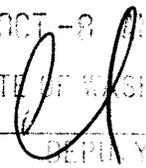


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STATE OF WASHINGTON

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NO. 37375-1-II
Clark County No. 06-1-01670-0

STATE OF WASHINGTON,

Respondent,

vs.

BERT LEE WIDMER

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

I. MR. WIDMER DID NOT RECEIVE A FAIR TRIAL, AND WAS DENIED DUE PROCESS, WHERE THE TRIAL COURT ALLOWED OUTSIDE FACTORS TO CORRUPT THE TRIAL.

II. MR. WIDMER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL WHEN HIS ATTORNEY FAILED TO OBJECT WHEN STATE'S WITNESSES REPEATEDLY REFERRED TO MS. ADAMS AS THE "VICTIM."

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. WAS MR. WIDMER DENIED A FAIR TRIAL WHERE WITNESSES FOR THE STATE REPEATEDLY REFERRED TO THE COMPLAINING WITNESS AS "VICTIM" AND WHERE THE COURT ALLOWED THE STATE TO EXPLOIT THE COMPLAINING WITNESS'S BLINDNESS IN FRONT OF THE JURY?

II. WAS MR. WIDMER DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL WHERE HIS ATTORNEY FAILED TO OBJECT WHEN STATE'S WITNESSES REPEATEDLY REFERRED TO MS. ADAMS AS THE "VICTIM?"

C. STATEMENT OF THE CASE

The State alleged that Bert Widmer committed Rape in the First Degree, Burglary in the First Degree, and Robbery in the First Degree in Clark County on June 11, 2003. CP 1-2. The allegation presented by the State was that Bert Widmer had followed Sharon Adams, a blind woman, home as she walked to her apartment after a church meeting at about seven in the evening. RP 172-175, 386-389. The State opined that Mr.

Widmer was standing behind Ms. Adams when she unlocked and opened the door to her apartment and that once the door was open, he forced his way in and grabbed her from behind. RP 388-389. Once inside, the State alleged, Mr. Widmer beat Ms. Adams about her face and torso, threatened to beat her more severely if she reached for the phone, and pushed her into her bedroom where he raped her vaginally and orally. RP 178-185, CITE. Prior to pushing her into the bedroom, the State alleged, Mr. Widmer took money from her purse. RP 180.

Ms. Adams' trial testimony was inconsistent. RP 165-231. She could not recall what she had done that day prior to going to her church meeting in the evening. RP 222. She stated that normally she would have done volunteer work in the afternoon and come home between three and four in the afternoon. RP 223. She was adamant, contrary to the position of the prosecutor, that her attacker was already inside her apartment when she unlocked her door and began to enter, and that he came at her from the front, not behind. RP 177-78. After her attacker threatened her and beat her, she testified she offered him her purse because she assumed he wanted money. RP 180. She was certain, initially, that she was the one who brought up the money. RP 181. However, she later changed her testimony and said that her attacker demanded money from her immediately after she came into the apartment. RP 226. She testified that

after he took some money from her purse he pushed her to the bedroom, continuing to beat her, where he instructed her to remove her pants and underwear and pushed her against the bed and forcibly raped her. RP 181-187. Ms. Adams testified that she told her attacker she enjoyed what was happening in an effort to get him to relax and prolong the event so that she could gather as much identifying information about him as possible. RP 187. She testified initially that no sexual touching, other than intercourse, occurred. RP 189. Later in her testimony she suddenly remembered that her attacker had also performed oral sex on her. RP 220. After intercourse, she testified he began to beat her again. RP 190.

After the beating ended, Ms. Adams testified she engaged her attacker in conversation in an effort to glean identifying information about him. RP 190. There was no sign of forced entry in Ms. Adams' apartment. RP 191-93. Ms. Adams called 911 after the intruder left and she subsequently underwent a sexual assault exam at the hospital. RP 191-95. On the floor of Ms. Adams' bedroom the police found a sundae cup from a McDonald's restaurant with a little bit of chocolate residue and melted ice cream in it. RP 65-67, 79, 222, 282. Mr. Widmer had been in a McDonald's restaurant approximately twenty-five minutes before Ms. Adams called the police. RP 297-98.

Approximately three years after this incident, detectives in Clark County discovered that the DNA collected from Ms. Adams had been matched to the DNA profile of Bert Widmer. RP 299-300. Clark County detectives Easter and Smith traveled to Reno, Nevada, to contact Mr. Widmer. RP 300. In questioning Mr. Widmer, Mr. Widmer told the detectives that he had been living in the Portland area during June of 2003, and frequently visited Clark County. RP 301. Mr. Widmer told the detectives he had met Ms. Adams on at least three occasions. RP 302. On the first contact, Mr. Widmer said they met at McDonald's and they spoke and shared a drink. RP 302. During the second encounter they again met at McDonald's and then went back to her apartment where they had intercourse. RP 303. On the third encounter, they again met at McDonald's and then returned to Ms. Adams' apartment. RP 303. Mr. Widmer told the detectives he did not use a condom during this encounter. RP 303. During this encounter, Mr. Widmer said that Ms. Adams accused him of stealing her wallet. RP 303. Mr. Widmer recalled that this encounter was in the afternoon, between approximately three and four, and lasted about an hour. RP 305-06.

