

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

State of Washington)
 Respondent)
 Vs.)
 Jack Vess)
 Appellant)

No. 39538-0-II

Statement of Additional
Grounds

FILED
 COURT OF APPEALS
 DIVISION II
 10 APR 12 PM 2:25
 STATION WASHINGTON
 BY *[Signature]*
 DEPUTY

Complete denial of Jack Vess's absolute United States
 enumerated rights accorded to him under Ammendments 1,5,and 6.
 The right to a fair trial by an impartial/unbiased jury. The
 right to confront his accusers. The right to compulsory process
 to a complete defense, through loyal and competent counsel.
 The right to be present in all stages of his trial process accorded
 to Jakc Vess through his United States Constitutional Enumerated
 Rights.

ARGUEMENT #1

The failure of law enforcement officers to properly administer
 the miranda rights deprived Mr. Vess of his fifth and fourteenth
 ammendment rights under the U.S. Constitution. Both the federal
 and state constitutions guarantee a criminal defendant the right
 to not incriminate himself/herself during questioning. As in

this case per Detective harper's tetsimony in 3.5 hearing.

Pg. 26 Ln. 19-25 Mr. Vess felt that he was undergoing a custodial interrogation as there were multiple officers there with him as per information on Pg. 19 of 3.5 hearing Ln. 7-11 and affirmed on Pg. 27 Ln. 4-6 of 3.5 hearing. Miranda was not read as detective Harper describes in the 3.5 hearing, but was done by deputy Swanson at time of physical arrest. Miranda is affirmed in U.S. Vs. Brown, Lake Vs. NY, McCarthy Vs. herdman as per U.S. Constitutional Ammendments 5 & 6, as well as in Criminal Law 412.2(3). Any questioning by the Clark County Sherrif's Department without prior miranda warnings, that they know will illicit a self incriminating response from the suspect as per Criminal Law 421.1(4). This information is prejudicial and was arroneously used in court against Mr. Vess, which resulted in his constitutional right being violated. 86S.Ct.384, 86S.Ct.478

To summarize we hold that when an individual is in custody or otherwise depriced of his freedom in any signigicant way by authorities, and is subjected to questioning without first being properly informed of his Miranda Rights his right against self incrimination is jeopardized. Procedural safeguards must be employed to protect the right, and unless other fully effected means are adopted to notify the person of his right of silence and to assure that the excercise of that right will be scrupulously honored. The following measures are required. The state has the burden of proof, to show that the defendant knowingly, intentionally and voluntarily waived a constitutional right. This was not done. The statement that detective Harper made prejudices the court and jury, and is a violation of constitutional magnitude. The police/detective interview was not recorded which creates a

further bias due to the detectives statements over Mr. Vess's which is also a violation of defendant's rights.

Detective Harper's testimony in 3.5 hearing does not coincide with his testimony given in examination. Pg. 569 Ln. 7-11 & Pg. 22 Ln. 7-25 both of these demonstrate the inconsistency of his testimony in regards to when Miranda was issued. This is clearly perjury under the color of the law. Pg. 572 Ln. 5-7 Miranda testimony changed for the third time. There were also instances of inconsistent testimony in the 3.5 hearing, as well as examination in regards to if deputy Swanson was present or not during interview. Pg. 19 Ln. 7-12 of 3.5 hearing & Pg. 569 Ln. 3-8 Detective Harper states that deputy Swanson was present during interview. Pg. 633 Ln. 14 Detective Harper's statement on Pg. 632-633 Kbn, 4-10 indicates that Mr. Vess was not free to move about his own home and was in fact in a custodial environment.

Detective Harper states that deputy Tim Gosch had numerous run ins with Mr. Vess through routine patrols, insinuating that they were of a negative nature. This is a prejudicial statement, because it gives the jury the impression that Mr. Vess has a habit of breaking the law. This also suggests that Mr. Vess has a prior history of being in trouble with the law. Pg. 631 Ln. 23-25

ARGUMENT 2

Violation of the 5 and 6 amendments of the U.S. Constitution to boast a witness/law enforcement officer's certificate of training creates undue bias toward the jury. CR 6.5. Jurors must remain impartial, however that is not likely to happen with statements of Detective Harper's training. This is a clear violation of

Mr. Vess's fair trial rights.

Detective Harper's testimony that 2 custodial officers were present in the court room, Pg. 568 Ln. 6 creates an undue prejudice, and compromises the jury by exposing them to this statement and should have been inadmissible, it was also highly inflammatory. This statement does not allow the jury to remain impartial. This is a 6 ammendment right violation.

