NO. 45998-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY TARRER,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

REPLY BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE TRIAL COURT'S DENIAL OF TARRER'S CONTINUANCE REQUESTS VIOLATED TARRER'S CONSTITUTIONAL RIGHTS

Defense counsel repeatedly stated he was not ready for trial for several reasons. Previous counsel had more than a year to prepare for Tarrer's trial. Defense counsel was actively investigating all leads for exculpatory evidence. Defense counsel had a sizable record from two previous trials to review. The trial court did not care. It erroneously determined the previous two trials resolved all possible issues and treated this trial merely as a summary procedure. Denying Tarrer's well-founded motions for a trial continuance was more than just an abuse of discretion; it was a deprivation of due process of law. State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950).

The State calls defense counsel's investigation of another shooter "speculative," complaining that defense counsel "never explained to the court what the status or prognosis of that investigation was." Br. of Resp't at 11. But in its denial of his continuance requests, the trial court never gave defense counsel a fair opportunity to explain anything. Indeed, the trial court implied that defense counsel made up the exculpatory evidence, stating, "and where these other, quote, witnesses came from regarding the shooter, I mean, if someone has just told you that, it's remarkably astonishing . . . ." RP 31.

Given the trial court's clear but unjustified skepticism regarding the new evidence, it does not appear there is any explanation counsel could have offered to obtain a continuance to complete his investigation and preparation.

In actuality, it is the State that speculates, asserting Tarrer's lawyer "had the benefit of the extensive investigation and preparation, and advice of an attorney who had tried the case before." Br. of Resp't at 11. The State does not cite the record for this proposition, ostensibly because there is nothing in the record to suggest previous counsel's investigation, preparation, and advice were extensive or beneficial.

The State also suggests that the trial court is in the best position to decide when there has been enough time to prepare for trial. Br. of Resp't at 11. Tarrer disagrees. Defense counsel is in the best position to assert whether or not he is prepared, whether or not he needs time to investigate and collect additional evidence, and whether or not he can be a constitutionally effective advocate for his client. Defense counsel repeatedly and forthrightly stated that eight months was not sufficient preparation time and that he was simply not ready for trial. RP 26-27, 30, 33, 39-40, 46-48, 57, 66, 893. But defense counsel's self-deprecating and candid appraisals fell on deaf ears. The trial court misplaced its focus on the fact that Tarrer had two prior trials, erroneously believing they resolved all possible retrial issues. The trial court's mistaken denial of the continuance motions doomed

Tarrer's trial from the start. The trial court deprived Tarrer of effective assistance or counsel, the preparation of his defense, and due process of law. The denials of Tarrer's motions to continue require reversal.

2. THE TRIAL COURT REPEATEDLY DEMONSTRATED BIAS, WHICH DEPRIVED TARRER OF A FAIR TRIAL

The essence of the trial court's bias, as in the context of the continuance denials, was that it allowed Tarrer's previous two trials to predetermine its rulings in this trial. The trial court demonstrated no interest in ensuring Tarrer's current trial was a fair one. Its bias against Tarrer deprived Tarrer of a fair trial.

The State attempts to characterize the trial court's bias as mere disagreement on legal issues. Br. of Resp't at 14-17. Upon a close examination of the record, however, the State's attempts fail.

The State first asserts that because the trial court stated it read the defense memorandum regarding eyewitness identification issues, including the cases cited therein, it merely disagreed with Tarrer on legal matters. Br. of Resp't at 15 (arguing trial court "read the defendant's memorandum of law, including cases"). But the trial court's reference to "pull[ing] up the case" referred only to this court's opinion that rejected Tarrer's eyewitness identification arguments from his previous trial. Compare RP 67-68 ("I went back and pulled up the case, you know, Section B, admission of eyewitness

identification . . . .") with CP 111 (Section II.B of this court's unpublished opinion titled "Admission of Eyewitness Identifications").

The trial court did not actually read the cases Tarrer cited. Neither did the State, apparently. Had they read the cases, they would know the cases were not "prospective or future rulings of appellate courts on the issue" of eyewitness identification, Br. of Resp't at 15, but *new* Washington, New Jersey, and United States Supreme Court case law. See CP 356-407; RP 63. The trial court knew how it would rule before reviewing the case law and its comments illustrate that it would have made no difference even if the law had completely changed. See Br. of Appellant at 24 & n.3. The trial court simply did not concern itself with fairly considering Tarrer's arguments. No disinterested, reasonably prudent observer could conclude the trial court's cursory, uninformed, and wholly predetermined ruling on this issue was the product of impartial decision-making. Cf. In re Pers. Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010).

The State next asserts there was no bias behind the trial court's statement, "Well, considering I've heard Mr. Tarrer testify before that he was a drug dealer" when it considered whether to allow the State to characterize Tarrer as such in his current trial. RP 689; Br. of Resp't at 15-16. The State's current cavalier explanation for the trial court's statement markedly differs from the blanched reaction of its trial deputy, who

interrupted the trial court and said, "You can't know that, Judge." RP 689. The deputy prosecutor's quick correction of the trial court demonstrates the State knew the trial court's remarks were biased and improper. And regardless of the ruling's substance, the trial court's readiness to overrule Tarrer's objection based on evidence from the previous trials rather than on the evidence currently before it leads to but one conclusion: the trial court was unable or unwilling to perform its functions with impartiality.

The State also tries to explain the trial court's comments on the prosecutorial misconduct issues as "merely acknowledg[ing] that this was a retrial with the same prosecutor, and the prosecutor could edit his prior closing to comply with the ruling of the Court of Appeals." Br. of Resp't at 17. But the State does not respond to Tarrer's multiple observations that the trial court failed even to familiarize itself with this court's prosecutorial misconduct rulings. See Br. of Appellant at 25-27. Indeed, the trial court all but endorsed declare-the-truth and cityscape puzzle analogies, which this court rejected in no uncertain terms. Compare RP 103, 107, 109 with CP 101-02 & n.6, 104-06. That the trial court did not know or care about this court's rulings on prosecutorial misconduct in order to intelligently rule on Tarrer's pretrial motions in limine to keep the same misconduct from occurring demonstrates the trial court's complete lack concern for Tarrer's right to a fair trial.

The trial court's continually flippant attitude toward Tarrer and his arguments and objections betrays its extensive judicial bias against him. The bias violated due process and rendered the trial fundamentally unfair. This court must reverse.

3. THE TRIAL COURT'S COMMENT THAT ASKED JURORS TO ALIGN THEMSELVES WITH VICTIMS AND AGAINST DEFENDANTS WAS UNCONSTITUTIONAL AND REQUIRES REVERSAL

a. The trial court's admonition to the jury invoking sympathy toward victims was a comment on the evidence

The State contends the court's admonition to the jury was not a comment on the evidence. Br. of Resp't at 18-21. The trial court's comments that juror misconduct would require victims to retestify and could result in a favorable plea deal for criminal defendants unquestionably aligned the trial court on the side of victims and against Tarrer. RP 182-83. The State does not actually provide any analysis regarding whether this was an impermissible comment, and instead merely states the trial court's admonition "was not a comment regarding the case, the defendant, or the evidence." Br. of Resp't at 21. This court should reject the State's unanalyzed, conclusory assertion.

Rather than analyzing whether the trial court commented on the evidence, the State contends "[a]ny possible misinterpretation" by the jury was cured by the trial court's other oral instructions. Br. of Resp't at 20-21.

But Washington authority is to the contrary. The State acknowledges that reviewing courts presume comments on the evidence are prejudicial. Br. of Resp't at 18 (citing State v. Bogner, 62 Wn.2d 247, 249, 253-54, 382 P.2d 254 (1963)). The State, however, ignores that prejudice is presumed even despite a trial court's instructions to disregard such comments: "the damage was done when the remark was made and *it was not capable of being cured by a subsequent instruction to disregard.*" State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (emphasis added). That the trial court told jurors to disregard comments on the evidence is of no moment. The trial court's admonition at the beginning of trial encouraged jurors to sympathize with victims and to assume criminal defendants are guilty. See Br. of Appellant at 29-30. These comments violated article IV, section 16 of the Washington Constitution, were presumptively prejudicial, and require reversal.

b. Tarrer did not waive or invite any error

The State contends Tarrer waived or invited the error he complains of. The State is again mistaken.

