No. 43557-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Todd Phelps,

Appellant.

Lewis County Superior Court Cause No. 11-1-00790-6

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

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14. Mr. Phelps was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

15. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge questioned and excused prospective jurors behind closed doors, and met with counsel in chambers on numerous occasions. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding closed proceedings without first conducting any portion of a Bone-Club analysis?

2. An accused person has the constitutional right to be present at all critical stages of trial, including jury selection. In this case, the court questioned and excused prospective jurors outside the courtroom in Mr. Phelps's absence. Did the trial judge violate Mr. Phelps's right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. art. I, §22?

3. A criminal Information must set forth all of the essential elements of an offense. In count two, the Information failed to allege that Mr. Phelps had sexual contact with a student who was less than 21 years old. Did the Information omit essential elements of the charged crime in violation of Mr. Phelps's right

to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22?

4. When evidence of multiple criminal acts is introduced to support a single conviction, the court must give a unanimity instruction unless the prosecution elects a single act upon which to proceed. Here, the state introduced evidence that Mr. Phelps may have had sexual contact with A.A. on multiple occasions during the charging period, but failed to elect a single act as the basis for the charge in count two. Did the trial court's failure to give a unanimity instruction violate Mr. Phelps's state constitutional right to a unanimous verdict?

5. A prosecutor may not express a personal opinion or "testify" to facts not in evidence. Here, the prosecutor "testified" to facts not in evidence, expressed a personal opinion, and made unconstitutional arguments suggesting Mr. Phelps had tailored his defense to the evidence after it was presented. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned, in violation of Mr. Phelps's state and federal constitutional rights to a jury trial, to due process, to be present during trial, and to confront his accusers?

6. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Phelps denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Todd Phelps was an assistant coach for the Pe Ell girls fastpitch softball team, and had been for 17 years (as of 2010). RP[1] 39, 298, 433, 1556. The team's season was in the spring, but there was also a select team that played in tournaments over the summer. RP 37-38, 1290.

In the summer of 2010, Mr. Phelps took his family and members of the team to various games and tournaments most weekends. One of the players that often traveled with the family was A.A. RP 37-39, 432, 440, 1290-1297. She was 16 and had a strained relationship with her own parents. RP 38, 41-42, 84-89, 105, 123, 142, 178, 222, 239, 535, 539, 719.

A.A. cut herself, experienced depression, resisted taking her anti-depression medication, lied to her parents frequently, contemplated suicide more than once, and generally preferred the company of the Phelps family. RP 39-41, 49-50, 99-101, 110, 113, 161, 226, 363, 379, 446, 517, 719. She often spent the night with Mr. Phelps's daughter Angelina who was 2 years older and tutored A.A. in math. RP 42, 184, 384, 438, 445, 509, 518.

[1] Citations to the trial will be RP, as those pages are consecutively numbered. All other citations to the transcripts will include the date.

After that summer season was over, A.A. rarely saw the Phelps family until the start of the school fastpitch season in February of 2011. RP 448. A.A. was continuing to have a difficult relationship with her family, and once the season started, she confided to Mr. Phelps that she had been cutting herself and had considered suicide. In late March, Mr. Phelps and A.A. talked in his truck in the parking lot of a church after watching a game. RP 450, 579, 695, 767-768.

Once Mr. Phelps learned of A.A.'s challenges, he worked to keep A.A. from self-harm and tried to help her improve her self-esteem. A.A. did not readily discuss her issues with adults, with the exception of Mr. Phelps. They developed a relationship that included phone calls and frequent texts, even late into the night. RP 469, 549, 984-1003, 1308. Mr. Phelps contacted several people to express his concerns about A.A., including A.A.'s mother, the head fastpitch coach, the other assistant coach, the pastor at A.A.'s church as well as the pastor's wife, and Mr. Phelps's own wife. RP 45-46, 50, 110-112, 188, 202, 205, 214, 217, 230, 245-6, 1298.

The first week of April, A.A. told her pastor's wife that Mr. Phelps had kissed her. While stories differed on where, how, and when, school authorities were notified of the allegation. RP 119, 144, 153-154, 218-220, 247, 269, 301, 306, 501, 513-516, 540, 1234, 1464.

