SC94658

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

CHADWICK WALTER,

Appellant.

Appeal from Clay County Circuit Court
7th Judicial Circuit, Division 4
The Honorable Larry D. Harman, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

Appellant, Chadwick Walter, relies on the argument set forth on pages 26-72 of Appellant's Substitute Brief but also makes the following additional reply to the issues raised in the State's Substitute Brief.

Point I

The State refuses to address one question: For what purpose did the State use Mr. Walter's mugshot in its slide show? The State refuses to address this question, because the answer undercuts the State's entire argument. The only plausible answer is the mugshot was the best way to improperly depict, and thus improperly argue, Mr. Walter was guilty.

Two Rights Can Make A Wrong

The State first distracts from the question by maintaining, "There is no authority for the proposition that a prosecutor cannot superimpose one piece of *proper* evidence or argument onto another" (Resp. Sub. Br. 25 (emphasis in original)). This position is contrary to the law. A substantial line of cases by this Court hold:

> Counsel may properly comment on any fact in the record so long as such comment has a legitimate bearing on any issue in the case; but counsel may not make an unfair, misleading, and prejudicial argument on immaterial facts which happen to get into the record without objection, and justify the argument on the ground that the facts about which he argued were in the record.

Beer v. Martel, 55 S.W.2d 482, 484 (Mo. 1932); *see also Gilmore v. Union Const. Co.*, 439 S.W.2d 763, 766 (Mo. 1969); *Gathright v. Pendegraft*, 433 S.W.2d 299, 316 (Mo. 1968); *Amsinger v. Najim*, 73 S.W.2d 214, 216 (Mo. 1934). Contrary to the State's argument, the use of properly admitted evidence is still constrained by the propriety of its usage in closing arguments. *Id.* Using a defendant's mugshot as evidence of guilt is improper, and it does not matter the mugshot was entered into evidence without objection.

Improperly relied on by the State is *State v. Strong*, 142 S.W.3d 702, 720-21 (Mo. banc 2004), which actually demonstrates the poverty of the State's position on this issue. The State discusses that in *Strong*, the prosecutor was allowed to superimpose the defendant's mugshot over graphic crime scene photos and the murder weapon in a slide show during argument (Resp. Sub. Br. 25). Omitted from the State's discussion, is that the slide show was presented to the jury during sentencing. The State, however, does not, and could not, contend this manipulation of crime scene photos would be appropriate during the guilt phase even if all the photographs were separately and properly admitted.

The result of the State's position, that once a piece of evidence is admitted with no limitation a party can make any use it wants out of it, would be the rampant back-dooring of improper argument through the mashing of evidence. According to the State's position, a prosecutor could potentially back-door a propensity argument whenever a defendant with prior convictions testifies. If a defendant testifies, it is often the practice of a defense attorney to introduce the defendant's prior convictions on direct to prevent the prosecutor from bringing up the convictions for the first time on cross-examination.

When these convictions are introduced on direct, they are not subject to any objection as it is the defendant introducing them. Next, a prosecutor is entitled to argue the evidence proves a defendant is guilty. *State v. Moore*, 428 S.W.2d 563, 565 (Mo. 1968). By the State's reasoning, in closing argument, the State would be allowed to show a slide listing the defendant's prior convictions and then slap the word "GUILTY" across them. After all, the defendant's prior convictions were introduced into evidence by the defendant without any limitation and the State can argue a defendant is guilty based on the evidence. There could be no serious contention the State would be allowed to do this. *See Old Chief v. United States*, 519 U.S. 172, 181 (1997); *State v. Mobley*, 369 S.W.2d 576, 581 (Mo. 1963).

The mere fact Mr. Walter's mugshot was introduced into evidence by being tucked into his jail records does not give the State carte blanche regarding its use of his mugshot in closing argument.

