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Washington State Supreme Court

MAR 18 2015

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Ronald R. Carpenter  
Clerk

No.: 91425-7

(Court of Appeal No. 70857-1-I)

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON

Respondent

v.

BRENDA NICHOLAS

Petitioner

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**DISCRETIONARY REVIEW**

Brenda Nicholas  
Pro Se - Petitioner  
9601 Bujacich Road NW  
Gig Harbor, WA 98332

**Federal Cases:**

United States v Medina (1988, F. DC NJ) 1988 US Dist. Lexis 5067.....6

Strickland v Washington, 466 U.S. 668, 80 L.Ed 2d 674, 104 S. Ct. 2052  
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Parra v Page, 1967, Okla. Crim 430 P.2d 834..... 3

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State v Pete, 152 Wash. 2d 546, 553-55, 98 P.3d 803 (2004)..... 10

**Constitutions:**

U.S.C.A. Const. Amend. 14..... 7, 13, 14

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**Other Statutes:**

CrR 4.7(a)(3).....7

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

*In re: Notice of Appeal of:* ) NO: 70857-1-1  
 )  
 Brenda Nicholas )  
 Appellant ) MOTION FOR DISCRETIONARY  
 ) REVIEW  
 )

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I. IDENTITY OF MOVING PARTY

Brenda Nicholas, Appellant, seeks the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Grant discretionary review of the order denying Brenda Nicholas' Court of Appeals, Motion for Reconsideration. The order was filed on January 12, 2015 and is attached as Appendix A.

III. FACTS

The Court of Appeals described the facts as follows:

On December 8, 2011, Seattle Police responded to the scene of a homicide at Four Freedoms House, an assisted living apartment complex for the elderly. Officers found the victim, Francis Fleming, lying on his back with obvious signs of trauma to his head and neck. Medics pronounced Fleming dead at the scene.

Detective interviewed several Four Freedoms residents and discovered that Fleming had a large amount of valuable coins in his apartment. The majority of the coin collection was missing. Fleming's neighbor told police that Fleming kept many of the coins in a leather brief case, which was also missing.

In the course of their investigation, police contacted Sylvia Sutton; a friend of Fleming's who had moved out of Four Freedoms several months prior. Sutton told the officers that she was the victim of financial scam by a woman who professed to be psychic. Sutton knew the woman as "Monica Marks." Sutton said that Marks was able to get a very large amount of money from her and the case was currently under investigation by the Elder Financial Abuse Detail of the Seattle Police Department. Sutton also said that Marks knew about Fleming's coin collections and had expressed a strong interest in them.

Detectives ran the name "Monica Marks" and the phone number she gave to Sutton. They discovered that the number was associated with Brenda Nicholas and another woman named Gilda Ramirez. They also discovered that the Kirkland Police Department had investigated Nicholas and Ramirez for theft and trafficking in stolen property. As part of that investigation, Kirkland Police Officers executed a search warrant on a house in Lynnwood. Nicholas and Ramirez were present at the time of the search, as was a man named Charles Jungbluth. Officers seized several items, including a leather briefcase. Inside the briefcase were papers with the full names of Fleming, Nicholas, and Sutton.

Nicholas, Ramirez, and Jungbluth were arrested for Fleming's murder. Ramirez and Jungbluth both admitted their involvement in the murder, but maintained that Nicholas was the mastermind of the operation.

Nicholas was charged with one count of first degree murder with deadly weapon enhancement. Ramirez and Jungbluth received plea deals for their testimony against Nicholas.

Under a separate cause number, Nicholas was charged with theft related crimes committed from September 26, 2007 through June 9, 2012. Nicholas pleaded guilty, in that case, to two counts of first degree theft and one count of first degree identity theft.

A jury found Nicholas guilty of first degree murder with a deadly weapon enhancement. She was sentenced for her counts of murder, theft and identity theft together in a single hearing. The State calculated her offender score at five, which included two prior out-of-state convictions. Based on that calculation, the court sentenced Nicholas to 412 months in prison. Nicholas appeals.

#### **IV. ARGUMENT**

##### **A. Interpretation as element of Due Process - Competence of Interpreter**

While an accused has no constitutional right, as such, to be furnished interpretive services, the failure to the trial court to appoint an interpreter for an accused who could not understand or be understood in the criminal proceedings

against him has been held in the particular circumstances of several cases to have resulted in denying the accused due process of law.

The judgment and sentence entered on an accused's plea of guilty were vacated in *Parra v Page* (1967, Okla Crim 430 P2d 834), where the court held that accused was denied due process of law and a fair and impartial trial, noting that he was a 23-year-old, uneducated, Mexican-American migrant worker who could neither read, write, nor speak the English language, his native language being Spanish, and that the minutes of the court did not reflect that he was advised of his constitutional rights or that an interpreter was present. The court said that the accused was not provided with the fundamental rights which guarantee a fair and impartial trial, and that in view of the vagueness of his knowledge of the English language, he should have been provided with an interpreter, for his benefit as well as for that of his counsel and the trial court.