While the school's investigation regarding the kiss was ongoing, Mr. Phelps met with A.A. and her parents. RP 50-51, 302. The two families agreed that Mr. Phelps should not lose his coaching job because he was trying to help A.A. RP 147, 314. The school agreed, and directed Mr. Phelps to have no further contact with A.A. via text or phone except as related to his coaching duties. RP 315-319. Mr. Phelps continued to have frequent contact with A.A. despite this directive, and later resigned his coaching job as a result. RP 64, 260-261, 300, 320-323, 984-1003.

In September of 2011, A.A. moved to her aunt's home near Fife. RP 131, 696. After being there a few weeks, she told her aunt (and then her parents) that she had sex with Mr. Phelps in July. RP 283, 286.

A police investigation led to charges of Rape in the Third Degree (with the allegation that Mr. Phelps held a position of trust and that A.A. was a particularly vulnerable victim) and Sexual Misconduct with a Minor in the Second Degree. CP 42-45 With respect to the second charge, the Information read:

> On or about July 27, 2011, in the County of Lewis, State of Washington, the above-named individual engaged in sexual intercourse with another person who was not marred to the defendant to-wit: A.K.A (DOB: 08/01/1994), and A.K.A. (DOB: 08/01/1994) did not consent to the sexual intercourse and such lack of consent was clearly expressed by A.K.A's words or conduct, and/or under circumstances where there was a threat of substantial unlawful harm to property rights of A.K.A. (DOB: 08/01/1994); contrary to the Revised Code of Washington 9A.44.060(1).

CP 43.

A list of prospective jurors was prepared for use during voir dire. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. Juror 62 was a handwritten addition to the list. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. During jury selection, Juror 62 indicated there was a reason he "should not be allowed to serve" on the case. RP (4/17/12 voir dire) 8. He also indicated that he'd read or heard something about the case, and had formed opinions that would affect his ability to be fair and impartial. RP (4/17/12 voir dire) 9. He answered yes when asked if he was acquainted with the parties, the attorneys, or the prospective witnesses. RP (4/17/12 voir dire) 9.

The prosecutor questioned Juror 62, who revealed that he lived in Pe Ell and knew "almost every person" on the witness list. RP (4/17/12 voir dire) 20-21. After a few additional questions, the court interrupted, and spoke directly with Juror 62:

> THE COURT: Juror 62 was actually excused from this case earlier and I thought he knew that. You're Mr. Kephart; is that right?
> JUROR NO. 62: Yes, sir.
> THE COURT: Yes.
> JUROR NO. 62: I was. But you also told me I had to come and go through the process, so I'm here.
> THE COURT: I think we had a miscommunication. But you told me all of those things and I thought... Well, at any rate, [you're] excused today --
> JUROR NO. 62: Thank you.
> THE COURT: -- so you can leave.

JUROR NO. 62: Appreciate it.
RP (4/17/12 voir dire) 21-23.

There is no further indication of the record of when (or where) the court had spoken with Juror 62, or whether any other jurors had been excused outside the courtroom prior to the start of voir dire. RP (4/17/12 voir dire) 2-128; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP.

Juror 28 and Juror 48 were questioned in open court during voir dire. RP (4/17/12 voir dire) 5, 25, 106; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. They were excused at some point; however, the record does not reflect when, where, how, or why this occurred. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP Nor does the record indicate whether or not either party objected. See RP (4/17/12 voir dire) generally.

Throughout the trial, there were references to proceedings that occurred outside the courtroom. The judge heard motions in limine in his chambers. RP (4/10/12) 9; see also RP (4/13/12) 3. The court also met with counsel in chambers prior to jury selection, and ruled on preliminary matters such as the procedures and time limits for voir dire and the need for alternate jurors. RP 3. Later in the trial, the parties met with the judge in chambers and discussed issues relating to A.A.'s journal. RP 627.

Another in camera meeting occurred following the defense case. RP 1427.

