

67149-9

67149-9

Court Of Appeals

Court of appeals STATE OF WASHINGTON
Division ONE

State Of WASHINGTON

RESPONDENT

V

REAVY D. WASHINGTON
Apellant

Statement of Additional Grounds

On appeal from the Superior Court of King County

Cause No.. 67149-9-1

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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Reavy Washington
DOC # 737297
WASHINGTON STATE PENITENTARY
1313 N.13th AVE
Walla Walla, WA 99362

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I. Assignments of error

1. Reavy Washington the defendant was denied my right to recieve a fair trial.
2. Reavy Washington recieved ineffective assistance of counsel.
3. The Prosecutor committed Misconduct during trial.
4. There was insuffecient evidence to convict the defendant of the crime of ATTEMPTED FIRST DEGREE ROBBERY.
5. The trial court abused it's discretion in denying Mr. Washington and his counsel their motions to dismiss this case.

II. Issues Presented

1. Did ineffective assistance of counsel, Prosecutorial misconduct, trial irregularities, and admission of in admissable evidence deprive Mr. Washington of a fair trial?(Error # 1,2,3,4and 5)
2. Was it ineffective assistance of counsel for my attorney to fail to call her investigator , whose testimony about earlier questioning would have created doubt about ms. Narin's testimony where the dispostive issue at trial was the credibility of the witnesses?
(Error #1 and 2)
3. Was it ineffective assistance of counsel for my attorney to elicit highly prejudicial testimony in the form of improper opinion snd fail to ask the court to strike that testimony and admonish the jury to disregard those statements? (Error # 1 and 2)
4. Was it ineffective assistance of counsel for my attorney to fail to object when the prosecutor repeatedly MADE STATEMENTS VOUCHING for ms. Narins credibility during closing arguments, which were not based on any inference from the evidence?
(eError # 1 and 2)
5. Ther was Prosecutorial misconduct when Ms. Montgomery repeatedly vouched for the or spoke about the credibility of any witness.
(Error # 1 and 2)
6. It was prosecutorial misconduct to encourage the jury to convict on the basis of facts not in evidence in this case.
(Error # 1 and 3)

7. Was it prosecutorial misconduct to misstate or mislead the jury in regard to the law about the elements of intent?
(Error #1 and 3)
8. There was insufficient evidence to convict me of ATTEMPTED FIRST DEGREE ROBBERY, where the only evidence and testimony showed that there was an assault committed at the scene.
(Error # 4)
9. Did cumulative error deny me a fair trial because the jury was exposed to inadmissible testimony which bolstered the credibility of the state's witness, Mr. Washington's trial attorney failed to object to this improper testimony and the improper closing statements made by the prosecuting Attorney.
(Error # 1,2,3 and 4)
10. Did the trial court abuse its discretionary power in denying that this case be dismissed on the motions made by him and his counsel?
(Error # 5)

III. Statement of the case

Factual Background

On May 25th, 2010 I reavy Washington the defendant was trying to get back home to my residence in Edmonds. I had been in Seattle doing some chores, checking on jobs and my mail and e-mails and job postings at worksorce. After doing these things I boarded a bus to the freemont area to visit a friend. Upon getting there I found out that he was not there. I decided to wait around a bit to see if he would return soon. while waiting I got a call from my girlfriend telling me I needed to get home because she wanted to leave. The transfer I had had expired and the bus driver would not allow me to board the bus with my bike without paying the fare. I tried several different people and places to see if I could get the bus fare. After being denied a few times I entered Seasons Nursery. Upon entering the establishment I stopped at the counter and placed my hands on the counter and politely said to Ms. Narin, "excuse me but I am a little bit embarrassed to have to ask you this, but would you happen to have some spare change so I can catch the bus to get home"

Ms. Narin testified that at that point she took an aggressive posture and gave me a look of indifference and said to me "no". Actually what she said was, "no, I don't give money to bums"

It was at this point that things changed. We both testified that I was at that point standing on one side of the counter with my hands on the counter in plain sight. I then said "well what if I do this" and I then proceeded to come around the counter where I then assaulted ms. Narin. This assault caused ms. Narin to fall backwards and to the ground where I assaulted her a bit more. This lasted about two minutes before I realized what I was doing. I stopped and turned around and left the establishment. Never once did I make any attempt to take anything from ms. narin's person, nor did I make any attempt to gain access to the cash register or attempt to take anything from the store.

Ms Narin testified that at no time did I ever make any attempt to go towards the cash register. She also testified that at no time did I make any demand for money. Ms narin also testified that at the time of this assault that her one fear and thought was that I would harm her and do something to her if she was to go unconscious.

I testified that at trial that hearing ms Narin say "no" that I Snapped and then came around the counter and assaulted her. I testified that I was angry at her perception of calling me a bum and her looking at me as though I was less than. I also stated that I never intended to nor was it ever my intention to commit any kind of robbery.

