NO. 45041-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WOLTER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

The prosecution responds to the issues raised on appeal by building straw men that it tries to tear down and using hyperbole to misrepresent the arguments raised. This Court should disregard the sarcastic asides and exaggerations inserted to distract the Court from the legal flaws in the State's case.

1. **The court lacked a legal basis to dismiss a selected, seated juror who remained impartial.**

At the outset, the prosecution's brief tries to skew this Court's assessment of the reason for dismissing Juror One by misrepresenting her remarks to the judge. She was not "less than forthcoming" as the State baselessly asserts. Response Brief at 46. *Sua sponte*, Juror One volunteered that she had an unexpected encounter over the weekend with a friend and the court and attorneys posed a few short questions to obtain the details. No one asserted in the trial court that she was "obviously" hiding information, as the State's exaggeratedly asserts in its brief.

Initially, the judge said to Juror One, "tell me exactly what he [the friend] said to you." 9ARP 1647. Her response was general, explaining her friend had spoken to Mr. Wolter and he "said a few

things to him." *Id.* The court asked no further questions and invited the attorneys to ask question. *Id.*

The prosecutor followed the judge and asked for "the most detail you can recall specifically what he told you?" 9ARP 1647-48. She responded, "he said hi to him in jail." 9ARP 1648.

But the prosecutor interrupted, "I can barely hear you." The juror continued, "he just said hi and that - -." *Id.*

The prosecutor interrupted again, "Who said hi?" *Id.* The juror said, "Mr. Wolter to my friend." *Id.* The prosecutor said, "Okay." *Id.*

The juror continued, "In just random, and he didn't – that – I think that was it. And then he also said that he told him, 'Say hi to the people that are free.' Or me. That's it." *Id.* The prosecutor interpreted Mr. Wolter's remark as being, "Say hi to the people that are outside," which the juror agreed was accurate. *Id.*

This was the sum total of the conversation that occurred out of court between Juror One and her friend. The prosecution's brief accuses the juror of hiding something by asserting that she first said "he just said hi" and only later adding that he also said to say hi to people outside. Response Brief at 46-47. Yet the State fails to mention that the prosecutor interrupted the juror as she spoke and then the juror related

the entire conversation at once, displayed in the transcript as two side-by-side sentences. 9ARP 1648. The State baselessly disparages the juror's forthrightness by misrepresenting the record.

The legal basis the court gave for dismissing this selected, seated juror also fails. The prosecution's brief brushes aside this flaw by saying the judge was hiding his true reasons for dismissing the juror because he wanted to spare the juror's feelings. The court's failure to articulate a valid basis for dismissing the juror supported by the record constitutes an erroneous application of the law and was premised on the judge's misunderstanding of the controlling legal standard for dismissing a selected juror.

To remove a selected juror for bias, the record must show that the juror was unable to "try the issue impartially and without prejudice to the substantial rights of the party challenging." *Hough v. Stockbridge*, 152 Wn.App. 328, 340, 216 P.3d 1077 (2009) (quoting RCW 4.44.170(2)). Juror One did not manifest unfitness to serve as required by RCW 2.36.110 and the court did not find such unfitness. She did not solicit her friend's communication, took steps to end the conversation, and conscientiously reported it to the trial judge. 9A RP 1650. She did not learn substantive information about the case that

would affect her deliberations and said it did not mean anything to her. *Id.* at 1648, 1651-52.

The prosecution's personal attacks on Juror One show that it wanted her removed from the jury because it did not think she would be a favorable juror. Its brief calls her "not strong enough" to get her friend to stop talking about Mr. Wolter and admits it feared she had a "personal connection" to Mr. Wolter. Response Brief at 50. But belittling the juror as a weak-willed woman is not a basis for trying to reconstitute the jury mid-trial in order to obtain a more favorable panel. *See State v. Berniard*, _ Wn.App. _, 327 P.3d 1290, 1299 (2014) (removing a juror based on her view on merits of case violates accused's right to unanimous jury verdict).

Although *Berniard* involves a juror's removal during deliberations, which requires increased sensitivity by the trial court as to the basis for removal, *Berniard* demonstrates the importance of a judge making clear findings of the juror's inability to proceed showing the dismissal is not premised on speculation or bias. It is never permissible to dismiss a juror for a reason "arising from the juror's view of the merits." *Berniard*, 327 P.3d at 1296. Likewise, "the quality of a juror's thoughts about the case and his ability to communicate

those thoughts to the rest of the jury" are not valid grounds to dismiss a juror. *Id.* at 1297.

The prosecution compares this case to *State v. Rafay*, 168 Wn.App. 734, 818-20, 285 P.3d 83 (2012), *rev. denied*, 176 Wn.2d 1023 (2013), *cert. denied*, 134 S.Ct. 170 (2013), where a juror was removed during trial after extensive observation over many weeks. The juror had not paying attention to testimony, fellow jurors had complained about her attitude, and this juror told another juror she did not wish to participate in the lengthy trial. *Id.* The court patiently waited to see it the juror's ability to serve improved over time before deciding dismissal was necessary. *Id.*

Unlike the judge in *Rafay*, the court "hastily" excused Juror One based on a single conversation that she did not elicit and unequivocally said it had no bearing on her ability to be fair. *Id.* at 822. The court did not cite observations or evidence indicating the juror was being less the candid in her assurances that the brief interaction with a friend who had once spoken to Mr. Wolter would disqualify her. The lack of comparable factual support to *Rafay* demonstrates the unreasonableness of dismissing Juror One based on a brief encounter that did not display any bias, obstruction, or other indication of an inability to serve.

The court found no misconduct by the juror and she had not committed any. Removing a juror in an "abundance of caution," over defense objection, without cause for finding impermissible bias, constitutes the improper dismissal of a juror and requires reversal. *Berniard*, 327 P.3d at 1299.

2. **The State relied on statements obtained from Mr. Wolter in violation of his rights to remain silent and receive the assistance of counsel.**

The prosecution expresses befuddlement over the straw men it creates in addressing Mr. Wolter's assertion that he was improperly questioned without *Miranda* warnings and later denied his right to counsel once requested. Because the State exaggerates Mr. Wolter's arguments in an effort to skirt them, its response is largely off-point.

a. *Custodial Interrogation*

Contrary to the trial court's finding that Mr. Wolter was not "in custody" until he was actually arrested, Mr. Wolter was deprived of his freedom of action in a significant way while he was interrogated by multiple officers before he was given *Miranda* warnings. *See* CP 232.

Custodial interrogation for purposes of *Miranda* means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action

in any significant way." *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This is an objective test resting on the perspective of a reasonable person in the suspect's position. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). Mr. Wolter's freedom of action was curtailed in a significant way through a combination of events when the Mr. Wolter knew that the police obtained sufficient evidence to arrest him and they continued to detain and question him, without *Miranda* warnings.

The combination of factors that together demonstrate that Mr. Wolter's freedom of action was substantially curtailed may make the line blurry as to exactly when *Miranda* warnings were required prior to continued interrogation. Questions at the outset of the stop are permissible. But the police knew Mr. Wolter was speeding before stopping him, quickly realized he had been drinking, and almost immediately took (and kept) his driver's license while running a warrant check that showed out of state warrants to arrest. 2RP 287. There is no question that the court applied the wrong legal standard when insisting *Miranda* warnings are not required until full custodial arrest, and it made its factual findings based on this misapprehension of the law. It was the State's burden to prove that Mr. Wolter's statements

were not the product of custodial interrogation. Other than the initial statements elicited at the outset of the stop, the State did not meet its burden of showing Mr. Wolter's freedom of action was not substantially curtailed as he was surrounded and questioned by various officers, his car was searched, his driver's license taken from him, and he failed several field sobriety tests.

b. *Request for counsel.*

The State's claim that this case is "nothing like *Nysta*" is another example of its hyperbole. Response Brief at 38 (citing *State v. Nysta*, 168 Wn. App. 30, 275 P.3d 1162 (2012), *rev. denied*, 177 Wn.2d 1008 (2013)). Similarly to *Nysta*, the police construed a request for counsel to be limited when it was not phrased in an ambiguous way. Id. at 41-42. He did not say "may be" or "perhaps" when he said, "I'd like to have an attorney present for that." 3RP 379.

And more egregiously than *Nysta*, the police interrupted Mr. Wolter as he tried to explain his request for counsel and pressured him to "tell his story." Detective Craeger cut off Mr. Wolter as soon as he asked for counsel by saying "before you go on with this" and then the detective gave a long-winded explanation of how important it was from his to "tell the story" to the police. 3RP 380-81. In *Nysta*, the officer

continued questioning the defendant but he did not expressly push the defendant away from requesting an attorney as the officer did in Mr. Wolter's case. These interruptions of Mr. Wolter unfairly hampered his ability to explain his request for counsel. The purpose of the interruptions was to press Mr. Wolter not to assert his right to counsel. This interference with his efforts to assert his right was impermissible and his request for counsel should have been respected.

3. The State failed to prove, or ask the jury to find, all essential elements of the aggravating circumstance involving a witness to an adjudicative proceeding

The prosecution asks the Court to ignore terms in the statute setting forth the essential elements of the aggravating circumstance involving a witness in an adjudicative proceeding. This Court is not permitted to ignore essential elements contained in the controlling statute. Because the State did not ask the jury to find, or prove to the jury, all essential elements of this aggravating circumstance, it must be stricken.

RCW 10.95.020(8) required the State to prove that "The victim was: (a) A . . . prospective, current, or former witness in an adjudicative proceeding; . . . and (b) The murder was related to the exercise of official duties performed or to be performed by the victim.

CP 326.

The jury was not instructed that it must find the victim was a witness in "an adjudicative proceeding." CP 374. Furthermore, the State did not prove the killing was related to the exercise of "official duties" and instead it scoffs at such a requirement.

Without even mentioning its obligation to prove the essential element that the killing was related to the victim's official duties as a witness, the prosecution insists that the only elements are that the witness was a "prospective, current, or former witness." Response Brief at 54. It claims that because there is no explicit requirement that a subpoena was issued, and potential witness suffices. Yet the statute also requires the victim's death was related to his or her "official duties," as a prospective witness.

The prosecution does not offer any definition of official duties beyond its own pontification of what policy the Legislature must have been trying to enforce. However, the principles underlying the doctrine of lenity are most rigorously enforced in penal statutes, and statutes that authorize the death penalty are among those that are most narrowly construed. *State v. Hacheney*, 160 Wn.2d 503, 518-19, 158 P.3d 1152 (2007) ("the rule of lenity dictates that we construe aggravating

circumstances narrowly, especially where their application determines the imposition of our most severe penalties, death or life without possibility of release.").

If the only evidence required was that the victim was a prospective witness, the official duty requirement of the statute would be superfluous. By inserting this requirement, the Legislature narrowed the reach of the aggravating circumstance and this narrowing must be viewed as an intentional effort to make a person eligible for the death penalty only if official duties had been triggered as the plain terms of the statute provide. *See State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (penal statutes are given "a strict and literal interpretation."); *see also In re Pers. Restraint of Acron*, 122 Wn.App. 886, 891, 95 P.3d 1272 (2004) (noting "[a]ppellate courts do not supply omitted language [from a statute] even when the legislature's omission is clearly inadvertent").

Here, there was no evidence that the victim had been issued an order to participate in the proceedings. *See* CrR 4.8 (describing process of issuing subpoena and requirement to obey or risk contempt of court); CR 45 (same). She did not have official duties in the case, even if she would have been asked to appear and testify. There are no cases

upholding this aggravating factor when the victim is a witness to another proceeding but he or she has neither testified nor been subpoenaed to do so. *See State v. Mason*, 160 Wn.2d 910, 925 n.4, 162 P.3d 396, 404 (2007) (jury rejected allegation that decedent's death was related to official duties where victim was also complaining witness in pending prosecution from an earlier incident).

The "official duty" requirement and the "adjudicative proceeding" language of the statute are essential elements. The jury was not told about the adjudicative proceeding requirement in the jury instructions. There was no evidence that the victim had an official duty to serve as a witness. The trial judge was troubled by the State's failure to prove the official duty component of the statute, but the prosecution responds by urging the Court to ignore this element. This Court should reverse this aggravating circumstance due to the lack of evidence and the instructional error.

B. CONCLUSION.

Mr. Wolter respectfully requests this Court order a new trial.

DATED this 5th day of August 2014.

Respectfully submitted,

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DIVISION TWO

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