At trial, A.A. testified that during the season before Mr. Phelps had resigned, he'd kissed her on three separate occasions, rubbed her upper thigh, grabbed her crotch and butt, and pulled her on top of him three different times. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566. She also stated that during the incident in which she alleged sexual intercourse, she shrugged when asked if they would have sex, and that she told the investigating officer that she never said no. RP 871-879.

The court did not instruct the jury with respect to the multiple possible acts that could comprise sexual misconduct, and the state did not elect one. Court's Instructions to Jury, Supp. CP; RP 1474-1553. In his closing argument, the prosecutor referred to all of the alleged sexual incidents that occurred during the fastpitch season, but did not elect one. RP 1501-1509.

In his closing argument, the defense attorney argued different theories supporting not guilty findings, including that if sexual intercourse had occurred in July, A.A. had consented to it. RP 1571. The prosecutor stated in his rebuttal that he was not aware until he heard it that the defense would claim that A.A. consented. RP 1580. He also

characterized the defense strategy as "grasping at straws." RP 1582. There was no defense objection. RP 1580-1583.

The jury voted to convict on both counts, and answered "yes" to the special verdict. Verdict Form A, Supp. CP; Special Verdict, Supp. CP; Verdict Form B, Supp. CP. After sentencing, Mr. Phelps timely appealed. CP 237.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

A. Standard of Review

Constitutional questions are reviewed de novo. McDevitt v. Harborview Med. Ctr., ___ Wn.2d___, ___, 291 P.3d 876 (2012). Whether a trial court procedure violates the right to a public trial is a question of law reviewed de novo. State v. Njonge, 161 Wn. App. 568, 573, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. Id, at 576.

B. The constitution requires that criminal trials be open and public.

Criminal cases must be tried openly and publicly. State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); Presley v. Georgia, 558 U.S. 209, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam).

Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. Bone-Club, at 258-259.

The public trial right attaches to a particular proceeding when "experience and logic" show that the core values protected by the right are implicated. State v. Sublett, ___ Wn.2d ___, ___, ___ P.3d ___ (2012). A reviewing court first asks "'whether the place and process have historically been open to the press and general public,'" and second, "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id, at ___ (quoting Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). If the place and process have historically been open and if public access plays a significant positive role, the public trial right attaches and closure is improper unless justified under Bone-Club.

The Supreme Court has yet to allocate the burden of proof when it comes to showing what occurred during a closed in camera proceeding. However, the court has provided some guidance: where the record shows the likelihood of a closure (in the form of "the plain language of the trial court's ruling impos[ing] a closure"), the burden shifts to the state "to overcome the strong presumption" that a closure actually occurred. State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005).

Similarly, the state should bear the burden of establishing that a closed proceeding does not implicate the core values of the open trial right. The prosecutor has an incentive to ensure that guilty verdicts are upheld, and is therefore the natural candidate to bear responsibility for putting on the record anything that transpired during a closed proceeding.[2] Thus, in this case, the burden should rest with the prosecution to establish what occurred outside of the courtroom. See Brightman (addressing state's burden once closure shown).

C. The trial court erroneously closed a portion of jury selection by questioning and dismissing jurors behind closed doors.

The state and federal Supreme Courts have repeatedly affirmed that the public trial right attaches to jury selection. State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009); State v. Brightman, at 515; Presley, at ___. A reviewing court need not apply the "experience and logic" test to jury selection, because it is well-settled that the public trial right applies. State v. Wise, ___ Wn.2d. ___, 288 P.3d 1113 (2012); see also In re Morris, ___ Wn.2d. ___, 288 P.3d 1140 (2012) (Chambers, J., concurring).

[2] Similarly, if a closed proceeding does implicate the core values of the public trial right, the prosecution should ensure that the court considers the five Bone-Club factors.

Where a portion of jury selection is unnecessarily closed, reversal is automatic. Strode, at 231 (plurality); Presley, at ____.

