69835-4

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NO. 69835-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

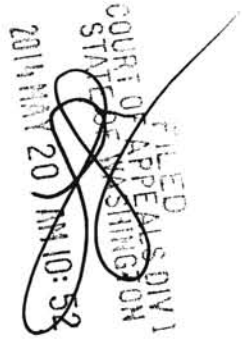
STATE OF WASHINGTON,

Respondent,

v.

ANTONNIO RAY THOMAS,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Mr. Thomas's conviction should be reversed because he did not receive a fair trial where a police officer testified extensively as to his conclusion that Mr. Thomas is guilty of the charged offense.

Based on sound law, the trial court granted Mr. Thomas's pretrial motion to exclude statements by law enforcement opining on Mr. Thomas's guilt. CP 74-75. The jury's role as arbiter of facts is inviolate. U.S. Const. amend. VI; Const. art. 1, §§ 3, 21, 22; *State v. Montgomery*, 163 Wn.2d 577, 589-91, 183 P.3d 267 (2008). Because it is the jury's role to decide factual questions, witnesses "may not testify as to the guilt of defendants, either directly or by inference." *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002); *accord Montgomery*, 163 Wn.2d at 591. Testimony regarding an accused's guilt invades the province of the jury and violates the accused's constitutional right to a trial by jury. *Olmedo*, 112 Wn. App. at 533; *State v. Quaale*, 177 Wn. App. 603, 606, 610-18, 312 P.3d 726 (2013) (reversing conviction where police officer provided opinion on accused's impairment at trial on felony driving under the influence and attempting to elude charges), *review granted* 179 Wn.2d 1022, 320 P.3d 719 (2014) (oral arg. scheduled May 29, 2014).

Despite the pretrial ruling, Detective Thorp testified he believed he had authority to arrest Mr. Thomas for criminal activity (probable cause) based on the following: "It was a combination of Ms. Heller's statement both to the initial responding officer, her follow-up statement to me, and the photographic evidence. They all supported probable cause for assault." 12/18/12 RP 59. He continued, "The facts can speak for themselves. Again, the photographs are facts. That shows that she was severely assaulted, and her statement – everyone else's statement that spoke with the responding officer, they were all consistent in naming Mr. Thomas as the individual who gave her those injuries." 12/18/12 RP 59-60. In short, Detective Thorp told the jurors not only that he opined Mr. Thomas was guilty of the charged crime, but also set forth the evidence he used to support that opinion. 12/18/12 RP 60-61.

Even the trial judge called Detective Thorp's testimony "crazy bad." 12/18/12 RP 128. She was "very concerned about that" because it was "very prejudicial" testimony that "had no business in this case." 12/18/12 RP 128, 130. The court abused its discretion by denying Mr. Thomas's motion for a mistrial. 12/18/12 RP 135-39.

The State responds by relying on legal distinction between Detective Thorp's probable cause determination and the more rigorous beyond a reasonable doubt standard under which the jury was to evaluate the evidence. Resp. Br. at 6, 11-13, 16. Although this argument might be appealing to an attorney, the lay jury does not have the same nuanced understanding of the distinct burdens. The jury was merely informed that probable cause is "different" from the standard at trial; it was not informed that beyond a reasonable doubt is more rigorous. 12/18/12 RP 60-62.

Moreover, the State's argument ignores the fact that this testimony derived from a police officer, who has the inherent weight and credibility of law enforcement behind him. *Montgomery*, 163 Wn.2d at 595 (noting police officers carry an "aura of reliability" although their opinions on guilt "have low probative value" (quoting *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)) *cf. United States v. Ortiz*, 362 F.3d 1274, 1278 (9th Cir.2004) (discussing prestige of government as applies to prosecutorial vouching). Even more egregiously, the officer did not only say he believed Mr. Thomas committed the charged crime but he also provided the jury with a roadmap of the evidence that led him to that conclusion. It was all too

easy for the jury to assume they should look at the same evidence to reach the same conclusion. The testimony invaded their province as factfinder. *See Montgomery*, 163 Wn.2d at 590-91; *Olmedo*, 112 Wn. App. at 533.

The State also incorrectly claims the trial court provided a "curative instruction." Resp. Br. at 9, 15, 17. The trial court did not strike the testimony. It did not tell the jury to disregard or not consider it. And it did not tell the jury that the beyond a reasonable doubt standard is significantly more strenuous than the officer's probable cause standard. Instead, the court simply said the evidence was "a distraction" and that "Probable cause is not the standard at trial." 12/18/12 RP 160-63. In fact, the trial court's musings were not in the form of an instruction to the jury at all. *See id.* Put simply, no curative instruction was provided.

Unlike the case law relied on by the State, Detective Thorp's testimony undeniably "relate[d] directly to [Mr. Thomas]." *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992) (contrasting direct relation to the case at hand, which is improper, with generic testimony about general conditions, which is not); Resp. Br. at 13 & n.8 (relying on *Sanders*). He also provided his conclusion rather than just

the facts he observed, another distinction made in the State's case law. Resp. Br. at 13 & n.8 (citing *State v. Madison*, 53 Wn. App. 754, 760-62, 770 P.2d 662 (1989)). Detective Thorp testified about this particular case, this particular suspect, the particular evidence in this case, and his conclusion in this case. The direct connection to Mr. Thomas weighs heavily in favor of a mistrial. *See Sanders*, 66 Wn. App. at 387-89. Likewise, Detective Thorp's opinion as to the ultimate question—guilt—as opposed to permissible testimony on underlying facts, also demonstrates the impropriety of the testimony. *See Madison*, 53 Wn. App. at 760-62.

For this reason, the State's analysis as to the cumulative nature of Detective Thorp's testimony is incorrect. Resp. Br. at 16. As discussed, Detective Thorp not only told the jury that he believed Mr. Thomas committed the crime but he provided the jury with a roadmap of the evidence that led him to that conclusion. The State asserts that because that underlying evidence was part of the State's case at trial, Detective Thorp's testimony was cumulative. Resp. Br. at 16. The problem with Detective Thorp's testimony was not his discussion of the underlying evidence. As the *Madison* court discussed, a witness may testify as to his observation and the underlying facts. *Madison*, 53 Wn.

App. at 760-62. But that same witness invades the role of the jury when he informs the jury of the conclusions he reached as a result of that evidence, *i.e.* that the accused is guilty. *Id.* That part of Detective Thorp's testimony was not cumulative. Moreover, his testimony accumulating the underlying evidence into a roadmap to find Mr. Thomas guilty also was not cumulative. Thus, this factor also weighs heavily in favor of a mistrial. *See State v. Perez-Valdez*, 172 Wn.2d 808, 856, 265 P.3d 853 (2011) (in deciding mistrial motion, court must look to whether improper statement was cumulative of properly admitted evidence).

This Court should reverse and remand for a new trial because the trial court abused its discretion in failing to grant a mistrial where the irregularity was serious, the testimony was not cumulative, and the court did not provide a curative instruction. *See Perez-Valdez*, 172 Wn.2d at 856.

2. The trial court abused its discretion in denying a mistrial when the State's witness testified, contrary to a pretrial ruling, that Mr. Thomas had a gun on the night in question.

Despite an independent pretrial ruling that the State could not present evidence that Mr. Thomas had or displayed a gun at the motorcycle club on the night in question, a witness testified that he

"remembered [Mr. Thomas] had a gun," and "figured that's what [Mr. Thomas] hit [Vivian Heller] with was the gun." 12/4/12 RP 136-40; 12/12/12 RP 159; CP 70-71. Although this time the trial court did tell the jury to disregard the testimony and that it could not consider it, the limiting instruction did not cure the serious error in admitting this non-cumulative evidence. The trial court again abused its discretion in failing to grant a mistrial. 12/12/12 RP 159-73.

The evidence that Mr. Thomas has a gun was entirely irrelevant to the charge of assault by physical contact and highly prejudicial. *E.g.*, *State v. Freeburg*, 105 Wn. App. 492, 500-01, 20 P.3d 984 (2001) (reversing conviction because admission of possession of gun not harmless). "Evidence of weapons is highly prejudicial, and courts have 'uniformly condemned . . . evidence of . . . dangerous weapons . . . which have nothing to do with the charged crime.'" *Id.* at 501 (quoting *United States v. Warledo*, 557 F.2d 721 (10th Cir. 1977) (third ellipses added)). While the witness here was merely speculating as to what happened in the alleged assault, he was not speculating but was certain that Mr. Thomas owned a gun. 12/12/12 RP 159; *see* Resp. Br. at 21-24, 26-27. The prejudice to Mr. Thomas was not that the jury would think he hit Ms. Heller with a gun, as there was no other evidence to

that effect, but that the jury would presume Mr. Thomas was a criminal or a bad person because he owned a gun.

Moreover, the evidence Mr. Thomas had a gun was not cumulative of any other properly admitted evidence. As discussed, Mr. Thomas had moved to exclude any reference to the gun, and his motion was granted. 12/4/12 RP 136-40; CP 70-71.

Although the court instructed the jury to disregard the evidence, such an instruction cannot cure the inherent prejudice of the irrelevant testimony that Mr. Thomas possesses a gun. Further, the jury not only heard the evidence but witnessed defense counsel's immediate reaction to it. Standing alone, or in combination with the other errors, this denied Mr. Thomas a fair trial.

3. The trial court denied Mr. Thomas's right to present a defense and abused its discretion by excluding evidence that Ms. Heller admitted attacking Mr. Thomas.

Mr. Thomas relies primarily on his argument in the opening brief regarding the denial of his right to present a defense when the trial court precluded him from admitting evidence from Shant'e Spears showing Ms. Heller was the attacker. Op. Br. at 17-21. By way of reply to the State's response, Mr. Thomas notes that the State's recitation of unrelated pretrial motions and rulings is irrelevant to the

Court's analysis of this issue. *See* Resp. Br. at 28-31. As the State recognizes, Mr. Thomas was not aware of the text messages between Ms. Spears and Ms. Heller, which corroborated Mr. Thomas's defense, until the day of Ms. Spears's testimony. Thus, he cannot have moved to admit the evidence earlier than he did and the trial court's pretrial rulings could not have taken this evidence into account. Moreover, the State seeks to rely on Criminal Rule 4.7, but defense counsel did not fail to disclose evidence in her possession. Resp. Br. at 33-35. As stated, both sides were unaware of the text message evidence prior to the day the issue was raised. Although it would have been preferred not to be surprised at trial with the evidence, the defense was just as "surprised" as the prosecution. In light of Mr. Thomas's constitutional right to present a defense and the evidence rules, the trial court erred by excluding this highly probative evidence at the time it was discovered.

4. The trial court's admission, over objection, of extensive photographs of Ms. Heller lying in a hospital gurney and injured unfairly prejudiced Mr. Thomas.

Courts and prosecutors must exercise restraint in admitting cumulative gruesome photographs when noninflammatory evidence amply supports the charged elements. *State v. Crenshaw*, 98 Wn.2d 789, 806-07, 659 P.2d 488 (1983); *State v. Sargent*, 40 Wn. App. 340,

348-49, 698 P.2d 598 (1985) (reversing where one photograph of autopsy would have been sufficient to infer premeditation but four were admitted in addition to two other cumulative photographs); *cf. In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (discussing inherent, highly persuasive value of photographs). Over defense objection, the trial court abused its discretion in permitting the State to present eight cumulative, prejudicial photographs of Ms. Heller lying in a hospital gurney with a neck brace, with a breathing tube in her nose, and hooked up to numerous other intravenous devices, cords and tubes. Exhibits 1-8, 15. Many of the photographs were also of little or no probative value because they depicted matters unrelated to the facial injuries purportedly sustained. *See* Exhibit 1. The main aim of these photographs was to repeatedly emphasize to the jury Ms. Heller's helplessness and to imply even greater wounds than she had sustained. *See* Exhibits 1-8 (showing breathing tube, neck brace, and numerous intravenous devices, chords and tubes).

In response, the State argues the photographs show that Ms. Heller's injuries to her face were not the result of a fall and were substantial bodily harm. Resp. Br. at 39-40. While this argument

shows why one of the photographs should have been admitted, it does nothing to advance the argument that all eight were necessary. "The State may present 'ample evidence' to prove every element of the crime [but] prosecutors do not have 'carte blanche to introduce every piece of admissible evidence' when the cumulative effect of that evidence is inflammatory and unnecessary." *State v. Whitaker*, 133 Wn. App. 199, 227, 135 P.3d 923 (2006) (quoting *Crenshaw*, 98 Wn.2d at 807). Evidentiary errors require reversal "if the error, within reasonable probability, materially affected the outcome." *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). These photographs compel compassion rather than for a reasoned evaluation of the evidence. "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). The cumulative effect of these photographs carried a strong risk of prejudice and the value placed on them by the jury cannot be quantified. *Salas*, 168 Wn.2d at 673.

5. By selecting alternate jurors off the record, the trial court violated Mr. Thomas's and the public's right to a public trial.

Like in *State v. Jones*, the trial court violated the constitutional right to a public trial by selecting alternate jurors in a closed proceeding. *State v. Jones*, 175 Wn. App. 87, 95-104, 303 P.3d 1084 (2013);[1] *see* Op. Br. at 25-30. Apparently overlooking pages 27-28 of Mr. Thomas's brief, the State argues Mr. Thomas failed "to analyze the alternate juror selection process under the experience and logic test." Resp. Br. at 45. But as set forth in the opening brief and as Justice Wiggins held in *Jones*, both experience and logic require that alternate juror selection take place in public. 175 Wn. App. at 95-104; Op. Br. at 27-28. Moreover, recitation of the results of the selection process in open court does not absolve the error. *Jones*, 175 Wn. App. at 95, 103-04 (reversible error where court announced process to be used and subsequent results in open court but actual process was conducted off the record). The State fails to distinguish, or even acknowledge, *Jones*. *See* Resp. Br. at 41-46. *Jones* is indistinguishable. In light of *Jones*

[1] The State's petition for review in *Jones* has been stayed pending *State v. Slert*, No. 87844-7 and *State v. Njonge*, No. 86072-6. *State v. Jones*, No. 89321-7 (petition for review filed Sept. 26, 2013).

and for the additional reasons set forth here and in the opening brief, reversal and remand for a new trial here.

6. Cumulative trial errors denied Mr. Thomas his constitutional right to a fair trial.

Even if no single error above requires reversal of Mr. Thomas's conviction, the cumulative effect of these errors necessitate that result. The State responds simply that no error occurred. Resp. Br. at 46-47. But, for the reasons set forth above and in the opening brief, several errors did occur during the below trial. Mr. Thomas is entitled to a new, far trial.

B. CONCLUSION

As set forth above and in Mr. Thomas's opening brief, he was denied a fair trial by the introduction of highly prejudicial evidence including police officer testimony explaining the reasons he believes Mr. Thomas is guilty, testimony that Mr. Thomas had a gun, and extensive, repetitive photographs of the alleged victim in a hospital gurney hooked up to various apparatus. Further, the trial court precluded the jury from learning of evidence corroborating Mr. Thomas's defense.

A new trial is also required because the trial court held part of voir dire—the selection of alternate jurors—off the record and during a

recess. Standing alone, or in the cumulative, these errors require remand for a fair retrial.

DATED this 19th day of May, 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. TONY RAY THOMAS, Appellant.	)))))))))	NO. 69835-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GRACE WIENER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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