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No. 339629

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WASHINGTON STATE COURT OF APPEALS
DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
83

STATE OF WASHINGTON,

Respondent,

vs.

KEITH W. BEIERS,

Appellant.

Consolidated with No. 350126

In re The Personal Restraint Petition of Keith W. Beiers,

Petitioner.

REPLY BRIEF OF PETITIONER/APPELLANT

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This brief is filed in reply to the Amended Brief of Respondent filed by the State of Washington. The case arises from a direct appeal, as well as a Personal Restraint Petition filed by Mr. Beiers. Many of the issues before this Court have been fully briefed and are properly before the Court. The following briefing is limited to the three issues needing more discussion.

1. The prosecutor's comments concerning Mr. Beiers' silence were a flagrant and ill-intentioned attempt to link Mr. Beiers' silence with guilt.

The State seeks to excuse its improper implication that silence was the reason for Mr. Beiers' arrest and implying that he was silent because he was guilty as "classic impeachment." (Amended Brief of Respondent, p. 25) This argument is misdirected as the State's attempt to link Mr. Beiers' silence to guilt was a choreographed attempt to implicate his right to remain silent.

The State violated Mr. Beiers' right to remain silent when it attempted to impeach him with his pre-arrest silence while implying to the jury that he would not have been arrested if he spoke up – that is, the reason he was silent was because he was guilty.

The State relies heavily on Jenkins v. Anderson, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d. 86 (1980). This reliance is misplaced.

In Jenkins, Miranda warnings had not been given. The Supreme Court distinguished earlier precedent in its analysis.

The Jenkins court upheld the State's use of pre-arrest silence under the facts of that case. However, it also held that:

Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial.

Supra, 447 U.S. at 241.

Washington has formulated its own rules that define such situations. In State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008), the Washington Supreme Court, in discussing the issue of improper comments on the defendant's pre-arrest silence, stated:

Finally, the Jenkins Court made it clear that each state jurisdiction remained free to formulate its own evidentiary rules with respect to the admissibility of such impeachment evidence, stating...

Id. at 214.

The Burke court analyzed Washington precedent and concluded that pre-arrest silence is not admissible as substantive evidence of an accused's guilt.

The Burke court stated:

Finally, when the defendant's silence is raised, we must consider "whether the prosecutor manifestly intended the remarks to be a comment on that right."

Id. at 216; State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

The Crane court then noted that a prosecutor's statement will not be considered a comment on the constitutional right to remain silent if: ...standing alone, [it] was "so subtle and so brief that [it] did not 'naturally and necessarily' emphasize defendant's testimonial silence." Crane, supra, at 331. A remark that does not amount to a comment is considered a "mere reference" to silence and is not reversible error, absent a showing of prejudice. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996). Thus, focusing largely on the purpose of the remarks, this Court distinguishes between "comments" and "mere references" to an accused's pre-arrest right to silence.

Here, the prosecutor asked Mr. Beiers on the stand:

So rather than tell the police just how dangerous that had been and how close to came you [sic] losing your life, you let them arrest you; correct?

RP 501.

The only purpose to this question was to link Mr. Beiers' silence with the arrest and make him look guilty. Additionally, the State

commented again on Mr. Beiers' silence at the close of cross-examination, when the prosecutor stated: "And rather than telling the police this terrifying story, you allowed them to arrest you?" RP 512. The only purpose for a question phrased in this manner was to link Mr. Beiers' silence with the fact of arrest, thereby "suggest[ing] to the jury that the silence was an admission of guilt." State v. Thomas, 142 Wn.App. 589, 595, 174 P.3d 1264 (2008). This comment was used as substantive evidence of guilt and violated Mr. Beiers' constitutional right to remain silent.

In the State's closing argument, the prosecutor argued:

But, you know, he allowed himself to be arrested rather than tell the police about this brutal encounter with all these people in the yard...

RP 536. In the State's rebuttal argument, the prosecutor argued:

Officer Kester told you oftentimes people who experience a very dramatic event, they don't tell you everything. So look at that in light of the defendant who told you about what he thought was an equally traumatic event who didn't tell the police anything. He got arrested and went to jail rather than telling them what he told you in the courtroom today.

RP 563.

During trial, the prosecutor commented on Mr. Beiers' pre-Miranda silence two different times during cross-examination, each time implying that his silence led to his arrest, so he must be guilty.

RP 501. The prosecutor's comments were an affront to Mr. Beiers' constitutional rights and done for the improper purpose of inviting the jury to infer guilt from silence.

2. The State has offered no strategic or logical reason why defense counsel would not have given an opening statement in this case.

The jury sat through the State's opening statement, the testimony of nine witnesses, including Mr. Beiers, the State's closing argument, and finally hears from defense counsel during his closing that this is a self-defense case. There is no possible strategic or tactical reason for defense counsel to have not given an opening statement. The statement would have given the jury the benefit of evaluating all of the witnesses' testimony through the prism of self-defense.