Here, the record suggests that jurors were questioned and excused behind closed doors.[3] RP (4/17/12 voir dire) 2-128; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. This became clear during the examination of Juror 62. During voir dire, Juror 62 acknowledged that he'd already been questioned and excused by the judge for reasons related to the case[4] (although a miscommunication resulted in his appearance for voir dire.) RP (4/17/12 voir dire) 21-23. Unlike other jurors who were excused, Juror 62's name did not appear on the printed struck juror list; instead, it was handwritten at the end of the list. This suggests there may have been other similarly situated persons whose names did not even appear on the list. See Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. In addition, Juror 28 and Juror 48 were questioned in open court, but the record does not reflect how or when they were excused. RP (4/17/12 voir dire) 5, 25, 106; See Struck Juror List (Clerk's Trial Minutes

[3] Whether this occurred in chambers, in the clerk's office, or in the hallway, the public trial right was violated. See State v. Leyerle, 158 Wn. App. 474, 483-84, 242 P.3d 921 (2010).

[4] The colloquy between the judge and Juror 62 made clear that the earlier questioning and decision to excuse the juror related directly to the facts of the case, rather than illness or unrelated hardship. RP (4/17/12 voir dire) 21-23.

(4/17/12)), Supp. CP. This suggests that they, too, were excused behind closed doors, possibly during a recess.

By excusing jurors for case-related reasons outside the public's view, the court violated the constitutional requirement that criminal trials be administered openly. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §10 and 22; Bone-Club, supra. Accordingly, Mr. Phelps's convictions must be reversed and the case remanded for a new trial. State v. Paumier, ___ Wn.2d. ___, 288 P.3d 1126 (2012).

D. The trial court erroneously held additional in camera hearings without undertaking Bone-Club analysis.

As the Supreme Court noted, "[t]the resolution of legal issues is quite often accomplished during an adversarial proceeding..." Sublett, at ___. Traditionally, adversarial proceedings have been open to the public. See, e.g., Press-Enterprise at 13 (addressing preliminary hearing in California); United States v. Simone, 14 F.3d 833 (3d Cir. 1994) (granting public access to post-trial examination of juror for misconduct); United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986) (granting public access to transcripts of sidebar and in camera rulings); United States v. Criden, 675 F.2d 550, 552 (3d Cir. 1982) (granting public access to transcript of

pretrial hearing held in camera). By contrast, the public trial right is less likely to attach to ex parte or nonadversarial matters.[5]

In keeping with this history, the experience prong suggests that proceedings must be open and public if they are adversarial in any way. Furthermore, where the record fails to establish what happened during a closed-door session, the hearing should be presumed to be adversarial. See Brightman, supra (allocating the burden on the issue of closure).

Open court proceedings are essential to proper functioning of the judicial system; this is especially true for hearings that have an adversarial tone, or for those that offer a possibility of prejudice to either party. Opening the courtroom doors to the public promotes public understanding of the judicial system, encourages fairness, provides an outlet for community sentiment, ensures public confidence that government (including the judiciary) is free from corruption, enhances the performance of participants, and (where evidence is taken) discourages perjury. See Criden, at 556 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). Each of these benefits

[5] See, e.g., In re Search of Fair Finance, 692 F.3d 424, 430 (6th Cir. 2012) (refusing public access to search warrant documents); United States v. Gonzales, 150 F.3d 1246, 1257 (10th Cir. 1998) (refusing public access to indigent defendants' ex parte requests for public funds).

accrues when the public, the press, and any interested parties have a full opportunity to observe every aspect of a proceeding.

Here, the judge and counsel met in camera on several occasions. RP (4/13/12) 3; RP 3-5, 627, 1427. Although the court gave a brief of summary of certain closed proceedings, no record was made of the proceedings themselves. RP (4/13/12) 3; RP 3-5, 627, 1427.

The public was unable to observe arguments made by the attorneys, concerns expressed by the judge, the demeanor of the participants, and the means by which the ultimate decisions were reached. Mr. Phelps, any family members, the press, and other interested spectators were likely unaware that proceedings were even taking place, and had no opportunity to play the important role secured to them when proceedings are open.

Furthermore, the absence of a complete record should be held against the prosecution. Without evidence of what actually occurred in chambers, it is fair to presume that the in camera proceedings had an adversarial tone. Brightman, supra.

