In re PRP of Glasmann (Edward Michael)

No. 84475-5

CHAMBERS, J. (concurring) — I agree with the lead opinion that the prosecutor's misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct. *See State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). I write separately because I was stunned that the State argued to this court there was nothing improper with the prosecutor showing the jury a photo of the defendant digitally altered to look more like a wanted poster than properly admitted evidence. It was the State's view in oral argument that the PowerPoint slide in question was merely an instance of using modern techniques to present stimulating closing arguments. It was the State's position that the State may add "guilty" to the text of a PowerPoint presentation and therefore that it does not cross the line to add the text "guilty" to the photograph itself.

Under the State's logic, in a shooting case, there would be nothing improper with the State altering an image of the accused by photoshopping a gun into his hand to illustrate the State's version of how the shooting must have occurred. In my view, the State in this case does not understand its role in ensuring a fair trial and the courts must establish the boundary lines. *See State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) ("The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated."); *State v. Thorgerson*,

172 Wn.2d 438, 462, 258 P.3d 43 (2011) (Chambers, J., dissenting) ("The proper measure of the success of any prosecutor is the prosecutor's devotion to the law, fidelity to the rules of the court and rules of evidence, and dedication to guarding the protections our constitutions and laws afford every person, including the accused."). Adding the word "guilty" to the PowerPoint slide was improper, whether in the text or splashed across the defendant's photo.

Certainly, lawyers may and should use technology to advance advocacy and judges should permit and even encourage new techniques. But we must all remember the only purpose of visual aids of any kind is to enhance and assist the jury's understanding of the evidence. Technology should never be permitted to dazzle, confuse, or obfuscate the truth. The jury's deliberations must be based solely upon the evidence admitted and the court's instructions, not upon whose lawyer does the best job of manipulating, altering, shuffling, or distorting the evidence into some persuasive visual kaleidoscope experience for the jury.

This was not a "he said, she said" case. Edward Glasmann's actions were captured on videotape by the security camera of the minimart. The State also had the testimony of five police officers, the witness who called 911, the 911 tape itself, and the victim, which altogether gave a real time account of the entire incident. There was absolutely no need for the prosecutor to alter an exhibit to demonize the defendant. I can only conclude the prosecutor's misconduct was flagrant and ill intentioned and designed to inflame the passions of the jury. *See Stenson*, 132 Wn.2d at 719. Turning Glasmann's photo into a poster one might expect to see on

the wall of an Old West saloon was completely unnecessary, and I cannot say the misconduct did not affect the verdict in this case. *See State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). I agree with the lead opinion that Glasmann's conviction should be reversed and the case remanded for a new trial.

AUTHOR:
Justice Tom Chambers

WE CONCUR: