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State v. Devan Appellant's Brief 1 Dckt. 39853

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. EVIN CHRISTOPHER DEVAN, Defendant-Appellant.	NO. 39853 CANYON COUNTY NO. CR 2011-20535 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Evin Devan was convicted, following a jury trial, of conspiracy to commit burglary, burglary, and trespassing. Mr. Devan asserts that the prosecutor committed misconduct during closing argument, rising to the level of a fundamental error, when the prosecutor used inflammatory language calculated to appeal to the passions and prejudice of the jury in characterizing defense counsel, and misstated the arguments raised by defense counsel during the course of closing arguments.

Statement of the Facts and Course of Proceedings

Evin Devan was charged with felony conspiracy to commit burglary and burglary as well as misdemeanor trespassing. (R., pp.19-21; 151.) Karl Riebe, the alleged victim, testified at trial that, in the early morning hours on the day prior to the charged offenses, he had heard a vehicle idling near his mother's property, which was adjacent to his own. (Trial Tr.[1], p.169, L.19 – p.178, L.9.) After the vehicle drove off, Mr. Riebe went to check on his mother's property. (Trial Tr., ,p.178, L.22 – p.180, L.7.) Mr. Riebe found that there was a shipping container on the property that had been broken into, some wire that had been strung out from the large spool that it had been wound around, and other items that appeared to be out of place. (Trial Tr., p.180, L.8 – p.182, L.23.) Because it was still too early in the morning for it to be light outside, Mr. Riebe then returned home to wait for daylight. (Trial Tr., p.183, Ls.2-15.)

[1] Because there are multiple volumes of transcripts of proceedings in this case, for ease of reference, citations made herein to the primary volume of transcripts for the trial and sentencing proceedings in this case are referred to herein as "Trial Tr." All other citations to the transcripts are made in accordance with the date of the proceeding transcribed.

Although he decided not to call police, Mr. Riebe kept watch over his property the rest of the day. Based on the way that items on his property had been moved around, Mr. Riebe believed that the people who had been on his property would return in order to take some of the items kept there. (Trial Tr., p.183, L.16 – p.185, L.14.) Later that evening, Mr. Riebe donned camouflage and night vision goggles, and found a hiding spot to lie in wait for anyone that might return to try to re-enter his property. (Trial Tr., p.185, L.15 – p.186, L.20.)

Shortly before three in the morning, Mr. Riebe saw two vehicles drive past and park next to where he was hiding by the side of the road adjacent to his property. (Trial Tr., p.187, Ls.8-20.) As he moved closer to the road, he saw five or six people who initially had a discussion as a group, but then started walking together down the road towards Mr. Riebe's property. (Trial Tr., p.189, L.14 – p.192, L.23.) Mr. Riebe testified that one of the people in this group was carrying a pair of bolt cutters with him at the time. (Trial Tr., p.193, L.25 – p.194, L.11.) The group headed towards a spot on Mr. Riebe's barbed wire fence where the wire had been cut the night before. (Trial Tr., p.195, Ls.5-16.) Mr. Riebe lost sight of this group as they then moved towards some trailers that were on his property. (Trial Tr., p.206, L.21 – p.207, L.1.)

According to his testimony, Mr. Riebe then crawled across the street towards where the two trucks were parked. (Trial Tr., p.208, L.20 – p.210, L.6.) He could discern the license numbers on one of the vehicles, but he didn't have anything to write the numbers down with. (Trial Tr., p.210, L.7 – p.p.212, L.22.) He could also see at least one person inside one of the trucks. (Trial Tr., p.211, Ls.11-12.) While he was attempting to get the license number off of the vehicles, a person inside one of them asked if he needed help. (Trial Tr., p.213, L.23 – p.216, L.24.)

Mr. Riebe then opened the door to the truck and shined a flashlight inside. (Trial Tr., ,p.217, Ls.2-20.) There were two women inside of the truck. (Trial Tr., p.217, Ls.20-23.) When confronted, the women claimed that the truck had broken down and that they were just waiting for someone to come drop off a part to fix the truck. (Trial Tr., p.218, Ls.4-12.) Mr. Riebe then closed the door of the truck and called police. (Trial Tr., p.218, L.12 – p.219, L.12.) While on the phone with police dispatch, Mr. Riebe read off the license plate numbers and provided descriptions of the trucks. (Trial Tr., p.220, L.24 – p.225, L.22.)

