

No. 44331-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Alan Olson,**

Appellant.

---

Cowlitz County Superior Court Cause No. 12-1-00936-5

The Honorable Judge Marilyn K. Haan

**Appellant's Reply Brief**

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## ARGUMENT

### **I. PROSECUTORIAL MISCONDUCT DEPRIVED MR. OLSON OF A FAIR TRIAL.**

#### **A. The prosecutor committed misconduct by minimizing the state's burden of proof.**

A prosecutor commits misconduct by making arguments that shift the burden of proof onto the accused and commenting on the lack of defense evidence. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011); *State v. McCreven*, 170 Wn. App. 444, 284 P.3d 793 (2012), *review denied* 176 Wn.2d 1015, 297 P.3d 708 (2013). The prosecutor questioned Mr. Olson at length about his failure to present specific pieces of evidence in support of his self-defense claim and made arguments shifting the burden of proof in closing. RP 330, 340, 353-55, 357, 437, 442, 465.

Respondent argues that Mr. Olson cannot “cannot hide behind the 5<sup>th</sup> Amendment right to silence” because he chose to testify at trial. Brief of Respondent, p. 13. This argument misapprehends the issue. The prosecutor's questions to Mr. Olson were improper because they violated his right to require the state to disprove self-defense beyond a reasonable doubt. *McCreven*, 170 Wn. App. at 470-71. Mr. Olson does not raise a Fifth Amendment claim.

Without citing any authority, Respondent claims that the prosecutor's comment on missing defense evidence was proper because Mr. Olson presented *some* but not *all* of the possible evidence for his self-defense claim. Brief of Respondent, p. 15. The state attempts to distinguish *McCreven* because the defendants in that case do not appear to have testified at trial.<sup>1</sup> Brief of Respondent, pp. 18-19. As the state points out, the decision to testify opens the accused up to cross-examination. It does not, however, permit a prosecutor to shift the state's burden onto the accused during cross-examination and closing argument.

Respondent relies heavily on *State v. Robideau*, 70 Wn.2d 994, 425 P.2d 880 (1967). The *Robideau* court held that it did not violate the privilege against self-incrimination to ask an accused person about prior inconsistent statements regarding an alibi. *Id.* at 998. The state's reliance on *Robideau* is misplaced. The prosecutor in Mr. Olson's case did not attempt to impeach him with a prior inconsistent statement. RP 317-57. Instead, he attempted to shift the burden onto Mr. Olson by pointing out numerous items of evidence that he could have introduced to support his self-defense claim but did not. RP 330, 340, 353-55, 357. The

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<sup>1</sup> It is unclear from the recitation of facts whether the defendants in *McCreven* testified. *McCreven*, 170 Wn. App. 444.

prosecutor's conduct in Mr. Olson's case was improper. *McCreven*, 170 Wn. App. at 470-71.

Additionally, the state argues that the prosecutor properly argued to the jury that Mr. Olson could not raise self-defense because he denied strangling Everett. Brief of Respondent, p. 17-18. The analysis of whether an accused person may raise self-defense, however, is completed by the court. *McCreven*, 170 Wn. App. at 470. Once the court rules that it will instruct the jury on self-defense, the inquiry ends. *Id.* At that point, the burden shifts to the state to disprove self-defense beyond a reasonable doubt. *Id.* The prosecutor's argument that Mr. Olson was precluded from raising self-defense was improper. *Id.*

Respondent cites to Division Three's opinion in *State v. Munguia*<sup>2</sup> for the proposition a prosecutor may invite the jury to determine whether the accused has presented corroborating evidence to support a self-defense claim. Brief of Respondent, p. 17-18. This court should not follow *Munguia* to the extent that it contradicts *McCreven*. First, the *Munguia* court reviewed the denial of a motion for a mistrial, which is subject to a more deferential standard of review than a prosecutorial misconduct claim. *Munguia*, 107 Wn. App. at 338 ("Mr. Munguia has not overcome the 'high

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<sup>2</sup> *State v. Munguia*, 107 Wn. App. 328, 338, 26 P.3d 1017 (2001).

degree of deference' paid to the trial court in its decision to deny his request for a mistrial"). Second, the *Munguia* court erroneously stated that, because it is the accused's burden to prevent some evidence of self-defense, a prosecutor may properly comment on the lack of evidence of self-defense. *Id.* That claim directly contradicts this court's holding in *McCreven*:

Whether the defense has presented evidence of self-defense is a question for the trial court to address when deciding whether to instruct the jury on the law of self-defense. Once the trial court has found evidence sufficient to require a self-defense instruction, that inquiry, even if erroneous, has ended. Thus, the prosecutor's argument improperly sought to shift the burden of proof to the defense and the trial court erred when it overruled the defense objections.