During trial, the State called several officers to testify. Officer Skarpho was asked why he responded to Ms. Adams' apartment and he testified it was for a "rape call." RP 54. He testified that Ms. Adams was

“upset, very upset.” RP 55. Officer Letarte also responded to Ms. Adams’ apartment. RP 71. He also testified that he was dispatched to a “rape” call. RP 72. Regarding Ms. Adams’ demeanor, he testified she was “very calm.” RP 74. Letarte referred to Ms. Adams as the “victim” repeatedly in his testimony. RP 74, 80. Melissa Paul, the sexual assault nurse who testified, also referred to Ms. Adams as the “victim.” RP 117. The sexual assault exam revealed evidence of sexual activity, but no trauma. RP 122. Detective Smith referred to Ms. Adams as the “victim” several times as well. RP 271, 288. Detective Easter testified she was dispatched to “interview the victim of a rape that occurred at 2600 T Street in Vancouver, Washington.” RP 340. Easter again referred to Ms. Adams as the “victim” later in her testimony. RP 349.

Prior to Ms. Adams’ testimony, Defense Counsel requested that she take the witness stand before the jury entered the courtroom to avoid any undue sympathy toward her by the jury or undue prejudice to Mr. Widmer. RP 152. The court laughed in response, and denied the request saying it didn’t see anything wrong with having her come forward in front of the jury. RP 152. When Ms. Adams was called to the stand, the prosecutor first sought to “orient” her to her surroundings:

Ms. Adams, you have a little sort of a desk in front of you here. There’s a microphone. Move your right hand forward a little bit. There’s a microphone right there...If you move your right hand a

little bit further to the right there's a cup there. You'll feel it. Okay. That cup is full of water. And there's some tissues here by your left hand.

RP 166. The State relied heavily upon Ms. Adams' blindness in its closing argument to the jury, arguing that she was the "perfect victim" because of her blindness and that Mr. Widmer "targeted the victim through her disability." RP 387.

The jury returned verdicts of guilty to all three charges. CP 30-32. The court imposed a standard range sentence. CP 39. This timely appeal followed. CP 53.

D. ARGUMENT

I. MR. WIDMER WAS DENIED A FAIR TRIAL WHERE THE COURT ALLOWED THE STATE TO EXPLOIT THE COMPLAINING WITNESS'S BLINDNESS IN FRONT OF THE JURY.

"Due process requires that the accused receive a fair trial by an impartial jury free from outside influences." *Musladin v. Lamarque*, 427 F.3d 653, 656 (9th Cir. 2005); citing *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507 (1966). The trial court abused its discretion when it denied defense counsel's reasonable request to have Ms. Adams take the witness stand before the jury entered the courtroom. Defense counsel correctly feared the undue prejudice Mr. Widmer would suffer as a result of over-emphasis on Ms. Adams' blindness. This was particularly so

because the defense was consent, not incorrect identification, and the State relied heavily on Ms. Adams' blindness as Mr. Widmer's motive for committing the crimes.

In *Musladin v. Lamarque*, the Ninth Circuit Court of Appeals addressed the question of outside influences that would prejudice a defendant's right to a fair trial. *Musladin v. Lamarque*, 427 F.3d 653, 656 (9th Cir. 2005). In that case, the Ninth Circuit reversed the defendant's murder conviction because spectators in the courtroom wore buttons depicting the deceased individual. *Musladin* at 656, 658. The Ninth Circuit stated "The Supreme Court has held that when the consequences of a courtroom practice is that an 'unacceptable risk is presented of impermissible factors coming into play,' there is 'inherent prejudice' to a defendant's constitutional right to a fair trial and reversal is required." *Musladin* at 656, citing *Holbrook v. Flynn*, 475 U.S. 560, 570-71, 106 S.Ct. 1340 (1986). Once a defendant establishes that there was an unacceptable risk of impermissible factors coming into play, no further showing is necessary because prejudice is presumed. *Musladin* at 658-59. There is no requirement, for example, that a defendant establish that the impermissible factor "branded" the defendant with an unmistakable mark of guilt. *Musladin* at 659.

