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State of Washington
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NO. 52656-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

KURT R. KILLIAN,

Appellant.

REPLY BRIEF OF APPELLANT,
KURT R. KILLIAN

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
THE HONORABLE BRYAN E. CHUSHCOFF, JUDGE

STEPHANIE TAPLIN
Attorney for Appellant
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

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I. ARGUMENT IN REPLY

Mr. Killian was denied a fair trial in this case. The trial court violated his First Amendment right to free exercise of his religion by failing to accommodate his request to swear an oath on a Bible before testifying. The prosecutor committed misconduct by expressing his personal opinion of Mr. Killian's guilt to the jury. In its response, the state attempts to excuse these errors, but its arguments fail. This Court should reverse and remand.

A. **The Trial Court Violated Mr. Killian's First Amendment Rights by Failing to Accommodate his Sincerely Held Religious Beliefs.**

At trial, Mr. Killian asked to swear his oath on a Bible prior to testifying. RP at 149-50, 153. Mr. Killian attempted to bring a Bible to court, but it was confiscated by prison guards. RP at 149. The trial court judge gave his attorney ten minutes to find a Bible in the courthouse. RP at 152. When the attorney could not find one, the judge swore Mr. Killian without a Bible and without using the language request by Mr. Killian. RP at 153-55. The trial court's actions violated Mr. Killian's First Amendment right to free exercise of his religion.

Religious freedom is a fundamental right protected by both the United States and Washington Constitutions. *First Covenant Church v. Seattle*, 120 Wn.2d 203, 226, 840 P.2d 174 (1992); U.S. Const. amend. I; Wash. Const. art. I, § 11. "Only those interests of the highest order and

those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526 (1972). State action that burdens a sincere religious belief is unconstitutional unless it withstands strict scrutiny. *Id.* at 200, 215; *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009).

In its response, the state argues that Mr. Killian’s desire to swear an oath on a Bible was not motivated by a sincere religious belief. Response Brief at 17-18.¹ This argument fails because courts are not arbiters of religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051 (1982). In order to trigger free exercise protections, “individuals must prove only that their religious convictions are sincere and central to their beliefs.” *Backlund v. Board of Comm’rs*, 106 Wn.2d 632, 639, 724 P.2d 981 (1986). At that point, “the court will not inquire further into the truth or reasonableness of the individual’s convictions.” *Id.*

At trial, Mr. Killian demonstrated that he was motivated by sincere religious convictions. He stated, “it seems like it would be a hollow oath if

¹ Specifically, the state argues that Mr. Killian cannot be a “devout Christian” because of his “record of terrorizing women.” Response Brief at 18. This inflammatory mischaracterization of Mr. Killian’s criminal history has absolutely nothing to do with whether he was motivated by a sincere religious belief. A person does not lose his First Amendment right to free exercise of religion due to his criminal history.

I didn't have my Bible" and reiterated, "it would be a hollow oath to me." RP at 150. This Court should not "inquire further into the truth or reasonableness" Mr. Killian's convictions. *Backlund*, 106 Wn.2d at 639.

The state also argues that the trial court did not burden Mr. Killian's exercise of his religion because the court gave his attorney ten minutes to locate a Bible. Response at 18. This argument fails because this limited timeframe "operate[d] against" Mr. Killian "in the practice of his religion," thus burdening his First Amendment rights. *Munns v. Martin*, 131 Wn.2d 192, 200, 930 P.2d 318 (1997).

The trial court also burdened Mr. Killian's free exercise right by refusing to allow him to "swear" rather than "affirm" his oath. RP at 153-55. The state argues that this refusal was justified because the court did not want Mr. Killian's oath to differ from any other witness. Response Brief at 19. This argument fails for two reasons. First, Washington does not require any particular oath or affirmation before testifying. ER 603.² Surely if it was critical that all witnesses swear an oath in exactly the same way, the court rules would reflect that need for standardization.

² This rule states that "before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." ER 603.

Second, it is hard to believe that a slight change in the wording of the oath could influence the jury's assessment of Mr. Killian's credibility. If this was a concern, the trial court could have addressed it in a jury instruction instead of burdening Mr. Killian's First Amendment rights. Under strict scrutiny, a hypothetical risk of "singling out" Mr. Killian cannot justify refusing to make the slightest change in the oath to accommodate his sincerely held religious beliefs.

Finally, the state argues that even if the trial court violated Mr. Killian's First Amendment rights, this error was harmless because he still testified. Response Brief at 20-21. To support this argument, the state cites to two cases that have nothing to do with the First Amendment. *Id.* at 21, citing *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (holding that the trial court's affirmative defense instruction over defendant's objection was harmless error); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824 (1967) (holding that commenting on the defendant's refusal to testify was not harmless error).

The state's argument fails because it forces Mr. Killian to choose between two constitutionally protected rights. As explained above, Mr. Killian had a First Amendment right to swear an oath that comports with

his religious beliefs.³ Additionally, the United State Supreme Court has held that a criminal defendant has a constitutional right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987). In Washington, a criminal defendant’s right to testify is explicitly protected by the state constitution. Wash. Const. art. I, § 22. This fundamental right cannot be abrogated by the court. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).

Under the state’s argument, Mr. Killian would only have a cognizable First Amendment claim if he chose to forgo his right to testify. Response Brief at 20. However, it is fundamentally unfair to force Mr. Killian to choose between these constitutionally protected rights. This Court should reject the state’s argument and reverse.

B. The Prosecutor Improperly Expressed his Personal Opinion about Mr. Killian’s Guilt in his Opening Statement.

During his opening statement, the prosecutor expressed his personal opinion about Mr. Killian’s guilt. He stated to the jury that “a crime has

³ Federal cases have also held that courts must accommodate religious beliefs pertaining to swearing or affirming oaths. See *United States v. Ward*, 989 F.2d 1015, 1020 (9th Cir. 1992) (reversing where the trial court refused to allow the defendant to swear an oath of his own invention); *Ferguson v. C.I.R.*, 921 F.2d 588 (5th Cir.1991) (reversing where the trial court insisted upon a party using a standard oath in order to testify); *Moore v. United States*, 348 U.S. 966, 75 S.Ct. 530 (1955) (per curiam) (reversing where a trial judge refused the testimony of witnesses who would not use the word “solemnly” in their affirmations for religious reasons).

been committed,” adding “I believe that the only answer is the defendant is guilty.” 10/31/18 RP at 17.

Litigants have a fundamental right to a fair trial protected by both the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of this constitutional right. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A “[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

In its response, the state argues that the prosecutor’s comments were proper when considered in context. Response Brief at 24-25. The state argues that the prosecutor was not expressing a personal opinion, he was merely “trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.” *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006) (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

This argument fails because it was “clear and unmistakable that counsel [was] not arguing an inference from the evidence, but [was] expressing a personal opinion.” *Id.* The Washington Supreme Court evaluated a similar issue in *Case*, 49 Wn.2d 66. There, the prosecutor explicitly acknowledged that he was offering his own opinion in closing argument: “I doubt that you haven’t already made up your mind. Now, you must have, as human beings. But if you haven’t, don’t hold it against me. I mean, *that is my opinion about what this evidence shows* and how clearly this evidence indicates that this girl has been violated.” *Case*, 49 Wn.2d at 68 (emphasis added). The Court reversed, holding that the prosecutor improperly expressed his personal opinion. *Id.*

Here, like in *Case*, the prosecutor explicitly acknowledged his personal opinion by stating “*I believe* that the only answer is the defendant is guilty.” 10/31/18 RP at 17 (emphasis added). This “clear and unmistakable” opinion was improper and could not be corrected with a jury instruction. *See State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). This Court should reverse because the prosecutor committed misconduct.

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II. CONCLUSION

Mr. Killian respectfully requests that this Court reverse his conviction and remand.

RESPECTFULLY SUBMITTED this 29th day of August, 2019.



STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, Kurt R. Killian

No. 52656-5-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On August 29, 2019, I electronically filed a true and correct copy of the **Reply Brief by the Appellant, Kurt Killian**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Theodore Michael Cropley (X) via U.S. mail
Pierce County Prosecuting (X) via email to:
Attorney Theodore.Cropley@piercecountywa.gov

Kurt Killian (X) via U.S. mail
DOC # 963405
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

SIGNED in Port Orchard, Washington, this 29th day of August,

2019.



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, Kurt Killian
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

NEWBRY LAW OFFICE

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Address:
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