

FILED
Court of Appeals
Division III
State of Washington
4/28/2020 1:28 PM
No. 37064-0-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

WAYNE BERT SYMMONDS,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

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- B. The trial court erred in failing to grant a mistrial when the prosecutor reviewed an exhibit with a witness prior to his testimony. (Assignment of Error No. 2)
- C. The trial court abused its discretion in denying a mistrial based on an objection that was founded on defense counsel's misunderstanding of CrR 3.5. (Assignment of Error No. 3)
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- C. HAS MR. SYMONDS ESTABLISHED PREJUDICE FLOWING FROM PROSECUTORIAL MISCONDUCT?

- D. DOES THIS CASE PRESENT ANY CIRCUMSTANCES JUSTIFYING MS. BURKHART'S ATTACK ON THE PERSONAL CHARACTER OF CHIEF DEPUTY PROSECUTOR OWENS?

III. STATEMENT OF THE CASE¹

Ida Cruz was the manager of the Center Conoco fuel station in Ephrata, Washington. Bartunek RP 55. On June 8, 2019, a person at the fuel station was causing a disturbance. Bartunek RP 57. Cruz directed her employee, Thomas Longley, to tell that person to leave. Bartunek RP 57. Police were called when the person refused to leave. Bartunek RP 58, 69–70.

Officer Downey and Sgt. Harvey of the Ephrata Police Department responded. Bartunek RP 80. At trial, Officer Downey testified he believed the person he was contacting was someone Ephrata police had trespassed earlier. Defense counsel objected to this testimony under Evidence Rules (ER) 404(b) and 609, and the court struck the testimony. Bartunek RP 84.

At the fuel station, the officers told the person, Mr. Symmonds, he had to leave. Mr. Symmonds responded: "Make

¹ The record on appeal consists of sequentially paginated Clerk's Papers and Supplemental Clerk's Papers, cited herein as CP at _____, the Report of Proceedings (Readiness Hearing, September 3, 2019) prepared by Cindy J. Chatterton, cited herein as Chatterton RP _____; the Verbatim Report of Proceedings (Trial, September 5–6, 2019) prepared by Tom Bartunek, cited herein as Bartunek RP _____, and the Transcript of Proceedings (Sentencing Hearing, September 17, 2019) prepared by Amy M. Brittingham, cited herein as Brittingham RP _____.

me.” At trial, the court overruled Mr. Symmonds’ objection to testimony concerning this statement that was based on the lack of a CrR 3.5 hearing. Bartunek RP 86.

At the fuel station, the officers again told Mr. Symmonds he was trespassing and needed to leave. Mr. Symmonds insisted he could go inside and buy his stuff. Bartunek RP 87. At trial, Mr. Symmonds objected to the testifying officer’s use of the word “trespassing.” The court sustained his objection. Bartunek RP 87.

At the fuel station, the officers repeated to Mr. Symmonds he was trespassing and needed to leave, and Mr. Symmonds again refused. *Id.* This second warning and refusal were testified to at trial, where the court overruled Mr. Symmonds’ objection. After being told a second time to leave the fuel station, Mr. Symmonds headed for the door into the building. Bartunek RP 89. The officers intercepted him, attempting to steer him away. Bartunek RP 89. Mr. Symmonds resisted and tried to punch Officer Downey. Bartunek RP 90. In the ensuing fracas, Sgt. Harvey and Mr. Symmonds went off the curb and fell to the ground. Bartunek RP 92-93. Officer Downey heard Mr. Symmonds say: “How’s that feel?” as he wrestled with Sgt. Harvey. Mr. Symmonds had grabbed the sergeant’s testicles. Bartunek RP 135. Sgt. Harvey

used his Taser twice to subdue Mr. Symmonds. Bartunek RP 97–99.

During a break after Officer Downey’s testimony, Sgt. Harvey came into the courtroom and viewed a diagram Officer Downey had made on the stand so he could testify to it. Bartunek RP 107. Defense counsel thought this was a violation of the limine motions and moved for a mistrial, which the court summarily denied. Bartunek RP 108-09.

