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State of Washington  
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NO. 36274-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

DELILA ELLEN REID,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Delila Reid's motion for substitution of counsel based on an irreconcilable conflict with her appointed attorney, when it failed to perform an adequate inquiry into this conflict.

2. The trial court erred in finding that Ms. Reid waived her right to a jury trial.

3. The trial court erred in overruling Ms. Reid's objections to the prosecutor's misconduct in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court may not permit a criminal defendant to be represented by an attorney with whom the client has an irreconcilable conflict, and must adequately inquire into the extent of such a conflict. Did the court err in denying Ms. Reid's request for a substitution of counsel due to irreconcilable conflict and a breakdown in communication without adequate inquiry, thus denying the right to counsel?

2. The right to a trial by jury is protected by both the federal and Washington constitutions. Where the record does not reflect that Ms. Reid understood the fundamental rights she was giving up by waiving her

right to a trial by a fair and impartial jury, her right to have the jury instructed on the presumption of innocence, and other attendant rights, must her conviction be reversed due to the inadequacy of the waiver?

3. The State's duty to ensure a fair trial precludes a prosecutor from employing improper argument and tactics during trial. Where the deputy prosecutor engaged in repeated misconduct in closing argument, and where such conduct was met by proper objection, was there a substantial likelihood that the comments affected the result, requiring reversal?

#### C. STATEMENT OF THE CASE

Delila Reid lives in Moses Lake. RP 113-14.<sup>1</sup> In the summer of 2018, there were a number of new homes under construction in the neighborhood of Moses Point. RP 52, 69. Near Ms. Reid's residence were two job sites – one operated by Hayden Homes, and the other by Hayden's subsidiary, Simplicity Homes. RP 140.

For several months, Ms. Reid drove to these two job sites to clean up scrap wood remaining from the construction. RP 113-15. Ms.

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<sup>1</sup> The verbatim report of proceedings consists of one primary volume containing the trial and suppression hearing, which took place on May 16 and July 25, 2018; it is referred to as "RP \_\_\_." The volume containing the sentencing and jury waiver is referred to as "2RP" \_\_\_."

Reid only picked up wood that was no longer needed by the framing crews, as she was told she was “cleaning up” the excess wood that could not be used in the homes. RP 121. Ms. Reid said this wood had knots, was cracked, was warped, or was water-stained. Id. Ms. Reid explained that she had been given permission to remove this scrap lumber by a member of the crew that she described as a tall Spanish-speaker with a cowboy hat. RP 85-86, 102-03, 114-15.<sup>2</sup>

In July 2018, the Hayden project manager installed game cameras on its job site, due to the perception that usable materials were disappearing after hours. RP 52. Upon examining its camera footage and conducting an independent investigation in the neighborhood, Hayden employees located Ms. Reid’s pick-up truck parked outside her home. RP 56-58. The truck was parked under a tree, still loaded with the same stacks of lumber that were visible on the camera footage. Id. The Hayden employees identified Ms. Reid as the person visible in the footage, which Ms. Reid did not deny. RP 60, 116.

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<sup>2</sup> Ms. Reid’s description of this individual was consistent, although she variably used the word “Spanish,” “Hispanic,” and “Mexican.” RP 85-86, 102-03, 114-15.

Ms. Reid explained, as she did later at trial, that she had been given permission to take the lumber from the members of the framing crew. RP 85-86, 102-03, 114-15, 121. She cooperated with the Grant County Sheriff's Deputy who came to her home and gave a written statement, explaining her understanding that she had permission to take the scrap materials. RP 15; CP 18-20.

Ms. Reid was charged with possession of stolen property in the second degree. CP 1-2.

Before the commencement of trial, Ms. Reid moved for a substitution of counsel, due to the serious breakdown in communication with her trial counsel. RP 18. Ms. Reid said her counsel was not "representing her correctly." RP 19-20. She explained her defense rested on counsel's ability to locate and interview her defense witness – the construction worker who gave her permission to take the lumber – and counsel had not done that. RP 22. Ms. Reid told the court when she complained to counsel that she felt they were not communicating well, his response was, "Well, that's not my job." RP 33.

Ms. Reid was also concerned that her defense counsel believed she was guilty. RP 30. The court informed her that she was not entitled to a lawyer who "makes you feel like he truly believes you're

innocent or not innocent.” RP 33. After a brief colloquy, the court denied the motion for new counsel. RP 34-35.

