Supreme Court No. 91042-1
(Court of Appeals No. 69835-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTONNIO RAY THOMAS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Antonnio Ray Thomas asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4(b)(1), (2), (3), and (4).

B. COURT OF APPEALS DECISION

Mr. Thomas seeks review of the Court of Appeals decision filed October 6, 2014. Copy attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. No witness, especially not the police, may testify they think the accused is guilty. The Court of Appeals held in State v. Jones,[1] that a defendant has no power to "open the door" to prosecutorial misconduct and that the State has an obligation to object to defense questioning that misdirects a case into topics not proper for jury consideration.

Here, defense counsel called the lead detective as a witness and had the detective say that he believed he had probable cause to arrest Mr. Thomas before any police ever listened to Mr. Thomas's account of the alleged assault. As the testimony veered toward forbidden territory of opinion of guilt, the prosecutor did not object.

[1] State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307, 314 (2008)

Rather, on cross-examination, the prosecutor had the officer detail for the jury why the witness believed Mr. Thomas committed the assault he was charged with. The Court of Appeals ignored the prejudice that ensued on the theory that it was acceptable rebuttal. Should this Court grant review to resolve the conflict with Jones and reaffirm long-standing precedent that in a fair trial, there is no room for police opinion as to guilt?

2. In a pretrial ruling, the trial court correctly barred admission of any evidence that Mr. Thomas had a gun, because of its irrelevance and prejudicial effect. But, a state witness said that Mr. Thomas had a gun, which the witness "figured" was used to assault the complainant. Did the trial court abuse its discretion in denying Mr. Thomas's motion for a mistrial and should this Court grant review to address this significant question of law under the state and federal constitutions?

3. The federal and state constitutions guarantee an accused the right to present a defense and to a fair trial. Relevant evidence is presumptively admissible. The key trial issue was whether Mr. Thomas attacked the complainant, or she him. Did the trial court abuse its discretion and deny Mr. Thomas's constitutional rights when it excluded evidence that the complainant admitted attacking Mr. Thomas to her own daughter? Should the Court now grant review to bring the decision below in line with settled precedent that allows a defendant to put on a defense?

4. Under Evidence Rule 403, evidence should be excluded upon objection if "its probative value is substantially outweighed by the danger of unfair prejudice or by considerations of the needless presentation of cumulative evidence." Did the trial court abuse its discretion by admitting repetitive, prejudicial photographs over objection from Mr. Thomas and should the Court grant review because the error below deprived Mr. Thomas of his constitutionally protected right to a fair trial?

5. The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution. Under the First Amendment, the public has a right of access to trial proceedings. A violation of this right is not susceptible to a harmless error analysis. Given the trial court's method of choosing the alternate jurors in private, off the record, should this Court accept review and reverse for a violation of Mr. Thomas's right to a public trial and the public's right to access to the courts?

6. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions, even if no single error requires reversal standing alone. In light of the cumulative effect of the errors below, should this Court grant review and give Mr. Thomas the fair trial he was entitled to in the first place?

D. STATEMENT OF THE CASE

Petitioner Antonnio Thomas and Shant'e Spears have children together that they co-parent. 12/12/12 RP 31; 12/13/12 RP 131-32; 12/17/12 RP 79, 192-93.[2] The children were injured in a car accident when Ms. Spears's mother, Vivian Heller, took them out of state on vacation with her boyfriend, Raymond Jennings. 12/12/12 RP 31, 35-38, 148; 12/18/12 RP 99, 101-02. Ms. Spears did not talk to her mother or allow her to see the children for a while afterwards. 12/12/12 RP 57-58, 61; 12/13/12 RP 29; 12/18/12 RP 120-21.

On May 28, 2012 Mr. Thomas went to socialize at a motorcycle club in Seattle, Washington to which he and Mr. Jennings belonged. 12/12/12 RP 50-51; 12/13/12 RP 134-35, 161-70. Mr. Jennings brought Ms. Heller there that evening as well. 12/12/12 RP 63-65, 151-52.

Mr. Thomas testified that Ms. Heller and he went out on the back patio to talk in private, because they had not seen each other since the car accident. 12/13/12 RP 177, 185-86. He lit a cigarette and turned to talk with Ms. Heller when she "popped" him in his face. 12/13/12 RP 189-92. He pivoted to get away but stumbled. 12/13/12 RP 193-96; 12/17/12 RP 55-56. Ms. Heller clawed at his back, hitting and yelling. 12/13/12 RP

[2] The verbatim report of proceedings are referred to by the first hearing date transcribed in each volume, e.g., "12/3/12 RP" followed by the page number.

196. He scrambled away; he told other club members that Ms. Heller had attacked him. 12/13/12 RP 198-201. He went home to clean himself up. 12/13/12 RP 197-98, 202-03. He had marks on his face and fingernail fragments under his skin. 12/13/12 RP 204-05. Two days later Ms. Heller called Mr. Thomas and his colleague Jesse Marvin then heard her admit attacking him. 12/17/12 RP 47-51; 12/17/12 RP 149-52.[3]

According to Ms. Heller, Mr. Thomas got angry as they spoke about the car accident and started punching her in the face. 12/12/12 RP 92-100. Ms. Heller could not say how she got away from Mr. Thomas, but when she did, she went back inside the club. 12/12/12 RP 102-04; 12/12/12 RP 158-59 (testimony of Jennings). She went to the emergency room and eventually underwent surgery on her nose. 12/6/12 RP 41-42, 44-45; 12/12/12 RP 105-06, 120; 12/17/12 RP 12-15; Exhibits 1-8.

The State charged Mr. Thomas with assault in the second degree. CP 1, 18. Mr. Thomas's asserted that Ms. Heller punched him and then had a seizure or otherwise slipped and fell, causing her injuries. E.g., 12/10/12 RP 267-70; 12/13/12 RP 62-63, 65-66, 76-77, 79-80 (Heller testifies to her epileptic condition); 12/18/12 RP 144-47 (Spears testifies to Heller's seizures); 12/19/12 RP 56-58, 63; 12/4/12 RP 4-11 (pretrial offer

[3] Vivian Heller admitted she called Mr. Thomas to discuss the incident, but denied she admitted she attacked him. 12/13/12 RP 60-62, 108-09.

of proof from nurse practitioner who treats Heller for epilepsy); 12/12/12 RP 173-74 (Thomas told Jennings Heller hurt falling).

As a result of the flawed process, including several evidentiary errors, Mr. Thomas was convicted of assault in the second degree. 12/19/12 RP 79-81; CP 99-105 (verdict form and judgment).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **Jones held that defense cannot "open the door" to prosecutorial misconduct. Here, the prosecutor exploited defense counsel's mention of probable cause and put on improper opinion testimony from the lead detective of how and why the detective thought Mr. Thomas was guilty of assault. This Court should grant review to resolve the conflict with Jones and to re-affirm the settled rule that forbids witnesses from opining on guilt of the accused.**

   a. An accused's right to a fair jury trial is invaded when a witness opines on guilt.

An accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. 1, §§ 3, 21, 22. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008); see id. at 589. Because it is the jury's role to decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials. Id. at 591. No witness may testify to his opinion about the guilt of the accused, either directly or by inference, because such testimony invades the exclusive province of the jury. City of Seattle v. Heatley, 70 Wn. App.

573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). C.f. State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987) (rape counselor's opinion testimony that alleged victim fit a specific rape trauma profile "constitutes, in essence, a statement that the defendant is guilty of the crime of rape"); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (expert opining child was not lying about sexual abuse "effectively testified" that defendant was guilty).

This line of precedent is settled and the trial court correctly granted Mr. Thomas's pretrial motion to exclude statements by law enforcement opining on Mr. Thomas's guilt. CP 74-75. But when the ruling was violated, the trial court erred in failing to grant a mistrial.

b. The detective's explanation of why Mr. Thomas was guilty of the charged offense and the evidence upon which he based that conclusion was an improper opinion on guilt.

Here, the prosecutor twice asked the lead detective to tell the jury just what in the evidence led him to believe Mr. Thomas was guilty: "[I]n this case what was it that led you to believe that you had probable cause to arrest Mr. Thomas?" 12/18/12 RP 59. The detective answered: "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." Id.

The prosecutor next asked the detective if the police "necessarily had to have talked to a suspect... prior to making a probable-cause determination?" and the detective gave an emphatic "No, not at all," response. Id. The prosecutor followed-up with "And can you tell us why, or what do you mean by that?" Id. The detective again testified why, in his opinion, the evidence showed that Mr. Thomas was guilty of assault:

> 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.

Id.

Defense counsel objected. 12/18/12 RP 60. The detective's testimony was damning; it contained an expression of opinion as to guilt, it weighed for the jury key pieces of evidence in the case, and suggested to the jurors they could ignore what Mr. Thomas had to say.[4]

"Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an 'ultimate issue' will generally depend on the specific circumstances of each case." State v. Heatley, 70 Wn.App. at 579; State v. Quaale, 177 Wn. App. 603, 617, 312 P.3d 726, 733 (2013) review granted, 179 Wn. 2d 1022, 320 P.3d 719 (2014). There

[4] The Court of Appeals did no characterize this testimony accurately: "Here, the officer merely gave straightforward answers to questions about police procedure." Opinion at 5.

is no doubt that here, the detective expressed his opinion as to Mr. Thomas's guilt. See Black, Alexander.

The flabbergasted trial judge knew Mr. Thomas's right to a fair trial was in jeopardy. "[T]hat is very prejudicial, that an officer thinks somebody is guilty." 12/18/12 RP 130. The prosecutor responded by explaining that the State had not "introduced probable cause into this case." 12/18/12 RP 131, 132, 134. The prosecutor said "[T]he State was simply trying to rebut." 12/18/12 RP 134.

Indeed, defense counsel called the lead detective as a witness and had the detective state that he believed he had probable cause to arrest Mr. Thomas before anyone on the police force ever listened to Mr. Thomas's account of the alleged assault. Opinion at 3-4.

While the trial court showed its displeasure with how the State had exploited the defense mention of probable cause[5], it unfortunately was unaware of the Court of Appeals holding in State v. Jones, 144 Wn.App. 284, 295, 183 P.3d 307 (2008), that "[a] defendant has no power to 'open the door' to prosecutorial misconduct." Jones squarely put the onus on the State to stop improper defense questioning that risks rendering a trial

[5] "[Y]ou could have objected...Again, if you're going to rise to the bait, if you think [defense counsel is] doing something, then you need to object." 12/18/12 RP 130.

unfair: "The prosecutor's proper course of action was to object to Jones's question. The prosecutor did not object." Id. at 295.

In Jones, a defense lawyer had taken the evidence off-course by asking the officer about a warrant for a missing informant's arrest and the prosecutor, apparently in an attempt to rebut a possible attack on the informant, had the police officer speculate the witness was too scared to come to court. Jones, 144 Wn. App. at 295. In reversing, the Court of Appeals criticized the prosecutor for putting on evidence that 'was not a proper subject for the jury." Id. "The prosecutor's proper course of action was to object to Jones's question," not exploit it. Jones, 144 Wn.App. at 295. Here, the Court of Appeals was wrong in side-stepping Jones. The jurors below were exposed to a detailed explanation of why the lead detective thought Mr. Thomas was guilty and that matters more than how the problem first came to be.

On this record, the Court of Appeals also wrongly concluded that "the prosecution's questions to the detective were within the scope of the colloquy between defense counsel and the detective." Opinion at 6. Yes, defense counsel was the first to touch upon the timing of the detective's conclusion that Mr. Thomas ought to be arrested, but the prosecutor's questioning of the officer far exceeded that narrow question. The detective told the jurors that the complainant's story matched up with the State's

assertion that a criminal assault occurred. The detective told the jurors that the complainant's account was consistent with that of other witnesses. The detective told the jurors that the statement of the accused on these matters was inconsequential.

All of this was improper opinion as to guilt, all of it became evidence for the jury to consider in deliberation, and all of it was prejudicial. Notably, in State v. Stith, 71 Wn.App. 14, 856 P.2d 415 (1993), improper *argument* about probable cause was reversible error, even though jurors were presumably instructed not to rely on it, and base their decision on the evidence instead.

c. This was an incurable violation and the Court of Appeals was wrong in downgrading it to an excusable "irregularity."

The Court of Appeals wrongly minimizes the error below as an "irregularity." Opinion at 6. The trial judge who witnessed the case first-hand called it "very prejudicial" and said it "had no business in this case." 12/18/12 RP 128, 130. "We never tell the jurors that [an officer believed the defendant was guilty] because it is distracting and in fact incorrect that the officers at a moment in time believe there's probable cause. It's a complete distraction, and again I think arguably may turn out to be reversible error." 12/18/12 RP 134.

Courts evaluate three factors to determine whether an error warrants a new trial: (1) the seriousness of the error, (2) whether the improper statement was cumulative of evidence properly admitted, and (3) whether the error could be cured by an instruction. State v. Perez-Valdez, 172 Wn.2d 808, 856, 265 P.3d 853 (2011). This Court reviews the denial of a motion for mistrial for an abuse of discretion. Id. at 858.

Here, the error was serious. As the trial court noted, the testimony was "completely impermissible." 12/18/12 RP 132. Lay witnesses are not permitted to opine on an accused's guilt. Montgomery, 163 Wn.2d at 591. Yet, that's precisely what the detective did. 12/18/12 RP 59-60. The prejudice arose not only from *what* was said, but from *who* said it. The detective's testimony was expressly cloaked in the prestige of his position.[6] Montgomery, 163 Wn.2d at 595 (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 it applies to prosecutorial vouching).

The Court of Appeals said "in light of the curative remarks made by the trial judge, there is no reason to believe the jury was misled into thinking that the detective's belief in probable cause satisfied the State's

[6] Before having the detective talk about why he felt he had probable cause to arrest Mr. Thomas, the prosecutor reviewed his police credentials. 12/18/12 RP 47-48, 52-53.

burden of proof." Opinion at 6. But, the trial court did not compare the probable cause standard to beyond a reasonable doubt, or even strike the detective's testimony. See 12/18/12 RP 60-62. The trial court only told the jurors "the officer's opinion about what might have happened, is not relevant to the work that the jury has to do," but then kept going and said: "I'm not being critical of the officer. I have no reason to be critical of the officer." Id. This was not any curative remark. Worse, what the court said could have been interpreted by the jurors as judicial approval for how the detective had weighed the evidence. The jurors heard the detective give his opinions and this was a bell that could not be unrung.

The goal in prohibiting a witness from giving an opinion about the defendant's guilt or innocence is to avoid having the witness tell the jury what result to reach. State v. Baird, 83 Wn. App. 477, 485, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997). "Particularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and thereby deny the defendant of a fair and impartial trial." State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985). The opinion of guilt testimony prejudiced Mr. Thomas not because it introduced an irrelevant legal standard into the proceedings, the testimony prejudiced Mr. Thomas because it undercut the jurors' role as independent fact-finders.

Fundamentally, the Court of Appeals seemed to have accepted the prosecution's suggestion that it could not have been expected to object during defense counsel's direct, lest it compromise its chances of winning: "As the State points out, raising an objection carries the risk that the jury will believe the objecting party is trying to hide something." Opinion at 6. However, every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. Review is needed to publicly avow that our criminal justice system, competitive as it may at times appear, in fact values fair play over gamesmanship.

Jones correctly held that a prosecutor bears a special responsibility to make sure that proceedings are fair and thus has the obligation to stop improper testimony, such as impermissible opinion of guilt, from making their way into evidence in the first place.[7] This Court should grant review to resolve the conflict between the Jones opinion and the ruling below. RAP 13.4(b)(2). This will reaffirm the rule of law excluding opinion of guilt testimony and make clear that the State cannot run roughshod over an accused's right to a fair trial under the guise of rebuttal testimony. RAP 13.4(b)(1). Furthermore, review is also warranted under RAP 13.4(b)(3)

[7] The trial court noted: "I just want you to be clear that this is your responsibility along with every officer of the court is not to introduce or to continue to introduce things that undermine this case." RP 132. "You didn't object when [defense counsel] did it, instead you continued it. So, if you know, if you think that's curing the problem, it makes the problem worse." RP 132-133.

and (4) as this issue implicates significant questions of law and substantial public interest worthy determination by the Supreme Court.

2. Multiple other errors deprived Mr. Thomas of his constitutionally guaranteed right to a fair trial under the Constitution of the State of Washington and of the United States and review should be granted to correct this.

a. 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.

The State was forbidden from putting on evidence that Mr. Thomas had or displayed a gun at the motorcycle club on the night in question. 12/4/12 RP 136-40; CP 70-71. The order was violated when State's witness Jennings testified that he was scared to confront Mr. Thomas as he "remembered [Mr. Thomas] had a gun." 12/12/12 RP 159.

In fact, Jennings speculated that Mr. Thomas *used* a gun to commit the charged offense: "I figured that's what he hit her with was the gun." Id.[8] Defense motion for a mistrial should have been granted. The error was serious, Mr. Jenning's testimony was not cumulative of properly admitted evidence, and the limiting instruction did not cure the taint. Perez-Valdez, 172 Wn.2d at 856. E.g. State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984

[8] The Court of Appeals minimized the error: "The fact that a person *owns* a gun is not necessarily prejudicial." Opinion at 7. (emphasis in original)

(2001) (reversing conviction because admission of weapon 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))

The "constitutional floor" established by the Due Process Clause "clearly requires a fair trial in a fair tribunal" before an unbiased court. Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (improper evidentiary rulings deprive a defendant of due process where it is so unfair as to "violate[ ] fundamental conceptions of justice"). Mr. Thomas was entitled to a trial utterly free of mention of a gun accusation. The error below deprived him of his constitutional right to a fair trial.

b. Trial court erred by refusing Mr. Thomas his constitutional right to present a defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to

present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). Article 1, section 22 of the Washington Constitution provides a similar guarantee. State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). These provisions require that an accused receive the opportunity to present his version of the facts to the jury. Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). "[A]t a minimum... criminal defendants have... the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (emphasis added); accord Washington, 388 U.S. at 19.

Here, Mr. Thomas sought to put on evidence that the complainant Ms. Heller had admitted punching him to her daughter Shant'e Spears. The Court of Appeals was wrong in justifying the exclusion of this evidence on the theory that another defense witness, Jesse Marvin, presented similar testimony. Opinion at 5. But, "[e]vidence tending to establish a party's theory, or to qualify or disprove the testimony of an

adversary, is always relevant and admissible." State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (emphasis added).

The evidence from Ms. Spears was plainly relevant to the defense theory was that Mr. Thomas did not assault Ms. Heller, but that she attacked him. It would have corroborated Mr. Thomas and Jesse Marvin's testimony in support of Mr. Thomas's defense. *See* 12/18/12 RP 73-79, 123-25. (Spears prepared to testify Heller told her Heller punched Thomas once for each grandchild); 12/17/12 RP 149-52, 180-83 (Marvin's testimony about Heller's telephone admission to attacking Thomas); 12/17/12 RP 48-51 (Thomas's testimony that Heller called and admitted attacking him); 12/13/12 RP 185-93 (Thomas's testimony that Heller attacked him). The exclusion directly cut into Mr. Thomas's ability to develop and corroborate his defense and mandates reversal.

This was constitutional error and review on this issue should be granted under RAP 13.4(b)(1), (3), and (4.)

c. Trial court erred in allowing the State to present cumulative and prejudicial photographs in violation of Mr. Thomas's right to a fair trial.

Courts and prosecutors must exercise restraint in admitting cumulative gruesome photographs when non-inflammatory 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) ("Highly prejudicial images may sway a jury in ways that words cannot.")

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. Their effect of these photographs was to repeatedly stress to the jury Ms. Heller's helplessness and to imply even greater wounds than she had sustained.

Ms. Heller, her treating physician, the responding officer, and Raymond Jennings all testified to the nature of her injuries. *E.g.*, 12/6/12 RP 44-45; 12/12/12 RP 104-05, 109-13, 159; 12/17/12 RP 12-15, 21-23. "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).

"[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). Defense objections to the photographs admission as cumulative and overly prejudicial should have been granted. 12/6/12 RP 46-47; 12/13/12 RP 104-06.

Here, the effect of the admission of all of the photographs as competent evidence against him was to deprive Mr. Thomas of a fair trial. See supra: U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22; Bracy v. Gramley; Estelle v. McGuire, 502 U.S. at 75; Dowling v. United States.

d. Review should be granted because a part of the jury selection process was conducted in a courtroom closed to the public.

Public criminal trials are a hallmark of the Anglo-American justice system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." State v. Coe, 101 Wn.2d

364, 380, 679 P.2d 353 (1984) (quoting Craig v. Harney, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed. 2d 1546 (1947)). Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."); Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right to... have a speedy public trial by an impartial jury..."). In addition, the public also has a vital interest in access to the criminal justice system. U.S. Const. amend. I (the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial); Const. art. I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."). These provisions provide the public and the press a right to open and accessible court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). "The public has a right to be present whether or not any party has asserted the right." Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complementary and interdependent functions in assuring the fairness of our judicial system." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). When trials are open to the public, citizens may be confident

that established, fair procedures are being followed and that deviations from those standards will be made known. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*). Openness thus "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Id. at 501; accord Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The right to a public trial includes the right to have public access to jury selection. E.g., Presley, 558 U.S. at 213; State v. Sublett, 176 Wn.2d 58, 71-72, 292 P.3d 715 (2012); State v. Jones, 175 Wn. App. 87, 95-104, 303 P.3d 1084 (2013) (holding selection of alternate jurors traditionally has been open to the public because in the general experience it is part of voir dire held in open court.) Under Jones, absent an on-the-record Bone-Club analysis, the trial court cannot close alternate juror selection. Id. at 102-03. But here, the trial judge selected alternates in a procedure noted on the record but during a time at which the court was not actually on the public record. See id. at 102-03; 12/19/12 RP 3.[9] As in Jones, the results were announced in public after the selection occurred. 175 Wn. App. at

[9] Although no such showing is required for appellate review of a public trial violation, spectators were present during Mr. Thomas's trial. 12/6/12 RP 24.

102. "Thus, the alternate juror drawing occurred off the record and outside of the trial proceedings." Id.

The Court of Appeals opinion tries to distinguish the two by emphasizing that "the record reflects that the random selection was done by the parties' attorneys under the supervision of the judge." Opinion at 12. But this does not change the fact that the public was cut-out of the process and without a Bone-Club inquiry. This is why review should be granted and the conviction reversed. See Wise, 176 Wn.2d at 18; State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005); Easterling, 157 Wn.2d at 181; Jones, 175 Wn. App. at 96, 103-04.

e. Even if no single error above requires reversal of Mr. Thomas's conviction, the cumulative effect of the errors combined necessitates that result.

Trials are infrequent as nearly all criminal cases settle with plea bargains. (Missouri v. Frye, 132 S. Ct. 1399, 1402, 182 L. Ed. 2d 379 (2012) ("97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas.") The trial court erred in failing to grant the several of the defense mistrial motions made below designed to stop the unfair proceedings, but was openly uncomfortable with the proceedings. Speaking about the opinion of guilt evidence, the trial court commented: "It's a complete distraction, and again I think arguably may

turn out to be reversible error... Is it going to be a fair trial with this garbage in it? I don't know." 12/18/12 RP 134.

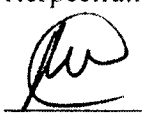
Mr. Thomas as an individual and the public on the whole have a vested interest in not allowing criminal convictions to stand where the fairness – and the outcome – of a proceeding is in such doubt.[10] Review should be granted to give Mr. Thomas a new, fair trial. See supra: U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22; Bracy v. Gramley; Estelle, 502 U.S. at 75; Dowling v. United States.

F. CONCLUSION

Antonnio Ray Thomas respectfully requests that this Court grant review.

DATED this 5th day of November 2014.

Respectfully submitted,



Mick Woynarowski – WSBA 32801
Washington Appellate Project
Attorney for Petitioner

[10] At sentencing, the trial court expressed doubt about the outcome: "I probably would have found Mr. Thomas not guilty... there were so many tangents that came in... a number of parts of the stories told by all the witnesses really didn't kind of hold together . . . I thought there was a reasonable doubt." 12/19/12 RP 96-97.

APPENDIX A: OPINION OF THE COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TONY RAY THOMAS, AKA ANTONNIO RAY THOMAS, Appellant.	)	No. 69835-4-I DIVISION ONE UNPUBLISHED OPINION FILED: October 6, 2014

BECKER, J. — This opinion affirms appellant Antonio Thomas' conviction for assault in the second degree. We conclude Thomas received a fair and public trial.

The victim of the assault was Vivian Heller, the grandmother of Thomas' three children and the mother of his former partner, Shant'e Spears.

In late April 2012, Heller, her boyfriend Raymond Jennings, and Thomas' two older children were in a serious car accident on a road trip through California. Spears had allowed the children to go on this road trip but specifically forbade Jennings from driving the car. Spears did not tell Thomas about the trip or ask his permission. Jennings was driving when the car went over a cliff and was caught by two trees. The children incurred injuries in the accident. Heller called

Spears to tell her about the accident. Spears called Thomas. Spears and Thomas flew down to California to pick up their children.

On May 28, 2012, Heller and Jennings attended a Memorial Day party at a motorcycle club in the Georgetown neighborhood. Thomas was also there. Jennings and Thomas were both members of the club. Thomas walked into a back room with Heller. Heller emerged with a bloodied face. Jennings found her and took her to the hospital. Someone at the hospital called the police. Seattle police officer Ryan Keith responded around 1:00 a.m. that night and observed that Heller had swelling in her face and a bloody and broken nose. He photographed Heller's injuries and took statements from Heller, Jennings, and a woman in the hospital room. Heller told the officer that Thomas had backed her up into a large barrel and the club's fence and punched her repeatedly in the face with his closed fist.

Detective Adam Thorp was the investigating officer. Based on witness statements and Officer Keith's photos, Thorp concluded he had probable cause to arrest Thomas. He went to Thomas' residence to arrest him on June 4, 2012, but Thomas was not there. Thorp put out a bulletin to other officers indicating probable cause to arrest Thomas. As a result, another officer contacted Thomas and arranged for him to come to the police station.

Thomas was charged and convicted of assault in the second degree. This appeal followed.

Probable Cause Testimony

Thomas contends the trial court erred in denying his motion for mistrial made after Detective Thorp gave testimony about his belief that he had probable cause to arrest Thomas.

An important fact bearing on this issue is that Detective Thorp was called as a defense witness. On direct examination, defense counsel introduced the topic of probable cause by eliciting the detective's testimony that he believed he had probable cause to arrest Thomas when he went to his residence on June 4.

> Q. Now, at the time you went out on June 4th to the residence where Mr. Thomas was living, at that time you believed you had probable cause to arrest; am I wrong or right about that?
> A. That is correct, I believed I had probable cause.
> Q. All right. Now, in the meantime after that date, you did not contact this person?
> A. Correct.
> Q. Now, Mr. Thomas was arrested on what date?
> A. He was arrested by a different officer, as a matter of fact, on—oh, gosh, I believe it was June 7th. Yes.
> Q. And that other officer was who?
> A. Officer Howard.
> Q. All right. And that was it per your instructions?
> A. Yes, I had completed a bulletin for Mr. Thomas. Officer Howard had seen that bulletin and that's when he contacted me and stated he knew the building manager and he set up a meeting with Mr. Thomas to show up at the North Precinct.
> . . . .
> Q. And what was the purpose of his coming to the North Precinct?
> A. To obtain a statement from him, get his side of the story and make a determination from there what his future would be, whether he'd be placed in custody or not.
> Q. But you had already decided there was probable cause to arrest?
> A. That's correct.

On cross-examination, the prosecutor asked Thorp to clarify the basis for his finding of probable cause:

Q. Now, when you had established that—you indicated that you had PC [probable cause], but for those of us less familiar with what that means, what does PC mean?
A. PC is probable cause, and that is essentially authority to arrest a person. I believe criminal activity has occurred and I can arrest the suspect who conducted that criminal activity.

. . . .

Q. What is—in this case what was it that led you to believe that you had probable cause to arrest Mr. Thomas?
A. 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.
Q. Now, in order to make that determination in your training and experience, does a detective necessarily—or an officer necessarily had to have talked to a suspect in order to speak with them prior to making a probable cause determination?
A. No, not at all.
Q. And can you tell us why, or what do you mean by that?
A. 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. There was no—

At this point, defense counsel objected. The trial court sustained the objection and stated that probable cause is not the standard at trial. However, when Thomas later moved for a mistrial, the trial court denied the motion. Thomas contends the motion should have been granted because the detective's testimony about probable cause was an improper opinion on guilt.

The standard of review for denial of a motion for a mistrial is abuse of discretion. State v. Perez-Valdez, 172 Wn.2d 808, 858, 265 P.3d 853 (2011). A mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

An accused is guaranteed the right to a fair trial by an impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, §§ 3, 21, 22. No witness may offer testimony in the form of an opinion regarding the guilt of the defendant. City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). Washington courts do not take an expansive view of claims that testimony constitutes an opinion of guilt. Heatley, 70 Wn. App. at 579.

