FILED
Court of Appeals
Division II
State of Washington
8/3/2018 4:12 PM

NO. 50287-9-II

COURT OF APPEALS, DIVISION II,

STATE OF WASHINGTON

JASON C. WILKS,

APPELLANT

v.

STATE OF WASHINGTON,

RESPONDENT

Appeal from the Superior Court of Pierce County, Washington

The Honorable Stanley J. Rumbaugh, Pierce County Cause No. 14-1-04908-2

REPLY BRIEF OF APPELLANT

By

Barbara Corey

Attorney for Appellant

WSB #11778

902 South 10th Street

Tacoma, WA 98402

(253) 779-0844

TABLE OF CONTENTS

A. THE TRIAL COURT HAD A DUTY TO INQUIRE INTO THEMATTER OF A SLEEPING JUROR WHERE THE TRIAL COURT WAS MADE AWARE DURING THE TRIAL THAT JUROR NO 10. APPEARED TO BE SLEEPING 1

B. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT THE RIGHT TO PRESENT HIS DEFENSE THROUGH EVIDENCE ESTABLISHING WHY THE ALLEGED VICTIMS HAD BEEN EITHER BANNED FROM THE WILKS' RESIDENCE OR WHY SAMANTHA HAD BEEN PROHIBITED FROM VISITNG THE RESIDENCE WHEN THAT EVIDENCE WAS ESSENTIAL TO HIS DEFENSE 2

C. THE DEPUTY PROSECUTOR COMMITTED INTENTIONAL AND FLAGRANT MISCONDUCT DURING CLOSING ARGUMENT. HE MADE ARGUMENT THAT COULD NO HAVE BEEN MADE IN GOOD FAITH AND THAT WERE NOT REASONABLE INFERENCES BASED ON THE EVIDENCE 6

D. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT PROVIDED MARIJUANA TO THE TEEN-AGE GIRLS AND THEREFORE THIS COURT MUST DISMISS COUNTS 5, 8 AND 13 17

E. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIMES OF FURNISHING LIQUOR TO A MINOR AS CHARGED IN COUNTS 6,9,11,14 AND 16 19

F. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED COUNST 2,3,4,7,10,12 AND 15 22

G. WILKS IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE 24

TABLE OF AUTHORITIES

Cases

State

State v. Jordan, 103 Wn. App. 221,221 11 P.3d 866 (2000) 1

State v. Rich, 63 Wn. App. 743, 749, 821 P.2d 1269 (1992)..... 2

State v. Hudlow, 99 Wn.2d 1, 14 659 P.2d 514 (1983) 2

State v. Jones, 168 Wn.2d 713, 702, 230 P.3d 576 (2010) 2,3

State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002) 3

State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983) 3

State v. Horn 3 Wnn.App.2d 302, 415 P.3d 1225 (2018) 3

State v. Lee, 188 Wn.2d 473, 488, 396 P.2d 316 (2017) 4

State v. Allen 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999) 4

State v. Whyde, 30 Wn. App. 162, 166, 632 P.2d 913 (1981) 4

State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996) 4

State v. Monday, 171 Wn.2d 667, 676, 257 P.3d551 (2011) 7

Reed, 102 Wn2d at 147 7

State v. Emery, 174 Wn2d 741, 278 P.3d 653 (2012) 8

State v. Coleman, 155 Wn.App. 951, 957, 231 P.2d 212 (2010) 9

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) 9

State v. Warren, 165 Wn.2d 17,30,195 P.3d 940 (2008) 14

State v. Emery, 174 Wn 2d at 751 17

State v. Crowder, 196 Wn.App. 861, 385 P.3d 275 (2016) 17

In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) 24

Federal

United States v. Wexler, 79 F.2d 526, 529-530 (2d Cir. 1935) 7

Statutes

RCW 2.36, 110 1

RCW 69.59.406 (2) 17

RCW 69.50.101(t)(2014) 18

RCW 69.50.406 18

Constitutional Authority

State Authority

Washington Constitution amend. VI 1

Wash.Const. Art. I, sec. 22 1,3,6

Wash. Const. Art. I, sec. 22 2

Federal Authority

U.S. Const. amend. VI 2

Sixth Amendment 3,6

Rules and Regulations

CrR 6.5 1

A. THE TRIAL COURT HAD A DUTY TO INQUIRE INTO THE MATTER OF A SLEEPING JUROR WHERE THE TRIAL COURT WAS MADE AWARE DURING THE TRIAL THAT JUROR NO. 10 APPEARED TO BE SLEEPING.

Contrary to the State's response, the trial court had an independent duty to assure that defendant received his constitutional right to jury trial as guaranteed by *Washington Constitution amend. VI* and *Wash. Const. art. I, sec. 22*. The trial court has a mandatory duty to excuse from jury duty any juror who in the court's opinion has manifested unfitness as a juror for a number of reasons incompatible with proper and efficient jury service. *RCW 2.36. 110; CrR 6.5*. The statute and court rule place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror. *State v. Jorden*, 103 Wn.App. 221, 227, 11 P.3d 866 (2000).

In this case, the trial court was informed that juror no. 10 had been observed sleeping on the morning of November 1, 2016 as well the day before. RP 11/1/16 47. These observations had been related by individuals in the gallery and the trial court deemed them insufficient to initiate any inquiry because "nobody directly involved with the case either saw it or brought it to the court's attention." RP 11/1/16 47. Defense counsel brought it to the court's attention as soon as he learned of it. It would have been unusual for individuals in the gallery to interrupt the proceedings to inform the court of their observations. Defense counsel asked to make a record of the witnesses' observations but the trial court refused. RP 11/1/16 48.

The trial court abused its discretion when it failed to take action to ensure that defendant received his important constitutional right to trial by jury. At the time of the report of the sleeping juror on November 1, 2016, the case had been in trial since September 19, 2016. There were alternate jurors available had the trial court conducted any inquiry. There is no authority for the State's proposition that the trial court does not need to initiate an inquiry into possible juror unfitness to determine whether witnesses' observations had merit.

In this case, the trial court failed to perform its mandatory duty to protect defendant's fundamental constitutional right to be tried by a competent jury first chosen sworn. *State v. Rich*, 63 Wn.App. 743, 749, 821 P.2d 1269 (1992). Had the trial court fulfilled its responsibilities, the case could have proceeded to deliberations with competent jurors.

B. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT THE RIGHT TO PRESENT HIS DEFENSE THROUGH EVIDENCE ESTABLISHING WHY THE ALLEGED VICTIMS HAD BEEN EITHER BANNED FROM THE WILKS' RESIDENCE OR WHY SAMANTHA HAD BEEN PROHIBITED FROM VISITING THE RESIDENCE WHEN THAT EVIDENCE WAS ESSENTIAL TO HIS DEFENSE.

The right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions. *U.S. Const. amend. VI; Wash. Const. Art. I, sec. 22; State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). In State v. Jones, 168 Wn.2d 713, 702, 230 P.3d 576 (2010),* the Supreme Court wrote:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. *Chambers v. Mississippi, 410 U.S.284, 993 S.Ct. 1038, 35 L.Ed.2d 297 (1973).* A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence.

The court held that evidence that defendant seeks to present "must be of at least minimal relevance." *State v. Darden,* 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If the evidence is relevant, then the burden is on the State to show that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Id.*

The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." *Id.* The Washington Supreme Court has held that "the integrity of the truth finding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).* The Washington Supreme Court therefore noted that for evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the *Sixth Amendment* and Const. Art., 1, sec. 22.*"Id. at 16.* (first and second alterations in original).

