

NO. 35543-4-II
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

State of Washington,
Respondent,
vs.
Martin Warren,
Appellant.

1991
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY SM
DEPUTY

APPELLANT'S ADDITIONAL GROUNDS

Martin Warren # 899907
Appellant, Pro-se
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA. 99362

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A. Assignment of Error

1. Did appellant suffered ineffective assistance of counsel?
 - A. Appellant's counsel was ineffective for failing to conduct a pretrial conference with defense key witnesses and/or appellant before trial.
 - B. Appellant's counsel, Mr. Longacre, was ineffective to appellant, Mr. Warren, by his failure to schedule a 3.5/3.6 hearing to suppress testimony and/or evidence before trial.
 - C. Appellant's counsel failed to object throughout the trial on witnesses testimony that were contrary to law or court rules.
 - D. Appellant's counsel provided ineffective assistance of counsel to appellant by his failure to convey the potential consequences of sentencing guidelines that could be imposed after a verdict of guilty.
2. Did Judicial Misconduct occur?
 - A. The court erred in not allowing appellant's counsel to introduce character evidence; limiting counsel's opening statement; denying good legal motions and not allowing to impeach Kathy Moore's testimony when it was clear that she had ulterior motives for testimony and lied on the stand.
3. Did the state committed Prosecutorial Misconduct?
 - A. Prosecutor's personal opinion statements during opening and closing arguments amount to prosecutorial misconduct.
 - B. Prosecutor's personal opinion statement were not supported by evidence on the record.
 - C. Prosecutor's evil and dishonest statements prejudiced jury's verdict and elements of the charge.

B. Statement of the Case

Martin Warren's defense counsel or the state never held a 3.5/3.6 hearing. They both mentioned it in the record. RP 27. There also was an insufficient attempt to suppress evidence or object during trial. Mr. Longacre fails to attempt to suppress restraining order from the evidence. RP 25. There was no stipulation hearing requested by Mr. Longacre to suppress statements made to officers. RP 389.

Mr. Longacre never objected to entering victims photos into evidence. RP 465. Mr. Longacre never objected to state entering several rounds of ammunition that had no barings on shooting. RP 661. Mr. Longacre excepts state's jury instructions with no objection. RP 1055 Mr. Longacre, again, agrees with state's jury instructions and even the Judge is shocked. RP 1172 Again as jury instructions are presented by state no argument from Mr. Longacre. RP 1175

The court erred in denying Mr. Longacres pretrial motions and limiting his opening statement. RP 14 The court erred in letting the state enter evidence that stated Mr. Warren was on bond for a serious felony when crime was committed on October 11, 2004, without Mr. Warren being on the list to testify and having not testified to said facts. RP 43, 389, 397, 398, 403, 1213

The Judge even tells jury Mr. Warren was on bond pending serious felony charges. RP 1213. Mr. Longacre objects to sta-

te's trying to enter testimony under excited utterance and the court faile to give a proper ruling on objection. RP 536. The court errored in ruling questions and answers fall under the excited utterance clause. RP 554 The court errored in overruling the objection by Mr. Longacre about excited utterances having truth to them. He states in his objection they can't be hearsay utterances or speculation. RP 550-52 The court errored in not letting Mr. Longacre ask Ivan Warren about his drug use. RP 676 The court errored in denying Mr. Longacre's movement to strike Kathy Moore's testimony on the grounds she lied on the stand and was under the influence of heavy methamphetamine use to the point of hallucinations. RP 1167-70

The record shows Kathy Moore was in no mental shape at the time of the incident to have a clear recollection of the events because she was so high on methamphetamines. In her own testimony she admits this facts several ways. Kathy Moore states her prolonged methamphetamine use has a profound effect on her, both mentally and physically. RP 764 Kathy Moore states she is using 1/4 gram of methamphetamines every three (3) hours every day. RP 765 She also says she injected the methamphetamines. RP 766