Under these circumstances, experience and logic suggest that the closed hearings should have been open to the public. The trial court's decision to close the courtroom violated both Mr. Phelps's constitutional rights and those of the public. U.S. Const. Amend. VI, U.S. Const.

Amend. XIV; Wash. Const. art. I, §10 and 22; Bone-Club, supra. Accordingly, his conviction must be reversed and the case remanded for a new trial. Id.

II. THE TRIAL COURT VIOLATED MR. PHELPS'S RIGHT TO BE PRESENT BY EXCUSING JURORS IN MR. PHELPS'S ABSENCE.

A. Standard of Review

Constitutional questions are reviewed de novo. McDevitt, at ___.

B. Mr. Phelps's conviction must be reversed because the trial judge violated his Fourteenth Amendment right to be present at all critical stages of trial.

A criminal defendant has a constitutional right to be present at all critical stages of a criminal proceeding. U.S. v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); State v. Pruitt, 145 Wn. App. 784, 788, 797-799, 187 P.3d 326 (2008). This right stems from the Sixth Amendment's confrontation clause and from the Fourteenth Amendment's due process clause. Gagnon, at 526.

Although the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present whenever "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." Id. Accordingly, "the

constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" U.S. v. Tureseo, 566 F.3d 77, 83 (2d Cir. 2009) (quoting Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

The right to be present encompasses jury selection. This allows the accused person "to give advice or suggestion or even to supersede his lawyers." Synder v. Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Furthermore, "[a]s Blackstone points out, 'how necessary it is that a prisoner ... should have a good opinion of his jury the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for his dislike.'" U.S. v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (quoting 4 W. Blackstone, Commentaries on the Laws of England, 353 (1765)).

In this case, Mr. Phelps was denied his Fourteenth Amendment right to be present during a critical stage of the proceedings. At some point, the trial court questioned and excused jurors outside the courtroom. RP (4/17/12 voir dire) 21-23; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. The trial court's decisions affected the makeup—and hence the fairness—of the jury that presided over Mr. Phelps's fate.

Excusing jurors for case-related reasons is functionally equivalent to excusing them for answers given during voir dire. The court's decision to question and excuse jurors in Mr. Phelps's absence violated his Fourteenth Amendment right to be present. Gordon, supra; Gagnon, supra. His conviction must be reversed and the case remanded for a new trial. Id.

III. MR. PHELPS'S CONVICTION FOR SEXUAL MISCONDUCT VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, §22.

A. Standard of Review

Constitutional questions are reviewed de novo. McDevitt, at ___. A challenge to the constitutional sufficiency of a charging document may be raised at any time. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. Id, at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. Id, at 105-106.

If the Information is deficient, prejudice is presumed and reversal is required. State v. Courneya, 132 Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). On the other hand, if the missing element can be found by fair construction of

the charging language, reversal is required only upon a showing of prejudice. Kjorsvik, at 104-106.

B. The Information was deficient as to count two because it failed to allege the essential elements of the charged crime.

The Sixth Amendment to the federal constitution guarantees an accused person the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.[6] A similar right is secured by the Washington State Constitution. Wash. Const. art. I, §22. All essential elements—both statutory and nonstatutory—must be included in the charging document. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). An essential element is "one whose specification is necessary to establish the very illegality of the behavior." Id (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

A conviction for second-degree sexual misconduct with a minor requires proof that the accused person "is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual contact with an enrolled student of the school who is at least sixteen years old and not more than twenty-one years old and not married to the

[6] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

employee, if the employee is at least sixty months older than the student..." RCW 9A.44.096(1)(b) (emphasis added). An essential element thus requires proof that the registered student is not more than 21 years old.

In this case, the Information did not include this element. It included two references to age—age 16 and age 18. CP 43. Nowhere in the charging language did the prosecution make clear that the state was required to prove that the registered student was under age 21. CP 43.

Because the Information is deficient, the conviction violated Mr. Phelps's right to notice under the Sixth Amendment and art. I, §22. Kjorsvik, at 104-106. The conviction must be reversed and the case dismissed without prejudice. Id.

