SUPREME COURT NO. __________

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SCOTT REED,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 41167-9-II
Clark County No. 09-1-00761-6

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS...I

TABLE OF AUTHORITIES... II

A. IDENTITY OF PETITIONER.. 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED................................. 3

1. WHETHER EXCLUSION OF THE DEFENDANTS' FRIEND FROM THE COURTROOM VIOLATED THEIR CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE. 3

2. WHETHER TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENT CONSTITUTES DEFICIENT PERFORMANCE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE. 9

3. WHETHER THE SPECIAL VERDICT INSTRUCTION PROTECTED REED'S RIGHT TO A UNANIMOUS VERDICT PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.. 12

4. THE SERIOUS TRIAL IRREGULARITY NECESSITATED A MISTRIAL.... 13

5. CUMULATIVE ERROR DENIED REED A FAIR TRIAL. 15

6. ISSUES IN THE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW 16

F. CONCLUSION... 16

TABLE OF AUTHORITIES

Washington Cases

In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004)...... 6

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010) 10

State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008)................... 14

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) 4, 5

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995)................................. 12

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005)..................... 3, 4

State v. Byrd, 72 Wn. App. 774, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995).. 11

State v. Coe, 101 Wn.2d 772, 685 P.2d 668 (1984) 15

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001)........................... 15

State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007) 4, 5

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006).................. 3, 4, 5

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 10

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000) 14

State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010)...................... 10

State v. Leyerle, 158 Wn. App. 474, 242 P.3d 921 (2010)......................... 5

State v. Lormor, 172 Wn.2d 85, 257 P.3d 624 (2011)........................... 6, 7

State v. Neidigh, 78 Wn. App. 71, 95 P.2d 423 (1995) 10

State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012) 12, 13

Federal Cases

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 12

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) 12

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) 3

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) 5

Presley v. Georgia, 559 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) 4

Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) 4, 7

Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) 11

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 10

Tinsley v. U.S., 868 A.2d 867 (D.C. App. 2005) 8

United States v. Rivera, 682 F.3d 1223 (9th Cir. 2012) 8

United States v. Sherlock, 962 F.2d 1349 (9th Cir. 1989) 8

Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) 4, 5

Woods v. Kuhlmann, 977 F.2d 74 (2nd Cir. 1992) 8

Other Cases

State v. Mahkuk, 736 N.W.2d 675 (Minn. 2007) 8

State v. Ortiz, 91 HAW. 181, 981 P.2d 1127 (Haw. 1999) 8

Constitutional Provisions

U.S. Const. amend I 3

U.S. Const. amend. VI 3

Wash. Const. art. I, § 22.. 3

Wash. Const. article I, section 10 3

Rules

RAP 13.4(b) 8, 11, 13

A. IDENTITY OF PETITIONER

Petitioner, JEFFREY SCOTT REED, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Reed seeks review of the October 8, 2013, part published decision of Division Two of the Court of Appeals affirming his conviction and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. During trial, courtroom security personnel removed a member of the public from the courtroom and told him if he returned he would be arrested for trespassing. Where the court did not undertake the required analysis on the record before the public was excluded from the proceedings or determine that exclusion was necessary, did the court fail to fulfill its constitutional obligation to ensure that Reed received a public trial?

2. The prosecutor argued in closing that the jury's job was to "declare the truth," and he trivialized the reasonable doubt standard by comparing it to everyday decision making, easing the State's constitutional burden. Where these improper arguments have been repeatedly condemned by appellate courts and where there is a substantial likelihood the prosecutor's flagrant misconduct affected the verdict, did

trial counsel's failure to object to the prosecutor's improper argument constitute ineffective assistance of counsel?

3. Was the special verdict instruction sufficient to protect Reed's right to a unanimous jury verdict where the instruction failed to inform the jury it could leave the form blank if it could not reach a unanimous decision on the special verdict?

4. Where a police officer improperly expressed his opinion as to Reed's state of mind at the critical moment, should Reed's motion for a mistrial have been granted?

5. Does cumulative error require reversal?

6. Do the issues raised in Reed's Statement of Additional Grounds for Review warrant reversal?

D. STATEMENT OF THE CASE

A complete statement of the case, with citations to the lengthy record, is contained in the Brief of Appellant at 3-11. Additional facts relevant to each issue are included in the Argument section of that brief. Because the brief will be forwarded as part of the Court of Appeals record to this Court, to avoid repetition, petitioner incorporates that statement by reference.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER EXCLUSION OF THE DEFENDANTS' FRIEND FROM THE COURTROOM VIOLATED THEIR CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a public trial. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). In addition, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," which provides the public itself a right to open, accessible proceedings. Easterling, 157 Wn.2d at 174. Moreover, the First Amendment implicitly grants the public a right of access to trials. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).

