

NO. 65494-2-I

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

REC'D  
JUL 08 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JASON KNUTH,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass J. North, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. DENYING FURTHER INTERVIEWS WHEN KEY WITNESSES MAY HAVE CHANGED THEIR STORIES VIOLATES THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Because there was a factual basis to believe L.S. would no longer testify in favor of the defense, the defense was entitled to interview her again to determine whether and to what extent her story had changed. See State v. Burri, 87 Wn.2d 175, 179, 550 P.2d 507 (1976). The witnesses in Burri were defense alibi witnesses, four of whom had already given statements to defense counsel. Id. at 176. After the prosecutor held a special inquiry hearing and instructed the witnesses not to speak to the defense, Burri argued he was unable to prepare for trial because the witnesses were unavailable for “further questioning and investigation.” Id. The court held Burri had the right to re-interview the witnesses to determine whether their testimony had changed. Id. at 179. His inability to do so deprived him of a fair trial. Id. at 180.

The State argues the prosecutor in this case did not engage in unauthorized and illegal interference with defense access to witnesses. Brief of Respondent at 32. But the ill intent or misconduct of the prosecutor in Burri was not essential to the court’s holding. The court’s reasoning focuses on defense counsel’s inability to conduct further witness interviews. Burri,

87 Wn.2d at 180-82. The court reasoned this violated Burri's right to a fair trial and was "nonetheless prejudicial even if the prosecutor believed his conduct lawful." Id. at 181.

This constitutional right can be violated by the court, as occurred in this case, as well as by the prosecutor, as occurred in Burri. Id. The result is the same: violation of a constitutional right that is presumed prejudicial unless the State can demonstrate it is harmless beyond a reasonable doubt. Id. at 181-82. Knuth's right to a fair trial was violated because his attorney was unable to prepare for trial by re-interviewing the State's principal witness about the substance of her allegations after she changed retracted her story as told in the previous defense interview and trial.

a. Knuth Properly Established the Need to Re-Interview the Complaining Witness to Determine Her Latest Account of What Happened.

First, the State claims the law requires affidavits to support a request for a new witness interview. Brief of Respondent at 26 (citing State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993)). But Blackwell does not support the State's assertion. 120 Wn.2d at 828-29. Blackwell and his companion were charged with assaulting two police officers. Id. at 824. The morning of trial, defense counsel moved to continue and asked for discovery of both officers' personnel files and service records. Id. Her only basis for

the request was her own personal opinion that one of the officers, not the other, was racist. Id. at 825.

The court did not hold the defense must file affidavits to show materiality. Id. at 828-29. The court reversed because “Neither defense counsel established any factual predicate” to show the records contained any material information. Id. at 829. The court held, “At a minimum, defense counsel should have provided an affidavit or representation to the court asserting the factual basis for believing the arrest of their clients was racially motivated.” Id. (emphasis added); see also State v. Etheridge, 74 Wn.2d 102, 111-12, 443 P.2d 536 (1968) (defendant failed to establish witnesses were material based only on the belief their testimony would be material).

In contrast to the attorney in Blackwell, defense counsel here did not rest on his own personal opinion. He supported his motion with a sworn declaration from David Windhausen, a factual basis for believing that L.S. had additional material information warranting a second interview. CP 136-138. Even if affidavits were required, this requirement was met. RCW 9A.72.085.<sup>1</sup> Windhausen’s declaration makes it reasonably likely L.S. had

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<sup>1</sup> RCW 9A.72.085 provides:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person’s sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or

new, previously unheard information material to the charges against Knuth. Blackwell, 120 Wn.2d at 828.

The anticipated testimony of the State's main witness is the very definition of material. See State v. Gosby, 11 Wn. App. 844, 845, 526 P.2d 70 (1974) (testimony of victim who was only eyewitness to crime was "clearly competent, relevant, and material"). Without it, the defense cannot prepare for trial. Yet the State argues L.S.'s account of what happened, the account it relied on at trial to prove the elements of the crime, is not material. This argument should be rejected because the cases cited by the state do not address the circumstances presented here.

Blackwell involved arresting officers' personnel files, not the complaining witness' version of what happened. 120 Wn.2d at 828-30. State v. Bebb, 108 Wn.2d 515, 523, 740 P.2d 829 (1987) (state not required to turn over police reports containing investigations with respect to other suspects) and State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), are

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proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state of Washington.

equally unpersuasive. In Gregory, the trial court abused its discretion in denying access to dependency files that might have supported the defense case. 158 Wn.2d at 791-92, 795. The files were material because they could have led to witnesses who could have refuted the victim's claims that she was not engaging in prostitution at the time, essentially an impeachment issue. Id. Blackwell, Bebb, and Gregory fail to show L.S.' testimony about her allegations was anything other than material.

b. It Was Unreasonable to Deny Counsel the Ability to Personally Confer with the Witness.

The State suggests counsel should have been satisfied with interviewing the Court Appointed Special Advocate (CASA) who told him L.S. had yet again changed her story. Brief of Respondent at 26, 28. But the Burri court noted the importance of interviewing the witness personally. See 87 Wn.2d at 178. In Burri, the State argued counsel should have been able to prepare from a copy of the transcript of the witnesses' testimony. Id. The court rejected this argument, stating, "It is no answer to say that making a copy of the illegally obtained testimony available to defendant obviated the prejudicial effect of interfering with the right of the defendant and his counsel to personally confer with and interview the alibi witnesses." Id. at 179 (emphasis added).

The Burri Court further held, “The attorney for the defendant not only had the right, but it was his plain duty towards his client, to fully investigate the case and to interview as many as possible of the eye-witnesses.” Burri, 87 Wn.2d at 181 (emphasis added) (quoting State v. Papa, 32 R.I. 453, 459, 80 A. 12, 15 (1911)). The State’s interference with Burri’s attorney’s ability to personally interview the witnesses, particularly eyewitnesses who were actually present at the time, violated Burri’s right to effective representation and compulsory process. Burri, 87 Wn.2d at 180.

Knuth’s attorney similarly had a duty investigate to determine the substance of L.S.’s account, now that that account had changed yet again. There is no substitute for personally interviewing an eyewitness. See id. at 179, 181. In the first defense interview, L.S. denied anything happened. 18RP<sup>2</sup> 27-29. In the first trial, she denied anything happened. 18RP 194. Now that she was recanting this prior testimony, counsel needed to interview her personally, not just rely on transcripts and recordings of interviews by others. See Burri, 87 Wn.2d at 179, 181.

The State argues counsel should have been satisfied with the prior interview and the testimony from the first trial at which L.S. recanted. Brief of Respondent at 26-27. The State maintains that it “would be presenting the same evidence in a second trial regardless of whether L.S. recanted yet again

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<sup>2</sup> The verbatim report of proceedings is referenced as noted in the opening brief of appellant.

or whether she retracted her recantation.” Brief of Respondent at 27. But a complaining witness who says no crime occurred and a complaining witness who claims to have been molested are not “the same evidence.” Having learned that L.S. had, yet again, changed her version of what occurred, trial counsel could not be prepared to meet her testimony without finding out before trial what exactly she would be claiming occurred.

c. The Court Abused Its Discretion in Failing to Carefully Consider Knuth’s Constitutional Right to Prepared Counsel.

A trial court’s discretion regarding discovery remains subject to the constitutional right to a fair trial and to prepared counsel. Burri, 87 Wn.2d at 180. The State cites State v. Kilgore, 107 Wn. App. 160, 176, 26 P.3d 308 (2001) and argues the scope of discovery, including the determination whether to allow a second interview of a witness, is within the discretion of the trial court. Brief of Respondent at 18. But Kilgore does not dictate the outcome of this case.

Kilgore asked for a new witness interview after the child had already testified in the trial and new information came to light indicating she may have recanted previously to her grandmother. Kilgore, 107 Wn. App. at 168. However, the grandmother had already testified under oath that the child had not recanted or admitted lying, and the court found that testimony credible. Id. at 168, 177. Essentially, the factual basis for the re-interview was

completely refuted. Under these circumstances, the court held, the trial court did not abuse its discretion in denying the defense request for a second witness interview. Id. at 176-77.

Kilgore does not support the State's assertion that the court did not abuse its discretion in this case. This was not a case where the defense requested a new interview after the witness had already testified. Nor did the court's ruling rest on a credibility assessment that rejected the factual basis for the new interview. On the contrary, at trial L.S. did retract her previous recantation, so the factual basis asserted for the re-interview turned out to be entirely accurate.

d. The State Cannot Rebut the Presumption of Prejudice.

The fact that L.S.'s trial testimony turned out to be largely consistent with her pre-trial interview with Carolyn Webster does not rebut the presumption of prejudice. See In re Welfare of J.M., 130 Wn. App. 912, 925, 125 P.3d 245 (2005) ("We can only speculate as to what weakness in the state's case or strengths in R.C.'s case might have been revealed by competent counsel."). As in J.M., we can only speculate what inconsistent or impeaching information could have been brought out had counsel been able to interview L.S.

Nor does the additional transcript provided by the State impact the analysis in this case. The court did not carefully consider the right to prepare for trial. It simply assumed that defense counsel should be satisfied with the previous interview and testimony. 11/30/09RP 3-5. But Burri demonstrates this was not good enough. 87 Wn.2d at 179, 181.