Sgt. Harvey testified to the same statements made by Mr. Symmonds at the fuel station that Officer Downey had. Mr. Symmonds objected again, arguing the lack of a CrR 3.5 hearing. This time, the Court sustained the objection and instructed the jury not to consider Mr. Symmonds’ statements to the officers. RP 120–22. Sgt. Harvey then described the rest of the fight, confirming Officer Downey’s account.

The jury convicted Mr. Symmonds of two counts of third degree assault, criminal trespass in the second degree, and resisting arrest. CP 64. Based on an offender score of 9+ resulting from 18 prior felonies, the court sentenced Mr. Symmonds to a standard range sentence of 57.75 months. CP 64–70.

IV. ARGUMENT

- A. AD HOMINEM ATTACKS INTENDED TO ASSASSINATE THE CHARACTER OF CHIEF DEPUTY PROSECUTOR OWENS, AN UPSTANDING, PROFESSIONAL PROSECUTOR, ARE UNWARRANTED AND OFFENSIVE. THEY CANNOT SERVE TO REMOVE THE REQUIRED SHOWING OF PREJUDICE FLOWING FROM PROSECUTORIAL ERROR.

A critical issue at trial was whether the circumstances of Mr. Symmonds statements to law enforcement required the safeguards of a hearing under CrR 3.5 to determine admissibility. Mr. Symmonds submerges weak arguments and a failure to research applicable case law² in the muck of unwarranted ad hominem attacks on Chief Deputy Prosecutor Ed Owens. Mr. Owens did not engage in any unfair misconduct, nor is he even close to the rogue prosecutor Mr. Symmonds makes him out to be. Mr. Symmonds argument underscores that the term “prosecutorial misconduct” should be abandoned as inaccurate, misleading, and unfair, and should be replaced by the term “prosecutorial error.”

“‘Prosecutorial misconduct’ is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial.” *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009).

² The State assumes appellate counsel failed to research applicable case law included in the annotations to CrR 3.5 in both Westlaw and Lexis. A knowing failure to inform the tribunal of the multitude of in-jurisdiction appellate opinions contrary to her position would be a violation of Rule of Professional Conduct (RPC) 3.3.

Recognizing that words pregnant with meaning carry repercussions beyond the ambit of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's (ABA) Criminal Justice Section urge courts to limit use of the phrase "prosecutorial misconduct" to intentional acts contrary to established law and rule, and not apply it to mere trial error. *See Measuring Prosecutorial Actions, An Analysis of Misconduct versus Error.*³ In no other area of litigation are mistakes labeled "misconduct." Judges "err." Defense counsel is "ineffective." Only prosecutors are considered to have committed misconduct when they make a mistake.

A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28–29 (Pa. 2008). The State urges this Court to use the phrase prosecutorial error in its opinions. This more accurately describes the concept.

³ Available at <http://ndaa.org/wp-content/uploads/misconduct.pdf> (last visited April 6, 2020).

Here both trial and appellate defense counsel failed to live up to prevailing professional norms by failing to notify the court of in-jurisdiction, controlling case law contrary to their position. While technically not “ineffective,” because their errors did not prejudice the defendant, they are clearly mistaken in their interpretation and presentation of the law.

As demonstrated below, Mr. Owens acted appropriately throughout Mr. Symmonds’ trial. To bolster her misconduct argument, appellate counsel dug up three cases in which Mr. Owens participated over 15 years ago, two of them published, and another published case from almost a decade ago concerning an issue of clear first impression. Because the question of misconduct is raised for the first time on appeal, Mr. Owens has no opportunity to make a record of the thousands of criminal cases he has handled without issue, nor the dozens of trials he has successfully and appropriately conducted since the Court of Appeals decided the cases cited in Mr. Symmonds’ opening brief as evidence of Mr. Owens’ character, or lack thereof.

Nor could Mr. Owens make a record of which deputy prosecutor in his office was actually in charge of any of these cases and, specifically, who made the strategic trial decisions complained of. Cases are often prosecuted in teams, as Mr. Symmonds’ trial was. The Court of Appeals

does not normally identify in its opinions which prosecutor did what, nor in most cases, should they.