As for the State's waiver argument, this court is bound by State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006), State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997), and Lampshire, 74 Wn.2d at 893, all of which hold that an article IV, section 16 violation, being constitutional in

nature, may be raised for the first time on appeal. This court should have little trouble rejecting the State's legally incorrect waiver argument.

As for invited error, the trial court told counsel it intended to admonish the jury regarding the seriousness of misconduct and how it could result in retrial and that a victim will have to retestify. RP 180. Though defense counsel said, "That's fine, Your Honor," he was simply acknowledging the trial court's wish to give a stern admonition regarding juror misconduct. RP 180. At most, this is a failure to object.

And even if defense counsel intended to agree that the trial court could mention a victim having to retestify, defense counsel certainly did not invite the trial court's discussion of "a child rape case which meant that, ultimately, the Prosecutor's Office dealt with the case because they did not want the five-year-old victim to have to testify again . . . ." RP 183. As discussed in Tarrer's opening brief, the repeated reference to victims was only part of the prejudicial comment on the evidence—the trial court's admonition also carried with it an assumption that defendants were guilty and that they did not deserve favorable outcomes once they had been charged with a crime. Br. of Appellant at 29-30. Tarrer simply did not invite the trial judge's lengthy invocation of sympathy for victims and presumption that defendants are guilty. This court should hold the trial court improperly commented on the evidence and reverse.

c. Any invited error or waiver constituted ineffective assistance of counsel

Even if defense counsel waived or invited the error, it was the result of ineffective assistance of counsel.[1] To establish an ineffective assistance of counsel claim, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactics, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed." Id.

No objectively reasonable attorney could agree to a trial court's unconstitutional comment on the evidence, especially where the trial court encouraged jurors to align themselves with crime victims and presume defendants guilty. No legitimate strategic reason could explain assenting to such comments by a trial judge.

---

[1] Although Tarrer did not argue ineffective assistance of counsel in the context of the comment on evidence in his opening brief, he did generally assign error to counsel's ineffectiveness, which should enable him to argue ineffective assistance of counsel in strict reply to the State's waiver and invited error arguments.

The prejudice from counsel's deficient performance requires reversal whenever the underlying error undermines confidence in the outcome of trial. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). As discussed, the trial court's admonition bolstered the character and value of victim testimony and disparaged criminal defendants. This comment prejudiced jurors from the very beginning of trial, polluting the lens through which they viewed the evidence. The judge's comments undermined the confidence in the outcome of trial and are presumed prejudicial. To the extent that defense counsel acquiesced in or agreed to the comments, defense counsel provided prejudicial ineffective assistance.

4. THE TRIAL COURT DEPRIVED TARRER OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED DR. KIESEL'S TESTIMONY

a. Dr. Kiesel's testimony was both relevant and admissible

The State acknowledges Tarrer has a constitutional right to present evidence in his defense. Br. of Resp't at 24 (citing Washington v. Texas, 338 U.S. 14, 19 , 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). The State also correctly notes criminal defendants may not present irrelevant or inadmissible evidence. Br. of Resp't at 24. But Dr. Kiesel's testimony was both highly relevant and admissible under ER 703. The trial court violated Tarrer's constitutional right to present a defense by excluding Dr. Kiesel as a witness.

The State provides no analysis for its implicit proposition that Dr. Kiesel's testimony was irrelevant. As discussed in Tarrer's opening brief, Dr. Kiesel's testimony pertained to the hotly contested issue of whether Claudia McCorvey looked at her shooter when she was shot. Br. of Appellant at 30-36. Dr. Kiesel's testimony was one of Tarrer's main avenues for challenging the veracity of McCorvey's eyewitness identification. Dr. Kiesel's testimony was certainly relevant.

Neither does the State address Tarrer's contention that Dr. Kiesel's testimony was admissible under ER 703, which "allows an expert to base his or her opinion on evidence not admissible in evidence and to base his or her opinion on facts or data perceived by or made known to the expert at or before the hearing." Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). Furthermore, expert testimony is admissible if the expert is qualified, the expert relies on materials and theories generally accepted in his or her relevant community, and the testimony would be helpful to the trier of fact. Id. Here, Dr. Kiesel was a medical examiner, he based his opinion on medical records, which is acceptable in the medical community, and his opinion testimony regarding whether McCorvey's wounds were more consistent with being shot in the back would have been helpful to jurors. Dr. Kiesel's expert testimony was admissible under ER 703. The State has not argued otherwise.

