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A. Assignments of Error

Assignment of Errors

1. The trial court erred in ordering sanctions for contempt against the defendant's counsel, Darquise Cloutier.

In making this assignment of error, exception is taken to Findings of Fact Number 7. CP 59.

Issues Pertaining to Assignments of Error

1. Did the trial court, in issuing sanctions for contempt, exercise its discretion in a manifestly unreasonable manner?
2. Did the trial court, in issuing sanctions, base its decision to order sanctions for contempt on untenable grounds or reasons?

B. Statement of the Case

The defendant was charged with Residential Burglary and Theft in the Third Degree. CP 1. The charges were based on the allegations that he had entered a mobile home in a trailer park to steal a water heater. CP 63, RP 2-3.

At trial, the State moved in limine to exclude any evidence that Timothy Grace gave permission to the defendant to enter the mobile home in order to take the water heater. Timothy Grace was the maintenance man at the trailer park. Shortly after the incident, he was found dead in a nearby trailer. The defense wanted to use the statement of permission to

show the defendant's state of mind. The State argued that the statement was being used to prove the truth of the matter being asserted and that no hearsay exception applied. In addition, the witness was unavailable to confront because he was found dead shortly after the incident. CP 63, RP 3-10.

Following this argument, the court issued the following ruling:

Judge: I see. Okay. When I – when I looked at this issue I was thinking what kind of a cautionary instruction can I give. Does it really go to the heart of the matter? And I couldn't think of a cautionary instruction because it goes to the heart of the matter. Umm – and so there we are with regard to Mr. Grace. I'm going to grant the – ahh – State's motion because it is hearsay. It does go to the heart of the matter. It's not a dying declaration. It's just like bringing somebody else in and saying they did it. It's the same issue only in this case – you know – it happens to be someone who's deceased. But it's – you know – the same issue. You can't go ahead and say well no I – it wasn't me. It was somebody else. Especially when we don't have any – umm – any person to deal with.

CP 63, RP 10-11.

Later, the Court extended this ruling to other witnesses, which the defense intended to call. These witnesses had overheard Grace making the statement to the defendant. CP 63, RP 21-23.

In her opening statement, defense counsel laid out the following as evidence that would be introduced and to which the State objected:

They didn't get very far because a neighbor apparently called the police and – ahh – the police stopped the vehicle – there are four people in this pickup truck – ahh – the water heater was in the back with my client's bicycle and his friend's bicycle. Umm – my client tried to explain that he had permission to take the water heater. The police officers aren't able to verify that information. Umm – unfortunately – ahh – that information was never able to be verified. Mr. – Mr. Tim Grace who was the maintenance man there – ahh – was found dead the next day – totally unrelated – totally unrelated to the – the alleged burglary or theft here. However the reason we're here today is because –

AH: Objection.

Judge: Sustained.

DC: - in any event we're here today – ahh- the trial of Mr. Vinsonhaler who's charged with Residential Burglary – umm – you'll hear that he entered and he has not denied that he entered this uninhabitable, condemned trailer.

CP 63, RP 75-76.

On the second day of trial, the State renewed her motion to exclude the statement made by Grace in the context of the co-defendant, who had already entered a guilty plea. Following that motion, the court made the following ruling:

So under both ER 403 as well as the hearsay rules, any mention of any

permission or any mention of – of – ahh – Timothy Grace, Decedent (ph), is improper.

DC: Well Your Honor, we would ask the court to reconsider that -

Judge: I've reconsidered it and there's no further argument. No more discussion.

DC: - well we have some room to – umm –

Judge: Then you better go talk to him.

DC: - that the – your understanding about the – but just to clarify Mr. Vinsonhaler can't indicate that he had permission to go into the –

Judge: He cannot.

DC: - his understanding was that he had permission – well how is he gonna explain to the jury that he – why he went in?

Judge: If Mr. –

DC: He can't make up a story – he has to tell the truth.

Judge: - it is improper under the Rules of Evidence and Criminal Procedure for the defendant to get up and say somebody else did it. The State has the burden of proof with regard to this defendant. Umm – nor can he say that – you know – some fictitious person out there said he had permission and what – Timothy Grace amounts to at this point is a fictitious person out there that gave him permission to go in the window at two in the morning. And so that's my ruling.

DC: Can I make an Offer of Proof?

Judge: No. We're done. That's it. It's over. I've made my ruling.

AH: And Your Honor –

Judge: The issue is that Timothy Grace isn't here for the State to cross examine.

DC: But Your Honor, the State shouldn't be able to take advantage of that.

Judge: Well Mr. –

DC: I mean nobody –

Judge: - it's not –

DC: - is here –

Judge: - it's not a viable defense.

DC: Well see it's not – if I can reiterate – it's not hearsay because – it doesn't matter what Mr. Grace said was truthful or not but it's more my client's State of mind – what he believed – that's why it's not hearsay.

