

No. 42346-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Suzannah Kenoyer,**

Appellant.

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Clallam County Superior Court Cause No. 09-1-00361-0

The Honorable Judge Ken Williams

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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### **ASSIGNMENTS OF ERROR**

1. The prosecutor committed misconduct that infringed Ms. Kenoyer's Sixth and Fourteenth Amendment rights to counsel and to due process.
2. The prosecutor improperly maligned the role of defense counsel in closing arguments.
3. The trial court erred by denying Ms. Kenoyer's motion for a mistrial/dismissal.
4. The sentencing court erred by finding that Ms. Kenoyer has the ability or likely future ability to pay his legal financial obligations.
5. The sentencing court erred by adopting Finding No. 2.5 (Judgment and Sentence).

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A prosecutor may not disparage the role of defense counsel. Here, the prosecutor disparaged defense counsel and the defense function in his closing argument. Did the prosecutor's misconduct violate Ms. Kenoyer's Sixth and Fourteenth Amendment rights to counsel and to due process?
2. A court may not find that an offender has the ability or likely future ability to pay legal financial obligations, absent some support in the record for the finding. Here, the sentencing court made such a finding in the absence of any supporting evidence in the record. Was the sentencing court's finding clearly erroneous?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Suzannah Kenoyer and Caron Salzer were close friends for thirty years. This friendship outlasted Salzer's marriage to Ms. Kenoyer's brother, and the two called each other sister. RP (6/6/11) 32-33, 36; RP (6/7/11) 67, 120. In the summer of 2007, Salzer was having a hard time of it emotionally, and sought to live with Ms. Kenoyer to have family support and love around her. RP (6/6/11) 33, 61; RP (6/7/11) 43, 69. Kenoyer's family was having a hard time of it financially, and the two agreed to pool their resources – financially and emotionally -- and live at Kenoyer's property outside of Forks. RP (6/6/11) 34-36, 50, 59, 63, 84; RP (6/7/11) 43-50, 62-63, 65, 69.

Ms. Kenoyer believed they agreed to share all property, and that saving her property from foreclosure due to past unpaid taxes was crucial to both of them. RP (6/6/11) 50; RP (6/7/11) 50-51, 65, 69-70. She pawned a bracelet of Salzer's and used the money for the tax bill in November of 2007. RP (6/6/11) 56, 82, 90; RP (6/7/11) 79, 93-97.

Salzer saw the bracelet in August of 2009 in the pawn shop and contacted the police. RP (6/6/11) 41, 46-47, 71; RP (6/7/11) 5-7. Ms. Kenoyer admitted that she pawned the bracelet, but explained her sincere belief that she was authorized to do so given her relationship and

agreements with Salzer. RP (6/6/11) 49, 82; RP (6/7/11) 18, 90, 93, 98, 103-104.

The state charged Ms. Kenoyer with Theft in the First Degree. CP 18. At the jury trial, the prosecutor told the jury that “[t]he defense is all about grabbing at straws. Grabbing at a tuft of weeds at the edge of the cliff, find anything it possibly can to throw at the jury -- .” RP (6/7/11) 197. The court sustained defense counsel’s objection, and told the jury “[Y]ou will disregard that argument. That objection is sustained.” RP (6/7/11) 198.

Apparently unsatisfied with the proof regarding the bracelet’s value, the jury found Ms. Kenoyer guilty of the lesser crime of Theft in the Second Degree. RP (6/8/11) 2-3.

Ms. Kenoyer moved for dismissal, or a mistrial, based on the prosecutor’s statements in closing. RP (6/24/11) 4-11; Motion for Dismissal or Mistrial, State’s Response to Defendant’s Motion for Dismissal or Mistrial, Supp. CP. The court denied the motion. RP (6/30/11) 2-4.

At sentencing, without any comment or argument from the parties, the court endorsed a finding in the Judgment and Sentence that: “The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 8; RP (6/30/11) 2-23.

Ms. Kenoyer timely appealed. CP 5.

## ARGUMENT

### **I. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MS. KENOYER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL AND TO DUE PROCESS.**

#### A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.<sup>1</sup> *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009).

To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

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<sup>1</sup> Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000).

- B. The prosecutor infringed Ms. Kenoyer's constitutional rights to counsel and due process by disparaging the role of defense counsel and impugning counsel's integrity.

It is improper for a prosecuting attorney to comment disparagingly on defense counsel's role or to impugn the defense lawyer's integrity.

*State v. Thorgerson*, 172 Wash.2d 438, 451-452, 258 P.3d 43 (2011) (citing *State v. Warren*, 165 Wash.2d 17, 195 P.3d 940 (2008) and *State v. Negrete*, 72 Wash.App. 62, 67, 863 P.2d 137 (1993)). Thus, for example, a prosecutor who characterizes defense counsel's presentation "as 'bogus' and involving 'sleight of hand'" improperly impugns counsel's integrity. *Thorgerson*, at 451-452.

In this case, the prosecuting attorney went beyond the misconduct that occurred without objection in *Thorgerson*. Specifically, the prosecutor directly and unambiguously accused defense counsel of "grabbing at straws... [g]rabbing at a tuft of weeds at the edge of the cliff, find anything it possibly can to throw at the jury." RP (6/7/11) 198. This was before the defense had even stood to present a closing argument. Although defense counsel objected, and the court instructed jurors to disregard the comment, this served to highlight the prosecutor's accusation that defense counsel was engaged in trickery.

The state's improper comments disparaged defense counsel and maligned the defense role, suggesting that defense attorneys do their job

by deceiving the jury. This argument infringed Ms. Kenoyer's Sixth and Fourteenth Amendment right to counsel by burdening the exercise of that right. It also interfered with her due process right to a fair trial.

Accordingly, her conviction must be reversed and the case remanded for a new trial. *Toth, supra*.

**II. THE SENTENCING COURT'S FINDING REGARDING MS. KENOYER'S PRESENT OR FUTURE ABILITY TO PAY HER LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.**

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, \_\_\_ Wash.App. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2011). In this case, the sentencing court entered such a finding without any support in the record. CP 8. Indeed, the record suggests that Ms. Kenoyer lacks any ability to pay the amount ordered, given that this conviction eliminates the possibility that she can pursue her chosen field of nursing. RP (6/30/11) 8-17. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

**CONCLUSION**

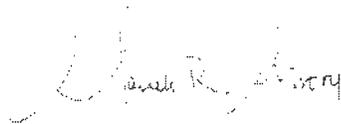
For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial. In the alternative, Finding No. 2.5 must be vacated.

Respectfully submitted,

**BACKLUND AND MISTRY**



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Suzannah Kenoyer  
P.O. Box 1381  
Forks, WA 98331

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Brian Wendt, Deputy Prosecutor  
Clallam County Prosecutor  
bwendt@co.clallam.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 29, 2011.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**December 29, 2011 - 8:28 AM**

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