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

STATE OF WASHINGTON

Respondent

vs.

JAMES NORMAN CLASSEN

Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable John Wulle
Superior Court No. 05-1-00408-8

APPELLANT'S REPLY BRIEF

MARK W. MUENSTER, WSBA #11228
1010 Esther Street
Vancouver, WA 98660
(360) 694-5085

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I. ISSUES RAISED BY RESPONDENT'S BRIEF

1. Can a witness be impeached with an inconsistent statement if he denies making the statement?

2. Was the proffered impeachment of Dr. Ward by his statement to Maurice Classen a collateral issue?

3. What is the proper standard of review for the admission of the jail guards' testimony concerning Dr. Classen's behavior during the 14 months he was in custody?

4. Was the jail guard testimony relevant?

5. Assuming the relevancy of the jail guard testimony, was its probative value outweighed by its substantial prejudicial impact?

6. Was the issue of misconduct during the prosecutor's closing argument preserved for appeal by filing of appellant's motion for new trial?

7. What is the standard of review for misconduct during a prosecutor's closing argument?

8. Is the record of the trial in this case, as reconstructed from the memories of the attorneys of the parties, adequate for full appellate review?

II. ARGUMENT IN RESPONSE

A. The trial court erred in restricting the cross-examination of Dr. Ward.

1. A witness can be impeached with an inconsistent statement even if he denies making the statement.

The state argues that the trial court did not err in restricting the cross–examination of its chief rebuttal witness about the statement that he allegedly made to Maurice Classen, appellant's son. The state appears to argue that by the simple expedient of denying any statement was made,

Dr. Ward could avoid being cross–examined about a statement that Mr. Classen was prepared to testify had been made to him. This argument should be rejected.

In *State v Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002), the court discussed two modes of impeachment: impeachment by inconsistent statement and impeachment by extrinsic evidence of bias. In discussing the former, the court observed as follows:

> Yet the policy of requiring a witness to have the chance to refute or agree with a prior inconsistent statement only applies to evidence that is offered as inconsistent with the witness's testimony. A prior inconsistent statement is a comparison of something the witness said out of court with a statement the witness made on the stand. ER 613(b) requires the witness have the opportunity either to admit the inconsistency and explain it (in which case the testimony of the prior statement is not admissible as evidence) *or to deny it (in which case evidence of the prior inconsistent statement is admissible).*
> 111 Wn. App. at 409-410. (Emphasis added).

Thus it is clear that the *Spencer* court refutes the prosecutor's argument that merely by denying making the statement to Maurice Classen, Dr. Ward could avoid cross-examination about it. The *Spencer* court held that refusing to allow impeachment of the state's chief witness was constitutional error, subject only to the stringent test for harmlessness for constitutional error.[1]

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[1] Any error in excluding such evidence is presumed prejudicial but is subject to a harmless error analysis: reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *State v. Johnson*, 90 Wn.App. 54, 69, 950 P.2d 981 (1998).

The prosecutor also cites *State v. Dolan*, 118 Wn. App. 323, 73 P.2d 1011 (2003) in support of his position. *Dolan* reversed a conviction for assault of a child in the second degree when the trial judge (who was coincidentally the same trial judge here) prevented the defendant from cross-examining a witness about her alleged statement that she would make the criminal case against him go away if he would relinquish custody of his children. *Dolan* in fact supports appellant's argument here, that the restriction of cross-examination of Dr. Ward denied him a fair trial.

State v. Newbern, 95 Wn. App. 277, 975 P.2d 1041 (1999) cited by the state in its brief, also supports appellant's argument that it was error to restrict cross–examination on the ground that Dr. Ward claimed not to have made the statement to Maurice Classen:

> But although the justification supporting impeachment may require that the witness remember the prior event, it does not require that the witness remember making the prior statement. See *State v. Hancock,* 109 Wn. 2d 760, 748 P.2d 611 (1988) (In indecent liberties case, defendant's wife claimed no memory of telling detective that she suspected "that something was going on between her husband and B" and was afraid of him. The *Hancock* court approved use of prior contradictory statements to impeach.). See also Tegland, *Washington Evidence* sec. 256, at 309.
>
> Generally, "if the witness testifies at trial about an event but claims to have no knowledge of a material detail, or no recollection of it, most courts permit a prior statement indicating knowledge of the detail to be used for impeachment." Tegland, sec. 256, at 309.