The first case Ms. Burkhart cites, *State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274, 1276 (2002), is published. There, the Court specifically noted the conduct complained of lay between two other cases, *State v. Easter*, 130 Wash.2d 228, 242, 922 P.2d 1285 (1996) and *State v. Lewis*, 130 Wn.2d 700, 706, 927 P.2d 235 (1996), that addressed comments on prearrest, pre-*Miranda* silence. *Curtis*, 110 Wn. App. at 12. In *Lewis* the appellate court found no Fifth Amendment violation, but did in *Easter*. *Id.* at 12–13. The *Curtis* Court decided the conduct complained of was on the *Easter* side of the line. *Id.* at 13.

The second case, too, was published: *State v. Silva*, 119 Wn. App. 422, 81 P.3d 889 (2003). There, the trial court allowed evidence and argument when the defendant selectively asserted his right to silence. During argument in the Court of Appeals, the State cited four cases in support of its position. The Court of Appeals distinguished the State's cases on the facts. *Silva*, 119 Wn. App. at 430. While the Court of Appeals found for the defendant, the trial court had ruled for the State, and the State's position was not frivolous.

The third case, *State v. Turner-Bey*, 124 Wn. App. 1002 (2004) (unpublished) involves prosecutorial vouching, a different topic than the others, and the conduct complained of has not been repeated.

The fourth case is *State v. Wallin*, 166 Wn. App. 364, 367, 269 P.3d 1072, 1074 (2012), which was stayed in the Court of Appeals⁴ while the Supreme Court considered, in *State v. Martin*, whether a prosecutor committed error when he asked a defendant if he had tailored his testimony to conform to other witness testimony, ultimately concluding he did not. 171 Wn.2d 521, 538, 252 P.3d 872 (2011). Although Mr. Wallin's appellate counsel then conceded *Martin* applied, the Court of Appeals distinguished *Martin* because in *Martin* the defendant talked about how he tailored his testimony on direct and concluded Mr. Wallin had not opened the door under the facts of that case. *Wallin*, 166 Wn. App. at 372. The Court noted that other jurisdictions were split, and may have come out differently in the *Wallin* case, but under Washington law the prosecutor erred.

The *Wallin* Court then engaged in a lengthy analysis of how the issue of defendants tailoring testimony to comport with that of other witnesses is addressed in various jurisdictions around the United States, *id.*

⁴ *Wallin*, 166 Wn. App. at 367.

at 374–76, ultimately concluding: “cross-examination that generically suggest to the jury tailoring, rather than a specific showing of tailoring, abridges a defendant’s rights to be present at trial and testify.” *Id.* at 376. That is what ultimately distinguished *Wallin* from the facts in *Martin*.

Three of the four cases Ms. Burkhart cites to demonstrate Mr. Owens supposed outrageous conduct involve close issues of law and generated published opinions. As the *Wallin* case demonstrated, “the lines” in the law are complex, nuanced, easy to cross, and often times invisible until after the fact. A prosecutor may err when he crosses these lines. Such error does not mean he has committed misconduct as that term is normally understood. “A prosecutor may strike hard blows, but not foul ones.” *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038; 84 L. Ed. 2d 1 (1985). The difference between hard and foul is not always readily apparent.

The cases cited by Mr. Symmonds are not evidence of disrespect for the court, and the errors in each were not repeated. Prosecutors cannot do their job if they risk exposure to libelous allegations and inferences when navigating “the line” in novel legal issues, a line the appellate courts are ultimately called upon to locate.

Mr. Owens’ entire career has been devoted to public service, first as a United States Marine, then as a police officer, and finally as a deputy

prosecuting attorney. He should not be subjected to the defamatory inferences and outright allegations Ms. Burkhart urges this Court to accept in support of her “prosecutorial misconduct” argument. The cited cases demonstrate nothing but Mr. Owens’ respect for the legal system and his willingness to take on challenging issues. Nothing in the cited cases indicates lack of respect for a defendant’s rights.

The apparent purpose of Ms. Burkhart’s personal attack on Mr. Owens is to avoid being required to show prejudice resulting from the remaining allegations of error, despite the fact no legal doctrine or case law holds prejudice is not required once an appellant manages to sufficiently slur a prosecutor. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Logan*, 102 Wn. App. 907, 911 n. 1, 10 P.3d 504 (2000).

