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AUG 20 2009

King County Prosecutor  
Appellate Unit

NO. 63073-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

LAURA CUTLER,

Appellant.

FILED  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Monica Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied a fair trial due to prosecutorial misconduct.

Issue Pertaining to Assignment of Error

Did the prosecutor commit flagrant and prejudicial misconduct during closing argument when she speculated to the jury that defense counsel was going to “get up and muddy the waters and try to distract you from what the real issue at hand is;” she warned defense counsel was going to “put the victim on trial,” “call him names,” and “make it so that you don’t like him;” and she accused defense counsel of engaging in a game of “smoke and mirrors” to confuse the jury and obtain an unwarranted acquittal?

B. STATEMENT OF THE CASE

In the spring of 2006, Laura Cutler (appellant) met Tom Brummel during group outpatient treatment for substance abuse. 3RP 12.<sup>1</sup> When their treatment together ended in August 2006, Cutler invited Brummel to her house for dinner with friends. 3RP 14-15. Brummel went on a Friday and stayed the weekend. 3RP 16; 4RP 33. They had sex once during that weekend. 3RP 16.

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<sup>1</sup> Transcripts are referred to as follows: 1RP (December 10, 2008); 2RP (December 11, 2008); 3RP (December 15, 2008); 4RP (December 16, 2008); 5RP (December 16, 2008 p.m.); 6RP (December 17, 2008); 7RP (December 23, 2008); 8RP (January 23, 2009).

Afterwards, Brummel hoped for a relationship with Cutler, but Cutler explained she was only interested in being friends. 3RP 17. Despite this, Brummel pursued a relationship over the next few months. 4RP 34. Brummel eventually stopped, however, when he became involved with another woman. 3RP 18, 35.

Nearly a year later, Brummel's relationship ended and he began to pursue Cutler again. 3RP 18-19. Brummel went to the house Cutler had lived in, but she had since moved. 3RP 19. Cutler's former roommate provided Brummel with her new phone number. 3RP 19; 4RP 36. Brummel immediately went to a nearby payphone and called Cutler. 3RP 20. While they were catching up, Brummel told Cutler he was living with his parents. 3RP 20. Cutler told him there was a room for rent in the house where she was living. 3RP 20. Brummel promptly moved in. 4RP 39.

The house was an unofficial clean and sober house located in the White Center neighborhood of Seattle. 3RP 23; 4RP 38. There were four roommates each occupying a room on one of the four floors and sharing the kitchen and living room. 3RP 24-25. Brummel rented the room on the fourth floor, while Cutler rented the room on the first floor. 3RP 15, 24. Tanya Prehoda rented the room in the basement, and Brian Higgs rented the room on the

second floor. 3RP 24.

After moving in, Brummel pursued an intimate relationship with Cutler, constantly alluding to the fact that he wanted to be with her. 6RP 36-37; 4RP 40-41. It was so intense that Prehoda quickly deduced Brummel had moved in solely in an effort to forge a romantic relationship with Cutler. 6RP 37. Cutler consistently declined Brummel's advances. 7RP 37.

On November 5, 2007 (approximately three weeks after Brummel moved in), Prehoda came home from work at 6:15 p.m. to find Cutler in the kitchen crying distraughtly. 6RP 18. Cutler appeared sober but very depressed. 6RP 19-20, 39. Prehoda tried to help but was rebuffed, so she went down to her room. 6RP 19. She left Cutler in the kitchen with Nahaku Kapiolani, a friend of Brian Higgs.<sup>2</sup> 6RP 18. At some point, Kapiolani went to the store and bought liquor. 6RP 21.

Higgs returned to the house sometime between 7:00 and 8:00 p.m. to find Cutler in the kitchen upset and crying. 6RP 64. He went up to his room. 6RP 65. He heard screaming and arguing between Cutler and Kapiolani. 6RP 65. Higgs left the house and went for a drive. 6RP 66-67.

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<sup>2</sup> Kapiolani could not be found and, did not testify at trial. 6RP 8-9.

Meanwhile, Prehoda returned to the kitchen and saw two foot-tall bottles of brandy. 6RP 21. Cutler was drinking, with half the bottle already gone. 6RP 21-23. She was yelling, screaming, and banging things. 6RP 23. After Prehoda returned to her room in the basement, she heard a window break upstairs. 6RP 24.

Higgs returned to the house about 10:00 p.m. 6RP 68. He saw a broken window and chairs thrown about. 6RP 70. Cutler was sitting in the hallway still crying, obviously intoxicated, and half naked. 6RP 72, 74, 77. Eventually, Cutler quieted and the mood in the house calmed down, but the disruption began again after Brummel returned to the house. 6RP 77, 84.

At some point, Kapiolani called the police and reported a noise disturbance. 4RP 18; 6RP 68. When the officer responded, he did not hear any disturbance. 4RP 78. Brummel and Kapiolani met the officer outside the house and said they had taken care of the problem, so the officer never went inside. 4RP 80.

Approximately 45 minutes later, police returned to the residence after Brummel called 911 to report that Cutler had bit off his lower lip. 4RP 18. The officer found Brummel on the front steps frantic and bleeding from the mouth. 4RP 82. Brummel and Higgs directed officers to Cutler's room. The officers found her on

the bed unclothed from the waste down and obviously intoxicated. 4RP 101,107; 5 RP 12-13, 16, 31. She attempted to resist arrest, but was quickly subdued. 4RP 102-03.

The EMT arrived and examined Brummel, determining he was missing a large portion of his lower lip. 5RP 42. An officer and medic returned to Cutler's bedroom, where they located what looked like the missing portion of lip on a blanket on the floor next to the bed. 5RP 35-36, 46.

The King County Prosecutor eventually charged Cutler with first and second degree assault. CP 1-5, 13-14. The case went trial in December 2008. 1RP. Cutler raised two defenses – voluntary intoxication and self defense to a sexual assault. CP 15-27, 76, 78. Brummel's testimony was critical to the State's case since he was the only eyewitness to the incident besides Cutler (who did not testify).<sup>3</sup> 5RP 9.

During trial, Brummel testified he had arrived home that night to find Cutler sitting on the kitchen floor, wearing only a sweatshirt and masturbating. 3RP 26-27. Brummel said Cutler was acting erratic in her emotions, vacillating between neediness and belligerence -- getting mad for half a minute and then calling him

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<sup>3</sup> Cutler had blacked out during the incident and could not remember the events of that evening. CP 20.

back to her.<sup>4</sup> 3RP 34-35; 4RP 61. Brummel thought Cutler appeared “kind of intoxicated, I guess, a little bit” but also thought she might be acting bizarre because she was bi-polar and depressed. 3RP 28; 4RP 47. Brummel said eventually he saw two empty quart bottles of Brandy. 3RP 47. Brummel stayed close to Cutler. 3RP 35-36.

Brummel testified he and Cutler were talking when Cutler told him to take a bath because he stank of cigarettes and directed him to her bathroom where she had drawn a bath. 3RP 28. When Brummel got out of the bath and returned to the kitchen, he said he found Cutler masturbating again and that she told him to stick his penis in her mouth. 3RP 30. Brummel claimed he did not want to take advantage of her and, instead, suggested they go to her bed where he could console her. 4RP 30.

Brummel testified while in Cutler’s bed he kissed, hugged, and rubbed Cutler. 4RP 26-27. Brummel said, despite Cutler’s condition, he believed she was “a willing participant” in what was happening in the bedroom and that all he could think about was “scoring.” 4RP 27, 30. He was interrupted, however, when

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<sup>4</sup> On cross examination, defense counsel established that the first time Brummel mentioned this erratic behavior was on the stand and that he had previously told detectives there had not been a hint of meanness prior to the incident. 4RP 24-25.

Kapiolani came in and said the police had arrived. 3RP 31. Upon hearing this, Brummel went to his bedroom. 3RP 31. On his way up there, Brummel commented to Higgs that he had finally gotten Cutler "in the sack" when he was interrupted by Kapiolani and the police. 3RP 31; 4RP 27-31.

Brummel testified he went back to the kitchen after the police left and found Cutler once again masturbating. 3RP 41-42. Brummel went to watch T.V. in a nearby room, but Cutler called him back to her. 3RP 42. He described Cutler's demeanor as happy. 3RP 43. They eventually went to her bed again where they continued to kiss. 3RP 43, 45. Despite Cutler's condition, Brummel said he was still open to having sex with her. 3RP 46; 4RP 30.

According to Brummel, while they were in bed, Cutler kept saying, "I love you but I hate you." 3RP 47. When Brummel questioned why she hated him, she said, "Because you are a f'ing nerd." 3RP 47. She then said, "Oh my god, I am in love with a nerd" and then mentioned if they got together he would have to take care of her daughters.<sup>5</sup> 3RP 50. Brummel then testified Cutler

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<sup>5</sup> During cross examination, the defense established this was the first time Brummel had mentioned Cutler's statement. 4RP 25-26.

got on her knees, leaned into him, grabbed his stomach, bit off his lower lip, and then spit it up in the air and over to the floor. 3RP 51-53.

During a vigorous cross examination, Brummel admitted he was “having severe memory lapses” while testifying because he was “having trouble with the exact sequence of events.” 4RP 25-58, 61.

In closing, after describing the State’s case based on the evidence, the prosecutor addressed what she assumed would be the defense’s strategy, warning:

Furthermore, what the defense gets up here and says is not evidence. The defense is going to get up and muddy the waters and try to distract you from what the real issue at hand is. They’re going to put Mr. Brummel on trial. Mr. Brummel is the victim here, and that is not what you’ve been summoned here to do. The defendant is the person who is on trial in this case. The defense is going to attack Mr. Brummel’s character, is going to call him names, to make it so that you don’t like him or won’t want to like him. And even in their attack of Mr. Brummel, the best that they can do is paint him to be some monster because he actually was interested in the defendant, because he tried to do nice things for her, tried to take her out to eat once in a while, he told her she was pretty, and he was trying to be a nice guy toward the defendant.

I challenge the defense to actually argue the evidence in this case without putting Mr. Brummel on trial, because that is not what you were summoned here to do.

7RP 52.

The prosecutor picked up this line of argument again during rebuttal, stating:

And any argument that I say, any argument that the defendant makes that is not supported by the evidence you must disregard. That's what I meant by the smoke and mirrors, because they're trying to throw everything at you, muddy the waters, cloud everything up, so that you'll just throw your hands up and say there's no way we can make a decision on this, we have to find her not guilty.

But [give] yourselves more credit than that. [Give] yourselves more credit that you can see past smoke and mirrors, that you can view all of the defendant's actions, all of the things that she did that point to her guilt in this case, to return with the proper verdict, guilty of assault in the first degree and guilty of assault in the second degree.

7RP 73.

The jury acquitted Cutler of first degree assault, but found her guilty of second degree assault. CP 91-92. With no criminal history, Cutler was sentenced to 98 days time-served. CP 93-99. She was also given strict conditions of community custody requiring her to follow the recommendations of her mental health providers and her substance abuse advisors, with the court calling her in for follow-up every 45 days. CP 93-99. She timely appealed her conviction. CP 100-108.

C. ARGUMENT

THE PROSECUTOR'S DISPARAGEMENT OF DEFENSE COUNSEL AND ACCUSATION THAT THE DEFENSE WAS PUTTING THE VICTIM ON TRIAL CONSTITUED FLAGRANT MISCONDUCT THAT VIOLATED CUTLER'S RIGHT TO PRESENT A VIGOROUS DEFENSE AND RECEIVE A FAIR TRIAL.

During closing arguments, the prosecutor maligned defense counsel by accusing her of trickery and dirty tactics. Additionally, the prosecutor made comments designed to inflame the passions of the jury favorably toward Brummel. This constituted misconduct. The improper comments inhibited the jury's ability to fairly decide the critical issue in this case – Brummel's credibility. As such, the misconduct prejudiced Cutler's right to have an unbiased jury fairly determine the merits of her self-defense theory.

Prosecutorial misconduct is grounds for reversal when the conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Prejudice is established if there is a substantial likelihood the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). When the misconduct was not objected to at trial, reviewing courts must determine whether the comment is so flagrant and ill intentioned as to

cause an enduring and resulting prejudice that could not have been remedied by a curative instruction. State v. Smith, 144 Wn.2d 665, 679, 30 P.3d (2001).

“An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.” State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). A prosecutor has a duty to ensure fairness to the accused and to ensure a verdict based on reason, not passion or prejudice. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

Appeals to the passion, prejudice, or sympathy of jurors are improper. Viereck v. United States, 318 U.S. 236, 247, 63 S.Ct. 561, 87 L.Ed. 734 (1943). Comments that inflame jurors to sympathize with the victim and otherwise distract jurors from the real issue of whether the State has proven each element of the crime are improper. People v. Littlejohn, 494 N.E.2d 677, 687 (Ill. App. 1986); People v. Emerson, 455 N.E.2d 41, 45 (Ill. 1983) (improper to accuse defense counsel of trying "dirty up the victim"); State v. Mills, 748 A.2d 318, 323-24 (Conn. App. 2000) (improper for prosecutor to tell jury not to victimize the victim again).

Here, the prosecutor's speculation that the defense was going to put Brummel on trial, call him names, and make it so the jury did not like him were no different than had the prosecutor accused the defense of trying to "dirty up the victim." See, Emerson, 455 N.E.2d at 45. These comments were not in response to the defense's argument (which had not yet been made). Indeed, no such comments were ever made by defense counsel, who argued fair inferences based on the evidence deduced at trial. The prosecutor's comments not only suggested dirty tactics by the defense, they also suggested that if the jury were to acquit based on self defense, it would be tantamount to trying and convicting Brummel for a sex offense. This was improper because it was the prosecutor's duty to make sure the jury was free to determine Brummel's credibility and the question of self defense without the fear of supposedly re-victimizing Brummel. The prosecutor's baseless accusations served no purpose except to inflame the jurors to sympathize with Brummel and constituted misconduct.