IV. MR. PHELPS'S CONVICTION FOR SEXUAL MISCONDUCT VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT UNDER ART. I, §21.

A. Standard of Review

Constitutional violations are reviewed de novo. McDevitt, at ___. A manifest error affecting a constitutional right may be raised for the first time on review.[7] RAP 2.5(a)(3); State v. Kirwin, 165 Wn.2d 818, 823, 203

[7] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. Id.

P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

B. The state constitution guarantees an accused person the right to a unanimous verdict.

An accused person has a state constitutional right to a unanimous jury verdict.[8] Wash. Const. art. I, §21; State v. Elmore, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act. Id, at 511.

[8] The federal constitutional guarantee of a unanimous verdict does not apply in state court. Apodaca v. Oregon, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

In the absence of an election, failure to provide a unanimity instruction is presumed to be prejudicial.[9] Coleman, at 512; see also State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008). Without the election or instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. Coleman, at 512.

Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. Coleman, at 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. Id, at 512.

C. The absence of a unanimity instruction requires reversal of the conviction in count two, because the prosecution relied on evidence of multiple acts.

The state presented evidence that Mr. Phelps had sexual contact with A.A. on multiple occasions. In particular, A.A. testified that Mr. Phelps kissed her on three separate occasions, rubbed her upper thigh, grabbed her crotch and butt, and pulled her on top of him three different times. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566.

[9] Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); State v. Greathouse, 113 Wn. App. 889, 916, 56 P.3d 569 (2002).

The prosecutor did not identify a particular act as the basis for count two. Instead, in closing, the prosecutor referenced more than one occasion on which Mr. Phelps allegedly had sexual contact with A.A. RP 1501-1506.

The court did not give a unanimity instruction as to count two. This violated Mr. Phelps's constitutional right to a unanimous jury, and gives rise to a presumption of prejudice.[10] Coleman, at 511-512.

In the absence of an election or a unanimity instruction, a divided jury might have voted to convict. Some jurors may have believed Mr. Phelps had sexual contact with A.A. at his house, while others believed sexual contact occurred on the bus but not at the house. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566.

Because Mr. Phelps may have been convicted by a jury divided in this manner, his conviction cannot stand. Count two must be reversed and the charge remanded for a new trial. Coleman, at 511. If the same evidence is presented on retrial, the state must elect a single act as the basis for the charge or the court must give a unanimity instruction. Id.

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[10] As a matter of law, it creates a manifest error affecting a constitutional right, and thus can be reviewed for the first time on appeal. RAP 2.5(a)(3); State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009) (failure to give a unanimity instruction is "deemed automatically [to be] of a constitutional magnitude.")

V. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. In re Glasmann, ___ Wn.2d ___, 286 P.3d 673 (2012).[11] Even absent an objection, error may be reviewed if it is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." Id, at ___.

Furthermore, prosecutorial misconduct may be argued for the first time on appeal if it is a manifest error that affects a constitutional right. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. State v. Toth, 152 Wn. App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show harmlessness beyond a reasonable doubt. State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011).

[11] Citations are to the lead opinion in Glassman. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers "agree[d] with the lead opinion that the prosecutor's misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct." Glasmann, at ___ (Chambers, J., concurring). Justice Chambers wrote separately because he was "stunned" by the position taken by the prosecution. Id.

B. The convictions must be reversed because the prosecutor engaged in misconduct that was flagrant and ill-intentioned.

The state and federal constitutions secure for an accused person the right to a fair trial. Glasmann, at ___; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, §22. Prosecutorial misconduct can deprive an accused person of this right. Glasmann, at ___.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); Wash. Const. art. I, §21 and 22. The due process clause affords a similar protection. U.S. Const. XIV; Sheppard v. Maxwell, 384 U.S. 333, 335, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

It is misconduct for a prosecutor to vouch for evidence, or to give a personal opinion on the guilt of the accused. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). A prosecutor may not "'throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

The state constitution further guarantees an accused person "the right to appear and defend in person... [and] to meet the witnesses against

him face to face." Wash. Const. art. I, §22. These state constitutional rights are broader than their federal counterparts, in that Washington prosecutors are prohibited from making certain arguments that are permissible under the federal constitution.[12] State v. Martin, 171 Wn.2d 521, 533-536, 252 P.3d 872 (2011). In Martin, the Supreme Court rejected the federal standard, and specifically adopted a standard based on Justice Ginsburg's dissent in Portuondo. Martin, at 533-536 (citing Portuondo, at 76-78 (Ginsburg, J., dissenting)).

