IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GREGG A. LOUGHBOM, Petitioner.	)	No. 97443-8 EN BANC Filed: August 20, 2020

YU, J. — We are asked to decide whether a prosecutor committed reversible error when they repeatedly invoked the phrase, "war on drugs" during a one-day jury trial, without objection by the defendant. We hold that the State's framing of Gregg Loughbom's prosecution as representative of the war on drugs denied Loughbom a fair trial and constitutes reversible error. Therefore, we reverse the Court of Appeals and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2017, Loughbom was charged with three counts of various drug crimes: count I, delivery of controlled substances acetaminophen and

hydrocodone; count II, delivery of controlled substance methamphetamine; and count III, conspiracy to deliver a controlled substance other than marijuana. These charges stemmed from two controlled drug buys conducted by a confidential informant (CI) on December 20 and 31, 2016. The information was later amended to include school zone enhancements for all three counts pursuant to RCW 69.50.435.

Loughbom's case proceeded to trial by jury on October 18, 2017. Five witnesses testified for the State, including the transportation director of the local school district, the two officers who arranged the controlled buys, the CI, and a lab technician. Loughbom presented no witnesses. The CI testified that he purchased methamphetamines directly from Loughbom during the first controlled buy and purchased hydrocodone and acetaminophen from an intermediary during the second controlled buy. He further testified that the intermediary received the pills from Loughbom.

During jury selection, the prosecutor asked, "Are there any among you who believe that we have a drug problem in Lincoln County?" He then commented, "Wow, okay. Just about every[one]," and followed with the question, "Is there anyone who feels that we don't?" 2 Verbatim Report of Proceedings (VRP) (Oct. 18, 2017) at 52-53. Thereafter, the prosecutor referenced the war on drugs three times:

1. During his opening statement, the prosecutor said, "The case before you today represents yet another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole. I've been tasked with presenting the evidence against the defendant, Gregg Loughbom[,] of the crimes of Delivery and Conspiracy to Deliver a Controlled Substance." *Id*. at 87.
2. The prosecutor began his closing argument by stating, "The case before you represented another battle in the ongoing war on drugs throughout our state and the nation as a whole. I have been tasked with presenting the evidence against the defendant, Gregg Loughbom, of the crimes of delivery of controlled substances . . . and conspiracy to deliver a controlled substance." 1 Narrative Report of Proceedings (NRP) (Oct. 18, 2017) at 183.[1]
3. During the State's rebuttal argument, the prosecutor stated that "law enforcement cannot simply pick and choose their CIs to be the golden children of our society to go through and try and complete these transactions as they go forward in the, like I said, the ongoing war on drugs in this community and across the nation." 2 VRP (Oct. 18, 2017) at 168.

[1] Due to a technical failure, approximately 103 minutes of trial audio were not recorded, including a portion of the lab technician's testimony, the State's entire closing argument, and much of Loughbom's closing argument. The NRP contains the parties' reconstruction of the prosecutor's closing argument. Pet. for Review at 4 n.1; Resp't's Answer to Pet. for Review at 3-4.

Loughbom did not object to any of these statements during trial.

The jury found Loughbom not guilty of count I (delivery of acetaminophen and hydrocodone) and guilty of counts II and III (delivery of methamphetamine and conspiracy to deliver a controlled substance other than marijuana.) In addition, the jury returned a special verdict form on count II finding that Loughbom delivered a controlled substance to a person within 1,000 feet of a school bus route stop. The trial court sentenced Loughbom to 40 months in prison and 12 months of community custody.

On direct appeal, Loughbom asserted for the first time that the prosecutor's repeated comments about the war on drugs constituted flagrant and ill intentioned misconduct. He also challenged his judgment and sentence on several other grounds that are not before this court. In an unpublished opinion, Division Three of the Court of Appeals affirmed the trial court, with one judge dissenting. *State v. Loughbom*, No. 35668-0-III, slip op. at 11 (Wash. Ct. App. June 4, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/356680_unp.pdf.

Loughbom filed a petition for review solely on the issue of prosecutorial misconduct, and we granted review. *State v. Loughbom*, 194 Wn.2d 1015 (2019).

ISSUE

Did the prosecutor's repeated references to the war on drugs constitute reversible error?

ANALYSIS

We presume prosecutors act impartially "in the interest of justice." *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). At the same time, we expect prosecutors to "'subdue courtroom zeal,' not to add to it, in order to ensure the defendant receives a fair trial." *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (quoting *Thorgerson*, 172 Wn.2d at 443). Justice can be secured only when a conviction is based on specific evidence in an individual case and not on rhetoric. We do not convict to make an example of the accused, we do not convict by appeal to a popular cause, and we do not convict by tying a prosecution to a global campaign against illegal drugs.

Loughbom contends that the prosecutor's multiple references to the war on drugs deprived him of a fair trial. To prevail on a prosecutorial misconduct claim, a defendant who timely objects to a prosecutor's conduct at trial must prove that the "conduct was both improper and prejudicial in the context of the entire trial." *Walker*, 182 Wn.2d at 477. However, when a defendant fails to object, as here, "the defendant must also show 'that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.'" *Id*. at 477-78

(quoting *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (plurality opinion)).

We agree with Loughbom and hold that the prosecutor's remarks about the war on drugs were improper and rise to the level of being flagrant and ill intentioned. The prosecutor's repeated invocation of the war on drugs was a thematic narrative designed to appeal to a broader social cause that ultimately deprived Loughbom of a fair trial. Accordingly, we reverse the Court of Appeals and hold that the prosecutor committed reversible error.

A. The prosecutor's repeated references to the war on drugs were erroneous

Over the course of Loughbom's one-day trial, the prosecutor asked the jury about the "drug problem in Lincoln County" and made three separate comments about the "ongoing war on drugs" during opening and closing arguments. The Court of Appeals held that these "repeated references to the war on drugs were imprudent, but ultimately fell short of misconduct." *Loughbom*, slip op. at 5.

This court has not previously confronted whether prosecutorial references to the war on drugs during trial constitutes error. However, there are four published Court of Appeals decisions that find similar rhetoric improper, and many federal courts agree. While not controlling, these decisions are persuasive. As an issue of first impression in this court, we hold that the prosecutor's multiple references to the war on drugs in a drug prosecution case amounted to reversible error.

Of the four Court of Appeals decisions rejecting references to the war on drugs, *State v. Echevarria* is the only case in which the prosecutor expressly invoked "the war on drugs" during trial. 71 Wn. App. 595, 597, 860 P.2d 420 (1993). There, the prosecutor appealed to the war on drugs several times during opening argument and "remarked that the jurors knew from the news the identities of the 'commanders' and 'generals' of the war on drugs." *Id*. at 596. The prosecutor further stated that "the trial would not be about these leaders, but rather about the 'enlisted men or the recruits' who become involved in drugs 'for the power or the money or the greed or peer pressure'" and made references to the "'battlefield of our own streets, our own neighborhoods and our own schools.'" *Id*. at 596-97. Ultimately, the Court of Appeals determined that these "repeated improper references to the war on drugs set the tone for the entire trial" and held that such comments deprived the defendant of a fair trial. *Id*. at 598.

Next, *State v. Neidigh*, 78 Wn. App. 71, 79, 895 P.2d 423 (1995), and *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006), include dicta stating that "exhortations to join the war against crime or drugs" are impermissible error. Although neither case involved an explicit invocation of the war on drugs, both reinforce our conclusion that appeals to the war on drugs during trial constitutes prosecutorial error.

Finally, *State v. Ramos* further supports a finding that appeals to the war on drugs are improper. 164 Wn. App. 327, 263 P.3d 1268 (2011). As with *Neidigh* and *Perez-Mejia*, the prosecutor in *Ramos* did not expressly mention the war on drugs. Instead, the State asked the jury to convict the defendant "in order to prevent 'the coke dealers' from engaging in 'drug activity' at Sunset Square." *Id*. at 337. In rejecting this language, the *Ramos* court cited *United States v. Solivan* as evidence that a prosecutor may not urge a jury to "convict in order to protect the community, deter future law-breaking, or other reasons unrelated to the charged crime." *Id*. at 338 (citing *Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991)). The excerpt from *Solivan* forcefully denounced appeals to the war on drugs, reasoning that "'[t]he fear surrounding the War on Drugs undoubtedly influenced the jury'" and that the prosecutor's comments were designed "'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 339 (quoting *Solivan*, 937 F.2d at 1153). Thus, while the prosecutor in *Ramos* did not specifically invoke the war on drugs, the court's lengthy references to *Solivan* indicate that it strongly condemned such rhetoric.

In addition to *Solivan*, several federal courts have also held that references to the war on drugs are improper. In one case, closing arguments "urg[ing] the jury to view this case as a battle in the war against drugs, and the defendants as enemy

soldiers" were found to be both improper and reversible error. *Arrieta-Agressot v. United States*, 3 F.3d 525, 527, 530 (1st Cir. 1993). Similarly, the statement that jurors served "'as a bulwark against the continuation of what [the defendant] is doing on the street, putting this poison on the streets'" was held to be improper. *United States v. Johnson*, 968 F.2d 768, 770 (8th Cir. 1992).

This is not to say, however, that there is complete consensus among federal courts about the propriety of these comments. The Eleventh Circuit, which held that two references to the war on drugs during closing argument were "clearly improper" in one case, also held that a prosecutor's invocation of the war on drugs during closing argument did not rise to the level of error in a different case. *United States v. Beasley*, 2 F.3d 1551, 1559-60 (11th Cir. 1993); *United States v. Delgado*, 56 F.3d 1357, 1369-70 (11th Cir. 1995).

Notably, the State does not dispute the Court of Appeals' denunciation of such references to the war on drugs, nor does it offer any contrary legal authority from Washington. Instead, the State merely distinguishes *Echevarria* and is otherwise silent as to the other cases. Accordingly, we agree with the Court of Appeals and join in rejecting "war on drugs" rhetoric.

Separately, the State contends that granting Loughbom's requested relief would "carve out an entirely new standard, which would effectively pronounce any utterance of the words 'war on drugs' as a spring board to mandatory reversal,

regardless of intent, context or prejudicial effect." Resp't's Answer to Pet. for Review at 7. To the contrary, finding error in the State's remarks invoking the war on drugs does not automatically lead to reversal. Where a defendant timely objects to misconduct, they carry the burden of demonstrating that the error was prejudicial. *Walker*, 182 Wn.2d at 477. Still further, where a defendant fails to object at trial, as here, we must move on to the inquiry of whether the comments were "'flagrant and ill intentioned'" in order to determine whether reversal is required. *Id*. at 477-78 (quoting *Glasmann*, 175 Wn.2d at 704).

B. Framing Loughbom's prosecution as representative of the war on drugs violated his right to a fair trial and requires reversal

As a general rule, defendants have a duty to request curative instructions when alleging error. Timely objections are of critical importance in our adversarial system because they "provide the trial court an opportunity to correct the misconduct" and "prevent[] abuse of the appellate process." *Walker*, 182 Wn.2d at 477. Moreover, we do not condone a "wait and see" approach to objections, nor do we approve a strategy of holding back an objection to gamble on reversal.

For the first time on appeal, Loughbom contends that framing his prosecution "in the broader context of the nationwide and local 'war on drugs'" violated his right to a fair trial. Pet. for Review at 7. Because Loughbom repeatedly failed to object to the State's comments at trial, he is "deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill

intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

This standard sets a much higher bar for reversal than the "improper and prejudicial" standard we employ when a defendant timely objects. Indeed, the difficulty of proving flagrant and ill intentioned misconduct emphasizes the magnitude of defense counsel's responsibility to protect their clients' right to a fair trial and the consequences for their clients when counsel fails to act. As such, we have only reversed convictions based on flagrant and ill intentioned misconduct "in a narrow set of cases where we were concerned about the jury drawing improper inferences from the evidence." *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 170, 410 P.3d 1142 (2018).

For example, we found racially charged comments referring to the police as "po-leese" and stating that "black folk don't testify against black folk" warranted reversal. *State v. Monday*, 171 Wn.2d 667, 671-72, 674, 681, 257 P.3d 551 (2011). We have also required reversal where a prosecutor superimposed "GUILTY BEYOND A REASONABLE DOUBT" over a defendant's booking photo and labeled PowerPoint slides with the caption "DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER." *Walker*, 182 Wn.2d at 468.

Under this heightened standard, our analysis "focus[es] 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. In other words, the inquiry is "whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection." *Walker*, 182 Wn.2d at 478. This must be assessed in the "context of the total argument." *Emery*, 174 Wn.2d at 762 n.13.

Notwithstanding counsel's repeated failure to object, we must conclude that the prosecutor's improper framing of Loughbom's prosecution as *representing* the war on drugs, and his reinforcing of this theme throughout, caused incurable prejudice such that his failure to object did not amount to a waiver of the prosecution's error.

Both Loughbom and the State appeal to *Echevarria* as establishing the threshold for flagrant and ill intentioned misconduct. Loughbom analogizes the prosecutor's comments during his trial as "every bit as inflammatory and prejudicial as those at issue in *Echevarria*," Pet. for Review at 11, while the State distinguishes *Echevarria* on the basis that its facts were more egregious. We agree that the misconduct in this case is less overt than what occurred in *Echevarria*. However, we note that the measurement of such error is not determined by a mere utterance of words. Rather, we must consider the broader context, such as the

frequency of improper comments, the intended purpose, the subject, and the type of case to determine whether incurable prejudice occurred.

Here, the prosecutor framed Loughbom's prosecution as representative of the war on drugs multiple times over the course of a single-day trial, in addition to alluding to the local drug problem during jury selection. Even more suspect is the near verbatim phrasing invoking the war on drugs at each point in the trial:

- Opening statement: "The case before you today *represents yet another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole*." 2 VRP (Oct. 18, 2017) at 87 (emphasis added).
- Rebuttal argument: "[L]aw enforcement cannot simply pick and choose their CIs . . . as they go forward in the, like I said, *the ongoing war on drugs in this community and across the nation*." *Id*. at 168 (emphasis added).
- Closing argument: "The case before you *represented another battle in the ongoing war on drugs throughout our state and the nation as a whole*. 1 NRP (Oct. 18, 2017) at 183 (emphasis added).

It follows that this is not a case where the prosecutor inadvertently uttered the phrase war on drugs. This rhetoric was practiced and strategically employed at both ends of Loughbom's trial. Indeed, even the Court of Appeals, which found no misconduct, described the State's use of the war on drugs as the prosecutor's "theme." *Loughbom*, slip op. at 5 ("During closing argument, the prosecutor

returned to his *theme* from opening.") (emphasis added). Remarks that are made at the beginning of the prosecutor's opening statement and at the beginning of closing argument must be understood as "a prism through which the jury should view the evidence." *Ramos*, 164 Wn. App. at 340.

The State contends that the prosecutor's comments, "while ill advised, were exceedingly benign," were "made with reasonable intentions," and "were well within acceptable bounds of argument by a prosecutor." Resp't's Answer to Pet. for Review at 10, 9, 6. We disagree. The prosecutor's "reasonable intentions" are irrelevant because we do not assess a prosecutor's subjective intent when deciding whether error occurred, *Walker*, 182 Wn.2d at 478, and repeated appeals to the war on drugs do not fall within the bounds of appropriate argument that this court has established.

We have explained that an "opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom." *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984). During closing argument, prosecutors have "wide latitude to argue reasonable inferences from the evidence," but they "must 'seek convictions based only on probative evidence and sound reason.'" *Glasmann*, 175 Wn.2d at 704 (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). Accordingly, references to the war on drugs at the beginning of the

prosecutor's opening statement, closing argument, *and* rebuttal argument cannot be said to be within the bounds of appropriate argument.

In this case, it is possible that if Loughbom had timely objected to the prosecutor's war on drugs remarks, a reprimand or an instruction to disregard the remark from the trial judge might have cured any potential prejudice at the outset by preventing the State from continuing to build on its war on drugs theme.

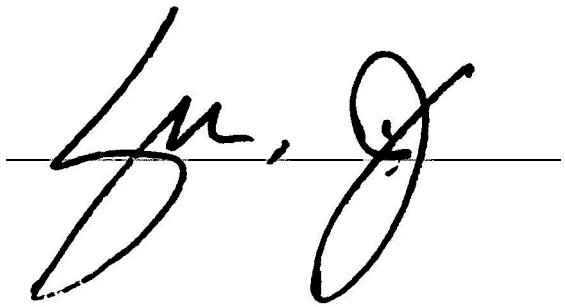
However, we have previously recognized that "[r]epetitive misconduct can have a 'cumulative effect,'" and we find that to be the case here. *State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268 (2015) (quoting *Glasmann*, 175 Wn.2d at 707). By the time the prosecutor framed Loughbom's trial as representing "yet another battle in the ongoing war on drugs" in his opening statement, he had already primed the jury to view Loughbom's prosecution through this prism by raising the specter of the "drug problem in Lincoln County" during jury selection. 2 VRP (Oct. 18, 2017) at 87, 52-53. Furthermore, two of the three references to the war on drugs were made in *closing*, and by that point it would have been too late to negate the prejudice that built up over the course of the single-day trial. Consequently, these facts support the conclusion that the prosecutor's repeated appeals to the war on drugs caused incurable prejudice.

We do not decide whether a single, inadvertent reference to the war on drugs during a longer trial would require reversal in the context of the total argument.

Here, however, it is deeply troubling that the State employed the war on drugs as the theme of Loughbom's prosecution and reinforced this narrative throughout his one-day trial. Accordingly, we hold that the prosecutor committed flagrant and ill intentioned misconduct that ultimately denied Loughbom of a fair trial and reverse.

CONCLUSION

Loughbom demonstrates that the State's repeated references to the war on drugs constitute prosecutorial error and that framing his prosecution as representative of the war on drugs deprived him of a fair trial. Accordingly, we reverse the Court of Appeals and remand for a new trial.



WE CONCUR: