NO. 33909-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS LIMPERT,

Appellant.

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

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

A. ARGUMENT IN REPLY

1. Mr. Limpert's constitutional right to confront witnesses was violated when his codefendant's out-of-court statements implicating Mr. Limpert were admitted at trial without testimony from the codefendant.

As set forth in Mr. Limpert's opening brief, his constitutional right to confront witnesses was violated when Ms. Dawson's out-of-court statements implicating him were admitted at trial but Ms. Dawson did not testify. Op. Br. at 7-12.

First, a detective testified that Ms. Dawson said she heard the complaining witness say "He just pulled a knife." RP 334-35. The State claims there was no confrontation violation because the codefendant's statement repeated a testifying declarant's out-of-court statement. But both levels of hearsay must be admissible in their own right in order for double hearsay to be admissible. ER 805; *United States v. McKinney*, 707 F.2d 381 (9th Cir. 1983).

Therefore, the fact that the detective testified to Ms. Dawson's out-of-court statement, which repeated what she heard Ms. Hamilton say, does not resolve the confrontation issue. Mr. Limpert's confrontation clause rights could be violated by either layer of hearsay, or both. *See McKinney*, 707 F.2d at 383 n.4. Both levels of hearsay

must be examined and pass constitutional muster. The State's response brief does nothing to resolve the confrontation problem presented by testimony regarding statements Ms. Dawson made that implicate Mr. Limpert. And the case law relied on by the State does not address double hearsay, it simply states there is no confrontation clause violation if a declarant is available for cross-examination at trial. Resp. Br. at 10, 13 (citing *State v. Price*, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006); *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999); *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 14, 84 P.3d 859 (2004)). While one declarant testified here—Ms. Hamilton—the declarant of the second layer—Ms. Dawson—did not. Ms. Dawson was an unavailable witness. Her statements could not be admitted against Mr. Limpert.

The State could not use Ms. Dawson's out-of-court statements to corroborate Ms. Hamilton's testimony where Ms. Dawson was not subject to cross-examination.

The State disregards the confrontation violation deriving from the additional testimony implicating Mr. Limpert through Ms. Dawson's out-of-court statements. Resp. Br. at 6. Mr. Limpert disagrees with the State's reading of the record. The detective's

testimony used Ms. Dawson's statement to implicate Mr. Limpert. The disputed exchange is:

> Q. What were they going after? What was the point of the commotion -- well, what was her understanding for why
> there was a commotion in the room?
>
> A. Because there was a phone that the victim would not return.

RP 335. The questioning and response led the jury to understand Ms. Dawson told the detective her understand was "they" "were . . . going after . . . a phone that the victim would not return." The prosecutor did not strike the first part of the question "What were they going after?" The State cannot therefore now contend that it is not a part of the record.

This Court should look at both pieces of evidence in determining Mr. Limpert's confrontation rights were violated and the error was not harmless beyond a reasonable doubt.

Finally, the State's argument that counsel tactically declined to object to the confrontation clause violation so that he could cross-examine the detective regarding exculpatory statements Ms. Dawson made also misses the mark. First, in addition to the inadmissible statements raised in Mr. Limpert's opening brief, the State elicited

extensive testimony from the detective about Ms. Dawson's statements that did not incriminate Mr. Limpert. RP 335-37. Counsel's ability to cross-examine the detective regarding these statements did not depend on the admission of the two incriminating statements. *See* RP 345-48 (cross-examination regarding Dawson's statements does not implicate Limpert).[1] Where there was any chance of implicating Mr. Limpert through Ms. Dawson's statements, the State objected and the issue was avoided. *Id*. Therefore, there was no strategic basis as the State alleges.

Because the untainted evidence was not overwhelming, the State cannot assure this Court that, beyond a reasonable doubt, Mr. Limpert would have been convicted of attempted assault if Ms. Dawson's incriminating statements had been properly excluded. The conviction should be reversed and remanded for a new trial.

[1] The State cites to RP 266-82 as showing "Ms. Dawson's hearsay statements were delved into at length by Mr. Limpert's counsel." Resp. Br. at 13. This portion of the verbatim report corresponds to counsel's cross-examination of a different witness, Makelle Hamilton. Accordingly the citation does not support the State's contention.

2. The prosecutor committed misconduct by analogizing to a highly-publicized, out-of-state robbery where the facts of that case were not in evidence at Mr. Limpert's trial .

In the alternative, the Court should reverse because the prosecutor played on the jury's passions and prejudices and rely on facts not in evidence by likening Mr. Limpert to the imprisoned O.J. Simpson. Op. Br. at 12-15. Instead of dealing with the misstatements of the prosecutor, the State conveniently and limitedly characterizes defense counsel's objection as a straw man to knock down. Resp. Br. at 21-23.

This Court should not take the State's invitation to disregard the prosecutor's misconduct in closing argument. The "prosecutor's duty [was] to ensure a verdict free of prejudice and based on reason." *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). Yet, here, the State argued Mr. Limpert should be imprisoned like O.J. Simpson. RP 420-21. But nothing at trial showed the evidence or law upon which Mr. Simpson was convicted. *See State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) (A prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record."); *Adkins v. Aluminum Co. of Amer.*, 110 Wn.2d 128, 750 P.2d 1257 (1988) (jury may not consider legal authority

beyond the court's instructions). O.J. Simpson, moreover, is an emotional analogy to draw upon, implicating a prosecutor's duty to ensure the verdict is free from passions or prejudices. *See* Op. Br. at 13-14 (and authorities cited therein).

The prosecutor argued in closing,

> Please take a look at Instruction No. 15 when you get it. That's the definition for robbery and it talks about how the taking of personal property off of the person of another by use of force, threat of force, intimidation, that's a robbery. A great example is O.J. Simpson. He's in prison in Nevada right now for going into a motel room –

RP 420-21.

Mr. Limpert's objection should have been sustained. RP 421. The argument was not a proper one to make to the jury. Because the trial court overruled the objection, however, the jury was free to use facts and law not before it and this emotional basis to convict Mr. Limpert. In light of the weaknesses in the State's case—a largely incredible complaining witness, defense evidence that directly challenged with the State's case, and acquittals on the robbery and conspiracy charges—this emotional appeal to matters outside the record was not harmless.

B. CONCLUSION

It is likely the improperly admitted statements of a codefendant implicating Mr. Limpert and the prosecutor's play on the jury's passion and prejudices impacted the verdict in this case. For the reasons set forth above and in the opening brief, the conviction should be reversed. In the alternative, this Court should exercise its discretion and strike the legal financial obligations imposed.

DATED this 17th day of October, 2016.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink, WSBA 39042
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
T: (206) 587-2711
F: (206) 587-2710
marla@washapp.org

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 33909-2-III
	)	
NICHOLAS LIMPERT,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] NICHOLAS LIMPERT 338607 MCC-TRU PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF OCTOBER, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710