

67249-5

67249-5

No. 67249-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

CRAIG A. ROWLAND,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 29 PM 4:50

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

APPELLANT'S REPLY BRIEF

LINDSAY CALKINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT.....1

1. CHERE MADILL SOUGHT AND RECEIVED
MEDICAL TREATMENT FOR ASTHMA;
HER STATEMENTS TO VANCE ANDERSON
ABOUT CHOKING WERE INADMISSIBLE
HEARSAY.....1

 a. Statements about asthma were for medical
 diagnosis and treatment, while the statements
 about choking were not.....3

 b. In the alternative, any statement attributing fault
 to Mr. Rowland should have been excluded.....6

2. MADILL’S STATEMENTS TO ANDERSON
AND SIMMONS WERE NOT EXCITED
UTTERANCES.....8

3. THE STATE CONCEDES THAT ABSENT
MADILL’S ERRONEOUSLY-ADMITTED
HEARSAY STATEMENTS, THERE WAS
INSUFFICIENT EVIDENCE TO CONVICT.....12

4. THE PROSECUTOR COMMITTED HIGHLY
PREJUDICIAL MISCONDUCT.....13

 a. The prosecutor improperly urged the jury
 to forgive the State’s lack of evidence.....13

 b. The prosecutor impermissibly told the jury
 to declare the truth.....16

 c. The prosecutor improperly argued that Mr.
 Rowland had a burden to present witnesses.....18

 d. Cumulative misconduct denied Mr. Rowland
 a fair trial.....19

5. THE CUMULATIVE ERRORS IN MR.
ROWLAND'S TRIAL REQUIRE REVERSAL
OF HIS CONVICTION.....21

B. CONCLUSION.....22

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Eugster v. State, 171 Wn.2d 839, 259 P.3d 146 (2011).....15

In re Disciplinary Proceedings Against DeRuiz,
152 Wn.2d 558, 99 P.3d 881 (2004).....13

State v Brown, 127 Wn.2d 749, 903 P.2d 459 (1995).....9, 10

State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956).....19

State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992).....9, 10

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984).....21

State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003).....6, 7

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).....19

Washington Court of Appeals Cases

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992).....21

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273
(2009).....16, 17

State v. Briscoeray 95 Wn. App. 167, 974 P.2d 912 (1999).....10, 11

State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989).....6, 7

State v. Evans, 163 Wn. App. 635, 260 P.3d 934
(2011).....14, 15,16, 17

State v. Huynh, 107 Wn. App. 68, 26 P.3d 290 (2001).....6

State v. Ramires, 109 Wn. App. 749, 37 P.3d 343 (2002).....11

<u>State v. Traweek</u> , 43 Wn. App. 99, 715 P.2d 1148 (1986), overruled on other grounds by <u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	18, 19
<u>State v. Sims</u> , 77 Wn. App. 236, 890 P.2d 521 (1995).....	7
<u>State v. Walker</u> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	16, 17, 19, 20
<u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	12
<u>State v. Williamson</u> , 100 Wn. App. 248, 996 P.2d 1097 (2000).....	11

United States Court of Appeals Cases

<u>United States v. Renville</u> , 779 P.2d 430 (8th Cir. 1985).....	5, 6, 7
--	---------

Court Rules

ER 803(a)(4).....	4
-------------------	---

Treatises

5A Tegland, Wash. Prac. § 367 at app. 89 (2d ed. 1982).....	7
5B Tegland, Wash. Prac. § 803.23 at 469 (4th ed. 1999).....	6

A. ARGUMENT

This case hinged on the trial court's erroneous admission of Chere Madill's hearsay statements to Vance Anderson, a firefighter, and David Simmons, a police officer. See AOB 17–19. Respondent argues that Madill's statements to Anderson were properly admitted as statements for medical diagnosis, and that her statements to Simmons were excited utterances. SRB 10–17. Respondent also argues that the prosecutor did not commit prejudicial misconduct by urging the jury to forgive the State's lack of evidence, telling the jury to find the truth, and suggesting that Mr. Rowland should have presented evidence. SRB 22–33. As set out below, these arguments fail.