In concluding its discussion of the *Sixth Amendment*, the Jones court wrote: "[T]he clear implication [is] that evidence of high probative value could not be restricted regardless of how compelling the State's interest may be if doing so would deprive the defendant[ ] of the ability to testify to [the defendant's] versions of the incident." *Id. at 721.*

More recently, this court issued its opinion in *State v. Horn*, 3 Wn.App.2d 302, 415 P.3d 1225 (2018) holding that defendant's claim of a denial of a *Sixth Amendment* right to present a defense claim must be analyzed under a three-step test. First, the evidence that a defendant desires to introduce of at least minimal relevance.'" *Jones*, 168 Wn.2d at 720

(quoting *State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002))*.. *A defendant has a right to present only* evidence that is relevant. Id.; *ER 401.* Second, if relevant, the burden shifts to the State to show that the relevant evidence "'is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" *Jones, supra.* Third, the State's interest in excluding prejudicial evidence must also be balanced against the defendant's need for the information sought, and relevant information can be withheld only if the State's interest outweighs the defendant's need. Id. The same test is used to review claims that the right to confront witnesses was violated. *State v. Lee,* 188 Wn.2d 473, 488, 396 P.2d 316 (2017).

Regarding the first prong of the test, impeachment evidence is relevant only where "(1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action." *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). Bias and interest are relevant to the credibility of a witness. *State v. Whyde,* 30 Wn. App. 162, 166, 632 P.2d 913 (1981). Impeachment evidence also may establish potential motive to fabricate the allegations against a defendant and, thus, is relevant to challenge credibility for this reason as well. See, e.g., *State v. Lubers,* 81 Wn. App. 614, 623, 915 P.2d 1157 (1996) Where an accuser's credibility is crucial, the accuser's motive to lie is not a collateral issue and, thus, extrinsic evidence may be used to impeach the accuser.

In this case, as argued in the opening brief, the trial court abused its discretion when it denied defendant his constitutional right to present a defense, including the presenting important impeachment evidence.

The State is wrong when it asserts that defendant was allowed to present evidence that LM had stolen from Samantha and Katie. Respondent's brief, p. 12, citing RP 10/27/16 136. The cited page in the report of proceedings references a hearing held outside the presence of the jury. RP 10/27/16 135-140.

Regarding the objectionable and "extremely inappropriate" texts from MR that defendant found on Samantha's phone, the content concerned MR, AB, LM, and BS. RP 11/1/16 159. Defendant should have been allowed to adduce this evidence to show that the four girls were acquainted prior to the bringing of any charges and also further to why explain these few girls, out of Samantha's many friends, were excluded from the Wilks home and her group of friends[1].

Although defendant was allowed to adduce minimal information about the alleged victim's motives for fabricating the allegations, he was not permitted to present his defense. The limited evidence that he was allowed to present failed to permit the jury to appreciate the magnitude of the issues and how the defendant, Katie, Samantha and the alleged victims were affected by them. The alleged victims talked among themselves. *E.g.*, RP 10/10/16 150; 10/5/16 51,59

The State misapprehends that its burden was to show that the relevant evidence "'[was] so prejudicial as to disrupt the fairness of the fact-finding process at trial." The State never considered constitutional issues in making its response to defendant's argument claim

[1] Appellant agrees that the State would have been entitled to a limited instruction pursuant to WPIC 5.30 had such evidence been admitted if the State requested one.

that he was entitled to present a defense. In *Hudlow, supra*, the Washington Supreme Court stated that it appeared no state interest could be compelling enough to preclude its introduction consistent with the *Sixth Amendment* and Wash. Const. Art. 1, sec. 22.

In *Horn, supra*, this court held when the defendant seeks to admit relevant evidence, the burden then shifts to the State to show that the relevant evidence "'is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Here the State failed at trial and again in this appeal to establish that the evidence defendant sought to admit was so inconsistent with any state interest that it needed to be precluded although it would deny defendant his Sixth Amendment and Wash. Const. Art.1, sec. 22 confrontation rights as well as disrupt the fairness of the fact-finding process at trial.

C. THE DEPUTY PROSECUTOR COMMITTED INTENTIONAL AND FLAGRANT MISCONDUCT DURING CLOSING ARGUMENT. HE MADE ARGUMENT THAT COULD NOT HAVE BEEN MADE IN GOOD FAITH AND THAT WERE NOT REASONABLE INFERENCES BASED ON THE EVIDENCE.

The Pierce County Prosecuting Attorney's Office, the office with the most convictions reversed in the State of Washington for misconduct in closing argument[2], urges this court to decline to use the term "misconduct" and instead use the term "prosecutorial error." Appellant respectfully asks this court to decline the state's invitation. This prosecutor's office time and again ignores established case law and makes similar impermissible arguments in case after case. This is not mere error. This is intentional and flagrant misconduct.

[2] "Pierce County prosecutors lead State in cases overturned because of their 'flagrant' actions", Tacoma News Tribune, 8/19/15 – ATTACHMENT A.

Defendants are among the people the prosecutor represents. *State v. Monday,* 171 Wn.2d 667, 676, 257 P.3d 551 (2011). The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *Id.*

Additionally, prosecutors must act to ensure that trials are conducted fairly so that juries decide cases dispassionately based on a reasoned testing of the evidence to ensure that the State meets its burden of proof beyond a reasonable doubt. Judge Learned Hand observed that "[i]t is impossible to expect that a criminal trial shall be conducted without some show of feeling," but our courts have long and repeatedly emphasized that prosecutors must abstain from appeals to passion, prejudice, or sympathy, making rational and reasoned arguments from the evidence instead. *United States v. Wexler*, 79 F.2d 526, 529-530 (2d Cir. 1935); see *State v. Reed,* 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). The prosecutor's duty to impartially pursue justice is not measured by the number of convictions obtained. *Reed*, 102 Wn.2d at 147.

In this case, the deputy prosecutor egregiously misrepresented the evidence presented at trial to deprive defendant of a fair trial and to earn an unfair and "dirty" conviction. This is exactly the type of intentional and flagrant misconduct that the cases on misconduct in closing arguments condemn.

Trial counsel's failure to object does not grant the deputy prosecutor license to commit multiple acts of misconduct. A defendant's failure to object at trial waives the challenge unless the reviewing court can determine that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a

substantial likelihood of affecting the jury verdict. *State v. Emery,* 174 Wn.2d 741, 761, 278 P.3d 653(2012). An objection is unnecessary in cases of incurable prejudice only because there is, in effect, a mistrial and a new trial is the only and the mandatory remedy. *Emery*, 174 Wn.2d at 762. Accordingly, reviewing courts focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction. *Id.* In the instant case, the experienced prosecutor's arguments contained many arguments that appellate courts have held to be improper and therefore had to have been flagrant and ill-intentioned. Presumably the experienced deputy prosecutor was/is well aware of the criminal law. His arguments were extremely prejudicial and could not have been cured by instructions.

a. The deputy prosecutor urged the jury to convict the defendant based upon the testimony of witnesses who were unconscious and/or blacked out at the time of the charged events, arguing that their testimony about the events were credible

In this case, defense counsel argued, "While *they* were *unconscious* he would move *their* bodies, touch *their* bodies, put his hands in *their* pants, *penetrate their vaginas*. He would *rape them*. He would *molest* them." RP 11/3/16 43. (emphasis added)

Consider that there was no competent testimony to any of that. If, in fact, the alleged victims were "unconscious", then they would not have been able to perceive any of this. Defendant denied committing any criminal acts. The other individuals who may have been present were Katie Wilks and Samantha Wilks. They denied witnessing any such conduct.

The prosecutor continues on appeal to urge this court to find that the girls were passed out or "blacked out" and thus unconscious. State's Response Brief, pages 22-23. The State then urges this court to apply the Miriam Webster's Third New International Dictionary (2002) definition of "unconscious" to this case. Unconscious is defined as "not knowing or perceiving: not aware." *Id.*

Thus, under the very argument made by the State, the alleged victims could not have been aware of anything that happened to them. The prosecutor's attribution to defendant of acts of which the alleged victims were "not knowing, not perceiving, and/or not aware" was flagrant misconduct. He urged the jury to conviction defendant of serious sexual offenses knowing that he lacked competent evidence. This is flagrant and intentional misconduct.

b. <u>The prosecutor impermissibly vouched for the credibility of the witnesses</u>.

It is improper for the prosecution to vouch for the credibility of a government witness. *State v. Coleman,* 155 Wn.App. 951, 957, 231 P.2d 212 (2010), pet. rev denied, 170 Wn.2d 1016 (2011). Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. *Id.*. A prosecutor's remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Brown,*132 Wn.2d 529, 561. 940 P.2d 546 (1997).

In this case, the prosecutor impermissibly vouched for the credibility of the alleged victims in his PowerPoint slide which stated, "The only conclusion supported by the evidence

is that LM, BS, MR, AB, and RR are telling the ***TRUTH***" (Appendix B-opening brief). Although the State contends that this argument was supported by the evidence, in fact the prosecutor preceded this argument with this impermissible set-up: "So there's three possibilities. One someone coached them; two, they made it up on their own; or three, they're telling the truth. . ." RP 111/3/16 106. The prosecutor continued to argue that there was no evidence of possibilities one and two and then used the absence of these facts to vouch for the credibility of the alleged victims. Passim.

This vouching is not supported by the evidence. Simply consider the preceding argument wherein the State admitted the several of the alleged victims were "unconscious" and were not even aware of the sexual assaults they claimed were perpetrated upon them and where there was no independent evidence to sustain those convictions.

c. <u>The deputy prosecutor misrepresented the testimony of defendant's father to suggest that defendant was present when his daughter and her friends watched television in the master bedroom</u>.

In addition, the deputy prosecutor overstated the testimony of defendant's father David Herzfeldt when he suggested to the jury that there were "piles of girls" on the defendant's bed when defendant was present. The State's response is that defendant's father testified to just that. State's Response brief, page 22. The witness did not. The deputy prosecutor's closing argument is a stunning example of how a simple answer was conflated into something else.

DEPUTY PROSECUTOR: When we chatted last week, you mentioned that sometimes you would look in and they would all be kind of piled up on the bed?
WITNESS: Correct, sir. RP 10/20/16 107-08.

Of course, the deputy prosecutor never asked if Samantha and her friends watched television in her parents' room when her father was home and/or in the bedroom as well as when this occurred, that is, before or after the alleged victims had been told they could no longer come to the Wilkes' residence. RP 10/20/16 107. In fact Herzfeldt testified that when Samantha had slumber parties, the girls either slept in the living room or in Samantha's bedroom which had a tv. RP 10/20/16 111.

d. The deputy prosecutor misstated the testimony of Nicholas Wilks who *never* testified that he saw defendant and the girls drinking in his room on homecoming."

Further, the deputy prosecutor confabulated that Nicholas Wilks saw "the defendant and girls drinking in his room on homecoming." Respondent's brief, page 22. The State erroneously

avers that this argument was supported by the record, citing testimony from defendant's son Nathan Wilks, who testified that defendant kept alcohol in his room and that Samantha and her friends would watch movies in his room. However, RP 10/24/16 141-45. However, there is nothing in the cited five pages of testimony that supports the State's inferences.

Nathan testified that defendant kept Fireball whiskey and other alcohol locked in the parents' bedroom. RP 10/24/16 142-43. The locking mechanism was *a handprint scanner* and could only be opened by defendant RP 10/24/16 143. Moreover, the State failed to cite the portion of Nathan's testimony where he denied that he had ever seen Samantha, any of her

friends or either of his parents drinking Fireball whiskey or any alcohol in his bedroom or his parents' bedroom. *Passim*. Nathan never testified that he had witnessed such events and the prosecutors confabulated evidence for closing argument in order to convict defendant.

e. The prosecutor misrepresented the testimony when he argued that the defendant threatened the victims when came forward and called state officials.

Next, the deputy prosecutor argued without evidence that "when *the victim* came forward, the defendant would take steps to *silence them*, "threatening to call state officials on *their parents*." Respondent's Brief, page 23. In support of this argument that the defendant threatened to call the parents of the alleged *victims* after one person came forward, the State cites the testimony of a single witness, LM, who in fact testified that after she reported the abuse, the defendant sent her a text, "I don't know what you're trying to get out of this, but I would appreciate it if you would stop. I don't want to have to call CPS on our family about your mom's meth use, but will if that's what it takes." RP 9/27/16 92. Again, deputy prosecutor engaged in an argument of exaggeration. He urged the jury to assume that what had allegedly happened to one victim had happened to all of the charged victims. This was damning because it suggested that the defendant was so distraught and threatened when LM made her report that he told her, he would call state officials on everyone's parents." This is improper and, again, urged the jury to convict based not on evidence, but rather, on passion and prejudice.

In fact, when the defendant wrote the text to LM, he did not know that anyone had alleged sexual abuse. RP 11/1/16. Rather, two state officials had just been at the Wilks

residence to look around to investigate her allegations that there were drugs and alcohol on the premises and that these substances had been provided to LM. RP 11/1/16 103; RP 11/2/16 156-58.

He sent the text to let her know that he did not appreciate her false accusations and that he did not want his family involved in her high school dramas. RP 11/1/16 103-104.

Thus the prosecutor, through somewhat artful yet deceitful language, argued to the jury that the defendant used LM as a vehicle to threaten the other *victims* because she had made a report to state officials.

Using these evidentiary tidbit, the prosecutor then characterized [3]defendant as "very willing to threaten children with legal action and other leverages and levers of control and power. He did what he could do to threaten and silence them, but they would not be silenced." RP 11/3/16 43-44. This prosecutorial argument is pure fiction, damning to defendant.

f. <u>The deputy prosecutor impermissibly urged the jury to convict the defendant based on passion and prejudice.</u>

A prosecutor is allowed to argue reasonable inferences from the evidence during closing argument, including inferences about the credibility of witnesses. *State v. Warren,*

---

[3] Defendant also told RR that he was would take out a restraining order against her if she did not stop harassing his daughter Samantha, who was suffering at school and socially. RP 11/2/16 133-34. He was acting to protect his child. *Id.*

165 Wn.2d 17, 30, 195 P.3d 940 (2008), cert. den. 556 U.S. 1192 (2009). However, a witness's appearance is not evidence. "Evidence is a legal term. Evidence includes testimony of witnesses, documents, and physical objects." WPIC 1.01.

In this case, the prosecutor did more than argue inferences about witness credibility. The prosecutor in fact testified when he offered his opinion as a "psychologist" to argue unreasonable from momentary behaviors of witnesses while testifying as justification to convict defendant of sex crimes. For example, he argued that LM was traumatized and covered herself subconsciously with her cardigan sweater when she testified as she described the abuse. RP 11/3/16 101-02. The prosecutor is not allowed to testify and certainly had no credentials as a psychologist to substantiate this highly prejudicial argument. The prosecutor further argued that he recalled that "there was a point when [MR] was weeping softly" [RP 11/3/16 103]. Again, that statement had no probative value as, even if true, MR could have been weeping for many reasons, including a sense of guilt at being less than truthful about what happened. These arguments encouraged the jury to convict on passion and prejudice rather than evidence. The arguments were intentional and flagrant misconduct that could not have been cured by any instruction.

g. <u>The prosecutor completely mischaracterized MR's testimony about the gift of the bracelet.</u>

The deputy prosecutor repeatedly argued in closing that defendant had purchased an expensive bracelet for LM. RP 11/3/16 60-61,102. This was a gross misstatement of the evidence.

The recipient of the evidence was also known to MR, as she is in the verbatim report of proceedings. RP 10/04/16 114-136, RP 10/05/16 18-96. Although in response to a question from the deputy prosecutor, MR initially answered that the defendant gave her a bracelet for her sixteenth birthday, she later clarified that answer. RP 10/04/16 30-31. When the deputy prosecutor showed her the bracelet, she described it as "the charm bracelet that they got me." RP 10/5/16 31. When the prosecutor asked her whether the bracelet was from the defendant or from more than one person, she answer, "I think Jason paid for it, but it was from all of them." RP 10/5/16 31. The prosecutor asked her about the quality and/or price of the bracelet. RP 10/5/16 31. MR was not certain about the price, stating, "I think the bracelet along in $150 and then the charms are like $20 something or $50 something each. It depends." RP 10/5/16 31-32. Based on her guess-estimate, the prosecutor jumped to the conclusion that this was "at least a $190 bracelet." RP 10/05 16 32.

Not only did MR's own testimony belie the truth of the prosecutor's argument but so did the testimony of other witnesses. Katie Wilks testified that she and her daughter Samantha purchased the bracelet and three charms for " a hundred bucks" for MR's birthday present. RP 10/25/16 90-91. MR and Samantha were best friends at that time. RP 01/25/15 91. Defendant knew they were going to make the purchase but he was not involved in it. *Id.* Samantha received a matching bracelet at the same time. *Id.* Had this "whole thing" [the allegations against defendant, charges, etc..] not occurred, Katie Wilks and Samantha planned to buy such bracelets for all the girls in celebration of the milestone 16th birthdays. RP 01/25/16 92.

Thus, once again, the deputy prosecutor cherry-picked a phrase from a witness's testimony to use in an intentional and flagrant misleading argument to suggest that the predatory defendant bought an expensive bracelet and gave it to MR as a prepayment or a bribe so she would not disclose his intended sexual misconduct. RP 11/3/16 61-62. Twisting the testimony, although he did make a slight effort to correct himself, he nevertheless purposely linked the bracelet with sexual intent to portray the defendant in a false and damning light. This type of argument resonates with a jury in a child sexual assault case.

h. The deputy prosecutor urged the jury to convict the defendant for reasons other than that the State had proved the charged beyond a reasonable doubt.

Finally, the deputy prosecutor committed reversible misconduct when he included in his PowerPoint closing a slide stating: Justice Guilty. (Opening Brief – Appendix E) The State contends that such a statement is not improper, ignoring well-settled law that such statements are impermissible. In a criminal case, the prosecutor's job at trial is to prove the charges beyond a reasonable doubt. The question for any jury is whether the burden of proof has been carried by the party who bears it, that is, the State. *State v. Emery,* 174 Wn.2d at 751[4].

There is nothing in any instruction to the jury that they are to seek justice. *Passim.* Indeed, such an instruction would be error. Rather, the to-convict instructions all state that the jury is to consider whether the State has proven its case beyond a reasonable doubt. If the jury finds that the State has done so, the jury should enter a guilty verdict. If the jury finds that the

[4] Although the error was not held to be reversible in *Emery,* that case did not present the multitude of flagrant and ill-intentioned prosecutorial arguments that the instant case does.

State has failed to do so, the jury should enter a not guilty verdict. The definition of reasonable doubt also is provided to the jury. In this case, the prosecutor's slide Justice Guilty urged the jury to convict for an improper and certainly on an ambiguous and undefined standard. Some jurors may have believed that "justice" would be served by convicting the defendant even if the proof did not rise to the level of beyond a reasonable doubt. After all, the State's attorney had informed them at the conclusion of the State's argument that JUSTICE = GUILTY rather than PROOF BEYOND A REASONABLE DOUBT = GUILTY.

D . THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT PROVIDED MARIJUANA TO THE TEEN-AGED GIRLS AND THEREFORE THIS COURT MUST DISMISS COUNTS 5, 8, AND 13.

In a criminal case, the prosecutor's job at trial is to prove the charges beyond a reasonable doubt. The question for any jury is whether the burden of proof has been carried by the party who bears it, that is, the State. *State v. Emery,* 174 Wn.2d at 751[5].

In this case, the State failed to prove an essential element of the crime of unlawful delivery of a controlled substance to a person under the age of eighteen. In *State v. Crowder*, 196 Wn.App. 861, 385 P.3d 275 (2016), pet rev denied, 188 Wn.2d 1003(2017), the court held that to prove a charge of unlawful delivery of a controlled substance to a minor pursuant to *RCW 69.59.406(2)*, the State must prove the defendant was a person over the age of 18 and that he distributed marijuana to a person under 18 who is at least three years his junior. For

[5] Although the error was not held to be reversible in *Emery*, that case did not present the multitude of flagrant and ill-intentioned prosecutorial arguments that the instant case does.

purposes of this crime, "marijuana . . . means all parts of the plant Cannabis, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis . . ." Former *RCW 69.50.101(t)(2014)*. The court held that the statute governing distribution to minors *(RCW 69.50.406)* incorporates the distribution stature *(RCW 69.50.401)* and simply adds elements regarding the age of the distributor and recipient. *196 Wn.App. at 869.*

The court reasoned, "Given the State must prove the presence of a controlled substance in a normal distribution case, the same is necessarily true in a case alleging distribution to a minor." *Id.* The court emphasized, "the requirement that the requirement that marijuana, to qualify as a controlled substance, must have a THC content of at least 0.3 percent is not something that can be dismissed as an unimportant definition." *Id.*

The court reversed and dismissed Crowder's convictions for marijuana delivery convictions because the testimony from the alleged victims did not establish the potency of the substance provided to them by the defendant. *196 Wn.App. at 871.* Although the alleged victims testified that the substance made them "feel high", their use of the term marijuana did not carry the same technical meaning as the term utilized by the toxicologist. *Id.* Further, there was no testimony about the meaning of the 0.3 THC cutoff level, whether the percentage is high, low, or average. *Id.* Because the State failed to provide any information to the jury regarding the significance of the 0.3 percent THC level, the State failed to meet its burden of proof. *Id.* Crowder's convictions were reversed with prejudice. *Id.*

Wilks' case is identical to Crowder on this issue. This court must reverse and dismiss with prejudice Counts 5, 8, and 13.

E. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIMES OF FURNISHING LIQUOR TO A MINOR AS CHARGED IN COUNTS 6, 9, 11, 14, AND 16.

The State failed to prove beyond a reasonable doubt that defendant furnished liquor to a minor in the charged counts.

Regarding Count 6, furnishing liquor to BS, defendant reiterates that this alleged victim asserts that defendant and his wife provided marijuana and alcohol to every kid who came to their house and that "they would sit out there and get you shit-faced drunk until you were puking." RP 10/4/16 46. BS was clear that defendant provided alcohol and marijuana to every kid who came to the house, "all of them." *Id.* There was not a single other witness at trial who corroborate this astonishing and patently false testimony from a witness who did not know whether her sexual assault allegations were based on dreams or reality or when any when alleged acts even occurred. RP 9/28/16 72, 172, 173; RP 10/416 66.