A bench trial was conducted before the same court that heard the motion for substitution of counsel. 2RP 3-5; CP 17. Ms. Reid entered a waiver of her right to a jury trial, although only a brief colloquy was conducted by the court, which did not indicate that Ms. Reid’s counsel had advised her concerning the rights she was giving up by entering the waiver. 2RP 3-5.

At trial, the Hayden project manager estimated that the value of the materials located at Ms. Reid’s home exceeded \$3000. RP 88-89. No inventory records or receipts were presented to support this claim. Id. Witnesses testified that Ms. Reid had immediately returned all wood to Hayden that was actually usable, in light of any mistake or misunderstanding concerning her permission to take scrap materials. RP 117-18.

Following the trial, Ms. Reid was convicted of possession of stolen property in the second degree. CP 25-28.

D. ARGUMENT

**1. Ms. Reid was denied her right to an effective advocate, contrary to the Sixth and Fourteenth Amendments and Article I, Section 22.**

*a. A criminal defendant has the right to representation by an effective advocate.*

The Sixth Amendment of the federal constitution and Article I, Section 22 of the Washington Constitution protect an accused's right to counsel at all stages of a criminal proceeding. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 2561, 165 L.Ed.2d 409 (2006); State v. Harrell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). The right to the assistance of counsel includes the right to the assistance of an attorney who is free from any conflict of interest in the case. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000). While accused persons are not guaranteed a good rapport with their attorneys, they are guaranteed representation by "an effective advocate" with whom they have no irreconcilable conflicts. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

A trial court may not permit a criminal defendant to be represented by an attorney with whom there is an irreconcilable conflict of interest. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); see also United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) (“For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant ‘privately and in depth.’”). The Ninth Circuit recently reaffirmed this requirement and held that a breakdown in communication with defense counsel may result in the constructive denial of counsel, requiring reversal. United States v. Velazquez, 855 F.3d 1021, 1037 (9th Cir. 2017). “Where a criminal defendant has, with legitimate reason, completely lost trust in [their] attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel.” Id. at 1033-34; see also United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998).

To determine whether there is an irreconcilable conflict justifying the substitution of counsel, the Washington Supreme Court has adopted the Ninth’s Circuit three-part test. Stenson, 142 Wn.2d at 724 (adopting the test set forth in Moore, 159 F.3d at 1158-59). The

factors include: “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” Id.

The appellate court reviews the trial court’s decision on a motion for new counsel for an abuse of discretion. Stenson, 142 Wn.2d at 733. An abuse of discretion occurs when a court’s ruling is based on facts that are not supported by the record, an incorrect understanding of the law, or an unreasonable view of the issues presented. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

*b. The trial court must adequately inquire into a request for new counsel based upon irreconcilable conflict.*

A serious breakdown in communication requiring substitution of counsel may occur even when counsel is competently representing an accused person. Nguyen, 262 F.3d at 1003 (“Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense.”). A court errs by focusing on the attorney’s competence when an accused person complains about the attorney-client relationship. Id. Instead, the court must inquire into the nature of the conflict between the lawyer and client. Id. at 1002.

The court must adequately inquire into a defendant’s complaints, by asking by questioning the defendant and attorney

“privately and in depth.” *Id.* at 1004; see also United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2002) (“In most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.”).

*c. The record here establishes irreconcilable conflict and a failure to adequately inquire privately.*

Here, Ms. Reid requested new counsel, based upon the breakdown of communication between herself and counsel. RP 19-21, 28, 33-34. Ms. Reid had already waived her right to a jury trial, and there is no indication that her motion for new counsel would have caused delay or inconvenience, as with a jury trial. 2RP 3-5; CP 17. Ms. Reid had not previously dismissed other appointed attorneys, and she repeatedly apologized for moving for the substitution on the day of trial. RP 29, 34. However, Ms. Reid stated that despite repeated efforts, she felt unable to communicate with defense counsel, she did not trust him, and did not believe he was on her side. RP 28-30, 33-34.

The State opposed Ms. Reid’s motion for new counsel, arguing that the State was ready for trial. RP 28-29. The State also suggested that because Ms. Reid had not complained about her counsel before, she should be foreclosed from complaining now. *Id.* (prosecutor says he

often gets “inklings when defendants are not satisfied, [and] this is the first I’ve heard of it”).