We do not regard the detective's testimony as an improper opinion on guilt. Defense counsel opened up the subject of probable cause for strategic reasons. This opened the door for the State on cross-examination to clarify the meaning of probable cause and give appropriate context to the detective's testimony elicited by defense counsel on direct examination. See State v. Gefeller, 76 Wn.2d 449, 455-56, 458 P.2d 17 (1969). This was a different and far less prejudicial exploration of the meaning of probable cause than what occurred in State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993), a case Thomas has submitted as supplemental authority. There, defense counsel made an argument suggesting that police officers had fabricated their testimony, and the prosecutor responded by arguing that "'the question of probable cause is something the judge has already determined before the case came before you today.'" Stith, 71 Wn. App. at 17. Here, the officer merely gave straightforward answers to questions about police procedure.

Also cited by Thomas as supplemental authority is State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008). There, the court stated that prosecutorial

misconduct would not be excused on the theory that defense counsel had opened the door to it. Jones, 144 Wn. App. at 295. Thomas argues that here, as in Jones, the State is improperly exploiting the "open door" rule. We disagree. What occurred here is not comparable to what happened in Jones. In Jones, defense counsel cross-examined an officer and elicited his testimony that the confidential informant had dropped out of sight. The State "seized the opportunity" to elicit "inadmissible and inflammatory hearsay evidence"—the officer's testimony that the informant was too frightened to testify even though he had previously appeared excited to do so. Jones, 144 Wn. App. at 295.

Here, unlike in Jones, the prosecutor's questions to the detective were within the scope of the colloquy between defense counsel and the detective, and the answers were not inflammatory. We reject Thomas' argument that the prosecutor had a duty to object when defense counsel introduced the irrelevant topic of probable cause. As the State points out, raising an objection carries the risk that the jury will believe the objecting party is trying to hide something. In light of the curative remarks made by the trial judge, there is no reason to believe the jury was misled into thinking that the detective's belief in probable cause satisfied the State's burden of proof.

Presenting testimony about probable cause is indeed an irregularity, and the trial court rightly chastised both counsel for their respective parts in it. Nevertheless, when viewed against the backdrop of all the evidence, the irregularity did not so prejudice the jury as to deny Thomas his right to a fair trial.

Gun Testimony

Thomas again moved for a mistrial, unsuccessfully, when Jennings testified that Thomas "had a gun," despite a pretrial ruling barring evidence that Thomas had or displayed a gun at the club on the night in question. Thomas argues on appeal that the reference to a gun was a serious irregularity that demanded a mistrial ruling.

On direct examination, the prosecutor asked Jennings how he reacted when he found Heller at the club with obvious injuries after her encounter with Thomas. Jennings responded that he wanted to "jump on him," but then he remembered that Thomas "had a gun":

> Q. So what did you do, what did you do when you saw this?
> A. . . . I didn't know what happened to her. I run to the back back there, at the back door. Mr. Thomas was still standing there in the back back there, and I run back there because I was going to jump on him. But I remembered he had a gun, so I figured that's what he hit her with was the gun.

Defense counsel immediately objected. The trial court sustained the objection, struck the answer, and instructed the jurors to disregard. Once the jury was excused, defense counsel moved for a mistrial. The trial court denied the motion.

The question is whether, in light of all the evidence, Jennings' testimony so prejudiced the jury that Thomas was denied a fair trial. We conclude it did not. The fact that a person *owns* a gun is not necessarily prejudicial. The trial court immediately struck Jennings' answer and instructed the jury to disregard it. The court emphasized to the jury that there was no evidence that Thomas

possessed a gun during this incident. Heller did not mention a gun in her testimony about being punched by Thomas in the back room.

Thomas relies on State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001). This case is not like Freeburg. There, evidence of the defendant's possession of a weapon at the time of arrest was purposefully admitted to show flight and consciousness of guilt. No limiting instruction was given. Here, Jennings' speculation that Thomas might have had a gun with him was immediately struck from the record, and the court gave a curative instruction. The trial court did not abuse its discretion in denying defense counsel's motion for mistrial.

Exclusion of Spears' Testimony

Thomas contends that the trial court improperly curtailed his right to present a defense by excluding testimony suggesting that it was Heller who committed assault on the night in question.

On December 18, 2012, the last day of trial testimony, Spears was on the witness stand. During a break, Spears disclosed to defense counsel that she had received text messages from Heller a day or two after the incident, in which Heller said that she herself had punched Thomas on the night of the incident, one punch for each grandchild. Thomas wanted to use Spears' testimony about the text messages to impeach Heller who, in her earlier testimony, did not mention punching Thomas. The testimony was excluded because it was disclosed late. Thomas made an offer of proof:

> This was late-breaking evidence. . . . My understanding . . . is that Ms. Spears received a text message from her mother a day or two after the incident itself. She would have testified that Ms. Heller was calm in the beginning and then she became more and more upset, her behavior escalated, and then she would come in and say—and then she got loud. And then she would have testified that with every punch she said this is for [J.S.], the punch against Mr. Thomas, this is for [W.R.], this is for [J.M.], and this was out of Ms. Heller's own mouth. It would be of course impeachment evidence. I want to make sure I cover it all.
>
> . . . .
>
> . . . the court barred me from bringing that evidence out.

Under both the United States and Washington Constitutions, an accused has the right to a meaningful opportunity to present a complete defense. U.S. CONST. amends. 6, 14; WASH. CONST. art. I, § 22. These provisions require that an accused receive the opportunity to present his version of the facts to the jury. State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010).

This case is not like Jones or State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996), where the trial courts excluded the only evidence of the defendants' defense theories and in each case the evidence had high probative value. Here, another witness had already testified that he heard Heller admit to attacking Thomas when Thomas received a phone call from Heller, which he put on speakerphone. And Spears' testimony that Heller's text messages admitted punching Thomas would have only impeached Heller's testimony that she did not hit Thomas. Because it would not have impeached her testimony that Thomas hit her, it had low probative value for the defense. Thomas fails to establish that the exclusion of the last-minute testimony deprived him of the opportunity to offer a meaningful defense.

Admission of Photographs

Thomas argues that the court abused its discretion by admitting prejudicial photographs of Heller. Our review is for an abuse of discretion. State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983).

Accurate photographic representations are admissible, even if gruesome, if their probative value outweighs their prejudicial effect. Crenshaw, 98 Wn.2d at 806. The eight photos of Heller that were admitted were taken while she was lying in a hospital bed. They show facial swelling, two breaks to her nose, bleeding from her nose, and black eyes.

Thomas defended in part on the theory that Heller sustained the injuries when she fell after attacking him. Heller has epilepsy, and Thomas suggested she might have been having an epileptic seizure. The photos tended to refute Thomas' theory and to support, instead, the State's assertion that the injuries were caused by Thomas punching Heller repeatedly in the face. We find no abuse of discretion.

Selection of Alternate Jurors

Thomas contends that the court violated his right to a public trial by conducting the selection of alternate jurors in a manner that was not open to the public.

On December 19, 2012, before instructions were given to the jury and closing arguments were presented, the trial court conducted a process for deciding which two jurors would be designated as alternates. The record contains the following description of the process:

(JURY NOT PRESENT IN THE COURTROOM.)

> THE COURT: We're going on the record. We made it on the record. We just did a random selection of little pieces of paper and the defense picked Juror No. 3 as the first alternate and the State picked Juror No. 4 as the second alternate. So they'll be dismissed with instructions at the end of closing. There's only one time I've ever had to call back an alternate, but you never know.[1]

A defendant's right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. State v. Strode, 167 Wn.2d 222, 225, 217 P.3d 310 (2009). To protect the defendant's right to a public trial, a trial court must analyze and weigh five factors before closing a portion of a criminal trial. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Thomas contends the record shows that "the drawing of alternate jurors was done during a court recess off the record without a Bone-Club inquiry," thus establishing a court closure which requires that his conviction be reversed and remanded for a new trial.

Thomas relies on State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013). In Jones, the court indicated at the close of evidence that a court clerk would randomly draw names of four jurors from a rotating cylinder to determine which jurors would be alternatives. There was a court recess during the defense closing arguments. The drawing occurred during the recess. The Jones court concluded that the procedure did not occur in open court and that the off-the-

[1] Report of Proceedings (Dec. 19, 2012) at 3.

record selection by the court clerk lacked safeguards against manipulation and chicanery:

> Although we do not suggest that the alternate juror drawing in this case was anything but random—and Jones does not appear to argue otherwise—there is simply no way to tell how the drawing was performed. The issue is not that the drawing in this case was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing could have been. Where such a drawing occurs during a court recess off the record, the defendant and the public lack the assurance of a truly random drawing that they would have if the drawing were performed in open court on the record. This lack of assurance raises serious questions regarding the overall fairness of the trial and indicates that court personnel should be reminded of the importance of their duties. Accordingly, we conclude that considerations of logic "implicate the core values the public trial right serves." [State v.]Sublett, 176 Wn.2d [58,] 72[, 292 P.3d 715 (2012)].

Jones, 175 Wn. App. at 102. The court concluded that the defendant was entitled to a new trial.

Here, unlike in Jones where the court clerk selected the alternates, the record reflects that the random selection was done by the parties' attorneys under the supervision of the judge. Although the jury was not present, the record provides no basis to believe that the drawing of names did not occur in an open courtroom where it could be witnessed by the public. Participation by counsel is an additional safeguard against manipulation and chicanery. We conclude that no closure occurred, a Bone-Club analysis was not required, and Thomas is not entitled to a new trial.

Affirmed.

Becker, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69835-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 5, 2014

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