While Mr. Riebe was doing this, the women who had been in the truck began yelling for the other individuals to come back. (Trial Tr., p.227, Ls.4-22.) Mr. Riebe retreated into a cornfield next to the roadway. Shortly thereafter, several people came running back towards to trucks. (Trial Tr., p.227, L.14 – p.228, L.17.) They then got into the trucks and attempted to drive away. (Trial Tr., p.228, L.18 – p.232, L.12.) Still on the phone with police, Mr. Riebe informed dispatch as to where the trucks were driving away and was then told to return to his home. (Trial Tr., p.233, Ls.4-7.)

He came back out to his property later that morning to meet with police. (Trial Tr., p.233, Ls.12-20.) Mr. Riebe noticed that a lock had been cut off another trailer and that one of his shops had been broken into. (Trial Tr., p.235, L.23 – p.236, L.23.) Inside the shop, there were recent footprints that were visible in the dust on the floor, and there were several items that had been moved. (Trial Tr., p.237, L.5 – p.238, L.9.) Mr. Riebe testified that the footprints visible inside the shop were not his, since he did not wear that type of shoe. (Trial Tr., p.243, L.23 – p.244, L.3.)

Although he was wearing night vision goggles, Mr. Riebe was unable to identify Mr. Devan as being among any of the individuals present on the night of the alleged

burglary. (Trial Tr., p.249, L.15 – p.250, L.9.) He also did not hear any of the people who were there refer to each other by name. (Trial Tr., p.253, Ls.15-22.)

Deputy Casey Zechmann was dispatched to the scene when Mr. Riebe first called in the license plate numbers of the trucks parked next to his property. (Trial Tr., p.314, L.10 – p.315, L.23.) The deputy saw headlights coming towards him as he made his way to Mr. Riebe's property. As he passed, he saw the truck driving by matched the description he was given for one of the vehicles. (Trial Tr., p.316, Ls.2-10.) Deputy Zechmann then pulled the truck over and confirmed that the license plate matched that given for one of the trucks by Mr. Riebe. (Trial Tr., p.316, Ls.11-17.) After pulling the truck over, the deputy eventually arrested the three people that were inside: Lauren Jones, Darrin Boren, and Jenny Osborn. After transporting them to the jail, Deputy Zechmann returned to talk to Mr. Riebe. (Trial Tr., p.316, L.20 – p.320, L.4.)

When looking around the property, the deputy also took note of several shoe prints around the property that were suspicious. (Trial Tr., p.320, L.12 – p.340, L.11.) He also took a picture of some of these impressions. (Trial Tr., p.320, L.12 – p.340, L.11.) Police were able to determine that the shoe print was made by a Nike shoe. Although law enforcement seized Mr. Devan's shoes later that day, no one took the shoes back to Mr. Riebe's property to make a comparison to the prints left there. (Trial Tr., p.343, L.20 – p.345, L.14.)

Police Officer Dale Schreiber also testified on behalf of the State. He was sent to a motel where police believed one of the trucks involved in the alleged burglary would be located. (Trial Tr., p.399, L.23 – p.401, L.23.) After seeing the truck there and confirming its license plate number, Officer Schreiber parked a short distance down the street to watch the truck. (Trial Tr., p.401, L.17 – p.408, L.21.) Eventually, Mr. Devan

approached the officer's car from the direction of the motel. Officer Schreiber got out of his car and crossed the street to talk to Mr. Devan. (Trial Tr., p.409, L.12 – p.410, L.21.) Mr. Devan informed the officer that he thought that he was being followed by another individual. (Trial Tr., p.410, L.16 – p.411, L.1.)

Because he was suspicious that Mr. Devan might have been one of the individuals involved in the burglary, the officer asked Mr. Devan to empty his pockets and provide identification. (Trial Tr., p.411, Ls.2-12.) The address on Mr. Devan's driver's license was the same as that indicated on the registration of the truck that Officer Schreiber was told was one of the vehicles suspected of being involved in the burglary. (Trial Tr., p.411, L.13 – p.412, L.3.) At that point, the officer detained Mr. Devan as a suspect in the burglary. (Trial Tr., p.412, Ls.4-22.)

The State also presented the testimony of some of Mr. Devan's alleged co-conspirators. Darrin Boren testified that Mr. Devan was present when he, Lauren Jones, Levi Jones, and Dana Harris were all discussing preparations for going on to Mr. Riebe's property. (Trial Tr., p.348, L.3 – p.353, L.15.) Mr. Boren testified that he was explaining the nature of the property as being in a remote location and that it would be easy for them to get on the property and take some items from there. (Trial Tr., p.353, L.25 – p.354, L.13.) Mr. Boren had already been on the property twice and had taken things from there before. (Trial Tr., p.354, Ls.14-23.)

Once at Mr. Riebe's property, Mr. Boren claimed that some of the people present were hesitant to go through with their plan. According to his testimony, Mr. Devan told the group that they should go forward with the plan. (Trial Tr., p.359, L.16 – p.360, L.14.) He further claimed that Mr. Devan assisted Lauren Jones in cutting off a padlock on one of the trailers on Mr. Riebe's property. (Trial Tr., p.360, Ls.15-21.) Once inside

the trailer, Mr. Boren testified that Mr. Devan and the others started moving things around. Mr. Boren claimed that, upon being notified that the police were being called, someone grabbed a bag full of "stuff" and everyone got back to the trucks and tried to drive away. (Trial Tr., p.361, L.3 – p.363, L.19.)

On cross-examination, Mr. Boren acknowledged that he was unable to give police Mr. Devan's name at the time of being questioned upon his arrest. He claimed that he was confused and upset at the time, although he could identify his face. (Trial Tr., p.367, L.10 – p.368, L.3.) But Mr. Boren was uncertain as to whether he had been provided any photographic lineup in order to attempt to identify Mr. Devan, and further was uncertain as to whether he was able to make a visual identification if that lineup was provided. (Trial Tr., p.372, L.11 – p.373, L.21.) In addition, Mr. Boren admitted that he was high on methamphetamine on the night of the alleged burglary and had been told by police that he and his wife would receive harsher punishment if they did not cooperate with the police. (Trial Tr., p.370, Ps.10-18; p.376, L.8 – p.378, L.3.)

Tiffany Jones, another alleged co-conspirator, also testified on behalf of the State. Ms. Jones admitted to being one of the group of people who burglarized Mr. Riebe's property. (Trial Tr., p.427, L.2 – p.428, L.1.) Ms. Jones testified that Mr. Devan was another of the individuals who was present for and participated in the burglary, as well as in discussions immediately prior in which the plans for the burglary were formulated. (Trial Tr., p.428, L.2 – p.431, L.20.) She further testified that Mr. Devan drove herself and two other individuals to Mr. Riebe's property in his mother's truck (Trial Tr., p.429, Ls.7-14.)

After the State rested its case, Mr. Devan presented the testimony of Gina White, who worked at the motel where Mr. Devan was initially detained by police. (Trial Tr.,

p.484, L.21 – p.485, L.6.) Although she had seen Mr. Devan driving the maroon truck that was allegedly used in the commission of the burglary, she also testified that she had seen that vehicle being driven more frequently by Dana Harris. (Trial Tr., p.485, L.9 – p.488, L.8.) Additionally, on the day of the alleged burglary, she testified that she had seen Mr. Harris driving this truck with another individual, but that Mr. Devan was not in the truck with them. (Trial Tr., p.488, Ls.14-20.)

Mr. Devan also testified on his own behalf and denied all prior knowledge of, or involvement in, either the burglary or the conspiracy to commit burglary. (Trial Tr., p.509, L.8 – p.512, L.25.) He testified that he had permitted Dana Harris to borrow his mother's truck on the night prior to the alleged burglary, and that he had allowed Mr. Harris to do so on previous occasions. (Trial Tr., p.515, L.24 – p.516, L.8.) But Mr. Devan testified that he did not go with Mr. Harris or anyone else to Mr. Riebe's property. (Trial Tr., p.516, Ls.13-15.) He also denied knowing several of the people who admitted to having participated in the burglary. (Trial Tr., p.515, Ls.14-17.)

Regarding the shoe prints that were found at Mr. Riebe's property, Mr. Devan also denied that those were his. (Trial Tr., p.521, Ls.13-20.) Because he was familiar with the Nike brand of shoes, Mr. Devan could testify to the fact that the sole prints were a match to a wide variety of different and popular brands of Nike shoes. (Trial Tr., p.519, L.3 – p.521, L.1.)

During closing arguments, defense counsel explained to the jury that there are various standards of proof that may apply in court cases, but that the State was required to establish proof by the highest of these standards – proof beyond a reasonable doubt. (Trial Tr., p.596, L.9 – p.598, L.2.) In rebuttal, the prosecutor first characterized the arguments made by counsel as "gobbledygook," then proceeded to ask the jurors to,

"throw out all of the argument that the defense attorney gave you," with regard to reasonable doubt in comparison to the lesser standards of proof. (Trial Tr., p.614, Ls.19-25.) Shortly thereafter, the prosecutor asserted that defense counsel was insulting the jurors with his argument, although the jurors didn't know it. (Trial Tr., p.616, Ls.16-17.) In addition, the prosecutor characterized defense counsel's arguments regarding the failure to make a direct comparison between Mr. Devan's shoes and the shoe prints at Mr. Riebe's property as an attempt to "punish the state" and to "spoon-feed" the jury. (Trial Tr., p.619, Ls.14-24.)

Mr. Devan was convicted of conspiracy, burglary, and trespassing. (Trial Tr., p.623, Ls.10-22; R., pp.82-83.) Following his conviction, he filed a motion for a mistrial or, in the alternative, a new trial on the basis that two of the jurors, during the course of trial, saw Mr. Devan in handcuffs in the hallway outside of the courtroom. (R., p.85.) This motion was subsequently amended to include the additional grounds that Mr. Devan was shackled with a leg restraint during the course of his trial without any finding on the part of the trial court that such restraints were necessary. (R., pp.89, 91.)

The State filed an objection to this motion, asserting that Mr. Devan had failed to make any objection to the leg restraints that were used and that a finding of necessity for these restraints was not required given that they were not visible or apparent to the jury. (R., pp.102-105.) The State further argued that any error in two jurors observing Mr. Devan in restraints in the hallway during trial was harmless. (R., pp.105-106.)

The district court ultimately denied Mr. Devan's motion for a mistrial or, alternatively, a new trial. (2/17/12 Tr., p.80, L.6 – p.86, L.23; R., pp.107-108). He was sentenced to concurrent sentences of five years, with two years fixed, for each of his convictions of conspiracy and burglary. (Trial Tr., p.687, L.687, L.9 – p.692, L.12; R.,

pp.120-122.) However, the district court suspended these sentences and placed Mr. Devan on probation for a term of five years. (Trial Tr., p.687, L.687, L.9 – p.692, L.12; R., pp.120-122.)

Mr. Devan timely appeals from his judgment of conviction and sentence. (R., p.127.)

ISSUE

Did the prosecutor commit misconduct, rising to the level of a fundamental error, when the prosecutor used inflammatory language calculated to appeal to the passions and prejudice of the jury, disparaged defense counsel, and misstated the arguments raised by defense counsel?

ARGUMENT

The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When The Prosecutor Used Inflammatory Language Calculated To Appeal To The Passions And Prejudice Of The Jury, Disparaged Defense Counsel, And Misstated The Arguments Raised By Defense Counsel During The Course Of Closing Arguments

A. Standard of Review

Because there was no contemporaneous objection to the misconduct occurring during closing arguments, this Court reviews Mr. Devan's allegation of prosecutorial misconduct under the three-part test for fundamental error articulated in *State v. Perry*, 150 Idaho 209, 226 (2010). Under this standard, fundamental error is established and reversal is required if the defendant can establish that: (1) the alleged error violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear and obvious from the record; and (3) there is a reasonable possibility that the error affected the outcome of the trial proceedings. *Perry*, 150 Idaho at 226.

B. The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When The Prosecutor Used Inflammatory Language Calculated To Appeal To The Passions And Prejudice Of The Jury In Characterizing Defense Counsel, Misstated The Arguments Raised By Defense Counsel, And Invoked The Prestige Of His Office During The Course Of Closing Arguments

Mr. Devan asserts that the prosecutor in this case committed misconduct, rising to the level of a fundamental error, during the closing arguments in this case.

The purpose of closing arguments is to sharpen and clarify the issues that must be resolved by the jury within the criminal case, and to assist the jurors in remembering and interpreting the evidence at trial. *See, e.g., State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). "Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints,

the evidence and the inferences to be drawn therefrom." *Id.* (quoting *State v. Sheahan*, 139 Idaho 267, 280 (2003)).

However, while both sides have considerable latitude to argue the evidence, that latitude is not unbounded. Of particular note, closing arguments should not disparage opposing counsel, misstate the evidence or the defense presented at trial, nor should closing arguments contain improper appeals to the passion and prejudice of the jurors. *Id.* at 86-87. Additionally, as quasi-judicial officers, prosecutors owe a special duty of care in conducting closing arguments. As was noted over a century ago by the Idaho Supreme Court:

> Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. It seems that they frequently exert their skill and ingenuity to see how far they can trespass upon the verge of error, and in so doing they transgress upon the rights of the accused. It is the duty of the prosecutor to see that a defendant has a fair trial, and nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced. When he has submitted all the facts in the case to the jury he should be content, but he should never seek by any artifice to warp the minds of the jurors by inferences and insinuations.

State v. Irwin, 9 Idaho 35, 71 P. 608, 611 (1908).

"Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. This can occur where the prosecutor employs inflammatory language regarding the defendant or defense counsel, particularly where that language is "seemingly calculated to arouse negative emotions" on the part of the jury towards the defendant. *See Phillips*, 144

Idaho at 87; *see also State v. Gross*, 146 Idaho 15, 19 (Ct. App. 2008); *State v. Baruth*, 107 Idaho 651, 657 (Ct. App. 1985). Likewise, it impacts upon a defendant's right to a fair trial if a prosecutor misstates or misrepresents the evidence, or seeks to distort the defense presented at trial. *See State v. Troutman*, 148 Idaho 904, 909-910 (2010); *State v. Beebe*, 145 Idaho 570, 575-576 (Ct. App. 2007).

In this case, the prosecuting attorney made several statements during the rebuttal portion of the State's closing argument that employed inflammatory language that was calculated to give rise to negative emotions against the defendant and defense counsel, and further misstated a portion of Mr. Devan's defense at trial. From the outset, the first word out of the prosecutor's mouth was, "Gobbledygook," which was used in reference to the arguments of defense counsel. Specifically, the prosecutor stated:

> Gobbledygook, that what the argument of the lawyers [sic] are, and that's what they do. So the first thing I'm going to ask you to do is throw out all of the argument that the defense attorney gave you about clear and convincing evidence, yadda, yadda, yadda.

(Trial Tr., p.614, Ls.19-25.)

The prosecutor then went further, and characterized defense counsel's argument as an "insult" to the intelligence of the jurors:

> **And what the defense is doing is really insulting, and you don't know it.** Because when we're little, we're spoon-fed. All I've done here -- and they want you to be spoon-fed. They want you to have an expert come in and tell you what you can already see. All I've done here is give you a spoon. You can feed yourself.

(Trial Tr., p.616, Ls.16-22 (emphasis added).)

The prosescutor later returned to its theme of accusing the defense of attempting to infantilize the jurors by "spoon-feeding" them later in rebuttal, but the prosecutor went a step further. (Trial Tr., p.619, Ls.14-24.) The State characterized Mr. Devan's cross-

examination and argument as to the failure of the State to physically compare the shoes taken from him with the actual prints on Mr. Riebe's property as an attempt to "punish" the state, as well as to "spoon-feed" the jury. (Trial Tr., p.619, Ls.14-24.)