Washington State Law

Much of the State's argument regarding Washington law is based on *In re Olsen*, 183 Wash. App. 1046 (Wash. Ct. App. 2014). *Olsen* is an unpublished table decision. *Olsen* has no precedential value even in Washington. Wash. Rule 14.1(a) ("A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports"). Missouri Courts have also routinely rejected the use of unpublished decisions from other states as "neither binding nor persuasive precedent in this court. *See Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 376 (Mo. App. E.D. 2005)

(citing *State v. Goodwin*, 43 S.W.3d 805, 814 (Mo. banc 2001); *see also Mackey v. Smith*, 438 S.W.3d 465, 472 (Mo. App. W.D. 2014) ("'Unpublished decisions of the courts of other states are not persuasive authority in this court.'" (quoting *J.B.M. v. S.L.M.*, 54 S.W.3d 711, 714 (Mo. App. S.D. 2001))). Given that Washington does not consider *Olsen* as authority and Missouri's consistent rejection of unpublished decisions from other States, this Court should reject the State's use of *Olsen* and disregard that portion of the State's brief.

Even if this Court were to consider *Olsen*, the State's claim that *Olsen* is "on all fours with this [case]" is disingenuous (Resp. Brief 26-27). The State repeatedly maintains that just like in this case, the prosecutor in *Olsen* plastered "guilty" across the defendant's mugshot (Resp. Brief 25-29). In contrast to the present matter, the photograph used in *Olsen* was not identifiable as a mugshot: "In fact, it does not even appear entirely clear that the photo is a booking photo as the photo shows Olsen from the neck up. Olsen has not demonstrated how the jury being shown his head shot photo had a substantial likelihood of affecting the verdict." *Olsen*, 183 Wash. App. 1046, *3. There is no such problem in identifying the picture used in this case as Mr. Walter's mugshot. Insofar as *Olsen* differs from this case on the most salient fact of this case, *Olsen* should be disregarded.

Mugshots Are Neutral?

Quoting *State v. Hamell*, 561 S.W.2d 357, 361 (Mo. App. 1977), the State argues "'[m]ugshots are in themselves neutral" (Resp. Sub. Br. 25 n.2). First, as a standalone statement, this notion is not viable; mugshots are consistently recognized as prejudicial

along with defendants being otherwise marked as confined. *See State v. Walker*, 341 P.3d 976, 991 n.3 (Wash. 2015) (McCloud, J., concurring) (listing cases from various jurisdictions finding mugshots to be prejudicial; *see also Deck v. Missouri*, 544 U.S. 622, 630 (2005); *Estelle v. Williams*, 425 U.S. 501, 518 (1976)). Second, even under the notion that mugshots are abstractly neutral, "The introduction of a mugshot is examined in light of the facts and circumstances of the case." *State v. Wright*, 978 S.W.2d 495, 499 (Mo. App. W.D. 1998) (citing *State v. Tivis*, 933 S.W.2d 843, 847 (Mo. App. W.D.1996)). The circumstances of this case were that the mugshot was placed into evidence with no apparent purpose as part of a packet of documents from the jail and then used by the State in closing argument to show Mr. Walter was guilty – that is not neutral.

Additional Prejudice

In addition to considering the State's deliberate use of Mr. Walter's mugshot at trial in its prejudice determination (App. Sub. Br. 34), this Court should consider the State's continued unwillingness to admit that action was improper. In *United States v. Kojayan*, 8 F.3d 1315, 1316-18 (9th Cir. 1993), the Ninth Circuit reviewed a case in which federal prosecutors withheld the existence of a cooperation agreement with a potential witness and then argued in close the defense was attempting to mislead the jury by arguing that the government could have called the potential witness. The government continued to maintain on appeal its actions were proper and its rebuttal argument was invited by the defense. *Id.* at 1322-23. The Court found in assessing prejudice that it "must consider the government's willfulness in committing the misconduct and its willingness to own up to it." *Id.* at 1318. This Court should do the same.