Instead, the State misconstrues this court's opinion in Tarrer's last appeal: "The Court of Appeals had previously upheld this same trial court's ruling in this case, that an expert witness could not testify to others' opinions; specifically whether McCorvey's gunshot wound was an entry or an exit." Br. of Resp't at 26. Contrary to the State's assertion, this court only addressed whether certain medical records themselves were admissible. CP 110-11. This court never mentioned ER 703 or addressed Tarrer's current arguments regarding the admissibility of an expert witness's testimony. See In re Electric Lightwave, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue."). The State's assertion that this court ruled "an expert could not testify to others' opinions" is false and should be rejected.

b. Even if the trial court wished to sanction Tarrer for the late disclosure of Dr. Kiesel as an expert witness, blanket exclusion was not an appropriate remedy and therefore was an abuse of discretion

Rather than address Tarrer's arguments that demonstrate Dr. Kiesel's testimony was admissible, the State treats this issue as a mere discovery violation over which the trial court has ample discretion. Br. of Resp't at 27-29. This conflicts with the State's own acknowledgment that the right to present an expert witness implicates Tarrer's constitutional rights. Br. of Resp't at 24. And, again, the State fails to provide any analysis to back up

its claim that there was no abuse of discretion, likely because the authority it cites undermines its position.

The State cites four factors under State v. Hutchinson, 135 Wn.2d 863, 882-83, 959 P.2d 1061 (1998), "to be considered in deciding whether to exclude evidence as a [discovery] sanction," which include

> (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Br. of Resp't at 28. The State also acknowledges that the exclusion of evidence "'is an extraordinary remedy and should be applied narrowly.'" Br. of Resp't at 28 (quoting Hutchinson, 135 Wn.2d at 882).

Under the Hutchinson factors the State recites but does not analyze, the trial court abused its discretion by excluding Dr. Kiesel. As for the effectiveness of less severe sanctions, the trial court and the State certainly could have limited the scope of Dr. Kiesel's testimony so that he was not discussing the specifics of and merely parroting the inadmissible medical records. See RP 886-87.

The second factor favors Tarrer as well: as discussed, Dr. Kiesel represented one of Tarrer's main avenues for challenging McCorvey's testimony that she faced her shooter. This testimony certainly could have changed the outcome of this case.

Under the third factor, the prosecutor would not have been surprised or prejudiced by Dr. Kiesel's testimony. Indeed, as the deputy prosecuting attorney stated, "I could cross-examine Dr. Kiesel, I think, pretty effectively that he has no idea if they were entrance or exits and neither do these folks, especially the resident interns who were just trying to save her life." RP 892. That the prosecution believed it could effectively cross-examine Dr. Kiesel belies any claim that the State would experience prejudice or surprise at Dr. Kiesel's testimony.

As for the final factor, there was no willful or bad faith violation in failing to timely disclose Dr. Kiesel. Defense counsel missed the deadline for disclosure because he was not prepared for trial and because the trial court nonetheless forced him to trial. See supra Part 1 and infra Part 6; Br. of Appellant at 20, 44-45; see also RP 893 (defense counsel stating with regard to the missed witness disclosure, "I will remind you that I told you I wasn't ready to go"). This cannot be characterized as willful or in bad faith. An analysis of the Hutchinson factors demonstrates that, even if this court were to treat Dr. Kiesel's testimony as a mere discovery violation, the blanket exclusion of Dr. Kiesel was an abuse of discretion.

c. The exclusion of Dr. Kiesel's testimony was not harmless

The State contends the exclusion of Dr. Kiesel's testimony was harmless essentially because Dr. Kiesel could not definitively testify McCorvey was shot in the back. Br. of Resp't at 29-30. But criminal defendants need not establish definitive medical truths for their evidence to provide reasonable doubt. Dr. Kiesel could have rendered an expert opinion that McCorvey's wounds were more consistent with being shot in the back. See Br. of Appellant at 35. This could have made all the difference to Tarrer's defense by undermining the testimony of McCorvey, who was allegedly the only living eyewitness to the shooting. The exclusion of this important testimony was not harmless under any stretch of the imagination, let alone beyond a reasonable doubt.