The State failed to prove Count 9, furnishing liquor to MR, where she testified that prior to her birthday on October 1, 2014, she went to the liquor store with Samantha and her parents and defendant bought some unknown kind of alcohol. RP 10/4/16 127-28. She could not recall whose idea it was to start drinking but believed that they started drinking in the boys' room – the boys were not home – and that they played some kind of drinking game of which she had no recollection. RP 01/4/16 129. She could not recall what or how much she had to drink. RP 10/5/16 19. She thought she had a couple of shots and the one big cup with soda and alcohol in it. *Id.* MR's testimony is insufficient to prove that whatever she may have consumed was alcohol. She did not know what it was. She did not describe any effects on her. She did not testify that she saw anyone pour anything into the glasses from which she

drank. It would be unusual for a young girl to consume a couple of shots of alcohol and "a big cup with soda and alcohol" and feel nothing. Yet the record is devoid of any such evidence. The State failed to prove anything more than that she may have been present at table where others were drinking although defendant denies that this occurred.

The State failed to prove beyond a reasonable doubt that defendant furnished liquor to LM as charged in Count 11. The State asserts that LM testified that she drank a half gallon of whiskey during a drinking game. Respondent's brief, pp. 6-7. Notwithstanding the fact that this would be fatal to her, this was not her testimony. She related a card game based on the board game Jenga where one of the blocks said "take a hit." RP 9/27/16 46. She testified that she did not take a hit. *Id.* She did testify that on one night she drank a lot, "like 12 shots", and that the foursome *finished* a whole half gallon of whiskey [without stating whether it was full when they started]. RP 9/27/16 47.

This was alleged to be Fireball whiskey. RP 9/27/16 45. Fireball whiskey is 66% proof. ATTACHMENT B. Assuming LM to be a 140 pound woman consuming 12 shots of Fireball whiskey over a 3 hour period [a longer period than they likely played this card game], her blood alcohol concentration under accepted formulas would be over the legal limit in all 50 states and her physical condition would be "onset of coma and possible death due to respiratory arrest, complete unconsciousness, depressed or abolished reflexes, subnormal body temperature, incontinence, impairment of circulation and respiration."
ATTACHMENT C

Defendant's intent in adding the information regarding the effect of that much alcohol on LM is not to introduce evidence that was not in the record but rather merely to illustrate

the necessity for the State to have provided at least some evidence of the consumption of the alcohol other than that she felt dizzy. RP 9/27/16 54. The alleged victim drank a substantial quantity. The State should have been able to support its case with some testimony about the taste of the drink, how she felt while she drank it, whether consuming 12 shots made her ill, etc. The State failed to do so and, viewing the evidence on this individual count, this failure resulted in a failure to meet its constitutional burden of proof.

The State also to prove beyond a reasonable doubt that defendant committed the crime of furnishing liquor to AB as charged in Count 14. AB also testified about a drinking game called "kings cup", played with cards where an individual who pulled a certain card had to take a drink from a shot glass. RP 10/6/16 77. The shot glass was in the center of the table with the cards. *Id.* AB never drank from the shot glass, only from a red cup. *Id.* She did not remember what she drank but averred that it was clear alcohol. RP 10/6/16 77-78. She did not describe the taste, how much she drank, or its effect on her. Passim. She testified that she smoked marijuana at the same time. RP 10/6/16 78. She testified that Samantha, Katie and defendant became intoxicated during the game. RP 10/6/16 79. She later testified that she thought she was messed up because of the alcohol and marijuana but nothing more. RP 10/6/16 81.

Likewise, the State failed to prove the charge in Count 16 regarding RR. RR's accounts of what allegedly happened at the Wilks residence were based on reports of "flashbacks" and dreams that began more than a year later. RP 10/10/16 145. She discussed the flashbacks with AB and told her that she did not know if anything had happened or not.

RP 10/10/16 147. She also talked to MR, AB. RP 10/10/16 149-50; RP 10/12/16 23. RR really had no reliable memory if anything had happened. *Id.*

Interestingly RR testified that there was alcohol there "every time" she was there and that she was there with other girls, including Jade Butler, Abigail Toomouth, and others. RP 10/10/16 130. Some of these girls testified for defendant and denied that they ever saw alcohol or marijuana at the Wilks residence. RP 10/13/16 88-89, 90-91, 94-95; RP 10/19/16 56, 57, 58, 59-60, 63.

For the foregoing reasons, this court must dismiss counts 6, 9, 11, 14, and 16 with prejudice.

F. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED COUNTS 2, 3, 4, 7, 10, 12, AND 15.

Defendant has briefly this in detail in the opening brief and provides only limited details in response.

Regarding Counts 2, 3, 4 [victim BS], defendant emphasizes that BS did not know if the incidents really occurred or if they were dreams/nightmares. RP 9/28/16 172. She did not know when any other acts occurred. RP 10/4/16 66.

This is an unfortunate case where multiple victims reported dreams and uncertainties and the number of victims resulted in unjust convictions.

Regarding Count 7 [victim MR], MR also had no actual memory to support her allegation. RP 10/4/16 132-33. Rather, she "believed" she felt defendant's hand inside her underwear and that he touched her vagina. *Id.* There were two other people in the bed, including her very best friend Samantha. *Id.* Right after the alleged assault, defendant and Katie got up and MR and Samantha also got up and left the bed. RP 10/4/16 133. It is

inconceivable that Samantha and Katie would not have noticed some movement in the bed and that RR would not have made some movement/reaction if something "real" had happened.

Regarding Count 10, LM reported that she was sexually assaulted after she had consumed 12 shots of Fireball whiskey. RP 9/27/16 45, 55-56. Her state of intoxication, even had she consumed somewhat less, nullifies any evidence that the State presented.

Regarding Count 12, AB testified that had no memory of what happened and that she started having flashbacks after she read about the case in the local paper. RP 10/6/16 91-92. She had no independent memory of being touched by defendant. RP 9/26/1653-54. She had talked to MR and RR about the case and after talking to RR, RR started having flashbacks, too. RP 9/26/16 54-55.

Counts 15 and 16 pertain to RR, who had no actual memory of what happened. She candidly testified, "I don't know for sure if it happened, but with dreams and flashbacks, I would assume so." RP 10/10/16 141. The prosecutor candidly conceded in closing that she lacked a clear memory of what had happened. RP 11/3/16 71-72. However, he asked the jury to convict, arguing that her mind "wouldn't have that clear of detail if it didn't happen." RP 11/3/16 71-72 (suggesting that detailed dreams can arise only from reality).

This case presents the troubling fact that a number of witnesses with flawed, weak and admittedly unreliable testimony based on dreams and flashbacks testifying in a trial on a "hot topic" such as child sexual assault can result in the conviction of an innocent man.

The State failed to prove Counts 2, 3, 4, 7, 10, 12, 13, 15, and 16, beyond a reasonable doubt. This court therefore must dismiss them with prejudice.

G. WILKS IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Defendant is entitled to a new trial based on the cumulative effect of egregious prosecutorial misconduct during closing argument, the trial court's denial of his right to present a complete defense, the State's failure to prove the crime of unlawful delivery of a controlled substance to a minor, and the other errors and arguments made herein. This court should reverse and remand for new trial on any counts remaining after that those that must be dismissed with prejudice, including the counts for distribution of a controlled substance to persons under the age of eighteen.