Newbern, supra at 292.

The *Newbern* court went on to say that impeachment by a prior inconsistent statement is encouraged because

> [c]ourts and commentators have both acknowledged that the jury is better able to determine the value and weight to give a witness's trial testimony if it knows that the witness expressed contrary views while the event was still fresh in the witness's memory and before the passage of time created opportunities for outside influence to distort the statement.
> *Newbern* at 295.

2. The impeachment was not on a collateral matter.

The state argues next that Dr. Ward could not be cross–examined about, and impeached with the statement he made to Maurice Classen on the grounds that this was a collateral issue. This argument should also be rejected.

Dr. Ward testified in the state's rebuttal case that Dr. Classen had the ability to premeditate. The defense had already presented evidence that Dr. Classen's mental illness diminished his capacity to premeditate. The proposed impeachment by Maurice Classen about his conversation with Dr. Ward was not collateral, because it would have cast doubt on the doctor's testimony about premeditation. Dr. Ward himself acknowledged this during the offer of proof on this matter. RP IX-B 843-44. He also acknowledged that he had had a conversation with Maurice Classen about his father's case, RP IX-B 843, 848.

Since Dr. Classen's mental condition was the main focal point of the defense, it was not a collateral matter to cross–examine the state's chief rebuttal witness about a conversation which cast doubt on the

certainty of his diagnosis. The court erred in restricting the cross–examination of Dr. Ward and excluding the impeaching testimony of Maurice Classen.

B. The trial court committed constitutional error by allowing the testimony of the jail guards.

1. Standard of review

This court should review violations of the right to an impartial jury and the presumption of innocence *de novo*. *State v. Johnson*, 125 Wn. App. 443, 457, 105 P.3d 85 (2005); *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005). The trial court in this case analyzed this issue solely as question of the admissibility of evidence under ER 403. Under the *Johnson* and *Gonzalez* standard, however, determination of the prejudice flowing from the introduction of this evidence is thus not entitled to deference. In addition, the *Gonzalez* court held that this was structural constitutional error which was not subject to harmless error analysis. *Gonzalez, supra* at 904.

The state argues that the introduction of testimony about Dr. Classen's behavior during the fourteen months he was in custody is a simple discretionary ruling on evidence by the trial court. The state relies principally on *State v. Mullin-Coston*, 115 Wn. App. 679, 64 P.3d 40 (2003).

The *Mullin-Coston* court allowed the introduction of a number of statements the defendant had made in phone calls placed from jail. While acknowledging Washington precedent such as *State v. Finch*, 137 Wn. 2d

792, 844, 975 P.2d 967 (1999), which held that the right to a fair trial was violated when the defendant was made to appear before the jury in shackles, the Court of Appeals analyzed the issue as purely an evidentiary question balancing the probative value of the evidence versus its prejudicial impact. In assessing the prejudicial impact of evidence which demonstrated that the defendant was being held in custody, the Court opined that jurors in a murder case would *assume* that the defendant was held in custody, and that therefore the impact of such evidence was slighter than seeing the defendant in shackles.

The flaw in the *Mullin-Costin* court's reasoning is that it completely undercuts the constitutional presumption of innocence. Our courts always have to be vigilant to protect the presumption of innocence in criminal trials. This is a constitutional mandate. *State v. Hutchinson*, 135 Wn. 2d 863, 887, 959 P.2d 1061 (1998); *State v. Gonzalez*, 129 Wn. App. 895,120 P.3d 645 (2005). That is why shackling a defendant can only be done under the most extreme of circumstances, and only after conducting a hearing regarding the necessity of doing so. See *State v. Hartzog*, 96 Wn. 2d 383, 635 P.2d 694 (1981). If it did not matter that jurors all assumed that a person on trial would be in custody, there would be no need to allow defendants to appear in civilian clothes, and no reason not to routinely use stun belts to prevent the escape of the accused from the courtroom. So the *Mullin-Costin* court's decision gives lip service to the constitutional presumption of innocence, but gives it no weight in assessing the

admissibility of evidence. The court's analysis runs along non-constitutional lines, analyzing the issue as one involving the application of ER 403.

