

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36885

|                              |   |                                  |
|------------------------------|---|----------------------------------|
| STATE OF IDAHO,              | ) | 2011 Unpublished Opinion No. 541 |
|                              | ) |                                  |
| <b>Plaintiff-Respondent,</b> | ) | <b>Filed: July 6, 2011</b>       |
|                              | ) |                                  |
| v.                           | ) | <b>Stephen W. Kenyon, Clerk</b>  |
|                              | ) |                                  |
| <b>CODY MILLER WILLIAMS,</b> | ) | <b>THIS IS AN UNPUBLISHED</b>    |
|                              | ) | <b>OPINION AND SHALL NOT</b>     |
| <b>Defendant-Appellant.</b>  | ) | <b>BE CITED AS AUTHORITY</b>     |
|                              | ) |                                  |

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Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Gregory S. Anderson, District Judge.

Judgment of conviction for delivery of a controlled substance, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Cody Miller Williams appeals from his judgment of conviction entered upon a jury verdict finding him guilty of delivery of a controlled substance. He contends that the prosecutor committed prosecutorial misconduct during closing argument. For the reasons set forth below, we affirm.

I.

**FACTS AND PROCEDURE**

A confidential informant (CI), who was a drug addict and had been arrested for felony probation violation and misdemeanor possession of drug paraphernalia, agreed to assist the police by participating in a controlled buy between the CI and Williams. On the day of the controlled buy, the officers met with the CI, searched the CI and his vehicle, provided him with marked bills, and fitted him with a wire to transmit an audio recording of the buy. The CI then drove to an apartment complex where he alleged Williams resided. The officers followed the CI

to the location and maintained visual contact with him until he entered the apartment. The officers maintained audio surveillance during the drug buy. When the controlled buy was complete, the officers regained visual surveillance of the CI as he left the apartment and followed him until he reached another rendezvous point. The officers searched the CI and discovered that he was no longer in possession of the money and was in possession of psilocybin mushrooms. The CI indicated that he bought the mushrooms from Williams.

Subsequently, Williams was arrested and charged with one count of delivery of a controlled substance, psilocybin mushrooms. I.C. § 37-2732(a)(1)(B). Williams pled not guilty. At trial, the CI testified that he telephoned Williams to set up the drug buy. The CI testified that Williams was present at the apartment along with a man, woman, and child and that he threw the money in front of Williams who was sitting on the bed. The CI stated that the woman then went into another room, got the mushrooms, and handed them to the CI. The CI also identified Williams at trial. An audio recording of the drug buy was also admitted into evidence at trial. A jury found Williams guilty of delivery of a controlled substance and he appeals.

## II.

### ANALYSIS

Williams argues that the prosecutor committed prosecutorial misconduct at trial. Specifically, Williams asserts that the prosecutor's statements during closing argument were improper when he stated:

Ladies and Gentlemen, you've been presented the evidence. I don't need to go into it any further. The decision is now yours. I know that this has been difficult for you. It's been a distraction in your lives, and I do want to join [defense counsel] in thanking you for your service today. You have family members who need you. You have employers who need you. I understand that, but I appreciate what you've done, because the time you've taken today and the last couple of days, matters. It is worthwhile. *I don't have to tell you about what a scourge drugs are on society. I don't have to tell you what it does to the individuals who become addicted. I don't have to tell you about the crime that comes from drug use. You know that.*

The state has proven its burden today. It has shown that [Williams] delivered drugs to [the confidential informant] on April 18, of 2008. You now have the awesome responsibility to convict him for what he did. *I ask you to take a stand and send a message to Cody Williams. Send a message to others like him that if you deal drugs in the State of Idaho, you will be prosecuted and you will be convicted.*

(emphasis added). Williams asserts that the italicized portions of the prosecutor's argument were improper because they invited the jury to convict Williams based upon factors other than the evidence--specifically, the jurors' disgust and frustration with the drug problems in society and a desire to alleviate those problems.

Williams made no contemporaneous objection to the prosecutor's statements at trial. In *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court clarified the fundamental error doctrine as it applies to allegations of prosecutorial misconduct. If the alleged misconduct was not followed by a contemporaneous objection, an appellate court should reverse when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings. *Id.* at 226, 245 P.3d at 978.

While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct, we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.* Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). In determining whether statements made in closing arguments are improper, we note that a prosecutor has considerable latitude in closing argument and has the right to discuss inferences arising from the evidence. *State v. Porter*, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997); *Phillips*, 144 Idaho at 86, 156 P.3d at 587. This latitude is not boundless, however, and it is impermissible to appeal to the emotion, passion, or prejudice of the jury through the use of inflammatory tactics. *State v. Gross*, 146 Idaho 15, 20-21, 189 P.3d 477, 482-83 (Ct. App. 2008); *Phillips*, 144 Idaho at 86, 156 P.3d at 587. Urgings, explicit or implied, for the jury to render a verdict based on factors other than the evidence admitted at trial and the law contained in the jury instructions have no place in closing arguments. *State v. Beebe*, 145 Idaho 570, 576, 181 P.2d 496, 502 (Ct. App. 2007).

Prosecutorial misconduct in closing argument will be considered fundamental error when it is calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *Porter*, 130 Idaho at 785, 948 P.2d at 140. Here, the state concedes that the portion of the argument which invites the jurors to “send a message to others like him that if you deal drugs in the State of Idaho, you will be prosecuted and you will be convicted” was improper. We agree. In *State v. Pecor*, 132 Idaho 359, 367, 972 P.2d 737, 745 Ct. App. 1998), the prosecutor stated, during closing argument, that the defendant was “the dealer, he is the dealer to your sons and to your daughters.” This Court held that the prosecutor’s statements were improper because they hypothesized about the commission of a crime against the jurors’ families and appealed to the jurors’ fears and not facts presented at the trial. *Id.* Similarly, the prosecutor’s statement here urged the jurors to consider factors outside the evidence to determine Williams’ guilt or innocence. The statement appealed to the jurors’ potential fear or loathing of drug dealers and their desire to eradicate crime in their community. Therefore, we hold that, under the first and second prongs of *Perry*, the portion of the argument that urged the jurors to send a message to others like Williams (particularly when considered with the portion of the argument referring to the scourge of drugs in our society) infringed upon Williams’ due process rights and was clear and obvious. The remainder of the prosecutor’s argument, urging the jury to send a message to Williams, was not improper.

We must next decide whether the error affected the outcome of the trial. *Perry*, 150 Idaho at 226, 245 P.3d at 978. Where prosecutorial misconduct is shown, we must determine whether we can conclude, beyond a reasonable doubt, that the result of the trial would have been different absent the misconduct. *Pecor*, 132 Idaho at 368, 972 P.2d at 746. In *Pecor*, this Court found the prosecutor’s statements to be improper, but went on to hold that the error was harmless. *Id.* at 368, 972 P.2d at 746. The Court held that the statement made by the prosecutor was not so inflammatory as to outweigh the evidence presented against Pecor at trial. *Id.* at 367-68, 972 P.2d at 745-46.

Here, the improper statement was made at the end of the prosecutor’s closing argument. The prosecutor did not go into detail regarding the jurors’ feelings, fears, or anger about drug dealers within their community. This situation is materially different from situations in which a prosecutor deliberately and repeatedly emphasizes the emotion, passion, and prejudice of the jury

or urges the jury to render a verdict based on factors not admitted at trial. *See State v. Troutman*, 148 Idaho 904, 909-10, 231 P.3d 549, 554-55 (Ct. App. 2010) (finding prosecutor's closing statement constituted misconduct and fundamental error where the prosecutor grossly mischaracterized the defendant's defense); *Beebe*, 145 Idaho at 575-76, 181 P.3d at 501-02 (finding prosecutor's closing statement constituted misconduct and fundamental error where the prosecutor highlighted concerns about protecting members of the public from mentally ill persons and cultivated sympathy for the victim); *Phillips*, 144 Idaho at 87, 156 P.3d at 588 (finding prosecutor's closing statement constituted misconduct and fundamental error where the prosecutor overtly and expressly appealed to the jurors' emotions by conveying not simply that witness testimony lacked credibility, but that the jurors should respond to it with irritation and resentment); *State v. Baruth*, 107 Idaho 651, 656-59, 1271-74, 691 P.2d 1266 (Ct. App. 1984) (finding prosecutor's closing statement constituted misconduct and fundamental error where the prosecutor stated the jury must convict the defendant to prevent him from committing further robberies).

In addition, the evidence against Williams was compelling. The CI testified that he contacted Williams by phone to arrange the drug buy and that, while the woman actually handed him the mushrooms, he threw the money toward Williams. The evidence presented at trial also demonstrated that, when the CI left the apartment, he was no longer in possession of the marked bills and had mushrooms in his pockets. The surveillance done by the investigating officers corroborated the CI's version of events, and an audio recording of the drug buy was also admitted into evidence and was reviewed by the jury. The audio recording was admitted into evidence but was not included in the record on appeal. Portions of a record missing on appeal are presumed to support the actions of the district court. *State v. Repici*, 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992). Based upon the evidence found in the record and the relatively brief nature of the statements made by the prosecutor, we are convinced beyond a reasonable doubt, that the jury would have reached the same verdict if the prosecutorial misconduct had not occurred. Therefore, we hold that a jury would have found Williams guilty of delivery of a controlled substance even if the prosecutor had not made the improper statements during closing argument. Accordingly, we determine that the prosecutor's improper statements constituted harmless error.

**III.**  
**CONCLUSION**

We hold that a portion of the prosecutor's closing argument constituted prosecutorial misconduct, but that it was harmless error. Accordingly, Williams' judgment of conviction for delivery of a controlled substance is affirmed.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**