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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA KIONI ELLIS, Appellant.	No. 53691-9-II UNPUBLISHED OPINION

VELJACIC, J. — As quasi-judicial officers, prosecutors are held to a higher standard than other attorneys. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Rules of Professional Conduct (RPC) 3.8.[1] When prosecutors commit misconduct that suggests racist stereotypes to the jury, justice falls prey to prejudice.

Joshua Ellis appeals his convictions for intentional murder in the second degree and felony murder in the second degree predicated on assault in the second degree. Ellis argues that the prosecutor committed misconduct during voir dire because he invoked racial stereotypes and appealed to the prejudice of the jury. Because the prosecutor committed misconduct that deprived Ellis of a fair trial, we reverse his convictions.[2]

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[1] "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." RPC 3.8 cmt. 1.

[2] Ellis also argues that the court erred in denying his request for an instruction on manslaughter in the first and second degree and in failing to vacate one of his convictions after merging the two counts. Because we reverse Ellis's convictions based on other grounds, we do not address these arguments.

FACTS

Ellis and Wendi Traynor met through mutual friends and began dating in 2016. Ellis owned a 10 mm pistol and several other firearms. Traynor owned a 9 mm pistol, and regularly carried it in her purse. Ellis and Traynor frequently went to the shooting range together.

In March or April 2017, Ellis moved to Louisville, Kentucky where his mother and his young children lived. Ellis told his friend Aaron Moetului that he "had a custody thing" with the mother of his children and also wanted to catch up and visit with family but then he would be back. 8 Report of Proceedings (RP) at 1071.

Shortly after, Traynor decided to move to Kentucky. Ellis flew back to Washington and then he and Traynor drove Traynor's car and belongings to Kentucky.

Traynor considered moving back to Washington shortly after arriving in Kentucky. In late June, Traynor's cousin purchased a ticket to fly to Kentucky to help Traynor move back to Washington, but Traynor decided to stay.

In early August, Traynor began to drive alone back to Washington. She ended up only driving as far as Western Kansas and then turned around and drove east. Ellis left Kentucky and drove west, eventually meeting up with Traynor in eastern Kansas and they both returned to Kentucky.

On October 3, Traynor packed her belongings while Ellis was at work and left Kentucky to drive back to Washington. She texted Ellis to say that her mother was ill and needed her. While Traynor drove, she talked to an old college friend on the phone and told her the relationship with Ellis was over. She did not answer calls from Ellis during the drive home. When she returned to Washington, she began looking for a job and an apartment. She also began dating her friend's roommate.

On October 17, Ellis texted and called Traynor's mother, asking her if she knew why Traynor had suddenly stopped communicating with him. Traynor's mother told Ellis that she did not know, but that he should probably just give Traynor some space. Traynor called her mother a few minutes later and was upset that she had spoken to Ellis, because Traynor told Ellis that she was returning to Washington because her mother was sick and she didn't want him to know she lied. Traynor was worried that Ellis was angry and she seemed concerned about what he might do. Over a period of 12 hours on October 17 and 18, Ellis called Traynor 60 times and she called him 7 times.

Ellis left Louisville on October 24 and drove 2,300 miles in 34 hours. He arrived in the Renton area on October 25 and met up with Traynor that day.

Shortly after Ellis's arrival, he and Traynor met up with Ellis's friend, Otis Stevenson, who let them stay at his home in Federal Way while they looked for their own apartment. On October 28, Ellis and Traynor did catering work with Ellis's friends Aaron and Shaunte Moetului at an event. To the Moetuluis, Ellis and Traynor appeared to be in a relationship, and they were planning on moving in together. Ellis told Aaron Moetului that he and Traynor were getting an apartment in the area, and they "were going to be kind of settling back down on this side in Washington." 8 RP at 1073.

Traynor entered into a lease for an apartment in Milton with her father as a co-signer. Ellis accompanied her when she went to pick up the keys and take possession of the apartment on November 1. Traynor told the leasing agent that Ellis was her boyfriend, but he was not on the lease, and thus not authorized to live in the apartment.

Beginning the afternoon of November 3, 2017, texts and phone calls to Traynor from her friends and family went unanswered. On the evening of November 3, Ellis sought out his friend Stevenson in the parking lot of a bar in Redondo Beach. Ellis seemed upset and teary-eyed, and told Stevenson he had "fucked [his] life up," was in trouble, and was returning to Kentucky. 10 RP at 1399. When Stevenson asked about Traynor, Ellis broke down, but never answered the question. Ellis ended up staying with Stevenson until November 10.