Judge: I know that's – I know that's your argument, but I'm finding clearly is hearsay and clearly not allowed under several sections in *Teglund* and the court rules.

CP 63, RP 213-215.

Prior to the defendant testifying, the court had the following colloquy with counsel about the parameters of her ruling regarding evidence involving Grace:

DC: Well my client can testify that he knew a Tim Grace. But not that Tim Grace gave him permission.

Judge: Right. But -

DC: That Grace was a maintenance man.

Judge: - what's the purpose of that?

DC: Just at the scene, basically.

Judge: But he wasn't there that night.

DC: Well he may have been – we – he was probably deceased in the trailer –

Judge: Probably was. So he talked to Mr. Lee about who Tim Grace was and – and if you don't go any further than – than that, then I don't have a problem with it.

DC: Okay.

Judge: Do you?

AH: I didn't – I – I do have a problem with it, Your Honor, because I don't know how it's relevant since Tim didn't have authority to give permission to do anything there according to Harold Lee. My concern is also that the line of questioning from defense counsel to Defendant is going to be did you believe you had permission to enter the trailer. Yes. Who did you believe you had permission from? I'm not allowed to say because of the court's ruling. And that –

Judge: The court's ruling is that he thought – he's allowed to say he thought he had permission.

AH: - okay so –

DC: Right. I understand that.

AH: - so –

Judge: Okay?

DC: Um-hum.

AH: - so the defense counsel may not ask him did you think you had permission to go into the trailer? Is that correct?

Judge: Correct.

DC: That's my understanding.

During its cross-examination of the defendant, the State made a tactical decision to waive the benefit of the court's ruling as follows:

Q: And your statement now today is that you told the officer when you were arrested that somebody named Tim gave you permission to take the water heater – is that right?

A: Yes. The – the man – that was acting maintenance – that was in the second trailer on the left.

Q: Okay. And did you tell the officer where

Tim lived?

A: Yes. They even sent someone down there.

Q: And when you showed up at the trailer park at about one in the morning, you said you went knocking on Tim, the maintenance man's door?

A: It wasn't at one in the morning. It was much earlier than that.

Q: What time?

A: Oh she got there about ten thirty – eleven o'clock like she said. And – umm – it was about eleven thirty.

Q: At night?

A: Yeah. Eleven thirty – eleven forty-five.

Q: Ah-hah. Did you hear anybody inside Tim's place?

A: No.

Q: Did you see any movement inside Tim's place?

A: No.
Q: Did you walk around his trailer?
A: No. I knocked on the door twice –
Q: Ah-hah.
A: - and we also called.

CP 63, RP 354-355; 364-365

In her closing, defense counsel made the following argument:

Umm – the problem is that you might say a lot of trial attorneys can look like this – this is called the Courtroom Handbook on Washington Evidence. So this basically tells us lawyers what kind of testimony – what kind of evidence we can bring in before the jury and what kind is not admitted. Quite a bit is not admitted. So you're probably still kind of puzzled about what actually went on May 12th 2008 and I don't blame you because there is some stuff that the Rules of Evidence prohibited us from discussing about.

You probably heard – you heard the hearsay rule. Hearsay is essentially statements made by somebody else that the witness wants to talk about. That's always an issue at trial. There's also certain rules that apply to people who are dead at the time of the trial. And in some cases we just can't talk about them. And when you have a case where the most important witness is dead –

AH: Objection Your Honor.

Judge: Sustained. The jury will disregard.

DC: Okay. When one of the possible witnesses is dead – a defense case can be very constrained. So I think that would

explain probably some of the puzzlement
you pro – you probably all are facing right
now and I – I can definitely – umm –
sympathize with that.

CP 63, RP 400-401.

Jury instruction number one instructed, among other things, that the “attorneys’ remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.” CP 63, RP 380-381. It also instructed the jury that “the only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence.” RP 379. In addition, the jury was instructed that “in determining whether any proposition has been proved you should consider all of the evidence introduced by all parties bearing on the questions. Every party is entitled to the benefit of the evidence, whether produced by that party or by another party.” CP 63, RP 380.

The jury later informed the court that they were unable to reach an agreement on the charges. CP 63, RP 419. Prior to bringing the jury to the courtroom to discuss the deadlock, the court addressed both counsel. During these proceedings, the State indicated that it would bring a motion for sanctions against defense counsel. CP 63, RP 421-422. Upon bringing

the jury into the courtroom, the trial court asked if there was any reasonable probability that the jury could reach an agreement on either count. The jury said no to that inquiry without giving any other additional information. CP 63, RP 422-423. The court declared a mistrial. CP 63, RP 424.