The court inquired of Ms. Reid and defense counsel as to the breakdown in communication. RP 19-34. Although the court asked Ms. Reid questions about her discomfort with her appointed counsel, Ms. Reid was asked to describe the conflict with counsel in her counsel’s and in the prosecutor’s presence. As a result, Ms. Reid was not free to explain the depth of the breakdown of communication.

Ms. Reid also revealed remarks attributed to her counsel which were incriminatory and prejudicial during this colloquy. RP 30. Describing a conversation with her lawyer and the breakdown in the level of trust, Ms. Reid told the court:

I’ve been expressing ... do you even think that I’m innocent or not, and he says that’s not his – you know, he’s not here to decide that, he’s just here to represent me. Well, I want to feel like my attorney, you know, there’s that communication there that he’s like, you know, knows whether he feels that I’m innocent or not innocent and not just like, oh, that’s no big deal.

RP 30.

The court acknowledged that “it seems to be at this point there’s a breakdown in some sort of communication” between Ms. Reid and her attorney. RP 32. However, the court found that defense counsel had not

“done anything that’s unethical or that he’s failed to comply with investigating the case.” Id. The court informed Ms. Reid that she did not have a right to an attorney who would not only represent her, but who would “feel wholeheartedly 100 percent that you are completely innocent,” or “make you feel like he truly believes you’re innocent or not innocent.” Id. at 32-33.

Ms. Reid continued to insist that “I don’t feel comfortable and I haven’t felt comfortable” with defense counsel’s representation. RP 33. She informed that court that she had told counsel that when she complained that she did not feel they were communicating well, his response was, “Well, that’s not my job.” Id.

The court denied the motion to substitute counsel. RP 34-35.

A defendant is denied her Sixth Amendment right to counsel when she is “forced into a trial with the assistance of a particular lawyer with whom she [is] dissatisfied, with whom she [will] not cooperate, and with whom she [will] not, in any manner whatsoever, communicate.” Nguyen, 262 F.3d at 1003-04 (citing Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970)).

Ms. Reid’s situation is similar to Velazquez, where the Ninth Circuit addressed a situation where a defendant raised concerns about

her representation, including conflict with her attorney and a breakdown in the attorney-client relationship. 855 F.3d at 1035. The Ninth Circuit found an abuse of discretion for the trial court not to conduct a “meaningful inquiry” into the defendant’s “concerns about her counsel or their relationship.” Id.

Like Ms. Velazquez, Ms. Reid “was dogged in placing her concerns on the record.” Velazquez, 855 F.3d at 1035. And like Ms. Velazquez, the trial court failed to conduct a sufficiently meaningful or private inquiry into Ms. Reid’s concerns about her counsel or the breakdown in their relationship. Id. The court agreed that Ms. Reid had experienced “a breakdown in ... communication” with counsel. RP 32. Because the court failed to fully explore this breakdown and provide a remedy, this Court should reverse. Velazquez, 855 F.3d at 1035.

*d. Reversal is required.*

A court’s unreasonable or erroneous refusal to substitute counsel is presumptively prejudicial and requires reversal because it constitutes the constructive denial of counsel. Velazquez, 855 F.3d at 1034; Nguyen, 262 F.3d at 1005; see also Gonzalez-Lopez, 548 U.S. at 150 (“We have little trouble concluding that erroneous deprivation of the right to counsel of choice, with consequences that are necessarily

unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” (internal citation omitted).

Here, the trial court failed to privately explore or address the extent of the conflict infecting Ms. Reid’s representation at trial. The court’s response to the substitution motion was fatally inadequate, resulting in structural error and requiring the reversal of her conviction.

**2. Ms. Reid’s right to a jury trial under the Sixth Amendment and Article I, Section 22 was violated.**

*a. A criminal defendant has the right to a jury trial under the Washington and federal constitutions.*

An accused criminal defendant in superior court has the right to a trial by a jury of 12 impartial and unanimous peers. Const. art. I, § 22; State v. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994). “The right of trial by jury shall remain inviolate.” Const. art. I, § 21. This right may be waived by the defendant, as long as the waiver is voluntary, knowing, and intelligent. Stegall, 124 Wn.2d at 724-25. The waiver must also be personally expressed by the defendant. Id.