In contrast, the court in *State v. Gonzalez*, *supra*, did give appropriate weight to the constitutional considerations at issue here. Gonzalez was held in custody, and was transported to the hearings by a custody officer. However, there was no indication in the record that any juror ever saw him in handcuffs before hearings. It was the trial judge who announced to the jury the fact that Gonzalez was in custody and would remain in custody during the course of the trial. It was this announcement, and not viewing of the defendant in shackles, which the *Gonzalez* court ruled violated the right to a fair trial:

As in *Williams*[2], the jury's awareness not only of transportation protocols, but also of the presence of uniformed guards throughout the trial, was a continuing reminder that the State perceived Mr. Gonzalez as meriting the trappings—if not the presumption—of guilt.

The court went on to note that the judge's announcement to the jury struck "at the very heart of the presumption of innocence," 129 Wn. App at 903, and held that

> [h]owever strong the government's case, the fundamental right to a fair trial demands minimum standards of due process. [Citation omitted]. When a trial right as fundamental as the presumption of innocence is abridged, however, reversal is required. 129 Wn. App. 905.

This court should hold that the introduction of the testimony of the

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[2] *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct 1691, 48 L. Ed. 2d 126 (1976)

jail guards concerning Dr. Classen's behavior while in jail for 14 months is likewise an abridgement of the presumption of innocence, which requires reversal.

2. Analysis under ER 403

The state argues that the evidence provided by the three jail guards was relevant to rebut Dr. Shapiro's testimony that Dr. Classen was bi-polar and that the probative value of this evidence outweighed its prejudicial impact. Even under the less stringent standard for evidentiary error, this argument should be rejected and a new trial granted.

The testimony of the three guards was in the part of the record which was not recorded by the trial court's equipment, and was summarized in the reconstructed report of proceeding prepared by the lawyers. Apparently, none of the three guards had any training in the diagnosis of mental illness. None was detailed to observe Dr. Classen 24 hours a day, and the first two guards had other responsibilities and other inmates to watch. Sgt. McKenzie was apparently called only to document the fact that Dr. Classen had been infraction free during the 14 months he had spent in custody. So as a threshold matter, insofar as the limited record reveals, the three witnesses had a limited opportunity to observe Dr. Classen, and would not have necessarily recognized signs of a manic episode had there been one.

Dr. Ward testified that a person who had manic episodes *while in custody* would be likely to have problems with the guards and other

inmates. The state's relevancy argument thus hinges on the proposition that Dr. Classen was not correctly diagnosed as bi-polar because he had not had any manic episodes *while in custody*, so far as the guards could tell. On the other hand, the state's other professional witness, Dr. Karnik, agreed that even if Dr. Classen had not demonstrated manic symptoms while at Western State Hospital, it did not mean that he was not bi-polar.

Because of the shortcomings of the jail guards' opportunity to observe, and because of their lack of training in the recognition of the symptoms of mental illness, the rebuttal evidence provided by the guards' testimony, even if relevant, had very little probative value to aid the jury in deciding whether Dr. Classen was in the throes of a manic episode on the night he attacked his wife. But because this evidence revealed to the jury what it otherwise had no basis to know, other than speculation, namely that Dr. Classen had been held in custody on the charges before them for a period of 14 months, the evidence had a severe prejudicial impact. Like the message directed by the trial judge in *Gonzalez*, this evidence sent the message to the jury that the court had determined that Dr. Classen was too dangerous to remain free during his trial. This was, as the *Gonzalez* court recognized, inherently prejudicial. *Gonzalez*, at 904. While the jury never saw Dr. Classen in shackles, the revelation that he had been in custody for 14 months pending trial had the same prejudicial impact and the trial judge's announcement in *Gonzalez*. The prejudicial impact of the jail guards' evidence substantially outweighed whatever

relevance their limited and untrained observations had. This court should reverse and remand for a new trial for this substantial error in Dr. Classen's trial.

C. The prosecutor's misconduct during closing argument requires a new trial.

1. This issue was preserved for appellate review because it was raised in Dr. Classen's motion for a new trial.

The state argues that the issue concerning misconduct during closing argument cannot be raised due to the absence of a contemporaneous objection, unless the misconduct was so flagrant that no instruction from the court could have prevented the prejudice. Implicit in this argument is the premise that raising the issue in a motion for new trial does not preserve the issue for appeal.