The State maintained nothing was wrong with the State's use of the mugshot in its brief to the Western District, and even after that court repeatedly condemned the practice,[1] the State continues to maintain it has done nothing improper (Resp. Sub. Br. 23-30). Indeed, the State goes so far as to suggest it could make any use of Mr. Walter's mugshot that it could dream up, because it was admitted into evidence with no limitation (Resp. Sub. Br. 25). The disturbing implication from this is the State is pushing for a legal policy that would allow it to engage in similar conduct in the future. The State's continued unwillingness to acknowledge any error in the use of Mr. Walter's mugshot and its desire to commit similar acts in the future further demonstrates the necessity for this Court to find reversible error.

The State attempts to use its refusal to acknowledge any impropriety to support an argument that its wrongful use of Mr. Walter's mugshot was not egregious (Resp. Sub. Br. 33 n.4). Any such notion must be rejected. While this case nominally presents an

[1] "[C]learly disparages a defendant's presumption of innocence[;]" "Such egregious conduct on the part of the prosecutor is unwarranted and cannot be condoned by any court[;]" "there is still no rational justification for the prosecutor's use of the mug shot during closing argument[;]" "there is no question that the prosecutor's use of the altered mug shot was improper[;]" and, "the prosecutor injected incompetent and potentially prejudicial matters into its closing argument by displaying an altered piece of evidence to the jury for the sole purpose of affecting the jury's opinion of the defendant." *State v. Walter*, WD76655, 2014 WL 4976913, at *17-18 (Mo. App. W.D. Oct. 7, 2014).

issue of first impression – can the State use a mugshot of a defendant in its closing argument and plaster the words "guilty" on it – the principles underlying the case are foundational in American jurisprudence:

> closing arguments must not go beyond the evidence presented; courts should exclude statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury.

State v. Deck, 303 S.W.3d 527, 543 (Mo. banc 2010) (internal quotation omitted). While there are innumerable ways for the State to violate these principles, each new violation does not represent a novel case in which a deliberate violation should be overlooked. The State must abide by these basic principles; the State failed to do so here, and it was egregious.

Decisiveness

The State argues on appeal that its misuse of Mr. Walter's mugshot could not conceivably have had a decisive effect on the jury's verdict (Resp. Sub. Br. 32-34). This position is in sharp contrast to the State's use of Mr. Walter's mugshot at trial, which was specifically designed by the State to have a decisive effect on the jury. Courts have recognized the end of the State's closing argument is "an especially delicate point in the trial process [because it] represent[s] the parties' last, best chance to marshal the evidence and persuade the jurors of its import." *United States v. Levy-Cordero*, 67 F.3d 1002, 1009 (1st Cir. 1995) (quoting *United States v. Taylor*, 54 F.3d 967, 977 (1st Cir.1995)). The State chose to use Mr. Walter's mugshot at the end of its presentation specifically for

the purpose of it having an effect on the jury (Tr. 443, 467). Further, the State's choice of photograph was calculated to have a strong impact on the jury. A mugshot conveys guilt by its nature, and it stands in contrast to the often well-dressed defendant. Having specifically designed and executed its misuse of Mr. Walter's mugshot to have a decisive effect on the jury, it is inconsistent for the State to now argue there was no possible way for its misuse of Mr. Walter's mugshot to have had a decisive effect on the jury.

Failure To Object Before The Verdict

While Appellant can appreciate a concern with gambling on the verdict as raised by the State (Resp. Sub. Br. 30-31), the error and responsibility for the error lie with the prosecution. A prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). In carrying out their jobs, prosecutors "represent the people of the state, including criminal defendants." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 581 (Mo. banc 1994). It is as much a prosecutor's duty to prosecute the defendant as it is "to protect the constitutional rights of the defendant." *United States v. Godwin*, 272 F.3d 659, 672 n.16 (4th Cir. 2001); *see also State ex rel. Chassaing*, 887 S.W.2d at 581. Given the duty of the prosecutor to protect the defendant's rights, there is a point at which the State ought not to be able to complain about defense counsel's failure to timely object and be held accountable for its own actions in violating a defendant's rights. This case concerns a well-though-out plan on the part of the State to improperly use Mr. Walter's mugshot as evidence of his guilt. That was improper, and the State needs to be held accountable for its actions.