The State filed a motion for sanctions on April 17, 2009. CP 3. At no time during the trial did the court warn defense counsel that either her words or behavior were potentially contemptuous or bordering on potential sanctions. The matter was heard on May 1, 2009 and Findings of Fact and Conclusions of Law on Contempt Sanctions were entered on May 7, 2009. CP 58-62. The court ordered a sanction of \$500. The financial obligation could be cured by attending one CLE in Evidence and one CLE in Trial Practice within one year of the ruling. CP 61-62.

C. Argument

The authority to impose sanctions for contempt is based on the inherent power of a constitutional court and RCW 7.21.050. *State v. Berty*, 136 Wn. App. 74, 84, 147 P.3d 1004 (2007). The court may not exercise its inherent contempt power unless the statutory contempt procedures and remedies are specifically found to be inadequate. *In the Matter of the Dependency of A.K.*, 162 Wn.2d 632, 647, 174 P.3d 11

(2007). In this case, the trial court made a specific conclusion of law that the summary contempt statute (RCW 7.21.050) was inadequate and that it was proceeding under its inherent authority. CP 61.

In *Berty*, the trial court made a similar finding but the appellate court found that its actions were actually authorized by the summary contempt statute. *Berty*, supra, at 136 Wn. App. 85. The actions of the trial court in this case also fall within the purview of the summary contempt statute.

RCW 7.21.050 provides as follows:

(1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

(2) A court, after a finding of contempt of court in a proceeding under subsection (1) of

this section may impose for each separate contempt of court a punitive sanction of a fine of not more than five hundred dollars or imprisonment in the county jail for not more than thirty days, or both, or a remedial sanction set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial sanction under this subsection may not exceed more than five hundred dollars for each day the contempt continues.

A finding of contempt is a discretionary ruling that will be overturned if the court abused its discretion in reaching its decision. An abuse of discretion occurs if it is exercised in a “manifestly unreasonable manner” or if the court bases its decision on “untenable grounds or reasons.” *Berty*, supra, at 136 Wn. App. 83-84.

The trial court made findings of fact that it granted the State’s motion in limine as to out of court statements of permission given to the defendant by Tim Grace and that defense counsel repeatedly violated that ruling. It then concluded as a matter of law that defense counsel repeatedly violated this order and that defense counsel “words and behavior were disrespectful of the Court’s authority and were an affront to its dignity.” CP 61.

The trial court does not specifically cite to any specific factual instances where violations of the ruling occurred. One can only speculate as to those instances. The failure to cite to specific factual instances in the

exercise of imposing contempt sanctions is manifestly unreasonable. In *Berty*, the trial court cited two specific instances where defense counsel disobeyed the court's ruling. The appellate court was able to refer to those factual instances as "clear examples of Grissom violating the trial court's order . . ." *Berty*, supra, at 86.

The court's authority to impose sanctions is a question of law that is reviewed de novo. *In the Matter of the Dependency of A.K.*, supra, at 162 *Wn.2d* 644. In this case, the record appears devoid of defense counsel violating the order. Rather, it demonstrates that defense counsel was careful to inquire into the parameters of the ruling, since the court had been unclear about it. For instance, the court stated that defense counsel could inquire of the defendant that he thought he had permission to enter the trailer to obtain the water heater. CP 63, RP 319-320. In addition, the State waived the benefit of the ruling, when it opened the door and brought the statement of permission into evidence during its cross-examination of the defendant.

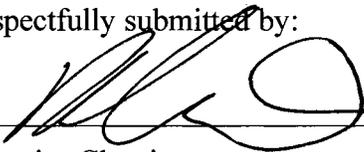
The trial court also concluded as a matter of law that defense counsel's argument, as stated in Findings of Fact 8, was improper and was willful and intentional and that it affected the outcome of the trial. CP 59-61.

This conclusion of law is based on untenable grounds or reasons. There is no factual evidence whatsoever that the argument of counsel affected the jurors' inability to reach an agreement on the charges. A jury is presumed to follow instructions. *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). The jury was instructed to "disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." CP 63, RP 380-381. No facts were presented to the court to overcome this presumption. In addition, the jury had before it the evidence that the defendant believed that Tim Grace had given him permission to enter the mobile home and to take the water heater. This evidence was placed before them by the State and could properly be considered by them to aid in reaching its decision. The jury was aware of the statement of permission to which defense counsel was alluding in her argument.

D. Conclusion

Based on the foregoing, the appellant respectfully requests that this court find that the trial court abused its discretion in finding and ordering contempt sanctions and vacate the contempt order and dismiss the sanctions imposed.

Respectfully submitted by:



Darquise Cloutier, pro se

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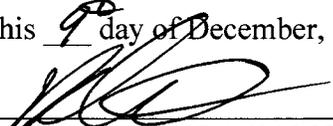
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CERTIFICATE

I certify that I mailed, by U.S. postal service, a copy of the foregoing Petitioner's Brief to the following, on December 9, 2009.

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Dated this 9 day of December, 2009



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