Likewise, the prosecutor's remarks disparaging defense counsel also constituted misconduct. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983); Walker v. State, 790 A.2d 1214, 1220 (Del. 2002).

[A]bsent specific evidence in the record, no particular defense counsel can be maligned. Even though such prosecutorial expressions of belief are only intended ultimately to impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury.

Bruno, 721 F.2d at 1195; see also, State v. Warren, 165 Wn.2d 17, 195 P.3d 940, 944 (2008); State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002); State v. Reed, 102 Wn.2d 140, 145-48, 684 P.2d 699 (1984) (improper for prosecutor to urge jury not to be swayed by defendant's "city lawyers"); State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988) (recognizing that attacks on defense counsel's integrity may be reversible misconduct); State v. Negete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (improper for prosecutor to argue that defense counsel is being paid to twist the words of a witness); United States v. Friedman, 909 F.2d 705, 709 (2d Cir. 1990) (holding it was "grossly improper" for the prosecutor to accuse defense counsel of being willing to "make any argument he can to get that guy off").

Here, the prosecutor made a direct, unprovoked and false allegation of duplicity on the part of defense counsel. Phrases like "muddy the waters" and "smoke and mirrors" are accusations of trickery or dirty tactics. Yet, the record reveals nothing to suggest

that Cutler's counsel engaged in anything other than the presentation of a vigorous defense. There were no smoke and mirrors – the defense offered a legitimate defense based on the evidence. When arguing self-defense, defense counsel emphasized the numerous inconsistencies in Brummel's statements, argued Brummel's lack of credibility, and raised acceptable inferences about his motives and actions that night based on the evidence before the jury. 7RP 54-60. This was not trickery or deceit – it was a vigorous, but fair, defense.

The State's answer to Cutler's self defense theory was not to ask the jury to weigh the evidence; instead, it was to impugn both defense counsel's integrity and the very legitimacy of challenging the State's evidence with a contrary theory. To attack that role is to attack the integrity of the adversary system. Echevarria, 71 Wn. App. at 598 (quoting State v. Huson, 73 Wn. 2d 660, 663, 440 P.2d 192 (1968)). The prosecutor, in accusing the defense of muddying the waters and doing anything to distract and confuse the jury, failed to live up to her duty to protect that system and seek a verdict free of prejudice and based on reason.

The misconduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. See, State v. Brown,

132 Wn.2d 529, 561, 940 P.2d 546 (1997). Certainly, the prosecutor could argue the evidence did not support the defense's theory or could remind the jury it had a duty to disregard argument not based on the evidence. However, the prosecutor went far beyond that and engaged in a damning attack on the defense — an argument that served no proper purpose.

The improper comments were more than an inadvertent or passing reference. The trickery theme was developed in the prosecutor's initial argument and emphasized in rebuttal as the prosecutor's final statements before deliberation. The comments were designed to persuade the jury to take a dim view of defense counsel and her tactics in establishing a self-defense theory. In warning the jurors against these alleged tricks and distractions, the prosecutor accused the defense of trying to dirty up Brummel by placing him on trial and suggested that an acquittal based on self defense would result in the supposed re-victimization of Brummel. Given this, the effect of these comments was plainly prejudicial.

The improper comments went to the heart of this case. The State's case negating self defense was not overwhelming. The State's evidence was limited solely to Brummel's testimony. Thus, his credibility was central to any verdict. Yet, the prosecutor's

comments about Brummel being unfairly put on trial tainted the jury's ability to fairly assess this. Moreover, the prosecutor's continuous accusations of wrong doing by defense counsel in arguing the self defense theory impeded the jury's ability to fairly determine which theory of the case was credible. Given this, the misconduct prejudiced Cutler beyond the curative reach of any instruction.

In conclusion, the prosecutor's accusations of deception and dirty tactics constituted misconduct that could not be easily disregarded even if the trial court gave a limiting instruction. Consequently, reversal is required.

D. CONCLUSION

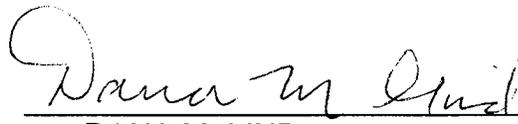
For the foregoing reasons, appellant asks this court to reverse the conviction.

DATED this 19<sup>th</sup> day of August, 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON, )

Respondent, )

v. )

LAURA CUTLER, )

Appellant. )

COA NO. 63073-3-1

*Filed  
8/20/09  
TB*

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**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 21<sup>ST</sup> DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LAURA CUTLER  
743 N. 4<sup>TH</sup> AVENUE  
KENT, WA 98032

**SIGNED** IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF AUGUST, 2009.

x *Patrick Mayovsky*