Argument 3

While juries ordinarily are presumed to follow courts instructions, in some circumstances risk that jury will no, or cannot, foolow these instructions is so great, and the consequences of failure so vital to defendant that practical and human limitations of jury system cannot be ignored. **Criminal Law 1144.15**

The prosecutor made sure the jury (and judge 3.5) repeatedly heard erroneous references by both the prosecutor and law enforcement witnesses through out the entire trial. Once again this subjects Mr. Vess to undue prejudice.

The 6 ammendment guarantee of an impartial jury and constitutional right of a fair trial. Defendants sixth ammendment right is violated even if one juror was unduly biase or improperly influences.

USCA Constitutional Ammendment 6

Violation of sixth ammendment right due to muror #2 Mr. Woblasa who on the fourth day of trial excused himself from duty which shows prejudice from other jorors, we have no idea what may have been said or done around or to other jury members. Pg. 340 Ln. 4-6 Defense counsel objected to this, and asked for a mistrial, Pg. 340 Ln. 15. The court denied the motion for mistrial three times and allowed Mr. Barr to sit in as an alternate juror.

This creates an impartial jury due to mysterious loss of a juror in the middle of the trial and in turn is a violation of constitutional magnitude, under USCA Constitutional ammendment 6, and Cr. 6.5.

ARGUMENT 4

Mistrials as we have shown in this case must lead to acquital, **Wade Vs. Hunter Supra., State Vs. Connors.** There was prosecutorial misconduct according to the pretrial agreement not to bring in Mr. Vess's criminal history. This was violated when the prosecutor pursued a line of questioning that was designed for the sole purpose to illicit testimony from two different witnesses concerning Mr. Vess's criminal background.

The testimony of Mike Raymond was objected to twice by defense counsel and was overruled by the judge with the understanding that if it happened again the judge would be left no choice but to grant a mistrial. Pg. 103-105 Ln. 14-7 Cr. 6.5

Again Clackamas County police video, (also under the pretrial agreement), the alledged victim DDV states, "He's done it before", Pg. 246 Ln. 20. This statement is highly prejudicial and was not to be brought up as per the pretrial agreement, yet the jury was flagrantly exposed to this prejudice. pg. 32 Ln. 14-20, there was never a rape conviction. This error is not only due to the prosecutor but also the court and the defense counsel, for allowing this travesty to take place. Pg. 231 Ln. 1-11

This shows prosecutorial misconduct by asking a witness questions that she knew would illicit prejudicial answers based on opinion and not fact. I.E , "Do you think that prior sexual abuse and violence in your home effected your reaction?" Obviously this was a tactic used by the prosecutor maliciously, it was objected to by defense counsel, pg. 231 Ln. 15. Defense identifies this

this issue and the fact that the jury heard it, shows that a violation of fair trial by an impartial jury is impossible, Pg. 236 Ln.4. Ms. Banfield denies this reference and the court allowed it and made no corrective measures, Pg. 237 Ln. 1-9. This is on the jury's mind during this entire recess and allows the comment to sink in, which means that no amount of corrective instruction given could correct the problem. Thus prejudicing Mr. Vess and the jury's impartial stand point. Conviction must be overturned.

ARGUMENT 5

At the beginning of the trial the prosecution added additional ammendments to the sentencing, Pg. 4 Ln. 9. The defense counsel abjected to the timing of this ammendment as it did not allow time to change defense strategy. On, Pg. 6 Ln. 7, the prosecutor feels there is no prejudice, which shows her opinion and not fact. Pg. 6 Ln. 13 defense counsel expalins that the trial was taken on good faith and that the prosecutor was going against this with the poor timing of the sentencing ammendment. Pg. 7 Ln. 1-13 court denies prejudice and continues with trial. Again the fifth and sixth ammendment rights were violated, along with WA constitution Ammendment 3,9,& 22. A prosecutor must use "Good Faith" juring trial according to the standards of the A.B.A. Standards for Criminal Justice on fair trial and free press 3d. A prosecutor should not make or authorize the making of any extreme prejudicial statement, that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial liklihood of prejudicing a defendant.

Ms. Banfield grossly violated these standards in multiple areas of this trial. Violation of ABA standards rules 2,3,& 9.

during recess and off the record. Detective Harper advised Ms. Banfield, "don't worry it won't be brought up!". This falls under the error not raised at trial rule. Court of appeal would review for plain error issues defendant raised on appeal but failed to raise at trial. To secure reversal defendant must prove that 1) There was error. 2) The error was plain. 3) The error affected substantial rights under the plain error standard. A conviction can be reversed only if viewed in the context of the entire trial and affected the fairness of the trial and judicial proceedings, or where failing to reverse a conviction would result in a huge miscarriage of justice.

