

COURT OF APPEALS
DIVISION II

No. 41791-0

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STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,

RESPONDENT,

vs.

EUGENE TREMBLE III

APPELLANT.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR THURSTON COUNTY

Cause No. 10-1-02484-2

APPELLANT'S REPLY BRIEF

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ORIGINAL

I. INTRODUCTION

The defendant is asserting that his attorney was ineffective at trial. He provides specific examples of this ineffectiveness including: Failure to Assure that the Jury was not exposed to the YouTube Video (or had been exposed to the YouTube Video prior to trial), Failure to recues himself for a conflict, and failure to be prepared for trial. Essentially, the State responds that there is no proof that Counsel's performance prejudiced the defendant. The very nature of these allegations calls into question the fundamental fairness of this trial.

II. ARUGMENT

Defense Counsel was ineffective in failing to address the YouTube video before the jury was exposed to it. Defense Counsel was also deficient for failing to withdraw when informed that he had previously represented a woman that accused Defendant Tremble of assaulting her. Finally, Defense Counsel was not prepared for trial.

A. DEFENSE COUNSEL FAILURE TO ADDRESS THE YOUTUBE VIDEO PREJUDICED THE DEFENANT DURING TRIAL.

The state argues: The jury first saw the security video of the assault as part of Ms. Thomas' testimony on December 7, 2010. *State's Response*, Page 8. The state notes that after the testimony the jury was warned not to do any kind of Internet search on this case. *Id.* The court warned again on December 8, 2010, specifically warning the jury to not research on YouTube. *Id.* at 8-9. The state then argues that it is presumed that the jury will follow the court's instructions, and as a result there is no prejudice to the defendant. *Id.* at 9.

The state's assertion misses the prejudice that the defendant suffered at trial. It is possible that the defendant had suffered the prejudice prior to the court's warnings. We will never know which (if any) jurors viewed the video prior to the warnings. We will never know which (if any) jurors had viewed the video prior to voir dire.

The State's assertion that the jury did not see the video in question until December 7, 2010 is speculative. The truth is no one can say when this video was first viewed because no one asked the jury.

It is presumed that the jury will follow the jury instructions and without more the court will not find that the jury did not follow the instructions. However, in this case no one assure that the jury had viewed the video before the instruction or even before the jurors were seated on the panel. The prejudice to the defendant is jurors prejudging, coming to a conclusion before the evidence is viewed.

B. DEFENSE COUNSEL SHOULD HAVE TAKEN THE OPPORUNITY TO RECUSE HIMSELF WHEN IT WAS BROUGHT TO HIS ATTENTION THAT HE HAD REPRESENTED A WOMEN THAT PREVIOUSLY HAD ASSERTED THAT THE DEFENDANT HAD ASSAULTED HER.

When it was brought to the attention of Defense Counsel that he had previously represented a woman that had accused Defendant Tremble of assault, Defense Counsel should have recused himself. This failure was multiplied when the issue of prior assaults and domestic violence were brought up during the sentencing.

The State acknowledges that Defense Counsel was informed that the victim he had previously represented might be called as a witness. *State's Response Brief*, P. 12.

The State indicated that it might attempt to use Ms. Davis as a rebuttal witness. The State argued “Again, I only see that as a potential rebuttal. I think it’s fairly unlikely potential rebuttal.” CP, P. 11, l. 14-15.

At sentencing the State argued (in referring to Mr. Tremble) as follows:

But he’s victimized a number of women in the past they’ve basically been the mothers of his various children, and when it came time to try to get the case into court and actually make a case on it, we could not get cooperation, we could never make the case. CP 265, 3-8.

The State in making this argument was referring to Charity Davis, Defense Counsel’s previous client.

This left defense counsel arguing a sentencing where one of his clients was being sentenced, and the experience of a previous client was being used to increase the punishment of that same client.

The disparate interest of these two clients represents a conflict that defense counsel should have recognized and should have addressed.

C. THE STATE ASSERTS THERE IS NO EVIDENCE THAT DEFENSE COUNSEL WAS PREPARED FOR TRIAL, THE DEFENDANT PROVIDES THIS EVIDENCE IN HIS PLEAS TO THE COURT.

The defendant repeatedly complained of the perceived shortcomings of his defense. Finally by letter he stated:

1. He has previously represented my children's' mother in a case. She has been vitim (sic) in one of my previous cases (Charity Davis)
2. He has never returned any messages provided discovery as requested, interviewed witnesses, reported any investigation findings, or informed me of my defense.
3. He has seen me at 2 court hearings and twice in the jail with no follow through after these meetings regarding the case. Letter Filed by Eugene Tremble December 2, 2010.

The State's response to these specific concerns is that the defendant has not asserted that he has been prejudiced by these failures. *State's Response Brief*, P. 5. The defendant stated in his plea to the court that Defense Counsel had not met with him to discuss his defense, nor provided the discovery of the case.

Despite the Defendant's pleas for help, no inquiry was performed as to his allegations. No Witnesses were put on in his defense. CP, P. 205, I. 5-24. After the state rested, the defense rested without providing any evidence. CP, P. 206, I. 8-12.

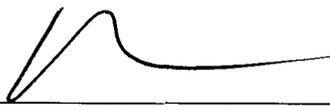
Without any input from the defendant, one wonders how Defense Counsel could ever be effective at trial. The Defendant requested new counsel so that he could obtain a fair trial.

III. CONCLUSION

The Defense counsel in this case failed to provide an effective defense. He failed to properly assure that the jury was not prematurely exposed to the YouTube video, and failed to assure that individuals had not previously viewed the video. The defense attorney failed to appreciate that he had previously represented a victim of the defendant, and failed to provide adequate information to evaluate whether or not he should have recused himself

Any of these deficiencies would be sufficient to question whether or not the defendant was given a fair trial. However, taken together these issues assured that the defendant would not given a fair trial. Defendant Tremble respectfully requests the Court overturn his conviction, and grant him a new trial.

Respectfully submitted this January 14, 2012.



Kenneth W. Blanford
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STATE OF WASHINGTON
SUPERIOR COURT
CLERK

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STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

I Kenneth W. Blanford, hereby certifies under penalty of perjury under the laws of the State of Washington that on the day set out below, I delivered true and correct copies of the opening brief of the appellant to respondent by ABC-Legal Messengers, Inc., to:

Pierce County Prosecutors
930 Tacoma Ave S # 946
Tacoma, WA 98402-2171

Eugene Tremble III
PO Box 769
Connell, WA 99326

Signed at Tacoma, Washington this January 14, 2012.



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