FILED
Court of Appeals
Division II
State of Washington
5/18/2020 2:05 PM

NO. 53771-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

WENDELL M. CLARK,

Appellant.

REPLY BRIEF OF APPELLANT, WENDELL M. CLARK

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
THE HONORABLE BERNARD F. VELJACIC, JUDGE

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TABLE OF CONTENTS

ARGUMENT IN REPLY 1

A. Counsel Performed Deficiently by Failing to Apply Settled Principles of Law to Mr. Clark's Case. 1

B. The Prosecuting Attorney Committed Prejudicial Misconduct During Closing Argument, which was Incurable by an Instruction. 5

CONCLUSION 6

TABLE OF AUTHORITIES

Washington Cases

City of Seattle v. Erickson,
188 Wn.2d 721, 398 P.3d 1124 (2017) 1, 3, 4

State v. Berhe,
193 Wn.2d 647, 444 P.3d 1172 (2019) 2

State v. Brown,
159 Wn. App. 366, 245 P.3d 776 (2011) 3, 4

State v. Estes,
188 Wn.2d 450, 395 P.3d 1045 (2017) 4, 5

State v. Gregory,
192 Wn.2d 1, 427 P.3d 621 (2018) 2, 3

State v. Jefferson,
192 Wn.2d 225, 249, 429 P.3d 467 (2018) 2, 3, 4

State v. Millan,
151 Wn. App. 492, 212 P.3d 603 (2009) 3

State v. Pierce,
195 Wn.2d 230, 455 P.3d 647 (2020) 2

State v. Slighte,
157 Wn. App. 618, 238 P.3d 83 (2010) 3

State v. Townsend,
142 Wn.2d 838, 15 P.3d 145 (2001) 2, 3

State v. Walker,
164 Wn. App. 724, 265 P.3d 191 (2011) 5, 6

///

U.S. Supreme Court Cases

Arizona v. Gant,
556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) 3

McCleskey v. Kemp,
481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) 1, 4

Strauder v. West Virginia,
100 U.S. 303, 25 L. Ed. 664 (1880) 1

I. ARGUMENT IN REPLY

Wendell M. Clark, a black man, was convicted in Clark County, Washington of raping a white woman. He was tried by a jury containing no black people. Mr. Clark was the only black person involved in this case, including all of the witnesses, the judge, the attorneys, and nearly 50 people in the jury venire.

Under these circumstances, reasonable trial counsel would have moved to change venue. Trial counsel should have applied existing case law to this proceeding in order to protect Mr. Clark's constitutional rights. Additionally, the prosecuting attorney committed prejudicial misconduct during closing argument that could not have been cured by an instruction.

A. Counsel Performed Deficiently by Failing to Apply Settled Principles of Law to Mr. Clark's Case.

A fair trial before an impartial jury "is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey v. Kemp*, 481 U.S. 279, 310, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L. Ed. 664 (1880)). All defendants have the constitutional right to "a jury selection process free from racial animus." *City of Seattle v. Erickson*, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017).

The Washington Supreme Court has repeatedly recognized that "*Batson* protections are not robust enough to effectively combat racial discrimination during jury selection." *Id*. Consequently, Washington affords a greater level of protection to criminal defendants. *See id*. at 734 (holding that trial courts "must recognize a prima facie case of discriminatory purpose" under *Batson* whenever "the sole member of a racially cognizable group has been struck from the jury"); *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018) (striking down Washington's death penalty because it "is administered in an arbitrary and racially biased manner" and is thus unconstitutional); *State v. Jefferson*, 192 Wn.2d 225, 242, 249, 429 P.3d 467 (2018) (applying an objective inquiry to peremptory challenges and noting that *Batson* failed to address "peremptory strikes due to implicit or unconscious bias, as opposed to purposeful race discrimination"); *State v. Berhe*, 193 Wn.2d 647, 665, 444 P.3d 1172 (2019) (holding that the proper test when evaluating a motion for a new trial based on racial animus is "whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict"); *State v. Pierce*, 195 Wn.2d 230, 244, 455 P.3d 647 (2020) (abrogating *State v. Townsend*, 142 Wn.2d 838, 846,

15 P.3d 145 (2001) because the *Townsend* rule disproportionately excluded people of color from juries).

In its response brief, the state argues that Mr. Clark's attorney was not ineffective for failing to raise "novel legal theories" premised on "anticipated changes in the law." Br. of Respondent at 10. However, *Erickson*, *Jefferson*, and *Gregory* were all decided well before trial in this case. Counsel was not expected to present novel theories, but he was expected to apply existing legal principles to this case.

The state points to a series of cases declining to apply the U.S. Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) retroactively. *See State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011); *State v. Slighte*, 157 Wn. App. 618, 625, 238 P.3d 83 (2010); *State v. Millan*, 151 Wn. App. 492, 502, 212 P.3d 603 (2009). In *Brown*, for example, the defendant argued that his trial attorney performed deficiently by failing to advise him on *Gant* while this U.S. Supreme Court case was pending. The Court held that counsel was not ineffective because *Gant* had not yet been decided and counsel had no duty to anticipate changes in the law.

Brown is distinguishable because in that case, the defendant's argument on appeal rested on a case that had not been decided. *Brown*, 159

Wn. App. at 373. Counsel thus could not be expected to act to safeguard rights that had not yet been articulated. *Id*.

Here, by contrast, counsel should have acted to protect Mr. Clark's existing rights under Washington law. This case more closely resembles *State v. Estes*, 188 Wn.2d 450, 395 P.3d 1045 (2017). In *Estes*, the Court held that counsel performed deficiently by failing to research the impact of deadly weapon enhancements under the Persistent Offender Accountability Act (POAA). 188 Wn.2d at 461. The Court analogized to other instances where defendants received ineffective assistance because their attorney did not conduct proper research. *Id*. at 460. Counsel in *Estes* did not need a case on point, specifically holding that attorneys must research the POAA, in order to know that failing to research this statute was ineffective. Instead, counsel should have applied existing legal principles to the case at hand.

In this case, Mr. Clark had the right to a fair and impartial jury guaranteed by state and federal law. *McCleskey*, 481 U.S. at 310; *Erickson*, 188 Wn.2d at 723. He had the right under Washington jurisprudence to a jury selection process free from implicit or explicit racial bias. *Jefferson*, 192 Wn.2d at 250. These fundamental rights are not "novel legal theories" dependent on "changes in the law." Defense counsel correctly observed that no one involved in this case—including nearly 50 people in the jury venire—was black except Mr. Clark. The next step, consistent with

Washington case law, was to act to protect Mr. Clark's right to a fair and impartial jury selection process. Counsel failed to so act, falling below the standard expected of a reasonable trial attorney. Like in *Estes*, trial counsel did not need a specific case on point in order to act appropriately to protect his client's rights.

B. The Prosecuting Attorney Committed Prejudicial Misconduct During Closing Argument, which was Incurable by an Instruction.

Mr. Clark was also denied a fair trial because the prosecuting attorney committed misconduct during closing argument. In its response, the state argues that any prejudice from this misconduct could have been cured by an instruction. Br. of Respondent at 21. This argument fails because the prosecutor committed repeated instances of misconduct and improperly bolstered the state's key witness.

This Court examined a similar case in *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). In *Walker*, the prosecuting attorney committed numerous instances of misconduct during closing argument. 164 Wn. App. at 730-36. The defendant's attorney did not object. *Id*. Despite this failure, the Court reversed, holding that "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Id*. at 737. Importantly, the case "was largely a credibility contest,

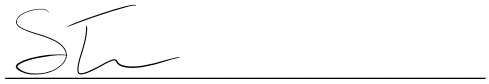
in which the prosecutor's improper arguments could easily serve as the deciding factor." *Id*. at 738. The Court also noted that "the prosecutor made the improper comments not just once or twice, but frequently." *Id*.

Here, like in *Walker*, the prosecutor committed repeated instances of misconduct during closing argument. She vouched for the credibility of the complaining witness; expressed her personal opinion about Mr. Clark's guilt; and implied that in order to acquit, the jury needed to find the complaining witness was not truthful. RP at 848, 851. Also like in *Walker*, this case depended on "a credibility contest." The complaining witness and Mr. Clark agreed about many of the facts but disagreed about consent. An instruction would not have cured prejudice in this case because the cumulative effect of the misconduct bolstered a case dependent on credibility determinations. This Court should reverse.

II. CONCLUSION

Mr. Clark respectfully requests that this Court reverse and remand for a new trial.

RESPECTFULLY SUBMITTED this 18th day of May, 2020.



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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 May 18, 2020, I electronically filed a true and correct copy of the Reply Brief of Appellant, Wendell M. Clark, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Aaron Bartlett Attorney at Law	(X) via email to: aaron.bartlett@clark.wa.gov
Wendell M. Clark DOC # 416403 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520	(X) via U.S. mail

SIGNED in Tacoma, Washington, this 18th day of May, 2020.

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May 18, 2020 - 2:05 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	State of Washington, Respondent v. Wendell Maurice Clark, Appellant
Superior Court Case Number:	18-1-01142-6

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