On November 10, Traynor's cousin, Jennifer Jones, contacted Shaunte Moetului and asked if she had heard from Ellis or Traynor. Shaunte Moetului then called Ellis, who told her that Traynor was fine and that he would tell her to contact her family.

That same day, Traynor's father and uncle went to Traynor's apartment to see if she was home, but there was no answer when they knocked and banged on the apartment door. They could hear a dog barking from inside the apartment. Traynor's father got a key from the leasing office, and they unlocked the door and deadbolt. When they stepped inside, they saw Traynor lying on the floor on her left side in a pool of dried blood.

Traynor had suffered a gunshot wound to the head. She was wearing a jacket, and her purse strap was around her left arm, suggesting she had just arrived or was on her way out. Her left hand was in her left jacket pocket, clutching a wallet and keys, and her gun was sticking out of her right jacket pocket.

On November 11, Ellis turned himself in to the police. The State charged Ellis with one count of premeditated murder in the first degree (count 1) and one count of felony murder in the second degree (count 2). RCW 9A.32.030(1)(a); RCW 9A.32.050(l)(b).The State also alleged that Ellis was armed with a firearm when he committed the offenses.

I. VOIR DIRE

On the first day of voir dire, a juror asked the defense counsel what his role in the trial was:

> THE COURT: Juror No. 22?
> JUROR NO. 22: You're the state, right?
> (DEFENSE): No, I'm not. I'm the people.
> JUROR NO. 22: Fair enough.
> (PROSECUTOR): That I would object to, Judge. He needs to rephrase that.
> (DEFENSE): I represent Mr. Ellis. I never say a thing. I never say a word. I never ask a question.

3 RP at 216.

During general voir dire, the prosecutor and defense counsel both discussed juror bias. Because Ellis is Black and Traynor was White, the defense was concerned about racial bias. The defense prepared questionnaires for the venire that included questions about interracial relationships and implicit racial bias.

The prosecutor informed the jury that Ellis is Black and Traynor is White and began a discussion about racial bias. First, the prosecutor asked jurors whether they believed the skin color of the parties factored into their evaluation of the case. After a potential juror voiced concern that systemic racism played a part in Ellis's arrest, the prosecutor explained that the State would prove to the jury that Ellis was "not sitting here because of the color of his skin" by producing evidence to support its case. 4 RP at 258. Next, the prosecutor discussed unconscious bias and invited the jurors to explain how they "check" themselves and how the attorneys might identify potential jurors who were unable to do so. 4 RP at 260.

At the end of general voir dire, the prosecutor again addressed implicit bias and institutional racism. In an exercise to explain implicit bias, he invited the jurors to close their eyes and imagine two people summoned for jury duty, one dressed entirely in blue and the other entirely in red, with facial tattoos reading either "Bloods" or "Crips." The prosecutor then asked the jurors which of

them imagined at least one of the two as Black and explained that that was implicit bias. He then asked them to imagine the same two people shaking hands, laughing, and talking about their roles in a movie because they were actually actors in costume. He continued: "The issue in implicit bias is this. If you judge somebody by their appearance right up front, you get to. If you stick to that opinion no matter what the evidence is, you're wrong. It's that simple." 4 RP 279-80. The court overruled a defense objection.

At the end of general voir dire on the second day, the prosecutor addressed the defense's response to the juror's question that he was "the people."

> [State]: The last subject I want to cover with you guys is part of what we've already covered, and that is in some states the most notorious case of all time for this example is The People versus O.J. Simpson, and I'm not talking about that case—
>
> [DEFENSE]: I'm going to object at this stage, Your Honor, as well.
>
> [PROSECUTOR]: He doesn't know what I'm going to say.
>
> THE COURT: Go ahead and finish your question [].
>
> [PROSECUTOR]: It's got nothing to do with that case or any of the facts. I say that, because in California the prosecutors and the government represent the people of the State of California. In Washington, . . . I represent the State of Washington. . . .
>
> [Defense counsel] yesterday told you he represents the people. . . .
>
> He represents Mr. Ellis, and Mr. Ellis alone. No one's confused about that, right? No one's confused about our roles. Okay?