The State also argues the right to a fair trial co-exists with the witness' right to refuse an interview. Brief of Respondent at 32. But there is no indication in the record L.S. was refusing to be interviewed. The only evidence is the CASA's opinion she was too fragile. CP 118. This violation of Knuth's right to a fair trial is presumed prejudicial and the State cannot meet its burden to show otherwise.

2. KNUTH'S TRIAL WAS TAINTED BY UNFAIR ARGUMENT, AND COUNSEL WAS INEFFECTIVE IN FAILING TO PRESERVE THE ERRORS.

a. The State's Closing Argument Undermined the Burden of Proof by Implying the Jury Must Choose Between Two Versions of Events Rather than Acquitting Whenever There Is a Reasonable Doubt as to the State's Version.

The problem with the argument that the jury must "decide what happened" is that it implies the jury must choose between the two versions of events provided by the State and the defense. This either/or scenario indicates that, if the jury does not believe the defense account of events, it must necessarily choose the only other option. But the jury may find a

defendant not credible and still have a duty to acquit when it finds a reasonable doubt about any element of the crime. See, e.g., State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (defendant has no duty to present evidence and State bears entire burden of proving each element of the crime beyond a reasonable doubt) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). By presenting the jury's duty as deciding what happened or solving the crime, the prosecutor undermined the burden of proof beyond a reasonable doubt.

When a prosecutor continues to make an argument that courts have already declared improper, the misconduct is flagrant and ill-intentioned. See Fleming, 83 Wn. App. at 214 (noting improper argument made over two years after it was declared improper in prior case). The court in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), declared, "The prosecutor's repeated requests that the jury "declare the truth," however, were improper. A jury's job is not to 'solve' a case. It is not, as the State claims, to 'declare what happened on the day in question.'" Id. at 429. Anderson was decided in December 2009, more than five months before the prosecutor made his closing argument in this case. Thus, this argument was flagrant misconduct.

Although the Anderson court declined to reverse the conviction based on this error, the concurrence noted how "disheartening" it is that

improper arguments that shift the burden of proof keep cropping back up. 153 Wn. App. at 434 (Quinn-Brintnall, J., concurring in result). Judge Quinn-Brintnall concurred with the result only because the evidence was so overwhelming: surveillance video presented at trial clearly showed the defendant committing the robbery. Id. By contrast, the evidence in this case was far from overwhelming. The State's case rested on the statements of one witness who claimed to be telling the truth even though she admitted lying under oath at Knuth's first trial. 18RP 194. This Court should reverse based on the prosecutor's misconduct.

b. The Prosecutor Committed Misconduct in Encouraging Guilt by Association with Windhausen's Bad Parenting.

The jury was charged with a solemn duty to decide whether the State had proved its case against Knuth, not whether Windhausen was a bad father who told his daughter he considered putting her up for adoption and had her shower in the public restroom of a junkyard/marina. Yet the State concedes, "This case was about Windhausen." Brief of Respondent at 40. While evidence of pressure on L.S. regarding her testimony was relevant, testimony reflecting poorly on Windhausen as a parent in other ways was not. The focus on Windhausen and the environment in which he chose to raise his children made it likely the jury would convict Knuth out of distaste for Windhausen because they were inextricably connected. Essentially, the

State encouraged the jury to punish Knuth, via guilt by association, for his friend Windhausen's inept attempts to protect and defend him. In this credibility contest, the prosecutor committed misconduct in inflaming the jury's passion and prejudice against Knuth by focusing on Windhausen's bad parenting.

One Washington commentator described the problem of unfair prejudice as "erroneous inferences that undermine the goal of the rules to promote accurate fact finding and fairness." City of Auburn v. Hedlund, 165 Wn.2d 645, 655, 201 P.3d 315 (2009) (citing Victor J. Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 Wash. L.Rev. 497 (1983)). The prosecutor's focus on irrelevant and inflammatory evidence in this case undermined these goals. Knuth's conviction should be reversed for prosecutorial misconduct.

c. Counsel Was Ineffective in Failing to Object.

Finally, if this Court finds these errors not preserved, it should nonetheless review them as ineffective assistance of counsel. The failure to preserve error can constitute ineffective assistance and justifies examination of the error on appeal to determine ineffectiveness. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). Courts have not found constitutional error when the complained of actions were either theory of the case or trial tactics. Id. at 849. But here, counsel failed to object to arguments that

amounted to guilt by association and undermined the burden of proof beyond a reasonable doubt. This was not justified by any conceivable theory of the case or tactic. Even if these errors were not preserved, this Court should address them as ineffective assistance of counsel.

C. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Knuth requests this Court reverse his conviction.

DATED this 8<sup>th</sup> day of July, 2011.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65494-2-1
	)	
JASON KNUTH,	)	
	)	
Appellant.	)	

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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 8<sup>TH</sup> DAY OF JULY 2011, 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] JASON KNUTH  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF JULY 2011.

x *Patrick Mayovsky*

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