In *State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186 (1984), the court rejected an argument by the state that a request for a curative instruction was necessary to preserve an issue for review where an objection and motion for a mistrial had been made. The court noted that neither was necessary where the misconduct was so flagrant that no instruction could cure it.

In *State v. Case*, 49 Wn. 2d 66, 298 P.2d 500 (1956), the court discussed the necessity for a motion for a new trial to preserve an issue of prosecutorial misconduct. It noted, as did the *Claflin* court, that the failure to make timely objections, ask for instructions to disregard the improper argument or move for a new trial did not waive the issue on appeal. 49

Wn. 2d at 76. The court also noted that a motion for a new trial should be made, so "that the trial court might have an opportunity to grant the relief the misconduct warrants, and thus save the time and expense of an appeal." 49 Wn. 2d at 75.

Other Washington decisions are in accord with this proposition. In *State v. Fagalde*, 85 Wn. 2d 730, 539 P.2d 86 (1975), the court allowed review of an evidentiary ruling despite the lack of a specific objection. The court stated that:

> It is the . . . rule that in order to preserve error, counsel must call the alleged error to the court's attention at a time when the error can be corrected. While arguments [concerning] admission of evidence should be advanced at the time the evidence is offered, a party is not necessarily precluded from raising the question on appeal *if his counsel brought it to the court's attention on a motion for new trial*. . . . [I]t is the duty of counsel to call to the court's attention, either during the trial *or in a motion for a new trial,* any error upon which appellate review may be predicated . . . to afford the court an opportunity to correct it. 85 Wn.2d at 731 (emphasis added).

Similarly, in *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979), the court noted that issues could be raised by a motion for new trial, which allowed the trial court a chance to review the issue before appeal:

> In order to preserve error for . . . appeal, . . .the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. Ideally, this will be done during the course of trial, but *the error may be raised in a motion for a new trial.*
> 91 Wn.2d at 642 (Emphasis added)

Accord, *In re Lee*, 95 Wn. 2d 357, 623 P.2d 687 (1980)[3] . See also *State v.*

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[3] The court allowed review despite that fact that defendants had not raised an objection at trial to the admissibility of their prior convictions:

Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991) (offer of proof in affidavit supporting motion for new trial allowed review of evidentiary issue).

Appellant submits that based on the above authority, the filing of the motion for new trial in this case, which raised the issue of the misconduct during closing argument, preserves this issue for appeal.

2. Standard of review for preserved issue of prosecutorial misconduct

Where the issue has been properly preserved, the standard for review is whether there was a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984).

In *State v. Reed*, 102 Wn. 2d 140, 684 P.2d 699 (1984), the charge was first degree murder, and the defense was, as in this case, diminished capacity. Among the several arguments made by the prosecutor that were deemed improper was this one:

The final insult to Anola Reed came from the eloquence of Don Taylor [defense counsel]. The final insult to that poor woman, because Gordon Reed doesn't have her around any more, it should be manslaughter. Whew! That is like out of Captain Marvel.... He's a cold murder two. It's cold. There is no question about murder two. 102 Wn. 2d at 144.

[A]n objection not raised in the trial court normally will not be considered on appeal. . . . [and] precludes attacking the use of the evidence on appeal. However, if a challenge is raised as late as in a motion for a new trial, it gives the trial court an opportunity to act upon it and preserves the issue on appeal.

The Court of Appeals had affirmed Reed's conviction, concluding that although the comments were improper, no prejudice resulted from these and the prosecutor's other comments. The Supreme Court reversed the conviction. The Supreme Court noted that the prosecutor's improper comments directly attacked the defense theory of diminished capacity which was the basis for the manslaughter instruction. The court noted that there was a plausible theory that Reed did not intend to premeditate the death of his wife. Consequently, the court found there was a substantial likelihood that the prosecutor's comments affected the jury's verdict.