This is such a case. When defense counsel raised this issue, the trial court failed to even give it real consideration, much less conduct a balancing test about whether the danger of prejudice to Mr. Widmer outweighed the State's interest in having the jury see Ms. Adams helped to the witness stand. This was an abuse of discretion in that the trial court failed to exercise its discretion at all. An abuse of discretion may arise from the manner of the exercise of discretion or from the result of the exercise. *Ben-Neth v. The Indeterminate Sentence Review Board*, 49 Wn.App. 39, 42, 740 P.2d 855 (1987), citing *State ex rel. Brown v. Board of Dental Examiners*, 38 Wash. 325, 328, 80 P. 544 (1905). "The court held that gross abuse or in avoidance of its duty was not an abuse of discretion, but rather the failure to exercise any discretion at all." *Id.* Here, the court's action was the failure to exercise any discretion at all. "To find that a result is arbitrary and capricious the agency must have acted willfully and unreasonably, without consideration of and in disregard of the facts." *Ben-Neth* at 42, citing *In re Buffelen Lumber & Mfg. Co.*, 32 Wn.2d 205, 209, 201 P.2d 194 (1948).

Mr. Widmer is entitled to a new trial without impermissible outside factors coming into play, such as undue emphasis on Ms. Adams' blindness.

II. MR. WIDMER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL WHERE HIS ATTORNEY FAILED TO OBJECT WHEN STATE'S WITNESSES REPEATEDLY REFERRED TO MS. ADAMS AS THE "VICTIM."

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) the defense attorney's representation fell below an objective standard of reasonableness, and (2) the attorney's deficient performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Generally this court does not consider issues raised for the first time on appeal but may if the error affects a constitutional right. RAP 2.5 (a). Here, Mr. Widmer raises this issue both as a reviewable constitutional infringement of his right to a jury trial as well as ineffective assistance of counsel. It is well established under settled Washington law that no

witness, lay or expert, may comment on the guilt or innocence of the defendant. Moreover, it is well established that it invades the province of the jury for a witness to express an opinion as to whether another witness is telling the truth and it is improper for the State to elicit such testimony. *State v. Jerrels*, 83 Wn.App. 503, 507, 925 P.2d 209 (1996); *State v. Carlson*, 80 Wn.App. 116, 906 P.2d 999 (1995); *State v. Castaneda-Perez*, 61 Wn.App. 354, 360, 810 P.2d 74 (1991). Such testimony is also argumentative, unfair, and misleading. *State v. Walden*, 69 Wn.App. 183, 186-87, 847 P.2d 956 (1993); *Castaneda-Perez* at 362-63.

In *State v. Kirkman* 126 Wn.App. 97, 107 P.3d 133 (2005), reversed on other grounds at *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), this court held that because an improper opinion violates a constitutional right it may be raised for the first time on appeal. See also *State v. Saunders*, 120 Wn.App. 800, 813, 86 P.3d 232 (2004). Improper opinion testimony violates a defendant's right to a jury trial and invades the fact-finding province of the jury. *Kirkman* at 106, citing *State v. Dolan*, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003).

Here, the witnesses for the State repeatedly referred to Ms. Adams as "the victim." Had the issue in this case been one of identity, that characterization, while still flatly improper, would have been far less prejudicial. Here, the defense was consent. Had Ms. Adams consented to

sexual intercourse, there would have been no victim. By referring to Ms. Adams as “the victim,” the State’s witnesses conveyed their opinion that Ms. Adams was telling the truth and Mr. Widmer was lying. Further, Washington courts as well as federal courts have long recognized the inherent danger in admitting opinion testimony of law enforcement officers. *State v. Carlin*, 40 Wn.App. 698, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder), *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) (statements of law enforcement officers often carry “an aura of special reliability and trustworthiness”) quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987).

The repeated characterization of Ms. Adams as “the victim” was an impermissible opinion that invaded the province of the jury. There can be no legitimate trial strategy in allowing this to occur, particularly where the defense was consent. Such error is not harmless beyond a reasonable doubt because Ms. Adams’ credibility was the central issue in the case and the evidence was not overwhelming. First, there was no evidence of a break-in and no evidence or witnesses to support the State’s theory that Mr. Widmer was behind Ms. Adams as she entered her apartment. Second, Ms. Adams’ testimony, by the State’s admission, was riddled with inconsistencies. Third, the sundae cup found on the bedroom floor

strongly suggests Mr. Widmer was there with Ms. Adams' consent. Ms. Adams' testimony was that Mr. Widmer beat her and stole money from her wallet during the beating. Is it reasonable to believe he did that with a sundae cup in his hand? If the State's theory is correct, Mr. Widmer would have come up behind Ms. Adams, grabbed her, beat her, and robbed her all while holding a sundae cup which he dropped on the bedroom floor. Fourth, there was conflicting evidence about Ms. Adams' demeanor. Officer Skarpho testified that Ms. Adams was very upset, while Officer Letarte said she was calm. Last, a reasonable juror could have found that Ms. Adams behavior was inconsistent with having been violently raped. Her testimony that she tried to prolong the rape and make Mr. Widmer believe she enjoyed it, and then engaged in small talk afterwards could be considered unusual.

Mr. Widmer was denied a fair trial and effective assistance of counsel and should be granted a new trial.

E. CONCLUSION

Mr. Widmer's convictions should be reversed and his case remanded for a new trial.

RESPECTFULLY SUBMITTED this 4th day of October, 2008.


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