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STATE OF WASHINGTON
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No. 96482-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Washington State Court of Appeals
Cause No. 35381-8-III

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

EDWARD LANE HART,
Defendant/Petitioner.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Chelan County Prosecuting Attorney's Office, respectfully requests this Court deny review of the October 2, 2018, unpublished opinion of the Court of Appeals Division III opinion in *State v. Hart*, No. 35381-8-III. This decision upheld the Petitioner's convictions for Rape of a Child in the Second Degree and Child Molestation in the Second Degree.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.
2. The decision of the Court of Appeals is not in conflict with a decision of another decision of the Court of Appeals.
3. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or the United States.
4. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

III. STATEMENT OF THE CASE

Upon filing of the case, attorney Julie Anderson filed a notice of appearance noting her intent to represent the Petitioner. CP 85. Ms. Anderson did not disclose or make aware that she had any

relationship to the parties prior to the filing of the charges. During defense interviews, it was revealed that Ms. Anderson was well-acquainted with both parties during the length of the marriage of the victim's mother and the Petitioner, and the victim had disclosed to Ms. Anderson the abuse she endured at the hands of the Petitioner when she was sixteen and working as an employee of Ms. Anderson's. CP 47. The State immediately moved for the disqualification of Ms. Anderson. CP 44. Ms. Anderson claimed she was not a material witness to the case and the only prejudice was that the Petitioner would not be able to find "private counsel before the trial date." RP 8. The Court granted the State's motion for disqualification of Ms. Anderson finding that the conflict would materially limit the Petitioner's defense. CP 10-11. The Petitioner was appointed public defense counsel. CP 16-19. During the course of the Petitioner's trial, Ms. Anderson was called as a witness for the State and provided crucial information for the prosecution. During the victim's testimony, it was revealed that Ms. Anderson had directed the victim, a minor at the time, to write a formal declaration of recantation of her allegations against the Petitioner on her firm's

letterhead. RP 263-268. Ms. Anderson denied any knowledge of the letter and denied it was done at her direction. RP 431-433.

Part of the State's evidence at trial involved the presence of a mole on Mr. Hart's penis. Three witnesses testified to observing the mole. The victim testified to the presence, color, placement and shape of the mole. RP 273-275. The Petitioner's ex-wife testified to the presence, color, placement and shape of the mole. RP 331-332, 341-343. The lead detective also testified as part of his investigation, he observed the presence, placement and color of the mole. RP 355-359.

On the third day of trial, the Petitioner offered new pictures of his penis taken by a defense investigator that morning after the close of the State's case. RP 470. The investigator testified that he did not witness any markings on the Petitioner's penis. RP 484-485. On cross-examination, the State elicited testimony that the charges against the Petitioner were thirteen months-old, that the investigator had not reviewed or obtained Mr. Hart's medical records, and he had not asked whether Mr. Hart had plastic surgery to have the mole

removed. RP 485-487. The State argued this evidence during closing arguments.

The Petitioner was subsequently convicted of one count of Rape of a Child in the Second Degree and one count of Child Molestation in the Second Degree. RP 541-545. The Petitioner appealed those convictions at Division III Court of Appeals. The convictions have been upheld. The Petitioner now petitions this court for discretionary review.

IV. ARGUMENT

A. THE COURT OF APPEALS PROPERLY HELD THAT MS. ANDERSON WAS A NECESSARY AND MATERIAL WITNESS FOR THE DEFENSE AND PROSECUTION AND WAS, THEREFORE, PROPERLY DISQUALIFIED FROM REPRESENTING THE PETITIONER.

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of the law under the

Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division III Court of Appeals holding in this case is not in conflict with any decisions at the Washington Supreme Court or any other division of the Court of Appeals.

The Sixth Amendment guarantee of the right to counsel includes a criminal defendant's right to select counsel of one's choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146-148, 126 S. Ct. 2557, 165 L.Ed.2d 409 (2006). However, "even for defendants with private attorneys, the right to counsel of choice is not absolute." *State v. Hampton*, 184 Wn.2d 656, 663, 361 P.3d 734 (2015). *Hampton* acknowledged this balancing as a discretionary exercise for the trial court. 184 Wn.2d at 663 (quoting *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010)). Courts are reluctant to disqualify a lawyer absent compelling circumstances.

Am. States Ins. Co. Ex Rel. Kommavongsa v. Nammathao, 153 Wn. App. 461, 466, 220 P.3d 1283 (2009). A trial court should enter findings concerning (1) the materiality of the testimony, (2) the necessity for the testimony, and (3) any prejudice to the client. *State v. Sanchez*, 171 Wn. App. 518, 545, 288 P.3d 351 (2012).

