

No. 42803-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Dennis McCarthy,
Appellant.

Kitsap County Superior Court Cause No. 10-1-00940-8
The Honorable Judge Theodore Spearman

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT’S IMPROPER DECISION TO PROVIDE JURORS WITH MATERIALS THAT HAD NOT BEEN ADMITTED INTO EVIDENCE VIOLATED MR. MCCARTHY’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

- A. The trial court violated both Mr. McCarthy’s and the public’s right to an open and public trial by responding to a jury request behind closed doors.

Courtroom closure issues can always be raised for the first time on appeal. *State v. Njonge*, 161 Wash.App. 568, 574, 255 P.3d 753 (2011).

Respondent’s argument that Mr. McCarthy “failed to preserve a claim of error” is incorrect. See Brief of Respondent, pp. 15-17.

Because this issue will likely be controlled by the Supreme Court’s decision in *Sublett*, Mr. McCarthy rests on the argument set forth in the Opening Brief. See *State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, review granted, 170 Wash.2d 1016, 245 P.3d 775 (2010).¹

- B. The trial court violated Mr. McCarthy’s right to counsel and his right to be present by providing the jury with a tape measure and masking tape without consulting either party.

The right to counsel and the right to be present attach to all critical stages of the criminal process. *State v. Ulestad*, 127 Wash.App. 209, 214,

¹ Oral argument in *Sublett* took place in June of 2011.

111 P.3d 276 (2005); *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). A stage is critical if it presents a possibility of prejudice (for purposes of the right to counsel) or if the accused person's presence would contribute to the fairness of the procedure (for purposes of the right to be present). *State v. Hawkins*, 164 Wash.App. 705, 715, 265 P.3d 185 (2011), review denied, 173 Wash.2d 1025, 272 P.3d 851 (2012); *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

The judge's decision to provide the jury with materials not admitted into evidence violates both constitutional rights and comprised a critical stage.

First, there was a possibility of prejudice. Neither party introduced a mockup of the scene; by providing jurors with masking tape and a tape measure, the judge allowed jurors to create their own mockup. Mr. McCarthy did not have the opportunity to expose inaccuracies in the jury's mockup, either through cross-examination or the presentation of other evidence. Nor did he have the opportunity to propose an instruction limiting the jury's consideration of any such mockup.

Second, Mr. McCarthy's presence at the time the decision was made would have contributed to the fairness of the procedure. He should

have been allowed to discuss the issue with counsel before a decision was made to provide the materials to jurors.

The trial court's decision violated Mr. McCarthy's right to the assistance of counsel and his right to be present. *Ulestad*, at 214; *Gagnon*; *Stincer*, at 745. His assault convictions must be reversed and his case remanded for a new trial. *Id.*

C. The trial court violated Mr. McCarthy's right to a verdict free from juror misconduct and one based solely on the evidence admitted at trial.

Jurors may only deliberate on evidence presented in open court. *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991). A jury's use of extrinsic evidence requires reversal if there is a reasonable possibility the extrinsic evidence may have affected the reasoning of even one juror. *Id.* The burden is on the prosecution to establish beyond a reasonable doubt that the extrinsic evidence did not affect the verdict. *Id.*

Here, the judge provided materials enabling jurors to create a mockup of the crime scene, and to conduct experiments supplementing the testimony and evidence received in open court. RP 1324. This violated Mr. McCarthy's right to a decision based on the evidence. *Navarro-Garcia*, at 821. Mr. McCarthy had no opportunity to object or to propose limiting instructions. RP 1324.

The error is presumed prejudicial, and the Respondent has failed to establish beyond a reasonable doubt that the error did not affect the verdict. Navarro-Garcia, at 821. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

II. THE TRIAL COURT VIOLATED MR. MCCARTHY'S RIGHT TO PRESENT A DEFENSE AND HIS RIGHT TO CONFRONTATION.

A. Mr. McCarthy's convictions must be reversed because the trial court prohibited the defense from cross-examining Carey on matters relating to her bias against him.

Mr. McCarthy had a Sixth and Fourteenth Amendment right to meaningful cross-examination aimed at exposing Carey's bias. *State v. Darden*, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002); *State v. Spencer*, 111 Wash.App. 401, 408, 45 P.3d 209 (2002). Evidence that she had assaulted and abused him demonstrated her bias against him, and should have been admitted. Exclusion of the evidence violated Mr. McCarthy's right to confront witnesses against him. *Spencer*, at 408; *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010).

B. The trial court violated Mr. McCarthy's constitutional right to present his defense.

The constitution guarantees Mr. McCarthy a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006); *State v. Maupin*,

128 Wash.2d 918, 924, 913 P.2d 808 (1996). This included the right to present testimony explaining, clarifying, or contradicting the government's evidence. *State v. Jones*, 144 Wash.App. 284, 298, 183 P.3d 307 (2008); *State v. Gefeller*, 76 Wash.2d 449, 455, 458 P.2d 17 (1969).