B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN HE FOLLOWED IN GOOD-FAITH THE COURT’S RULINGS ON LIMINE MOTIONS, ATTEMPTED TO ENSURE WITNESSES ANSWERED QUESTIONS DIRECTLY AND HONESTLY, DISCUSSED EXHIBITS WITH HIS WITNESSES PRIOR TO THEIR TESTIMONY, AND ACCURATELY ARGUED THE CIRCUMSTANCES UNDER WHICH A CrR 3.5 HEARING IS REQUIRED.

1. *The State’s witnesses did not violate the court’s limine order prohibiting expression of opinion regarding Mr. Symmonds’s guilt, and the prosecutor did not attempt to have them do so.*

The defense's third motion in limine was "to prohibit and exclude any evidence or testimony that a witness believed a crime has occurred or that the defendant committed a crime." CP at 51. Following brief argument on the motion, the court's ruling was a bit cryptic:

MR. OWENS: We do not believe we're going to have anybody testify that a crime has been committed, but we are going to ask for testimony from witnesses, why they wanted the defendant trespassed from the property.

THE COURT: Okay. Mr. Bierley?

MR. BIERLEY: I don't object, your Honor, to them eliciting the testimony about why they wanted Mr. Symmonds to leave. But saying that he was trespassing or that he was trespassed or really that he was trespassing is a conclusion that the jury would have to make. That's one of the counts here is trespassing in the second degree. The witnesses can't simply state their opinion as to his guilt to that charge. They can say something like, we'd asked him to leave, he didn't leave, so we called the cops, had them come over and advise him that he needed to leave.

But if the witness is going to testify that he was trespassing, that's making a conclusion that should be left to the jury, based upon the facts elicited, not their opinion.

MR. OWENS: We're not going to ask what crime they think the defendant was committing to have it—we're going to ask, why did you want the defendant removed from the property?

THE COURT: Okay. So there's a nuance there, I see the nuance. I think that question and that type of testimony is fine. The actual, hey, he was trespassing, I think, is where Mr. Bierley is going at, with regard to prohibiting somebody from answering or giving testimony to the effect, he was trespassing, versus, we didn't want him here

on the property, we didn't give him permission to be here anymore, something to that effect.

MR. OWENS: Right.

MR. BIERLEY: Correct.

THE COURT: I see the distinction. It's going to be granted. Obviously with that caveat that you're going to be able to ask that question of why you wanted -- or not you, but why the witness wanted Mr. Symmonds potentially removed from the premises.

Bartunek RP 5–6. Notably the court did not say that witnesses were forbidden from using the word “trespassing.” The law does not have a monopoly on the English language. While witnesses could not express an opinion on the legal conclusion that Mr. Symmonds was trespassing, the limine ruling did not preclude the officers from using the word, when relevant, in its ordinary sense: either to mean Mr. Symmonds was not allowed to be at the fuel station or to describe what happened there, and more specifically, what was said to Mr. Symmonds during their encounter.

The first use of the word during testimony was when one of the officers was describing what happened the day before Mr. Symmonds' arrest. Bartunek RP 84. Defense counsel made clear he objected based on ER 404(b) and 609, evidence he did not think this testimony violated the court's limine ruling. Bartunek RP 84.

The remaining testimonial use of “trespassed” was during entirely factual recitations of what the officers said to Mr. Symmonds immediately before the scuffle leading to his arrest. Bartunek RP 84–87. These were not comments or opinions on guilt. Simply because the word “trespass” also happens to be the name of a criminal charge does not remove that word from the lexicon available to a witness so long as they are not offering an opinion on guilt. That neither witness was offering such an opinion, or violating the court’s limine order, is demonstrated by the number of times the court overruled Mr. Symmonds’ objections.

The same is true with the word “assault.” Sgt. Harvey, in recounting his observations, sought distinguish between simply flailing around in resistance and actively trying to hurt the officers. Here, however, the court decided Sgt. Harvey was getting a little too close and sustained the objection with an order to strike. Bartunek RP 137.

The trial court was correct. This is a nuanced issue with no clear line between describing observations and nearing the exclusive province of the jury. If the trial court and counsel find it difficult to define that line, it is to be expected that witnesses, too, may be confused. Here, there was no prosecutorial misconduct or failure to prepare witnesses, just a vague ruling the court was called to interpret a number of times. On the sustained

objection, any error was corrected by the court's order to the jury to disregard the statement about an assault having occurred.

In addition, overwhelming evidence established Mr. Symmonds's guilt. Defense counsel could have requested certain words be expressly forbidden, although the court should not have granted such a motion as it would have interfered with honest testimony, such as the answer to "what did you hear?"

2. *The prosecutor did not violate, or attempt to violate, the court's order excluding witnesses.*

The court's exclusion order "prohibit[ed] all witnesses from discussing the case or completed testimony with other witnesses until all witnesses have completed their testimony and have been excused." CP at 50. During a trial recess, Mr. Owens showed Sgt. Harvey a diagram prepared on the stand by the previous witness that Sgt. Harvey would be questioned about during his testimony. Bartunek RP 107-08. Neither Sgt. Harvey nor Officer Downey discussed the case among themselves during trial, nor with any other witness. Sgt. Harvey did not observe the trial prior to his testimony. He entered the courtroom during a recess and discussed his upcoming testimony with Mr. Owens, which was not prohibited by the court's limine order. During this final witness preparation session, Sgt.

Harvey viewed a newly-created exhibit about which he would be asked to testify. Bartunek RP 108.

Mr. Symmonds criticizes the prosecutor for not adequately preparing his witnesses, and also criticizes him for discussing with the witness his anticipated testimony prior to the witness taking the stand. Reviewing with a witness newly-created exhibits the attorney intends to ask about is not a violation of ER 615 or of the court's limine order in this case. The trial court clearly did not consider the prosecutor's actions a violation of the order, evidenced by its overruling without comment Mr. Symmonds's objection and its contemporaneous denial of motions to suppress and for mistrial, without requesting either explanation or argument from the prosecutor.

The record clearly establishes the prosecutor talked to the witness in full view of defense counsel and whoever else was in the courtroom. It appears counsel stood by silently as Mr. Owens prepared the witness, objecting only after the conversation ended and court was back in session. The accusation, objection, and counsel's motions were raised immediately following the recess. Bartunek RP 107. There is no evidence counsel said anything to the prosecutor or his witness as they spoke just a few feet away. He certainly did not try to stop their conversation. Had counsel been seriously concerned, he could have prevented the entire incident by

promptly telling the prosecutor he believed it was a violation of the limine order. The parties could then have discussed it with the judge. It is fair to conclude defense counsel chose instead to ambush the prosecutor.

Even had this been a violation of ER 615, the normal remedy would have been to allow cross examination on what the witness discussed or observed, and to allow inferences from that discussion to be made in closing argument. “There are generally three possible sanctions for an ER 615 violation that a Washington court may impose: (1) hold the witness in contempt, (2) allow cross-examination regarding the violation and/or comments about the witness’s actions during closing argument, or (3) preclude the witness from testifying.” *State v. Skuza*, 156 Wn. App. 886, 896, 235 P.3d 842 (2010). “Sanctions for a violation of an ER 615 exclusion ruling lie within the trial court’s exercise of sound discretion.” *Id.* at 896. “Exclusion is considered a very severe remedy.” *United States v. Solorio*, 337 F.3d 580, 593 (6th Cir. 2003); Karl B. Tegland, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON EVIDENCE §615:3, at 342 (2019). Here, the defense counsel did not ask for the lesser and more appropriate remedy of cross examination, nor did he attempt to cross examine Sgt. Harvey about the witness preparation session.

The trial court’s denial of the motions for exclusion or mistrial, Bartunek RP 108–09, were a proper exercise of its discretion in which Mr.

Owens's efforts to fully prepare his next witness were implicitly found reasonable and appropriate.

3. *Mr. Owens correctly identified the circumstances under which a CrR 3.5 hearing is required; the circumstances here are not among them.*

The omnibus order concerning issues arising under CrR 3.5 states: “no *custodial* statements will be offered in state’s case in chief or in rebuttal.” CP at 18 (emphasis added). When the trial court struck the officer’s testimony, Bartunek RP 123–25, Mr. Owens noted the statements were not custodial and thus they should be admitted. Bartunek RP 120–22. Mr. Symmonds replied that because there was no 3.5 hearing, the court had not made a decision on admissibility, rendering the statements inadmissible. Bartunek RP 122–23.

The requirement of a CrR 3.5 hearing applies only to in-custody statements. *State v. Harris*, 14 Wn. App. 414, 422, 542 P.2d 122 (1975) (“We construe CrR 3.5 as applying to custodial statements only.”); *See, also, State v. Falk*, 17 Wn. App. 905, 909, 567 P.2d 235 (1977) (“The constitutional concerns exemplified by CrR 3.5 apply only to custodial statements.”); *State v. Jones-Tolliver*, 36260-4-III, 2019 WL 6876818, at *2 (Wash. Ct. App. Dec. 17, 2019)(unpublished).⁵ (“While [CrR 3.5]

⁵ Cited pursuant to GR 14.1 This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

broadly states that it governs the admission of ‘a statement of the accused,’ the rule actually applies only to custodial statements to law enforcement.”); *State v. Weyrauch*, 153 Wn. App. 1026 (2009) (unpublished)² (“Further, CrR 3.5 applies only to statements made while a person is in custody.”)

This is not a new rule. Case law, including opinions predating adoption of CrR 3.5, consistently holds that the hearing required to test the voluntariness of a defendant’s statements is not required for out-of-custody statements. “CrR 101.20W,⁶ has many times been held to apply to ‘custodial’ statements only[.]” *Harris*, 14 Wn. App. at 420 (citing *State v. Toliver*, 6 Wash. App. 531, 494 P.2d 514 (1972); *State v. Woods*, 3 Wn. App. 691, 477 P.2d 182 (1970); *State v. Ratow*, 4 Wn. App. 321, 481 P.2d 20 (1971)).

At the time he made the statements at issue here, Mr. Symmonds cannot be deemed to have been “in custody” within the meaning of CrR 3.5. There is no evidence in the record that the voluntariness of his statements was ever at issue in any phase of the case. The statements to which the officers testified were contained in the probable cause report,

Crosswhite v. Wash. Dep’t of Social and Health Services, 197 Wn. App. 539, 544, 389 P.3d 731 (2017)

⁶ CrR 101.20W is the Washington Criminal Rule replaced by CrR 3.5 in 1973.

CP at 6, so there was no discovery violation. Defense counsel acknowledged the statements were not custodial. Bartunek RP 121. Mr. Owens was entitled to elicit trial testimony about Mr. Symmonds's non-custodial statements without having them first "vetted" in what would have been a pointless and wasteful CrR 3.5 hearing.

Mr. Owens's sole error here was in not providing sufficient authority to the trial court to overcome defense counsel's incorrect comprehension of established law. The fact that defense counsel did not properly research his objections is not evidence of misconduct by the State.

Defense counsel claimed the prosecutor affirmatively said at the readiness hearing just days before trial the State was not offering statements of the defendant. Bartunek RP 123. The trial court said he remembered asking whether CrR 3.5 findings or an order needed to be entered. Bartunek RP 124. The court recalled the prosecutor saying at the readiness hearing the State was not offering any statements made to law enforcement. Bartunek RP 124. Unfortunately, the trial court misremembered the details. The transcript of the readiness hearing shows no such statement from the prosecutor. Chatterton RP 4-7. Even in the improbable event of a conversation occurring off-record as the judge seemed to recall, it is likely the prosecutor would simply have been

referring to the fact there were no custodial statements requiring a CrR 3.5 hearing. It is highly improbable a seasoned prosecutor would, that close to trial, have misinformed the court concerning the existence of statements included in the initial probable cause report and produced to the defense at the onset of the case.

The Judge erred in sustaining Mr. Symmonds's objection and granting his motion to strike the officer's testimony because the State had not violated any rules. There being no error other than an error in Mr. Symmonds's favor, cumulative error does not apply.

C. MR. SYMMONDS FAILS TO ESTABLISH PREJUDICE.

To prevail on his claim of prosecutorial misconduct, Mr. Symmonds must establish not only that Mr. Owens' conduct was improper, but that it was "prejudicial in the context of the entire record and the circumstances at trial." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (citing *State v. Thorgerson*, 172 Wash.2d 438, 448, 258 P.3d 43 (2011)). The defendant must "show a substantial likelihood that the misconduct affected the jury verdict. *Id.* (citations omitted). "Evidentiary error is grounds for reversal only if it results in prejudice . . . An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *In re Det. of West*, 171 Wash.2d 383, 410, 256 P.3d 302 (2011) (alteration in

original) (internal quotation marks omitted) (quoting *State v. Neal*, 144 Wash.2d 600, 611, 30 P.3d 1255 (2001)).

Here the evidence was both strong and uncontroverted. Two officers testified to Mr. Symmonds assaults, and the testimony of the two civilian witnesses was consistent with the officers' version of events. Bartunek RP 54–72. There is no substantial likelihood the verdict would have been different had the complained of prosecutorial error not occurred. Even under the more stringent “beyond a reasonable doubt” standard reserved for constitutional, error the result would not have been different.

Lacking a scintilla of evidence of prejudice, Mr. Symmonds stages a personal attack on the prosecutor's ethics, yet he fails to cite any case in which a verdict was reversed on those grounds. *See State v. Logan*, 102 Wn. App. 907, 911 n. 1, 10 P.3d 504, 506 (2000) (Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.)

D. NONE OF THE CIRCUMSTANCES OF THIS CASE JUSTIFY MS. BURKHART'S ATTACK ON THE PERSONAL CHARACTER OF CHIEF DEPUTY PROSECUTOR OWENS.

Attempting to hide the extreme weakness of her legitimate arguments, Ms. Burkhart attacks Mr. Owens' professionalism on the

slimmest of bases. The State recognizes that defense appellate counsel are strongly disincentivized to file briefs under *Anders v. State of Cal.*, 386 U.S. 738, 741, 87 S. Ct. 1396, 1398, 18 L. Ed. 2d 493 (1967) because the Office of Public Defense pays less for an *Anders* brief than for a case in which a merits brief is filed,⁷ and that *Anders* briefs require as much or more work as merit briefs.

The state also recognizes that Washington has completely disregarded ABA Standard 21-2.3 by removing any risk to an indigent defendant for proceeding with a frivolous appeal. Between these two facts, there is an extremely strong incentive to file frivolous appeals. That, however, does not justify attacks on the prosecutor's professionalism in this case. "The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." Rule of Professional Conduct 3.5, Comment 4.

Ms. Burkhart's abusive argument disparaging and attacking a prosecutor who has practiced for 20 years with no disciplinary history, an argument based on decades-old cases that presented novel issues of law and involving mistakes the prosecutor never repeated, especially when

⁷ www.opd.wa.gov/documents/0378-2016_AppellatePaymentPolicies.pdf at 2 (last visited March 6, 2020)

viewed in light of trial defense counsel's failure to research applicable law as well as her own, is simply uncalled for. The fact is that Mr. Symmonds received a fair trial in which the prosecutor made every effort to follow the trial court's limine orders and established case law. The record, including what was actually said at readiness hearing, establishes Mr. Symmonds was convicted on strong evidence, after a fair trial under the rules. There is simply no justification for Ms. Burkhart's libelous attack. She owes Mr. Owens an apology.

V. CONCLUSION

The foremost error in this case was committed by both trial and appellate defense counsel when each failed to become familiar with the actual, long-established requirements of CrR 3.5. The prosecutor is not a loose cannon, as alleged by Mr. Symmonds. In this trial, there were no violations of the court's limine orders, and in any event, the alleged errors were harmless in the face of overwhelming, competent evidence.

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This Court should affirm the verdict and Ms. Burkhart should apologize to Mr. Owens.

Dated this 28th day of April, 2020.

Respectfully submitted,

GARTH DANO
Prosecuting Attorney

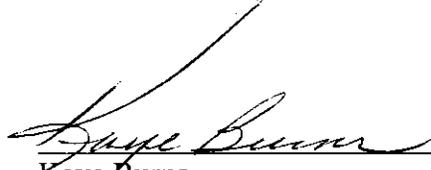
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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: April 28, 2020.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

April 28, 2020 - 1:28 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Wayne Bert Symmonds
Superior Court Case Number: 19-1-00330-1

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