*b. The burden of proving the waiver of the right to a unanimous jury lies with the State, not the defendant.*

Where a defendant waives the right to trial by jury, the State must prove such a waiver comported with due process, and was

voluntary, knowing, and intelligent. State v. Hos, 154 Wn. App. 238, 249, 225 P.3d 389 (2010). This Court “must indulge every reasonable presumption against such waiver, absent a sufficient record.” Id. at 249-50. The validity of the waiver of a jury trial is reviewed de novo. State v. Ramirez–Dominguez, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

This Court has found a jury waiver valid where a defendant executes a written waiver, after being advised by counsel. E.g., State v. Benitez, 175 Wn. App. 116, 128-29, 302 P.3d 877 (2013) (finding the written waiver “strong evidence” of the waiver’s validity). The Benitez Court also noted that in reviewing the totality of the record, “[a]n attorney’s representation that the defendant’s waiver is knowing, intelligent, and voluntary is also relevant.” Id. In Benitez, because the Court found, among other factors, that Mr. Benitez’s counsel had reviewed the jury trial right with him, and moreover, had assured the court that his client understood the rights he was waiving, the Court found the jury trial waiver was valid. Id. at 130.

Ms. Reid’s waiver was constitutionally invalid, as compared to Mr. Benitez’s. Ms. Reid’s case is different from Benitez in a number of ways. First, during Ms. Reid’s brief appearance in court on April 10<sup>th</sup>,

the court asked her only three questions before the waiver was accepted: 1) whether the signature on the waiver document was hers; 2) whether “you’re waiving your right to have this matter decided by a jury of 12 individuals, your peers?”; and 3) whether “you’re also agreeing, in essence, for a judge, such as myself, or another judge, to actually review the evidence and then make a decision about your case?”. 2RP 3-5. The waiver was immediately accepted by the court. Id. at 2RP 5.<sup>3</sup>

Unlike in Benitez, Ms. Reid was not asked whether she understood that she was giving up the right to have 12 individuals find her guilt beyond a reasonable doubt. 175 Wn. App. at 128-29. Nor does the record reflect that Ms. Reid’s attorney reviewed the jury waiver with her, as did Mr. Benitez’s attorney. Id.; compare 2RP 3-5. In Benitez, counsel affirmatively told the court that he believed his client’s waiver of a jury trial was voluntarily, knowingly, and intelligently made. Id. at 129. Here, there was no indication that counsel took the time to explain the jury waiver to Ms. Reid, or that

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<sup>3</sup> The written waiver included the pre-printed phrase that Ms. Reid had the “opportunity to consult with counsel,” but the record reflects no such consultation. CP 17.

Ms. Reid understood the waiver and entered it knowingly and intelligently.

Ms. Reid's waiver thus lacked several of the key indicia of reliability found so critical by this Court – most importantly, it lacked her “attorney’s representation that the defendant’s waiver is knowing, intelligent, and voluntary.” Benitez, 175 Wn. App. at 129.

*c. Because Ms. Reid’s waiver was invalid, this Court should reverse her conviction.*

Ms. Reid was denied her right to a fair and impartial jury under Article I, Section 22 and the Sixth Amendment. This issue is properly raised under RAP 2.5(a)(3), as it involves a manifest error affecting a constitutional right. Ms. Reid has made a plausible showing of practical and identifiable consequences: her guilt was determined by the same judge before whom she moved for a substitution of counsel, rather than before a fair and impartial jury of her peers, whom she could have helped to select.

Manifest constitutional error is presumed prejudicial, and the burden is on the State to prove it was harmless beyond a reasonable doubt. State v. Lamar, 180 Wn.2d 576, 585-86, 327 P.3d 46 (2014) (citations omitted). The State cannot meet this burden. But for Ms.

Reid's invalid jury waiver, she would have proceeded to trial before a fair and impartial jury of her peers. Had one of these 12 jurors found the State had failed to meet its burden of proof, the verdict would have been different. This Court should reverse.