From the outset, the prosecutor in this case used inflammatory language in calling defense counsel's argument "gobbledygook" that the jurors should "throw out." This language was calculated to inflame the negative emotions of the jurors, rather than elucidating the evidence and argument presented at trial. However, this rebuttal argument progressed to an even more egregious appeal to the passion and prejudice of the jury when the prosecutor asserted that defense counsel's argument was an "insult" to the jury – and that they just did not realize it was such.

In describing this purported "insult," the prosecutor routinely referenced "spoon-feeding," and expressly described this as an action that people undertake with small children. The inference to be drawn from the prosecutor's repeated remarks was that defense counsel was attempted to infantilize the jury, or was otherwise insulting their intelligence through questioning some of the State's evidence and whether that evidence met the standard of proof beyond a reasonable doubt. The prosecutor's statement that the defense was "insulting" them, and that the jury did not even realize it, coupled with the theme of spoon-feeding of the jury is analogous to the misconduct that occurred in *Phillips*, wherein the prosecutor repeatedly referenced that the jurors may be irritated by the arguments raised by the defendant. *See Phillips*, 144 Idaho at 85. Just as in *Phillips*, the assertion that the jurors were being personally insulted by defense counsel's argument, coupled with the repeated claims that defense counsel was trying to spoon-feed the jury, "was inflammatory language calculated to arouse negative emotions." *Id.* at 87.

In addition, the State mischaracterized the defense in this case, and did so using similarly inflammatory language, when the prosecutor argued that defense counsel was seeking to "punish the state" when counsel challenged the failure of the State to make a direct comparison of Mr. Devan's shoes with the actual shoe prints found at the scene of the alleged burglary. Mr. Devan's arguments in this regard were aimed at an entirely proper purpose – arguing the evidence from his respective standpoint and holding the State to its burden of proof. It is not a "punishment" against the State to hold the State to this burden, nor is it punishing the State to point out deficiencies in the State's case. Taken together, the State's theme of appealing to the passion and prejudice of the jury during its rebuttal closing argument was a violation of Mr. Devan's constitutional right to a fair trial that is plain from the face of the record.

Moreover, this error is not harmless. From the outset, the alleged victim in this case could not identify Mr. Devan as being one of the people who were present on the night of the alleged burglary. He could not even state whether he had seen Mr. Devan before that date. The only persons who could connect Mr. Devan to the alleged conspiracy and burglary were his alleged co-conspirators – each of which had the motivation to curry favor with police and the prosecution to give favorable testimony in light of the charges that they were themselves facing. Moreover, Mr. Devan presented the evidence of a witness who had seen Dana Harris driving Mr. Devan's mother's truck earlier on the day of the alleged burglaries when Mr. Devan was not in the truck. This corroborated Mr. Devan's testimony that he was not present for, nor a conspirator in, the planning or execution of any burglary.

Finally, the timing of this misconduct is also of special significance with regard to measuring its prejudice. As was noted by the Court in *Troutman*:

> It is important to note that this misconduct by the prosecutor occurred in rebuttal argument. At this point in the trial the state has the last word and is in a position to leave the last impression upon the jury. From an evidentiary standpoint, this case was not open and shut for the state, and Troutman presented a viable defense. Therefore, we cannot conclude beyond a reasonable doubt that the result of the trial would not have been different absent the distortion and mischaracterization of Troutman's defense.

Troutman, 148 Idaho at 909-910.

Here, as in *Troutman*, the prosecutor had the opportunity to have the last word and leave the last impression in the minds of the jurors as to how to evaluate this case. The prosecutor used that opportunity to insinuate that the jurors should feel insulted by defense counsel's arguments in trying to establish reasonable doubt within a case where the proof of Mr. Devan's guilt was neither overwhelming nor uncontroverted. In light of the repeated theme of appealing to the passions and prejudice of the jurors, as well as the fact that Mr. Devan presented a plausible defense at trial, Mr. Devan submits that there is a reasonable possibility that the misconduct in this case affected the outcome of the proceedings.

CONCLUSION

Mr. Devan respectfully requests that this Court reverse his judgments of conviction and sentences, and remand this case for further proceedings.

DATED this 9th day of April, 2013.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of April, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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