

84856-9

FILED
COURT OF APPEALS
DIVISION II

09 OCT 09 PM 12:26

STATE OF WASHINGTON
BY [Signature]
DEPUTY

38034-0 consol.
No. 38104-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Olsen,

Appellant.

Thurston County Superior Court Cause No. 07-1-01363-0

The Honorable Judge Christine A. Pomeroy

Appellant's Reply Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant
BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 339-4870
FAX: (866) 499-7475

PM 10-29-09

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT..... 5

I. The trial court’s instructions relieved the state of its burden to prove each essential element and failed to make the relevant legal standard “manifestly apparent to the average juror.” 5

II. The trial court should have instructed the jury on Manslaughter in the Second Degree..... 7

A. The trial judge’s refusal to instruct on Manslaughter in the Second Degree denied Mr. Olsen his constitutional right to due process under the Fourteenth Amendment. ... 10

B. If the federal constitution does not protect the right to a lesser included instruction in a noncapital case, the refusal to instruct on Manslaughter in the Second Degree violated Mr. Olsen’s state constitutional right to have the jury consider applicable lesser included offenses. 10

III. Defense counsel’s deficient performance prejudiced Mr. Olsen in violation of his right to the effective assistance of counsel..... 11

A. If the failure to instruct on second-degree manslaughter was caused by counsel’s error, then Mr. Olsen was denied the effective assistance of counsel..... 11

B. Defense counsel should have requested instructions on Murder in the Second Degree and Manslaughter in the First Degree 12

IV. The trial court should have granted Mr. Olsen's motion for a new trial. 14

V. The trial court should have excluded irrelevant and prejudicial portions of the phone calls between Mr. Olsen and Frazier..... 18

VI. The trial court should have allowed Mr. Rayan to testify about his conversation with Mr. Totten..... 19

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES

Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) 11

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)
..... 11

Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503
(2006)..... 20, 21

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 5, 7

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
(1984)..... 12

WASHINGTON CASES

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 12

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 7

State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003)..... 15

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000)..... 7

State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990)..... 5

State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003) 19, 20

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) 10, 14

State v. Flores, 164 Wn.2d 1, 186 P.3d 1038 (2008)..... 21

State v. Grier, 150 Wn.App. 619, 208 P.3d 1221 (2009) 13, 14

State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996) 5, 6

State v. Morgan, 86 Wn. App. 74, 936 P.2d 20 (1997) 8, 9, 14

<i>State v. Nguyen</i> , 165 Wn.2d 428, 197 P.3d 673 (2008).....	8, 10, 14
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	8
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	12
<i>State v. Roche</i> , 114 Wn. App. 424, 59 P.3d 682 (2002)	15, 18
<i>State v. Savaria</i> , 82 Wn. App. 832, 919 P.2d 1263 (1996).....	15
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	5
<i>State v. Watkins</i> , 136 Wn.App. 240, 148 P.3d 1112 (2006)	5
<i>State v. Wilson</i> , 144 Wn.App. 166, 181 P.3d 887 (2008)	19
<i>State v. Woods</i> , 138 Wn.App. 191, 156 P.3d 309 (2007)	7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI.....	11, 20
U.S. Const. Amend. XIV	5, 10, 11, 20

WASHINGTON STATUTES

RCW 9.69.100	8, 9, 14
RCW 9A.32.060.....	14
RCW 9A.32.070.....	8

OTHER AUTHORITIES

WPIC 28.06.....	12
-----------------	----

ARGUMENT

I. THE TRIAL COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH ESSENTIAL ELEMENT AND FAILED TO MAKE THE RELEVANT LEGAL STANDARD “MANIFESTLY APPARENT TO THE AVERAGE JUROR.”