**3. Ms. Reid's right to a fair trial was violated by prosecutorial misconduct in closing argument.**

*a. Ms. Reid has the right to due process.*

The Due Process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

*b. Prosecutors have special duties which limit their advocacy.*

A prosecutor's improper argument may deny a defendant the right to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act

impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution. 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the outcome. Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

*c. The prosecutor engaged in misconduct when he shifted the burden of proof, arguing Ms. Reid was obligated to present a “missing witness.”*

In rebuttal argument, the deputy prosecutor argued that Ms. Reid “does in this case need to produce some witnesses that she doesn’t produce.” RP 160. Ms. Reid objected to this argument as burden-shifting. Id. When the court overruled the objection, the prosecutor

continued, escalating to the following: “We have these mythical people,” referring to “missing witnesses” that Ms. Reid had not called to testify. Id. Ms. Reid again objected, saying the prosecutor had again shifted the burden to the defense to produce exculpatory witnesses. RP 161. The court simply said, “I hear the objection,” but told the prosecutor, “Go ahead.” Id.

The prosecutor proceeded with argument, finally referring to these individuals as “these magical people ... who supposedly gave her permission when she didn’t have it.” RP 161. The prosecutor argued that Ms. Reid’s explanation for taking the lumber was not reasonable, and Ms. Reid objected for the third time to the argument shifting the burden of proof. RP 162. The prosecutor defended his argument, stating the defense had asserted a good faith claim of title, an affirmative defense. RP 163.<sup>4</sup> The court overruled this third objection, as well. RP 163.

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<sup>4</sup> The defense never asserted the affirmative defense of good faith claim of title, nor did it ask for the court to take judicial notice of this defense; rather, the defense argued the defense of mistake. RP 111-12, 151-52, 156. But see State v. Sundberg, 185 Wn.2d 147, 156, 370 P.3d 1 (2016) (where defendant asserts an affirmative defense, no error where the prosecutor attacks such evidence or lack thereof, “and the missing witness doctrine plays no part in such circumstances”). This Court has held, in fact, that good faith claim of title is not a defense to possession of stolen property. State v. Hawkins, 157 Wn. App. 739, 748, 749, 238 P.3d 1226 (2010).

“Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence. State v. Montgomery, 163 Wn.2d 577, 652, 183 P.3d 267 (2008). However, “[u]nder the ‘missing witness’ or ‘empty chair’ doctrine..., where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and,...he fails to do so,- the jury may draw an inference that it would be unfavorable to him.” State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (internal citations omitted).

Even if a missing witness instruction is not actually given, it is generally only “permissible for the prosecutor to comment on the defendant’s failure to call a witness provided that it is clear the defendant was able to produce the witness and the defendant’s testimony unequivocally implies that the absent witness could corroborate his theory of the case.” Blair, 117 Wn.2d at 487. In addition, application of the missing witness rule to the defense must not shift the burden of proof to the defendant or constitute an impermissible comment on facts not in evidence. Blair, 117 Wn.2d 479; Montgomery, 163 Wn.2d at 599 (“the doctrine may not be applied if it

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would infringe on a criminal defendant’s right to silence or shift the burden of proof.”).

Here, as in Montgomery, the missing witness inference requested by the State was not supported by the evidence presented. Id. There was no evidence that the tall construction worker with the hat was “peculiarly available” to Ms. Reid. WPIC 5.20; Montgomery, 163 Wn.2d at 599. If anything, the Hayden Homes employees were more available to the State than to the defense. Given that the heart of the defense rested on Ms. Reid’s understanding – or misunderstanding – of what she was told by this employee of Hayden Homes, the complainant corporation, the State’s argument shifting the burden cannot be considered harmless.

As the Montgomery Court held, this Court should not find the prosecutor’s argument, requesting a missing witness inference, “in combination with the prosecutor’s repeated references to the absence” of the “mythical” and “magical” witnesses, which in this case denigrated the defense, was harmless. RP 160, 161; 163 Wn.2d at 600.

*d. This Court should reverse Ms. Reid’s conviction.*

The prosecutor’s misconduct violated Ms. Reid’s right to a fair trial. Due to the multiple instances of the prosecutor’s misconduct in

closing argument, there is a substantial likelihood the cumulative effect of the prejudice affected the outcome; therefore, this Court should reverse Ms. Reid's conviction. Reed, 102 Wn.2d at 146-47; see also United States v. Holmes, 413 F.3d 770, 778 (8<sup>th</sup> Cir. 2005) (reversing due to misconduct in rebuttal argument, which court found particularly egregious, as defense had no opportunity to respond).

E. CONCLUSION

Ms. Reid's conviction should be reversed based on the deprivation of the right to counsel. In addition, because the prosecutor committed misconduct in closing argument, Ms. Reid is entitled to reversal of her conviction and a new trial. The case should be remanded for a new trial with new counsel appointed.