Ms. Narin testified that while she was on the ground I had opportunity and that in that close proximity I could have reached up and tried to get to the cash register, but I never did. She testified that I stopped assaulting her and turned around and let.

These are some of the facts testified to by both parties during my trial. Never once did the State prove that I made any attempt to Commit Robbery in any shape, form or fashion.

B) PROCEDURAL BACKGROUND

On may 25th, 2010 I was arrested and charged with First Degree Attempted Robbery. They used the bodily harm clause to bring charges, because they go along with the serious level of robbery.

During my time in jail I originally was assigned an attorney named Seth Conant. He worked out of the same office (SCRAP), that my trial counsel works out of. Mr Conant made several attempts to have a deal worked out that I could plead to 3rd degree assault, but the prosecuting attorney said no and offered only plead guilty and get 53 months at the low end of the scale for robbery. At that offer I was advised by Mr. Conant that he would not advise that I accept it and that he could show that there was "no intent" to commit robbery. We set it for trial. There were numerous continuances which I did not agree to nor did I sign, nor was I notified about. My original speedy trial date was september and then it just kept bouncing around later and later because one reason or another. I then drafted and sent in a motion to have my case dismissed with prejudice based on CrR 3.3 and sent it to the court and the prosecuting attorney office. At my omnibus hearing my motion was brought up to the judges attention by the prosecuting attorney, but the judge denied my motion and granted my attorney another continuance, because all the delays had run its course and my the attorney Mr. conant was leaving the felony division and going to the misdemeanor division and therefore assigning me a new attorney. which I prosted to in open court.

Me and my new attorney met, talked and disscussed stratergy for trial. I asked her to her to make the motion again about my speedy trial rights being violated, (which I have included a copy of). But she didn't make that motion until trial and then it was denied again.

Trial started Dec.1,2010. At the half time mark my counsel made a motion to dismiss for lack of evidence to prove intent but the judge denied the motion and said,"I am required to treat everything that ms. Narin said as accurate and draw all inferences from that in favor of the State".

The trial continued and at the end of testimony the jury was given the instruction that they could convict me of either ATTEMPTED FIRST DEGREE ROBBERY or a lessor charge of FOURTH DEGREE ASSUALT.

I was found guilty of the greater charge attempted first degree robbery and sentencing was set for Dec. 19, 2010. My attorney made a motion to continue the sentencing so she could have a mental evaluation to establish diminished capacity (after the fact I was found guilty to establish a reason), hoping that this would give the grounds for an exceptional sentence downward. This evaluation took three months to be done and have the notes transcribed and handed to my attorney and the court. At my sentencing a motion was made to request a downward departure, but the judge denied this request and sentenced me to 87 months incarceration and 18 months probation.

At that time defense requested an appeal notice and the court did grant this motion.

IV. ARGUMENTS

A) Mr. Washington received ineffective assistance from counsel.

To prove ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient, and that this deficient performance prejudiced him. *State v. Henderson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stevenson* 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed, *State v. Powell*, 150 Wn.App 139, 153, 206 P.3d 703 (2009)

Courts presume that counsel was ineffective, *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of the reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. (once again refer to the *Strickland* case noted above).

1- Mr. Washington's trial attorney's failure to call her investigator into testify, or enter into evidence the sworn statement by ms. Narin at an earlier sworn questioning in which the prosecuting attorney was present fell below an objective standard of reasonableness.

Before trial began defense counsel requested a continuance to have her investigator interview the witnesses. during her questioning of ms. Narin, at no time did ms Narin say that it was an attempted robbery. She described it as an assault at the interview and in the presence of the investigator. In the interview the investigator asks ms. Narin if there is anything inaccurate about her statement that she gave to the police and it is at this time that the prosecuting attorney interrupts and coaches the witness about her statement and states "there is one little fix/change. It had to do with what the person said upon coming in". In the presence of the investigator she led ms. Narin to say "that the defendant didn't ask for change for the bus" that it was the officers statement and not her's.

Ordinarily, the decision to call a witness is a matter of trial tactics and will not support a claim of ineffective assistance. However if this failure to call the investigator was unreasonable and resulted in prejudice, or could have caused doubt in the jury's mind as to the credibility of ms. Narin's testimony as to the events that day, or if there was reasonable probability that had the attorney presented the witness the outcome or the trial would have been different, a failure to call the witness will support a claim of INEFFECTIVE ASSISTANCE of counsel (State v Sherwood 71 Wn.App. 481,484,860 P.2d 407 (1993)).

In this case trial counsel had the interview notes and during trial she never called the investigator, who was on the witness list, to testify, nor did she ever enter into evidence the interview notes or questioned ms. Narin about the change, or asked if she was being led by the prosecuting attorney to change her statement, which I asked my counsel to do but she refused. I asked her to do this to show that it would show that ms. Narin was lying about little things and that could cast doubt on her credibility. My counselor responded to me "that we don't want to make ms. Narin to look like a liar because the jury will not look favorably on me by attacking her on the witness stand". If the investigator was called to testify she could also have testified that ms. Narin was being led to say that I was looking at the cash register and not out the window like I testified to.

Therefore defense counsel had the ability to bring forth a witness whose testimony could have caused doubt about ms. Narins credibility about what was actually said and what thoughts she may have had, where the main issue was the credibility of the witnesses and to whether or not I made any attempt. It was unreasonable for counsel to not call her investigator to testify when she had her listed as a witness.

(Thus the first prong of showing ineffective assistance of counsel is proved here and is satisfied.)

The second prong of showing that ineffective assistance of counsel requires a showing of prejudice or a showing that there was a reasonable probability the outcome would have been different had the investigator testified. In this case where the jury's determination of my testimony over ms. Narins was the dispositive issue, the defendant's testimony was not corroborated because the defense counsel did not call her other witness or enter into evidence the interview. The state presented the investigating officer who questioned ms. Narin and took her statement about the defendant asking for "change for the bus", and also testified that she never mentioned that it was any type of robbery, but described it as an assault.

This officer went over his report with her and had he read it before signing it. Never during that interview did she say that the cash register come into play. Never once did she make this change until the prosecuting led her to change her statement to make it sound like it was a demand for money and therefore because no "money" was given, the defendant attempted to commit robbery.

Once again there is a reasonable probability that had the jury heard this testimony and been aware of the contradiction of ms. Narin, or or the leading of this witness by the Prosecuting attorney's question the jury might have decided that she was not truthful about all the events that happened and her credibility been in question and not been weighed more favorable than the defendant's. Because the jury did not hear that testimony, it is not fair to say that the defendant's trial was fair, especially considering the improper closing statements made by the state during closing arguments. I believe had the jury heard that information, they might have come back with a different verdict of guilty of the lesser charge of assault.

2- Defense counsel allowed and elicited improper opinion ~~xxx~~ testimony from the investigating officer that included a clear inference that the defendant did intend to access the cash register, and that showed intent when there was none, and counsel never objected or asked the ~~x~~ court to strike that testimony.

Officer Kolding^{on} redirect examination testified under the prosecuting attorney leading the following:

Q. Well when you say that the cash register never came into play what do you mean by that?

A. WE WERE NOT LED TO BELIEVE THAT anything was taken from the cash register, nor that the cash register was used as a weapon.

Q. Did ms. Narin talk to you about the cash register had been at least involved in the crime?

A. Yes she did. She was~~XX~~ working behind the cash register at the time of the event, and she stated that the suspect had requested money and when denied he came back around the counter, if you will, "to ostensibly attempt to access the cash register"

Then under re-cros examination:

Q. Now officer kolding I heard you testify that ther was sort of an ostensible intent to access the cash register. I just want to clarify that that that wasn't an intent that was verified, that it's just an assumption?

A. We did not do any work towards verifying that. That would be what was implied.

Because officer Kolding had no first hand knowledge of the events that actually took place, he was not qualified to testify as to whether or not the defendant mad an attempt to gain access to the cash register. His notes were what he was to refer to and not his thoughts or implied thoughts. Therefore officers Kolding "speculative OPINION" as to whether or not I formed the intent to access the cash register was improper ~~x~~ opiniobn testimony to the defendants guilt or intent, and invaded the province of the jury to determine the facts of the case.

Therefore the testimony of officer, as to ~~h~~ the intent was just speculation on his part. Despite this, counsel never objected to this testimony, nor asked the court to strike that part of his testimony, which was improper opinion testimony on his part. Also there was a hint of speculation and conjecture. And it also was an invasion of the fact finding part/function of the jury. This testimony was highly prejudicial and the Washington courts have acknowledged that opinion ~~kw~~ testimony from a law enforcement officer is especially likely to influence the jury (State ~~v~~ Carlin, 40 wn. App 698,703,700 P.2d 323 (1985)). Ruled opinion of a police officer "may influence the fact finding and thereby deny defendant a fair trial"

"No witness, lay or expert may testify to his opinion as to the guilt or intent of a defendant whether by direct statement or inference". (State V Black, 109 wn.2d 336, 348, 745 P.2d 12 (1987) emphasis added (citing State V Garrison, 71 wn.2d 312,315,427 P.2d 1012 (1967): State v Haga, 8 wn.App 481, 507 P.2d 159 review denied, 82 wn.2d 1006(1973).

Hence the testimony of Officer Kolding clearly conveyed to the jury the impression that Officer Kolding "thought" the defendant did have the intent formed in his mind to commit robbery and was guilty. And this was calculated to, and undoubtedly did convince/influence the jury in reaching its verdict.

Impermissible opinion testimony regarding the defendants guilt does violate the defendants constitutional right to fair jury trial, which includes the independent determination of the facts by the jury. State v Kirkman, 159 wn 2d.918,927,155 P.3d 125 (2007) citing State v Demery 144 wn.2d 753,759,30 P.3d 1278 (2001).

Particularly in this case, where the credibility of ms. Narin and the defendant was the dispositive issue, eliciting testimony from a law enforcement officer, that clearly signaled to ~~the~~ the jury that the officer believed the defendant was guilty, was his thought, and defense counsel did not ask the court to strike and admonish the jury to disregard it, constituted ineffective assistance of counsel. Thus this shows another part of ineffective assistance and that's another avenue satisfied.

Part of officer Kolding's redirect and recross, as to the defendants intent was based on speculation and conjecture on his ~~XXXXX~~ part. Even though evidence relating to the existence of Any fact cannot rest on guess, or speculation or conjecture (state v Prestegard, 108 wn App. 14,23,28 P.3d 817 (2001), defense ~~x~~ counsel never asked the court to strike officers Kolding testimony.

Defense counsel's failure to ask the court to strike the improper testimony of the officer, and to ask the court to admonish the jury to disregard, fell below an objective level of reasonableness. To elicit such testimony and to fail to ask the court to strike or instruct the jury is far beyond a merely lame cross-examination, (Matter of Pirtle 136 wn.2d 467,489,965 P.2d 593 (1998)).

There was simply no legitimate strategic or tactical reason for defense counsel to allow, or elicit improper opinion testimony that was highly prejudicial to the defendant, and then fail to ask the court to ~~XXXX~~ strike it and tell the jury that it must not consider the testimony they just heard. There is a probability ~~that~~ that had the jury been instructed to disregard that ms.Narins credibility would have been viewed differently and the outcome of the trial been different. Thus the second prong of ineffective assistance of counsel is also satisfied.

3- Defense counsel failed to object when the Prosecuting Attorney either misstated facts and/or vouched for the credibility of ms. Narin and inferred that the defendant was not being truthful, nor was he to be taken as credible.

{It is a misconduct for the prosecutor to state a personal belief as to the credibility of a witness, (State V Warren, 165 wn.2d 17,30,195 P.3d 940 (2008), citing (State v ~~W~~ Brett, 126 wn.2d 136,175 892 P.2d 29 (1995)).

The prosecutor repeatedly and clearly expressed her personal~~XXXXXX~~ opinion about ms. Narin's credibility, and, ~~that~~ that the defendant was not credible. Saying things like:

- A) Ms. Narin is the one right there. She can tell where his eyes are focused on, what he is doing and what he is thinking right then.
- B) From everything that he said, what his discussion was about, and what his choices were as he went into that store, we all know what he was thinking right then.
- C) He is presumed innocent; however, the defendant is not presumed to be credible. And ~~just~~ just because he testifies doesn't mean you take his version as gospel.
- D) You had the opportunity to observe her testimony/testify, you~~XXXXXX~~ had the opportunity to observe her demeanor. You know that she has nothing to gain out of coming and testifying as to what happened.

She gets nothing out of this. On the other hand the defendant ~~XXXX~~ has nothing to loose by testifying and testifying the way he did.

E) So ask yourself whether or not ms. Marin called him a name, whether that person you saw testify, the person who presents herself in a pretty gentle, understated way is actually..., of course not. It's an excuse that the defendant made up to justify the fact that he assaulted her.

These comments plus others make it clear and unmistakable that the Prosecuting attorney was expressing her "personal opinion", rather than making inferences from the evidence, where the evidence showed that an assault had occurred and not an attempted robbery. In this case, where the credibility was the dispositive issue, these improper comments were highly prejudicial. Despite this defense counsel made no objections to any of the prosecutor's statements or her vouching for ms. Narins credibility and saying the defendant was not credible. Failure to do so did constitute ineffective assistance of counsel.,

Also during closing arguments my own defense counsel made conflicting and misleading statements to the jury about how to view the witness and her credibility. In part of her closing statements she say's "I am absolutely not suggesting that Julie Narin is lying. I believe, well I shouldn't say believe. The evidence is consistent with her being truthful as much as she can be".

It seems even here my counsel is not trying to cast doubt on the witnesses testimony or her credibility as to the actual events that did occur. Here once again it seems that my own attorney was not acting in my best interest to prove that ms. Narin was mistaken/lying like I asked her to.

In my case counsel's errors were so serious as to deprive me the defendant a fair trial, a trial that is suppose to be reliable. (State v Gordon __wn.2d__, 260 P.3d ~~XXXX~~ 884, 88-889 (2011) Quoting (State v Grier 171 wn.2d 17, 32-33, 246 p.3d 1260 (2011) citing (State v Thomas, 109 wn.2d 222, 225-26, 743 P.2d 816 (1987)). Thus the court should reverse and remand ~~xxx~~ for a new trial, or dismiss with prejudice the conviction of Attempted First Degree Robbery Against the defendant.

B) PROSECUTORIAL MISCONDUCT DEPRIVED THE DEFENDANT OF A FAIR TRIAL

A defendant claiming prosecutorial misconduct must establish and prove both improper comments and the resulting prejudicial effects. (State v McKenzie, 157 wn.2d 44,52,134 P.3d 221 (2006) Comments that are calculated to appeal to the jury's passion and prejudice, and to encourage it to render a verdict on facts not in evidence are improper, (State v Stith, 71 wn.App 14,18,856 P.2d 415 (1993, citing (State v Stover, 67 wn.App, 228, 230-31, 834 P.2d 671 (1992). Courts consider the allegedly improper comments in the context of the total arguments, the issue in the case, the evidence addressed in the arguments and the instruction given to the jury. Prejudice occurs if there is a substantial likelihood the instances of misconduct affected the jury's verdict (matter of Pirtle, 127 wn.2d 672, 904 ~~Rxqwx~~P.2d 245).

Where defense counsel does not object to a prosecutor's misconduct, or request a curative instruction, or move for a mistrial the defendant must show that the misconduct was so flagrant and ill intended that no instruction could have erased the prejudice engendered by it (State V Belgard, 110 wn.2d 504,507,755 P.2d 174 (1988)

1-) The prosecutor made several comments revealing her personal opinion about ms. Narin's credibility over the defendants

Improper vouching occurs when the prosecutor expresses a personal ~~xxx~~ belief in the veracity of a witness over another, or indicates that evidence not presented at trial supports the testimony of a witness (State v Thorgeron, 172 wn.2d 438,443,258 P.3d 43 (2011). As discussed in the above section, the prosecutor made numerous comments to the jury indicating her personal belief that ms. Narin was a credible witness and telling the truth, and that the ~~def~~ defendant was not credible and was "making an excuse to justify the fact he assaulted her", and "this is a person who had excuses after excuses for this day. And he had these excuses because he knew he was caught".

2-) The prosecutor improperly encouraged the jury to render a verdict on assumptions and on facts not in evidence.

During most of the prosecuting attorney's argument, she was leading the jury by asserting that everyone knew what the defendant was thinking at

the time this assault happened, when none of them were there. She made statements like: "here ultimately we all know why this happened". And then she turns around seconds later and says "we'll never just know specifically why that happened, regardless of his explanation that he gave". She also tells the jury that "what we're asked is to figure out what a person is thinking". This showed that she was telling the jury not to consider the facts or what the facts showed, nor pay attention to what the defendant testified to during trial, but to figure out what was in the mind and thoughts of the defendant at the time of the incident. Again she tells the jury in her closing argument "and what we have here is a witness, the defendant, who gives the state a story that's completely illogical.

The prosecutor even went as far as to tell the jury that I didn't respond out of anger at being called a bum, that I responded to being told "no about the money". She was telling the jury that my thoughts were saying "what if I do this, are you still going to say no to giving me money". She made the statement "that shows what's going on in the defendant's mind. She also said to the jury that "they shouldn't find the defendant guilty of the lesser charge of fourth degree assault because that would be giving the defendant a treat".

3-) The prosecutor misled the jury on the "intent clause" in the law regarding the elements of "attempt and intent."

A prosecutor's misleading or misstatement of the law is a serious irregularity having the grave potential to mislead the jury (State v Davenport, 100 Wn.2d 757,764,675 P.2d 1213 (1984). In this case the prosecutor told the jury several times in different ways that they "knew what was in the mind of the defendant and his thoughts" when the assault had occurred, thus trying to prove that the requirement to show intent had been proved. But according to WPIC 100.01 Attempt Definition, A person commits the crime of attempted (fill in the blank) when, with intent to commit "THAT specific" crime, he or she does an act that is a substantial act towards the commission of "THAT SPECIFIC" crime. And in this case it's "attempted robbery", which would mean that there was a "specific movement to take something".

At no time during the trial or during the witnesses interview by the police or at the interview with the investigator was there any mention

that the defendant made any attempt to take anything from ms. Narin's person or take anything from the business or the cash register. The witness even testified that there was no attempt.

First, the prosecuting attorney, nor officer Kolding were present at the time of the incident, so neither could legally testify as to the events, nor as to what was actually "going on in the defendant's mind" to in anyway describe what the defendant's "INTENT" was. Thus to do so would be speculative opinion, which is not ~~xxx~~ admissible in any court.