5. THE PROSECUTOR'S ILL INTENTIONED AND FLAGRANT MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED TARRER OF A FAIR TRIAL

The Pierce County Prosecutor has a quasi judicial duty to ensure a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). The deputy prosecuting attorney utterly failed to comply with his duty.

The State contends the prosecutor did not disparage defense counsel's chosen defense and that he was merely "arguing the credibility of the defendant's expert, Dr. Loftus." Br. of Resp't at 32. The prosecutor told jurors Tarrer called Dr. Loftus "to distract you, to confuse you, to make you

worry, and to make you hesitant about reaching a verdict." RP 1271-72. The prosecutor also stated Dr. Loftus's "whole testimony *is designed* to have you think no one can ever accurately identify somebody who committed a crime against them." RP 1272 (emphasis added). These comments were more than asking jurors not to believe Dr. Loftus. They implied Tarrer's chosen defense employed trickery, distraction, and confusion to prevent the jury from "doing the right thing for the right reasons" and that, indeed, Dr. Loftus's testimony was *designed* to do so. RP 1271-72. These comments maligned defense counsel and were the equivalent of calling defense counsel's arguments "sleight of hand," "bogus," and an "example of taking the[] facts and completely twisting them to [the defense's] own benefit . . . ." State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014); State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011); State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). This ill intentioned and flagrant misconduct requires reversal.

The State does not really address Tarrer's other disparagement argument that the prosecutor improperly blamed Tarrer "that 23 years is a very long time to wait for some final justice to come in this case; but it is almost here." RP 1271; Br. of Appellant at 41-42. These misleading statements suggested to jurors that they should convict not based on the evidence but out of sympathy for victims who have had to wait for "final

justice." Cf. State v. Huson, 73 Wn.2d 660, 662, 664, 440 P.2d 192 (1968) (holding similar delay argument improper but not reversible because failure to object was tactical decision); see also Br. of Appellant at 41-42. This argument deflected responsibility for the delay onto Tarrer when the State actual bears more of the blame for the long delay in this case. The prosecutor asked jurors to convict for improper reasons. This argument was flagrant and ill intentioned and required reversal.

Aside from the disparagement arguments, the prosecutor also told jurors they should balance the rights of Tarrer with the rights of the victims when considering whether to convict Tarrer:

> There was an early United States Supreme Court justice whose name was Benjamin Cardozo who said, Justice, though due to the accused, is due to the accuser, too; We are to keep the balance true; and I tell you that because -- while the defendant has every right to a fair trial, that doesn't mean that while you deliberate the evidence in this case, you should not be mindful of Claudia McCorvey, Lavern Simpkins, Marquise McCorvey, and the others who have been affected by this case.

RP 1271. This quotation diminished the jury's proper role and the reasonable doubt burden. The jury's sole responsibility is to determine whether the State has proved every element of the charged offenses beyond a reasonable doubt. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Telling the jury it needed to "balance" its reasonable doubt determination by considering "justice" "due the accuser" is so egregious that

it is not curable by instruction. It was flagrant and ill intentioned misconduct that requires reversal.

The prosecutor also diminished the reasonable doubt standard by misstating that a lack of evidence could not negate a belief beyond a reasonable doubt. RP 1297-98. ("I mean, all of these things are stuff that you could have that you don't have: and I'm going to suggest to you that the law doesn't let you think about those things when you decide if the case was proved beyond a reasonable doubt."). But, per the trial court's instructions, a reasonable doubt may arise from the lack of evidence. CP 492; State v. Bennett, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007) (requiring instruction that reasonable doubt may arise from lack of evidence). The State repeatedly and egregiously undermined the reasonable doubt standard. This was flagrant and ill intentioned misconduct and requires reversal.

Taken individually or together, the prosecutor's misconduct in this case was "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). This court should accordingly hold that the prosecutor's misconduct deprived Tarrer of a fair trial.

6. TARRER RECEIVED CONSTITUTIONALLY INADEQUATE ASSISTANCE OF COUNSEL

a. Missing the deadline for disclosing Dr. Kiesel was prejudicial

The State concedes "failing to timely file a witness list or give notice of a witness could be 'deficient' performance." Br. of Resp't at 40. But the State contends there was no prejudice given that "the trial court excluded Dr. Kiesel's testimony because it lacked a sufficient basis, not simply because of the late disclosure." Br. of Resp't at 40. Thus, in the State's view, the untimely disclosure "did not preclude the defense from calling a qualified expert witness." Br. of Resp't at 41.