Defendant, Ms. Nicholas does not have sufficient knowledge in the English language to not only have understood the proceedings, but reading and writing would definitely not have been something she could have done. All parties involved were aware of this matter, yet they brought in a Romani Interpreter who was not qualified but biased to the trial itself.

Numerous cases discuss the sufficiency of interpretive services generally and the discretion that the trial court is allowed in exercise in determining the qualifications of interpreters, but in relatively few cases have these questions been discussed in relation to the interpretive services furnished an accused. It has been held in few cases, however, that it was an abuse of discretion for the trial court to proceed where the appointed interpreter was shown not to have been competent to translate the accused's testimony.

Thus, where interpreters were appointed by the court who were familiar with the English, Spanish and Cuban languages, but were unable to correctly understand and interpret the testimony of the accused, who was a West Indian Negro of mixed blood, and they were also unable to converse with him, it was held in *Kelly v State* (1928) 96 Fla 348, 118 So. 1, to be reversible error to proceed with the trial with the accused endeavoring to testify in broken English and with the help of such interpreters. The court pointed out that it did not appear

from the record that accused's liability in this direction was sufficient to enable him to make his testimony correctly and intelligibly understood by the jury, and reasoned that an accused in a criminal prosecution has the right, if he so desires, to testify as a witness in his own behalf, and in order to make this right fully effective it is necessary that his testimony be made fairly intelligible to the jury when it is practically to do so, concluding that the trial court had abused its discretion under the circumstances of this case.

And in *State v Deslovers* (1917) 40 RI 89, 100 A 64, accused's conviction was reversed where the record showed that the interpreter appointed to translate the testimony of accused and a number of witnesses from French into English was incompetent and unable to discharge his duties. The court said that it must be conceded that in the selection, appointment, and retention of an interpreter, as well as in the manner of conducting an examination through him, the trial court is vested with large discretion, and that the exercise of such discretion will not be interfered with unless an injustice to the complaining party clearly appears, but that failure to remove this interpreter and appoint a competent one must have been prejudicial to the accused, and must have denied him that fair and impartial trial to which under the law he was entitled.

Although the courts in numerous instances have found that there was no prejudicial effect resulting from the appointment of a biased or arguably biased interpreter of testimony in criminal or civil cases, and although they have often disagreed as to what relationships or interests are indicative of bias, they are in general agreement that the better practice is to appoint a disinterested interpreter, at least where one is available.

Here in the immediate, Ms. Nicholas' Romani Interpreter, Mr. Tony Urich, at trial was not a professional interpreter nor was he certified as an interpreter (03/25/2013 RP489) of Romani dialect, there is no written standard for the Romani Language/dialect, nor was he certified for court interpreting. He is/was a police officer by profession (03/25/2013 RP478) not an interpreter. In fact he was addressed as an "officer" by the Prosecuting Attorney Ms. Ulrey and not as Interpreter (03/25/2013 RP478). It is clear in the sense that the State used Mr. Urich's position as an officer to intimidate the jury.

Mr. Urich testified that the amount of time his parents spoke Romani to him versus English was 60% English and 40% Romani (03/23/2013 RP 491-492). Mr. Urich went on to testify that in fact he interpreted other court hearings, then recanted and said "investigations" "a total of 10." This trial was his first time to appear in court (03/25/2013 RP493).

After Mr. Urich had testified, the court decided it needed to find the interpreter qualified.

**Court:** We have two issues. First, the RCW 2.43.030 is one. The Court needs to find the interpreter qualified. There is certainly good cause for not finding a certified interpreter, because there aren't any in Romani, right? (03/25/2013 RP489).

**Mr. Newcomb:** I would admit that, yes. (03/25/2013 RP489).

In questioning Mr. Urich about his qualifications outside the presence of the jury Mr. Urich testified that he "got a letter of recommendation from the United States Attorney's Office." (03/25/2013 RP494). However, when questioned by Ms. Nicholas's defense counsel Mr. Urich revealed that the person who wrote the letter of recommendation did not know whether or not he in fact provided accurate interpretations. (03/25/2013 RP498).

The court soon determined Mr. Urich "qualified" saying, "the court makes basically a prima facie determination that the witness is qualified as an interpreter." (03/25/2013 RP498).

It made it obvious that there was no certified Romani Interpreter...The court should have found out if he was qualified before and not after testimony has been provided.

The court had handed out the transcripts of Mr. Urich's interpretation of phone calls from the defendant/appellant Ms. Nicholas with her husband from county jail.

The court should have questioned the qualifications of Mr. Urich's interpretation of the phone calls in the presence of the jury, since the jury had the right to hear and see for themselves; to understand and come to their own conclusion as to the creditability of the actual interpretation.

This was a critical part of the jury's evidence especially due to seriousness of the charges that the appellant Ms. Nicholas was facing. The questions that the

jury faced during deliberations were regarding the phone calls that Mr. Urich has translated. The conversations in the phone calls as interpreted by the Romani interpreter did not flow naturally and consequently made no sense. They were incomprehensible and thus causing the jurors the uncertainty.

The jury could have and should have gotten the truth, but they never got the real interpretation of the phone calls because the judge would not allow a written interpretation. Instead the judge ordered Ms. Nicholas to give the interpretation on the witness stand as the tapes were played word for word. Unfortunately, Ms. Nicholas's defense counsel objected to the order; defense counsel said it would take too long and be overwhelming to question. Since the judge and defense counsel could not come to an agreement they left the transcripts "as-is" a false translation.

Ms. Nicholas challenges the court based on the use of a biased interpreter and failure to provide a neutral unbiased interpreter. The court in *United States v Medina* (1988, F DC NJ) 1988 US Dist LEXIS 5067, remanded for an evidentiary hearing on a seemingly related claim that an evidently foreign language speaking defendant's guilty pleas to robbery charges were involuntary. The defendant argued in part that counsel had erroneously allowed his codefendant to act as an interpreter in out-of-court plea negotiations and unlawfully induced him.

In Ms. Nicholas' matter it is very apparent that the court appointed "qualified" interpreter Mr. Tony Urich was first an officer of the state, and second his dialect and the actual dialect used by this appellant Ms. Nicholas was in so many ways different.

It was held reversible error in *People v Allen* (1974) 22 Ill App 3d 800, 317, NE2d 633, to allow to act as interpreter of a prosecution

Although defendants have no constitutional "right" to flawless, word for word translations, interpreters should strive to translate exactly what is said, and courts should discourage interpreters from "embellishing" or "summarizing" its testimony.

The record reveals that the transcript translated from the so called "phone call" was submitted to the jury as evidence and was done so with malice against the appellant Ms. Nicholas and all other respects overwhelming to the defense



Where illegal evidence has been admitted, a reversal must follow, unless the court can clearly see that illegal evidence could not have prejudiced defendant. (citing *State v Thompson* (1896) 14 Wash 285, 44 P 533).

**B. The trial court erred in allowing the admission of overly lurid autopsy photographs-**

Trial court abused its discretion by failing to properly constrain the state in its presentation of graphic and potentially inflammatory evidence in form of photographs of victim's body, both at crime scene and in connection with her autopsy, and videotape of crime scene showing victim's body, in capital murder's re-sentencing trial, much of which evidence was cumulative. *Mitchell v State*, 2006 OK CR 20, 136 P.3d 671 (Okla. Crim. App. 2006).

Ms. Nicholas' defense counsel argued the admission of an over abundance of these overly lurid autopsy photos. The judge denied the motion. As a result of the denied motion there were so many pictures that a lot of time was spent showing them. They were so lurid that one of the jury member fainted during the viewing.

Another jury member sent an email to the court's clerk (on record) saying she felt her constitutional rights were violated by making her sit through such a lengthy presentation of these photos.

Generally, the State must disclose "evidence that is material and favorable to the defendant." CrR 4.7 (a) (3).

The purpose behind discovery disclosure is to protect against surprise that might prejudice the defense. If the State fails to disclose evidence or comply with a discovery order, a defendant's constitutional right to a fair trial may be violated; as a remedy, a trial court can grant a continuance, dismiss the action, or enter another appropriate order. (citing, *State v Barry*, 339 P.3d 200 (2014)).

"Governmental misconduct," as is required under criminal rule governing dismissal for such misconduct, can be something as basic as simple mismanagement. CrR 8.3 (citing, *State v Barry*, 339 P.3d 200 (2014)).

"Prejudice," as is required under criminal rule governing dismissal for governmental misconduct, includes the right to a speedy trial and the right to

adequately prepared counsel. CrR 8.3(b). (citing, *State v Barry*, 339 P.3d 200 (2014)).

Appellate court reviews discovery violation sanctions for an abuse of discretion. CrR 4.7, CrR 8.3. (citing, *State v Barry*, 339 P.3d 200 (2014)).

A “danger of unfair prejudice,” so as to support exclusion of relevant evidence, exists when evidence is likely to stimulate an *emotional response* rather than a *rational decision*. (citing, *State v Barry*, 339 P.3d 200 (2014)).

Trial courts have considerable discretion to consider the relevancy of evidence and to balance the probative value of the evidence against its possible prejudicial impact.

“Abuse of discretion,” in making decision regarding relevant and prejudicial effect of evidence, is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Any error in a trial court’s decision regarding the relevance of prejudicial effect of evidence requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.

Highly prejudicial images may sway a jury in ways that words cannot. *State v Gregory*, 158 Wash. 2d 759, 866-67, 147 P.3d 1201 (2006).

Such imagery, then, may be very difficult to overcome with an instruction. Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented.

*In re Personal Restraint of Glasmann*, 175 Wash. 2d 696, 286 P. 3d 673 (2012), the Supreme Court reversed the defendant’s convictions after the prosecutor improperly presented the jury with multiple copies of the defendant’s veracity and stating that the defendant was “Guilty, Guilty, Guilty.” The Court determined that the multiple altered photographs were improper because the prosecutor’s modification of the photographs was the equivalent of submitting unadmitted evidence to the jury.

Here, the State engaged in improper conduct, not only did the State present overwhelming evidence connecting Ms. Nicholas to the murder but also this case is distinguishable from cases where the misconduct is not a matter of

determining whether there is sufficient evidence to convict the defendant. Rather, this court must determine whether the misconduct encouraged the jury to base its discretion on improper grounds.

**C. The trial court erred in failing to find a mistrial upon the fainting of a juror due to lurid photos -**

During the testimony of these lurid photos, one of the jury members fainted and everyone rushed into the jury box-including the current witness that was on stand; the arresting officer; the prosecutor; the detective; and attorneys despite the fact the no one is supposed to go to the jury box or interact with the jurors. It was clearly made known that this fainting incident occurred due to these lurid photos. This juror was replaced with an alternate juror.

Regardless of this particular juror being dismissed, the emotional bond the jurors had formed after about 3 weeks of trial; him fainting was extremely emotional and damaging to the jury on many levels.

Defense counsel initially filed a motion for mistrial, but later that motion was withdrawn against Ms. Nicholas wishes.

Regardless of Ms. Nicholas's concerns the judge and defense counsel decided to question the jurors and ask them if they felt they could continue with the trial.

The judge, defense counsel and state prosecutor all felt that this was a good enough remedy to solve the damage done by the juror fainting.

While Ms. Nicholas understands that the determination of whether or not to dismiss a juror for bias, prejudice, indifference, *inattention or any physical or mental defect*, or by reason of conduct or practices incompatible with proper and efficient jury service is within the discretion of the trial court; however the trial court abuses its discretion when its decision is manifestly unreasonable, or based upon untenable grounds or reasons.

Considering the entire record and circumstances of this case, there is substantial likelihood that these misconducts by the state, the trial court and even the defense counsel the jury have had to be affected.

A trial in which irrelevant and inflammatory material is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.

**D. The trial court erred in allowing the admission of jail phone calls recordings unidentified by the state as calls to be used until their actual proposed admission during the course of the trial -**

Defense counsel was not notified of these phone calls to Archie Marks from jail. One particular call in English, the prosecutor decided to play for the jury while Ms. Nicholas was being questioned. Defense counsel objected because this call was not submitted as evidence, nor had defense counsel heard this call before it was presented.

When the point was brought up about the evidence not being approved for submission to the jury by the defense counsel; the jury had already been tainted from the evidence.

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, a prosecutor must seek convictions based only on probative evidence and sound reason. In *State v Huson*, 73 Wash. 2d 660, 663, 440 P.2d 192 (1968) the prosecutor should not use the arguments calculated to inflame the passion or prejudices of the jury. American Bar Association, Standards for Criminal Justice std. 3-5.8(c).

Our courts have repeatedly and unequivocally denounced the type of conduct that occurred in this case. First, we have held that it is error to submit the evidence to the jury that has not been admitted at trial. *State v Pete*, 152 Wash. 2d 546, 553-55, 98 P.3d 803 (2004). The “long-standing rule” is that consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Ms. Nicholas was denied such liberty secured by these Constitutions.

E. The trial court erred in allowing the states witness Detective Cloyd Steiger to refuse to answer a defense counsel's question in that he deliberately refused to answer -

During questioning by the defense counsel the state's witness Detective Cloyd Steiger refused to answer them, especially when the questions pertained to Archie Marks. Witness Gilda Ramirez testified that Archie Marks "helped her get rid of the evidence" but Mr. Marks was never subpoenaed or investigated. That was just one of the questions out of several that defense counsel asked Detective Steiger about in regards to Archie Marks. Instead, Detective Steiger refused to answer any of them. At one point, Detective Steiger said with great agitation that he refused to answer any questions about Archie Marks; with no explanation as to why.

Defense counsel was upset and addressed the matter to the trial court's judge, but the judge did not take any action.

Defendant's right to confront and cross-examine witnesses against him, under the Confrontation Clause, applies to those who bear testimony against him, which is typically a solemn declaration or affirmation made for purpose of establishing or proving some fact. U.S.C.A. Const. Amend. 6.

Ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee, in that it commands, not that evidence be reliable, but that reliability be assessed in a particular manner, i.e., by testing in crucible of cross examination. U.S.C.A. Const. Amend. 6.

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..." Article 1, section 22, (amendment 10) of our state constitution states, "In criminal prosecutions the accused shall have the right...to meet the witnesses against him face to face..."

Although the [trial] court could have more clearly ordered the witness to testify; this trial court just ignored the request from the defense counsel; this clearly shows prejudice to Ms. Nicholas.

**F. The trial court failed to grant a motion for continuance of trial -**

In preparing for the trial, Ms. Nicholas's defense counsel Mr. Newcomb had a death in the family. Mr. Newcomb had to fly out of the country. He came back in an extremely hurried time before appearing for trial. Ms. Nicholas felt that her defense counsel did not have enough time to prepare for trial or question the witnesses.

Defense counsel asked for an extension; even till the day before the trial. Both the pre-trial and trial judges denied defense counsel's motion for continuance. Given the seriousness of the charges; the potential length of trial; and the emergency situation of the defendant's counsel, shouldn't the trial court have given the necessary extension?

Ms. Nicholas contends the court abused its discretion in not allowing the continuance for the trial. Under the time-for-trial rule, defense counsel has authority to make binding decisions to seek continuance.

**G. Constitutional Right to proper assistance of counsel -**

Effective assistance of counsel under the constitutional guarantee is generally taken to mean that such assistance provides that the rights of the accused are properly safeguarded and the accused's defense is competently and zealously presented. In this regard, the effectiveness of counsel is not only tested merely by counsel's performance in the courtroom; but also measured by the lawyer's familiarity with the facts and law of the particular case. The issue whether an attorney has provided adequate representation to the client with respect to in-competency on the client's part has been used to claim ineffectiveness of counsel as basis for reversal of a conviction.

The court cannot properly assume that a defendant is entering a defense with a complete understanding of all the strategies being used by the counsel.

Essential to the concept of the due process of law is the right a person has to be notified of legal proceedings, the opportunity to be heard and defend himself in an orderly proceeding, and to have counsel represent him.

The right to be heard would be of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated laymen have small and sometimes no skill in the science of law. If charged with a crime, he is incapable generally, of determining for himself whether the indictment is good or bad. He is unfamiliar of the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent of evidence, or evidence irrelevant to the issue or otherwise inadmissible. Powell v Alabama, 287 U.S. 45, 68-69 (1932).

Ms. Nicholas' counsel, Mr. Jonathan Newcomb conducted himself below the standard by not objecting to the numerous of errors - when he should have; not questioning all the witnesses before the trial (investigation); not arguing certain points that were prejudicial to Ms. Nicholas. Ms. Nicholas felt she was discriminated against not only by the courts but discriminated even by her own counsel, due to her language barrier (nationality).

U.S.C.A. Const. Amend. 6 - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense and to have the counsel represent him/her.

Sixth Amendment right to counsel of choice commands not that a trial be fair but that a particular guarantee of fairness be provided, to wit, that the accused be defended by the counsel he believes to be best. U.S.C.A. Const. Amend. 6.

The Due Process Clause safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial. U.S.C.A. Const. Amend. 14.

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in progressive society. U.S.C.A. Const. Amend. 14.

Under the Due Process Clause of the Fourteenth Amendment, a state's conviction cannot be brought about by methods that offend a sense of justice.

Judicial review of the guarantee of due process imposes on Federal Supreme Court an exercise of judgment upon the whole course of proceeding to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. U.S.C.A. Const. Amend. 14.

Deficient performance, for the purpose of an ineffective assistance of counsel claim, is performance falling below an objective standard of reasonableness based on consideration of all the circumstances. U.S.C.A. Const. Amend. 6.

In, *Strickland*, the court explained that a court should hold that a defendant was denied effective assistance of counsel if there is a reasonable probability that the proceeding would have been different had the counsel not erred. The court also noted that, while it is not enough for the defendant to show that the error had conceivable effect on the outcome of the proceeding, a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case. *Id. at 693.* (Citing *Strickland v Washington*, 466, U.S. 668, 80, L.Ed. 2d 674, 104 S.Ct. 2052)

Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty, a duty to avoid conflicts of interest.

From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's cause and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in course of prosecution. U.S.C.A. Const. Amend. 6.

Defense counsel has duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. U.S.C.A. Const. Amend. 6.

Counsel has a duty to make reasonable investigations or to make reasonable decision that makes particular investigations unnecessary - yet necessary. U.S.C.A. Const. Amend. 6



Inquiry into counsel's conversation with defendant may be critical to proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. U.S.C.A. Const. Amend. 6.

- Conclusion -

The cumulative effect of these many errors requires the reversal of Ms. Nicholas convictions.

When the combined effect of errors during trial denies the defendant her right to a fair trial, the courts may reverse her convictions. If this court should decide that any one of these errors by themselves is insufficient to warrant a reversal, Ms. Nicholas submits that these many errors together warrant the reversal of her convictions with instructions to dismiss.

For the reasons stated, appellant Ms. Nicholas asks respectfully from this court to reverse her conviction for murder in the 1<sup>o</sup> to be reversed, remanded and vacated.

Dated this 16<sup>th</sup> day of March 2015.

By: Brenda Nicholas  
Brenda Nicholas  
Pro-Se Appellant

MAR 18 2015

IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
Ronald R. Carpenter  
Clerk

THE STATE OF WASHINGTON )                    DECLARATION OF MAILING  
COUNTY OF PIERCE                    ) ss.

I, **Brenda Nicholas**, state that on this 16<sup>th</sup> day of March 2015. I deposited in the mail of the United States of America a properly stamped envelope containing a copy of the following described documents:

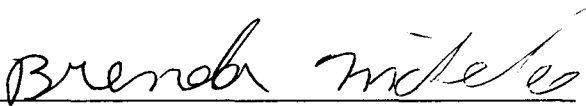
**Discretionary Review**

I further state that I sent these copies to the following addresses:

King County Prosecuting Attorneys  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104-2385

Supreme Court of the State of Washington  
415 12<sup>th</sup> Avenue SW  
Post Office Box 40929  
Olympia, WA 98504-0929

Dated: 3-16-15

  
Brenda Nicholas (Pro-Se) - DOC #339217  
Washington Correction Center for Women  
9601 Bujacich Road NW  
Gig Harbor, Washington 98332

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 BRENDA NICHOLAS, )  
 )  
 Appellant. )

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No. 70857-1-I  
DIVISION ONE  
UNPUBLISHED OPINION  
FILED: January 12, 2015

2015 JAN 12 AM 9:10  
DEPT OF APPEALS DIST  
STATE OF WASHINGTON

APPELWICK, J. — Nicholas appeals the calculation of her offender score, arguing that the trial court erred in including foreign convictions without conducting a comparability analysis. The State concedes this error. In addition, Nicholas raises eight issues in her statement of additional grounds. We remand for resentencing. We otherwise affirm.

**FACTS**

On December 8, 2011, Seattle police responded to the scene of a homicide at Four Freedoms House, an assisted living apartment complex for the elderly. Officers found the victim, Francis Fleming, lying on his back with obvious signs of trauma to his head and neck. Medics pronounced Fleming dead at the scene.

Detectives interviewed several Four Freedoms residents and discovered that Fleming had a large amount of valuable coins in his apartment. The majority of the coin collection was missing. Fleming's neighbor told police that Fleming kept many of the coins in a leather brief case, which was also missing.

In the course of their investigation, police contacted Sylvia Sutton, a friend of Fleming's who had moved out of Four Freedoms several months prior. Sutton told the officers that she was the victim of a financial scam by a woman who professed to be a

psychic. Sutton knew the woman as "Monica Marks." Sutton said that Marks was able to get a very large amount of money from her and the case was currently under investigation by the Elder Financial Abuse Detail of the Seattle Police Department. Sutton also said that Marks knew about Fleming's coin collections and had expressed a strong interest in them.

Detectives ran the name "Monica Marks" and the phone number she gave to Sutton. They discovered that the number was associated with Brenda Nicholas and another woman named Gilda Ramirez. They also discovered that the Kirkland Police Department had investigated Nicholas and Ramirez for theft and trafficking in stolen property. As part of that investigation, Kirkland police officers executed a search warrant on a house in Lynnwood. Nicholas and Ramirez were present at the time of the search, as was a man named Charles Jungbluth. Officers seized several items, including a leather briefcase. Inside the briefcase were papers with the full names of Fleming, Nicholas, and Sutton.

Nicholas, Ramirez, and Jungbluth were arrested for Fleming's murder. Ramirez and Jungbluth both admitted their involvement in the murder, but maintained that Nicholas was the mastermind of the operation.

Nicholas was charged with one count of first degree murder with a deadly weapon enhancement. Ramirez and Jungbluth received plea deals for their testimony against Nicholas.

Under a separate cause number, Nicholas was charged with theft related crimes committed from September 26, 2007 through June 9, 2012. Nicholas pleaded guilty, in that case, to two counts of first degree theft and one count of first degree identity theft.

A jury found Nicholas guilty of first degree murder with a deadly weapon enhancement. She was sentenced for her counts of murder, theft, and identity theft together in a single hearing. The State calculated her offender score at five, which included two prior out-of-state convictions. Based on that calculation, the court sentenced Nicholas to 412 months in prison.

Nicholas appeals.

### DISCUSSION

Nicholas argues that the trial court erred in including out-of-state convictions in her offender score without conducting a comparability analysis. The State concedes this error. Nicholas also raises eight issues in her statement of additional grounds.

#### I. Sentencing Error

Under the Sentencing Reform Act, an out-of-state conviction is included in a defendant's offender score if the prior offense is comparable to a Washington offense. RCW 9.94A.525(3). Classification of an out-of-state conviction is a mandatory step in the sentencing process. Id. The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (disapproved of on other grounds by State v. Jones, \_\_\_ Wn.2d \_\_\_, 338, P.3d 278 (2014)). Where the State fails to meet its burden and the defendant fails to object, the proper remedy is to remand for resentencing to allow the State to present evidence of the defendant's prior convictions. Mendoza, 165 Wn.2d at 930; see also Jones, 538 P.3d at 281, 282-83.

At sentencing, the State calculated Nicholas's standard range sentence based on an offender score of five. The offender score included two prior convictions from

California. The State did not provide the sentencing court with documentation pertaining to the California convictions. It did not cite to the statute or statutes under which Nicholas was convicted or provide the elements of the crimes. It simply listed the prior crimes as “grand theft” and “theft of elder/depend[e]nt a[d]ult \$400+.”

The court sentenced Nicholas with an offender score of five. Neither the State nor the trial court conducted a comparability analysis. The State concedes that this was improper.

The State also concedes that Nicholas did not waive her right to a comparability analysis. Unless the State provides a certified copy of the judgment and sentence, a defendant must affirmatively acknowledge the facts and information introduced for the purposes of sentencing. Mendoza, 165 Wn.2d at 930. “The mere failure to object to a prosecutor’s assertions of criminal history does not constitute such an acknowledgement. Nor is a defendant deemed to have affirmatively acknowledged the prosecutor’s asserted criminal history based on his agreement with the ultimate sentencing recommendation.” Id. at 928 (citation omitted) (footnote omitted).

During her trial testimony, Nicholas acknowledged having California convictions for “grand theft” and “theft and embezzlement.” The prosecutor asked her if the convictions were related to “the psychic thing,” and Nicholas replied, “Yes.” Neither the prosecutor nor Nicholas expanded further on the convictions. We agree that this was insufficient to constitute an affirmative acknowledgment of the facts and information relating to her out-of-state convictions. Furthermore, in Nicholas’s plea agreement, she did not check the box that read: “The defendant understands that one or more convictions from other jurisdictions have been included in the offender score, and agrees that these

convictions have been properly included and scored according to the comparable offense definitions provided by Washington law.” Nicholas did not waive her right to a comparability analysis.

Likewise, Nicholas’s counsel did not waive a comparability analysis on her behalf. Counsel did not object to the State’s offender score calculation and requested a sentence at the low end of the associated standard range. But, counsel’s agreement to an offender score calculation or sentencing recommendation is not an affirmative acknowledgement of criminal history. State v. Lucero, 168 Wn.2d 785, 788-89, 230 P.3d 165 (2010).

The trial court did not engage in the mandatory comparability analysis. Nicholas did not waive her right to that analysis. We accept the State’s concession of error and remand for resentencing.

II. Statement of Additional Grounds

Nicholas also raises several additional grounds for relief.

A. Romani Interpreter’s Testimony

Nicholas argues that the trial court erred in allowing the State’s witness Tony Urich to testify as a Romani language interpreter. The State called Urich to interpret a jail phone call between Nicholas and her husband in which Nicholas spoke both English and Romani.

The admission or refusal of evidence lies largely within the sound discretion of the trial court. Maehren v. City of Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979). Absent an abuse of discretion, we will not reverse the trial court’s decision to allow certain evidence. State v. Jones, 95 Wn.2d 616, 628, 628 P.2d 472 (1981).

During pretrial motions in limine, the State informed the court that it intended to call Urich as a witness. Defense counsel did not object to Urich's qualifications at that time. After Urich testified on direct, defense counsel requested that he be able to question Urich's qualifications on cross-examination. The State asked that the court first review Urich's qualifications on the record. The court agreed and questioned Urich about his background and experience speaking Romani. It concluded that he was qualified to testify as an interpreter. Defense counsel then cross-examined Urich.

Nicholas asserts that Urich was not adequately qualified. No one is certified to interpret Romani. In the absence of a certified interpreter, the trial court must determine if the proposed interpreter is qualified. See RCW 2.43.030(1)(b). Urich was a native Romani speaker who had previous experience interpreting the language. Nicholas was able to cross-examine Urich about his qualifications. Under these circumstances, it was not an abuse of discretion to permit him to testify. See, e.g., State v. Laureano, 101 Wn.2d 745, 766-67, 682 P.2d 889 (1984) (trial court properly permitted interpreter to testify where defendant's principal language was Spanish and interpreter was of Cuban descent and defendant was able to cross-examine interpreter about her qualifications and translation), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1990).

Nicholas further asserts that the court improperly considered Urich's qualifications after his testimony, rather than before. During motions in limine, defense counsel explicitly stated that he did not object to Urich's qualifications. Based on that stipulation, the trial court did not abuse its discretion in failing to consider Urich's qualifications prior to his testimony.



Nicholas also argues that the jury should have been present for the questioning of Urich's qualifications, so it could make its own conclusion about whether he was qualified. But, whether a witness is qualified is a matter within the sound discretion of the trial court. See, e.g., State v. Rodriguez, 163 Wn. App. 215, 231-32, 259 P.3d 1145 (2011); Barci v. Intalco Aluminum Corp., 11 Wn. App. 342, 352, 522 P.2d 1159 (1974). It is the jury's job to determine a witness's credibility. State v. Schneider, 36 Wn. App. 237, 243, 673 P.2d 200 (1983). And, the jury was able to do so here when Urich testified.

Finally, Nicholas contends that the judge should have allowed her to present her written interpretation of the phone calls so the jury could compare them to Urich's testimony. But, Nicholas did not request this from the court. And, Nicholas was able to testify about her interpretations that differed from Urich's.

The trial court did not abuse its discretion in admitting the interpreter's testimony.

#### B. Failure to Grant Mistrial

Nicholas argues that trial court erred in failing to grant a mistrial after a juror fainted upon viewing Fleming's autopsy photos. We review a trial court's denial of a motion for mistrial for abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). After the juror fainted, defense counsel orally moved for a mistrial. Counsel subsequently withdrew the motion. The trial court thus did not abuse its discretion in not granting the motion.

#### C. Ineffective Assistance of Counsel

Nicholas maintains that counsel's choice to withdraw the motion for mistrial was against her wishes and constituted ineffective assistance of counsel. To prevail on a claim of ineffective assistance, a defendant must show that (1) counsel's performance fell

below an objective standard of reasonableness based on consideration of all the circumstances and (2) the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The reasonableness inquiry requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Matters of trial strategy are generally left to counsel's professional discretion. In re Per. Restraint of Davis, 152 Wn.2d 647, 720, 101 P.2d 1 (2004). There may be sound tactical reasons not to request a mistrial. State v. Dickerson, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993). Here, Nicholas fails to show that counsel's decision to withdraw the motion was not a legitimate trial tactic.

Nicholas lists numerous additional ways in which she perceived counsel's performance to be deficient. But, her remaining assertions lack the required specificity for our review. RAP 10.10(c) ("[T]he appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors."); State v. O'Connor, 155 Wn. App. 282, 293-94, 229 P.3d 880 (2010) (declining to review statement of additional grounds where appellant did not explain the underlying facts for his claims).

#### D. Failure to Grant Continuance

Nicholas maintains that the trial court erred in denying defense counsel's motions for a continuance. But, counsel's motions and their respective denials are not part of the record before us. We cannot review this challenge. See Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994) ("An insufficient record on appeal precludes review of the alleged errors.").

E. Admission of Autopsy Photos

Nicholas argues that the trial court erred in allowing the State to present graphic photos of Fleming's autopsy, because they were extremely prejudicial. Under ER 403, evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. The trial court has wide discretion in balancing the probative value of evidence against its potential prejudicial impact. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). A trial court abuses its discretion only if its decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. Gorman v. Pierce County, 176 Wn. App. 63, 84, 307 P.3d 795 (2013), review denied, 179 Wn.2d 1010, 316 P.3d 495 (2014).

Nicholas moved to exclude "autopsy photos in excess of what is needed to explain Mr. Fleming's injuries or more gruesome than what is needed to explain his injuries or the circumstances of his death." Nicholas asked that the court exclude a group of four specific photos and admit only one or two out of a second group of four. The court considered the photos individually. It excluded several of the photos as impermissibly inflammatory. It admitted one photo from the first group to show cause of death. It also admitted two photos from the second group, finding that their likely prejudicial effect did not outweigh their probative value.

The photographs are not part of the record before this court. But, we can see from the record that is before us that the court carefully considered the photographs, their relevance, and their potential to prejudice the jury. The court gave a legitimate reason for admitting the photo from the first group. And, in admitting the other photos, the court

granted Nicholas's request to admit only one or two photos from the second group. This was not an abuse of discretion.

F. Admission of Jail Phone Call Recordings

Nicholas maintains that the trial court erred in allowing the prosecution to use the recording of a second jail phone call. She protests that the State did not follow proper procedure by submitting the tape into evidence before playing it to the jury. But, the failure to follow procedure does not require reversal where it does not affect the ultimate admissibility of the evidence. See, e.g., State v. Hettrick, 67 Wn.2d 211, 220, 407 P.2d 150 (1965).

During Nicholas's testimony, the State sought to play a portion of the phone call for impeachment purposes. Defense counsel initially objected that he had not heard the call. The court took a recess so counsel could listen to the recording. After listening to the tape, counsel had no objections. Nicholas thus waived a challenge to the tape's admissibility on appeal. RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").

G. Detective's Failure to Answer Questions

Nicholas argues that the trial court erred in allowing State's witness Detective Cloyd Steiger to refuse to answer questions from the defense. During cross-examination, Detective Steiger declined to answer questions concerning an ongoing investigation. Nicholas's counsel did not object.<sup>1</sup> We decline to review this claim on appeal. RAP 2.5(a).

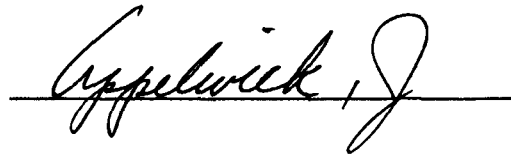
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<sup>1</sup> Nicholas asserts—without citation—that her "counsel was upset and addressed the judge about it." But, the record shows that counsel did not object during the testimony or at any other time that day. Nicholas does not point to a time when counsel raised this

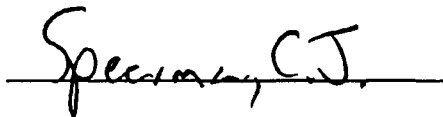
H. Cumulative Error

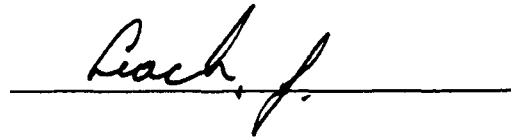
Finally, Nicholas alleges that cumulative error warrants the reversal of her conviction. The accumulation of otherwise nonreversible errors may deny the defendant a fair trial. Coe, 101 Wn.2d at 789. Nicholas fails to show that any errors occurred at her trial, as the only error involved her sentencing. Accordingly, there is no cumulative error.

We remand for the sentencing court to conduct a comparability analysis and for resentencing. We otherwise affirm.



WE CONCUR:





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issue to the court. We decline to comb the record for evidence to support her claim. See RAP 10.10(c) (“[T]he appellate court is not obligated to search the record in support of claims made in a defendant/appellant’s statement of additional grounds for review.”).