Second, the witness even under cross examination testified that the defendant never made any attempt to take anything, nor that while she was laying down on the floor, after being hit, did the defendant ever make any reach or attempt to reach for the cash register even though it was defenseless and within reach in such a confined space. Yet the prosecuting said that it was the defendant's intent, but because ms. Narin was laying on the ~~fo~~ floor half defenseless but fighting back, that the defendant gave up. Thus, the prosecutor had no evidence that it was my intent or that I made an attempt, yet she told the jury in so many words that the element that establishes intent had been proven.

4-) The prosecutors repeated prejudicial misconduct denied the defendant a fair trial.

~~When~~ When a prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatements affected the jury's verdict, the defendant is denied a fair trial (State v Gother, 52 Wn. App 350,355,759 ~~xxx~~ P.2d 1216 (1988)). The cumulative effects of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase the combined prejudicial effects (State v Case 49 Wn.2d 66,73,298 P.2d 500 (1956)).

In this case the jurors were confronted with a credibility contest between Ms. Narin and Mr. Washington (defendant). The prosecutor's improper statements vouching that ms. Narin was more credible than the defendant, her repeated misstatements of facts, and the misleading about the law as for intent and attempted crimes, created a substantial likelihood that the improper statements affected the decision of the jury. Thus the court should reverse the conviction and dismiss with prejudice or remand back for a new trial.

C) THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT
OF ATTEMPTED FIRST DEGREE ROBBERY,

The state presented no physical evidence whatsoever that it was the defendant's "INTENTION" to take anything, which is part of the necessary elements that have to be proved in cases of robbery, Taking something. Constitutional due process requires that every element be proven beyond a shadow of doubt, or reasonable doubt of the crime that the defendant was charged with, and in no phase of the fact finding process did the prosecutor prove "intent", (Appredi v New Jersey, 530 U.S. 466, 477, 120 S.Ct 2348, 147 L.Ed. 2d 435 (2000); U.S Constitutional Amendment XIV ; Const. ~~ART~~ ART. 1 § 3.

D) Cumulative Error Denied and Deprived the Defendant Of A Fair Trial

When multiple errors occur at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 292, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied 513 U.S. 849 115 S.Ct 146, 130 L.Ed. 2d 86 (1994). Courts apply the cumulative error doctrine when several errors occurred at ~~X~~ the trial court level, but none alone warrant reversal (State v Hodges, 118 Wn.App 668, 673, 77 P.3d (2003) review denied, 151 Wn.2d 1031, 94 P.3d 960 (2004).

Where the defendant cannot show that prejudicial occurred, cumulative cannot be said to have deprived the defendant of a fair trial (State v Stevens, 58 Wn.App 478, 498, 794 P.2d 38 Review denied, 115 Wn.2d 1025 802 P.2d 128 (1990).

Thus the defendant has in this document (Statement Of additional Grounds), listed multiple prejudicial errors that occurred at the trial level, which is mentioned in the above sections. In the event that this court determines that none alone warrant a reversal by themselves of my conviction, this court could and should rule that the cumulative ~~XXX~~ combination of these errors effectively denied the defendant of a fair trial.

E) Did the trial court abuse its discretionary powers in denying the defendant's motion to dismiss this case when a motion was made to dismiss on violation of Speedy trial rights under CrR3.3, and ~~X~~ also when the state rested and his attorney motioned the court to ~~XX~~ dismiss, based on insufficient evidence.

1- The defendant sent a motion to dismiss for violation of CrR 3.3 by by mail to the court and to the prosecuting attorney on October 19, 2010 which the prosecutor brought up in open court which she acknowledge she X recieved October 27, 2010 an this was at the defendants Omnibus Hearing. The Judge at that time refused to accept or entertain the motion because it was not submitted by an attorney. Again this motion was brought up to the court at the defendants 3.5 motion hearing, and again the court failed to dismiss, even though the defendant said his rights were violated according to (State v Kenyon). A copy of that motion is included here.

Now it is true that the state or county defense counsel switched in the middle of my legal process, (which I objected to) and I was given a different attorney, who represented me in trial, this change occurred well after the five day curative period for unforeseen or unavoidable circumstances allowed in CrR 3.3. This plus the fact the defendant was never notified about the continuances, one after another shows that the court did abuse its power and continue this case well beyond reasonable dates and did violate his right to a fast and SPEEDY TRIAL.

@2- After the state rested and had no other witness and showed no, nor presented any physical evidence th the defendant made any "Attempt" to commit the crime of robbery, nor did the court or could the court prove that it was the defendants "INTENT" to commit robbery, defense counsel requested the case be dismissed for lack of evidence. The court ruled that she had to "take all the states evidence as true" and also draw all inference from that evidence in favor to the state. Which does not give the defendant the presumption of being Xinnocent, nor does that allow the defendant the right to be seen as telling the truth.

A decision is based on "untenable grounds" or made for "untenable reasons" if it rests on facts unsupported in the record or was reached by applying wrong legal standards (State v Rundquist, 79 wn.App. 786,793,905 P.2d 922 (1995)).

In the record the court even stated "we cannot know beyond any shadow of a duty. Its impossible to talk about intent in those terms". But yet the court allowed the prosecuting attorney to talk in those exact terms and did not make any curative instruction to the jury, nor did defense X counsel object when the prosecutor did this.

Thus the court could rule that the trial court did abuse its power and dismiss this case or remand for trial for violations of rights.

CONCLUSION

I Reavy Washington, the defendant, hereby submit this document to the Court as my Statement Of Additional Grounds/ Pro-Se statement. I send this to the court, addressing the issues that I believe violated my Rights to a fair trial on several levels. I know that my Attorney Maureen Cyr, from the Appellate Project submitted a brief also, but I am addressing issues that she did not address, which I believe either denied or deprived me a fair trial. I have also referenced cases that support my claims on the levels I have presented.

These are issues that I have touched on in this statement in hopes that the court will look at and evaluate to do its most to see if there is any credibility or relevance to, in determining whether or not to grant this appeal and dismiss with prejudice and/or remand back for re-trial, or just vacate the conviction. These are the reasons I would seriously ask the court to look at;

1) The evidence in this case, the testimony of the witness and my own Testimony showed and stated that there was never any attempt made to take anything, cash or property from Ms. Narin nor from Seasons Nursery. Ms. Narin testified that she was assaulted by me and during the assault she fell backwards then to the ground where I assaulted her. She testified I never made any attempt to take cash from her nor made any movement towards the cash register to take anything, which was supposed to be my focus of interest. And according to the requirements to fulfill the charge of "Robbery", is that a person took something, or in my case where I am charged with "attempted" robbery I made an attempt to take something, which the evidence and testimony showed that I never did.

2) The prosecutor never proved intent because she ~~xxx~~ could not ever prove for a fact that I had in my mind to commit robbery like I did testify. She just made inferences and speculated about it since that was the charge I was charged with, that, that is what had to be my intent or in my mind or my thoughts.

3) Then there are areas of the witnesses testimony that contradicted her story, and yet my counsel, the judge, the prosecutor and more importantly the jury never gave a second look at nor seem to care.

A-) She stated that when she was looking at my eyes and the direction they were looking, she said that my line of sight was looking over

her left shoulder. ~~XXXX~~ She later testified that the cash register was on a counter at waist level behind her and to her right. She also said there was a window behind her head, but said that my eyes were not looking in that direction, that my focus was on the cash register. Well if the cash register was at waist level and to her right, why did she testify that my sight was to her left and on the register. And to top that off she said I was looking over her shoulder, (where the window is), then that would place the register up and above waist level and when she fell she would have bumped it with her head or shoulders.

B-) In line with the above, she stated that when I pushed her backwards her butt or hands hit the register and made a sound. Well this space was only about six feet by six feet. She fell to the ground and I started hitting her and pushed / hit her with a chair. Well with ms. Narin on the ground and the cash register in easy accessible reach, if it was my intention, and had it been my intention to commit robbery, Ms. Narin testified that I could of just reached for it and it would have opened. She said there was no lock on it. So if that was supposedly my intention and my focus, why then when the cash register is unprotected do I never make any attempt to reach for it. I just stop the assault and ~~X~~ turn off and leave.

C-) Even the witness, ms. Narin testified that I came in to the nursery and stood on one side of the counter with both of my hands in plain sight, never raising my voice or demanding for to give me anything, I calmly asked her for change for the bus so I could get home. She even testified that I said " excuse me, I am a little embarressed to ask you this". This showed that my intention ~~W~~ was not to come in and commit any kind of robbery, but I humbly asked for change.

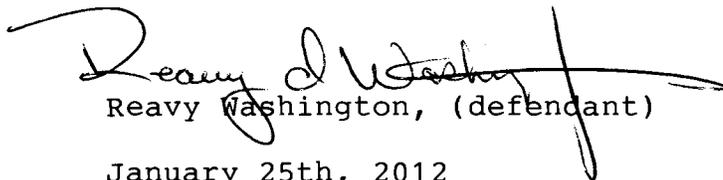
40) Beside the above statement, I once again make it known now in this document that it was never my intention to commit robbery against ms. ~~M~~ Narin nor against the nursery. I do ~~XB~~ admit to erroring in my actions and over reacting to ms. Narin's statement about not giving money to bums. I admit to committing an assault, Not attempted robbery. I even ~~X~~ tried to have my attorney make some arrangements to have me plead to a charge of second or third degree assault, but that was not an acceptable offer the prosecutor would accept. And I am even mor surprised ~~X~~ that my counsel did not make that the lessor included crime in this case.

So in closing, for the reasons above and the other issues like, ineffective assistance of counsel, prosecutorial misconduct, cumulative error and the possibility that there was abuse of power by the court, I ask this court to vacate or overturn this conviction for Attempted First Degree Robbery. I ask that if that is not granted that maybe it will be dismissed

~~XXXXXXXXXXXXXXXXXXXX~~

with prejudice or that charge and/or remanded to the original court for sentencing for the lesser included offense which I will now plead guilty to, or remanded for a new trial based on the facts that I did not receive a fair trial since there was insufficient evidence and also for the numerous trial errors that kept the defendant from receiving a fair trial.

RESPECTEDLY submitted by


Reavy Washington, (defendant)
January 25th, 2012

Reavy Washington
DOC # 737297
Washington State Penitentiary
~~XXXXXXXXXXXXXXXXXXXX~~
~~XXXXXXXXXXXXXXXXXXXX~~

1313 N. 13 ave
walla, walla Wa 99362

P.S Please excuse the errors in my typing.

Original

TO whom it may concern:

My name is Reany Washington, the Defendant in this case. I would like this Statement entered into the record in my case.

I originally signed temporary waivers of my Speedy trial rights back in July 2010, which extended my Speedy trial expiration date to no later than Sept. 2010. I did this, signed those waivers, with the sole purpose of giving my attorney at that time the opportunity at the time he claimed was needed to prepare for my case.

On October 19, 2010 I submitted a motion to the Court, with a copy sent to the Prosecutor's office, making a request for dismissal of all charges in this case based upon violation of the stated Statutes limiting the Courts leeway regarding my Speedy trial rights in accordance with CrR 3.3.

Now it is true that the State changed my attorney, which was not at my request, this change occurred on/about Oct 27, 2010, which was/is well beyond the five day Curative Period for "unforeseen or unavoidable" circumstances allowed in CrR 3.3.

In keeping with those limitations, and as upheld in the case STATE v Kenyon case # 81374-4, the remedy advised to the Court is clear and that is dismissal of all charges with prejudice on the grounds of violation of my Speedy trial rights.

Your honor I close saying these rights are an important part of our legal system and I beseech you to protect them.

SUPERIOR COURT OF WASHINGTON, for KING Co

STATE OF WASHINGTON

Plaintiff

CASE NO. 10-1-04120-2SEA

- VS -

REAVY DORBY WASHINGTON

Defendant

RE: MOTION FOR DISMISSAL
CLERKS ACTION REQUIRED

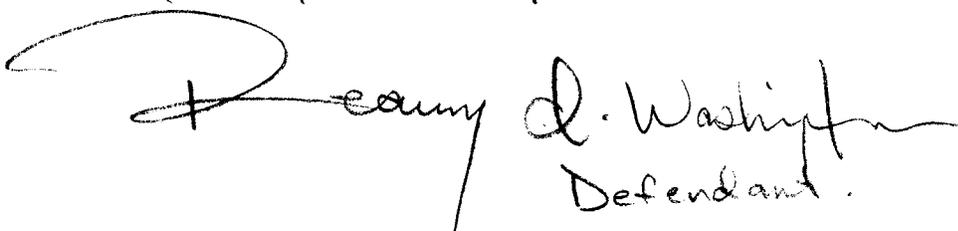
I, REAVY DORBY WASHINGTON, Defendant, do hereby move to petition the Court TO DISMISS ALL CHARGES in Case NO. 10-1-04120-2SEA, on the grounds of violation of TIME FOR TRIAL Restrictions, as per Rule CrR 3.3.

As per court documents the trial date was set for Sept. 20, 2010, with an expiration date of Sept. 27, 2010. Under Rule CrR 3.3, an inmate detained in jail, the Court is limited to 60 days from the date of arraignment. As it regards to any excluded periods allowed under the law, per sub-section (e), any continuances or motions by the Court or any Party for delay must have been made before the time for trial had expired. The Court must state on the record and/or in writing the reasons for these continuances and inform all relevant Parties. As the Defendant, I have as of this date OCTOBER 19 2010 received no such communication or notice regarding a continuance or otherwise excluded period.

AS it regards to any "Cure Periods" for unavoidable or unforeseen circumstances, the Court may only have continued the case beyond specific limits on motion of the Court or Party made within five days after the time for trial had expired. AS of this date October 19 2010, I have no notice or communication to inform me of any motion for continuance based upon unavoidable or unforeseen circumstances.

Be it that these above facts are true, the only action/Recourse available to the Court under the Law is Dismissal of ALL CHARGES with prejudice. Therefore I, REAVY DORBY WASHINGTON, the Defendant, having written and submitting this document/motion, move the COURT TO Dismiss ALL CHARGES in this Case NO. 10-1-04120-2SEA against ME.

I Thank the court for their time.

REAVY DORBY WASHINGTON

Reavy D. Washington
Defendant.

Dated October 19 2010