These constitutional provisions assure a fair trial, foster public understanding and trust in the judicial system and give judges the check of public scrutiny. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); see also Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 508, 104 S.Ct. 819, 823, 78 L.Ed.2d 629,

637 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed."). A public trial "ensure[s] that [the] judge and prosecutor carry out their duties responsibly ... encourages witnesses to come forward[,] and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

The court has an independent obligation to protect the defendant's and the public's right to open proceedings and assure that justice is administered openly. Easterling, 157 Wn.2d at 187 (Chambers, J., concurring) ("[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts."); State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); State v. Duckett, 141 Wn. App. 797, 806, 173 P.3d 948 (2007).

While the public trial right is not absolute, it is strictly guarded to assure that members of the public are excluded from trial proceedings only in the most unusual circumstances. Easterling, 157 Wn.2d at 174-75; Brightman, 155 Wn.2d at 509. "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley v. Georgia, 559 U.S. 209, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). Thus, members of the public cannot be excluded unless the court

has conducted an analysis of relevant factors[1] on the record and entered specific findings that justify the closure. Presley, 130 S.Ct. at 724-25; Waller, 467 U.S. at 45-47; Easterling, 157 Wn.2d at 175; Bone-Club, 128 Wn.2d at 258-59; State v. Leyerle, 158 Wn. App. 474, 481, 242 P.3d 921 (2010). Exclusion of the public without the required analysis and findings violates the right to a public trial. Brightman, 155 Wn.2d 506, 515-16; Duckett, 141 Wn. App. at 805.

Denial of the right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. Easterling, 157 Wn.2d at 181 (citing Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing Waller, 467 U.S. 39)). This is because denial of the public trial right is structural error, and prejudice is

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[1] This Court has identified the relevant factors as:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59. In Waller, the United States Supreme Court held, "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Waller, 467 U.S. at 48.

presumed. Neder, 527 U.S. at 8; Easterling, 157 Wn.2d at 181. The remedy is therefore remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

In this case there is no question that a member of the public was improperly excluded from the courtroom during the proceedings. An undercover officer in the courtroom felt the man had intimidated a witness who was leaving the courtroom. 26(B)RP 1609-10. The man was told that if he returned to court he would be arrested for trespassing. 27(A)RP 1674-75. The court did not authorize the exclusion, did not consider on the record whether the exclusion was necessary, and did not enter any findings that the exclusion was justified. 27(A)RP 1674. In fact, the court agreed that the man should not have been excluded from the proceedings and told the sheriff's office it had no authority to ban him from the courtroom. 27(B)RP 1862.

The Court of Appeals held that there was no courtroom closure, and thus no violation of the right to a public trial, relying on State v. Lormor, 172 Wn.2d 85, 257 P.3d 624 (2011). Slip Op. at 6. That case decided "whether the removal of a person from the courtroom, under the facts of this case, was a closure in violation of the right to a public trial." Lormor, 172 Wn.2d at 87. Lormor's daughter, who was not yet four years

old, was excluded from the courtroom before trial. She was terminally ill, confined to a wheelchair, and required a ventilator to breathe. Id.

This Court noted that Lormor's trial was conducted in an open courtroom, the public in general was not prohibited from attending, only one member of Lormor's family was excluded, Lormor himself was not excluded from any portion of the trial, nor was any part of the trial conducted in an inaccessible location. Lormor, 172 Wn.2d at 93. The Court concluded that, "[f]actually, the exclusion of one person, without more, is simply not a closure under those scenarios."

Here, there was more. There was the appearance, based on actual events, that members of the public could be culled from the crowd by state officers, removed from the proceedings and prohibited from returning under threat of arrest, with no finding by the court that such action was necessary. If this is going on, the public cannot have confidence that standards of fairness are being observed. See Press-Enterprise, 464 U.S. at 508. Removal of even one person under this factual scenario impacts the right to public trial.

In Lormor, this Court held that a courtroom closure occurs only when the courtroom is completely and purposefully closed to all spectators. Lormor, 172 Wn.2d at 93. It is established under federal law and a number of other jurisdictions, however, that partial closures of the

courtroom, where access is restricted but other members of the public are permitted to attend, are still closures for purposes of the Sixth Amendment right to a public trial. See, e.g., United States v. Rivera, 682 F.3d 1223, 1225, 1230-33 (9th Cir. 2012) (Sixth Amendment right to a public trial violated by district court's exclusion of defendant's family members from sentencing proceedings); United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989) (some of defendant's family members excluded to protect young sex crimes victims from trauma and embarrassment of public scrutiny); Woods v. Kuhlmann, 977 F.2d 74, 76-77 (2nd Cir. 1992) (witness intimidation was substantial reason justifying exclusion of defendant's family during testimony of one witness); Tinsley v. U.S., 868 A.2d 867, 873-74 (D.C. App. 2005) (even limited closure of courtroom by exclusion of specific spectators implicates Sixth Amendment; closure upheld because court found necessary after offer of proof); State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007) (partial closure of courtroom through exclusion of defendant's brother and cousin violated right to public trial); State v. Ortiz, 91 HAW. 181, 191, 981 P.2d 1127 (Haw. 1999) (citing cases). Whether the unauthorized exclusion of members of the public as occurred in this case violates the right to a public trial is a significant issue of constitutional law and an issue of substantial public importance which this Court should review. RAP 13.4(b)(3), (4).

2. WHETHER TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENT CONSTITUTES DEFICIENT PERFORMANCE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

During closing argument, the prosecutor told the jury that a criminal trial is a search for the truth and that the State's role was to present evidence, the court's role was to enforce the rules and give the jury the law, and the jury's role was to declare the truth. 29RP 2240-42.

Then, after reminding the jury that the State has the burden of proving each alleged criminal event beyond a reasonable doubt, the prosecutor elaborated on the meaning of that standard:

> And an abiding belief is, I think, I will suggest to you, the same sort of frame of mind that we require in any important decision we make. Say, a decision to marry or a decision to make a significant investment. What we do in those scenarios, hopefully is to consider all of the facts, the pros, the cons, the ups, the downs, consider all the facts in an objective, reasonable way, and then determine a course of action.
>
> And the point I would make to you is that you're never certain if that marriage is going to succeed or that investment is going to pay off big time, but we have an abiding belief in the decision that we made, we – we – we believe the decision to marry or make that investment was a correct one.
>
> And that's where we are in the question of our burden of proof, the question of reasonable doubt.

29RP 2243-44. Defense counsel did not object to the prosecutor's improper argument, choosing instead to address it in closing. 30RP 2376-77.

As the Court of Appeals recognized, the prosecutor's arguments diminishing the burden of proof and exhorting the jury to declare the truth were clearly improper. Slip Op. at 23; State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); State v. Anderson, 153 Wn. App. 417, 425, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010); State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). The Court of Appeals held that the prejudice resulting from the prosecutor's misconduct could have been cured by instruction if defense counsel had objected. Slip Op. at 25-26. It nonetheless concluded that trial counsel's performance was not deficient, noting that counsel made a strategic decision to address the prosecutor's misstatements of the law in closing argument instead of seeking an instruction from the court. Slip Op. at 26-27.

If the prosecutor's conduct was curable, then defense counsel was ineffective in failing to seek the cure. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). Trial counsel clearly recognized that the prosecutor's arguments misstated the law, and he attempted to correct the error by addressing it in his closing argument. 30RP 2376-77. While this was clearly a strategic choice, that fact does not alone insulate counsel's conduct from a claim

that it was deficient. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

There was no legitimate reason for counsel not to object to the prosecutor's misconduct and seek a curative instruction to ensure Reed's right to a fair trial. A properly sustained objection and request for curative instruction would have informed the jury that the prosecutor had misstated the law and the improper arguments should be disregarded. Given counsel's decision to forgo this procedure and only offer a counter argument, the jury was left to decide who was right on how to interpret the burden of proof—defense counsel or the prosecutor. It is not counsel's role to persuade the jury what the law is, and there was no benefit to the defense from letting the jury think it was. See State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995). Trial counsel's failure to object and seek a curative instruction constitutes deficient performance, and the Court of Appeals' decision to the contrary presents an issue of substantial public importance. RAP 13.4(b)(4).

