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No. 57463-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GANTRY LOMONE MATTHEWS,

Appellant.

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sharon Armstrong

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE COURT'S CONCLUSION THAT THE OFFICER'S VIOLATION OF THE IN LIMINE WAS INTENTIONAL WAS SUPPORTED AND SHOULD HAVE RESULTED IN A MISTRIAL

The State contends Officer O'Keefe's statements in his direct testimony did not amount to intentional violations of the court's *in limine* order, and even if they did, the trial court did not abuse its discretion in denying the defense motion for a mistrial. Brief of Respondent at 11-15. The State also contended that the officer's violative remarks were harmless in light of the entirety of the record. *Id.* On the contrary, the trial court's initial conclusion that O'Keefe intentionally violated the order, which it did not alter, was supported by the evidence, and the officer's comments were the type of evidentiary harpoon which should have resulted in a mistrial. Further, harmless error is not the test in this situation.

The prosecutor noted to the trial court after O'Keefe's gaffes that she had advised him of the trial court's *in limine* ruling prior to his testimony yet he still violated the order. Given the officer's conduct, the court's ruling that the officer "must have intentionally violated the rulings of the limine [sic] the prosecutor conveyed to him[]" was eminently supported. 11/10/05RP 55.

Further, the officer's comments were of such a manner that nothing short of a mistrial would have served as a remedy. The *Miles* decision cited in the opening brief, which the State did not attempt to distinguish, and which resulted in a reversal of a conviction based upon a testifying officer's single comment that the defendant and his confidante were going to duplicate their robbery, has direct application to Mr. Matthews' matter. *State v. Miles*, 73 Wn.2d 67, 436 P.2d 198 (1968). In *Miles* as here, the trial court denied a defense mistrial motion, and as in *Miles*, the court instructed the jury to disregard the officer's comments. *Miles*, 73 Wn.2d at 68. Nevertheless, in *Miles* the Supreme Court reversed the conviction based upon the officer's single remark. *Id.* at 69. The same result should apply here as O'Keefe's comments were no less an evidentiary harpoon than the officer in *Miles*.

Finally, whether or not the officer's comments were harmless in light of the entire record is simply not the test. The test is not whether the error was harmless or not harmless, but rather whether the officer's intentional impropriety violated Mr. Matthews' due process rights to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Under this test, and keeping in mind the decisions from *Miles, supra* as well as *State v. Taylor*, 60

Wn.2d 32, 371 P.2d 617 (1962), cited in the opening brief, the officer's comments violated Mr. Matthews' right to a fair trial. As such, the court erred in denying Mr. Matthews' motion for a mistrial.

2. THE ENDS OF JUSTICE EXCEPTION TO
THE MANDATORY JOINDER RULE SHOULD
NOT APPLY

Relying on this Court's decision in *State v. Ramos*, 124 Wn.App. 334, 101 P.3d 872 (2004),¹ the State argues that the decision in *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) was an "extraordinary circumstance" implicating the "ends of justice" exception to the mandatory joinder rule allowing the State to retry Mr. Matthews. As Mr. Matthews contended in his opening brief, the State is reading far too much into the *Ramos* decision, which simply does not stand for the proposition for which the State contends.

The only question this Court needed to resolve in *Ramos* was whether the decision in *Andress* required a reversal of Mr. Ramos' conviction. In so doing, this Court could have merely reversed the conviction and remanded to the trial court for further proceedings. But, instead this Court went on to gratuitously determine whether the "ends of the justice" exception to the

¹ The Supreme Court has granted discretionary review in *Ramos* to review the trial court's pretrial ruling finding the mandatory joinder rule did not bar the State from charging the defendants with first degree manslaughter. *State v. Ramos*, No. 77347-5.

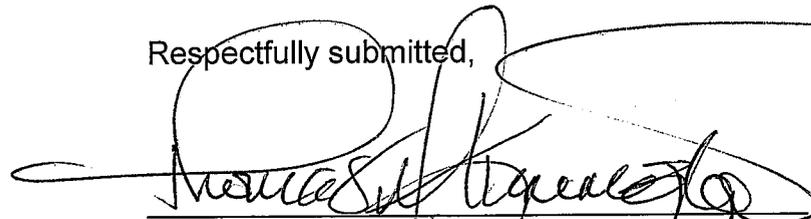
mandatory joinder rule barred the State from retrying the two defendants for manslaughter on remand. This Court concluded that the mandatory joinder rule did not require *this Court* to dismiss the prosecution at that point, but left it to the trial court to determine whether the ends of justice exception would be defeated by dismissing manslaughter charges against the two. Thus, contrary to the State's argument, *Ramos* does not stand for the proposition the decision in *Andress* constituted extraordinary circumstances as that portion of the opinion is merely *dicta*.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant as well as the instant reply brief, Mr. Matthews contends this Court must reverse his conviction and either remand with instructions to dismiss or remand for a new trial.

DATED this 20th day of February 2007.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends across the width of the signature block.

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 57463-9-1
)	
v.)	
)	
GANTRY MATTHEWS,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 20TH DAY OF FEBRUARY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> GANTRY MATTHEWS
712725
CEDAR CREEK CORRECTIONS CENTER
PO BOX 37
LITTLE ROCK, WA 98556 | (X)
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() | U.S. MAIL
HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF FEBRUARY, 2007.

X _____
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