The same result should be reached here. Dr. Classen's defense to the charge of murder in the first degree was that he lacked the capacity to premeditate the killing of his wife. As did the prosecutor in *Reed*, the prosecutor here ridiculed the defense argument that manslaughter was appropriate for the jury's consideration. He compounded the misconduct by telling the jury that manslaughter was equivalent to an "accident," a palpably incorrect statement of the law, for the reasons given in Appellant's opening brief at 31-32. In a case where the fact of homicide was not contested, but the mental state in which the act was done was the whole focus of the trial, there was a substantial likelihood that this misconduct affected the jury's verdict.

3. Standard of review if error not deemed preserved

Where no objection or attempt to obtain a trial court ruling has been made, courts have reviewed prosecutorial misconduct where the

misconduct is so flagrant that no instruction could obviate the prejudice caused by the misconduct.

Even under this more stringent standard of review for cases where the issue has not been preserved by any attempt to obtain a trial court ruling, such as *State v. Belgarde*, 110 Wn. 2d 504, 755 P.2d 174 (1989), reversal is required here. The prosecutor's argument, while not as extreme as the rhetoric used by the *Belgarde* prosecutor, was nevertheless flagrant enough because it focused on the main issue of the trial, mental responsibility for the crime, and deliberately misstated the applicable legal standards for the lesser-included manslaughter offenses. No "limiting" or "curative" instruction would have been effective in trying to nullify the effect of this argument.

Courts have often discussed the lack of utility of such after the fact attempts by the court to "cure" the effect of argument or evidence via an instruction. In *Bruton v. United States*, 391 U.S. 135, 20 L.Ed.2d 476, 88 S. Ct. 1620 (1968), the United States Supreme Court considered the effect of limiting instructions when a co-defendant's statement implicating the defendant was admitted. The court, after discussing the general rule that juries are presumed to follow instructions, observed that

> . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

86 S. Ct. at 1 627. Earlier, Justice Jackson had observed in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 93 L.Ed.790, 69 S. Ct. 716, 723 (1949):

> The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.

Another court, in discussing the effect of a "corrective" instruction on prosecutorial misconduct during argument, pungently observed "'If you throw a skunk in the jury box, you can't instruct the jury not to smell it.'" *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962), quoted in *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979).

The prosecutor's sarcastic comments about manslaughter being the equivalent of an accidental death were the equivalent of a skunk thrown in the jury box. An instruction by the court, even assuming the court chose to give one, would not have alleviated the effect of this improper argument on the key issue of the case. This court should reverse the conviction under either standard of review.

III. CONCLUSION

A witness can be impeached with a prior inconsistent statement even if the witness professes not to have made the statement or not to have memory of it. The proposed impeachment of Dr. Ward by testimony from Maurice Classen was not collateral, as it cast doubt on the certainty of the doctor's testimony concerning his diagnosis of appellant's mental status at

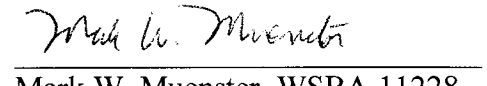
the time of the crime. It was constitutional error to restrict the cross examination of this vital state's witness.

Although Dr. Classen was not made to appear before his jury in shackles, the effect of testimony from three jail guards about his behavior while in custody for the 14 months preceding the trial was the equivalent of "shackle" evidence, which substantially erodes the presumption of innocence. The admission of this testimony was constitutional error requiring a new trial under the authority of *State v. Gonzalez, supra.* Even under the less stringent non- constitutional standard, it was error to admit this testimony, since its probative value was substantially outweighed by its prejudicial impact.

The error regarding the prosecutor's closing argument was preserved for appellate review by the motion for new trial, which allowed the trial judge an opportunity to take corrective action by ordering a new trial before an appeal. Even if this error was not deemed to be preserved by the motion for new trial, the misconduct was so flagrant that no corrective action by the trial court short of granting a new trial could "cure" it.

Dated this 14 day of May, 2007

LAW OFFICE OF MARK W. MUENSTER



Mark W. Muenster, WSBA 11228
Attorney for James Classen
1010 Esther Street
Vancouver, WA 98660
(360) 694-5085

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's reply brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 15th day of May 2007 with postage fully prepaid.

DATED this 15th day of May, 2007

John K. O'Brien

Mike Kinnie
Deputy Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666

James Classen
DOC #897116
PO Box 777
Monroe, WA 98272

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