Jury instructions violate due process if they relieve the prosecution of its burden to prove every essential element of a criminal offense. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Instructions “must make the relevant legal standard ‘manifestly apparent to the average juror.’” *State v. Watkins*, 136 Wn.App. 240, 240-241, 148 P.3d 1112 (2006) (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Mr. Olsen’s theory at trial was that Sublett and Frazier killed or fatally wounded Mr. Totten while engaged in a burglary/robbery that terminated before Mr. Olsen was recruited.¹ Respondent concedes that Mr. Olsen would not be guilty of murder if Mr. Totten was killed or fatally wounded before Mr. Olsen became involved. Brief of Respondent, pp. 38-40. Accordingly, the issue to be determined is whether or not the

¹ For the purpose of the felony murder statute, a burglary (and presumably a robbery) is considered to be in progress until after the burglar (or robber) flees the scene. *State v. Dennison*, 115 Wn.2d 609, 616, 801 P.2d 193 (1990).

court's instructions made it "manifestly apparent to the average juror" (1) that a burglary and/or robbery terminates after the participants leave the scene, and (2) that Mr. Olsen was not criminally responsible for anything that occurred prior to his involvement. *LeFaber*, at 900.

The court's instructions did not explain when a burglary or robbery terminates. Court's Instructions, CP 46-77. Nor did the court clarify that Mr. Olsen could be convicted of felony murder only if he participated in the burglary and/or robbery in progress when Mr. Totten was killed or fatally wounded. Court's Instructions, CP 46-77.

Under the facts of this case and the court's instructions, a reasonable juror could have concluded that Mr. Olsen was an accomplice to a single ongoing burglary/robbery. Jurors could have believed that the crime commenced when Frazier and Sublett first attacked Mr. Totten (without Mr. Olsen's help), continued when they returned and moved the body (with Mr. Olsen's help), and concluded when all three left the residence for the last time. *See* Instructions Nos. 15 and 21, CP 64-65, 71. This interpretation would make Mr. Olsen an accomplice to the entire criminal enterprise, including the murder, even if he joined Sublett and Frazier only after they'd killed or fatally wounded Mr. Totten.

Where the court's instructions are not manifestly clear, the state must prove any error was harmless beyond a reasonable doubt. *State v.*

Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). To meet this standard, the prosecution must establish (beyond a reasonable doubt) that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Woods*, 138 Wn.App. 191, 202, 156 P.3d 309 (2007).

Instead of addressing harmless error, Respondent erroneously argues that Mr. Olsen must show that jurors actually misunderstood the instruction. Brief of Respondent, p. 40. This is incorrect. The standard Respondent cites does not apply where the instructions misstate an element of a criminal offense. Where the instructions misstate an element (including an element of accomplice liability), the stringent constitutional harmless error standard applies. *See, e.g., State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

The court's instructions were not manifestly clear. Because they allowed conviction even absent proof that Mr. Olsen was an accomplice to felony murder, the conviction must be reversed. The case must be remanded to the trial court for a new trial. *Winship, supra*.

II. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON MANSLAUGHTER IN THE SECOND DEGREE.

Instruction on a lesser-included offense is required whenever the evidence, taken in a light most favorable to the accused person, supports

an inference that only the lesser crime was committed. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008); *State v. Pittman*, 134 Wn. App. 376, 385, 166 P.3d 720 (2006). Respondent concedes that Manslaughter is a lesser-included offense of premeditated murder. Brief of Respondent, p. 43. The only issue, therefore, is whether the facts, when taken in a light most favorable to Mr. Olsen, support an inference that he committed only Manslaughter.

A person commits Manslaughter in the Second Degree when (acting with criminal negligence) he causes the death of another. RCW 9A.32.070. A manslaughter charge can be based on failure to summon aid, where the accused person has a legal duty to do so. *See State v. Morgan*, 86 Wn. App. 74, 81, 936 P.2d 20 (1997). A witness to a violent offense has a duty to summon aid. RCW 9.69.100.

When taken in a light most favorable to Mr. Olsen, the evidence established that he was not guilty of First Degree Murder: he said he accompanied Frazier and Sublett to Mr. Totten's residence after they had already killed or fatally wounded Totten. RP (6/11/08) 792-810; Exhibit 179A, CP. Furthermore, when viewed in his favor, the evidence established that he committed manslaughter. According to Mr. Olsen, Mr. Totten may still have been alive when Mr. Olsen got to the house. RP (6/16/08) 855; Exhibit 179A, p. 11, 18, CP. Under these circumstances,

Mr. Olsen was a witness to a first- or second-degree kidnapping, and thus had a legal duty to summon medical aid. RCW 9.94A.030; RCW 9.69.100. His breach of this duty was reckless or criminally negligent and could have been a cause of Totten's death. *Morgan, supra*. A rational jury could have accepted Mr. Olsen's version of events and found him guilty of manslaughter instead of intentional murder.