Kathy Moore said she would hallucinate if she din't sleep and even if she did she still heard voices that were not there. RP 769 Kathy Moore even says she was hallucinating at the time of incident in her testimony. She said she hallucinated

hearing and feeling Martin Warren's truck coming back after he left. RP 796 Kathy Moore also stated that her drug use made everything phase together and made her preception squed. RP 809 Kathy Moore also lied in her testimony, she said she entered the house to help Ivan Warren and Dortha Warren revive Russell Warren. RP 793 Several other witnesses testified this was not true. Officer that took Kathy Moore's statement said Kathy Moore never mentioned going back into house after shooting. RP 843. Ivan Warren testified that Kathy Moore never came into the house after shooting. RP 845 Officer that made the initial interview with Kathy Moore said she never mentioned going back into the house after the shooting in that interview. RP 853 Dortha Warren said Kathy Moore never came back into the house after shooting. RP 862 Dortha Warren also stated that Kathy Moore never helped with the dying father. RP 863 Kathy Moore also had ulterior motives to testify against Martin Warren, as the state would be reducing her charges in a plea deal that would keep her from going to prison. RP 799

The court errored in denying Mr. Longacre's argument against premeditation. RP 848 The court also errored in denying Mr. Longacre's to enter character evidence. Court would not allow defense to ask state's witness Ivan Warren about his drug use to establish character. RP 679 The court denied Mr. Longacre's argument to enter character evidence against state's claim of premeditation. RP 848

The court denied character evidence to be established by bringing the affair between state's witnesses, Ivan Warren appellant's brother and Kathy Moore, appellant's girlfriend into evidence. RP 849 Court denied character evidence when the defendant said he did not get angry about the affair, why would he get so made about borrowing a truck. The state objected to question and the court sustained the objection. RP 850 Court denied character evidence in the form of Dortha Warren testifying about family history and the appellant's Martin Warren's childhood. RP 870, 872, 874, 875

In opening and closing statements by the state, the state, several times, committed prosecutorial misconduct by arguing his personal opinion not supported by evidence in the record, in an evil and dishonest way that swayed the jury's verdict.

The state, also, used testimony barred by his own objection at closing arguments.

At trial, the court would not allow defense counsel to bring in testimony by Ivan Warren, pertaining to his affair with state's witness and appellant's girlfriend, Kathy Moore, by sustaining state's objection. RP 846 Which was later used by the state at closing arguments and created a picture painting appellant's mental state for the jury. RP 1183

The state told the jury that methamphetamines do not effect ones preceptions. RP 402

State told the jury that what's important about Russell

Warren was that he was alive when the sun came up and dead by Martin Warren's [appellant's] hands by the after noon. RP 1180

State makes false statement about appellant entering house in combat position. RP 1177, 1186. States gives personal opinion on what Martin Warren [appellant] was doing when he entered the old homestead house after shooting. He stated that Martin Warren was looking for Kathy Moore, to either take her with him or kill her. RP 1189

State gives personal opinion statements about his belief of Martin Warren's mother, Dortha Warren, knowing Martin was going to kill his father. RP 1194

The state tells the jury to decide Martin Warren's guilt on the fact you can not kill somebody unless its justified. RP 1248

C. Argument

1. Did appellant suffered ineffective assistance of counsel during pre-trial and trial?

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The assistance of counsel is deemed fundamental and essential to a fair trial of the accused as a matter of due process of law.

A criminal defendant's Sixth Amendment right to counsel attaches to a "critical stage" of the proceeding which takes

place after the formal initiation of criminal proceedings involving an actual confrontation between a representative of the state and the defendant. State v. Royer, 58 WN.App. 778, 794 P.2d 245 (1990); Kirby v. Illinois, 406 U.S. 682, 92 S.Ct 1877, 32 L.Ed.2d 411 (1972); United States v. Gouveia, 476 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984); United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973)

A. Was appellant's counsel ineffective by his failure to conduct a pretrial conference with defense key witnesses and/or appellant before trial?

Defense counsel should, at early stage, begin to gather information with which to attack the prosecution case through motions to suppress evidence, attacks upon the admissibility of any statements or confessions made by the defendant, and attacks upon the admissibility of any identification of the defendant . . . Defense counsel should be searching for a possible violation of the defendant's constitutional rights in everything that the police did or did not do. . . . procure witnesses, interview them . . . and obtain evidence necessary to make and present a defense. State v. Edwards, 68 Wn.2d 246, 412 P.2d 747 (1966) (other citations omitted)

In the present case, appellant's counsel **failed** to conduct a pretrial conference with appellant and defense key witnesses, to assist counsel in presenting a more effective defense on behalf of appellant.