4 RP 283-84.

II. ELLIS'S TRIAL TESTIMONY

Ellis put forth a self-defense argument. He testified to the following: Traynor was upset when he originally decided to move to Kentucky, and that he did not encourage her to follow him. Traynor's mood changed significantly within a week of moving to Kentucky. She was upset because she wanted Ellis to work less and spend more time with her. Traynor did not have a job,

did not leave the apartment much, began drinking more frequently, and seemed to become depressed.

To support his claim of self-defense, Ellis testified about two incidents that occurred while he and Traynor lived in Kentucky. The first where she was intoxicated and upset, and said "I'm going to go, and you're going to go with me." 11 RP at 1508. When Ellis asked her what she meant, Traynor pointed her gun at him. The second occurred at a bar where Ellis was talking to a woman he knew in high school, when an intoxicated Traynor began yelling at the woman and eventually threatened to shoot her in the kneecaps.

Ellis testified that he left Kentucky on October 24 because he needed to make money, and that he was heading either for Montana, Washington, or Oregon. He drove west to take a job in Montana but didn't stay because it was too cold and because the state was not "diverse." 11 RP 1690. When he did not find work in Montana, he continued on to Washington. When he met up with Traynor, she asked him to co-sign or "guarantee the money" on the lease for the apartment. 11 RP at 1537. He refused. Later, she asked him to move into the apartment with her, and he agreed after "some convincing" by Traynor. 11 RP at 1542.

Ellis testified that by November 2, he wanted to leave and return to Kentucky. He decided to end the relationship on November 3 and move back to Kentucky that day. Ellis testified to the events on November 3 as follows: While Traynor was at a job interview on the morning of November 3, he packed his belongings into his car so he could leave before she returned but Traynor returned before he was finished. At some point, Traynor found a note that Ellis wrote saying "I love you. I'm going back to Kentucky," and she became "hysterical." 11 RP at 1550, 1711. Ellis explained to Traynor that he was moving back to Kentucky and that their relationship was over. They sat and talked in the bedroom and Traynor became angrier and more aggressive.

Eventually, Traynor pulled her gun out of her purse, pointed it at him and said, "'I can't let you leave.'" 11 RP at 1555. Ellis "smacked" the gun out of her hand and walked towards the front door. 11 RP at 1555. He made no effort to take control of the weapon.

As he reached the door, Ellis heard Traynor quickly approaching. When he turned around, Traynor was behind him. She was pacing back and forth with both hands in her jacket pockets.

Then, while facing him, Traynor started to pull her gun out of her jacket pocket, and Ellis thought she was going to shoot him. He "believed it was me or her." 11 RP at 1570. Ellis reached into his coat pocket for his gun and fired a shot without aiming or looking at where he was aiming. Ellis's arm was close to Traynor, but he did not place the gun against her head.

Ellis testified that he was in shock, left the apartment, and never returned. He said he could not return because he did not have a key. He needed time to figure out his best course of action, so he stayed with Stevenson for a few days and talked to several attorneys, then turned himself in to the police.

III. VERDICT

The closing arguments painted vastly different pictures of the events and Ellis and Traynor's relationship. The essence of the State's case was that Ellis was a possessive, controlling boyfriend who refused to let Traynor leave him. She finally got away, began a new relationship and set up an apartment just for herself with no room for him. When he realized she was not coming back, Ellis executed her. He then removed her weapon from her purse and put it in her pocket.

Ellis's case focused primarily on self-defense. He conveyed that Traynor was very attached to him and believed they were going to be married. But she was unhappy away from her family. She showed, through the incidents in Kentucky, that she was prone to jealousy and had

pointed her weapon at him and others. Ellis loved Traynor but had changed his mind and was not willing to stay in Washington with her. Because Traynor had put so much into the relationship, she was unwilling to let Ellis leave it.

The jury found Ellis guilty of intentional murder in the second degree for count one and felony murder in the second degree with an assault in the second degree predicate for count two. The jury also entered special verdicts finding that Ellis was armed with a firearm. The court imposed a standard range sentence of 280 months. Ellis appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Ellis argues that the prosecutor committed misconduct because he improperly appealed to the jury's passions and prejudice during voir dire. He contends that the prosecutor repeatedly invoked racial stereotypes under the guise of attempting to uncover juror's unconscious bias. He asserts that there is a substantial likelihood that the comments affected the outcome of the case because the verdict depended on the jury's perception of Ellis and whether it believed his testimony and version of events. He also argues that the trial court abused its discretion "when it failed to curtail this improper questioning." Br. of Appellant at 20.