In this case, Mr. McCarthy should have been permitted to introduce evidence that Carey had assaulted, abused, and manipulated him, to correct the misleading and one-sided portrait of their relationship presented by the government. *Gefeller*, at 455. By admitting evidence of Mr. McCarthy's prior misconduct while excluding Carey's abusive behavior, the court gave the jury an incomplete picture of the relationship.

Mr. McCarthy should also have been permitted to introduce Dr. Rybicki's expert testimony. *Philippides v. Bernard*, 151 Wash.2d 376, 393, 88 P.3d 939 (2004). Dr. Rybicki's testimony was relevant to undermine the government's efforts to bolster Carey's credibility² and its arguments regarding the reasonableness of her fear. See, e.g., *State v. Magers*, 164 Wash.2d 174, 184-86, 189 P.3d 126 (2008); *State v. Grant*,

² For example, a social worker testified that it is not unusual for DV victims to maintain contact with their abusers. RP 609.

83 Wash.App. 98, 920 P.2d 609 (1996); *State v. Ciskie*, 110 Wash.2d 263, 273-80, 751 P.2d 1165 (1988).

Furthermore, the court erroneously focused on whether or not Dr. Rybicki's testimony established a defense, instead of whether or not it would be helpful to the jury under ER 702. RP 28-29. The government introduced allegations of prior abuse in an effort to bolster Carey's credibility. Contrary to the trial judge's ruling, Mr. McCarthy was entitled to present expert testimony to help the jury evaluate the impact of this evidence on her credibility. RP 1194-1195. Grant, at 109. By claiming that prior incidents resulted in Carey's delayed reporting, inconsistent statements, and contradictory behavior, the government opened the door to testimony rebutting its claim. Jones, at 298; Gefeller, at 455; *State v. Hartzell*, 156 Wash.App. 918, 926, 237 P.3d 928 (2010). The evidence should have been admitted. ER 702; Philippides.

By excluding relevant and admissible evidence, the trial court violated Mr. McCarthy's right to present a defense. U.S. Const. Amend. XIV; Holmes, *supra*. His convictions must be reversed and the case remanded for a new trial.

III. MR. MCCARTHY WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

A. The trial court's erroneous decision to disqualify the prosecuting attorney's office violated Mr. McCarthy's right to a speedy trial.

Mr. McCarthy's trial was delayed beyond his speedy trial expiration date because of the trial court's erroneous decision to disqualify the county prosecutor's office. No facts in the record establish that the prosecuting attorneys had a conflict of interest requiring disqualification. RP (8/12/11). Their request to be removed from the case was supported only by vague assertions, apparently under the theory that any attorney who interviews a witness should be disqualified (unless a third party was present to observe the interview). RP (8/12/11).11-12, 15-16. Even counsel for Respondent remarked in open court (shortly after undertaking the prosecution) "I still don't understand all the reasons for the conflict that Kitsap County perceives." RP (8/18/11) 42.

Even if the individual deputies had a conflict, they could have been screened from the rest of the office, allowing another attorney to take over. Presumably this would have been less disruptive than assigning the case to someone outside the office and Mr. McCarthy's trial might still have occurred before his September 22nd expiration date. *State v. Schmitt*, 124 Wash.App. 662, 668-669, 102 P.3d 856 (2004).

Respondent urges an interpretation of the speedy trial rule that renders the rule meaningless. See Brief of Respondent, pp. 35-37. According to Respondent, where an erroneous decision (such as an improper disqualification of the prosecutor's office, as in this case) results in a new commencement date, speedy trial is not violated if trial is held before the new expiration date. Brief of Respondent, pp. 35, 37.

Respondent fails to cite a single case that has interpreted the speedy trial rule in the manner proposed. Brief of Respondent, pp. 35-37. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

Furthermore, numerous cases demonstrate that speedy trial is violated if the new commencement date results from an erroneous decision such as the one made in this case. See, e.g., *State v. Chavez-Romero*, ___ Wash.App. ___, ___, 285 P.3d 195 (2012) (erroneous determination that defendant was absent resulted in improper reset of commencement date); *State v. Raschka*, 124 Wash.App. 103, 100 P.3d 339 (2004) (same).³ Respondent's position lacks merit.

³ See also *State v. Saunders*, 153 Wash.App. 209, 220 P.3d 1238 (2009) (erroneous grant of continuance resulted in improper reset of expiration date); *State v. Nguyen*, 131 Wash.App. (Continued)

B. Any conflict of interest that may have existed was the result of government mismanagement.

Government mismanagement cannot justify a delay beyond speedy trial. See, e.g., *State v. Michielli*, 132 Wash.2d 229, 937 P.2d 587 (1997); see also *State v. Brooks*, 149 Wash.App. 373, 384, 203 P.3d 397 (2009). Here, any conflict should have been evident since the inception of the case. Nothing in the record shows that new facts arose during the pre-trial interviews conducted by the prosecuting attorneys. Because he was a former police officer, Mr. McCarthy sat in solitary confinement while the prosecuting attorneys prepared for trial for eight months. RP (8/12/11) 14; RP 1000.

