No. 45709-1-II

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

IN RE THE PERSONAL RESTRAINT PETITION OF

GEORGE WOODARD,

PETITIONER.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY

PETITIONER'S REPLY BRIEF

George Woodard DOC 294146
In Pro Persona
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362-8817

REPLY

1. The State's Assertion That There Is Overwhelming Evidence Of Mr. Woodard's Guilt Is Incorrect As This Case Is Properly Characterized As A 'Credibility Contest' Between The Complainant And Defendant.

The State repeatedly makes claim throughout their response to Mr. Woodard's personal restraint petition (PRP) that there was an overwhelming amount of evidence against Mr. Woodard to establish his guilt on the charged offenses. Thus, any error occurring at trial would have been necessarily harmless. Response, at 13, 19, 22, 60, 62. The State is incorrect and attempts to mislead this Court through conflated facts and arguments regarding the nature of the evidence presented at trial and its corresponding testimony as compared to the procedural posture of this case after appellate review.

It must be first noted that Mr. Woodard's conviction for child molestation in the second degree has already been reversed by this Court on direct appeal and the sentence vacated. State v. Woodard, 163 Wn. App. 1027 (2011). Consequently, the only two convictions remaining at issue in this case are the convictions for rape of a child in the second degree and kidnapping in the first degree with sexual motivation. The elements for the charge of rape are found at RCW 9A.44.076, and the elements for the charge of kidnapping are found at RCW 9A.40.020.

Secondly, it must be observed that the only relevant

physical evidence admitted at trial (notwithstanding the fact of its inadmissibility at trial – see section 5, below) to support the charge of rape was the rape kit (Exhibit 29); M.P.'s panties (Exhibit 28); the testimony of Teresa Shank who forensically analyzed the rape kit and panties for DNA (4RP 92-149); and the results of the forensic colposcopic exam of M.P. for potential sexual assault as performed by, and testified to, by nurse practitioner Lisa Wahl (SRP 5-28).

Thirdly, upon examination, none of the physical evidence or testimony noted above proved in any way, let alone beyond a reasonable doubt, that Mr. Woodard engaged in sexual intercourse with M.P. which was necessary to a finding of rape. This fact is necessarily conceded by the State in their response. See Response at 11 ("[T]he physical findings [upon Ms. Wahl's forensic examination of M.P.] were inconclusive"; citing SRP 9-25); Response at 44 ("[T]he testimony from Ms. Shank and the WSP laboratory report regarding the panties and the rape kit yielded no conclusive DNA that could be tied to Woodard"; citing 4RP 93-149).

Fourthly, it must be acknowledged that, with regards to the kidnapping charge, Deputy Shannon found no physical evidence anywhere at the scene where M.P. alleged that Woodard parked the van in the culdesac at the end of Lowery Lane. 3RP 111-113, 123, 132. Moreover, there were no eyewitnesses that saw the van parked where M.P. alleges it was parked during

the alleged sexual assault as determined by Deputy Shannon's canvassing of the residents of the houses in that neighborhood. SRP 60-61. Additionally, M.P. herself at no time testified that she was physically restrained by Woodard or was otherwise obstructed by Woodard from leaving the van at any time (while parked) through any of its four exits. Cf. 2RP 120-128; 2.2RP 4-60; 3RP 3-14, 153-161. Further, since there were houses in the culdesac as evidenced by the canvas of the neighborhood by Deputy Shannon, it was not a location where M.P. would not likely be found. Thus, there was no evidence to prove beyond a reasonable doubt, let alone at all, that Mr. Woodard kidnapped M.P. with sexual motivation which was necessary to a finding of kidnapping.

Lastly, because there were no other eyewitnesses to the sexual assault alleged by M.P., and due to the fact that there was no physical evidence admitted at trial to prove any of the necessary elements for the charges of rape and kidnapping, the case was largely a credibility contest between the sole complainant and Mr. Woodard.