A. Legal Principles

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to trial by an impartial jury. *State v. Davis*, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). The Washington Constitution provides a similar guarantee in article I, sections 3 and 22. *Id.*

An "'impartial jury'" is also "'an unbiased and unprejudiced jury.'" *State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019) (quoting *Alexson v. Pierce County*, 186, 188, 193, 57 P.2d

318 (1936)). "[W]hen explicit or implicit racial bias is a factor in a jury's verdict, the defendant is deprived of the constitutional right to a fair trial by an impartial jury." *Berhe*, 193 Wn.2d at 657. "'[T]heories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial.'" *Monday*, 171 Wn.2d at 678 (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J. concurring)).

Furthermore, it is improper for a prosecutor to make comments designed to appeal to the passion and prejudice of the jury, or encourage a verdict based on emotion rather than evidence. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). A prosecutor's appeal to passion or prejudice risks a violation of a defendant's right to a fair trial by an impartial jury. *State v. Hecht*, 179 Wn. App. 497, 507, 319 P.3d 836 (2014). Instead, the purpose of the jury selection process is "to discover bias in prospective jurors" and "to remove prospective jurors who will not be able to follow . . . instructions on the law," in order to *ensure* the ultimate goal of an impartial jury, a fair trial, and the appearance of fairness. *Davis*, 141 Wn.2d at 825-26.

Generally, to prevail on a claim of prosecutorial misconduct, a defendant bears the burden of showing that the comments were improper and that they were prejudicial. *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020). If a timely objection was raised, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). However, "when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence," the constitutional harmless error standard applies. *Monday*, 171 Wn.2d at 680.

"Under [the constitutional harmless error] standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict." *Id*. The burden is on the State. *Id*.

B. Analysis

Ellis points to three parts of the prosecutor's voir dire that he argues are improper: the mention of *The People v. Orenthal James (O.J.) Simpson*, the implicit bias mental exercise involving gang members, and the statement about jury nullification.[3]

1. *The People v. O.J. Simpson*

The prosecutor, allegedly seeking to clarify the attorney's roles in the proceeding, invoked the name of a notorious case involving the prosecution of a Black man for the murder of his White former spouse. To mention it when a Black man is on trial for murdering his White girlfriend is bad faith on the part of the prosecutor. The prosecutor committed misconduct.

In *Monday*, the defendant appealed his jury conviction of murder in the first degree. 171 Wn.2d at 675. He argued that the prosecutor injected racial prejudice into the trial proceedings by asserting that Black witnesses are unreliable and using derogatory language toward a Black witness. *Id.* at 676. The Supreme Court determined that the State intentionally and improperly imputed an "antisnitch" code to Black persons only. *Id*. at 678. The State also began referring to the police as "po-leese." *Id*. at 679. The court determined that the only reason to use the word

[3] During voir dire, the prosecutor also discussed the juror's duty, and the related concept of jury nullification, stating "if you find beyond a reasonable doubt, you cannot say we've had institutional racism in our country for a long time, and therefore in this particular case where it's an African-American defendant and a Caucasian female, we will find him not guilty anyways because that will help. Two wrongs never make a right." 4 RP at 281. Because we conclude that the State fails to meet their burden to prove beyond a reasonable doubt that the comments relating to the *O.J. Simpson* case and implicit thought exercise did not affect the jury's verdict, we do not address the prosecutor's statement relating to jury nullification.

"po-leese" was to subtly, and likely deliberately, call to the jury's attention that the witness was Black and to emphasize the prosecutor's contention that "[B]lack folk don't testify against [B]lack folk." *Id.* The court opined that "[T]heories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial." *Id.* at 678 (quoting *Dhaliwal*, 150 Wn.2d at 583). The court held that it was improper for the prosecutor to cast doubt on the credibility of the witnesses based on their race, thus the court could not say beyond a reasonable doubt that the impropriety did not affect the jury's verdict, despite overwhelming evidence of guilt, including a video of the crime. *Monday*, 171 Wn.2d at 681.

The prosecutor's statements here, while not as pervasive as those in *Monday* in that they did not occur throughout the trial, are nevertheless significant because they came at a critical point in the proceeding: voir dire. Voir dire is where racial stereotypes and inflammatory history can be planted like a mustard seed at the infancy of a case, tainting all that follows.[4] And the comment was egregious. The use of the notorious *O.J. Simpson* case where a Black man was charged with murdering his White female love interest in a case where a Black man is charged with murdering his White female love interest invited the jury to draw parallels between that case and the case against Ellis. Although O.J. Simpson was famously acquitted in his murder trial, he was later found civilly liable for wrongfully causing the deaths of Nicole Brown Simpson and Ronald Goldman. *Rufo v. Simpson*, 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (2001). Moreover, a majority of American society now believes that O.J. Simpson actually did commit the crimes.[5]

[4] Prosecutorial misconduct of this ilk has a similar effect on the court system as a whole. One occurrence hurts the credibility of the entirety; for this reason, such conduct is taken seriously.

[5] Janell Ross, *Two decades later, black and white Americans finally agree on O.J. Simpson's guilt*, THE WASHINGTON POST (Mar. 4, 2016), https://www.washingtonpost.com/news/the-fix/wp/2015/09/25/black-and-white-americans-can-now-agree-o-j-was-guilty/.

The possibility that the use of the *O.J. Simpson* case was mere accident or poor judgment belies the sheer abundance of other "The People versus" cases not involving a similar scenario to the one before the jury, that were available to clarify the prosecution's role in the case.[6] Even so, there was no need to clarify who represented whom, and the lawyers' respective roles in the trial, because this issue was clarified immediately after the initial comment was made. In his attempt at "clarification" the prosecutor chose the most inflammatory reference he could have made. The sensationalized coverage, societal implications, and consequences of the infamous *O.J. Simpson* trial could not have been unknown to members of the jury.

Like in *Monday*, the State cannot meet its burden to show beyond a reasonable doubt that the misconduct did not affect the jury's verdict. The prosecutor's misconduct, occurring at the inception of the case, planted in the jurors' minds that Ellis was like O.J. Simpson, who many people believe was guilty of murdering his wife even though he was acquitted at trial. We cannot conclude beyond a reasonable doubt that the misconduct did not affect the jury's verdict. Accordingly, the error was not harmless. Furthermore, the prejudice was only increased by the prosecutor's implicit bias thought exercise.

2. Implicit Bias Thought Exercise

"[R]esearch suggests that . . . [c]alling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make." Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC Irvine L. Rev. 843, 846 (2015). However, race must be made salient without at the same time triggering

[6] *The People vs. Larry Flynt*, *The People vs. Philip Spector*, *The People vs. Roman Polanski*, *The People vs Woody Allen*, or any case from the long-standing crime drama "Law & Order." And if the prosecutor was desperate, even a made-up case for that matter, would have been better.

detrimental associations or stereotype threat. *See Id*. at 846-47 (discussing the possible negative effects of race salience at trial).

Viewed objectively and in the best light, the purpose of the mental exercise could have allowed the jurors to recognize their own biases. It should be noted that in order to demonstrate an example of implicit racial bias, it is necessary to identify a race-based stereotype. The prosecutor used an example of a stereotype associated with race that was not directly related to the facts of the case, in that there was no evidence of Ellis being associated with a gang. However, the mental exercise specifically invoked the stereotype of Black men as violent and criminal. Again, this was an invitation to the jury to find Ellis was like a violent gang member. It occurred at the inception of the case and tainted the entirety of the case. We cannot conclude beyond a reasonable doubt that the misconduct did not affect the jury's verdict. Accordingly, it was not harmless.

While one might question whether each of these examples alone would taint the entire trial, at the very least when viewing the entirety of the voir dire presentation—a critical stage in ensuring the accused receives a fair trial by an impartial jury— the prosecutor's use of both the O.J. Simpson case and stereotypes of Black men as violent, in a case where a Black man stands accused of a violent crime, was prejudicial such that we cannot conclude beyond a reasonable doubt that the misconduct did not impact the jury's verdict. In the aggregate, too, the misconduct was not harmless.

CONCLUSION

We conclude that the prosecution committed misconduct and failed to meet its burden to prove beyond a reasonable doubt that the misconduct did not affect the jury's verdict. Therefore, it was not harmless. Accordingly, we reverse.

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

Veljacic, J.

We concur:

Maxa, P.J.

Cruser, J.