The Martin court quoted extensively from Justice Ginsburg's opinion, noting that she "criticized the majority for 'transform[ing] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility.'" Martin, at 534 (quoting Portuondo, at 76 (Ginsburg, J., dissenting)). Importantly, the Martin court highlighted Justice Ginsburg's opinion "that a prosecutor should not be permitted to make such an accusation during closing argument because a jury is, at that point, unable to 'measure a defendant's credibility by evaluating the defendant's response to the accusation, for the broadside is fired after the defense has submitted its case.'" Martin, at 534-35 (quoting Portuondo, at 78 (Ginsburg, J., dissenting)).

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[12] The U.S. Supreme Court allowed such arguments in Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

Here, the prosecutor told jurors (a) that he'd just learned of Mr. Phelps's defense (implying that the defense had been forced to change theories based on the evidence), and (b) that defense counsel wasn't present for an interview with A.A. and thus had "no idea of context was of the interview [sic]," that defense counsel "doesn't even know what the notes were about," and that the prosecution was "obligated to give [the notes] to him." RP 1580, 1582. There was, of course, no evidence supporting any of these statements. See RP generally.

The prosecutor concluded that defense counsel was "grasping at straws to get anything." RP 1582. This was not argument based on facts introduced at trial; instead it was an improper statement of the prosecutor's personal opinion. By making this statement, the prosecutor effectively testified, throwing "the prestige of his public office ... into the scales against the accused." Monday, at 677 (citation and internal quotation marks omitted.)

The prosecutor's misconduct was flagrant and ill-intentioned. Glasmann, at ___. It pervaded the entire closing argument, thus an objection could not have cured any prejudice. Id. Accordingly, the conviction must be reversed and the case remanded for a new trial. Id.

VI. MR. PHELPS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, art. I, §22. of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, §22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective

standard of reasonableness; and (2) that the deficient performance resulted in prejudice - "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

C. Mr. Phelps was denied the effective assistance of counsel by his attorney's failure to object to prosecutorial misconduct that was flagrant and ill intentioned.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

> At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to

> make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge v. Hurley, 426 F.3d 368, 386 (6th Cir., 2005).

Here, defense counsel should have objected to the prosecutor's flagrant and ill-intentioned misconduct. The prohibitions against prosecutorial "testimony" and statements of personal opinion are well established. By failing to object, counsel's performance thus fell below an objective standard of reasonableness. At a minimum, Mr. Phelps's lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. Id.

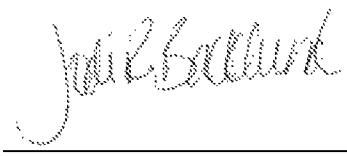
Furthermore, Mr. Phelps was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. See Glasmann, at ___. The failure to object deprived Mr. Phelps of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. Hurley. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

CONCLUSION

For the foregoing reasons, the convictions must be reversed. Count one must be remanded for a new trial; count two must be dismissed without prejudice. If count two is not dismissed, it must be remanded for a new trial.

Respectfully submitted on February 26, 2013,

BACKLUND AND MISTRY



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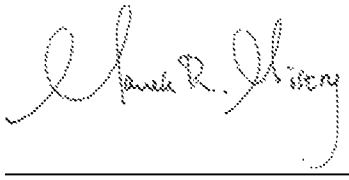

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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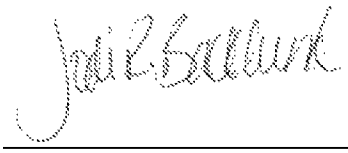
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 26, 2013.



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