

No. 67258-4-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD RASMUSSEN,

Appellant.

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

The Honorable J. Wesley St. Clair

REPLY BRIEF

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STATE OF WASHINGTON

TABLE OF CONTENTS

A.REPLY ARGUMENT 1

 1. DETECTIVE CASTRO’S COMMENTS ON L.R.’S
 INTERVIEW Demeanor WERE OPINIONS ON
 CREDIBILITY..... 1

 2. THE TRIAL COURT ERRED IN DENYING THE
 DEFENSE MOTION FOR A MISTRIAL. 3

 3. THE PROSECUTOR COMMITTED MISCONDUCT
 IN CLOSING ARGUMENT BY TELLING THE
 JURY THAT ACQUITTAL REQUIRED A SPECIFIC
 REASON TO ACQUIT..... 4

B. CONCLUSION 6

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Barr</u> , 123 Wn. App. 373, 98 P.3d 518, <u>review denied</u> , 154 Wn.2d 1009 (2004)	2
<u>State v. Escalona</u> , 49 Wn. App. 251, 742 P.2d 190 (1987)	4
<u>State v. Farr Lenzini</u> , 93 Wn. App. 453, 970 P.2d 313 (1999)	1
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).	2,3
<u>State v. Venegas</u> , 155 Wn. App. 507, 228 P.3d 813, <u>review denied</u> , 170 Wn.2d 1003, 245 P.3d 226 (2010).....	4,5
<u>State v. Walker</u> , --- P.3d ----, 2011 WL 5345265 (Div. 2, Nov. 8, 2011).	5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 14.....	5
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A. REPLY ARGUMENT

1. DETECTIVE CASTRO'S COMMENTS ON L.R.'S INTERVIEW DEMEANOR WERE OPINIONS ON CREDIBILITY.

This case involves a police witness who described the complaining, testifying witness by stating she was tearful, upset, "obviously," during his investigative interview. State v. Farr Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) ("Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference") (emphasis added). The Respondent contends that the officer only factually described the complainant's demeanor. BOR, at p. 9. But the Respondent itself admits this was done to show the credibility of the complaining declarant. BOR, at p. 9. *Castro's testimony was simply for the purpose of showing the officer's assessment of the witness's credibility.* Respondent does not explain why it is proper under the cases cited to have a police officer essentially bolster the credibility of the testifying complainant.

Importantly, this case also involves a timely objection by defense counsel at trial. 3/31/11RP at 207. The Respondent next

analyzes Kirkman and contrasts it to this case. However, Kirkman involved the issue whether the testimony in that case was such an explicit comment on credibility that it made out manifest constitutional error under RAP 2.5. State v. Kirkman, 159 Wn.2d 918, 926-27, 936, 155 P.3d 125 (2007).

The cases cited support Mr. Rasmussen's proposition that a police officer can improperly imply his opinion of the credibility of a person. Mr. Rasmussen's remaining legal arguments in the Opening Brief demonstrated also that there is great prejudice resulting when the person is the complaining witness, who also testifies at trial, and the improper opinion emanates from a police officer, a person the jury is highly likely to trust and believe. Respondent complains of appellant's discussion of Kirkman and State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518, review denied, 154 Wn.2d 1009 (2004), but Mr. Rasmussen did not argue, and does not depend in this case being factually identical to either decision. Mr. Rasmussen cited the Kirkman case for contrast with the rule approving questions about whether a witness was "consistent," and cited the Barr case as an example of a case where an opinion of an officer was deemed improper. Appellant's

Opening Brief, at pp. 6-7.

2. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR A MISTRIAL.

Mr. Rasmussen maintains his arguments in the Opening Brief that a mistrial was required. During examination by the deputy prosecutor, Rebecca Zuckerberg, the complainant's mother, gave a non-responsive answer when asked what she meant by her immediately previous testimony that L.R. was "anxious to talk to" her about the alleged incidents by the defendant. 4/4/11RP at 353-54. The court overruled counsel's objection to the testimony of the complainant's mother, who continued as follows:

[L.R.] has told me that she understands that this is a very painful thing for me to hear. And she has also told me that the reason she never said anything was because she was told that if she did, that I would get hurt.

4/4/11RP at 353-54. Mr. Rasmussen's counsel sought a mistrial. 4/4/11RP at 354, 360. The trial court stated the court was requiring the "jury to strike her answer." 4/4/11RP at 354. In assessing the degree of prejudice such as resulting in a violation of an order in limine, a court should examine (1) the seriousness of the irregularity; (2) whether it was cumulative of properly admitted

evidence; and (3) whether it could have been cured by an instruction. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987).

The Respondent on appeal states this testimony as “cumulative.” BOR, at p. 15 (citing RP 486, 514). Mr. Rasmussen argues that the testimony complained of was the only instance in which the alleged threat was actually passed on or communicated to the complainant’s mother. This improper comment was not cumulative or repetitive of any other evidence properly admitted at trial that Mr. Rasmussen was violent.

3. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY TELLING THE JURY THAT ACQUITTAL REQUIRED A SPECIFIC REASON TO ACQUIT.

In closing argument, the prosecutor told the jury that a reasonable doubt is “a doubt for which a reason exists.” 4/7/11RP at 742. Mr. Rasmussen maintains this was misconduct. In Venegas, the prosecutor argued, “In order to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is’—blank.” State v. Venegas, 155 Wn. App. 507, 523, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d

226 (2010). It is therefore misconduct to argue to the jury in a way that requires that the defendant convince the fact-finder that there is a specific factual reason to find him not guilty.

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to.

State v. Walker, --- P.3d ----, 2011 WL 5345265 (Div. 2, Nov. 8, 2011, at 3).

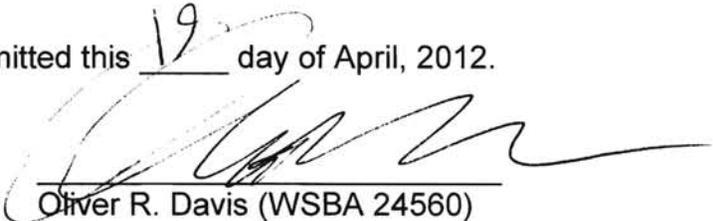
Despite differences in language, the prosecutor in this case effectively engaged in argument employing the same mechanism and improper framing of the State's burden disapproved of in Walker and Evans. The prosecutor essentially stated that "a reason [must] exist" in order to acquit, and specifically framed this requirement as the "formula" for applying the definition of reasonable doubt in the jury instructions. 4/7/11RP at 742. The prosecutor, as in Venegas and the cited cases in the Opening Brief, told the jury that before it could find Mr. Rasmussen not guilty, it needed a reason. This shifted the burden of proof to Mr. Rasmussen. U.S. Const. amend. 14. There, and in this case

where the complainant and Mr. Rasmussen, the accused, both testified for the jury, the case is akin to Venegas where errors required reversal because the case was a credibility contest, see Venegas at 526–27, and the defendant here argues the same result is required.

C. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Rasmussen respectfully requests this Court reverse his judgment and sentence.

Respectfully submitted this 19 day of April, 2012.



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)	
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)	NO. 67258-4-I
v.)	
)	
RICHARD RASMUSSEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **APPELLANT'S REPLY BRIEF** 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF APRIL, 2012.

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