Anna Tolin addressed this specific issue:

3. As widely recognized in research, defense counsel acknowledges that jurors are quickly influenced by evidence in a case, yet Mr. Cossey failed to make any opening statement and waived his opportunity to do so initially and at the opening of the defense case. Particularly in a self-defense case, not doing an opening statement and presenting no theory to apply to the affirmative defense testimony presented does not meet the minimal standard of competent representation for a criminal defense lawyer in a serious felony case in Washington. A review of the record reveals [sic] no plausible strategic reasons to avoid giving an opening statement in this case.

4. In my opinion it was highly risky to waive initial opening argument that eliminated a crucial opportunity to provide the jury with a narrative of the defense theory of the case before the state's evidence was offered. This decision may have been influenced by the lack of pretrial interviews and desire to hear the state's presentation of evidence before opening. Yet even this questionable strategy was undermined by the failure to present any opening argument at trial. The record in this case leads me to conclude that the ability to raise reasonable doubt about a self-defense shooting in the face of no opening statement violates the standard of care for minimally competent counsel.

(Declaration of Anna Tolin, p. 11)

In its brief, the State attempts to minimize the resulting prejudice from the lack of an opening statement by relying on statements made by defense counsel during closing argument. (State's Amended Brief, pp. 45-46) Defense counsel's statements were made by the same attorney who neglected to make an opening statement. A jury's evaluation of each witness's testimony have been significantly different with the benefit of the defense theory of the case and the interplay of self-defense.

3. Defense counsel operated under an actual conflict between Mr. Beiers and Officer McIntyre.

When defense counsel agreed to represent Mr. Beiers, he knew that Officer McIntyre was a key witness to Mr. Beiers' defense. Defense counsel was also aware that he was representing Officer McIntyre in proceedings which resulted in Officer McIntyre being placed on the

Brady list. Defense counsel interviewed Officer McIntyre prior to her testimony at Mr. Beiers' trial. Defense counsel stated:

I interviewed Officer McIntyre prior to her testimony at Mr. Beiers' trial. Ms. McIntyre had been more forthcoming in her interview than she was at trial. I have no knowledge of whether anyone from the State had talked with Officer McIntyre before the trial to cause her to alter her anticipated testimony.

(See Declaration of Robert R. Cossey, Attachment A)

Defense counsel called Officer McIntyre as a defense witness to present the anticipated testimony that she gave to defense counsel prior to trial. When Officer McIntyre testified at trial, she altered her anticipated testimony and became less forthcoming at trial than she had been in her interview. This put defense counsel in the position of needing to use confidences and secrets he obtained from a former client. (RPC 1.7(b); RPC 1.8 (b))

When counsel is faced with a trial witness that changes or alters the substance of her testimony from that which was given pre-trial, it becomes the obligation of counsel to inquire into that change and specifically probe into those inconsistencies. In this case, when defense counsel was faced with the reality that Officer McIntyre had altered her anticipated testimony, defense counsel did nothing. The reason that defense counsel did nothing was because the witness on the stand was

also counsel's client. Defense counsel chose not to challenge Officer McIntyre. But for the fact that Officer McIntyre was defense counsel's client, her decision to not give favorable testimony on behalf of Mr. Beiers would have been the subject of further examination by defense counsel.

Defense counsel's conflict precluded his ability to highlight the flaws in Officer McIntyre's testimony and her inclusion on the Brady list in explanation to the jury for this alteration of testimony.

In its brief, the State takes the position that defense counsel was never put in the position of cross examining Officer McIntyre because she was a defense witness. (Amended Brief of Respondent, p. 42) However, the State acknowledges that Officer McIntyre's placement on the Brady list did have a direct bearing on her credibility which is always at issue whenever a witness takes the stand. (Amended Brief of Respondent, p. 42) She had other favorable testimony to give on behalf of Mr. Beiers. For whatever reason, she altered her testimony, and defense counsel found himself in a position that his actual conflict precluded him from examining Office McIntyre on these issues.

When Officer McIntyre was on the stand, defense counsel had divided loyalties to a key witness. As set forth by Ms. Tolin:

1. Mr. Cossey suffered from a serious, unwaived conflict of interest which violated the Washington Rules for Professional Conduct and divided the loyalties counsel owed to Mr. Beiers as well as a key trial witness in his case, Officer Sandra McIntyre, which likely prejudiced the outcome of Mr. Cossey's [sic] trial and interfered with Mr. Cossey's minimal obligations to provide competent, loyal, and adequate criminal defense.

* * *

A. Trial Counsel's Conflict of Interest Violates the Standard for Effective Assistance of Counsel.

1. Mr. Cossey's simultaneous and possible subsequent representation of Mr. Beiers and a witness in his case, Officer Sandra McIntyre, violates not only the Sixth Amendment standard but also the minimum licensing standard for Washington criminal defense lawyers.
2. The Washington Rules of Professional Conduct (RPC's) prohibit lawyers from representing two clients with conflicting interests. It is a violation of the RPC's for a lawyer to engage in simultaneous adverse representation of two clients. RPC 1.7(a)(1). Similarly, lawyers must not represent a client when the lawyer's duties to other clients and/or self-interest would materially affect the representation. RPC 1.7(a)(2). Even when representing clients on separate cases, lawyers may not engage in representation that calls for the use of confidences and secrets obtained from a former client adversely to that client without permission. RPC 1.7(b) and 1.8(b).

