.Va. at 766, 289 S.E.2d at 487. Accord State v. Grubbs, 178 W.Va. 811, 818, 364 S.E.2d 824, 831 (1987) (quoting Kanney and Myers for the same proposition). While the trial court sustained defense counsel’s objection in this case, it did not instruct the jury to disregard the prosecutor’s improper argument.

Moreover, in addition to the trial court, this Court is required to independently intervene in such a situation. Justice Cleckley reminded the Supreme Court of Appeals of West Virginia in Guthrie that:

[T]his Court is obligated to see that the guarantee of a fair trial under our Constitution is honored. Thus, only where there is a high probability that an error did not contribute to the criminal conviction will we affirm. “High probability” requires that this Court possess a “sure conviction that the error did not prejudice the defendant.”

Guthrie, 194 W.Va. at 685, 461 S.E.2d at 191 (citation omitted).

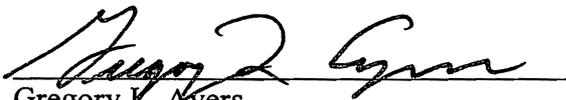
The cumulative effect of the prosecutor’s highly inflammatory, prejudicial comments during closing arguments severely prejudiced Mr. Fitzwater. The prosecutor effectively persuaded the jury to return a guilty verdict to combat our state’s drug problem and protect the safety of the community. Since, as shown above, these are impermissible factors in the jury’s consideration of guilt or innocence, their prejudicial effect on the jury in this case denied Mr. Fitzwater his state and federal due process rights to a fair trial. U.S. Const. amend. XIV; W.Va. Const. art. III, §10.

CONCLUSION

For the above reasons, Petitioner Thomas Fitzwater respectfully requests the Court to reverse his conviction and sentence and remand his case to the Circuit Court for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on this 3rd day of June, 2013, a copy of the foregoing Petitioner's Brief and the Appendix Record were sent via U.S. Mail to counsel for respondent, Marland Turner, Assistant Attorney General, Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25301.


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