Appellant was being accused of a very serious crime that required extensive preparation and communication with appellant and defense "key" witness.

B. Was appellant's counsel ineffective by his failure to schedule a 3.5/3.6 pretrial hearing to suppress evidence and testimony?

Once it has been determined that a constitutional violation may have occurred and a decision has been made to pursue exclusion of evidence, counsel should file motion to suppress as soon as practical. The motion can be to suppress evidence or to suppress testimony from the defendant or both. CrR 3.5, 3.6; State v. Valladares, 31 Wn.App. 63, 639 P.2d 813 (1982); State v. Duckett, 73 Wn.2d 692, 440 P.2d 340 (1990); State v. Williams, 91 Wn.App. 344, 955 P.2d 865 (1998) (other citations omitted)

In the present case, appellant's counsel **failed** to file and serve a motion to suppress appellant's testimony under CrR 3.5, after it was determined that said testimony was obtained in violation of appellant's Constitutional rights.

Likewise with a motion to suppress evidence, fruits of a poisoned tree.

C. Did appellant's counsel ineffective by his failure to object throughout the trial on witnesses testimony?

During trial, when testimony was presented by state's wit-

nesses, appellant's counsel **failed** to object although testimony's admissibility was contrary to court and evidence rules and to significant leading questions by the state. (citations omitted)

D. Did appellant's counsel ineffective by his failure to convey the potential consequences of sentencing guidelines that could be imposed after verdict?

From the start of the case, appellant's counsel did not reasonably interviewed witnesses; did not filed and served key pretrial motions; failed to reasonably contact the appellant in order to properly prepare a defense and therefore, was ill prepared for trial and failed to convay the possibility of a life sentence without the posibility of parole if convicted. And after trial, he apologized for the verdict and confesed he shouldn't have took the case because he **was not** prepared or qualified to argue a Murder In The First Degree.

When there is a crime with specific intent due to some mental process such as deliberation or premeditation under the exculpatory rule, methamphetamine intoxication and related effects of the drug , such as, sleep deprevation and toxic psychosis, it should be taken into account to show a particular state of mind unable to formulate premeditation.

However, appellant's counsel did not presented this arguments as defense at trial. Dufresne v. Morgan, 572 F.Supp. 334 (1983)

Appellant's counsel, never interviewed a single witnesses.

When courts have considered counsel to have a duty to "conduct an in-depth investigation of the case which includes an independent interviewing of witnesses." Ford, 638 F.2d at 1117.

Failure to interview potential witnesses, thus, often provides the basis for granting relief. Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir. 1976), 429 U.S. 868, 97 S.Ct. 178, 50 L. Ed.2d 148 (1976); McQueen v. Swenson, 498 F.2d 207, 216 (8th Cir. 1974)

And violates the 6th Amendment to the United States Constitution. Id

Appellant's counsel **failed** to have any pretrial investigation and held no pretrial conference with appellant to discuss appellant's defense in any way, shape or form. Counsel only visited appellant eight (8) times. At one time to ask few questions. At another with appellant's counsel and the last six (6) times, to ask for more money, therefore, we can conclude that appellant's counsel only met appellant for two (2) times to discuss the case and to prepare a defense.

Considering the seriousness of the case, it shall be crystal clear to this Honorable Court that appellant suffered ineffective assistance of counsel.

A criminal defendant is entitled to "reasonably competent assistance" from counsel at every stage of the proceedings, including but not limited to pretrial preparation and investigation. United States v. Garcia, 698 F.2d 31, 35 (1st Cir 1983);

Cepulonis, 699 F.2d at 575; United States v. Fusaro, 708 F.2d 17 at 26-27 (1st Cir. 1983)

Appellant believe a pretrial investigation is a major part of the structure of presenting a defense. Unfortunately, appellant's counsel **never** investigated anything in any of the officer's written reports and/or taped and written statements of the witnesses. In fact, he did not requested a copy of the state's professional [expert] witness, Sara Leisenring, MD, until he was cross-examining her at trial.