ARGUMENT 7

Standard of review U.S. Vs. Geston, defendant does not object to misconduct U.S. Vs. Blueford. Witness character and conduct of witnesses Cr. 613, Mike Raymond was a hostile witness from the very beginning due to previous conflicts. Mr. Raymond claims to talk with DDV at 0130 and says she left Mr. Vess's house 30 minutes prior and was in Gladstone OR at 0130, which was over fifty miles away if a direct path was taken and well over sixty five if traveling on I-5 to downtown Portland to Highway 99 as DDV claims. Pg. 96 Ln. 9-25

The prosecutor avoided this information which would clear the possibility of any assault happening. This violates the fifth amendment right to a fair trial, this also shows prior inconsistent statements which are admissible for impeachment under rules 801 and 802.

ARGUMENT 8

The prosecutor's comments violated the fundamental restraints against prosecutorial excess, and were inappropriate and inflammatory. The damage was so substantial that it could not have been corrected even if the judge had not neglected to administer curative instructions. The court and jury heard several inappropriate statements, as well as the prosecutor's statement that, "You must hold Mr. Vess accountable for his actions!" Personal opinion made by the prosecutor during closing argument is forbidden. The prosecutor cannot give his/her personal opinion of guilt or innocence of the defendant. The statements made by the prosecutor are highly improper and prejudicial. In order for the defendant to prevail on the claim of prosecutorial misconduct during closing arguments the defendant must demonstrate 1) That the prosecutor's remark was improper. 2) That the remark taken in the context of the entire trial, resulted in extreme substantial prejudice. **U.S. Vs. Udechukwu.** "Prosecutorial misconduct" closing argument, conviction reversed new trial **U.S. Vs. Baker**

Pg. 684 Ln. 21-24 This statement was not fact and not proven.

Pg. 686 Ln. 10-20 Was not proven that the message was sent by Mr. Vess. **Pg. 686 Ln. 21** Directly claims these were once again sent by Mr. Vess, but was not supported by evidence.

Pg. 688 Ln. 24 Shows a text from Matt Bateman in regards to seeing DDV's "Big Boobs". **Pg. 692 Ln. 24** "We Know something is going on up there." This is prosecution opinion, not fact. There are more instances of the prosecutor's opinion in **Pg. 697 Ln., 10-13** and in **Pg. 702 Ln. 6-11** where the prosecutor states, "We raised the issue that maybe there was a prior sexual assault in her past." With this statement and the fact that we were reuniting

our relationship shows the jury thgat this prior assault was by me, and this is why we were estranged. This statement puts question in the jury's eyes as to my past history which shows biased judgement.

Pg. 705 Ln. 9-11 The prosecutor explains to the jury that DDV was vaginally penetrated. this is a very biased opinion and is not fact. This was not proven in trial or supported by the evidence. **Pg. 705 Ln. 9-11** The prosecutor used speculation and opinion not fact that DDV was raped by Mr. Vess without physical evidence to support this statement. **Pg. 708 Ln. 1-15** Prosecutor again puts the burden of proof on Mr. Vess this si severe prosecutorial misconduct. **Pg. 708 Ln. 16-17** Prosecutor claims that there is blood in DDV's pants and that it was Mr. Vess's doing and not of natural causes. Prosecutor claims DDV was assaulted analy but there is no physical evidence to confirm this.

Pg. 70 Ms. Banfield claims that I said I had no hlep getting upstairs. This is contradicted by DDV **Pg. 189 Ln. 10-11**. No Mr. Vess did not need or utilize Ms. Vess's help. **Pg. 709 Ln. 6-8** Statement is extremely prejudicial for prosecutor to make such a statement for a man that has not been found guilty and evidence not presented to support such claims.

Pg. 710 Ln. 8 Prosecutor makes statement, "This is going to be fun." This is not only prosecutor opinion but it also sounds like a game to her. **Pg. 712 Ln. 17** prosecutor calls Mr. Vess's statements contradictory this is also opinion. A person that is medicated and under the influence of alcohol being rudely awoken from a deep sleep, may not know what they do for the first few seconds or even minutes. **Pg. 713 Ln. 9-11** Prosecutor continues to throw trash statements at Mr. Vess and prejudice the jury.

Pg. 717 Ln. 23-25 Prosecutor uses her opinion and places words in Mr. Vess's mouth. "We've got to figure out what's going on here, who she's talked to, and who she's told." This was never admitted into evidence because it was never said. Prosecutorial misconduct continues. this is swaying the jury's opinion with these types of statements.

Pg. 719 Ln. 9-12 Prosecutor identifies Mr. Vess as "Very defiant" this is a derogatory, as well as unproven. Statements not proven with evidence. Pg. 719 Ln. 17 Mr. Vess is identified by the prosecutor as being "less than credible" and then goes on to Pg. 719 Ln. 21 saying, "untrustworthy" pg. 725 Ln. 5-6 Prosecutor claims that DDv was raped by Mr. Vess but once again there was no physical evidence of this accusation brought into court. Pg. Pg. 730 Ln. 2-13 Prosecutor makes several unproven and very damaging statements against Mr. Vess with no proof. Pg. 745 Ln. 5-7 Ms. Banfield claims that she's dealing with someone's life, "and I'm not talking about his. I'm talking about hers. he took away a piece of her life." This is a very derogatory statement from a public official sworn by oath to uphold the law and not use shady tactics to sway judge or jury. This what all of these statements are doing.

Pg. 745 Ln. 15 Prosecutor claims, "We know there was intercourse." This is not a fact proven by evidence. There was no penetration of any kind proven. Pg. 745 Ln. 17 Prosecutor goes on to say, "We will concede incest in closing." Pg. 745 Ln. 23 Again Ms. Banfield claims, "But now we're going to concede incest." Pg. 745 Ms. Banfield says Mr. Vess took something away from her. Pg. 754 Ln. 6-9 Prosecutor tells jury to follow the law. Find the defendant guilty of rape 2 and incest. These were

that the attorney was inadequately prepared to make decisions about the trial. **White Vs. Godinez**

Defense failed to locate or interview witnesses **Rios Vs. Rocha, Stewart Vs. Wolenbarger**. Counsel's performance was constitutionally deficient for failing to investigate a potential favorable witness that could have provided an alibi for some of the states accusations. There was no strategic reason for counsel's failure and the defendant told his attorney to subpoena the individual. **Towns Vs. Smith**. Counsel's failure to investigate and interview a known favorable witness before deciding not to call him to testify at trial was unreasonable and prejudiced the defendant even though he may have had some damaging information. **Stanley Vs. Bartley**.

Defense failed to investigate third party evidence from swabs as Mr. Vess requested. Who is this third person? Mr. Vess advised defense counsel who this party could have been. Defense counsel failed to adequately support client claims. **Richey Vs. Bradshaw Fisher Vs. Gibson**, counsel's representation was objectively unreasonable and prejudiced the defendant where the attorney failed to assist client.

On Pg. 739 Ln. 17-19 defense brings up that alledged victim DDV was previously assaulted, makes it sound to the jury as if this was Mr. Vess's fault. Mixed with DDV's statements from the dash cam video, "He's done it before" is very negative, and damaging comment for defense to make of defendant in closing arguments.

ARGUMENT 10

Violation of ethics and professional conduct. Defense counsel Mr. Barrar concedes guilt of Mr. Vess during closing arguments Pg. 736 Ln. 18-25, Pg. 739 Ln. 2. On Pg. 739 Ln. 15 and Pg. 742 Ln. 23-24 counsel continues with this negative defense and calls

it consensual sex. The conceding guilt is confirmed by the prosecutor on Pg. 745 Ln. 12-13. This is not only a violation of ethics of professional conduct but also a violation of constitutional magnitude. This cannot be overlooked or misheard by the jury and creates a huge bias against Mr. Vess. Violation of the fifth ammendment right. **US Vs. Molina, US Vs. Manning, US Vs. Modica, US Vs. Zant, Wiley Vs. Sowders.** In wiley 647F2d the court agreed that attorney conceded guilt and created an irreversable error. Court held that Wiley was deprived of effective counsel when his own lawyer conceded his guilt. In Swanson the ninth circuit court held that defense cousnel concession constituted ineffective assistance of counsel, which lessened the government's burden of proof. In both above mentioned cases Wiley and Swanson, the court found lawyer negligent and did not act diligently in representing client, which caused injury to client's case. **Standard 4.43, Cr. 1139 and 1134, Cr. 641.13(2)** When defense concedes that there is no reasonable doubt concerning only factual issues in dispute, government has not been held to it's burden of persuading the jury the the defendant is guilty and thus defendant has been deprived of due process USCA Ammendment 5. We move the court that acquital is emminent.

ARGUMENT 11

Under rule 801 Mike Raymond, Brian Jacobson, and detective harper committed perjury. Their testimony was inconsistant with original stories. This may be ok for civilian witnesses but is not ok for law enforcement. Detective Harper's testimony in 3.5 hearing is not sonsistant with testimony in trial. This is a huge prejudice towards Mr. Vess. If Detective Harper lied about these little things we heard and see in the transcripts, what can't we see?