By failing to raise the conflict issue in a timely fashion, the prosecution mismanaged its case and delayed the trial beyond speedy trial. *Michielli*, supra. Accordingly his convictions must be reversed and the case dismissed with prejudice. *Id.*

IV. THE TRIAL JUDGE ERRONEOUSLY ADMITTED EVIDENCE OF MR. MCCARTHY'S PRIOR MISCONDUCT IN VIOLATION OF ER 403 AND ER 404(B).

Mr. McCarthy rests on the argument set forth in the Opening Brief.

815, 129 P.3d 821 (2006) (same); *State v. Kenyon*, 167 Wash.2d 130, 216 P.3d 1024 (2009) (improper finding that judge unavailable resulted in improper reset of expiration date);

V. MR. MCCARTHY'S CONVICTIONS WERE BASED IN PART ON PROPENSITY EVIDENCE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Mr. McCarthy rests on the argument set forth in the Opening Brief.

VI. THE ERRONEOUS ADMISSION OF HEARSAY REQUIRES THE REVERSAL OF MR. MCCARTHY'S ASSAULT CONVICTIONS.

A prior consistent statement is only admissible as substantive evidence if certain conditions are met. ER 801(d)(1). A prior consistent statement is not admissible merely because the witness has been impeached. Instead, the foundation for admission under the rule requires proof of recent fabrication:⁴

Cross examination alone does not justify admission of prior consistent statements; the questioning must raise an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later.

State v. Bargas, 52 Wash.App. 700, 702-03, 763 P.2d 470 (1988).

It is this inference that makes proof of a prior consistent statement relevant to show veracity. *Id.* Otherwise, the evidence is mere repetition, which does not establish veracity. State v. Brown, 127 Wash.2d 749, 758 n.2, 903 P.2d 459 (1995).⁵ The proponent must also show that the witness

⁴ Respondent apparently concedes that any impeachment here did not suggest improper influence or motive.

⁵ Brown, at 758 n.2.

was “unlikely to have foreseen the legal consequences” of the statement.

State v. Makela, 66 Wash.App. 164, 168-169, 831 P.2d 1109 (1992).

For example, in *Bargas*, the defendant

raised the inference [a witness] “was not being completely truthful”. A review of the cross examination indicates counsel did attempt to reveal inconsistencies in her statements. However, the questioning did not raise any inference that [she] had fabricated a story after her statements to [the police]. Indeed, based on Mr. *Bargas*' testimony, the defense theory was that [the witness] had fabricated her story from the inception, even before her statements to the officer. The defense's attempt to point out inconsistencies in the victim's testimony did not raise an inference of recent fabrication. The statements were not admissible on that basis.

Bargas, at 703.

Here, as in *Bargas*, the foundation was not met. Mr. McCarthy did not make an allegation of recent fabrication: instead, he alleged Carey had fabricated her account from the first time she had accused him of assault.

Nor did he suggest she had a particular reason to fabricate that arose recently. Furthermore, even if cross examination had raised an inference of recent fabrication, the evidence would still have been inadmissible.

The prosecutor failed to show that Carey made her earlier statements before any reason to fabricate arose, and failed to prove that she was unlikely to have foreseen the legal consequences of her statements.

Bargas, at 703; *Makela*, at 168-169.

Because the trial turned on Carey's credibility, the government's improper attempt to bolster her testimony through repetition prejudiced Mr. McCarthy. Brown, at 758 n.2. The assault convictions must be reversed, and the case remanded for a new trial. Id.

VII. MR. MCCARTHY WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. McCarthy rests on the argument set forth in the Opening Brief.

VIII. CAREY'S MISCONDUCT INFRINGED MR. MCCARTHY'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Mr. McCarthy rests on the argument set forth in the Opening Brief.

IX. THE TRIAL COURT ABUSED ITS DISCRETION BY SCORING COUNTS I AND II SEPARATELY INSTEAD OF FINDING THAT THEY COMPRISED THE SAME CRIMINAL CONDUCT.

Mr. McCarthy rests on the argument set forth in the Opening Brief.

X. MR. MCCARTHY'S SENTENCE WAS IMPOSED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY FIND AGGRAVATING FACTS BEYOND A REASONABLE DOUBT.

Mr. McCarthy rests on the argument set forth in the Opening Brief.

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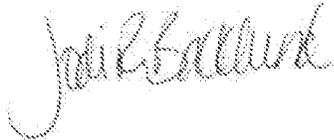
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CONCLUSION

The assault convictions must be reversed and the case either dismissed with prejudice or remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on November 20, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply 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 November 20, 2012.

A handwritten signature in cursive script, appearing to read "Jodi R. Backlund".

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BACKLUND & MISTRY

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