*McCreven*, 170 Wn. App. at 471. The *Munguia* reasoning conflicts with the long-settled principle that, once the accused has presented some evidence, the burden shifts to the state to disprove self-defense beyond a reasonable doubt. *Id.*

Finally, the state argues that Mr. Olson cannot raise prosecutorial misconduct on appeal because his trial counsel did not object to the improper arguments. Brief of Respondent, p. 19. As argued in Mr. Olson's opening brief, this failure on the part of defense counsel constituted ineffective assistance of counsel. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). Additionally, the prosecutor's

misconduct was so flagrant and ill-intentioned that it could not have been cured by an objection and limiting instruction. *Glasmann*, 175 Wn.2d at 714.

The prosecutor committed misconduct by commenting extensively on the lack of defense evidence and shifting the burden onto Mr. Olson to prove self-defense. *Walker*, 164 Wn. App. at 732; *McCreven*, 170 Wn. App. at 470-71. Mr. Olson's conviction must be reversed. *Walker*, 164 Wn. App. at 732; *McCreven*, 170 Wn. App. at 470-71.

B. The prosecutor committed misconduct by cross-examining Mr. Olson about trial strategy and privileged communications with counsel.

Attorney-client privilege protects communication and advice between an attorney and his/her client. *State v. Perrow*, 156 Wn. App. 322, 328, 231 P.3d 853 (2010); RCW 5.60.060. Trial strategy, including what evidence to present to the jury, falls within the province of defense counsel, not the accused. *State v. Cross*, 156 Wn.2d 580, 611, 132 P.3d 80 (2006). The prosecutor cross-examined Mr. Olson at length about communications with his attorney and matters of trial strategy, including his decision to testify. RP 356, 364-65.

Respondent again argues that Mr. Olson "cannot hide behind his 5<sup>th</sup> Amendment rights not to testify." Brief of Respondent, p. 16. Though the prosecutor's misconduct touches on Mr. Olson's Fifth Amendment

rights, the state again misapprehends the issue. The prosecutor's cross-examination was improper because it attempted to impeach Mr. Olson's credibility with matters properly allocated to his attorney. *Cross*, 156 Wn.2d at 611. The state also committed misconduct by asking Mr. Olson about privileged communications with counsel. *Perrow*, 156 Wn. App. at 328.

The state argues that an attorney's statements at pretrial and omnibus can be adopted as admissions by the accused. Brief of Respondent, p. 16 (*citing State v. Rivers*, 129 Wn.2d 697, 709, 921 P.2d 495 (1996); *State v. Dault*, 19 Wn. App. 709, 578 P.2d 43 (1978)). The cases Respondent cites are inapposite. Mr. Olson does not argue that the prosecutor erred by attributing his attorney's statements to him. In *Rivers* and *Dault*, the state impeached the accused with prior inconsistent statements made through counsel. *Rivers*, 129 Wn.2d at 707-08; *Dault*, 19 Wn. App. at 718. Here, the prosecutor did not point to a prior inconsistent statement. RP 317-57. Rather, the prosecutor committed misconduct by commenting on trial strategy and privileged communications with counsel. RP 356, 364-65. Even if they were properly attributed to Mr. Olson, defense counsel's statements were not proper impeachment material.

