

No. 45163-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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IN RE THE PERSONAL RESTRAINT OF  
SHAMARR PARKER,

Petitioner.

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REPLY BRIEF OF PETITIONER

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A. ARGUMENT IN REPLY

THE PROSECUTION CONCEDES OR DOES NOT DISPUTE A NUMBER OF IMPORTANT ISSUES AND ITS REMAINING ARGUMENTS ARE MERITLESS

Although some of the claims presented by the prosecution in its response were adequately addressed in Mr. Parker's initial pleading, a few points need to be considered in reply.

First, the prosecution concedes or does not dispute much of what Mr. Parker claimed. For example, in its response, the prosecution concedes that this proceeding involves a "timely first personal restraint petition" and that the state has no indication that Mr. Parker is anything other than indigent. State's Response to Personal Restraint Petition ("Res.") at 2-3. The prosecution also agrees that Parker is under restraint pursuant to the judgment and sentence he is challenging, another threshold question in PRP proceedings. See RAP 16.4; Res. at 1-2.

In addition, the prosecution apparently concedes that no other remedies are adequate under the circumstances and that relief is authorized and not limited under Title 10.73 RCW. Res. at 1-22; see In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (failure to address in response brief an issue raised by appellant/petitioner is an apparent concession).

Thus, the only issues remaining for this Court to decide revolve around the question of whether the restraint Mr. Parker is suffering is

“unlawful.”

In answering that question, the Court should first reject the prosecution’s apparent attempts to cloud the issues. For example, the prosecution emphasizes that a PRP is not a “substitute for appeal,” noting policy reasons why PRP proceedings are limited and implying that the Court should hold Parker to a burden which is nigh insurmountable in light of those concerns. Res. at 2-5.

But the Supreme Court already took those policies and concerns into consideration in establishing the “actual prejudice” standard for constitutional errors and the “miscarriage of justice” standard for nonconstitutional errors. See Matter of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). As a result, applying those standards properly serves the interests the prosecution cites in the way our Supreme Court has decided is proper in light not only of the interests the state cites but the other interests the Supreme Court balanced in crafting the additional “threshold requirements” for some PRPs. See In re the Personal Restraint of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). As the Supreme Court has noted, those competing interests include the Court’s concern that “collateral review **must be available** in those cases in which [a] petitioner is actually prejudiced by the error.” See In re Taylor, 105 Wn.2d 683, 686, 717 P.2d 755 (1986), overruled in part on other grounds by, In re

Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992) (emphasis added).

Put another way, “collateral attacks on convictions. . . are limited” by application of the “threshold requirements,” “but not so limited as to prevent the consideration of serious and potentially valid claims.” Cook, 114 Wn.2d at 810. Those are exactly the kinds of claims Parker has raised here.

The prosecution also throws in citations to principles which do not seem to be relevant to its claims. For example, it declares that “naked castings into the constitutional sea” are not sufficient to support a constitutional claim but then makes no attempt to even claim - let alone prove - that Parker made such “castings.” See Res. at 3-4; Brief in Support of Personal Restraint Petition (“Brief”) at 1-43; compare, In re Williams, 111 Wn.2d 353, 759 P.2d 436 (1988) (petitioner challenged pleas of guilty used as criminal history in current sentencing solely by declaring that they were “uncounseled and not voluntarily or intelligently made and violated 6<sup>th</sup> Amendment Rights” without any cites to authority, transcript or anything other than the declaration), cited in, Res. at 4.

The prosecution’s arguments also seem to treat ineffective assistance of appellate counsel as mostly an afterthought. See Res. at 21-22. But the Supreme Court has held that “if a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has

necessarily met his burden to show actual and substantial prejudice.” In re Personal Restraint of Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

Indeed, where, as here, the claim is one of ineffective assistance of *appellate* counsel, as this Court has previously noted, “the Petitioner has not had a previous opportunity to obtain judicial review,” so the heightened PRP standards of actual and substantial prejudice and a miscarriage of justice do not apply to the ineffective assistance claim. See In re D’Allesandro, 178 Wn. App. 457, 314 P.3d 744 (2013). Instead, the petitioner need only show the merit of the legal issue which appellate counsel failed to raise and that the failure to raise the issue was prejudicial because there is a reasonable likelihood of success. In re the Personal Restraint of Netherton, 177 Wn.2d 798, 801, 306 P.3d 918 (2013).

Thus, if Parker shows that appointed appellate counsel’s failure to raise the issues of the highly prejudicial misconduct and the improper admission of the victim’s statements to others was deficient performance which prejudiced Parker, he is entitled to relief.

Here, he has more than met that standard, for counsel was deficient in relation to both the misconduct and the improperly admitted evidence. Further, Parker has met the requirements of showing that he is entitled to relief based on the misconduct and improperly admitted evidence even

without counsel's ineffectiveness. The prosecution's claims to the contrary and its arguments regarding ineffectiveness either ignore the record, the law or both.

- a. The prosecution's claims that the misconduct was not fully preserved and that there was not reversible error for both the ineffectiveness and the misconduct misstates the record and misapprehends the law

Regarding the misconduct, the prosecution first claims that "most" of the misconduct below was not "preserved" by proper objection. Res. at 7-8, 21. According to the prosecution, of the seven (or nine) "alleged instances of improper argument only four were preserved for review." Res. at 21. As a result, the prosecution posits, those comments would have been subjected to a higher standard of review so it is "not surprising that appellate counsel" would not have raised a challenge to that misconduct. Res. at 21.

At the outset, the prosecution's claims depend upon its declaration that there was no objection below to comments at pages 671, 678 and 779. See Res. at 8. But even a cursory glance at the record belies these claims. On page 671, the prosecutor made the first "imagine her terror" exhortation, followed only a moment later when the prosecutor repeated the same flagrant argument, urging to the jurors to imagine how terrified the victim must have felt and implying they should consider that in

deciding the case. 2RP 672. At that point, counsel specifically objected to the *repeated* comments of the prosecutor on the topic thus far:

Your Honor, I'm going to object. Counsel **keeps referring to terror and fear**, basically, playing to the prejudices and the passions of the jury as opposed to the facts of the case. 2RP 672 (emphasis added).

Thus, those comments were specifically objected to within moments. The prosecution has not explained how this specific objection to the repeated references was not sufficient to preserve the issue or somehow did not apprise the trial court or opposing party of the issue. See Res. at 1-22.

And after that, the prosecutor *again* exhorted the jury to “imagine her terror, nowhere to run, nowhere to go for help, nobody to call.” 2RP 672. Indeed, the prosecutor returned to this theme over and over throughout the entire closing. See 2RP 677 (“consider the experience that she had to go through, not only was she kidnaped, raped and robbed, but she had been forced to tell her story over and over and over”); 2RP 779 (imagine what she went through “in the middle of this rape, when she is in that dark field” and how she wanted to “maintain her dignity”).

By the time the comments on 677 and 779 were made, however, the court had overruled counsel's objection to the same argument. Counsel is not required to engage in the futile act of continuing to raise the

same objection anew when the court has already overruled it. See, e.g., State v. Cantabrana, 83 Wn. App. 204, 921 P.2d 572 (1996) (counsel need not object after related objection overruled because further objection likely would have been a futile endeavor). And in fact, although counsel was not required to do so in order to preserve the issue, counsel actually *did* object again, when the prosecutor described the incident as A.W. “experiencing a waking nightmare - -” but again, the hyperbole and improper appeals to passion by the prosecutor were allowed as the trial court overruled the objection. 2RP 686.

The prosecution’s claim that there was some problem of “preservation” for these comments fall in light of the actual record, and this Court should so hold.

This Court should also so hold regarding the other allegedly “unpreserved” misconduct of comments on page 678. The comment on that page to which Parker drew the Court’s attention is the first of the theme of A.W. being victimized by having to participate in the prosecution of the case, “being forced to tell her story over and over” and suffering in the process. That misconduct culminated in the prosecutor’s actually comparing A.W.’s having to testify against Parker with being raped again. The prosecutor said the crimes were not “just something that ends when she gets home” and instead “[i]t continues. It continues.” 2RP 678. The

prosecutor then noted how many officers, nurses and others - including defense counsel - A.W. had to talk to, characterizing that as A.W. being “forced to relieve it.” 2RP 678.