DATED this 3rd day of August, 2018

/s/BARBARA COREY, WSBA#11778
Attorney for Appellant
barbara@bcoreylaw.com
902 South 10th Street
Tacoma, WA 98405

CERTIFICATE OF SERVICE:
I declare under penalty of perjury under the laws
Of the State of Washington that the following is a true
and correct: That on this date, I delivered via the filing portal
a copy of this Document to: Pierce County
Prosecutor's Office, Room W554, 516 Third Avenue
Seattle, WA 98104

8/3/18 /s/William Dummitt
Legal Assistant
William@bcoreylaw.com

ATTACHMENT A

CRIME

Pierce County prosecutors lead state in cases overturned because of their 'flagrant' actions

By Adam Lynn - Staff writer

April 19, 2015 12:00 AM
Updated April 19, 2015 06:48 AM

It's rare in the state of Washington for so-called "prosecutorial misconduct" to lead to the reversal of someone's criminal conviction. A prosecutor's mistake in those instances must be so "flagrant and ill-intentioned" that nothing short of a new trial would correct it.

What's not unusual is for one of those instances to come from Pierce County.

An analysis by The News Tribune found that 14 cases statewide since January 2013 have been overturned because of prosecutors' actions during trial.

Of those, six cases — almost 43 percent — were handled by the Pierce County Prosecuting Attorney's Office. In three of those, the errors were committed by veteran attorneys in leadership positions in Prosecutor Mark Lindquist's office.

Today's top news by email

The local news you need to start your day

Enter Email Address

Lindquist and his leadership team attribute the high percentage of misconduct-related reversals in part to what they consider higher court decisions not always consistent with established precedent.

He and his team held the Washington State Supreme Court up to special criticism, saying it has unjustly overturned some Pierce County jury verdicts.

ADVERTISING

Replay

Learn More

Report inappropriate ad by Taboola

In one case, the high court overturned the conviction of a man found guilty of masterminding the murder of an armored-car guard based on a ruling that hadn't been issued when the man's trial was underway, said Lindquist and his chief appellate attorney, Kit Proctor.

"They changed the rules on us in the middle of the game," said Lindquist, appointed to head the prosecutor's office in 2009 and victorious in elections in 2010 and 2014. "Once we know what the rules are, we're going to abide by those rules."

Wendy Ferrell, judicial communications manager for Washington State Courts, said the Supreme Court would have no comment on the Pierce County prosecutors' criticism.

"The Supreme Court's opinions speak for themselves," Ferrell said.

Reversals come at a high cost in terms of public money spent and judicial resources expended.

For example, Pierce County spent more than $385,000 to prosecute and defend Dorcus Allen, cop killer Maurice Clemmons' alleged getaway driver, only to see the case overturned because of deputy prosecutors Stephen Penner and Phil Sorensen's mistakes at trial. Allen's case is back in Pierce County for retrial.

Overturned convictions also bring emotional trauma to victims and their relatives, who must endure again what can be a grueling legal odyssey.

"It deflates them," said Lew Cox, founder and executive director of Tacoma's Violent Crime Victim Services, a victim-advocacy agency. "They've been picking up the pieces of their lives, thinking it's over with. Now, they're back on this roller coaster."

The state's Supreme Court has said there is yet another cost for cases overturned because of prosecutorial misconduct: Undermining "the integrity of the entire criminal justice system."

RELATED STORIES FROM TACOMA NEWS TRIBUNE

Six cases of 'prosecutorial misconduct'

Greg Link is an attorney with the Washington Appellate Project, a nonprofit group that provides legal services to indigent clients throughout Washington and has written appeals for Pierce County defendants, including Allen.

"It's my feeling that it is a systemic problem in that office," Link said of the high percentage of prosecutorial-misconduct findings from Pierce County. "I work with prosecutors around the state, and from what I've seen Pierce County stands out in that regard.

"They also stand out for their willingness to try to defend it on appeal. Many prosecutors will admit that misconduct took place but will argue it wasn't prejudicial. Pierce County fights the misconduct ruling itself."

Last month, Superior Court Judge Edmund Murphy, citing "prosecutorial vindictiveness," threw out a high-profile child-sex abuse case being pursued by Lindquist's office.

Lindquist said recently that his office practices a "vigorous" form of prosecution but that he does not think his deputies are overly aggressive.

Still, chief appellate attorney Proctor said, she is encouraging deputy prosecutors during closing arguments to dial back their use of PowerPoint presentations, which higher courts have identified as an area in which prosecutors are susceptible to crossing the line.

"Believe me, we are worried about every reversal," she said during a meeting of The News Tribune's editorial board that also was attended by Lindquist and his chief of staff, Dawn Farina.

Lindquist said it's important to curtail the number of cases overturned by the higher courts.

"We don't want families to have to go through this," he said. "We don't want the community to go through this."

SEVERAL HIGH-LEVEL REVERSALS

Prosecutors' behavior during criminal trials is held to a higher standard than that of defense attorneys because prosecutors occupy a special role in the criminal justice system.

They are tasked with prosecuting lawbreakers but also, as representatives of the state and quasi-judicial officers, with ensuring criminal defendants are treated fairly.

"A prosecutor does not fulfill either role by securing a conviction based on proceedings that violate a defendant's right to a fair trial — such convictions in fact undermine the integrity of our entire criminal justice system," state Supreme Court Justice Mary Yu wrote in a January opinion overturning Odies Walker's conviction.

A recent series of reversals of high-profile cases in Pierce County prompted The News Tribune to look into prosecutorial-misconduct findings against local prosecutors.

The overturned convictions included those of Walker, found guilty of aggravated first-degree murder in the death of armored-car guard Kurt Husted, and Dorcus Allen, also convicted of first-degree murder in connection with the shooting deaths of four Lakewood police officers in 2009.

The newspaper examined more than 250 appellate or Supreme Court decisions issued statewide since January 2013 in which defense attorneys raised the question of prosecutorial misconduct during an appeal.

The newspaper chose that time frame for review because appellate opinions issued since January 2013 are readily available online.

The state Court of Appeals and the Supreme Court found prosecutors committed an error of some variety — misstating the evidence, vouching for a witness, appealing to a jury's passion or prejudice — in about a quarter of those cases.

Pierce County prosecutors were found to have committed such trial errors in 11 cases since 2013. King County prosecutors made such mistakes in 13 cases, and prosecutors in 13 other counties were found to have committed misconduct of some variety during trials.

But the standard for overturning a case because of a prosecutor's error is steeper than just finding he or she made a mistake.

The higher courts also must find that the error was "so flagrant and ill-intentioned" that it undercut the defendant's right to a fair trial so severely it could not have been cured by the trial judge giving an instruction to the jury.

The News Tribune's analysis found 14 cases statewide that fit that bill: six Pierce County cases, three from Thurston County, two from Mason County, and one each from Lewis and King counties.

In addition, there was the case of Pierce County Superior Court Judge Michael Hecht, who was prosecuted by the state Attorney General's Office on charges of felony harassment and patronizing a prostitute.

CLOSING ARGUMENTS FAULTED

Deputy prosecutors' missteps during closing arguments were the bugaboo during each of the Pierce County cases.

Farina, Lindquist's chief of staff, was dinged for repeatedly asserting her opinion of Walker's guilt and for injecting race, whether intentionally or not, into a trial in which race was not a factor.

Penner, Lindquist's chief criminal deputy, and former prosecutor and current judge Phil Sorensen were chastised for repeatedly misstating the law during closings in Allen's trial.

John Sheeran, who heads Lindquist's felony division, saw a case overturned for what the Supreme Court called "pervasive misconduct," including bickering with defense counsel in front of the jury and whispering to jurors during his closing argument, among other things.

Deputy prosecutors John Neeb, Jennifer Hernandez and Thomas D. Howe, who now works with the Attorney General's Office, also were found during the time analyzed by The News Tribune to have committed errors that led to convictions being overturned by higher courts.

In one of the most recent Pierce County reversals — that of Walker, published Jan. 22 — the Supreme Court addressed Farina's use of PowerPoint in making her closing argument and issued a rebuke: "It is regrettable that some prosecutors continue to defend these practices and the validity of the convictions obtained by using them."