Appellant's counsel, Mr. Longacre, was, indeed, very ineffective and unprepared to conduct a Murder In The First Degree defense. An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense. David v. Alabama, 596 F.2d 1214, 1217 (5th Cir 1979); 466 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980)

Appellant's attorney, Mr. Longacre, failed to communicate to appellant the possibility of a life sentence if convicted. Mr. Longacre, would always mislead appellant and say to trust him. This being in direct violation of RPC 1.4

Appellant's counsel did not provided appellant with "reasonably competent advice." McMann v. Richardson, 397 U.S. 759, 770-771, 90 S.Ct. 1441, 1448-49, 25 L.Ed.2d 763 (1970)

After appellant's trial, his attorney, Mr. Longacre told him that he should not have took his case because he was not prepared or qualified to defend a First Degree Murder case.

This appellant's counsel comments to appellant after the trial, is further evidence of receiving ineffective assistance of counsel by the counsel's own admission, and therefore, it should be clear that appellant did not had adequate legal defense. Cardarella v. United States, 375 F.2d 222 (8th Cir. 1967); 351 F.2d 272 (8th Cir.)

D-1 Did the trial court erred in failing to impeach a state's witness after a motion was filed to impeach and the witness was proven to lie in her testimony?

The court erred in not impeaching state's witness Kathy Moore's testimony after an impeachment motion was filed supported by evidence in the record that the witness had lied in her testimony, saying that she rented the house to help with dying victim, and by doing so, limited defense's opening statement by denying good legal pre-trial motion and not allowing any character evidence to be entered in trial.

Further, this witness, Kathy Moore had ulterior motives to testify against appellant, Martin Warren, because of a plea bargain deal she had with the prosecution, in which her sentence and charges were to be reduced in exchange for her testimony, and therefore, making said testimony being "perjured" testimony and therefore, the trial court shall have suppressed. (citations omitted)

The trial court erred in denying good legal pretrial motion

filed to broaden the defense's opening statement. This had a very adverse effect on the foundation of defendant's defense.

The court erred in not allowing defense to enter character evidence by testimony. The defense was denied the asking of state's witness Ivan Warren about his drug use to establish his character about the affair between himself and another state's witness, to wit: appellant's [defendant's] girlfriend Kathy Moore.

The court erred in not letting character testimony evidence from appellant's mother, Dortha Warren, about family history, be entered into evidence, on a defense of diminished capacity.

In State v. Eakins, 73 Wn.App. 271, 869 P.2d 83 (1994), the court held that: "The defendant should be allowed to present evidence of his peaceful character to show that were it not for the defendant's mental condition caused by self induced intoxication, the defendant would not or could not form the requisite intent or premeditation to commit the charged crime."

An erroneous trial court ruling on the admission of character evidence warrants reversal of the judgement if the reviewing court determines that the outcome of the trial would have been different had the error not occurred.

A defendant in a criminal case is entitled to introduce reputation evidence of his character trait pertinent to rebut the nature of the charge against him. ER 404(a)(1); 405(a); State

v. Arine, 182 Wash. 697, 48 P.2d 249 (1935)

Character evidence is as much a part of the evidence as any other evidence. State v. Allen, 89 Wn.2d 651, 657, 574 P.2d 1182 (1978)

Character is a generalized description of a person's disposition or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness.

Federal Rule of Evidence 404(A) states that an accused may introduce "evidence of a pertinent trait of his character." The word "pertinent" is read as synonymous with relevant. United States v. Staggs, 553 F.2d 1073, 1075 (7th Cir. 1977); 22 Wright & Graham, Federal Practice and Procedure: Evidence § 5236 at 383 (1978)

3. Did the state committed Prosecutorial Misconduct?

Government misconduct or arbitrary action, required misconduct need not be evil, venal or dishonest; simple mismanagement is sufficient State v. Cochran, 51 Wn.App. 116, 751 P.2d 1194 (1988) (other citations omitted)

A. Prosecutor's personal opinion statements during opening and closing arguments amount to prosecutorial misconduct?

The prosecutor willfully engaged in misconduct by making malicious statements based on personal opinion with no factual base supported by evidence in the record and used testimony denied by the court because of his own objection to the defense

in defense's closing argument and told the jury that Mr. Warren was on bond pending serious felony charges.

The prosecutor, in closing arguments, told the jury that Martin Warren came into the house with a pistol in a combat stance. There is no evidence to support such claims and this implication of the premeditation and thought it took to take such a stance had a very likelihood to effect the jury in a way to use it as supporting evidence to weigh the possibility of premeditation.

The prosecutor also made claims the wounds on victim's hand were made in his attempt to defend himself. This also was personal opinion totally unfounded and devoid of evidence to support such a claim by the record. And the jury was never instructed to disregard any remark, statement or claim not supported by evidence. The effect these statements made on the jury were profound and significantly swayed the jury in their guilty verdict. United States v. McWaine, 243 F.3d 871 (5th Cir. 2001)

The trial court failed to respond to inflammatory comments of events and behavior stated by prosecutor to the jury to support his premeditation claim that had absolutely no evidence given to support such claims. His intent was to mislead the jury to conclude the element of premeditation existed. This is far below the ABA Prosecution Standards, std 3-5.8(a)

In making arguments in closing which diverted the jury from its duty to decide the case on evidence directed by the

jury instructions by stating: "What's important about Russell Warren was, he was alive when the sun came up and dead by Martin Warren's hands by the afternoon." This is far from all that's important in this case. The way prosecutor used this statement to lead the jury away from the elements and jury instructions went far below the ABA Prosecution Standards, std 3-5.8(d)

The prosecutor stated in closing that after the shooting Martin Warren went out to the old homestead house behind the main house to find Kathy Moore to either take her with him or kill her. This statement was devastating to the defendant and was used as a very malicious court room tactic to paint Mr. Warren as a plotting vengful killer. There was no evidence in the record to support the prosecutor's claim.

ABA Prosecution Standard 3-5.9, prohibits any argument in which the prosecution intentionally argues on the basis of fact outside record, and with no evidence this went far below this standard. The prosecutor is not allowed to strike foul blows against the defendant in closing arguments by stating matters of personal opinion or statements not supported by evidence in the record, stating Mr. Warren's intent to kill Kathy Moore was a foul blow of epic preportion. Ber v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935)

And is far below ABA Prosecutor's Standard std 3-5.8.

The prosecutor told the jury Mr. Warren was on bond pending serious felony charges without Mr. Warren being on the witness'

list or testifying to those [unproven] facts.

This prosecutor's actions greatly prejudiced the appellant in the eyes of the jury, and had a profound effect on the jury which lead to the conviction of mr. Warren.

The prosecutor in closing arguments stated that he thought state's witness and appellant's mother Dortha Warren, knew all along that appellant, Martin Warren, was going to kill his father. This statement was also directed to sway the jury to come to the conclusion of premeditation by an unsupported record and a crystal clear evil and dishonest and malicious court room tactic that any attorney knows was against court room rules.

The NDAA standards urge that the prosecutor's closing arguments to the jury be characterized by a reliance upon the evidence, by fairness, accuracy, and rationality. Std 85.1.

The NDAA Standards also support the order of argument set forth by rule 29.1 of the federal rules of criminal procedure, prosecutor defense, prosecution. std 85.1

The prosecutor also stated the wounds on the victims hands were caused by him raising them to defend himself. This again is personal opinion with no supporting evidence in the record. It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence of guilt of the defendant. ABA Prosecution Standards std 35.8(a),(b)

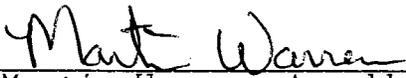
Several times in the prosecutor's closing arguments and in

trial he gives his opinion and beliefs outside the evidence provided by the record. This was malicious court room tactic that had a decisive impact on the jury and effected their verdict.

D. Conclusion

Based on the foregoing, appellant prays to this Honorable Court to reverse conviction on First Degree Premeditated Murder and remand for new trial, in the interest of justice and fairness, to glorify our precious United States Constitution.

DATED THIS 5th day of July, 2007.



Martin Warren, Appellant, pro-se

DECLARATION OF MAILING

IN ACCORDANCE WITH 28 USC § 1746, I declare under penalty of perjury, of the laws of the state of Washington, that on this date, I mailed the following documents:

- A. Appellant's Additional Grounds; and
- B. Declaration of mailing

directed to:

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DIVISION II
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STATE OF WASHINGTON
BY DM
DEPUTY

DATED THIS 5th day of July, 2007.

Martin Warren
Martin Warren