The State is incorrect, as the trial court repeatedly stated that one of its reasons for excluding Dr. Kiesel was the untimely disclosure. RP 888 ("Well, first of all, all your witnesses were supposed to be disclosed two weeks prior to trial . . . . we are now . . . into the third week of trial; and you suddenly pull this little rabbit out of your hat."), RP 892 (court stating "part of the problem, also, is that this witness was not timely disclosed"). Contrary to the State's contention, the trial court's exclusion of Dr. Kiesel was based, at least partially, on defense counsel's tardy disclosure. And as already discussed, counsel's failure was prejudicial because Dr. Kiesel would have cast doubt on McCorvey's testimony that she saw her shooter.

Defense counsel's failure to timely disclose Dr. Kiesel as a witness constituted prejudicial ineffective assistance of counsel.

b. Failing to object to the prosecutor's improper closing arguments constituted ineffective assistance

On the one hand the State argues Tarrer waived his right to challenge prosecutorial misconduct because defense counsel did not object. Br. of Resp't at 39. On the other hand the State argues counsel's failure to object was not deficient or prejudicial. Br. of Resp't at 41-42. These inconsistent arguments cannot be squared.

The prosecutor repeatedly diminished the State's burden of proof, told the jury it could not consider a lack of evidence in determining whether there was reasonable doubt, and implied Tarrer was the reason for the 23-year delay for "final justice." Counsel's performance fell below an objective standard by failing to preserve these errors for appellate review. State v. Emert, 84 Wn.2d 839, 848, 621 P.2d 121 (1980) (holding failure to preserve error may constitute ineffective assistance of counsel and requires examining claimed error on appeal). As discussed, the multiple instances of misconduct were extremely prejudicial and likely to tip the scales in favor of guilty verdict. This court should reject the State's inconsistent arguments and hold that defense counsel's failure to object to the prosecutor's egregious misconduct in closing arguments constituted ineffective assistance.

7. THERE WAS CUMULATIVE ERROR DEPRIVING THE DEFENDANT OF A FAIR TRIAL

The State posits that the cumulative error "analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court's weighing of those errors." Br. of Resp't at 42-43 (citing State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994)). True, Russell states that "reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless" and then highlights the difference between constitutional and nonconstitutional harmless error analysis. 125 Wn.2d at 94. But the State, though it cites Russell, provides no analysis whatsoever regarding how to categorize the several errors in Tarrer's trial. The State's lip service to Russell is unhelpful.

Tarrer's trial suffered from multiple errors, including the denial of Tarrer's motions for continuance, judicial bias, judicial comment on the evidence, the exclusion of Dr. Kiesel as a defense witness, prosecutorial misconduct, and ineffective assistance of counsel. These errors all implicated Tarrer's right to present a defense and right to a fair trial. These errors are thus all constitutional in nature. In the event this court considers any of the errors harmless, this court must be "convinced beyond a reasonable doubt that any reasonable jury would have reached the same

result in absence of the error." Russell, 125 Wn.2d at 94. But even if this court concludes that any of the errors is harmless individually, their combined impact deprived Tarrer of a fair trial. The cumulative effect of this case's manifold errors requires reversal.

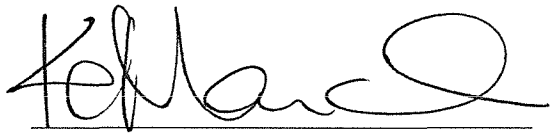
B. CONCLUSION

For the several reasons discussed here and in his opening brief, Tarrer did not receive a fair trial. Tarrer asks this court to reverse his convictions and remand for a new, fair trial before an impartial judge.

DATED this 6th day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 45998-1-II
	)	
LARRY TARRER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF FEBRUARY, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARRY TARER
NO. 37606-086
FCI GREENVILLE
P.O. BOX 5000
GREENVILE, IL 62246

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF FEBRUARY, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 06, 2015 - 2:30 PM

Transmittal Letter

Document Uploaded: 3-459981-Reply Brief.pdf

Case Name: Larry Tarrer
Court of Appeals Case Number: 45998-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us