The defendant had been unjustly convicted on the basis of known false testimony by police officers. Perjury committed under "Color of Law" that has led to an unjust conviction and the constitutional deprivation at issue in this case perjury by a government official leading to an unjust conviction of an innocent defendant. This violates the right to a fair trial and unbiased jury. Fifth and sixth amendments to the constitution. This is an unjust violation of not only police ethics but also professional conduct.

ARGUMENT 12

Law enforcement had no grounds for arrest warrant. In case where probable cause for arrest was lacking, it would be incongruous to test police behavior by the objective reasonable standard in a suppression hearing. An officer whose request for warrant caused an unconstitutional arrest where warrant application is tainted by false statements lacking in the indicia of probable cause. At time of warrant all law enforcement had was DDV's statement. Fourth amendment right was violated. The officer's application was slanderous and it created the danger of unlawful arrest. In cases of perjury by law enforcement the need to avoid intimidation and self censorship apply with diminished force to law enforcement. Perjured testimony by law enforcement is likely to be more damaging to defendant's constitutional rights than such testimony by ordinary citizens, due to the fact the police carries special credibility in the eyes of the jurors, and in the case of police officers who cooperate regularly with prosecutors in the enforcement of criminal law. A police officer on a witness stand performs the same functions as any other witness he is subject to compulsory process. Take a sworn oath and respond to questions on direct examination and cross examination. Violation

conviction of an innocent defendant. Mr. Vess has indeed been unjustly convicted on the basis of known false testimony by law enforcement. We move the court to reverse this conviction and move for acquittal.

SUMMARY

In this Statement of Additional Grounds there has been several acts of flagrant misconduct from not only the prosecutor, court, defense counsel, but also professional law enforcement officers sworn to uphold the law, as well as witnesses and the alleged victim.

With these damaging comments and statements that were not supported by physical evidence, this unfairly prejudiced Mr. Vess and his constitutional right to a fair trial, & the jury's decision to convict an innocent man. These errors standing alone may not add up to much but the cumulative errors weigh very heavy against the defendant. We have shown this court that law enforcement had minimal probable cause at best. We have shown that law enforcement's testimony in 3.5 hearing and trial do not match for the reading of miranda warning and various other questions, and igniting the question of perjury under the color of law. There has been several instances where the defendant's past has been brought up against the pretrial agreement. This alone warrants a new trial. It has been brought to this court's attention that defense counsel Mr. Barrar has conceded guilt on the defendant's side during closing arguments. In part of video the alleged victim claims there was a precious rape that did not occur, which brings forth reasonable doubt to the mind of the jury.

We have infact proved prejudice on the jury's part for losing joror #2 on the fourth day of trial with no explanation.

A criminal conviction must be reversed on grounds of above mentioned misconduct if the defendant shows 1) Improper conduct by prosecutor, court, law enforcement, or defense. 2) Prejudice to the defendant's right to a fair trial. The preudice is shown where there is substantial likelihood that misconduct affected the jury's verdict and depriving the defendant of his constitutional rights to a fair trial. **Constitutional Ammendments 4,5,6, &14.**

The United States Constitution as well as the state of Washington promise that every citizen receive a fair trial regardless of their guilt or innoscence.

Accordingly we are not persuaded that the prosecutor's misconduct was harmless beyond a reasonable doubt. The state must convict on the merrits, and and not by way of misstating the nature of reasonable doubt. We wonclude that the misconduct, taken toether and by cummulative effect rose to a level of manifest constitutional error. Which Mr. Vess cannot find harmless beyond a reasonable doubt given the nature of the trial.

We ask this court for complete reversal and acquittal of all charges.

Thank you!

FILED
COURT OF APPEALS
DIVISION II

10 APR 12 PM 2:25

STATE OF WASHINGTON

BY _____
DEPUTY

NO. 39538-0-II

**AFFIDAVIT OF SERVICE
BY MAILING**

State of Washington)
)
 Vs.)
)
Jack Vess)

I, Jack Vess, being first sworn upon oath, do hereby certify that I have served the following documents:

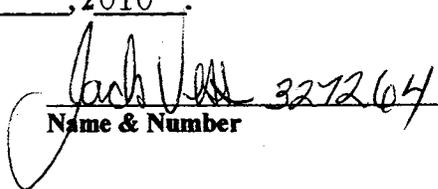
Statement of Additional Grounds

Upon: The Court of Appeals Division II

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 8 day of April, 2010.


Name & Number 327264

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.