Finally, Respondent argues that the prosecutor was entitled to call attention to Mr. Olson's late disclosure of his witnesses in order to

“question the credibility of his self-defense claim.” Brief of Respondent, p. 17 (*citing to Dault*, 19 Wn. App. 709). First, as noted above, it is misconduct for a prosecutor to comment on the lack of evidence for self-defense because the accused has not duty to present evidence. *McCreven*, 170 Wn. App. at 471. In fact, the *Dault* court reversed because the court’s instructions had improperly attributed the burden to the accused. *Dault*, 19 Wn. App. at 714. Second, *Dault* did not deal with late disclosure of witnesses but with impeachment by prior inconsistent statement. *Dault*, 19 Wn. App. at 717-18. The state’s reliance on *Dault* is misplaced.<sup>3</sup>

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by attempting to undercut Mr. Olson’s credibility with his attorney’s trial strategy decisions and privileged communications with counsel. *In re Glasmann*, 175 Wn.2d 696, 714, 286 P.3d 673 (2012). Mr. Olson’s conviction must be reversed. *Id.*

**II. OFFICER SHELTON’S TESTIMONY INVADED THE PROVINCE OF THE JURY AND DEPRIVED MR. OLSON OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL.**

Testimony providing an improper opinion of guilt or witness credibility violates the right to a trial by jury. *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) *aff’d on other grounds*, 165 Wn. 2d

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<sup>3</sup> Also, as argued above, this court should not follow Division Three’s decision in *Dault* to the extent that it conflicts with *McCreven*.

870, 205 P.3d 916 (2009); U.S. Const. Amends. VI, XIV; Wash. const. art. I, §§ 21, 22. A law enforcement officer's improper opinion testimony may be particularly prejudicial because it carries "a special aura of reliability." *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). At Mr. Olson's trial, a police witness – Officer Shelton -- testified that the first version of events given by an alleged victim of domestic violence is usually the truth. RP 101.

The state argues that Shelton's testimony was permissible because it "mirrors the idea behind Evidence Rule 803 for excited utterances." Brief of Respondent, p. 21. The rule permitting admission of a statement into evidence, however, does not permit a witness to testify that such a statement is true. Mr. Olson does not challenge the admission of Everett's statement. Rather, he challenges Shelton's improper opinion regarding its credibility.

Respondent points out that Shelton's testimony would have been permissible argument in closing. Brief of Respondent, p. 21. Shelton's testimony, however, was evidence, not argument. Though the state may be afforded latitude to argue inferences in closing, the constitution prohibits a police witness from doing the same in his/her testimony. *Sutherby*, 138 Wn. App. at 617. Drawing such inferences during the

evidence portion of a trial violates the exclusive province of the jury by providing impermissible opinion testimony. *Id.*

The state also argues that Shelton's opinion testimony constituted a proper use of profile evidence. Brief of Respondent, pp. 20-21.

Respondent cites to dicta in *Braham* in support of its argument. Brief of Respondent, p. 20 (*citing State v. Braham*, 67 Wn. App. 930, 936 n. 5, 841 P.2d 785 (1992)). Shelton's testimony, however, went far beyond traditional profile evidence. RP 101. Shelton did not simply provide, as argued by the state, that "victims have concerns which affect their story and cooperation." Brief of Respondent, p. 21. Rather, he told the jury that the first version of an alleged victim's story is usually "closest to the truth of what happened." RP 101. Shelton's testimony constituted an impermissible, explicit opinion of Everett's credibility and invaded the province of the jury. *Sutherby*, 138 Wn. App. at 617.

Finally, Respondent asserts that a lack of objection to profile testimony waives the issue for appeal. Brief of Respondent, p. 20 (*citing to Braham*, 67 Wn. App. at 935). Testimony providing an "explicit or nearly explicit" opinion of guilt or witness credibility, however, can be raised for the first time on appeal because it constitutes manifest error affecting a constitutional right. *King*, 167 Wn.2d at 332. Additionally, as

argued in the Opening Brief, defense counsel's failure to object constituted ineffective assistance. *Hendrickson*, 138 Wn. App. at 833.

Officer Shelton's testimony included explicit, improper opinions of Everett's credibility and Mr. Olson's guilt. *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009). This error requires reversal of Mr. Olson's conviction. *Hudson*, 150 Wn. App. at 656.

### **III. THE COURT ERRED BY FAILING TO INQUIRE INTO JUROR MISCONDUCT.**

The right to a fair trial before an impartial jury includes the right to a trial in which the jury does not deliberate prior to hearing all of the evidence and the court's instructions. *United States v. Resko*, 3 F.3d 684, 688 (3d Cir. 1993); U.S. Const Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22. It is reversible error for a trial court to fail to inquire into possible juror misconduct in the form of early deliberations. *Resko*, 3 F.3d 691. At Mr. Olson's trial, the court failed to inquire into possible juror misconduct despite indication that the jury may have engaged in premature deliberation when it asked to hear the 911 tape a second time before the close of evidence. RP 392.

Respondent argues that Mr. Olson cannot prove when the jury made the request to hear the 911 tape again. Brief of Respondent, p. 22. It is clear from the record, however, that the request was made *before* the

court instructed the jury on the law and charged it to begin deliberation. RP 392. It is irrelevant at what point during the evidence phase the jury began deliberating because it is misconduct for the jury to deliberate at any point until trial has ended. *Resko*, 3 F.3d at 688.

Respondent relies on a line of cases in which a single juror revealed a premature opinion of guilt to an outside party. Brief of Respondent, pp. 23-24 (*citing to Tate v. Rommel*, 3 Wn. App. 933, 938, 478 P.2d 242 (1970); *State v. Hatley*, 41 Wn. App. 789, 706 P.2d 1083 (1985)). Those cases are not relevant to the issue Mr. Olson raises. Rather than a single juror expressing a pre-formed opinion to a third party, there was evidence in Mr. Olson's case that the entire jury – or some portion of it – had been discussing the evidence amongst themselves before they were permitted to do so.

The state also relies on *Rommel* for the proposition that Mr. Olson must establish prejudice from any premature deliberation. Brief of Respondent, p. 23. In *Rommel*, however, the court considered affidavits from several jurors and outside parties regarding possible juror misconduct. *Rommel*, 3 Wn. App. at 934-35. Mr. Olson assigns error to the trial court's failure to conduct such an analysis. The court's failure to inquire into possible juror misconduct in Mr. Olson's case represents a breakdown of its "continuous obligation" to excuse any juror who has

committed misconduct. *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000); RCW 2.36.110. The court's failure to inquire into possible juror misconduct precluded Mr. Olson from determining whether the jury had been prejudiced by premature deliberation. *Resko*, 3 F.3d at 694.

The court's failure to hold a hearing regarding possible juror misconduct deprived Mr. Olson of his due process right to an impartial jury. *Resko*, 3 F.3d 691. This error requires reversal of Mr. Olson's conviction. *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

**IV. THE COURT IMPROPERLY COMMENTED ON THE EVIDENCE AND VIOLATED MR. OLSON'S RIGHT TO A FAIR TRIAL BY PLAYING THE 911 TAPE A SECOND TIME BEFORE THE CLOSE OF EVIDENCE.**

A trial judge violates the right to a fair an impartial jury by placing undue emphasis on one party's evidence. *State v. Koontz*, 145 Wn.2d 650, 657-58, 41 P.3d 475 (2002); U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. A judge also "invades a fundamental right" by conveying a personal attitude or instructing jurors that factual matters have been established as a matter of law. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Wash. Const. art. IV, § 16. At Mr. Olson's trial, the court

complied with a juror request by replaying the state's 911 tape immediately before instructing the jurors on the law. RP 392, 403-05.

Respondent claims that this was not error. Brief of Respondent, p. 25 (*citing to State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126 (1983)). The state argues that *Frazier* is directly on point. *Id. Frazier*, however, dealt only with the admissibility of tape-recorded evidence as an exhibit that went to the jury room. *Id.* The court held that the admission of the tape into evidence did not unduly emphasize the state's evidence. *Id.* at 190.

Mr. Olson does not assign error to the admission of the 911 tape in his case. Rather, the trial court placed undue emphasis on the state's evidence and made a judicial comment by replaying the tape directly before delivering the jury instructions. RP 403-05. This procedure meant that the tape was the last thing the jury heard during the evidence phase of trial. It also aligned the state's evidence with the court's instructions.

The state points out that defense counsel did not object to the court's second playing of the 911 tape. Brief of Respondent, p. 25. As argued in Mr. Olson's Opening Brief, that failure constituted ineffective assistance of counsel. *Hendrickson*, 138 Wn. App. at 833.

The court deprived Mr. Olsen of his right to a fair trial by an impartial jury by placing undue emphasis on the state's evidence and

commenting on the evidence. *Levy*, 156 Wn.2d at 725; *Koontz*, 145 Wn.2d at 661. Mr. Olson's conviction must be reversed. *Levy*, 156 Wn.2d at 725; *Koontz*, 145 Wn.2d at 661.

**V. MR. OLSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Olson relies on his argument in the Opening Brief.

**VI. THE COURT ERRED BY ORDERING MR. OLSON TO PAY FEES AND COSTS FOR A CHARGE ON WHICH THE JURY ACQUITTED.**

The state concedes that the court erred by ordering Mr. Olson to pay a DNA collection fee when he was convicted of a misdemeanor. Brief of Respondent, p. 28.

Legal financial obligations (LFOs) only be assessed if they relate to charges for which the jury convicted; a person acquitted of some charges but convicted of others may not be required to pay costs for the charges resulting in acquittal. *State v. Moon*, 124 Wn. App. 190, 194-95, 100 P.3d 357 (2004); *Utter v. State, Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 312, 165 P.3d 399 (2007) (citing *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) ).

The jury acquitted Mr. Olson of Assault in the Second Degree and convicted only of Assault in the Fourth Degree. CP 3-9. The court ordered him to pay \$2,281.69 in LFOs, including \$816.69 in attorney fees. CP 4-5. The court made no inquiry into what portion of the fee could be

attributed to defending against the felony assault charge. *See generally* RP 488-502. This was error. *Moon*, 124 Wn. App. at 194-195.

Respondent relies on cases from Divisions One and Three for the proposition that a court may order an accused person to pay costs of the prosecution for a greater charge if s/he is convicted of a lesser-included offense. Brief of Respondent, p. 28 (*citing State v. Baggett*, 103 Wn. App. 564, 13 P.3d 659 (2000); *State v. Buchanan*, 78 Wn. App. 648, 898 P.2d 862 (1995)). This court has yet to speak to the issue in a published case.

Statutes authorizing a court to order a person to pay the costs of his/her prosecution are “in derogation of common law” and courts should construe them narrowly. *Moon*, 124 Wn. App. at 195. This court should not follow Divisions One and Three’s decisions in *Baggett* and *Buchanan* because they rely on a broad interpretation of the LFO statutes and reimburse the state for decisions to overcharge cases.

Mr. Olson was only convicted of a misdemeanor. If the state had only charged him with a misdemeanor, the cost of his prosecution would have been lower. The order that Mr. Olson pay the costs of the prosecution of a charge of which he was acquitted violated RCW 10.01.160. *Moon*, 124 Wn. App. at 194-95. The order imposing legal financial obligations must be vacated. *Moon*, 124 Wn. App. at 195.

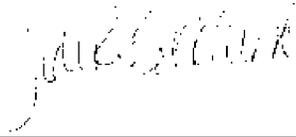
## CONCLUSION

The prosecutor committed flagrant and ill-intentioned misconduct: she made extensive burden-shifting arguments and questioned Mr. Olson about trial strategy and privileged communications with counsel. Officer Shelton provided an impermissible opinion of Everett's credibility, which invaded the province of the jury. The court denied Mr. Olson due process when it failed to inquire into possible juror misconduct. The court made an impermissible comment on the evidence and over-emphasized the state's theory when it replayed the 911 tape before trial had ended. Mr. Olson received ineffective assistance of counsel when his attorney failed to object to the prosecutorial misconduct, opinion testimony, juror misconduct, and playing the 911 tape a second time. The court erred in ordering Mr. Olson to pay the costs of his prosecution for a charge of which he was acquitted.

The Court of Appeals must reverse Mr. Olson's conviction. In the alternative, the court must vacate the order to pay legal financial obligations, and remand the case with instructions to exclude any costs or fees associated with the felony assault charge.

Respectfully submitted on November 14, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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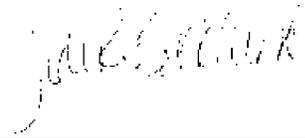
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney  
baur@co.cowlitz.wa.us

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 14, 2013.



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# BACKLUND & MISTRY

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