B. Counsel had a non-waivable conflict of interest under RPC 1.7 requiring him to withdraw from representing Mr. Beiers.

1. The materials reviewed establish that when Mr. Cossey agreed to represent Keith Beiers on the underlying charges, he was simultaneously representing Officer Sandra McIntyre, an important witness in Mr. Beiers' case. Officer McIntyre had extensive involvement in interactions between Mr. Beiers, the victims, and the witnesses in this case. At the same time, Robert Cossey was advocating for Officer McIntyre in an ongoing federal investigation of obstruction of justice charges pertaining to her integrity and honesty as a witness and law enforcement officer in an excessive force and wrongful death investigation.
2. A fundamental minimum requirement for competent representation by a Washington criminal defense lawyer is undivided loyalty in defending one's client. Mr. Beiers, facing very serious assault charges, was entitled to a defense counsel who did not suffer from divided loyalties to a key witness in his case.
3. The facts provided confirm that Officer McIntyre was involved in soliciting reports of neighborhood criminal activity and received significant information: from Mr. Beiers in this regard. This information became relevant to the issues under dispute in this case, and made it necessary for Mr. Cossey as defense counsel to call her as a witness. In doing so, he would need unfettered ability to examine Officer McIntyre about her involvement and conduct in the case. At the same time, Mr. Cossey owed a conflicting duty to Officer McIntyre. Information about Officer McIntyre

being the target of a serious federal investigation that questioned her honesty and credibility had the potential to discredit or at least color her testimony as a witness, and it could be contrary to Officer McIntyre's interests to be viewed as opposing the conviction being pursued by the prosecutor by offering helpful information to Mr. Beiers' defense.

4. The failure to recognize this conflict prevented Mr. Beiers' from receiving minimally competent counsel in this case.

4. Conclusion.

Mr. Beiers requests that his Personal Restraint Petition be granted, his conviction be reversed, and that he be granted a new trial.

DATED this 7th day of August, 2017.



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WINSTON & CASHATT, LAWYERS,
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Attorneys for Petitioner/Appellant

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on August 7, 2017, I caused a true and correct copy of the foregoing document to be served on the following parties in the manners indicated:

Brian O'Brien and Gretchen Verhoef Spokane County Prosecutor's Office 1100 West Mallon Spokane, WA 99260	VIA REGULAR MAIL <input type="checkbox"/> VIA EMAIL (with consent) <input checked="" type="checkbox"/> HAND DELIVERED <input type="checkbox"/> BY FACSIMILE <input type="checkbox"/> VIA FEDERAL EXPRESS <input type="checkbox"/>
Attorneys for State of Washington Email: scpaappeals@spokanecounty.org	

Keith W. Beiers P. O. Box 1749 Airway Heights, WA 99001	VIA REGULAR MAIL <input checked="" type="checkbox"/> VIA EMAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> BY FACSIMILE <input type="checkbox"/> VIA FEDERAL EXPRESS <input type="checkbox"/>
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DATED on August 7, 2017, at Spokane, Washington.

Cheryl Hansen

1032566

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

STATE OF WASHINGTON,

Respondent,

No. 339629

vs.

KEITH W. BEIERS,

Appellant.

DECLARATION OF ROBERT R. COSSEY

ROBERT R. COSSEY declares and states as follows:

1. I represented Keith Beiers in his trial in Spokane County Superior Court.
2. I commenced representation of Mr. Beiers in November of 2012. At that same time, I was also representing Officer Sandra McIntyre in connection with her involvement with the federal investigation of Spokane Police Officer Karl Thompson. Mr. Beiers' trial did not commence until November of 2015. By the time of Mr. Beiers' trial, the Karl Thompson matter in which I was representing of Officer McIntyre had been completed.

DECLARATION OF
ROBERT R. COSSEY -- 1

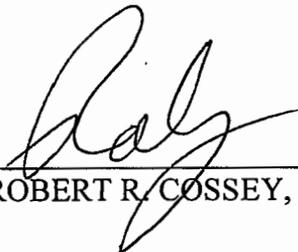
Attachment A

3. I interviewed Officer McIntyre prior to her testimony at Ms. Beiers' trial. Ms. McIntyre had been more forthcoming in her interview than she was at trial. I have no knowledge of whether anyone from the State had talked with Officer McIntyre before the trial to cause her to alter her anticipated testimony.

4. The "defense surveillance video" was not shown to the jury during Mr. Beiers' trial.

Under penalty of perjury of the laws of the State of Washington, I declare the above is true and correct.

DATED this 5 day of July, 2017, at Spokane, Washington.



ROBERT R. COSSEY, WSBA No. 16481

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