And it must be further understood that in cases where a credibility contest exists between parties, i.e., "her word against his word", an emotionally-charged jury could easily be swayed by the admission of improper opinion testimony by expert witnesses who classically hold a "special aura of reliability" (for example), let alone other prejudicial trial errors.

See, e.g., State v. Walker, 164 Wn.App. 724, 738, 265 P.3d 191 (2011) ("[T]his case was largely a credibility contest in which the prosecutor's improper arguments could easily serve as the [jury's] deciding factor."); State v. Romero, 113 Wn.App. 779, 795, 54 P.3d 1255 (2002) ("Presented with a credibility contest, the jury could have been swayed by Sergeant Renfield's testimony, which insinuated Mr. Romero was hiding his guilt. [] In sum, a close question exists on the facts; therefore, we cannot say the error was harmless beyond a reasonable doubt.").

This is especially true where, as here, in this case of alleged child sexual assault, "prejudice ... is at its highest." State v. Salterelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

With this in mind then, Mr. Woodard implores this Court to consider all of his claims with the understanding of the credibility contest that occurred at trial, and the lack of evidence to support the remaining two charges in this case when deciding whether the claims presented require reversal of his convictions.

2. Woodard's Right To A Fair Trial And Impartial Jury Was Violated By The Improper And Inadmissible Expert Opinion Of Lisa Wahl Regarding Woodard's Guilt And By Her Improper Legal Conclusion.

The State, in response to Mr. Woodard's personal restraint petition (PRP), properly concedes that Lisa Wahl—an expert state's witness who examined M.P. for potential sexual assault—gave an

improper legal conclusion to the jury: "The State concedes that Ms. Wahl's testimony gave an improper legal conclusion: 'On that spectrum of normal and diagnostic blunt trauma you have levels of normal variance to inconclusive to very concerning to diagnostic. A notch is considered a normal variance and it could or could not indicate blunt penetrating trauma, which as the legal term is called rape.' SRP 14." Response at 12.

That was the first of three glowing "expert" opinions rendered by Ms. Wahl wherein she expressed an obvious disdain for what she clearly thought was a guilty defendant who "raped" M.P. just as M.P. had described to her. Ms. Wahl's three improper opinions at trial did nothing more than portray her opinion of the guilt of Mr. Woodard, thus, invading the jury's exclusive province. U.S. v. Gainey, 380 U.S. 63, 77 (1965) (The determination as to whether a defendant is guilty or innocent of a charged crime is solely a question for the jury); State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985) (same). See also State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (a witness may not give legal conclusions).

That said, the next instance of an improper opinion rendered by Ms. Wahl occurred upon a question by the State as to whether it was possible to have actual penile penetration (of the vagina) without any injuries to which Ms. Wahl responded in the affirmative. SRP 23. But immediately following her response to the yes or no question, she provided unsolicited

testimony about some "study" she seemed to know about where, allegedly, through insertive penile-vaginal intercourse, 37 teenage girls became pregnant and out of those, 34 of them apparently still had "normal findings." Id. But then she follows that with her obvious inferrence of Woodard's guilt of having alleged sexual intercourse with M.P. (who also had "normal findings" as examined by Ms. Wahl) through her glowing statement that, with those 34 girls, it was "fairly obvious something had happened." Id. (Emphasis added). Ms. Wahl's inferrence and connection between the "study" and this case was clear.

In Ms. Wahl's opinion, M.P., who claims that Woodard had penile-vaginal intercourse with her and was found to have "normal findings," was being truthful in her statements to Ms. Wahl necessarily because of this so-called "study" of 37 pregnant girls who had actually had intercourse where 34 of those also had "normal findings" like M.P. Thus, M.P. is telling the truth about the alleged intercourse with Woodard, and Mr. Woodard is guilty.

The jury could not help but hear the clear implication of Ms. Wahl's improper inferrence, especially where, as here, this case and the charges of rape and kidnapping turned on the credibility between M.P. and Woodard at trial. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (A witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference).

Moreover, the study Ms. Wahl alluded to, at a minimum, (assuming for the sake of argument that it does really exist and she wasn't simply making it up), was not helpful to the trier of fact and would have served only to confuse and mislead the jury because (1) there was no evidence or testimony that M.P. was herself pregnant through an act of sexual intercourse with Woodard, (2) a "normal" finding does not equate to a female having had penile-vaginal intercourse with a male (whether resulting in pregnancy or not), and (3) there was no testimony or evidence as to what developmental age the "teenage" girls were in the study or whether they were even close to M.P.'s physical developmental age (primary and secondary sexual characteristics) or not, and it should have been excluded under both ER 402 and ER 403 as it was not relevant to whether or not Mr. Woodard had sexual intercourse with M.P. on December 24, 2008. RCW 9A.44.076.

The third instance of improper opinion testimony from Ms. Wahl which affected the fairness of Mr. Woodard's trial was when she was asked if it would be possible for M.P. to have sex as she had described and not see any physical signs, to which Ms. Wahl responded: "Well, I wouldn't call it sex. I would call it victimization, but, yes, that's true." SRP 24 (emphasis added).

Ms. Wahl's message to the jury was as brazen as it was clear. Ms. Wahl, in essence, told the jury: "M.P. had sex with Woodard, and Woodard is guilty of it."

The State argues and asserts—notwithstanding their concession regarding Ms. Wahl's improper legal conclusion (Response at 12)—that none of Ms. Wahl's comments constitute improper opinion testimony; and none, including the improper legal conclusion, were prejudicial to Mr. Woodard. Response at 2-23. The State however, is trying to put lipstick on a pig.

Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591 (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Here, the law and facts favor Mr. Woodard in that: (1) the witness involved was a nurse practitioner who performed a colposcopic examination on M.P. for evidence of sexual assault and was presented as an expert witness and was the final State witness to testify before the State rested, hence, her testimony carried with it that "special aura of reliability," Demery, 144 Wn.2d at 765, inherent with witnesses of that type; (2) the nature of the testimony went to the crucial issue of whether or not Woodard engaged in "sexual intercourse" with M.P., RCW 9A.44.076; (3) the charged offense against Woodard was a sexual offense for second degree rape of a child against a 12-year-old girl; (4) Woodard's defense was that he denied

engaging in sexual intercourse with M.P., 5RP 34-35, 41-42, thus squarely contradicting M.P.'s testimony, 2.2RP 22-29; and (5) there was no other evidence before the trier of fact that corroborated M.P.'s alleged claim of sexual intercourse with Woodard because: (a) there were no other eyewitnesses outside of M.P. and Woodard, 5RP 60-61, (b) the physical findings reported by Lisa Wahl pursuant to her forensic sexual assault examination of M.P. proved "inconclusive", Response at 11 (citing to 5RP 9-25), and (c) the forensic examination of the rape kit and M.P.'s panties worn during the alleged sexual assault "yielded no conclusive DNA that could be tied to Woodard," Response at 44 (citing to 4RP 93-149).

Consequently, the improper opinion testimony and improper legal conclusion made by Lisa Wahl, the State's expert witness who carried that "special aura of reliability," Demery, 144 Wn.2d at 765, in this child sex case where "prejudice -- [wa]s at its highest," Salterelli, 98 Wn.2d at 363, regarding Woodard's guilt— either by her direct statement or by her inferrence— was inherently prejudicial to Mr. Woodard and violated his constitutional right to a fair trial as it: (1) invaded the exclusive province of the jury to determine the guilt or innocence of Mr. Woodard, and (2) improperly bolstered the uncorroborated statements of M.P..

The sexually-related testimony was of such a nature as to likely impress itself upon the minds of the jurors: "... which as legal terms is called rape;" [] "... and it's fairly obvious that

something had happened;" [] "Well, I wouldn't call it sex[,] I would call it victimization[.]" SRP 13-14, 23, 24.

