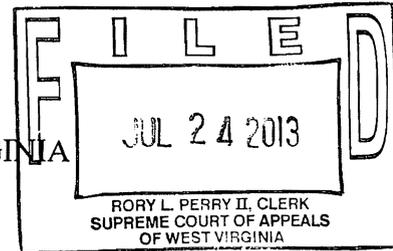


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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 REPLY BRIEF

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REPLY 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.

In defending the trial court's refusal to grant a mistrial in this case, the State does not argue the prosecutor's closing argument (1) was not inflammatory, (2) did not appeal to the passions and prejudices of the jury, (3) only contained facts or issues the jury had every right to consider, or (4) did not violate the prosecutor's duty not to assert his personal opinion as to the justness of his cause. The State did not make these arguments because it could not. There can be no doubt the prosecutor's remarks — describing the drug problem in West Virginia as poison being sold to our kids and killing our families and friends, a generation of people, and causing people to steal and commit crimes — were extremely inflammatory. (A.R. Vol. II, 131-32). There further can be little question the prosecutor's comments, "I am sick of it[.]" A.R. Vol. II, 132, and the only way to combat this problem is with the jury's verdict, A.R. Vol. II, 132, were not only inflammatory but an expression of the prosecutor's personal opinion as to the justness of his cause. See Petitioner's Brief, at 7-16, for discussion of how these comments violated the prosecutor's ethical and professional duties.

Instead, the State argues the prosecutor's comments were not prejudicial. Brief in Response to the Petitioner's Brief (State's Brief) 6. Mr. Fitzwater strongly disagrees. To support its argument, the State cites Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464 (1986), a death penalty case where the prosecutor in closing argument described the defendant, *inter alia*, as an "animal" and wished he had been killed. State's Brief 9. While the Supreme Court found the prosecutor's argument offensive and improper, the Court found the defendant was not denied a fair trial because much of the prosecutor's argument was invited by or responsive to the

defense summation, the trial court instructed the jury several times that the arguments of counsel were not evidence, and the evidence of guilt was “overwhelming.” Id. at 182, 106 S.Ct. at 2472. The State’s reliance on Darden is misplaced since there is a much stronger likelihood the jury’s verdict in this case was influenced by the prosecutor’s improper argument.

It is significant that the State failed to cite or address the eight (8) state and federal cases in Mr. Fitzwater’s brief, at 12-13, all of which reversed convictions for arguments similar to those made in this case. As stated by Maryland’s highest court, “[c]ourts throughout the country have condemned arguments of that kind, which are unfairly prejudicial and risk diverting the focus of the jury away from its sole proper function of judging the defendant on the evidence presented.” Hill v. State, 734 A. 2d 199, 209-10 (Md. 1999). Rather than addressing these cases, the State cites two intermediate appellate court cases from Georgia and Missouri indicating a prosecutor is allowed to comment on the prevalence of crime, the necessity for law enforcement, and the evils which may occur when a jury fails in its duty. State’s Brief 7-8.

In U.S. v. Solivan, 937 F.2d 1146 (6th Cir. 1991), a case discussed at page 12 of Mr. Fitzwater’s initial brief, the Sixth Circuit noted that appeals to the jury to act as the community conscience are not per se impermissible “[u]nless calculated to invite the passions and prejudices of the jurors[.]” Id. at 1151. As demonstrated in this case, the prosecutor’s closing argument was clearly calculated to do just that.

The State asserts that none of the grounds for this Court’s reversal of the conviction in State v. Critzer, 167 W.Va. 655, 280 S.E. 2d 288 (1981), due to prosecutorial misconduct in closing argument, are present here. The State is incorrect. First, the Critzer Court, id. at 659, 280 S.E. 2d at 292, noted the prosecutor injected his personal opinion as to the defendant’s guilt, whereas the prosecutor in this case vented his personal opinion as to West Virginia’s horrendous drug problem explaining, “I’m sick of it.” (A.R. Vol. II, 132). Secondly, the prosecutor in

Critzer, id., argued facts not in evidence just as the prosecutor here did when he talked about the drug problem in West Virginia that kills our families, our friends, a generation of people, and makes them commit crimes. (A.R. Vol. II, 131-32). Moreover, what the Court said about the prosecutor's improper argument in Critzer is also pertinent to this case: "The prosecutor's manifest propose could only have been to inflame the minds of the jury in order to gain a conviction based on emotions rather than evidence." Critzer, 167 W.Va. at 659, 280 S.E.2d at 292.

The State further claims "[t]his Court has consistently refused to reverse convictions on the ground argued in support of the present petition." State's Brief 10. The State's claim is simply not true since the issue presented in this case is one of first impression, as stated in Petitioner's Brief, at 5.

The State argues that none of the four factors this Court used in Syl. Pt. 6, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995), to determine whether prosecutorial comments require reversal, are present here. State's Brief 11. The State makes this assertion without even discussing the Sugg factors, save one, the strength of the evidence introduced to establish Mr. Fitzwater's guilt. See discussion of these four factors in Petitioner's Brief, at 10-16. Regarding the strength of the evidence, Mr. Fitzwater agrees with the State that the evidence of his possession of the pills was sufficient to convict. Mr. Fitzwater, however, is not challenging the sufficiency of evidence, but the extremely inflammatory, prejudicial argument that made it impossible for the jury to fairly consider and decide whether he had an intent to deliver or distribute the drugs in his possession. Thus, Mr. Fitzwater strongly disagrees with the State that the prosecutor's improper argument had no influence on the verdict. State's Brief 11. As Mr. Fitzwater noted in his opening brief, at 14, there was evidence of only one of the five circumstances from which intent to deliver could be inferred, i.e., the amount of the controlled

substance. See trial court's instructions, A.R. Vol. II, 127-28. Any chance the jury might consider the absence of the other factors favorably to Mr. Fitzwater and find him guilty of the lesser offense of possession was, as a practical matter, effectively destroyed by the prosecutor's improper argument which the State concedes was "veering in the dramatic." State's Brief 11. This is not a case where the evidence was so overwhelming there was no reasonable chance the prosecutor's improper argument influenced the guilty verdict. See discussion in Petitioner's Brief, at 14-15.

Since all the Sugg factors are present in this case, Mr. Fitzwater has shown he was clearly prejudiced by the prosecutor's intemperate remarks which resulted in manifest injustice, warranting a mistrial. See State v. Stephens, 206 W.Va. 420, 425, 525 S.E.2d 301, 306 (1999).

Lastly, the State argues the trial court's general instructions to the jury cured any prejudicial impact of the prosecutor's statements. State's Brief 12-13. Although Syl. Pt. 6, State v. Sugg, 193 W.Va. 388, 456 S.E. 2d 469, does not require consideration of jury instructions, even assuming, *arguendo*, their consideration, the trial court's instructions¹ in this case did not ameliorate or cure the harm caused by the prosecutor's improper arguments. There are several fundamental flaws in the State's argument. First, the most significant fallacy is that while the trial court sustained defense counsel's objection to the prosecutor's improper argument out of the presence of the jury, A.R. Vol. II, 133, the jury was never instructed to disregard the State's improper, incendiary argument. See, e.g., Critzer, 167 W.Va. at 661, 280 S.E. 2d at 292 ("No instructions were given to the jury telling them the prosecutor's comments were improper and that they should disregard them."); U.S. v. Johnson, 968 F. 2d 768, 772 (8th Cir. 1992)

¹ These general instructions told the jury the attorneys' arguments were not evidence, that their deliberations were to be based on the evidence, and that it is not the policy of the law to convict people on insufficient evidence in order to make examples of people to deter crime or satisfy public demand that crime be prevented. (A.R. Vol. II, 41, 42, 129).

(finding no curative instruction was given where similar prejudicial comments by prosecutor and that standard instructions were not sufficient to cure the error... “[s]uch a broadly sweeping rule would permit *any* closing argument no matter how egregious.” (citation omitted)); Sizemore v. Fletcher, 921 F.2d 667, 670 (6th Cir. 1990) (“when a prosecutor has made repeated and deliberate statements clearly designed to inflame the jury and prejudice the rights of the accused, and the court has not offered appropriate admonishments to the jury, we cannot allow a conviction so tainted to stand.”) See also U.S. v. Morsley, 64 F.3d 907, 913 (4th Cir. 1995) (“any prejudice to [the defendant] was effectively negated by the court’s curative instructions. *See United States v. Butera*, 677 F.2d 1376, 1383 (11th Cir. 1982) (“[p]rosecutorial misconduct can be considered harmless error where the district court gives an immediate curative instruction, and the evidence of the defendant’s guilt is overwhelming”), *cert. denied*, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed. 2d 958 (1983)); U.S. v. Solivan, 937 F. 2d 1146, 1157 (6th Cir. 1991) (“In cases where an admonition has been found to mitigate or remove the taint of prejudicial prosecutorial misconduct, the admonition has been swiftly given and firm.”).

Secondly, the trial court’s general instructions to the jury were delivered before the prosecutor’s improper argument.² Thus, without any subsequent curative instruction, the arguments of counsel were the last thing the jury heard before deliberating.

Finally, this Court has recognized that a curative instruction may not be able to “unring the bell” with respect to a very prejudicial prosecutorial argument. See Stephens, 206 W.Va. at 425-26, 525 S.E. 2d at 306-07. Accord State v. Summerville, 112 W.Va. 398, 406, 164 S.E. 508, 510-11 (1932) (finding trial court’s instructions to disregard prosecutor’s prejudicial arguments did not cure error).

² As indicated in the State’s Brief, at 13, the trial court’s instruction to the jury, that what the lawyers say in final arguments is not evidence, was given before the trial began. (A.R. Vol. II, 41).

In Solivan, 937 F. 2d at 1157, where the Sixth Circuit found prosecutorial comments very similar to those in this case to be reversible error, the court noted that “the statements were deliberately injected into the proceedings to inflame the jurors’ emotions and fears associated with the current drug epidemic that is reported daily in our newspapers and which threatens the very fabric of our society.” Thus, the court held “[t]he statements were so inflammatory in the context of the ongoing drug war that no charge could have sufficiently cured the prejudice.” Id. Accord State v. Ramos, 263 P. 3d 1268, 1275 (Wash. App. 2012). The same analysis is applicable here.

Therefore, the State’s contention the trial court’s general instructions cured the prosecutor’s highly prejudicial closing argument must be rejected.

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 24 day of July, 2013, a copy of the foregoing Petitioner's Reply Brief was sent via U.S. Mail to counsel for respondent, Laura Young, Assistant Attorney General, Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25301.


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