At that point, the prosecutor again focused on A.W. having to testify at Parker’s trial, noting that, “she comes in here and she has to tell it to a room full of strangers,” so that “[w]hat happened to A[.] W[.] on December 19, 2008[,] didn’t end on December 19<sup>th</sup>, 2008. It kept going.” 2RP 678.

The prosecution is absolutely correct that counsel did not object to these further improper attempts by the prosecution to incite the jurors to decide the case emotionally by making them feel sorry for all that the victim had allegedly gone through and thus bolstering her credibility. But again, Parker’s previous objections to similar “imagine how the victim feels” arguments had already been overruled.

More importantly, these arguments set the stage and ultimately became part of the ongoing theme of the prosecutor which culminated in the prosecutor comparing A.W.’s experience during cross-examination to being raped again:

A[.] W[.] has weathered two storms. What she suffered at this man’s hands **and what she suffered on the stand - -**

[DEFENSE COUNSEL]:     Objection, Your Honor.

THE COURT: Overruled.

[PROSECUTOR]: - - **to carry a truth to you**[.]

2RP 780 (emphasis added). The comments on page 678 that A.W. had to keep telling her story “over and over” and that her victimization thus had not stopped were an integral part of the argument, made only moments later, comparing the victim’s having to testify and be asked about the incident to the rape and using it to ennoble the victim as carrying “a truth” to the jury despite it all. 2RP 780. The prosecution’s claims that the misconduct was not “preserved” despite the record below should be rejected, as should the further theory that appellate counsel thus was not ineffective in failing to raise this serious, prejudicial prosecutorial misconduct on direct appeal.

The prosecution also claims that the four instances of misconduct that it concedes were preserved were somehow not misconduct. Res. at 9. But again the prosecution is treating each separate comment in isolation and/or misstating Parker’s actual arguments in an apparent attempt to minimize the impact of the improper comments below. For example, the prosecution tries to gloss over the comments telling the jurors to “imagine the terror” A.W. must have felt at the time of the crime, contained on 2RP 672. Res. at 9. According to the prosecution, this was simply “reference to the facts of the crime as supported by the evidence and its impact on the

victim.” Res. at 9.

That claim might actually be tenable if the comment was made in isolation or if it was the only time the prosecutor tried to incite the jury’s strong emotional reaction to the victim’s suffering in an effort to gain the conviction. Unfortunately, it was not. See 2RP 672-79; 776-79. And the prosecution has not explained how these further comments, relating to and expanding upon the theme of the first, can be deemed simple discussion of the “nature of the crime and its effect on the victim.”

Regarding the improper shifting of the burden of proof, the prosecution tries to minimize the gravity of the argument, focusing on the fact that “the comment” occurred in the last paragraph of closing and declaring that “clearly” the comment was only the prosecutor asking the jury to find the defendant guilty based on the proper burden of proof. Res. at 10.

Yet again, however, the prosecution is parsing out one part of the prosecutor’s argument in an effort to sanitize it, instead of looking at the argument as a whole. *After* the prosecutor had repeatedly told the jury to imagine how terrified and traumatized A.W. was by the experience and *after* the prosecutor had repeatedly emphasized how much additional trauma A.W. had to go through in order to prosecute the case, and *after* the prosecutor had told the jury that what A.W. went through “on the stand”

was akin to the rape, *then* the prosecutor told the jurors, “Justice Benjamin Cardoza was a former United States Supreme Court Justice,” and that Cardoza:

said something that is powerful and resonates. He said that justice, though due the accused, is due to the accuser as well. In this case, justice - -

[COUNSEL]: Objection, Your Honor; this is improper argument. It shifts the burden.

THE COURT: Overruled.

[PROSECUTOR]: Justice in this case is holding the defendant accountable for the waking nightmare that he foisted upon Ashley Weeks on December 19<sup>th</sup>, 2008[.] . . .

Ladies and gentlemen, **it’s no longer reasonable to doubt that the defendant is guilty[.]**

2RP 713 (emphasis added). Counsel again objected that the argument was improper and “shifts a burden to the defendant,” but that objection was overruled. 2RP 713. The prosecutor then again repeated, “[i]t is no longer reasonable to doubt that the defendant is guilty” of the robbery and while armed with a deadly weapon. 2RP 713.

Thus, this misconduct wasn’t one “comment,” as the prosecution repeatedly states in their response. See Res. at 10. Instead, it was a pervasive force throughout the closing, starting by telling the already emotionally-charged jurors that they should give “A.W.” her “due” (i.e.,

give her “justice” by convicting), after which the prosecutor said *not once but twice* that it was “no longer reasonable to doubt that the defendant is guilty.”

The prosecution claims that Parker somehow “fails to explain” how the argument could have confused the jury as to their burden, apparently ignoring the argument on that point in Parker’s brief. Res. at 10; Brief at 28. Notably, the prosecution does not even attempt to argue that the argument was correct i.e., that the jury had to determine whether it was “reasonable to doubt” guilt i.e., was required to convict *unless* they thought there was reasonable doubt, as the trial prosecutor argued here.

Further, because trial counsel objected below, had the issue been raised on direct appeal, reversal would have been required under the more forgiving “substantial likelihood” standard.

The prosecution’s final effort at minimization relates to the prosecutor’s highly improper comparison of what A.W. suffered during the rape to what she had suffered “on the stand” at trial, by having to testify and presumably because of cross-examination. Res. at 10. The prosecution does not dispute that Parker had a constitutional right to choose to go to trial or a constitutional right to confront and cross-examine his accuser. Res. at 10-11. Nor could it, as those rights are fundamental to our entire system of criminal justice. See, e.g., Davis v. Alaska, 415 U.S. 308, 94 S.

Ct. 1105, 39 L. Ed. 2d 347 (1974) (noting the importance of the right to cross-examination and that “the cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness”).

Instead, the prosecution focuses on the sole “storms” comment in isolation then declares that *defense counsel* invited the comment in his closing by questioning the very shaky credibility of the accuser. Res. at 11. And the prosecutor declaims that Parker has “failed” to explain how the jury would be persuaded “to convict simply because petitioner took his case to trial and challenged the State’s evidence.” Res. at 11.

These claims are unfathomable. Essentially, the prosecution is asking this Court to rewrite the rules prohibiting a prosecutor from drawing a negative inference from a defendant’s exercise of a constitutional right so as to require that the defendant prove that the negative inference *alone* persuaded a jury to convict. See Res. at 11. But that is not the law. Instead, it is well-settled that such comments are not only a violation of the right in question but also of the due process right to fundamental fairness. See Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 106 (1965); see also, State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

Indeed, such comments violate due process because they “chill” the

exercise of a constitutional right. See United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Where the prosecutor makes such improper comment, such as by asking the jurors to draw a negative inference from the defendant's exercise of his constitutional rights to silence, for example, the error is presumed prejudicial on direct appeal and the prosecution bears the heavy burden of proving the constitutional error harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). That standard is not met unless the prosecution shows that the evidence against the defendant is so overwhelming that *every jury* would *necessarily* have convicted even absent the error. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Here, the prosecution declares that the rule “that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions,” but that is wrong. See Res. at 3. The constitutional harmless error standard *is* relevant and *does* apply where, as here, the issue of ineffective assistance of appellate counsel is involved. Otherwise, how could the Court properly determine whether Parker was prejudiced by appellate counsel's failure to raise issues subject to that harmless error standard, on direct review? Indeed, the prosecution itself notes that Parker should have to show that he was “reasonably likely to have prevailed” on his arguments, which by definition

requires examining the proper standard of review which would have applied. See Res. at 21.

Notably, the prosecution does not even attempt to argue it could have met the constitutional harmless error standard for the prosecutor's improper comments drawing a negative inference from Parker's going to trial and cross-examining A.W. , had appellate counsel raised it on direct appeal. Res. at 21. Instead, the prosecution just declares that Parker failed to show any of the objected-to comments were "improper or that they had any negative impact on the jury's verdict." Res. 21.

Had the prosecution even tried to meet the proper standard, however, it could not. Where, as here, there is conflicting evidence from which the jury could have made its determination, constitutional error such as this is not "harmless." See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 54 P.3d 1255 (2002). And this is so even if the evidence would be sufficient to support a conviction in the face of a "sufficiency of the evidence" challenge on review, because the quantum of evidence required to satisfy sufficiency is only that *any* reasonable jury *could* have convicted, even if other juries might not. See Romero, 113 Wn. App. at 783-85.

If counsel had raised the misconduct issues on the direct appeal, there is more than a reasonable probability this Court would have reached a different result. The misconduct in this case was so egregious that

counsel objected, over and over. Further, the evidence against Parker was slim. The jury clearly did not believe A.W.'s version of events completely, or it would have also convicted Parker for the rape A.W. claimed had occurred.

Ultimately, the prosecution relies on a declaration that there was no "actual and substantial" prejudice, claiming that, because Parker was only convicted of *some* of the charged crimes, he cannot complain of the prosecution's flagrant misconduct as error compelling reversal by itself, under the PRP standards. Res. at 11. But the prosecution does not discuss any of the serious problems with its evidence, including the fact that its star witness admitted to repeatedly lying about what happened.

With the misconduct, the prosecutors here first repeatedly incited the jury's passions and prejudices against Parker and for A.W., repeatedly invoked the "terror" A.W. had felt, implied that having to testify and be cross-examined by Parker's counsel was like raping her all over again and then told the jury that it should convict because "justice" was "due" A.W. and it was "no longer reasonable to doubt" guilt, thus shifting the burden of proof on its head. "Actual" and substantial prejudice means nothing more than showing that the error was not simply speculative but likely had actual effect. See In re Personal Restraint of Stockwell, \_\_\_ Wn.2d \_\_\_, 316 P.3d 1007 (2014) (no actual and substantial prejudice and a petitioner could not

withdraw a plea when his judgment and sentence misstated the maximum punishment he could receive but he received an exceptional sentence below the standard range and below both the mistaken and actual maximum and further had completed the entire sentence two decades prior to the decision on the personal restraint petition).

Again, even if the prosecution were correct and the misconduct would not compel reversal under the PRP standards, appellate counsel's failure to bring the issues under the more favorable standards of direct appeal would mandate granting relief. Counsel's failure to do so left Parker in the unenviable position of having to file a collateral attack to vindicate his rights, when he should have received relief by way of direct review. This Court should so hold and should grant Parker relief from the unlawful restraints he is suffering as a result.

b. The prosecution's claims about the improperly admitted evidence are also without merit

In its response, the prosecution declares that the statements to Miller were admissible as excited utterances, making a long argument about why, although the trial court did not say it was admitting the statements as such below, it actually was doing so. Res. at 13-14. The prosecution then faults Parker for having "wholly" failed to address this theory of admissibility of the statements as excited utterances. Res. at 15. Notably, the prosecutor

admits that the statements were *not* admissible as “prior consistent statements,” as Parker argued. Res. at 16; Brief at 32-39.

But even if the evidence was admitted under the excited utterance exception, as the prosecution urges this Court to find, that does not support the prosecution. The “excited utterance” exception is based on the theory that the “startling event” so stills the mind that there is no chance that the resulting declarations are “the result of fabrication, intervening actions, or the exercise of choice or judgment.” State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quotations omitted). A statement is not an excited utterance where, as here, the witness has decided to fabricate a portion of her story prior to making the alleged excited utterance. State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995), abrogated in part and on other grounds by, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Thus, in Brown, when a woman who worked as a prostitute had gone voluntarily to an apartment but then been raped, she decided before calling police that she would lie about going there willingly because she did not think police would believe her otherwise. Similarly, here, before she got home and made the declarations to Miller and the police that night, A.W. admitted, she had decided to lie about where she had been that day, in order to avoid getting into trouble. RP 137, 172, 249. Those comments

were clearly not made while so under the influence of the startling event that there was no opportunity for reflection or self-interest - they were made after she had decided in her own self-interest to *lie*.

The prosecution's other claims regarding all of the issues raised on Mr. Parker's behalf are adequately anticipated in the opening brief and require no further discussion.

B. CONCLUSION

For the reasons stated herein and in Petitioner's previous pleading, Shamarr Parker respectfully asks this Court to grant him the relief to which he is entitled, reverse the convictions and remand for a new trial.

DATED this 19<sup>th</sup> day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows, to Mr. Shamarr Parker, DOC 752439, Coyote Ridge CC., P.O. Box 769, Connell, WA. 98326-0769, and to the Pierce County Prosecutor's Office, via efilng this date.

DATED this 19<sup>th</sup> day of June, 2014.

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