In the State's response, the State tries to assert that:

> Ms. Wahl did not state that Woodard was guilty of raping or kidnapping M.P. SRP 24. Ms. Wahl's statement, while admittedly an opinion regarding the description of the sexual encounter as described to Ms. Wahl by M.P., did not infer that Ms. Wahl was opining that Woodard raped M.P. The statement was in regards to the physical contact pursuant to the information self-reported by M.P.
>
> Ms. Wahl's testimony was clear throughout her time on the stand, M.P.'s medical history was consistent with being raped, as that was what M.P. reported, but the physical findings were inconclusive and was equally consistent with a person who had blunt penetrating trauma and a person who had no sexual contact. See SRP 9-25.

Response at 11 (emphasis added). However, the State is clearly confused as to what constitutes permissible opinion testimony, and their apparent argument that Ms. Wahl was somehow allowed to make opinionated statements based only those statements made by M.P. to Ms. Wahl is erroneous, and stands in derogation to Washington law. See State v. Dunn, 125 Wn. App. 582, 591, 105 P.3d 1022 (2005) ("'Dr. Feldman's physical findings were inconclusive, and Washington law has never recognized the ability of a doctor or other expert to diagnose sexual abuse based solely on the statements of an alleged victim. If Dr. Feldman had a scientific basis for her opinion concerning sexual abuse, that basis surely is novel.'")(citation omitted).

An expert's opinion on an ultimate issue of fact that is "based solely on the expert's perception of the witness' truthfulness"

is unfairly prejudicial and thus inadmissible because it takes an ultimate issue of fact from the jury. State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992); see also State v. Black, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987); State v. Florczak, 76 Wn.App. 55, 74, 882 P.2d 199 (1994); State v. Fitzgerald, 39 Wn.App. 652, 694 P.2d 1117 (1985). An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility. Fitzgerald, 39 Wn.App. at 657.

Here we have the State admitting the truth of at least three things: One, that Ms. Wahl gave an improper legal conclusion to the jury; Two, that Ms. Wahl's forensic physical examination of M.P. proved to be inconclusive for sexual assault; Three, Ms. Wahl's statements given to the jury on the stand were her opinions based only on the oral history and statements given to Ms. Wahl by M.P. during the forensic examination. Response at 11-12. Consequently, caselaw makes clear the resulting prejudice that ensues to a defendant when an expert witness gives improper opinion testimony at trial especially where, as here, it occurs in the naturally prejudicial context of a child sexual assault case.

Aside from the State's admissions and concessions in this case, Respondent still expends considerable time opposing this single issue (almost one-third of their 64-page brief) regarding Woodard's claim that Ms. Wahl made at least three improper, inadmissible and prejudicial comments to

the jury thereby denying him a fair trial. This issue is critical.

Although the State argues there was no prejudice to Woodard, Ms. Wahl's comments themselves were prejudicial and did in fact prejudice Woodard as they more than likely swayed the jury to find Mr. Woodard guilty of the substantive offenses in spite of the lack of forensic physical evidence in the case and uncorroborated statements made by M.P., thereby denying him a fair trial. And contrary to the State's proffer, there is no "overwhelming evidence" of Mr. Woodard's guilt on the two charged offenses of rape and kidnapping outside of M.P.'s allegations (see Section 1, above), thus, the prejudice here to Woodard is actual and substantial.

There was a clear cumulative prejudicial effect on the jury from Ms. Wahl's improper statements at trial. They plainly violated the exclusive province and function of the jury and Mr. Woodard's inviolate constitutional right to a fair trial and impartial jury, and reversal is required.

3. <u>Woodard's Right To A Fair Trial Was Violated When The Trial Judge Impermissibly Commented On The Evidence During Preliminary Instructions To The Jury.</u>

At the start of trial, after the jury was sworn and preliminary instructions were read to the jury, the trial judge while speaking directly to the jury made an impermissible comment on the evidence through an admonition to the jury

by telling them:

> There may be some evidence that certain things happened at a particular location. You may know where that location is. You may not go near it or by it going to or from the Law and Justice Center or perhaps over the weekend or during a long recess. If that's the situation don't stop to look things over, because conditions may not necessarily be the same as they were when all the actions took place that led to the charges being filed.

1RP 107 (emphasis added). Defense counsel then moved for a mistrial based on that portion of Judge Brosey's statement wherein he told the jury that "the actions took place," and thereby making an impermissible comment on the state's evidence — which the judge denied. Id. at 128, 130.

On this claim, the State can only attempt to argue against it by making frivolous argument that Mr. Woodard "is distorting the statement, failing to read the statement in its entirety, and mischaracterizing the impact of the words." Respondent further argues that even if there was error, it was harmless and Woodard was not prejudiced because there was "overwhelming evidence of guilt." Response at 22.

Regardless of what the State may erroneously try to convince this Court of, it does nothing to change the fact that Judge Brosey still made the comment — in those words — directly to the jury at the start of trial and thus, the bell of prejudice had been rung. It cannot be undone.

The jury could not help but hear the plain implication that the judge himself believed the State's evidence. And while the comment may have been a small part of the

judge's instructions as a whole, it was enough to move defense counsel to move for a mistrial which prompted a full argument between the parties and the court. After all, it only takes one bullet to do damage. And even though the judge defended his comment and denied counsel's motion, the comment and its plain implication still would have had an effect on the jury by unfairly coloring the proceedings to the State's favor—before any testimony was even presented.

The judge's error here, whether accidental or purposeful, had only one profound effect--and that effect was a conveyance to the jury that Judge Brosey's evaluation of the facts and evidence and his attitude toward the merits of the case was that Mr. Woodard was guilty of the charged offenses as the State alleged. See State v. Jacobs, 121 Wn.App. 669, 685, 89 P.3d 232 (2004) ("An impermissible comment communicates to the jury the personal beliefs of the trial judge regarding the merits of the case or allows the jury to surmise that the judge personally believed the evidence presented.").

Here, the comment was prejudicial to Mr. Woodard in that it necessarily instructed the jury to give greater weight to the State's evidence--which is error. In re Detention of R.W., 98 Wn.App. 140, 146, 988 P.2d 1034 (1999) (An impermissible comment on the evidence by the court "in effect instruct[s] the jury to give greater weight to the State's evidence, which is error."). And once made, the damage was done. Reversal is required.

4. Woodard's Right To A Fair Trial Was Violated Through Actual And/Or Apparent Bias Towards Him By The Trial Judge.

On this claim, it was clear that Judge Brosey—especially during closing arguments to the jury—held an appearance of bias towards the defense throughout the trial proceedings. In this regard, Mr. Woodard incorporates the facts and argument from his petition. See PRP at 22-26, 31-35.

The State argues that "the trial court did not make erroneous rulings." Response at 36. However, at a minimum, there were substantial instances throughout the 4-day trial where prejudice to Mr. Woodard was evident and his fair trial and due process rights plainly violated without any action by Judge Brosey other than to deny defense counsel's motions for dismissal and/or mistrial. Some examples of those: (a) improper judicial comment on the evidence, (b) improper expert opinion testimony from Lisa Wahl, (c) improper legal conclusion from Lisa Wahl, (d) admission of inadmissible testimony by James Barnes in violation of court order, (e) admission of inadmissible testimony by Jonathan Neff in violation of court order, and (f) admission of inadmissible physical evidence—rape kit and panties. See PRP Claims One, Three, Five, Eight.

The unfair prejudice to Woodard accumulated and compounded throughout the trial. And by the end of trial, Judge Brosey—who is supposed to be an impartial administrator

of justice—should have granted defense counsel's motion for a mistrial or dismissal. However, Judge Brosey instead slanted his rulings towards the State thereby violating the appearance of fairness doctrine. Reversal is required.

5. Woodard's Rights To A Fair Trial And Due Process Of Law Were Violated When Inadmissible Physical Evidence Was Introduced At Trial That Was Not Properly Identified By Any Witness; And Further, Where There Was A Substantial Break In The Chain Of Custody.

In the State's response brief, Respondent's confusion as to the state of being and operation of the law here is apparent. Respondent argues, essentially, that because Lisa Engler, Deputy Fulton, Debra Hensley, and Teresa Shank testified at trial to the possession of the rape kit and M.P.'s panties, that the chain of custody was sufficiently established making them admissible; and further that the object itself does not have to be identified if the chain of custody is sufficiently established. Response at 40-45. However, Respondent conflates the law and the facts at hand.

Under Washington law, before any physical object connected with the commission of an alleged crime can be admitted as an exhibit at trial, there first is a foundational requirement where there must be an identification of the object itself by the person who took the item into custody, i.e., possession for the state. That object must be "identified as the same object and in the same condition as it was at the time of its seizure."

State v. Tretton, 1 Wn.App. 607, 610, 464 P.2d 438 (1969)(citing State v. Russell, 70 Wn.2d 552, 553, 424 P.2d 639 (1967); Allen v. Porter, 19 Wn.2d 503, 508, 143 P.2d 328 (1943). See also State v. Roche, 114 Wn.App. 424, 436, 59 P.3d 682 (2002); State v. Picard, 90 Wn.App. 890, 897, 954 P.2d 336 (1998). Without that initial identification at trial, the object is inadmissible. This procedure is necessary in order to preclude evidence from being erroneously admitted and thereby denying the defendant a fair trial.

Then, after the object is admitted as an exhibit (only after its proper foundational identification), the chain of custody must be testified to by those witnesses who had possession of the object between its original acquisition and trial. This is necessary when the object "is not readily identifiable and is susceptible to alteration by tampering or contamination." Roche, 114 Wn.App. at 436. This more stringent test requires the proponent to establish a chain of custody "with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with." U.S. v. Cardenas, 864 F.2d 1528, 1531 (10th Cir. 1989). The object "is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired." Roche, 114 Wn.App. at 436; State v. Gersvold, 66 Wn.2d 900, 406 P.2d 318 (1965)(Summarizing evidence pertinant to chain of custody).

No case in Washington has held that simply establishing

a chain of custody in-and-of-itself is what renders an object foundationally admissible. It is only when the evidence has first been identified by the person who seized the evidence as being the same object and in substantially the same condition that determines whether it is admissible or not. The State is wrong to the extent they argue otherwise. See Response at 43 ("Ms. Engler need not have to be able to state that a pair of panties, void of any packaging, are the panties that she recovered from M.P."); compare Roche, 114 Wn. App. at 436 ("'Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed.'")(quoting State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984)). The evidence then, i.e., the physical object seized, can only be admitted after its proper identification.

In the instant case, the rape kit and panties were not identified by those persons who seized the items (Deputy Fulton and Lisa Engler). That rendered the rape kit and panties inadmissible at trial. See 4RP 154-55 (Deputy Fulton answering "No" when asked if he could tell the court whether that particular box was the same box he picked up at the hospital); 3RP 165 (Lisa Engler failing to identify or recognize the panties stating that: "It would be hard to remember a pair of underwear from a year ago.").

Even further though, there was a significant gap in the chain of custody (six months) to which no witness testified to. See PRP at 37-38, 45-48. That just multiplied the inadmissibility of the rape kit and panties.

For the state to essentially argue here that establishing the chain of custody is the prerequisite to admissibility puts the cart before the horse. Otherwise, if that were so, the procedural requirement and need for identification of the object as "the same object and in the same condition it was at the time of its seizure," Tretton, 1 Wn. App. at 610, becomes illusory.

The rape kit and panties were not identified at trial as being the same object and in the same condition as they were at the time they were seized. Consequently, they were inadmissible. Their erroneous admission at trial prejudiced Mr. Woodard and denied him a fair trial.

6. Woodard's Right To Compulsory Process Was Violated When Defense Counsel Failed To Call A Medical Expert To Testify In Behalf Of The Defense In Opposition To The State's Three Expert Medical Witnesses.

Due to the fact that determination of this claim necessarily turns on the need for an evidentiary hearing regarding the underlying claim as to whether or not trial counsel was constitutionally deficient in his representation of Mr. Woodard at trial (see PRP Claim 7a), and because the facts of this claim as well as his ineffective assistance of

counsel claim both need to be factually resolved at an evidentiary hearing in superior court in order to establish the record in this case, and Mr. Woodard, having pled prima facie facts that, if true, see PRP at 51, 55, 56-68, entitle him to relief, Mr. Woodard again repeats his request for an evidentiary hearing with expert assistance at that hearing pursuant to RAP 16.12; CrR 3.1, so that this Court can make a judicial determination of this claim on its merits.

7. Woodard's Right To Confront Witnesses Was Violated When Defense Counsel Failed To Properly Impeach Two State Witnesses, and Further, Failed To Impeach, At All, Another State's Witness At Trial.

Due to the fact that determination of this claim necessarily turns on the need for an evidentiary hearing regarding the underlying claim as to whether or not trial counsel was constitutionally deficient in his representation of Mr. Woodard at trial (see PRP claim 76), and because the facts of this claim as well as his ineffective assistance of counsel claim both need to be factually resolved at an evidentiary hearing in superior court in order to establish the record in this case, and Mr. Woodard, having pled prima facie facts that, if true, see PRP at 52-55, 68-71, entitle him to relief, Mr. Woodard again repeats his request for an evidentiary hearing pursuant to RAP 16.12; CrR 3.1, so that this Court can make a judicial determination of this

claim on its merits.

In addition, the State concedes that defense counsel's performance was deficient with regards to counsel's failure to impeach James Barnes. See Response at 54 ("[T]he State concedes it is odd that Mr. Blair would not question Mr. Barnes about the declaration Mr. Barnes wrote stating he had nothing useful or relevant to testify about and wished to be removed from the witness list. See 4RP 66-77; Pet. Ap. N. On its face this would appear to be deficient performance [.]").

8. Woodard Was Denied His Right To Effective Assistance Of Trial Counsel Throughout The Proceedings.

Due to the fact that determination of this claim as to whether or not trial counsel was constitutionally deficient in his representation of Mr. Woodard at trial (see PRP Claims 2, 6, 7a, 7b) needs to be factually resolved at an evidentiary hearing in superior court in order to establish the record in this case, and Mr. Woodard, having pled prima facie facts that, if true, see PRP at 7-8, 20-22, 34-40, 48-50, 51-55, 56-71, entitle him to relief, Mr. Woodard again repeats his request for an evidentiary hearing pursuant to RAP 16.12; CrR 3.1, along with expert assistance at that hearing, so that this Court can make a judicial determination of this claim on its merits.

Moreover, as already noted above, the State concedes

Mr. Blair's deficient performance with regards to failing to impeach James Barnes. Response at 59. Further though, the State also concedes Mr. Blair's deficient performance with regard to failing to object to Lisa Wahl's impermissible legal conclusion. See Response at 51 ("The State would agree that failing to object to this testimony could be considered deficient.").

9. Woodard Was Denied His Right To Effective Assistance Of Appellate Counsel When Counsel Failed To Assign Error To A Ground Raised By Counsel On Direct Appellate Review.

In the State's response, the State argues that "[t]o establish appellate counsel's deficient performance Woodard must show his appellate counsel should have known she needed to assign error to the trial court's denials of the motions for mistrial but failed to properly do so." Response at 61. Respondent makes a frivolous argument based on the fact that appellate counsel obviously: (1) graduated from a school of law; (2) was admitted to the Washington State Bar; (3) is an appellate attorney; (4) is familiar then with the Rules of Appellate Procedure (RAP); (5) is familiar with published Washington appellate and supreme court cases; and (6) based on the above, would know her legal requirement of assigning error to trial court issues on direct appellate review.

Consequently, appellate counsel would also know then, that a failure to assign error would preclude appellate review of a meritorious claim. See RAP 10.3(a)(4) (brief of appellant should contain: "Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error."). Cf. Escude ex rel. Escude v. King County Public Hosp. No. 2, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) ("It is well settled that a party's failure to assign error or to provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error;" citing cases). See also State v. Fortun, 94 Wn.2d 754, 756, 626 P.2d 504 (1980) (failure to assign error precludes appellate review); State v. Tanzymore, 54 Wn.2d 290, 292, 340 P.2d 178 (1959) (no issue is presented on appeal, where no error is pointed out under assignment of error); Boyle v. King County, 46 Wn.2d 428, 433, 282 P.2d 261 (1955); Hafer v. Marsh, 16 Wn.2d 175, 181, 132 P.2d 1024 (1943); Hubbell v. Ernst, 198 Wash. 176, 178, 87 P.2d 985 (1939) (arguments in brief cannot be considered where there was no assignment of errors in accordance with rule).

It would seem then, with over seven decades (at least) of caselaw on this issue, that we can certainly presume that appellate counsel knew her requirement under the law and the rules of court to assign error to alleged trial errors.

However, notwithstanding Respondent's frivolous argument, the State does concede that appellate counsel was indeed deficient for failing to assign error to the issue regarding the introduction of improper testimony from James Barnes and Jonathan Neff during trial. See Response at 61-62 ("The State also concedes that appellate counsel's failure to assign error to the trial court's mistrial rulings was deficient."). And further, the State additionally concedes the effect of appellate counsel's deficiency on direct appellate review. See Response at 61 ("The State will concede that this Court declined to reach the merits of whether Mr. Barnes and Mr. Neff's testimony regarding the prior sexual encounters and drug use violated Woodard's right to a fair trial.").

Thus, due to appellate counsel's deficient performance, Mr. Woodard was prejudiced by the denial of access to court and the "loss of opportunity to seek some particular order of relief." Christopher v. Harbury, 536 U.S. 403, 414 (2000). Had this Court reached the merits of the claim, there was more than a reasonable probability that, but for counsel's unprofessional error, Woodard would have prevailed on his claim resulting in a vacation of his convictions and remand for a new trial.

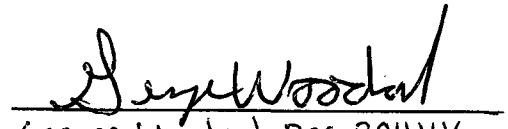
10. The Combination Of Trial Errors Require Reversal Of Woodard's Remaining Two Convictions Under The Cumulative Error Doctrine.

Because partial determination of this claim of cumulative error necessarily requires an evidentiary hearing first be held on Woodard's ineffective assistance of counsel claims (see PRP Claims 2, 6, 7a, 7b), see Section 6-8 above, before it can be reviewed on its merits, Mr. Woodard again repeats his request for an evidentiary hearing with expert assistance at that hearing pursuant to RAP 16.12; CrR 3.1.

CONCLUSION

Mr. Woodard respectfully requests this Court remand this case to the superior court for an evidentiary hearing with appointment of counsel for that hearing on his ineffective assistance of counsel claims; and a reversal and remand for either dismissal of charges with prejudice or a new trial.

Dated this 15th day of July, 2014.



George Woodard DOC 294146
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362-8817

DECLARATION

I, George Woodard, declare that, on July 15th, I deposited the foregoing document(s),

Petitioner's Reply Brief

or a copy thereof, in the internal legal mail system of Washington State Penitentiary and made arrangements for postage, addressed to:

Court of Appeals Div II	and Sara Beigh
950 Broadway Ste 300	Lewis County Prosecuting Att
Tacoma, Wa 98402-4454	345 W. Main St, 2nd Floor
	Chehalis, Wa 98532-1900

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Walla Walla, Washington on July 15th 2014,

Signature and number: Gerry Woodard

TO: Clerk, Court of Appeals

July 15TH, 2014

Re: In Re Pers. Rest. Pet of George P. Woodard
cass # 45709-1-II

RECEIVED
JUL 17 2014
CLERK OF COURT OF APPEALS DIV-II
STATE OF WASHINGTON

Dear Clerk

Please find enclosed a Petitioner's Reply Brief to be filed with the Court in the above-reference cass number.

Thank You,
Sincerely,

George Woodard

George Woodard # 294746
Washington State Penitentiary
Rainier A-1-01
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Walla Walla, Wa 99362