NO. 45998-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LARRY TARRER,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. INTRODUCTION

Larry Edward Tarrer did not receive a fair trial for several reasons. First, the trial court denied his continuance requests for necessary investigation and preparation, showed judicial bias against him, impermissibly commented on the evidence, and violated his rights to present a witness in his defense by excluding a critical expert witness. Second, the prosecutor committed flagrant misconduct during closing argument. Third, Tarrer's trial counsel provided ineffective assistance of counsel. These errors individually and collectively entitle Tarrer to a new, fair trial.

On remand for a new trial, Tarrer is entitled to an impartial tribunal. Because Judge Katherine M. Stolz cannot provide such a forum, Tarrer asks this court to order reassignment to a judge who can fairly and impartially consider the parties' controversies and apply the law.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in twice denying Tarrer's requests for a continuance of the trial date for additional preparation and investigation.

2. The trial court erred in failing to provide Tarrer with an impartial tribunal.

3. The trial court erred in impermissibly commenting on the evidence before the jury.

4. The trial court erred by excluding one of Tarrer's expert witnesses in violation of his constitutional right to present witnesses in his defense.

5. The prosecutor committed misconduct during his closing argument by disparaging the defense and misstating and trivializing the beyond-a-reasonable-doubt standard.

6. Tarrer received ineffective assistance of counsel.

7. The accumulation of trial errors deprived Tarrer of a fair trial.

Issues Pertaining to Assignments of Error

1. Defense counsel moved to continue the trial date, representing that he needed more time to investigate, interview witnesses, and otherwise prepare for trial. Citing the fact Tarrer had been tried twice before (represented by different counsel), the trial court denied the defense motions. Did the trial court's erroneous denial of the motions to continue deprive Tarrer of prepared and effective counsel?

2. The trial court unreasonably denied Tarrer's motions to continue, improperly based other substantive rulings on what transpired during previous trials, prejudged its rulings on motions in limine without reviewing or considering Tarrer's new arguments on those issues, and failed to heed the Court of Appeals reversal for prosecutorial misconduct.

Would a reasonably prudent and disinterested observer conclude that the trial court was a fair and impartial forum for Tarrer?

3. The trial court admonished the jury not to commit misconduct out of a concern for the impact on the victims of crime and the State's ability to obtain convictions on the charges. Was this impermissible comment on the evidence?

4. The trial court refused to allow a defense expert to testify to his opinion that information contained in medical records was consistent with the victim being shot in the back, thereby contradicting the victim's account that she faced her shooter (and was therefore in a position to see and later identify him as Tarrer). Did exclusion of this expert deprive Tarrer of an opportunity to present his defense?

5. In its closing argument, the prosecutor diminished the standard of proof beyond a reasonable doubt and disparaged the defense. Did these instances of misconduct, taken alone or cumulatively, deprive Tarrer of a fair trial?

6. Did defense counsel's failure to timely disclose one of its experts and to make appropriate and timely objections regarding prosecutorial misconduct constitute ineffective assistance of counsel?

7. Does the cumulative effect of the assigned errors, if the errors do not each themselves warrant reversal, require reversal?

8. Given the trial court's demonstrated bias against Tarrer, must this court order the assignment of a new trial judge on remand?

C. STATEMENT OF THE CASE

1. Factual background

On the evening January 8, 1991, several people came and went from Claudia McCorvey's Tillicum apartment. RP 529, 536-39, 567, 573-74, 819, 828-29. McCorvey's apartment served as a hub for using and dealing crack cocaine. RP 663-64, 819, 856-57. McCorvey, who had recently started using crack again, was six months pregnant at the time. RP 530-31, 578.

Bishop Johns, known in the community as "Slim," dealt crack out of McCorvey's apartment that day. RP 532-34, 536, 575, 819, 828-29. Beginning in the afternoon, Johns, Lavern Simpkins, McCorvey, Rickey Owens, and up to 10 others smoked crack or bought crack at the apartment, coming and going, into the early hours of the morning on January 9, 1991. RP 536-39, 567, 573-74, 828-29, 847.

According to McCorvey and Johns, Tarrer was in McCorvey's apartment that night. RP 543-45, 572. By McCorvey's account, Tarrer was drunk and Johns and Tarrer argued over Tarrer's missing drugs. RP 562-64, 604-06, 643-46, 686, 700. Johns and McCorvey were under the impression

that Tarrer believed someone had stolen his drugs. RP 605-06, 688, 703, 871-72.

Owens, who had bought crack out of the apartment earlier that evening, returned in the early morning hours to buy more. RP 732-33, 742, 749. Owens said that when he was leaving the area, he saw a man pull a gun out of an Oldsmobile Cutlass parked outside and walk back toward the apartment complex. RP 742-44, 768-69, 779-80.

At that time, Simpkins and McCorvey were the only people in the apartment. RP 545-46. Someone threw open the front door and shot multiple times into the apartment. RP 549, 649. Two bullets hit Simpkins, one of which perforated her heart and a lung, killing her. RP 419-20, 426, 433. McCorvey, who was also shot twice but survived, suffered a bullet wound to her thoracic spine, paralyzing her from about the belly button down. RP 549, 561. McCorvey claimed she was facing her shooter and saw him as he fired. RP 549, 648-53.

When police and paramedics arrived, McCorvey, still conscious, was taken to Madigan Army Medical Center. RP 228, 241, 250-51, 267-68. Simpkins was found dead. RP 222. Doctors performed an emergency cesarean section on McCorvey, delivering her baby alive. RP 270-73. The baby was weak due to McCorvey's blood loss and died shortly after delivery. RP 274-78.

Police found five .45 caliber shell casings at McCorvey's apartment. RP 312-13, 316, 493, 502. They never found a fifth slug, however. RP 318-19, 375-75. They also found a bottle of Tanqueray gin that had Tarrer's fingerprints on it. RP 347, 351-52, 354-55, 358, 787-92. Owens claimed to have traded the bottle of gin with Tarrer in exchange for crack. RP 733, 740, 772.

McCorvey was transferred from Madigan to Harborview Medical Center in Seattle. RP 556, 558. On January 9, 1991, Detective Fred Reinicke of the Pierce County Sheriff's Office showed McCorvey a photomontage with six photographs, including a photo of Tarrer. RP 564-66, 678, 694, 924-26, 928, 931-32. None of the other people in the montage looked anything like Tarrer. RP 1036-37. McCorvey identified Tarrer as her shooter. RP 565-66, 705, 939.

Reinicke came back to Harborview two days later and showed McCorvey the same photomontage. RP 938-40. McCorvey again identified Tarrer as the shooter. RP 942.

About a month later, Reinicke interviewed Owens and showed Owens the same photomontage. RP 754-55, 976-78. Owens identified Tarrer as the man who had retrieved the gun from his Cutlass. RP 754-55, 976-78.