In a Pierce County case decided in 2012, the Supreme Court ruled that prosecutors had to be careful about how they use PowerPoint presentations.

In a 5-4 decision, the high court said that then-Pierce County deputy prosecutor John Hillman committed misconduct when he used a booking photograph of defendant Edward Glasmann with the words "guilty, guilty, guilty" superimposed on it in red letters.

"A prosecutor could never shout in closing argument that 'Glasmann is guilty, guilty, guilty!' and it would be highly prejudicial to do so," Chief Justice Barbara Madsen wrote for the majority.

"Doing this visually through use of slides showing Glasmann's battered face and superimposing red capital letters (red, the color of blood and the color used to denote losses) is even more prejudicial."

The decision overturned Glasmann's convictions for assault, attempted robbery, kidnapping and obstructing a law enforcement officer. His case was sent back to Pierce County, where it still is being litigated 11 years after he was arrested.

PROSECUTORS: LAW BEING SHIFTED

Lindquist and Proctor, his chief appellate attorney, point to the Glasmann case as an example of the Supreme Court shifting the law out from under prosecutors.

Proctor told The News Tribune's editorial board that she's not sure whether Hillman even showed jurors the slides of Glasmann that the Supreme Court cited in its decision.

The slides were in a draft PowerPoint presentation, but Hillman does not think he used them during his closing argument, she said.

Hillman, who went to work for the Attorney General's Office after the Glasmann trial, used similar slides when he successfully prosecuted Hecht in 2009. The appeals court, citing the Glasmann decision, overturned Hecht's convictions last year, and the Attorney General's Office decided not to retry him.

Last June, the appeals court also citing Glasmann, overturned the conviction of a Thurston County man after prosecutors there used similar slides.

Proctor told The News Tribune editorial board that the Glasmann decision is bad law.

Jurors are carefully and clearly informed that a deputy prosecutor's closing argument is not evidence but strictly a summation of what he or she thinks the evidence shows, she said.

Jurors are presumed to follow those instructions in reaching a verdict, Proctor added.

In rare cases, an instruction, even if given at the trial level, is not enough to overcome a prosecutor's misconduct, the high court has said.

'SERIOUS MISCONDUCT' WITH POWERPOINT

That's what happened in the Walker case, the only one of the six Pierce County convictions reversed because of the Glasmann ruling.

Farina's PowerPoint presentation contained about 250 slides. More than 100 of them were headed with the words, "DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER."

One of her slides showed Walker's booking mugshot with the words, "GUILTY BEYOND A REASONABLE DOUBT," written across it in red letters.

Justice Yu, writing for a majority that included five other justices, said Farina went over the top.

"The prosecution committed serious misconduct here in the portions of its PowerPoint presentation discussed above — it included multiple exhibits that were altered with inflammatory captions and superimposed text; it suggested to the jury that Walker should be convicted because he is a callous and greedy person who spent robbery proceeds on video games and lobster; it plainly juxtaposed photographs of the victim with photographs of Walker and his family, some altered with racially inflammatory text; and it repeatedly and emphatically expressed a personal opinion on Walker's guilt," Yu wrote.

Farina disagreed.

"I don't think I pounded it into the pavement with my presentation," she said. "I have an issue with that."

Yu went on to write that the majority agreed with a concurrence written by Justice Sheryl Gordon McCloud that went into greater detail about the racial nature of Farina's closing argument.

Farina's PowerPoint included five slides that contained three quotations from Walker in which he used the N-word, according to a hard copy of the presentation The News Tribune obtained through a public records request.

One slide showed a photograph of Walker and his family at dinner after Husted's death with the sentence: "This is how you murder and rob" (N-words) "next time it will be more money." The News Tribune has chosen to use shorthand for the N-word, but Farina used the actual word in her presentation.

"The problem is that the state altered the photo of the black defendant and his black family, at dinner, by superimposing on it a quote highlighting race as some kind of important factor with the moniker, '(N-words),' " McCloud wrote.

"There is no denying that this word is powerful, gripping and emotional. But it was irrelevant — there was no indication of a racial motive in this case, and indeed, the victim apparently referenced was not even black.

"It also created imagery highlighting the defendant's race — his blackness — in a case where that had absolutely no relevance. That alteration of the evidence is inflammatory, whether the prosecutor intended it or not."

Farina told The News Tribune she did not intend to inject race into the case when she included that slide in her PowerPoint presentation. Rather, she said, she wanted to remind jurors of what Walker allegedly said and how he used his ill-gotten money.

"We call that a confession," Lindquist said in support of his chief of staff.

Farina also pointed out that the Glasmann decision had not been published at the time of Walker's trial, that the defense did not object to her use of the N-word in her closing argument, and that the statement and photograph the high court objected to had been admitted as evidence.

"I think that's significant," said Farina, a 26-year prosecutor.

Proctor agreed.

"The evidence showed that those words came out of the defendant's mouth," she said. "Prosecutors are allowed to draw reasonable inferences from the evidence during closing argument. That's the point of closing argument."

Yu's opinion stated that prosecutors knew long before the Glasmann decision that "visual aids must be used only for their proper purpose."

The justice also dispensed with Farina's contention that her PowerPoint couldn't have been too prejudicial because the defense did not object.

"The state's misconduct here was so flagrant, pervasive, and prejudicial that it could not have been overcome with a timely objection and an instruction to the jury to disregard the improper slides," Yu wrote.

Farina said that, had Glasmann been decided before her closing in Walker, she would have changed her PowerPoint to comply with that ruling.

The Prosecuting Attorney's Office is preparing pleadings to appeal the Walker decision to the U.S. Supreme Court.

A draft brief to the nation's highest court authored on behalf of the county by attorney Stephen Trinen was shared with The News Tribune by Farina.

In it, Trinen writes that the state Supreme Court's opinion in Walker "was improperly based on an unsupported theory of the overwhelming effect of PowerPoint on jurors, as well as a theory of implicit racial bias in the criminal justice system."

"The result of the opinion is that it has an improper and overly chilling effect on prosecutors' closing arguments," Trinen wrote. "Insofar as they are unable to know where the proper boundaries are, prosecutors are necessarily required to censor themselves unnecessarily in order to avoid an after-the-fact reversal where no objection was ever made."

Lindquist and his leaders also speculated that a higher case load might skew the numbers, although state court records show King County prosecutors tried more cases in 2013-14 than Pierce County — roughly 670 to 400 — with one conviction overturned because of a prosecutor's mistake at trial.

"Unlike mistakes made by trial judges and defense attorneys, which are called 'errors,' mistakes by prosecutors are labeled 'prosecutorial misconduct,' even when the prosecutor's conduct is ethical," Proctor said last week in response to follow-up questions from The News Tribune.

"Sometimes an argument made by a prosecutor can be transformed into 'misconduct' when the law changes after the argument is made."

HOW KING COUNTY DOES IT

Mark Larson is the chief criminal deputy prosecutor for King County, the state's largest.

Since January 2013, King County prosecutors had one conviction overturned because of prosecutorial misconduct. In that case, a deputy prosecutor told jurors about the defendant's refusal to consent to a warrantless seizure of his DNA and argued that was evidence of his guilt.

Larson said his office takes a systematic approach to avoiding reversals because of prosecutorial misconduct.

Among other things, it compiles an annual list of prosecutorial misconduct complaints and submits them to a committee of senior attorneys for review. The deputy prosecutor found to have committed misconduct is interviewed and counseled, Larson said.

The office's appellate team also keeps track of developments in the law regarding prosecutorial misconduct, Larson said, and deputy prosecutors received training and updates.

"You do have to pay attention to this area," he said.

Larson said recent rulings such as Glasmann and Walker might signal the end of PowerPoint as a ubiquitous tool for prosecutors.

"I think the sun is setting on it," he said. "The court is worried about using PowerPoint as a way to editorialize."

Proctor said Pierce County's appellate division also reviews instances of prosecutorial misconduct with the deputy found to have committed it.

"In some instances, this discussion becomes the topic for one of our in-house continuing legal education classes; these also occur when there is a change in the law," Proctor said. "Our appellate division regularly offers advice and training to avoid prosecutorial error and to keep up with changes in the law. We review all published cases across the state for lessons to be learned."

LINDQUIST: PROUD OF PROSECUTORS

Lindquist's office does not make a habit of vetting a deputy prosecutor's closing argument before it's delivered.

Lindquist said he trusts his attorneys to do professional work, and, because of their heavy caseloads, reviewing their closing arguments before they're delivered is unworkable.

"We have neither the time nor the inclination to do that," he said.

Lindquist said he is proud of the work his deputies perform and that the community seems to support the way his office prosecutes cases.

"We represent the community with vigor, fair play and an eye toward justice," Lindquist said last week. "The men and women in our office prosecute about 6,000 felonies a year and do an outstanding job of protecting the community."

SUGGESTED FOR YOU

Crazy Rich Child Stars That Never Have To Work Again

Celebs You Didn't Know Passed Away

ATTACHMENT B

WIKIPEDIA

Fireball Cinnamon Whisky

Fireball Cinnamon Whisky is a mixture of whisky, cinnamon flavoring and sweeteners that is produced by the Sazerac Company. With estimated sales of at least $150 million in 2015, it is the best-selling liqueur in the United States.[1] Its foundation is Canadian whisky, and the taste otherwise resembles the candy with a similar name, Ferrara Candy Company's "Atomic Fireball" candy.[2] It is bottled at 33% alcohol by volume (66 U.S. proof).[3]

According to the official Fireball website, the product was developed in Canada in the mid-1980s, and for a long time was little known outside of Canada.[4] In addition to the United States and Canada, Fireball is now also widely available in various other countries.[5]

Fireball Cinnamon Whisky

Type	Cinnamon flavored Canadian whisky
Manufacturer	Sazerac Company
Country of origin	Canada
Introduced	1984
Alcohol by volume	33% by vol (66 proof)
Flavor	cinnamon
Ingredients	Canadian whisky cinnamon sweeteners propylene glycol (in North American markets)
Website	fireballwhisky.com (http://fireballwhisky.com)

Contents

History
Serving
Awards and accolades
Health concerns
In popular culture
Similar products
Legal dispute
See also
Notes
References
External links

History

Fireball was originally part of a line of flavored schnapps developed by Seagram in the mid-1980s.[3] The manufacturer's story line is, in part, that it was the product of a Canadian bartender's efforts to warm up from an Arctic blast. The Sazerac Company purchased the brand rights and formula from Seagram in 1989.[3][6]

It was marketed as "Dr. McGillicuddy's Fireball Whisky".[3] Ostensibly, the named doctor was Dr. Aloysius Percival McGillicuddy, allegedly more commonly referred to as "the shot doctor"[3] who was "born" in the year 1808.[7][A] Later, in 2007, the product was rebranded as "Fireball Cinnamon Whisky".[8][6]

ATTACHMENT C

Advertisement

GlobalRxPh
The Clinician's Ultimate Reference

Patient weight: 140 lbs

Percent of body capable of absorbing alcohol (Usual ranges):

Male: 0.5 - 0.9 Average: 0.7

Female: 0.45 - 0.7 Average: 0.55

0.65

Time spent drinking or time elapsed.

3 Hours (Enter zero for acute ingestion.)

Volume consumed: 2.0 Fluid oz

Number of drinks: 12

See table below for common volumes and percentages.

Alcohol units: 66 proof (e.g. 5% or 100 proof)

Calculate BAC Reset

Results

Blood alcohol concentration:
420.0 mg/dl

Blood alcohol level:
0.420 g/dL = 0.420 %(w/v)

Your level is above 0.08%..... You are LEGALLY drunk in all 50 states.

Specific Effects Related to the (BAC)

Onset of coma, and possible death due to respiratory arrest. Complete unconsciousness. Depressed or abolished reflexes. Subnormal body temperature. Incontinence. Impairment of circulation and respiration.

Disclaimer: This is only a rough estimate based on population averages and does not take into account existing disease states, drug interactions, or age.

Background Info

Definition: Blood alcohol concentration (BAC) is the amount of alcohol in an individual's body, measured by the weight of the alcohol in a volume of blood. The BAC limit determines the maximum amount of alcohol that can be consumed before it is illegal to operate a motor vehicle on a public road.

This program summarizes some of the effects that may be seen based on the calculated blood alcohol concentration. Generally, there is wide variation in alcohol tolerance among individuals and therefore the predominant effects may vary. The effects of alcohol intoxication are greatly influenced by individual variations among users. Some users may

Advertisement
Medical Calculators - A thru Z

become intoxicated at a much lower blood alcohol concentration. Impairment can result from any level above 0.00. Also, the degree of impairment rises dramatically as the BAC rises.

An individual's BAC depends upon that person's gender, weight, metabolism, time period over which the alcohol was consumed and the amount of food in the stomach prior to drinking. Although a person's BAC can be *estimated*, the level cannot be determined solely by the number of drinks consumed, and cannot be precisely calculated by a person's height and weight.

In single-vehicle crashes, the relative risk of a driver with BAC between .08 and .10 is at least 11 times greater than for drivers with a BAC of zero, and 52 times greater for young males. Further, many studies have shown that even small amounts of alcohol can impair a person's ability to drive.

Disclaimer

All calculations must be confirmed before use. The authors make no claims of the accuracy of the information contained herein; and these suggested doses are not a substitute for clinical judgement. Neither GlobalRPh Inc. nor any other party involved in the preparation of this program shall be liable for any special, consequential, or exemplary damages resulting in whole or part from any user's use of or reliance upon this material.PLEASE READ THE DISCLAIMER CAREFULLY BEFORE ACCESSING OR USING THIS SITE. BY ACCESSING OR USING THIS SITE, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS SET FORTH IN THE DISCLAIMER. Read the disclaimer

Advertisement

Lab Values - A thru Z

Advertisement

This document Copyright © 1993-2018 **David McAuley, Pharm.D.** , All Rights Reserved. **Do Not Copy, Distribute or otherwise Disseminate without express permission.** *This page was last updated: 08/03/2018 09:42:33*

This site complies with the HONcode standard for trustworthy health information: verify here.

Disclaimer | Contact Us | Privacy Policy | Medica Network Privacy Policy | Website Search

BARBARA COREY, ATTORNEY AT LAW

August 03, 2018 - 4:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50287-9
Appellate Court Case Title:	State of Washington, Respondent v Jason C. Wilks, Appellant
Superior Court Case Number:	14-1-04908-2

The following documents have been uploaded:

- 502879_Answer_Reply_to_Motion_20180803161026D2687532_4001.pdf
  This File Contains:
  Answer/Reply to Motion - Reply to Response
  The Original File Name was WILKSREPLYBRIEF.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us
- rsand@co.pierce.wa.us

Comments:

Sender Name: William Dummitt - Email: william@bcoreylaw.com
Filing on Behalf of: Barbara L. Corey - Email: barbara@bcoreylaw.com (Alternate Email: william@bcoreylaw.com)

Address:
902 S. 10th St
Tacoma, WA, 98405
Phone: (253) 779-0844

Note: The Filing Id is 20180803161026D2687532