"Decisive Effect" And "Outcome-Determinative" Are The Same Thing

Finally, the State argues this Court should consider Mr. Walter's Point I waived, because Mr. Walter's prior briefs failed to argue the State's misuse of Mr. Walter's mugshot had a "decisive effect" on the verdict (Resp. Sub. Br. 34-35). The State's basis for this argument is *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009). The State declines to examine the actual facts of *Essex*, instead merely quoting the statement: "'This argument appeared nowhere in the brief to the court of appeals, and that portion of the substitute brief will not be considered by this Court'" (Resp. Sub. Br. 35). The basis of this statement in *Essex* was that in its brief to the court of appeals Essex argued the attorney's fees were unreasonable, while in its brief to this Court Essex argued "intervenors may not be considered a 'prevailing party' . . . and are not entitled to attorneys' fees." *Id.* The source of the *Essex* holding was Rule 83.08(b), which states that a substitute brief "'shall not alter the basis of any claim that was raised in the court of appeals brief.'" *Id.* The State neither cites to nor examines Rule 83.08.

Rule 83.08 has not been used as a hyper-technical "gotcha" rule, and the State's attempt to go beyond the language in the Rule ignores this "Court's policy 'to decide a case on its merits' whenever possible." *Williams v. Hubbard*, 455 S.W.3d 426, 432 (Mo. banc 2015) (quoting *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 338 (Mo. banc 1998)). The basis of Mr. Walter's claim as raised in Point I of Appellant's Substitute Brief has remained consistent throughout the briefing of the issue – the prosecutor committed misconduct when he displayed Mr. Walter's mugshot to the jury with the word "guilty" slapped

across it – whatever variations exist between Mr. Walter's briefs they are not encompassed by Rule 83.08.

Even if the State's argument is indulged, it is meritless. In front of the Western District, this Point initially was argued as preserved error, but engaged in an extensive comparative analysis of *In re Glasmann*, 286 P.3d 673 (Wash. 2012), including that Court's findings of plain error (App. W.D. Br. 64-66). In the reply brief in front of the Western District, this Point was alternatively argued under a plain error standard, and specifically cited to the "decisive effect" standard (App. W.D. Reply 22 (citing *State v. Vanlue*, 216 S.W.3d 729, 734 (Mo. App. S.D. 2007))). Finally, the State faults Appellant for failing to "attempt to prove 'decisive effect'" in the Substitute brief before this Court (Resp. Sub. Br. 35). While it is true Appellant never uses the words "decisive effect," Appellant does use the words "outcome-determinative" and argues that standard (App. Sub. Br. 32). "Decisive effect" and "outcome-determinative" mean the exact same thing: "Plain error can serve as the basis for granting a new trial only if the error had a decisive effect, i.e., it was outcome-determinative." *State v. Whitaker*, 405 S.W.3d 554, 559 (Mo. App. E.D. 2013).

The State would like this Court to solely to determine manifest injustice based on the strength of the evidence, while Appellant would like this Court to also consider the deliberate nature of the misconduct, *State v. Barriner*, 34 S.W.3d 139, 151-52, 155 (Mo. banc 2000), the need for deterrence, *State v. Banks*, 215 S.W.3d 118, 120 (Mo. banc 2007), and the State's continued refusal to admit any impropriety, *Kojayan*, 8 F.3d at

1316-18. Appellant is unaware of any reason this difference of opinion should result in this Court considering Point I waived.

CONCLUSION

Based on the argument presented above and in Appellant's Brief, Mr. Walter respectfully requests this Court reverse the judgment of the trial court and remand the case with instructions for the court to vacate and set aside the judgment and sentence, and schedule this case for retrial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Damien de Loyola, hereby certify as follows:

The attached reply brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, this brief contains **3,306** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

A true and correct copy of the attached brief was placed for delivery through the e-filing system on June 8, 2015 to: P. Benjamin Cox, Office of the Attorney General, at ben.cox@ago.mo.gov.

/s/ Damien de Loyola
Damien de Loyola