Shortly thereafter, police located Tarrer in Federal Way and arrested him. RP 945, 949-50, 971-73.

2. Procedural background

In February 1991, the State charged Tarrer with first degree murder for causing the death of Simpkins, first degree attempted murder for attempting to cause the death of McCorvey, and first degree manslaughter for the death of McCorvey's unborn quick child. CP 1-3. In May 1991, the State amended its information to charge murder in the second degree and first degree assault. CP 6-7.

Tarrer entered an Alford[1] plea to second degree felony murder predicated on first degree assault and to assault, and was sentenced to 233 months for the murder and 270 months for the assault. CP 13, 22. The judgment and sentence does not indicate whether these sentences were to be served concurrently or consecutively; however, it is clear from the Court of Appeals ruling affirming Tarrer's convictions and sentences that the sentences, though exceptional, ran concurrently. CP 13, 36. Tarrer began serving his sentences in November 1991. CP 16-17.

In July 2004, Tarrer brought a pro se CrR 7.8 motion to vacate his judgment based on In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), and In re Personal Restraint of Hinton, 152 Wn.2d 853, 100

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

P.3d 801 (2004), in which the Washington Supreme Court ruled, respectively, that assault could not serve as a predicate felony for second degree felony murder and that Andress applied retroactively. CP 41-43. Pierce County Superior Court denied his motion. CP 59-60. Tarrer appealed, and the Court of Appeals reversed the trial court and remanded for further proceedings. CP 58, 63-66.

On remand, Tarrer's judgment and sentence was vacated; however, Tarrer appealed the trial court's denial of specific performance of his guilty plea. CP 69. The Court of Appeals dismissed Tarrer's appeal because he was not an aggrieved party and again remanded for further proceedings. CP 69-72. The mandate for this appeal was filed in September 2007. CP 67.

In April 2009, the State filed a "Corrected Information" in which it again charged Tarrer with first degree murder, attempted first degree murder, and first degree manslaughter. CP 73-74. In September 2009, the State amended its information to charge aggravating circumstances for the attempted first degree murder charge. CP 76. These circumstances included, (1) "the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense," (2) "the current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant," and (3) "the offense involved an invasion of the victim's privacy." CP 76.

Tarrer's case went to trial in September 2009. CP 96. This trial resulted in a mistrial. CP 96. Tarrer was retried in 2010. CP 96. This trial resulted in a conviction on all charges, but the Court of Appeals reversed for prosecutorial misconduct. CP 98-109. The Court of Appeals also considered evidentiary issues likely to recur on remand and ruled that, among other things, the trial court did not abuse its discretion by excluding some of McCorvey's medical records on the basis of hearsay or by admitting Owens's and McCorvey's eyewitness identifications of Tarrer using photomontages. CP 110-14. In addition, the Court of Appeals declined Tarrer's request to reassign his case to a different trial judge on remand. CP 114.

Thereafter, Tarrer's case was remanded for the trial at issue in the instant appeal.

3. Motion for recusal

Before trial, Tarrer moved to recuse the trial judge, claiming she could not be impartial. CP 115-24; RP 8-13. Specifically, Tarrer referenced the trial court's comment during sentencing in the previous trial that "[t]his court is going to do its best to make sure you never get out of prison alive." CP 117. Tarrer argued that the trial court's comment demonstrated its actual bias and also violated the appearance of fairness doctrine. CP 123. The trial court, referencing the Court of Appeals ruling that Tarrer failed to

adequately demonstrate evidence of the trial court's actual or potential bias, denied Tarrer's recusal motion. CP 125-26; RP 10-11; see also CP 114 (portion of Court of Appeals unpublished slip opinion denying Tarrer's request for reassignment).

4. Motions for continuance of trial date

A month before trial, defense counsel moved for a two- to three-month continuance of the trial date. RP 26-27. Defense counsel cited his need to conduct further investigation regarding another possible shooter and interviews of additional defense witnesses. RP 26-27. In addition, defense counsel indicated that he wished to serve a subpoena duces tecum on Harborview—where McCorvey was treated—in search for medical records. RP 26-27.

The State opposed the motion, RP 27-30, and the trial court denied the continuance request, noting, "This case has been pending in front of me since 2008. I've tried it twice already," RP 31. The trial court did not find defense counsel's reasons for a continuance compelling given that the case had already been tried twice. RP 31. In its written order on the continuance, the trial court stated "that the reasons stated during the motion do not justify a further delay of the trial date, particularly when those reasons include issues that were litigated previously in this case . . . ." CP 354-55.

Days before trial, defense counsel again moved for a continuance of the trial date. RP 38. Defense counsel indicated that he had had an intervening trial for which he had to prepare, had additional motions to bring, including a motion on the admissibility of eyewitness identification, and was still seeking witness interviews. RP 38-40. The State again opposed the motion, noting that defense counsel had "a distinctive advantage" over previous defense counsel given that he had two sets of transcripts from the previous trials. RP 42. The court again denied the continuance. RP 48.

5. Motions in limine

The trial court adopted most of its rulings in limine from Tarrer's 2009 and 2010 trials. CP 413-18. However, Tarrer moved to limit the State's closing argument, given that the Court of Appeals had reversed on prosecutorial misconduct grounds. CP 127-28; see also CP 99-109 (Court of Appeals' slip opinion discussing various instances of prosecutorial misconduct in 2010 trial). Although the trial court granted many of these motions, it refused to rule that the State could not ask the jury to render a "true verdict" "[s]ince we do instruct" the jury to render a true verdict. CP 432-33; RP 103. The trial court also denied Tarrer's motion to exclude arguments regarding puzzle analogies, allowing the State to use cityscape puzzle analogies in closing argument to discuss the interplay between

circumstantial and direct evidence. CP 433; RP 107. The trial court's denial of these motions in limine directly conflicted with the Court of Appeals' views that puzzle analogies and asking the jury to render a true verdict were prosecutorial misconduct. CP 101-02 & n.6, 104-06.

Tarrer also moved to exclude McCorvey's and Owens's eyewitness identifications because the photomontage procedures employed were unduly suggestive. CP 128-332, 356-407; RP 39-41. Specifically, the defense argued that there was new Washington, United States Supreme Court, and out-of-state case law that altered the suggestibility analysis. CP 356-407; RP 39. The trial court permitted Tarrer to "argue it, again; but you already know how I'm going to rule," given that the Court of Appeals had affirmed the admissibility of the eyewitness identifications in the last appeal. RP 68; see also CP 111-12 (unpublished slip opinion affirming admissibility of eyewitness identification). Later, the court incorporated its prior ruling that there was nothing unduly suggestive. CP 419-22; RP 122.

6. Defense expert witnesses

Although the trial court admitted Owens's and McCorvey's eyewitness identifications, it also allowed Geoffrey Loftus, Ph.D. to testify regarding issues relating to the accuracy and reliability of eyewitness identification. See RP 1090-180 (Loftus testimony). Dr. Loftus's testimony described issues with the accuracy of human perception and memory,

including problems that affect the reliability of eyewitness identifications and photomontage procedures. RP 1093-103, 1104-08, 1116-19, 1121-32.

Tarrer also wished to call Dr. Eric Kiesel, a forensic examiner, to discuss his review of McCorvey's medical records. RP 883. Specifically, defense counsel wished to elicit Dr. Kiesel's expert opinion that the documentation in the medical records was more consistent with McCorvey being shot in the back. RP 883-84, 888. The defense argued that, even though the medical records themselves were inadmissible, Dr. Kiesel should be able to use the data in the medical records to form his opinion, pursuant to ER 703. RP 888.

The trial court refused to allow Dr. Kiesel's testimony because he was not a timely disclosed witness and because "his report really is just an attempt to try to" get inadmissible records into evidence. RP 888-89. In addition, the trial court opined, "we don't have any kind of expert opinion. We just have a lot of blathering on. That's not an expert opinion. The Court is not going to admit it, and I'm not going to back-strap in these medical records." RP 896.

7. Convictions, sentencing, and appeal

The jury found Tarrer guilty of first degree murder, first degree attempted murder, and first degree manslaughter. CP 521-24, 526. The jury also returned a special verdict finding that the attempted murder of

McCorvey involved an invasion of McCorvey's privacy and that McCorvey's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the crime. CP 525.

The trial court imposed a total sentence of 896 months. CP 531; RP 1373. The court imposed 416 months on the first degree murder and a consecutive 480-month exceptional sentence on the attempted first degree murder. The trial court also imposed a concurrent term of 120 months for the first degree manslaughter. CP 531.

Tarrer's timely appeal follows. CP 546-58.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY TWICE DENYING TARRER A CONTINUANCE OF THE TRIAL DATE

The trial court denied defense counsel's request for a continuance because it perceived that any and all issues in the current trial were firmly established in Tarrer's two previous trials. The trial court's conclusion that defense counsel did not require more time to investigate and prepare merely because Tarrer had already been tried twice was an abuse of discretion and deprived Tarrer of effective assistance of counsel. This court must accordingly reverse.

The granting or denial of a motion for continuance is reviewed for an abuse of discretion. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169

(2004). An abuse of discretion occurs when the trial court's decision is "manifestly unreasonable or exercised on untenable grounds, for untenable reasons." Id. "In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." Id. at 273.

Though reviewed for an abuse of discretion, the Washington and United States Supreme Courts have recognized "[t]he constitutional right to have the assistance of coun[sel] . . . carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law . . . ." State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950); see also Avery v. Alabama, 308 U.S. 444, 446, 60 S. Ct. 321, 84 L. Ed. 377 (1940) ("[T]he denial of opportunity for appointed counsel . . . to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement than an accused be given the assistance of counsel."). "[T]here are no mechanical tests for deciding when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result; . . . the answer must be found in the circumstances present in the particular case." State v. Eller, 84 Wn.2d 90, 96, 52 P.2d 242 (1974) (citing State v. Cadena, 74 Wn.2d 185, 189, 443 P.2d 826 (1968), overruled in part on other grounds by State v. Gosby, 85 Wn.2d

758, 767, 539 P.2d 680 (1975)); accord Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

Under the circumstances here, the trial court's denial of Tarrer's motions for continuance deprived Tarrer of the assistance of ready and prepared counsel.

A month before trial, defense counsel moved for a continuance indicating he was in the "middle of doing an investigation" pertaining to a witness who claimed someone besides Tarrer was the shooter and pertaining to witnesses "necessary or at least very helpful for the Defense." RP 26. Defense counsel noted the difficulty in contacting the witnesses given that "this case is such an old case." RP 26. In addition, defense counsel planned to serve a subpoena duces tecum on Harborview for a list of doctors working there in 1991 when McCorvey was treated for gunshot wounds. RP 26-27. Specifically, defense counsel sought a list of doctors who might have treated McCorvey given that the medical records showed "some disagreement about entrance wounds and exit wounds." RP 27. Defense counsel argued that his need to find additional witnesses and further investigate was material to Tarrer's defense: "These witnesses are material. If there is, indeed, another shooter, and it's consistent with the idea that there's problems with whether the wounds are entrance or exit wounds, those are two very big issues . . . ." RP 30.

Rather than address defense counsel's asserted need for additional time to investigate, the trial court denied the continuance because Tarrer had already twice been tried:

> The Court is going to deny the continuance request. This case has been pending in front of me since 2008. I've tried it twice already . . . . The issue of the doctor [from Harborview] that wrote the note has been -- you know, [previous trial counsel] did an extensive search for that individual and could not find them in any state on any medical register which the Court, then, excluded that which was affirmed as a decision by the Court of Appeals.
>
> I mean -- and where these other, quote, witnesses came from regarding the shooter, I mean, if someone has just told you that, it's remarkably astonishing; and you've been on this case seven months since May 22nd of this year . . . . and so the bottom line is: That's been seven months, and it will be eight months by the time we get to trial. The Court does not see that there is any need -- given that this case has been tried twice -- that there is a reason for me to continue it, so I'm going to deny the motion to continue.

RP 31.

The trial court later scoffed again at defense counsel's statement that he needed to investigate the possibility of an alternate shooter: "and at this point, seven months into this, when this has been pending, this case, for 22 years, and somebody is suddenly coming up with some mysterious alternate shooter, you know, I'm sorry. You've been on the case for seven months." RP 33. The trial court felt that seven months was "more than adequate time to prepare" this first degree murder, first degree attempted murder, and first

degree manslaughter case "given the fact that this case has gone to trial twice." RP 33.

That the trial court had previously presided over two trials, handled by different defense counsel, did not negate current defense counsel's duty to Tarrer to independently investigate and attempt to locate defense witnesses. Indeed, it is the duty of the trial court "to allow the appointed attorney a reasonable time within which . . . to make adequate preparation for trial," Hartwig, 36 Wn.2d at 601, regardless of what previous trial counsel did or did not do. And, as defense counsel pointed out, the fact that Tarrer had already gone to trial twice only

> increase[d] the time . . . required . . . to prepare because [he had] to review not only the regular discovery which is a couple of thousand pages long, [he] also [had] to review all those transcripts; and so it doesn't make the case shorter, the investigation and preparation shorter. It makes it longer.

RP 33. The trial court's denial of the continuance deprived Tarrer of prepared and effective counsel and was therefore an abuse of discretion.

Defense counsel's inadequate preparation resurfaced a week before trial when he again moved for a continuance. In making this motion, defense counsel noted that he had had an intervening trial in another case and was still seeking witness interviews. RP 39-40. Defense counsel also noted that previous trial counsel "had the case for 14 months prior to trial." RP 40. In addition, given defense counsel's attempt to prepare and brief other issues,

he noted he had not yet had a chance to work on motions in limine at all and was a week overdue in providing the court and the prosecution a list of defense witnesses. RP 46-48, 57.

Without addressing defense counsel's concerns about his lack of preparation, the trial court admonished, "Well, the witness lists were supposed to be filed two weeks prior to trial. That's in the omnibus order that was entered in this case back in October," and denied the continuance. RP 48. The trial court again noted, "this case has been to trial twice. We have two entire transcripts from trials." RP 57-58.

In response to additional criticism by the court for not timely filing witness lists, defense counsel responded, "I have advised the Court that I was not yet ready. Again, I will point out that this is, now, eight months tops since I've been on it. The first trial took over a year, and the second trial took over a year; so I apologize for being late." RP 66. The trial court again failed to understand defense counsel's duty to independently and thoroughly prepare and investigate, stating, "Yeah, and it's so much easier now because . . . all the pretrial motions the Court's rulings have been affirmed, so basically that cuts down a lot of the work."[2] RP 66.

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[2] The trial court was mistaken that all its previous pretrial rulings had been affirmed. While this court considered some of the trial court's pretrial evidentiary rulings in Tarrer's last appeal, this court certainly did not consider all of them. The trial court later acknowledged that not all of its rulings had been

Later in the trial, the untimely disclosure of witnesses also deprived Tarrer of an opportunity to present an expert witness, Dr. Eric Kiesel, who would render an opinion that McCorvey was shot in the back and could not have been facing her shooter. As discussed in more detail in Part 4 below, the court refused to allow Dr. Kiesel's testimony in part because the "witness was not timely disclosed." RP 892. Defense counsel again cited his lack of preparation for trial: "I will remind you that I told you I wasn't ready to go . . . ." RP 893.

Dr. Kiesel's exclusion was another consequence of the trial court's refusal to give defense counsel additional time to prepare for trial. Cf. State v. Comer, 176 Wash. 257, 268, 28 P.2d 1027 (1934) (holding that counsel's demonstrated preparation in examining witnesses negated any error in refusing continuance); State v. Nicholas, 55 Wn. App. 261, 271-72, 776 P.2d 1385 (1989) (noting that since counsel did not indicate he was unprepared to proceed, denial of continuance did not deny right to counsel and was not abuse of discretion).

In denying Tarrer's motions to continue, the trial court focused not on counsel's represented need for additional preparation and investigation time but on the fact that Tarrer had had two previous trials. The trial court's

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considered or affirmed. RP 893 ("[The Court of Appeals] didn't touch on some of the other issues that were raised.").

attitude was that Tarrer's first and second trials had resolved all possible controversies, and the trial court could not conceive of why defense counsel might have needed more time to prepare. This misguided notion deprived Tarrer of effective assistance of counsel, the preparation of his defense, and due process of law. This manifest abuse of discretion requires reversal.

2. JUDICIAL BIAS DEPRIVED TARRER OF A FAIR TRIAL

The trial court repeatedly made clear that it was biased against Tarrer through its rulings and comments to the deputy prosecutor and defense counsel. Given this extensive evidence of judicial bias, Tarrer did not receive a fair trial. This court must reverse.

An unbiased, impartial judge and the appearance of fairness within our court system are the hallmarks of due process of law. In re Pers. Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004); State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992); In re Pers. Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). At minimum, due process requires a fair tribunal "'before a judge with no actual bias against the defendant or interest in the outcome of his particular case.'" Davis, 152 Wn.2d at 692 (quoting Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997)). "Impartial means the absence of actual or apparent bias." Swenson, 158 Wn. App. at 818 (citing State v.

Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002)). "'The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.'" Post, 118 Wn.2d at 618 (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)).

To establish a claim that a trial court acted partially and in violation of the appearance of fairness doctrine, there must be some evidence of the judge's "actual or potential bias." Post, 118 Wn.2d at 619; State v. Perala, 132 Wn. App. 98, 113, 130 P.3d 852 (2006); State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). The test to determine whether a judge's impartiality might reasonably be questioned is an objective one: "A court must determine 'whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral [trial].'" Swenson, 158 Wn. App. at 818 (first alteration in original) (quoting State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996)). Here, the evidence objectively demonstrated the trial court's actual and potential bias against Tarrer.

As already discussed in the context of the trial court's denial of Tarrer's continuance requests, the trial court improperly allowed its experiences from Tarrer's previous two trials to predetermine its rulings in this trial. This evidence of bias was not isolated to the motions to continue, however.

During McCorvey's redirect examination, the prosecutor asked whether drug dealing was dangerous and whether or not there were times when drug dealers could have their drugs stolen. RP 688. Immediately after McCorvey answered affirmatively, the prosecutor asked, "Larry [Tarrer] thought his drugs were stolen that night; right?" RP 688. Defense counsel objected, asked to be heard outside the jury's presence, and then argued that the prosecutor "is trying to characterize Larry as being a drug dealer. There is no testimony that he gave drugs to anybody. There's no evidence of that. That's an entirely inappropriate characterization of the situation." RP 688. The trial court responded, "Well, considering I've heard Mr. Tarrer testify before that he was a drug dealer, I mean . . ." RP 689. The prosecutor interrupted, "You can't know that, Judge," to which the court answered, "I know I can't know that. I mean, not officially. Personally, yes, I know that." RP 689. Although the prosecutor argued he was going to establish that Tarrer was a drug dealer through other witnesses, and the court ultimately overruled the defense's objection on this basis, RP 689-90, the trial court's readiness to overrule Tarrer's objection based on evidence from the previous trials rather than on the evidence currently before it shows that the trial court was not performing its duties impartially.

Similarly, during pretrial motions, defense counsel attempted to litigate the admissibility and suggestibility of McCorvey's eyewitness

identification, arguments that Division Two rejected in Tarrer's last appeal. See CP 111-12 (portion of unpublished slip opinion relating to admissibility of eyewitness identification). Defense counsel argued that new case law in Washington, New Jersey, and the United States Supreme Court on the issue of eyewitness identification had changed the proper suggestibility analysis. CP 356-407; RP 63. Before reviewing defense counsel's materials or considering his arguments, the trial court concluded,

> Whatever prospectively the Supreme Court might rule or the Court of Appeals might rule in the future, that's not where we are right now. Irrespective of whatever New Hampshire, New Jersey, or some other state has done, this state, our Court of Appeals, Division II, has allowed that identification, both by the photomontage and in court, to stand; so, you know, I don't really intend -- you know, you can argue it, again; but you already know how I'm going to rule.

RP 68. That the trial court knew how it would rule before even considering Tarrer's arguments or reviewing more recent case law demonstrates it was unwilling or unable to provide Tarrer with a fair and impartial forum.[3] No reasonably prudent and disinterested observer could conclude otherwise.

Outside of referring to Tarrer's previous trials, the trial court made other comments and rulings that also reveal its bias against Tarrer.

In a preliminary discussion of motions in limine, the prosecutor misrepresented that "the Defense is moving to preclude me from doing a

[3] Indeed, the trial court's comments suggest that even if the law had changed entirely, it would have made no difference to the trial court.

closing argument; and we have to take that one up . . ."[4] RP 85. The prosecutor also stated, "I might waive it; I might not have a choice." RP 85. In response, the court retorted, "Mr. Neeb can basically cut and paste his closing argument to avoid offending the Court of Appeals." RP 85. This court reversed Tarrer's last convictions because of multiple egregious instances of prosecutorial misconduct. See CP 99-109, 114. The trial court's comments make light of this serious misconduct, suggesting that the only problem with the prosecutor's previous arguments was that the Court of Appeals found them offensive. This also shows the court's bias against the defense.

When it came time to rule on the motions in limine restricting the State's closing argument, the trial court also failed to heed many aspects of the Court of Appeals' ruling, which also demonstrated its bias. While the trial court granted the defense motion in limine to preclude the State from making a declare-the-truth argument in closing, the trial court thought "there's a distinction between searching for the truth, or the truth is what you decide, and the instruction about render a true verdict." RP 103. The trial court went on, "Since we do instruct [the jury] on [rendering a true verdict], I

[4] In fact, the defense was just moving to proscribe the same or similar arguments in the State's closing that had previously deprived Tarrer of a fair trial. Compare CP 99-109 (slip opinion discussing various instances of prosecutorial misconduct) with CP 127-28 (defense motions in limine regarding closing argument).

would assume that the appellate court, if they felt that was an inappropriate instruction from the Court, would have taken time to reverse it in their opinion." CP 432; RP 103. This court's opinion made quite clear, however, that "'asking [the jury] to render a true verdict'" was misconduct. CP 101-02 & n.6. The trial court's contrary view reveals a lack of concern for Tarrer's right to a fair trial.

In the same vein, the trial court refused to prohibit the State from employing puzzle analogies in closing:

> I'm going to make no ruling on that. I'm going to defer until or when and if we actually get to some sort of argument regarding a puzzle, whether or not -- because [the Court of Appeals doesn't] actually talk about puzzles. [It] talk[s] about shifting the burden of proof, and there's a distinction there; so it does seem to me that puzzle imagery can be used under certain circumstances but not under others . . . .

RP 109. The trial court also earlier endorsed the use of a puzzle analogy using certain cityscapes:

> you can use the puzzle analogy to show how circumstantial versus direct evidence, you know, may occur; and if you put the skyscraper in the water, gee, that could be Chicago. That could be New York; but if you stick the Space Needle in the water and, oh, wait, you know that that's Seattle because you know there's not another Space Needle in the world.

RP 107; see also CP 433.

The trial court was incorrect. In its previous ruling in this case, this court specifically addressed and rejected cityscape puzzle analogies, relying on this court's recent decision in State v. Johnson, 158 Wn. App. 677, 682,

685, 243 P.3d 936 (2010). CP 104-06. Such analogies in closing argument misstate and trivialize the reasonable doubt standard and are therefore misconduct. Johnson, 158 Wn. App. at 685; CP 106. That the trial court did not know this demonstrates an absence of suitable interest in ensuring Tarrer received a fair trial.

The trial court repeatedly demonstrated that it was unwilling or unable to adjudicate Tarrer's rights impartially. This bias infected all aspects of Tarrer's trial, rendering the trial fundamentally unfair as a matter of due process of law. This court must accordingly reverse Tarrer's convictions and remand to give Tarrer a trial before an impartial tribunal.

3. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE, REQUIRING REVERSAL

The trial court also improperly commented on the evidence in a manner that aligned the court with crime victims and their interests and against defendants. This also prejudiced Tarrer and requires reversal.

Article IV, section 16 of the Washington Constitution, provides, "Judges shall not charge juries with respect to matters or fact, nor comment thereon, but shall declare the law." This constitutional prohibition on commenting on the facts "prevent[s] the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the

evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

As Washington courts have held, almost since statehood, all remarks or observations regarding the facts before the jury are strictly prohibited by article IV, section 16. State v. Bogner, 62 Wn.2d 247, 252, 383 P.2d 254 (1963); State v. Walter, 7 Wash. 246, 250, 34 P. 938 (1893); State v. Coella, 3 Wash. 99, 121, 28 P. 28 (1891). "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). That is, a court's improper comment on the evidence may be either express or implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). This constitutional violation may be raised for the first time on appeal. Id. at 719-20; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

A comment on the evidence is presumed prejudicial, and the State bears the burden to show no prejudice resulted. Lane, 125 Wn.2d at 838. Prejudice is presumed even despite jury instructions to disregard such comments. Lampshire, 74 Wn.2d at 892 ("[T]he damage [i]s done when the remark [i]s made and it [i]s not capable of being cured by a subsequent instruction to disregard.").

The trial court improperly commented on the evidence during its admonition to the newly impaneled jury to avoid juror misconduct to protect victims' interests in not having to repeatedly testify:

> We cannot emphasize strongly enough that you are not to discuss the case or conduct any research . . . by yourself on the subject of his trial. This is very important because it can lead to a mistrial. That has recently happened both in King and Snohomish Counties where the . . . jurors have committed misconduct during deliberation by researching the issues in the case. That means the county has to try the case. In the case of the King County case, it was a rape case which means the victim will have to testify again. In the Snohomish case, it was a child rape case which meant that, ultimately, the Prosecutor's Office dealt with the case because they did not want the five-year-old victim to have to testify again; so it's very important that you not conduct any research.

RP 182-83 (emphasis added).

The trial court's comments that juror misconduct would require victims to testify again, possibly resulting in a favorable deal for the defendant, aligned the trial court on the side of victims and against defendants, implying that the jurors should share this view. The trial court's focus on victims in its admonition also assumed that the defendants in the King and Snohomish County cases were guilty, which generally bolstered the character and value of victim testimony and disparaged defendants. Especially considering that the victim in this case, McCorvey, later testified, the trial judge's remarks to the jury—invoking sympathy for victims and presuming defendants' guilt—was an improper comment on the evidence.

The trial court's admonition encouraging jurors to sympathize with victims and the State was improper. These unacceptable comments on the evidence were presumptively prejudicial, requiring this court to reverse.

4. BY EXCLUDING A KEY DEFENSE EXPERT WITNESS, THE TRIAL COURT DEPRIVED TARRER HIS RIGHT TO PRESENT A DEFENSE

The trial court ruled that Tarrer could not present an expert witness who would testify to his opinion from reviewing McCorvey's medical records that McCorvey was shot in the back and could not have been facing her shooter. This ruling deprived Tarrer of his constitutional right to present this witness in his defense. This error also entitles Tarrer to a new trial.

A party may call an expert witness, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. ER 703 provides,

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the *facts or data need not be admissible in evidence.*

(Emphasis added.) Opinion testimony is not objectionable just because "it embraces an ultimate issue to be decided by the trier of fact." ER 704. "The expert may testify in terms of opinion or inference and give reasons therefor

without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination." ER 705.

"Generally, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact." Johnston-Forbes v. Matsunaga, ___ Wn.2d ___, ___ P.3d ___, 2014 WL 4247770, at *3 (Aug. 28, 2014). "ER 703 allows an expert to base his or her opinion on evidence *not admissible* in evidence and to base his or her opinion on facts or data *perceived by or made known to the expert* at or before the hearing." Id. (emphasis added). "That an expert's testimony is not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility." In re Marriage of Katare, 175 Wn.2d 23, 39, 283 P.3d 546 (2012).

While reviewed for an abuse of discretion, Johnston-Forbes, 2014 WL 4247770, at *3, the denial of an expert witness to a criminal defendant implicates important constitutional protections. Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers, 410 U.S. at 302. The "right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the

jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). "A fair trial contemplates the defendant will not be prejudiced by the denial to him of his right to . . . compulsory attendance of witnesses." State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). "This is a fundamental element of due process of law." Id. at 181.

In this case, denying Tarrer the opportunity to present the testimony of Eric Kiesel, M.D., a forensic examiner, was an abuse of discretion because it violated Tarrer's rights to present a witness in his defense. Dr. Kiesel's testimony was germane to the hotly contested issue of whether McCorvey faced her shooter when she was shot, and thus represented one of Tarrer's main avenues for challenging the veracity of McCorvey's eyewitness identification.

In an offer of proof, defense counsel indicated that Dr. Kiesel would testify regarding the size of gunshot entrance wounds and exit wounds. RP 883. In addition, "with regard to the medical records related to Ms. McCorvey, there were five doctors that looked at her. Four of them said that entrance wounds were on the back. One of them said the exit wound was on the back." RP 883. Because of the importance of this testimony to the defense, Tarrer argued that "Dr. Kiesel should be allowed to review the

medical records and testify with regard to [them] under [ER] 703." RP 884. In addition, the defense argued,

> Also under 703, Dr. Kiesel should be allowed to testify with regard to the size of entrance wounds and what they typically mean. The State has introduced such evidence,[5] and I think that it's important that I can use that evidence to rebut the State's case and to assure Mr. Tarrer as fair a trial as possible.

RP 884.

The State responded that, while Dr. Kiesel would say McCorvey's wounds were consistent with being shot in the back, Dr. Kiesel would also acknowledge that "practicing hospital physicians are . . . little better than 50 percent at determining entrance wounds versus exit wounds on a living person who they are treating emergently." RP 886. The State also asserted that Dr. Kiesel would not be giving an opinion but would just be parroting inadmissible medical records. RP 886-87.

In response, defense counsel argued, "Dr. Kiesel should be at least allowed to testify that the medical records that he reviewed were consistent with entrance wounds in the back and exit wounds in the front." RP 888. In addition, defense counsel asserted, "He can rely on data, even if that data is inadmissible; and those observations or data, [under ER 703], that should be

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[5] The State's expert, Dr. John Howard, who performed Simpkins's autopsy, had testified that entrance gunshot wounds tended to be smaller than exit wounds. See RP 417-21.

allowed to be reviewed by Dr. Kiesel and testified to before this jury." RP 888.

The trial court agreed with the State:

> Well, he can't testify to those opinions because he -- it's someone else's opinion. All he can say is, yeah, I looked at records; and he can't give you an opinion one way or the []other; so, no, Dr. Kiesel is not going to testify. A, he wasn't timely disclosed; and, B, his report really is just an attempt to try to circumvent the opinion that the Court of Appeals[6] has already rendered regarding those medical records which is: They don't come in.

RP 888-89.

The State's contention was that Dr. Kiesel "doesn't have an opinion. He could give an opinion on what he's read if those were facts and data; but Dr. Kiesel doesn't even have an opinion that these are entrance or exit wounds based on what he's reviewed, and that's the opinion that . . . is lacking." RP 891-92.

Without addressing ER 703's application or effect at all, the trial court again agreed with the State: "we don't have any kind of an expert opinion. We just have a lot of blathering on. That's not an expert opinion.

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[6] The trial court's reference to the Court of Appeals opinion pertained to this court's ruling in Tarrer's last appeal that it was not an abuse of discretion to exclude the medical records themselves as inadmissible hearsay under the business records exception. CP 110-11. Specifically, this court held, "Under the business records exception, witnesses cannot testify to others' opinions." CP 111. However, this court's ruling never addressed whether a physician could give an opinion based on the medical records under ER 703.

The Court is not going to admit it, and I'm not going to back-strap in these medical records." RP 896.

The State and the trial court miscomprehended the expert opinion Dr. Kiesel would give. Just because Dr. Kiesel might not have been able to conclusively state with 100 percent certainty that McCorvey was shot in the back, he could render an expert opinion that the wound measurements in the medical records were *more consistent* with that conclusion. Although the medical records themselves were inadmissible, experts are entitled to rely on inadmissible evidence in forming opinions or inferences. ER 703; Johnston-Forbes, 2014 WL 4247770, at *3. The trial court should have allowed Dr. Kiesel to testify. Any perceived deficiencies in the bases for his conclusions went to weight, not admissibility.

The trial court failed to engage in any meaningful analysis of ER 703, and instead called Dr. Kiesel's potential testimony "blathering on." RP 896. By excluding Dr. Kiesel's testimony, the trial court denied Tarrer an opportunity to draw exculpatory inferences for the jury. Such inferences were part and parcel of Tarrer's right to present witnesses and to give his version of events to assist his defense. Indeed, the key defense strategy was to attack McCorvey's identification of Tarrer as the shooter in any way possible, and Dr. Kiesel's testimony most certainly would have helped achieve this objective. The denial of this testimony violated Tarrer's Sixth

Amendment and article I, section 22 rights. Failing to recognize the importance of Tarrer's constitutional right to defend himself against the State's charges, the trial court egregiously abused its discretion. This court must reverse.

5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DENIED TARRER A FAIR TRIAL

The prosecutor told the jury it needed to balance justice to the accused with justice to the accuser. The prosecutor also stated that the law did not allow the jury to consider any lack of evidence against Tarrer in determining whether Tarrer was guilty beyond a reasonable doubt. These misstatements of the law eased the State's burden of proof and destroyed the presumption of innocence.

The prosecutor also implicitly disparaged Tarrer, blaming him for the victims having to wait 23 years for justice. The prosecutor expressly disparaged Tarrer and his defense by arguing to the jury that Dr. Loftus was intended to distract and confuse them.

This misconduct on the part of the prosecutor rendered the trial unfair. This court must reverse on this basis.

The prosecutor has a duty to "ensure a verdict free of prejudice and based on reason" State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984); accord State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A

prosecutor is a quasi judicial officer with an independent duty to ensure a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Misconduct by a prosecutor can deprive a defendant of his constitutional right to a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Even if there is not a contemporaneous objection to a prosecutor's argument, prosecutorial misconduct requires reversal when it is so flagrant and ill intentioned that instructing the jury cannot cure the resulting prejudice. Id.

a. The prosecutor committed misconduct by diminishing the beyond-a-reasonable-doubt burden of proof

The presumption of innocence and corresponding burden of proof beyond a reasonable doubt are the "bedrock[s] upon which [our] criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); accord In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). To mislead the jury regarding these fundamental principles is prejudicial because it reduces the State's burden of proof and undermines a defendant's rights to due process. State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010).

The prosecutor quoted Benjamin Cardozo to the jury: "Justice, though due to the accused, is due to the accuser, too; We are to keep the balance true . . . ." RP 1271. The prosecutor employed this quotation

because, "while the defendant has every right to a fair trial, that doesn't mean that while you deliberate the evidence in this case, you should not be mindful of Claudia McCorvey, Lavern Simpkins, Marquise McCorvey, and the others who have been affected by this case." RP 1271.

Suggesting to the jury that it needed to balance the rights of Tarrer with the rights of the victims was a gross misstatement of the law. And the endorsement of such a statement by reference to a former United States Supreme Court justice exacerbated its prejudicial effect. The prosecutor's quotation diminished the jury's role and the reasonable doubt burden of proof. The sole role of the jury is to determine whether the State has proved every element of the charged offenses beyond a reasonable doubt. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The prosecutor's suggestion that the jury needed to "balance" its reasonable doubt determination by considering the "justice" "due the accuser" was flagrant and ill intentioned misconduct.

The prosecutor continued to engage in misconduct when he further discussed the reasonable doubt standard:

> A reasonable doubt arising from the lack of evidence is the question of: Do you have enough? Again, there will always be more. Do you wish you had more? Do you wish you had DNA evidence? Do you wish you had shoe prints? Do you wish you had the gun and the ballistics that tie it to it? I mean, all of these things are stuff that you could have that you don't have; and I'm going to suggest to you that the law

> doesn't let you think about those things when you decide if the case was proved beyond a reasonable doubt. What you look at is: Is the evidence that was actually presented enough?

RP 1297-98.

The State argued there were no possible reasons to doubt outside of reasons provided in the evidence. In other words, the State told the jury that there was no possibility that the absence of evidence could exist to negate a belief beyond a reasonable doubt. This argument directly contradicted the mandatory reasonable doubt jury instruction that stated, "A reasonable doubt is one for which a reason exists and may arise from the evidence or *lack of evidence*. CP 492 (emphasis added); State v. Bennett, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007) (holding reasonable doubt instruction is mandatory). The prosecutor's argument to the contrary suggested that the jury could not consider a lack of evidence against Tarrer in determining whether the State met its burden of proof. This undermining of the reasonable doubt standard was flagrant and ill intentioned misconduct.

b. The prosecutor committed misconduct by explicitly and implicitly disparaging the defense

"[A] prosecutor must not impugn the role or integrity of defense counsel." State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore

impermissible." Id. at 432 (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam)).

Our supreme court has found improper disparagement of defense counsel where the prosecutor characterized defense counsel's arguments as "sleight of hand" and "bogus." State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). These arguments were ill intentioned because they were planned out ahead of time and implied deception by defense counsel. Id. Similarly, our supreme court determined the prosecutor's argument was improper when he described defense counsel's argument as a "'classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.'" State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (quoting verbatim report of proceedings).

The prosecutor's comments about Dr. Loftus's testimony were in the same vein as those disapproved in Thorgerson and Warren. The prosecutor argued that the jury needed to "do[] the right thing for the right reasons," which, in the prosecutor's view, meant,

> reaching a proper verdict based on the evidence and the law and nothing else, and I say those last words because there are times in trials when there are witnesses who are called whose sole purpose is to distract you, to confuse you, to make you worry, and to make you hesitant about reaching a verdict. Geoffrey Loftus is a perfect example of one of those individuals, one of those kind of witnesses, because Geoffrey

> Loftus's entire testimony was designed to make you think that it's impossible for any eyewitness to ever accurately identify . . . .

RP 1271-72. Defense counsel objected, "mischaracterizes the evidence," which the trial court overruled. RP 1272. The State continued, "His whole testimony is designed to have you think no one can ever accurately identify somebody who committed a crime against them." RP 1272. These arguments improperly implied that the defense used trickery, distraction, and confusion to prevent the jury from "doing the right thing." Cf. Thorgerson, 172 Wn.2d at 451-52; Warren, 165 Wn.2d at 17. These comments attributed deception to defense counsel and the defense's presentation of Dr. Loftus's testimony. This court should find the prosecutor's comments disparaging the defense were flagrant and ill intentioned misconduct.

In addition, the prosecutor argued, "It goes without saying, I think, that 23 years is a very long time to wait for some final justice to come in this case; but it is almost here." RP 1271. This was misleading and suggested to the jurors that they should convict on improper grounds. These comments were analogous to those in Huson. There, the prosecutor stated the defendant "has been a criminal for twenty-five years. And he has got away with it." Huson, 73 Wn.2d at 662. The Huson court did not reverse based on these statements, but this was because it determined defense counsel had consciously decided not to object in order to argue in response that the

prosecutor's tirade against his client showed the prosecutor was not interested in ensuring Huson a fair trial. Id. at 664.

There was no similar tactic here, as defense counsel did not discuss the 23-year period since the crime in his closing. The prosecutor's statements suggested that Tarrer was to blame not only for committing the crimes in question, but also for delaying "final justice" for a "very long time." By referring this way to the length of time between the trial and the underlying crime, the prosecutor suggested to the jury that the amount of time the victims had been waiting for "justice" should factor into its decision. This argument deflected responsibility for the delay onto Tarrer. It was therefore a flagrantly improper argument that asked the jury to convict Tarrer for improper reasons.

c. Taken alone or cumulatively, the misconduct in this case denied Tarrer a fair trial

Once it is established that a prosecutor's conduct was improper, on review, the court considers the likely effect and whether instruction could have cured it. Emery, 174 Wn.2d at 762. The focus is on whether the misconduct created a "feeling of prejudice" that would prevent a fair trial. Id. "'[T]he cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.'" Glassman, 175 Wn.2d at 707 (quoting State

v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011)). Even when there is no objection, reversal is still required where the misconduct is so flagrant and ill intentioned that a curative instruction would have been useless to obviate the prejudice. Glassman, 175 Wn.2d at 703-04.

Here, the State suggested that the jury's consideration of whether there was a reasonable doubt was limited to the evidence adduced at trial and could not be based on the State's failure to present evidence. The State told the jury it needed to consider whether there was reasonable doubt by balancing victims' need for justice. The State also disparaged defense counsel by suggesting that Dr. Loftus's testimony was just a diversionary tactic and by attributing the 23-year wait for "final justice" to Tarrer. All of this misconduct was incurable by instruction because the prosecutor's comments were designed to minimize the State's burden and cast the defense in a bad light and would have had that very impact regardless of any attempted curative instruction. Accordingly, this court should hold that the prosecutor's misconduct deprived Tarrer of a fair trial.

6. TARRER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, REQUIRING REVERSAL

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient

performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactics, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed." Id.

a. Missing the deadline for disclosing Dr. Kiesel

Defense counsel's failure to timely disclose Dr. Kiesel as an expert witness was one of the reasons the trial court disallowed his testimony. As already discussed, this failure is directly attributable to the trial court's unreasonable refusal to grant counsel a continuance so that he could be adequately prepared for trial. If, however, this court still finds that defense counsel was at fault for the tardy disclosure, counsel was ineffective.

"Representation of a criminal defendant entails certain basic duties." Strickland, 466 U.S. at 688. Defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." Id. Failing to meet a filing deadline constitutes deficient representation. State v. Lopez, 107 Wn. App. 270, 276, 27 P.3d 237 (2001) (citing State v. Snyder,

860 P.2d 351, 359 (Utah Ct. App. 1993)). Indeed, no objectively reasonable attorney would miss a deadline for witness disclosure, thereby depriving his or her client of the opportunity to present a witness's testimony at trial. Nor could a legitimate strategy explain missing such a deadline. By failing to timely disclose Tarrer's expert witness, counsel's performance fell below an objectively reasonable standard.

As discussed above, this failure was prejudicial, as there is a reasonable probability that the outcome of trial would have differed if Dr. Kiesel had been allowed to testify. Dr. Kiesel would have cast doubt on McCorvey's testimony that she faced her shooter, a key piece of evidence supporting Tarrer's conviction. See supra Part 4. Because counsel's failure to timely disclose Dr. Kiesel as a witness resulted in the exclusion of Dr. Kiesel's testimony, counsel's assistance was ineffective.

b. Defense counsel failed in his duty to object to the prosecutor's improper closing arguments

If this court concludes that Tarrer's prosecutorial misconduct claims have not been adequately preserved, Tarrer was also denied his right to effective assistance of counsel when his attorney failed to object to the prosecutor's improper arguments. "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of

constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The prosecutor's arguments misstated the burden of proof and otherwise disparaged defense counsel's constitutionally mandated role. Counsel was ineffective in failing to object to all of these instances of misconduct to preserve these errors for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (failure to preserve error may constitute ineffective assistance and justifies examining error on appeal).

Prejudice from deficient performance requires reversal whenever the error undermines confidence in the outcome. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). That confidence is undermined here. The prosecutor diminished the State's burden of proof, told the jury it could not consider whether a lack of evidence supported reasonable doubt, cast Tarrer's chosen defense as an obstruction to "doing the right thing," and implied Tarrer was the reason that the victims had to wait 23 years for justice. These instances of misconduct were likely to tip the scales in favor of a guilty verdict. This court must reverse.

7. IF THE FOREGOING ERRORS DID NOT INDIVIDUALLY DEPRIVE TARRER OF A FAIR TRIAL, THEIR CUMULATIVE EFFECT SURELY DID

Courts reverse a conviction for cumulative error "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) ("While it is possible that some . . . errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.").

Tarrer's trial abounded with errors, which include the trial court's denial of Tarrer's motions for continuance, the trial court's bias against Tarrer, the trial court's unconstitutional comments on the evidence, the trial court's exclusion of defense expert Dr. Kiesel, prosecutorial misconduct during closing argument, and ineffective assistance of Tarrer's counsel. If this court determines that, individually, these errors do not require reversal of Tarrer's conviction, it should conclude that, together, these errors deprived Tarrer of a fair trial. These errors' cumulative effect requires reversal.

8. ON REMAND, JUDGE KATHERINE STOLZ MUST BE DISQUALIFIED

The Washington Supreme Court recently clarified that, "[g]enerally, a party seeking a new judge files a motion for recusal in the trial court."

State v. McEnroe, ___ Wn.2d ___, ___ P.3d ___, 2014 WL 4384132, at *5 (Sept. 4, 2014) (citing State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007)). This rule is "based on the assumption that the challenged judge gets to evaluate the stated grounds for recusal in the first instance." Id. (citing CJC Canon 2.11(A)). "This recusal procedure allows the parties to develop a record adequate to determine whether 'the judge's impartiality might reasonably be questioned.'" McEnroe, 2014 WL 4384132, at *5 (quoting CJC Canon 2.11(A)). Here, Tarrer filed a motion for recusal in the trial court, asserting that the trial judge was unable to provide an impartial forum, thus preserving his claim that he is entitled to reassignment on remand. CP 115-24; RP 8-13.

Tarrer also developed a record revealing that the trial court's impartiality might reasonably, if not certainly, be questioned. As argued in Part 2 above, the trial court demonstrated continual bias against and antagonism toward Tarrer throughout the trial. As discussed, the trial court demonstrated its inability to remain impartial by allowing Tarrer's previous two trials to control its decision-making in this trial, by prejudging Tarrer's new arguments without considering their substance whatsoever, and by making light of and disregarding this court's previous reversal on prosecutorial misconduct grounds. The judicial bias in this case deprived Tarrer of a fair trial and demonstrates that Tarrer would not be provided an

impartial tribunal were he remanded to the same courtroom. Accordingly, on remand, this court must order reassignment of this matter to a different, impartial judge.

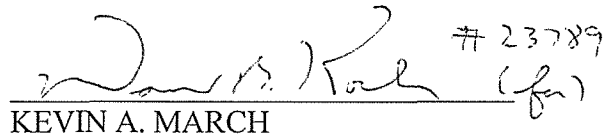
E. CONCLUSION

Individually and cumulatively, multiple errors denied Tarrer a fair trial. This court must reverse Tarrer's conviction and remand for retrial, this time before an impartial judge.

DATED this 3rd day of October, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 45998-1-II
	)	
LARRY TARRER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF OCTOBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARRY TARER
NO. 37606-086
FCI GREENVILLE
P.O. BOX 5000
GREENVILE, IL 62246

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF OCTOBER, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

October 03, 2014 - 1:28 PM

Transmittal Letter

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Case Name: Larry Tarrer
Court of Appeals Case Number: 45998-1

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