

No. 46147-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

DAVID L. NEWLAND

Appellant.

From the Superior Court for Clark County
Cause No. 13-1-00090-3

APPELLANT'S REPLY BRIEF

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ARGUMENT IN REPLY

I. THE ERROR OF ADMITTING CUMULATIVE EVIDENCE OF A CHILD SEX INVESTIGATION, UNRELATED TO THE CHARGED OFFENSE, WAS NOT HARMLESS ERROR.

The State relies on *Guloy* to argue that the overwhelming untainted evidence supports the notion that the inadmissible evidence was not necessary to reach a guilty verdict. *State v. Guloy*, 104 Wash.2d 104 Wn. 2d 412, 426, 705 P.2d 1182 (1985). Under that test, this court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. In *Guloy*, two cannery workers, Viernes and Domingo, were killed in order to advance a gambling conspiracy. *Id.* at 414–15. The evidence showed that Dictado was the leader of the gang and that Dictado wanted to send two members of the gang to Alaska in order to gain control of gambling in that state. *Id.* During the trial, witness San Pablo was permitted to testify to two out-of-court statements made by Dictado that he was going to kill Viernes. *Id.* at 425. On review, the court held that the admission of these statements violated the confrontation clause. *Id.* However, focusing on the untainted evidence that the two defendants were observed leaving the scene of the murder and Domingo's dying declaration that the defendants had attacked him, the court held that exclusion of the statements would not have

resulted in a different verdict and therefore the error was harmless. *Id.* at 422–23.

In this case, there is no overwhelming untainted evidence to pass the test for harmless error. The State’s best evidence was the testimony of Detective McCarthy. Detective McCarthy alleged that the defendant, who is 75 years old with heart condition, swung his elbow at the officer after the officer pushed the defendant to move him out of the hall. Kim Karu, the CPS worker, testified that she did not actually see the assault itself take place. RP 216. Conversely, Melanie Newland states on the 911 recording that the Defendant was the victim and the Detective was the assailant.

Further, the allegations of sex abuse infiltrated and tainted the entire trial. The Prosecutor made it clear from the start that the State’s theory of the case was that Mr. Newland was trying to obstruct a child sex investigation. It was discussed prior to introducing the jury at motions in limine. RP 22. The prosecutor addressed it in Opening twice stating, “The case you are about to hear more of is a dangerous situation created by the defendant. The Defendant wanted to hinder a **child sexual abuse** investigation involving his son.” RP 214-215. During the trial there were many other references to and suggesting sex abuse that was not related to the charged crime. For example Detective McCarthy and Kim Karu testified:

We investigate felony level crimes against kids. Most of those are **child sexual abuse**. (RP 235, lns: 20-24, RP 236, ln:1)

I had substantial criminal or credible evidence that his son **raped his granddaughter**. (RP 315, lns :19-324, RP 316, lns 1-11)

by January 10th, I had spoken to the **victim** on the phone but I had not done a formal interview, she had already been formally interviewed in the state where she was currently a resident. I had spoken to that detective who had done the interview to assess his feelings about her, about the **allegations** that she was making, and as he has been working **child sexual abuse cases for 20 year...** (RP 233, lns: 21-24; RP 234, lns: 1-6)

I am a detective assigned to the Children's Justice Center, which is a joint unit between the Vancouver Police Department and the Clark County Sheriff's Office. We investigate felony level crimes against kids. **Most of those are child sexual abuse**. (RP 235, lns: 20-24, RP 236, ln: 1)

CPS kind of has two roles with us. One, they generate referrals when people call Child Protective Services and they generate a referral that then says there's an allegation of **abuse**, it's then forwarded to my supervisor, who then determines then whether or not this is **criminal level** that needs to be investigated. That's one role. (RP, 236, lns: 5-12)

The second role is if there's an allegation that comes through law enforcement, someone calling 911, someone reporting it, and some – school calling 911, when we have a **valid allegation of abuse**, we will then reach out to CPS and report it ourselves so that they, then, have a referral to go along with our law enforcement case, and so then they work the case from the **Child Protective Services** side and we work the case from the law enforcement side. (RP 236, lns: 13-21)

The safety aspect of the kids goes hand-in-hand between law enforcement and Child Protective Services because if we deem that –if, it it's deemed that the children in the home are not safe, **CPS can't take the kids without law enforcement** signing over custody unless they go get a writ from a judge. (CP 237, lns: 1-7)

Her duties include **investigation of abuse and neglect** in the parental home and assessment of safety and risk to children. (RP 330, lns: 11-13)

Karu went further to testify that her concern was for the **safety of the children** and that her concern stemmed from **child sexual abuse allegations** that had been made against David Newland, Jr. (RP 352, lns: 7-11)

In Closing the Prosecutor Argued:

“The defendant created this whole situation involving the confrontation. He knew exactly why the police were there that day. His son was being investigated for some **very serious charges, allegations,**” e.g. child sexual abuse, child rape. (RP 494, lns: 16-20)

In the context of “performance of his official duties” element of Assault Third Degree, the prosecutor again incorporated the **child sexual abuse theme** stating that McCarthy was there investigating one of the most serious allegations that’s out there, e.g. child sexual abuse, child rape. (RP 501, lns: 14-18) He even suggested E.N. could have been taken from the home.

In this case, the error was not harmless as the entire trial was infiltrated with the tainted evidence that suggested the Defendant was somehow associated with, or condoned, child sex abuse. This evidence could only arouse an emotional response rather than assist a jury in coming to a rational decision.

II. THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT’S MOTION FOR A MISTRIAL

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). To determine

whether a trial irregularity deprived a defendant of a fair trial, a reviewing court considers the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). A reviewing court reviews claims of prejudice against the backdrop of all the evidence. *Id.* at 254.

In this case, the admission of ‘child sex abuse’ evidence, the willful violation of the motion in limine, and numerous references to a CPS investigation whitewashed a simple Assault III case into a sex case. Therefore, the resulting prejudice caused by the violation of the motion in limine was even greater. In addition, the State’s theory of the assault was a “swing-and-miss” supported only by the testimony of detective McCarthy himself. Karu, the CPS worker, didn’t see the alleged assault. (RP 341, Ins:20-24, RP 342, Ins: 1-15, RP 499, Ins:16-21, RP 526, Ins :24, RP 527, Ins:1)

III. THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT

At the end of the first day of trial, the Prosecutor stated on the record:

and if Melani Newland is called by the defense, which I am pretty sure she will be, I think it's going to be fair game for the state to cross examine her regarding the fact that Detective McCarthy was involved in a case that resulted in ... her husband doing 131-171 months for **sex abuse allegations**.. it goes to her bias. (RP 395, lns:20-20-24, RP 396, lns:1-11)

The defense elected not to call Melani Newland because of that threat. (RP 401, lns:17-24) Then, over defense objection, the prosecutor in closing argued that Melani Newland, the declarant on the 911 tape was biased because her husband was being investigated. (RP 495, lns:15-22) The prosecutor went further, stating, "Your decision must be made solely upon the evidence presented during these proceedings. We don't know what she, Melani Newland, saw." (RP 521, lns:13-16) "We have no idea what direction she was looking." (RP 522, lns:2-3) "We have no idea what she saw before seeing him on the ground." (RP 522, lns:7-8) "Like she was trying to tattle on this person that she didn't really want in her home. We don't have information from that source... Melani Newland. (RP 522, lns:22-24, RP 523, lns:1-2)

A defendant has a constitutional right not to testify. The courts have carefully protected that right by prohibiting prosecutorial comment thereon. *State v. Contreras*, 57 Wn. App. 471, 473, 788 P.2d. 1114 (1990). Although, such a comment may constitute harmless error. *Id.* The absence of a duty to call witnesses is not a specific constitutional right. *Id.* It is a

judicially developed corollary of the State's burden to prove each element of the crime charged beyond a reasonable doubt. *Id.* Improper comments by a prosecutor deny the defendant a fair trial and require reversal of his conviction if there is a substantial likelihood that the comments affected the verdict. *State v. Traweck*, 43 Wn. App. 99, 107-08, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986). When a comment also affects a separate constitutional right, such as the privilege against self-incrimination, it is subject to the stricter standard of constitutional harmless error. *Id.* The court must reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.*

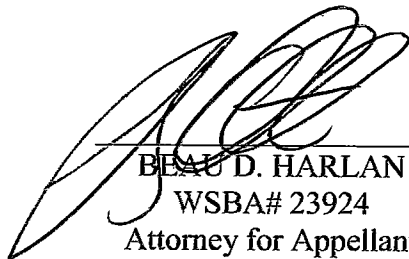
It was therefore an impermissible suggestion by the government to imply the defense had a burden to present Melani Newland as a witness. The State bears the entire burden of proving each element of its case beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). The prosecutor's statement suggested that the defendant was obliged to call Melani Newland to prove his innocence. Mr. Newland had no such duty.

CLOSING

Based upon the foregoing arguments and authorities, Appellant respectfully requests reversal of Appellant's conviction for Assault in the Third Degree and remand for a new trial with specific instructions for the trial court to exclude any evidence of child sexual abuse during trial.

DATED this 23rd day of March, 2015.

Respectfully submitted,



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March 23, 2015 - 4:40 PM

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