DATED this 8th day of April, 2019.

Respectfully submitted,

s/ Jan Trasen

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JAN TRASEN (41177)  
Washington Appellate Project (91052)  
Attorneys for Appellant

## APPENDIX

ULISES INFANTE

**FILED**

**AUG 20 2018**

KIMBERLY A. ALLEN  
GRANT COUNTY CLERK

**SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY**

**STATE OF WASHINGTON,**

v.

**DELILA REID,**

**Defendant.**

Cause No. 17-1-00650-8

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON HEARING PURSUANT TO**

~~CR 3.5~~ *Bench Trial*

**I. HEARING**

- 1.1 This matter came on for Bench Trial on the 25th day of July, 2018.
- 1.2 The Defendant was represented by Brett Bierley, and the State was represented by Kevin McCrae Deputy Prosecuting Attorney.
- 1.3 The Court received testimony from Deputy Nicholas Overland, Roger Silva, Sean Hoiness, Christopher Lacelle and Delila Reid.
- 1.4 Based upon the testimony heard and the arguments of counsel, the Court announced its decision at the conclusion of the hearing.
- 1.5 The Court now enters the following Findings of Fact and Conclusions of Law in support of its decision:

**II. FINDINGS OF FACT**

- 2.1 Hayden Homes was building homes in the Moses Point area of Grant County, WA. The project manager, Roger Silva, and his assistant set up game cameras at the site to monitor construction materials that were disappearing.

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- 2.2 Ms. Reid had permission to obtain scrap material from the construction site.
- 2.3 Hayden homes left unused but still good materials on the site to be picked up by vendors and returned for full credit.
- 2.4 Ms. Reid took both scrap and valuable materials from the Hayden Homes construction site.
- 2.5 Ms. Reid had this material in here possession when she was contacted by Deputy Overland, Roger Silva and Christopher Lacelle.
- 2.6 Ms. Reid allowed Mr. Silva and his associates to take the building materials back.
- 2.7 Mr. Silva identified the property as belonging to Hayden homes by viewing the items taken in the back of the truck Ms. Reid was using on the game camera, as well as "smart panels" he identified as being unique to Hayden Homes, as well as matching the items Ms. Reid had to item that were missing from the Hayden Homes site.
- 2.8 Mr. Silva identified the items in the back of the truck as being worth at least \$2000 on the low end.
- 2.9 Mr. Silva identified other items and the value thereof.
- 2.10 The amount of construction materials Ms. Reid had in her possession exceeded \$750.
- 2.11 Ms. Reid's explanation that someone had given her permission to take the items was not credible.
- 2.12 Ms. Reid knowingly exceeded the permission she had to take materials from the site.
- 2.13 These events all occurred in the State of Washington.

#### CONCLUSIONS OF LAW

- 3.1 Ms. Ried knowingly possessed stolen construction material taken from Hayden Homes ~~and other construction sites.~~
- 3.2 The value of the construction materials taken from Hayden Homes exceeded \$750.00

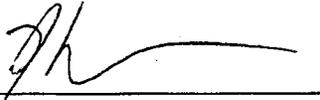
#### IV. ORDER OF THE COURT

The Court having had the opportunity to hear and consider the testimony of the above named witness, and the arguments of counsel, and having made the above Findings of Fact and

Conclusions of Law, it is the Verdict of this Court that the State has carried its burden of proving the defendant guilty of Possession of Stolen Property in the Second Degree.

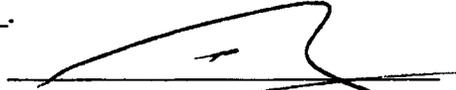
DATED this 20<sup>th</sup> day of August, 2018.

Presented by:



Kevin J. McCrae  
DEPUTY PROSECUTING ATTORNEY  
WSBA #43087

Deputy Prosecuting Attorney



JUDGE of the Above Entitled Court  
Approved as to form:



Brett Bierley  
DEFENSE ATTORNEY  
WSBA # 47369

Attorney for the Defendant



# WASHINGTON APPELLATE PROJECT

April 08, 2019 - 4:35 PM

## Transmittal Information

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**Appellate Court Case Number:** 36274-4  
**Appellate Court Case Title:** State of Washington v. Delila Ellen Reid  
**Superior Court Case Number:** 17-1-00650-8

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