3. WHETHER THE SPECIAL VERDICT INSTRUCTION PROTECTED REED'S RIGHT TO A UNANIMOUS VERDICT PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The Sixth Amendment to the United States Constitution requires that a jury must unanimously find beyond a reasonable doubt any aggravating circumstances that increase a defendant's sentence. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 313–14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); State v. Nunez, 174 Wn.2d 707, 709, 285 P.3d 21 (2012). In Washington, a jury uses special verdict forms to find these aggravating circumstances. Nunez, 174 Wn.2d at 709. In Nunez, this Court held that it is not error to instruct the jury that it must be unanimous to reject an aggravating factor. Id. at 718-19. It relied in part on State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995).

In Brett, the jury was not only instructed that it had to be unanimous to answer the special verdict "yes" or "no", it was also instructed that if it could not reach a unanimous decision, it should leave the special verdict form blank. Brett, 126 Wn.2d at 173. This Court held that jury unanimity was ensured because the jury was told not to fill in the blank if it could not agree. Id. Such an instruction ensures that any verdict entered is actually unanimous rather than a compromise based on

the jury's misperception that it was required to answer the question. In Nunez, this Court concluded "that the instruction given in Brett, requiring a jury to leave a special verdict form blank if it could not agree, is a more accurate statement of the State's burden and better serves the purposes of jury unanimity." Nunez, 174 Wn.2d at 719.

The special verdict instructions given here did not inform the jury it could leave the forms blank if it did not reach a unanimous decision. CP 330, 335-36, 338, 341, 343, 345. Whether such an instruction was required presents a significant constitutional question and in issue of substantial public importance which should be reviewed by this Court. RAP 13.4(b)(3), (4).

4. THE SERIOUS TRIAL IRREGULARITY NECESSITATED A MISTRIAL.

Prior to trial, Reed moved to preclude Sergeant Alie from testifying to his opinion as to the intent, state of mind, or purpose of the driver of the Kia in moving forward before the passenger shot Alie. 19RP 809; CP 77, 112-14. The court granted the motion, ruling that personal opinions about mental state are not relevant. 19RP 810-11. When Alie testified, however, he characterized the driver's movements as willful and intentional: "There's a beat where there's nothing, no response at all. Suddenly he makes a real willful, intentional movement." 24RP 1142.

Defense counsel objected and the court sustained, telling the officer to simply describe what he saw and telling the jury that personal opinions of the officer should be disregarded. 2RP 1142.

When Alie finished testifying, defense counsel moved for a mistrial. 24RP 1160. The court acknowledged that Alie's testimony improperly presented his opinion of the driver's state of mind to the jury, but it felt that sustaining the objection and admonishing the jury to disregard was sufficient to cure any prejudice. 24RP 1162-63. The court denied the motion for mistrial. 24RP 1165. The court also denied Reed's motion for reconsideration of that ruling. 26(A)RP 1477-79.

A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. State v. Greiff, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000); State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). In determining whether a trial irregularity deprived the defendant of a fair trial, the appellate court considers (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other properly admitted evidence, and (3) whether the irregularity could have been cured by an instruction to disregard. Babcock, 145 Wn. App. at 163.

The Court of Appeals recognized that Alie's improper opinion testimony was a serious trial irregularity but held that other factors

mitigated the seriousness, and thus a mistrial was not required. Slip Op. at 32. To the contrary, the attempted first degree murder case came down to what the jury thought Reed's intent was at that moment he leaned forward in the car, and Alie did his best to tell them how to decide. It is well recognized that testimony from police officers carries an "aura of reliability" likely to influence the jury. See State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). Although the court instructed the jury to disregard Alie's opinion, given the closeness of the case on the critical issue of premeditation, this serious trial irregularity could not have been cured by instruction, and the mistrial should have been granted. This Court should reverse Reed's conviction of attempted first degree murder and remand for a new trial.

5. CUMULATIVE ERROR DENIED REED A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find that the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

Contrary to the Court of Appeals' conclusion, multiple errors in this case created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Reversal of Reed's convictions is therefore required.

6. ISSUES IN THE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Reed raised several arguments in his statement of additional grounds for review, which the Court of Appeals rejected. Those arguments are incorporated herein by reference.

F. CONCLUSION

For the reasons set forth above, the Court should grant review.

DATED this 7th day of November, 2013.

Respectfully submitted,

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of the Petition for Review in *State v. Jeffrey S. Reed,* Court of Appeals Cause No. 41167-9-II directed to:

Jeffrey S. Reed, DOC# 343607
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Port Orchard, WA
November 7, 2013

GLINSKI LAW OFFICE

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