No. 82736-2

MADSEN, C.J. (concurring)—A criminal conviction must not be allowed to stand when it is obtained in a trial permeated by racial bias deliberately introduced by the prosecution, as occurred here. Regardless of the evidence of this defendant's guilt, the injection of insidious discrimination into this case is so repugnant to the core principles of integrity and justness upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint.

I cannot agree with the majority's illusory harmless error analysis in this case. As the dissent points out, there is abundant evidence of the defendant's culpability.[1] Rather than engage in an unconvincing attempt to show the error here was not harmless, the court should hold instead that the prosecutor's injection of racial discrimination into this case cannot be countenanced at all, not even to the extent of contemplating to any degree that error might be harmless.

There are many cases where racism, injected into a trial in various ways, has

[1] The majority suggests that the length of the trial indicates that the evidence cannot be overwhelming, majority at 15 n.4, but, as the dissent points out, the defendant confessed and there was a videotape of the entire event.

required reversal. *E.g.*, *Hamilton v. Alabama*, 376 U.S. 650, 84 S. Ct. 982, 11 L. Ed. 2d 979 (1964) (summary, per curiam decision reversing a judgment of contempt where it was based on discrimination by the prosecutor in addressing an African American witness only by her first name); *Johnson v. Virginia*, 373 U.S. 61, 62, 83 S. Ct. 1053, 10 L. Ed. 2d 195 (1963) (arrest and conviction based on refusal of African American to comply with segregated seating arrangements imposed in the courtroom; the Court reversed on the ground that "State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws"). Such cases involve the "point where the due process and equal protection clauses overlap or at least meet." *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 159 (2d Cir. 1973). Injection of such discrimination is "antithetical to the purposes of the fourteenth amendment . . . whether in a procedure underlying, the atmosphere surrounding, or the actual conduct of, a trial." *Id*.

In *Weddington v. State*, 545 A.2d 607, 610 (Del. 1988), the defendant was tried for murder and assault. During the prosecutor's examination of the defendant, an African American, he asked the defendant about convincing two other men to go to Indiana with him because there were "'some loose white women up there.'" (Emphasis omitted.) On appeal, the State agreed that the question was improper and, together with the defense, asked the court to find it was not harmless error. The court declined to engage in a harmless error analysis. Instead, the court concluded that "[s]uch a question violates the fundamental fairness which is essential to the very concept of justice" and "[a] question

which improperly injects race as an issue before the jury poses a serious threat to a fair trial." *Id*. at 613. The court held that reversal was required because "the right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that *an infringement upon that right can never be treated as harmless error*." *Id*. at 613, 614-15 (emphasis added).

In *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000), the court determined that the evidence was sufficient to convict the defendants and noted that the defendants had not objected to a police detective's references on the witness stand to their Cuban origin and negative generalizations about the Cuban community (improper statements about the police "working Cubans," the way Cubans package drugs in wafers, and resident aliens posing a flight risk). The court nevertheless concluded the improper references to Cubans constituted reversible error, stating that "[t]he fairness and integrity of criminal trials are at stake if we allow police officers to make generalizations about racial and ethnic groups in order to obtain convictions. People cannot be tried on the basis of their ethnic backgrounds or national origin." *Id*. at 597. The court did not engage in a harmless error analysis.

Other courts have also noted the serious nature of injecting racial considerations into a case. "To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." *McFarland v.*

Smith, 611 F.2d 414, 417 (2d Cir. 1979). "In cases where race should be irrelevant, racial considerations, in particular, can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible." *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002).

In *State v. Cabrera*, 700 N.W.2d 469 (Minn. 2005), the prosecutor argued during closing argument that the defendant's counsel engaged in racist speculation by referring to gang associations of the State's witnesses, stating that "'the defense case in addition to the—in addition to just throwing mud on young black men and saying that they're—if they're young black men they must be in gangs—'" *Id*. at 474. After defense counsel's objection was overruled, the prosecutor returned to the subject and said that "'[y]ou heard nothing about gangs other than what came from the State's witnesses telling about their past association and some wild and, I submit, racist speculation on the part of counsel here . . . . Members of the Jury, this is not about race.'" *Id*.

The court noted that the defendant's theory of the case included the idea that, given the witness's admissions during testimony about past gang membership, gang rivalry might have played a role in the shooting at issue, which the defense claimed was carried out by another person. The court stated that "within the context of the record before us, the prosecutor's allegation that defense counsel was engaging in 'racist speculation' was incorrect and undermined the prosecutor's obligation to ensure that the defendant received a fair trial" and constituted "serious prosecutorial misconduct." *Id*. at 475.

The court said that given the strength of the evidence, "it would be difficult for us *not* to conclude that the prosecutor's comments were harmless beyond a reasonable doubt." *Id*. Nevertheless, the court reversed the conviction because improper injection of race can still affect the jurors' partiality and must be removed. *Id*. (citing *Varner*, 643 N.W. at 304-05). The court stated, "Affirming this conviction would undermine our strong commitment to rooting out bias, no matter how subtle, indirect, or veiled." *Id*.

In the present case, too, the prosecutor's corruption of the trial cannot be tolerated. The prosecutor's blatant racist attacks impugned the standing and credibility of the State's witnesses, who were African American, and explicitly informed the jury that because these witnesses were black they lied on the stand because all black people have a "code" under which they refuse to tell the truth to police and refuse to testify truthfully. Further, it cannot be ignored that the defendant himself is African American and was presumably subject to the same charge in view of the prosecution's questioning. The appeals to racial bias in this case were not isolated incidents but instead pervaded the prosecution of this case.

Regardless of the evidence against this defendant, a criminal conviction must not be permitted to stand on such a foundation. The appeals to racism here by an officer of the court are so repugnant to the fairness, integrity, and justness of the criminal justice system that reversal is required. Accordingly, though I cannot agree with the majority's harmless error analysis, I would reverse the defendant's convictions because the integrity of our justice system demands it.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Mary E. Fairhurst

Justice Debra L. Stephens