Respondent erroneously suggests that the evidence does not support a manslaughter instruction for three reasons. First, Respondent suggests that Mr. Olsen would have been exempt from the duty to summon aid because of his fear that Sublett and Frazier would harm him. Brief of Respondent, p. 45. Second, Respondent incorrectly asserts that it was "impossible" that Mr. Totten was alive when Mr. Olsen entered the house, and thus "[i]t would have been impossible for Olsen to report the attack in time to prevent death..." Brief of Respondent, p. 46. Third, Respondent claims there was no evidence "that Olsen could have reasonably thought Totten was alive." Brief of Respondent, p. 46.

But Respondent applies the wrong standard in assessing the evidence. The evidence is to be taken in a light most favorable to the accused person, and the jury is free to disregard any particular piece of evidence. *Nguyen*. Furthermore, an accused person may pursue inconsistent and contradictory defenses at trial. *State v. Fernandez-*

Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In this context, taking the evidence in a light most favorable to Mr. Olsen means disregarding his testimony that he was afraid (and thus exempt from the duty to summon medical aid), and privileging his testimony that Mr. Totten may have been alive over other contrary testimony. *Nguyen*.

When the correct standard is applied, the error is apparent. The trial court should have viewed the evidence in a light most favorable to Mr. Olsen and instructed the jury on manslaughter. Its failure to do so requires reversal.

- A. The trial judge's refusal to instruct on Manslaughter in the Second Degree denied Mr. Olsen his constitutional right to due process under the Fourteenth Amendment.

Mr. Olsen stands on the argument set forth in his Opening Brief.

- B. If the federal constitution does not protect the right to a lesser included instruction in a noncapital case, the refusal to instruct on Manslaughter in the Second Degree violated Mr. Olsen's state constitutional right to have the jury consider applicable lesser included offenses.

Respondent expresses confusion about Mr. Olsen's *Gunwall* analysis.² Brief of Respondent, p. 43-44. The *Gunwall* analysis is provided because the federal constitution does not necessarily protect the right to a

² *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

lesser-included offense in noncapital cases; as noted in Appellant's Opening Brief, the U.S. Supreme Court has expressly reserved that issue. Brief of Appellant, p. 32 n. 18 (citing *Beck v. Alabama*, 447 U.S. 625, 638 n. 14, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)). If the federal right is ultimately found to apply in noncapital cases, the *Gunwall* analysis will prove unnecessary.

III. DEFENSE COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED MR. OLSEN IN VIOLATION OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

An accused person is guaranteed the effective assistance of counsel. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance claims are reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Reversal is required when defense counsel's deficient conduct prejudices the accused. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*).

A. If the failure to instruct on second-degree manslaughter was caused by counsel's error, then Mr. Olsen was denied the effective assistance of counsel.

Defense counsel proposed a nonstandard manslaughter instruction. Compare Defendant's Jury Instructions, No. 11, CP 59, with WPIC 28.06.

If the trial court's failure to instruct the jury on manslaughter is attributable to defense counsel, then Mr. Olsen was denied the effective assistance of counsel. *Reichenbach, supra.*

Respondent does not dispute that counsel's performance was deficient, or that the deficiency may have prejudiced Mr. Olsen. Brief of Respondent, p. 50. Instead, Respondent relies on the argument that Mr. Olsen was not entitled to a manslaughter instruction. Brief of Respondent, p. 50. Accordingly, Mr. Olsen's conviction must be reversed if the court's failure to give a manslaughter instruction is attributed to counsel's error. *Reichenbach, supra.*

B. Defense counsel should have requested instructions on Murder in the Second Degree and Manslaughter in the First Degree.