1. CHERE MADILL SOUGHT AND RECEIVED MEDICAL TREATMENT FOR ASTHMA; HER STATEMENTS TO VANCE ANDERSON ABOUT CHOKING WERE INADMISSIBLE HEARSAY.

Madill left her apartment on Greenwood Avenue and approached Anderson, whose fire truck had been dispatched to an address next door to Madill's. 1RP 56–57. Madill was having difficulty breathing and could neither sit still nor form complete sentences. 1RP 60. She was breathing very rapidly and had an elevated heart rate. 1RP 63.

Anderson testified that Madill said that her “boyfriend had taken her inhaler and that she was asthmatic and that he had choked her.” 1RP 61–62. When asked whether Anderson could make any conclusions from her elevated heart and respiratory rates, Anderson stated, “She was taking short, [sticcado] breaths, and every asthmatic case that I’ve been on present that way.” 1RP 64. In response to the prosecutor’s leading question about whether strangulation would also lead to elevated heart and respiratory rates, Anderson responded that it would. 1RP 64. But when Anderson called for additional medical support, they evaluated Madill and administered asthma medication (“the medication that she had said that she’d been taking.”). 1RP 63. When asked why he felt that he needed to call additional medical support, Anderson responded,

Because asthma—when asthma presents like this without any medical intervention—first of all, it’s for the comfort of the patient. When you’re that anxious and your breathing is not getting better, we are concerned about respiratory drive, and sometimes that can get so high that it shuts down completely. So it seemed paramount that we get advanced . . . support there as soon as possible and they can . . . administer the medication . . . that she didn’t have with her.

1RP 65. Then the following exchange occurred:

Q: . . . And after she was administered medication, did you make any observations of her?

A: After a few minutes . . . it took some time . . . to bring her down out of that really highly anxious state and then she was able to speak in full sentences, and that's when we got a lot of this information—

Q: Okay.

A: --that we've been talking about, about the boyfriend and stuff. She wasn't speaking like that when we first got there. Again, it was two- to three-word sentences. I have asthma. No inhaler.

1RP 65–66.

a. Statements about asthma were for medical diagnosis and treatment, while the statements about choking were not. Citing no authority, Respondent argues that Madill's statements to Anderson were properly admitted as statements for medical diagnosis. SRB 10–11. Respondent states, "Anderson, a trained EMT, obtained information from Madill to assess and treat her injuries . . . The marks on Madill's neck were consistent with strangulation and Anderson was concerned about her extremely anxious state triggering an asthma attack." SRB 10. The record does not support this concern about a potential asthma attack. Rather, the testimony cited above indicates that Anderson was

treating Madill for an asthma attack that was already in progress.

1RP 61–66.

Anderson's testimony shows that Madill was only saying two- or three- word sentences—"asthma" and "no inhaler"—when he first spoke to her. 1RP 66. At that point Anderson assessed her high pulse and respiratory rate and called for advanced support. 1RP 63. The testimony excerpted above shows that this call was directly related to her presentation as an unmedicated asthmatic. 1RP 63, 65. Only after she was treated for her asthma attack and was able to calm down did Madill ever discuss her boyfriend. 1RP 65–66. Thus, the statement "She said that—when we finally got her calmed down, she had said that her boyfriend had . . . choked her" was not for medical diagnosis and treatment. It was to report an alleged crime. 1RP 61–62.

A statement may only be properly admitted under the medical diagnosis exception in ER 803(a)(4) when it is "reasonably pertinent to diagnosis or treatment." ER 803(a)(4). As this Court explained in State v. Butler, a statement is "reasonably pertinent" when 1) the declarant's motive in speaking is to facilitate treatment, and 2) the content of the statement must be reasonably relied on by the medical professional in making the treatment. 53 Wn. App. 214,

220, 766 P.2d 505 (1989) (citing United States v. Renville, 779 P.2d 430, 436 (8th Cir. 1985)). This test advances the policy justifications for the medical diagnosis exception to the hearsay rule: first, the speaker is assumed to provide accurate information in order to receive effective treatment, and second, information reliable enough to serve as the basis for medical treatment is reliable enough to overcome concerns about hearsay. Renville, 779 F.2d at 436.

Here, it is clear that Madill's statement about being choked by her boyfriend do not satisfy either Butler prong. When she approached Anderson, she could only make two- or three-word sentences and was hyperventilating. 1RP 60, 66. She said, "I have asthma" and "No inhaler." 1RP 66. These statements were for the purpose of diagnosis and treatment: Madill was looking for medication for an ongoing asthma attack. See 1RP 63, 66. Anderson responded by treating her for that attack. 1RP 63–65. It was only after she received that medical treatment that she made a statement about her boyfriend choking her. 1RP 65–66. But by that time, she did not have any motive to seek medical treatment: she had calmed down, and was able to breathe and speak in full sentences. 1RP 65. Nor did Anderson attempt to treat her for the

alleged choking: police were called, and Anderson testified that other paramedics on the scene determined that Madill did not need to go to the hospital for an evaluation. 1RP 73. Thus, her statement to Anderson about being choked was neither motivated by treatment nor “reasonably relied upon” by medical personnel in giving treatment, and it should have been excluded as hearsay. Butler, 53 Wn. App. at 220; Renville, 779 F.2d at 436.

b. In the alternative, any statement attributing fault to Mr. Rowland should have been excluded. The medical diagnosis exception permits statements about the cause of the injury but generally does not allow statements attributing fault. State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). In Redmond, the Supreme Court provided an example to elucidate the distinction: “For example, the statement ‘the victim said she was hit on the legs with a bat,’ would be admissible, but ‘the victim said her husband hit her in the face’ would not be admissible.” Id. at 496–97; State v. Huynh, 107 Wn. App. 68, 75, 26 P.3d 290 (2001) (citing 5B Teglund, Wash. Prac. § 803.23 at 469 (4th ed. 1999)).

This Court has held that attributions of fault to a domestic partner may be admissible because the identity of a purported abuser may be relevant to the prevention of future injury. See, e.g.,

Butler, 53 Wn. App. at 221.¹ But this exception is deeply rooted in child abuse cases, where both 1) physicians have a legal obligation to prevent a child from being returned to an abusive household, and 2) children have difficulty separating causation from fault. Butler, 53 Wn. App. at 217, 221 (citing 5A K. Tegland, Wash. Prac. § 367 at app. 89 (2d ed. 1982) and Renville, 779 Wn.2d 438). In one case where this Court applied the exception to an adult speaker, the medical personnel included a physician whose medical center had a policy of referring apparent abuse victims to the social work department, and a social worker who counseled the speaker about avoiding future abuse. State v. Sims, 77 Wn. App. 236, 239–40, 890 P.2d 521 (1995).

That is certainly not the case here. The record shows that Anderson did not offer any treatment for any alleged abuse. The only medical treatment offered was for asthma. 1RP 63, 66. The portion of Madill's statements about being choked "by her boyfriend" were an attribution of fault, and should not have been admitted in the trial court. Redmond, 150 Wn.2d at 496; Butler, 53

¹ The Supreme Court has never recognized an exception for attributions of fault to a household member. Redmond, the case in which the Supreme Court explained that a statement that a victim said her husband hit her in the face would not be admissible, was issued after both the Court of Appeals cases Butler and Sims.

Wn. App. at 217 (noting that in some cases it may be necessary to delete the a portion of the testimony and admit the rest).

2. MADILL'S STATEMENTS TO ANDERSON
AND SIMMONS WERE NOT EXCITED
UTTERANCES.

Appellant's Opening Brief argued that any statements Madill made about choking to either Anderson or Simmons were not excited utterances. AOB 8–15. Respondent replies that Madill's statements to Anderson were "made in a spontaneous manner, on the heels of a clearly startling event and while Madill was still under the influence of that event." SRB 11–12.

As indicated above, the initial statements that Madill made to Anderson—that she had asthma and did not have an inhaler—did appear to be properly admitted as excited utterances. 1RP 66. But Anderson took great measures to explain that Madill had not made any statements about her boyfriend choking her until after she had received asthma medication and was able to calm down. 1RP 65–66. Thus, they were not "spontaneous;" as indicated in Appellant's Opening Brief, Madill had both the time and the motive to fabricate a story about her boyfriend after she had received medication for asthma. AOB 9–15.

As for the statements made to Simmons, the police officer who arrived on the scene after Madill had medication and was able to calm down, the prosecuting attorney at trial admitted that her statements would likely not be excited utterances because “by the time officers arrived she had already had time to cool down.” 1RP 27. The rest of the record supports this. While Madill did “fluctuate from being hysterical to calm,” there is no indication that Madill’s statements to Simmons about being choked were a spontaneous reaction to a startling event. See State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). Madill could just have easily been upset by her asthma attack, or upset by her boyfriend leaving her. As indicated in the Opening Brief, without evidence that the speaker was still under the influence of the startling event, the excited utterance exception is not appropriate. AOB 9–15.

Respondent’s brief is not particularly responsive on this point. Respondent states, “Rowland relies on State v Brown, 127 Wn.2d 749, 759, 903 P.2d 459 (1995), to argue that Madill’s statements should not have been admitted because of her subsequent recantation.” SRB 12. That is not Appellant’s argument. Rather, Appellant argued that just like the Brown court used evidence that a victim had said that she had fabricated her

statement as evidence that she had had the opportunity to do so; an opportunity to fabricate indicates that a speaker is no longer responding sincerely to the stress of a startling event. See AOB 10–12 & n. 2.

Respondent argues that this case is like State v. Briscoeray because the factual scenarios appear similar. 95 Wn. App. 167, 974 P.2d 912 (1999); SRB 14–15. Briscoeray is dissimilar from this case because of the considerable independent evidence that the speaker in Briscoeray was still under the influence of the startling event that she spoke of: a security guard received an anonymous phone call that there was domestic violence occurring in the speaker's apartment; and 30 to 40 seconds later, the speaker ran out of that very same apartment hysterical. Briscoeray, 95 Wn. App. at 168–69. Her statements thus clearly satisfy the second and third Chapin prongs: that the admitted statement must have been made while the declarant was experiencing stress caused by the startling event, and that the admitted statement relate to the startling event. 118 Wn.2d at 686.

Here, there was no such independent evidence of Madill having been choked, and the choking's causing what stress she exhibited to Anderson and Simmons. Rather, the independent

evidence in this case—the fact that she was successfully treated for an asthma attack—indicates that this Court should recognize that the startling event in this case was an asthma attack, not choking. See Briscoeray, 95 Wn. App. at 168–69. Her statements “asthma” and “no inhaler” were excited utterances; her later stories that her boyfriend choked her were not.

Furthermore, as argued in Appellant’s Opening Brief, the trial court was required to make a finding that Madill was under the stress of the startling event at the time the statement was made. AOB 16–17. Respondent argues that State v. Ramires and State v. Williamson do not “hold that the failure to explicitly make such a finding requires reversal.” Ramires, 109 Wn. App. 749, 757–58, 37 P.3d 343 (2002); Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000). Respondent is correct that the clear rule that both cases establish does not appear in the holdings of those cases. But the failure to follow this clear rule was error. AOB 1, 16–17.

Finally, Appellant cannot determine the reason for Respondent’s argument that Appellant cannot raise for the first time on appeal an objection to Madill’s hearsay statement based on her recantation. SRB 19–22. Appellant has made no such argument. Mr. Rowland properly objected to Madill’s hearsay statements on

hearsay grounds; Appellant asks this Court to hold that the trial court erred in overruling those objections. 1RP 61, 105; AOB 9–15.²

3. THE STATE CONCEDES THAT ABSENT
MADILL'S ERRONEOUSLY-ADMITTED
HEARSAY STATEMENTS, THERE WAS
INSUFFICIENT EVIDENCE TO CONVICT.

Appellant argues that the jury would not have had enough evidence to convict Rowland without the improperly-admitted hearsay statements of Madill. AOB 17–19. The State does not attempt to respond to this argument, and so the issue is conceded. State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005); see In re Disciplinary Proceedings Against DeRuiz, 152 Wn.2d 558, 580, 99 P.3d 881 (2004).

² The argument as a whole need not be considered because it was not raised by Appellant, but at one point Respondent asserts: "When asked by the court, the defense conceded that Madill's initial statements to EMT Anderson and Officer Simmons were admissible for the truth of the matters asserted." SRB 21. This is not what happened; Appellant refers this Court to the page cited by Respondent (2RP 9). Defense counsel was requesting a limiting instruction on prior inconsistent statements, and the court pointed out that the prior inconsistent statements had already been admitted. 2RP 9. Defense counsel never conceded that they were admitted properly; rather, Defense counsel objected twice. 2RP 9; 1RP 61, 105.

Respondent also states, "During the testimony of Anderson and Simmons, the defense objected to Madill's statements, presumably as to the foundation." SRB 20. That also did not happen; they explicitly objected to hearsay. 1RP 61, 105.

4. THE PROSECUTOR COMMITTED HIGHLY PREJUDICIAL MISCONDUCT

Appellant argues that the prosecutor committed flagrant misconduct during closing argument by repeatedly shifting the burden of proof and by telling the jury to find the truth. Respondent claims that these infractions did not occur by attempting to distinguish the prosecutor's remarks from remarks that this Court has held were improper. These attempts do not succeed.

a. The prosecutor improperly urged the jury to forgive the State's lack of evidence. During closing argument the prosecutor attempted to explain the State's paucity of evidence by stating:

The evidence is important. Domestic violence cases, it's not like a burglary. You're not going to get a video tape, you're not going to get a million different witnesses all pointing to the same individual, all pointing to the same kind of crime. It's happened, by definition, in an intimate surrounding, an intimate area . . . [L]ook at your jury instructions . . . [t]here's nothing in there about calling every witness who again would say a darn thing.

2RP 85–86. This was improper because instead of arguing that their evidence had satisfied the beyond-a-reasonable-doubt standard, the prosecutor was arguing that it was enough evidence in light of the general lack of evidence in domestic assault cases.

AOB 21. This is precisely what occurred in State v. Evans, 163 Wn. App. 635, 642, 645, 260 P.3d 934 (2011); see AOB 20–21. In Evans, the prosecutor argued: “don’t say, ‘I wish I had the universe,’ okay? Don’t say, ‘I wish I had fingerprints, I wish we had the video from the satellite.’” 163 Wn. App. at 642. Likewise, here, the prosecutor effectively told the jury “don’t wish for a video tape” and “don’t wish for more witnesses.” 2RP 85–86. The prosecutor in Evans also said “the court’s instruction doesn’t tell you to say, ‘Well, I wish I had more.’” 163 Wn. App. at 645. Similarly, here, the prosecutor said, [L]ook at your jury instructions . . . [t]here’s nothing in there about calling every witness who again would say a darn thing.” 2RP 86. The Evans Court explained that this was improper because it encouraged the jury to overlook the weaknesses in the State’s case. 163 Wn. App. at 645.

In spite of the striking similarities between the prosecutor in Evans and the prosecutor in this case, Respondent argues that Evans should be distinguished, but does not explain why. SRB 23–25. Respondent first states, “The State did not suggest to the jury that a lack of evidence was not a reasonable doubt, nor did the State tell the jury not to ask for more evidence.” SRB 24. To the contrary, the record clearly shows both implications in the

prosecutor's arguments that the jury should not expect additional evidence such as a video or more witnesses. 2RP 85–86.

Respondent then argues that “The prosecutor’s argument properly explained why the available evidence may be limited without undermining the burden of proof.” SRB 25. But the Evans Court explicitly stated that it was improper to encourage the jury to disregard a lack of evidence. 163 Wn. App. at 645. Finally, Respondent suggests that the fact that Evans was decided by Division Two is a reason to disregard its holding. SRB 24 n. 5 (“Division Two’s decision in Evans deemed several arguments misconduct that this Court has not decided yet.”). But the three divisions comprise a single Court of Appeals in Washington. Eugster v. State, 171 Wn.2d 839, 841, 259 P.3d 146 (2011). Whether controlling or persuasive, Evans is the only authority directly on point; Respondent does not and cannot cite any authority vindicating the prosecutor’s improper argument. See SRB 24–25.

b. The prosecutor impermissibly told the jury to declare the truth. Appellant argued that it was misconduct for the prosecutor in this case to tell the jury, “Look at all of that evidence, do not leave your commonsense at the door, please use it, and you

will find that [sic] the only true verdict in this case. Find the defendant guilty.” 2RP 86; AOB 21–22. Respondent acknowledges the caselaw from this Court showing that “seek the truth” arguments are improper. SRB 25–26; see State v. Walker, 164 Wn. App. 724, 265 P.3d 191, 196 (2011); Evans, 163 Wn. App. at 644–45; State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009).

In response to this authority, the State argues, “Evans does not hold that simply uttering the word ‘true’ is misconduct.” SRB 26. That is not the argument here. Rather, the argument is that like the prosecutors in Anderson and Evans, the prosecutor here urged the jury to “solve the case” rather than determine whether the State had met its burden of proof. AOB 22; Evans, 163 Wn. App. at 644; Anderson, 153 Wn. App. at 429. This argument was exacerbated by the prosecutor’s urging the jury not to “leave [their] commonsense at the door;” the thrust of the argument was that the jury should use their logic to solve the case and get to the truth. See 2RP 86.

Respondent also argues, “No Washington case has found a single reference to the truth to be misconduct.” SRB 26. That is also not Appellant’s argument. See AOB 21–22. Nor is that a

distinction that has been recognized by this Court: in the “declare the truth” cases, the courts are focused on the impropriety of the argument, not how many times it was made. See, e.g., Anderson, 153 Wn. App. at 429 (explaining that in contrast to the prosecutor’s instructions to the jury to “find the truth,” “the jury’s duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.”). Citing that reason, the Evans Court wrote, “Thus, a prosecutor’s request that the jury ‘declare the truth’ is improper.” Evans, 163 Wn. App. at 644. The Court did not say, “A prosecutor’s making repeated requests that the jury ‘declare the truth’ would be improper.” See id; see also Walker, 265 P.3d at 196 (making no reference to the frequency of “declare the truth” comments but nonetheless holding them improper).

c. The prosecutor improperly argued that Mr. Rowland had a burden to present witnesses. Appellant argues that the prosecutor committed misconduct by stating, “There’s a couple other folks present at the scene, according to Ms. Madill. We’ve never seen them. We never heard their statements.” 2RP 70–71; AOB 23–25. In response, the State argues, “The prosecutor did not argue that Rowland had any obligation to call these other persons

as witnesses. The only implication was that . . . Madill's recantation was not credible." SRB 28.

But that is clearly not the only implication. Madill's trial testimony was exculpatory of Rowland. 2RP 22, 30. To argue that there should have been witnesses called to corroborate her story was to argue that the defense should have put on a case. AOB 24; See State v. Traweek, 43 Wn. App. 99, 106–07, 715 P.2d 1148 (1986), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). For example, in Traweek, the prosecutor argued:

Mr. Traweek doesn't have to take the stand and you can't hold that against him. That doesn't mean the defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hadn't it be [sic] presented if there are explanations, which there aren't?"

Id. at 106. Explaining that this type of argument was not permitted, this Court wrote: "[A] defendant has no duty to present any evidence . . . The prosecutor's statement suggested that the defendant was obliged to call witnesses and thus to prove his innocence. There was no such a duty." Id. at 107.

The prosecutor's comments in this case were no different. Like the prosecutor in Traweek, the prosecutor in this case argued

that the defendant should have presented evidence of his innocence. See 2RP 70–71, 86; Traweek, 43 Wn. App. at 106. This was improper. See, e.g., State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

d. Cumulative misconduct denied Mr. Rowland a fair trial. A prosecutor's repeated impropriety may rise to the level of flagrant and ill-intentioned misconduct. Walker, 164 Wn. App. at 737 (citing State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956)); see Evans, 163 Wn. App. at 647–48. Here, the prosecutor committed three clear violations when he asked the jury to forgive weaknesses in the State's case, told the jury to find the truth, and implied that Mr. Rowland should have presented evidence. Supra § A.4. Mr. Rowland was convicted on extremely thin evidence. AOB 17–19. The State's evidence consisted only of the testimony of Anderson, Simmons, and Kevin Stewart, a second police officer who went with Madill back to her home. The testimony of Anderson and Stewart was based directly on Madill's statements to them, which Madill later told the jury she had fabricated. See 2RP 22, 30. Anderson stated that any redness around Madill's neck was "mild." 1RP 76. He stated that there was no petechiae, a frequent indicator of strangulation, on Madill's neck. 1RP 75. Madill did not require

any additional medical treatment beyond her treatment for asthma. 1RP 73. And the photographs introduced by the state show hardly any redness—and some show no redness at all. See, e.g., Ex. 3–6.

Simmons testified that Madill had no other injuries and had no defensive injuries whatsoever. 1RP 123. When they arrived back to Madill’s apartment, everything was in order. 1RP 145. There was no indication that any struggle had occurred. 1RP 145.

In light of this weak evidence, the prosecutor’s repeated misconduct was highly prejudicial. See Walker, 164 Wn. App. at 737. Mr. Rowland received an unfair trial, and his conviction must be reversed. Id.

5. THE CUMULATIVE ERRORS IN MR. ROWLAND’S TRIAL REQUIRE REVERSAL OF HIS CONVICTION.

As argued in Appellant’s Opening Brief, the cumulative error doctrine requires reversal in this case. AOB 32–33; see State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The State does not attempt to respond to this argument.

Here, the trial court erroneously admitted prejudicial hearsay statements. Supra § A.1, 2. Those statements were the primary evidence used to convict Mr. Rowland. Supra § A.3. In addition, the prosecutor argued that Mr. Rowland should have

presented a defense, that the jury should forgive the State's lack of evidence, and that the jury should find the truth. Supra § A.4. These errors were highly prejudicial because the State's evidence was quite weak. AOB 17–19. Mr. Rowland is entitled to a new trial because these errors had a cumulative, material effect on the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150–51, 822 P.2d 1250 (1992).

B. CONCLUSION

For the foregoing reasons and for the reasons stated in his Opening Brief, Mr. Rowland respectfully requests that this Court reverse his conviction for assault in the second degree.

DATED this 29th day of FEBRUARY, 2012.

Respectfully submitted,



LINDSAY CALKINS (WSBA No. 44127)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67249-5-I
v.)	
)	
CRAIG ROWLAND,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF FEBRUARY 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 FEB 29 PM 4:50

- | | | |
|--|-------------------|-------------------------------------|
| [X] JEFFREY DERNBACH, DPA
KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] CRAIG ROWLAND
338466
COYOTE RIDGE CORRECTIONS CENTER
PO BOX 769
CONNELL, WA 99326-0769 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF FEBRUARY, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710