The trial court and the Court of Appeals concluded that defense counsel was a possible witness for the prosecution and also could be an important witness for the defense in a case that likely would turn on witness credibility. The Court found these conclusions were certainly tenable bases for determining that counsel likely would be a necessary witness and could no longer act as an advocate. RPC 3.7(a). They also satisfy the first two questions of the *Sanchez* test—the testimony was material and necessary. The Petitioner is incorrect in its assertion that Ms. Anderson’s testimony was not helpful to the State. While the trial court had the foresight to see the potential need for Ms. Anderson’s testimony, the Court of Appeals had the benefit of hindsight in determining just how necessary and material her testimony was at trial. The importance of Ms. Anderson’s testimony and role it played were paramount. The

letter was generated prior to the investigation of the Petitioner and vastly supported the victim's version of events and explanations about the reasons behind the recantation.

The remaining question is whether disqualification would work a substantial hardship. RPC 3.7(a)(3); *Sanchez*, 171 Wn. App. at 545. The only basis for claiming hardship was that the Petitioner could no longer afford an attorney. That "hardship" was easily remedied by the trial court's appointment of experienced counsel to represent the Petitioner at public expense. The trial court also rejected the implied argument that appointed counsel were not as capable as retained attorneys, pointing to recent successes by local public defenders. This unsupported allegation simply does not establish substantial hardship. The trial court had very tenable bases for removing Ms. Anderson. Her testimony was necessary for both sides. The court did not abuse its discretion by disqualifying Mr. Hart's initial counsel of choice.

B. THE COURT OF APPEALS PROPERLY FOUND THAT THE ARGUMENTS MADE BY THE PROSECUTOR IN CLOSING ARGUMENTS DID NOT HAVE A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE JURY'S VERDICT; THE JURY WAS ADVISED THAT CLOSING ARGUMENTS WERE NOT EVIDENCE; AND THE ARGUMENTS WERE REASONABLE INFERENCES DRAWN FROM THE EVIDENCE PRESENTED AT TRIAL.

The standards governing this issue are well settled. The appellant bears the burden of demonstrating prosecutorial misconduct on appeal and must establish that the conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 718-719. The allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Reversal is not required where the alleged error could have been obviated by a curative instruction. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The failure to object constitutes a waiver unless the remark was so flagrant and ill-intentioned that it evinced an enduring

and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.*; *State v. Swan*, 114 Wn.2d 613, 665, 790 P.2d 610 (1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Finally, a prosecutor has “wide latitude” in arguing inferences from the evidence presented. *Stenson*, 132 Wn.2d at 727. Comments by the prosecutor regarding “advances in plastic surgery” were objected to on two occasions during cross examination. Both were stricken by the Court. The two remarks were not evidence and the jury was instructed not to consider the comments of the attorneys; it is not apparent that anything more needed to be done. The prosecutor elicited on cross examination whether the defense investigator had inquired whether or not the Petitioner had received plastic surgery. The prosecutor also inquired on cross examination whether or not the defense investigator had inquired about the Petitioner’s medical records. The relevance of the mole was clear, although the inference to be drawn was not. Three witnesses testified that one was present in the past, while one witness testified that no mole currently existed. While the jurors could infer that one or more witnesses were incorrect in their testimony, it was equally

likely that all were correctly reporting information that they had experienced at different times over the preceding decades. It was not improper for the prosecutor to suggest that there had been a recent change possibly effectuated by plastic surgery that explained the conflict in the testimony. Under these circumstances, there was not a substantial likelihood that the two comments affected the jury's verdict. Accordingly, the Petitioner has not sustained his burden of proving misconduct deprived him of a fair trial.

C. PETITIONER'S ADDITIONAL PRO SE SUBMISSION REGARDING STATUTE OF LIMITATIONS SHOULD NOT BE CONSIDERED BY THIS COURT BECAUSE IT IS CURRENTLY UNDER CONSIDERATION ON PERSONAL RESTRAIN PETITION AT THE COURT OF APPEALS.

The Petitioner has submitted a personal restraint petition for consideration at the Court of Appeals Division III on the basis that the statute of limitations had expired for prosecution. That matter has yet to be resolved and was submitted as a separate petition from his direct appeal that is the basis for his petition for discretionary review.

V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

DATED this 7th day of January, 2019.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



By: Nicole Hankins WSBA #42895
Deputy Prosecuting Attorney

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DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 7th day of January, 2019, I caused the original RESPONDENT'S ANSWER TO PETITION FOR REVIEW to be filed via electronic transmission with the Supreme Court, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Edward Lane Hart	(X)	U.S. Mail
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1 Signed at Wenatchee, Washington, this 7th day of January, 2019.

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4 Cindy Dietz
5 Legal Administrative Supervisor
6 Chelan County Prosecuting Attorney's Office
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CHELAN COUNTY PROSECUTING ATTORNEY

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