Failure to request an instruction on a lesser-included or lesser-degree offense may constitute ineffective assistance. *State v. Grier*, 150 Wn.App. 619, 208 P.3d 1221 (2009). Assuming that Mr. Olsen was entitled to instructions on second-degree murder and first-degree manslaughter, Respondent does not dispute that counsel's performance was deficient or that the deficiency prejudiced Mr. Olsen. Brief of Respondent, pp. 51-52. Instead, Respondent contends that the evidence did not support the instructions. Brief of Respondent, pp. 51-52. This is incorrect.

1. The evidence supported instructions on intentional second-degree murder.

When taken in a light most favorable to Mr. Olsen, the evidence establishes that he committed only second-degree intentional murder. First, the jury acquitted him of premeditated intentional murder; this conclusively establishes that he did not have the premeditated intent to kill Mr. Totten. Verdict Form B, CP 78. Second, Frazier suggested that Mr. Olsen intended to kill Mr. Totten. RP(6/9/07) 519, 528, 530-31. This evidence, when taken in a light most favorable to Mr. Olsen, entitled him to instructions on second-degree intentional murder. *Grier*.

Respondent erroneously disregards the proper standard for viewing the evidence and ignores an accused person's right to present inconsistent and contradictory defenses. *Nguyen; Fernandez-Medina*. Under the correct standard, defense counsel should have requested instructions on second-degree intentional murder. *Grier*.

2. The evidence supports instructions on first-degree manslaughter.

As outlined earlier in this brief, Mr. Olsen's failure to summon aid breached the duty imposed by RCW 9.69.100, and thus recklessly caused Mr. Totten's death. *Morgan, supra*. This constitutes Manslaughter in the First Degree. RCW 9A.32.060. Respondent again applies the wrong legal

standard in assessing the evidence. Brief of Respondent, pp. 50-52.

Defense counsel should have requested the instructions. *Grier*.

3. Defense counsel's failure to propose instructions on second-degree murder and first-degree manslaughter was objectively unreasonable.

Under the circumstances of this case, an all-or-nothing strategy was objectively unreasonable. Because Respondent does not address the reasonableness of counsel's performance, Mr. Olsen relies on the argument set forth in the Opening Brief.

4. Mr. Olsen was prejudiced by his attorney's failure to request instructions on these lesser-included and inferior degree offenses.

There is a reasonable probability that the jury would have convicted Mr. Olsen of second-degree murder or first-degree manslaughter had the appropriate instructions been given. Because Respondent does not address the issue of prejudice, Mr. Olsen relies on the argument set forth in the Opening Brief.

IV. THE TRIAL COURT SHOULD HAVE GRANTED MR. OLSEN'S MOTION FOR A NEW TRIAL.

A new trial is warranted when newly discovered evidence "(1) [would] probably change the result of the trial, (2) was discovered after the trial, (3) could not have been discovered before trial by the exercise of

due diligence, (4) is material, and (5) is not merely cumulative or impeaching.” *State v. Roche*, 114 Wn. App. 424, 435, 59 P.3d 682 (2002). Even impeaching evidence ““can warrant a new trial if it devastates a witness’s uncorroborated testimony establishing an element of the offense.”” *State v. Roche*, at 438 (quoting *State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996), *overruled on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003)). Such evidence “is not merely impeaching, but critical.” *Savaria*, at 838.

Here, the trial judge abused her discretion by denying Mr. Olsen’s motion for a new trial. Mr. Olsen brought material evidence to the trial court’s attention, establishing that Frazier helped plan the murder long before she met Mr. Olsen, and directly contradicting Frazier’s sworn testimony on critical issues (including her denial that she planned the murder and her version of what happened immediately after the killing). Affidavit of Katrina Berchtold, CP 79-82; RP (6/9/08) 580, 587. Contrary to Respondent’s assertion (Brief of Respondent, pp. 53-54), this important evidence would likely have changed the outcome of the trial—it implicated Frazier in the premeditated murder of Totten, demonstrated her bias, and devastated her testimony on critical issues.

The evidence was not cumulative. Although Frazier’s credibility had been impeached (as Respondent points out, p. 54), the newly

discovered evidence implicated her in a premeditated murder and undermined her credibility more thoroughly than anything Mr. Olsen was able to present at trial. Affidavit, CP 79-82.

The evidence could not have been discovered prior to trial. Mr. Olsen (and his attorney) did not know that Ms. Berchtold had important information; in addition, they knew her only as "Alexis Cox" and were ignorant of her real identity.³ Thus they could not have located her for an interview prior to trial. Motion for New Trial, CP 84. Although Ms. Berchtold tried to speak with the prosecuting attorney during trial, she did not telephone defense counsel until after Mr. Olsen's conviction. Affidavit, CP 81-82; RP (7/23/08) 1117-1121.

The evidence was also material. Ms. Berchtold directly implicates Frazier in the premeditated murder of Mr. Totten, contradicts Frazier's sworn testimony that she did not help plan the murder, and contradicts her sworn testimony that Sublett went with Mr. Olsen to Ms. Berchtold's to smoke methamphetamine after the murder. Affidavit, CP 80; RP (6/9/08) 587. Respondent erroneously attacks the timeline in Berchtold's affidavit,

³ "Alexis" is Ms. Berchtold's middle name; however, the last name "Cox" is a fabrication of April Frazier's. Affidavit, CP 82.

failing to take into account defense counsel's acknowledgment that his office staff made an error in preparing the affidavit:

MR. WOODROW: Your Honor, I just wanted to make a record. On paragraphs three and four, they were typographical errors... For the affidavit. Your Honor, just so -- typed in there was before June. That should have read before January. Paragraph four should have read on January 19th, not June 19th... What I'll do, Your Honor, is I'll contact Ms. Cox and have her execute a subsequent affidavit.

THE COURT: I do see it was June 12th, and I was thinking why is it so late at this point. You're telling me that I should turn everything that said June into January?

MR. WOODROW: Yes, Your Honor. Mr. Jackson and I have talked about this briefly, and I had indicated to him that that was a typographical error. When this was prepared, I was actually in another trial with Mr. Bruneau, and so I apologize for the June. It should be the January date being June.
RP (7/23/08) 1117-1122.⁴

The corrected timeline is as follows, with all dates occurring in 2007:

Prior to January 19:	Frazier discusses killing Mr. Totten.
January 19:	Berchtold gives birth to her first child.
January 29-30:	Mr. Totten is killed
January 30:	Frazier claims Sublett and Mr. Olsen visit Berchtold to smoke methamphetamine.

Affidavit, CP 79-82; RP (7/23/08) 1117-1122.

The trial judge was aware of the correct dates when she denied Mr. Olsen's motion for a new trial. As this timeline shows, Ms. Berchtold's information relates directly to the pertinent period.

⁴ It does not appear that a corrected affidavit was filed.

The newly discovered evidence was critical and would likely have changed the outcome of this case. The jury clearly had some difficulty believing April Frazier (since they acquitted Mr. Olsen of premeditated murder). Additional evidence that she was directly involved in planning the killing and that she lied in her sworn testimony may well have resulted in acquittal. The trial judge should have granted the motion for a new trial. *Roche, supra*.

V. THE TRIAL COURT SHOULD HAVE EXCLUDED IRRELEVANT AND PREJUDICIAL PORTIONS OF THE PHONE CALLS BETWEEN MR. OLSEN AND FRAZIER.

An erroneous evidentiary ruling requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Wilson*, 144 Wn.App. 166, 177-178, 181 P.3d 887 (2008).

In this case, the trial court erroneously admitted recordings that included cumulative evidence, evidence of unrelated crimes (and planned crimes), and foul language likely to inflame the passion and prejudice of the jury. Exhibits 178A and 178B, CP. The court's admission of this evidence—without even balancing it on the record—was an abuse of discretion under ER 402, 403, and 404(b). *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003).

Respondent argues that the evidence was admissible in its entirety because it “revealed the kind of relationship that existed between Frazier

and Olsen...,” and showed “motive, intent, preparation, plan, knowledge, and absence of mistake or accident.” Brief of Respondent, p. 58, 60. But Respondent’s lengthy discussion of the probative value and prejudice cannot substitute for what the trial judge failed to do—balance the evidence on the record.

The erroneous admission of this prejudicial evidence violated Mr. Olsen’s right to a fair trial. The trial judge’s errors (including her failure to balance the evidence on the record) requires reversal of Mr. Olsen’s conviction. The case must be remanded for a new trial, with instructions to exclude the evidence (or, in the alternative, to redact those portions that are overly prejudicial). *DeVincentis, supra*.

VI. THE TRIAL COURT SHOULD HAVE ALLOWED MR. RAYAN TO TESTIFY ABOUT HIS CONVERSATION WITH MR. TOTTEN.

An accused person must be provided a meaningful opportunity to present a complete defense at trial. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); U.S. Const. Amend. VI; U.S. Const. Amend. XIV. In this case, the trial judge denied Mr. Olsen the opportunity to present his defense.

Mr. Rayan’s testimony was relevant, admissible, and critical to Mr. Olsen’s case. Mr. Rayan would have testified that Mr. Totten had asked Frazier to leave his property, and was considering seeking a restraining

order against her. RP (6/12/08 pm) 9-10, 49-52. This testimony showed that Frazier had a motive to kill Mr. Totten and lied under oath about her relationship with him. Respondent argues that the evidence was (in part) cumulative because Frazier's motive to kill Mr. Totten was apparent and because she'd already been impeached. Brief of Respondent, p. 63. Had Frazier been a peripheral witness, this argument might have merit; however, she was the state's primary witness against Mr. Olsen, and provided the only evidence linking him to the actual killing. Under these circumstances, the court should have allowed Mr. Rayan to testify.

Respondent is correct that Mr. Olsen did not definitively establish the timeframe when Mr. Rayan spoke to Mr. Totten. Brief of Respondent, p. 63-64. From the offer of proof and Mr. Rayan's testimony, it appears that the conversation took place sometime in January.⁵ RP (6/12/08 pm) 9-10, 49-52. Regardless of when it occurred, the evidence contradicted Frazier's testimony about a rosy relationship, and showed that she had reason to fear eviction. Given the importance of her testimony, the evidence should have been admitted. By excluding it, the court violated Mr. Olsen's right to present his defense.

⁵ The investigative report attached to Mr. Olsen's Motion Regarding Proposed Testimony indicates that the conversation took place before Mr. Rayan overheard the argument between Mr. Totten and Sublett. Motion Regarding Proposed Testimony, CP 24-25.

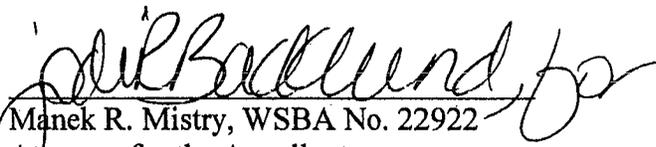
The error is presumed prejudicial. *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038 (2008). Respondent does not argue that any error was harmless. Brief of Respondent, p. 62-65. Because of this, Mr. Olsen's conviction must be reversed and the case remanded for a new trial, with instructions to allow Mr. Rayan to testify regarding his conversation with Mr. Totten. *Holmes, supra*.

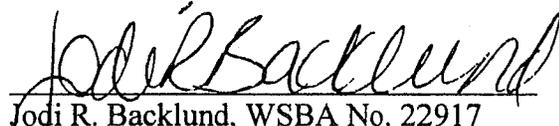
CONCLUSION

Mr. Olsen's murder conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on October 28, 2009.

BACKLUND AND MISTRY


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant


Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

COURT OF APPEALS
DIVISION II

09 OCT 30 PM 12:25

STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

I certify that I mailed a copy of Appellant's Reply Brief to:

Christopher Olsen, DOC #831898
Washington State Penitentiary
1313 N 13th Ave.
Walla Walla, WA 99362

and to:

Thurston County Prosecuting Attorney
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502

and that I e-mailed a copy of the brief to Jeffrey Erwin Ellis, attorney for
co-defendant Michael Sublett.

I further certify that I sent the original and one copy to the Court of
Appeals, Division II, for filing;

All mailed postage prepaid, on October 28, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on October 28, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant