NO. 46593-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

GREYCLOUD LAWLER,

Appellant.

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

The Honorable Barbara Johnson, Judge

BRIEF OF APPELLANT

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1. A biased juror was seated on the jury panel and deliberated on the verdicts.

2. The trial court violated appellant's constitutional right of confrontation by excluding relevant evidence of the State's key witness's motive to lie.

3. The prosecutor's improper closing argument, unremedied by the trial court's responsive instruction, violated appellant's rights to a fair trial and to a verdict based on the evidence.

Issues pertaining to assignments of error

1. During voir dire, a prospective juror stated that he would not be able to remain impartial because of his past experiences with domestic violence, including a situation similar to the conduct alleged in this case. He further stated he did not think he would be able to follow the court's instructions to set his prior experiences aside and judge the case fairly. Where this juror was seated and deliberated on the verdict, was appellant denied his constitutional right to trial by a fair and impartial jury?

2. Appellant was charged with domestic violence rape, kidnapping, assault, and harassment based on testimony from the alleged

victim, corroborated by medical testimony that she received narcotic pain medication while being examined after the incident. The court excluded evidence that the alleged victim had been seeking pain medication up to the time of her encounter with appellant. Where the witness's pill-seeking behavior was highly relevant to her motive to lie when reporting the alleged incident, did the court's refusal to allow cross examination on that issue deny appellant his constitutional right of confrontation?

3. Appellant exercised his right not to testify at trial. During closing argument, however, the prosecutor argued that the jury could consider his demeanor in the courtroom when deliberating on the charges. The trial court's instruction in response to defense counsel's objection failed to correct this misleading argument. Did the improper argument and instruction deny appellant his rights to a fair trial and to a verdict based on the evidence?

B. STATEMENT OF THE CASE

1. Procedural History

Appellant Greycloud Lawler was charged with first degree rape, second degree kidnapping, second degree assault, felony harassment, possession of methamphetamine, and interference with reporting domestic violence. CP 21-24. The State alleged that the rape, kidnapping, and

harassment were committed while Lawler was armed with a deadly weapon and that the offenses were domestic violence offenses. Id.

The case proceeded to jury trial in Clark County Superior Court before the Honorable Barbara Johnson. The first trial ended in a mistrial on April 22, 2014, when defense counsel had a medical emergency. RP 145-50. The second trial commenced on June 11, 2014. RP 157. The jury found Lawler guilty of the lesser offense of second degree rape and guilty of the remaining charges, and it entered affirmative special verdicts. CP 74-86. The court imposed standard range sentences, with consecutive deadly weapon enhancements, for a total sentence of 282 months to life. CP 90-91. Lawler filed this timely appeal. CP 115.

2. Substantive Facts

Greycloud Lawler and MDJ started dating in March 2013. RP[1] 460. They went to a motel for Valentine's day in 2014. RP 460. The next day when they were checking out, MDJ told the clerk she had been assaulted and asked her to call 911. The clerk did not observe any injuries to MDJ, and she told MDJ to make the call herself using a phone in the lobby. RP 272-73. MDJ called 911 and reported that she had been

[1] RP refers to the six consecutively paginated volumes of the Verbatim Report of Proceedings from 4/21/14, 4/22/14, 6/11/14, 6/26/14, 6/30/14, 7/1/14, 7/2/14, 7/3/14, 8/6/14, and 8/12/14. An additional volume from voir dire on 6/30/14 is referred to as Voir Dire RP.

assaulted. RP 482. After she spoke to police, MDJ was taken to the hospital in an ambulance. RP 395.

Lawler was arrested a short distance from the motel. RP 286. A bindle of methamphetamine was found in his possession. RP 287, 305. Lawler also had a knife in a leather sheath tucked into his waistband. RP 289, 315. He had injuries to his face at the time of his arrest. RP 328.

Prior to trial, the State moved to exclude evidence of pill-seeking behavior by MDJ prior to the alleged incident. CP 20. Defense counsel explained that in her interview, MDJ said she had not been using drugs that day, but she had been asking for pain medications. RP 47. There would be evidence that she received pain medication at the hospital, and it was the defense theory that her complaints of pain were her method of obtaining the pain medication she had been seeking before going to the motel with Lawler. RP 47-48. The court ruled that if there were evidence that MDJ was under the influence of drugs at the time her behavior might be relevant, otherwise the evidence would be excluded as highly prejudicial. RP 48.

During voir dire, the prosecutor asked if any of the potential jurors had a close friend or family member involved in a situation with similar allegations to this case. Voir Dire RP 19. Juror No. 23, Mr. Shipman, indicated that he did. He said his mother had been taken away from her

biological father as a child, his sister was raped by her stepfather and removed from the home, and a niece who was living with him was mentally and physically abused by a boyfriend. Shipman said the boyfriend had been drunk and pulled a gun on him once. Id. at 30. He called the police, but his niece begged him not to mention the gun incident. Eventually, however, she got to the point where she wanted the boyfriend gone, and the sheriff removed him from the house. Id. at 31.

The prosecutor asked Shipman whether anything about his experiences would cause him difficulty, given the nature of the charges, being fair and impartial. Shipman responded, "I don't know how I could be objective with all that past experience." Id. at 32. The prosecutor asked whether he would be able to follow the court's instruction to set aside his past experiences and judge the case on its merits, and Shipman said, "Honestly, I think that would be a pain in the neck, you know. I don't think I would be able to do that with all these experiences." Id. at 33.

When defense counsel asked if anyone felt uncomfortable serving in this jury, Shipman raised his number to indicate that he did. Id. at 78. Defense counsel did not ask him any further questions individually, although he asked the entire panel whether everybody could agree it would be helpful to hear from the medical examiner, police officers, and

independent third parties to make the best decision. Id. at 81. Neither party challenged Shipman for cause or exercised a peremptory challenge to excuse him, and he was seated on the jury. Id. at 87-88.

At trial, the Sheriff's Deputy who responded to MDJ's call testified that he saw bruising on her face and a scratch on her forehead, and she looked afraid. RP 255. The motel clerk testified that after the police left, she saw damage to the curtain and toilet lid in the room Lawler and MDJ had used. Bedding from that room was also found to have holes in it. RP 274-75.

The medical personnel who treated MDJ testified that she reported being held against her will, choked, smothered, and sexually assaulted. RP 359. She also said her head was slammed into the bed and the toilet and she was hit in the face. RP 364. She complained of nausea and pain, and she received anti-nausea medication, two narcotic pain medications, and benzodiazepine. RP 360-61, 372, 374.

MDJ was examined by a sexual assault nurse examiner, who took a full statement from MDJ. She testified about what MDJ said and about the results of the physical examination. RP 425-36. Although she saw no bruising on MDJ's neck or petechiae on her face, the nurse examiner gave her opinion that the physical findings were consistent with MDJ's claims that she had been choked. RP 439-44.

MDJ testified that she and Lawler planned to spend Valentine's Day together at the Value Motel, but she almost backed out when they started bickering on the way there. RP 460-62. She said that Lawler was jealous about something he had seen on her Facebook page. They argued some more when they were at dinner, because Lawler thought she was looking at another man. RP 461-63.

They returned to the motel after dinner, and Lawler took a shower. MDJ testified that he was in the bathroom for two hours, and she believed he was using drugs. RP 463-64. He came out of the bathroom wrapped in a towel, and they had a loud confrontation. RP 464-65. The argument escalated, and MJD was screaming. RP 466. When Lawler attempted to cover her mouth with his hand, she tried to push him away. That made him angrier, and he covered her mouth and nose again. RP 466-67. MDJ testified that they wrestled on the bed, but she could not get his hands off her mouth, and she passed out. RP 467-68. When she came to, Lawler put his hand on her neck with his thumb under her chin and choked her. RP 469. MDJ testified that she lost consciousness three or four times before Lawler relented and got off of her. RP 470.

MDJ testified that Lawler always carried a hunting knife in a leather case, and he had it with him that night. He usually wore it on his

belt, but it was on the nightstand next to the bed when he was wrapped in the towel. RP 471.

MDJ said she tried to plead with Lawler that they needed to stop fighting and calm down. RP 471. He responded with compassion at times but also called her a liar and said she didn't love him. When she said she wanted to leave, he broke her phone and ripped the motel phone out of the wall. There was a lull in the violence for a while, and the two of them slept in the bed together. RP 472.

Around 4:00 MDJ woke and went into the bathroom. When Lawler noticed she was out of bed he got upset. She testified that he told her she was not going home and that she would not see her children again, which made her feel like she was going to die. RP 473. After that, Lawler slept by the door with his knife, and MDJ went back to bed. RP 473-74.

The next morning Lawler was still angry, and they started arguing again. RP 474. MDJ told Lawler she would not leave with him. He then dragged her into the bathroom and threatened to drown her in the toilet. She ripped off the shower curtain trying to get away. A maid knocked at the door at that point, and MDJ said she ripped the blinds off the window trying to get the maid's attention. RP 475-76. That made Lawler even angrier, and he dragged her back to the bed and slammed her head into the headboard. RP 476. He then felt bad and got off of her. RP 477.

MDJ testified that as they were getting ready to leave, Lawler said he had spent the last of his money on the room, and he was not leaving until they had sex. RP 477. MDJ did not fight with him because she was afraid, but she was crying as he had intercourse with her for about 10 minutes. RP 479-80. MDJ testified that she ran to the lobby as Lawler was getting his things together to leave. RP 481. Lawler followed her into the lobby, told her he loved her, then walked away. RP 481.

MDJ testified that she had screamed a number of times over the course of the night, as loudly as she could, for a half hour at a time. No one responded to her screams, however. RP 484. The motel clerk testified that no noise complaints were recorded in the motel's log for that night. RP 279-80.

The defense presented testimony from an expert in forensic pathology. RP 498. He testified that manual strangulation blocks the flow of blood from the brain back to the heart, causing increased pressure in the small blood vessels. These blood vessels break, resulting in tiny hemorrhages, or petachiae, on the surface of the face and in the eyes. RP 503-04. He testified that with multiple strangulations, he would expect to see evidence of petachiae. In examining the photographs of MDJ taken at the hospital, however, he saw no evidence of petechial hemorrhages. RP 505-06.

Lawler decided not to testify, and the defense rested. RP 516, 520.

In closing argument, prosecutor asked the jury to consider Lawler's behavior in the courtroom while MDJ was testifying, saying "while she's talking about that experience, the person that was there was seated a few feet to her left. And he's sitting there a few feet to her left where he can eye her, stare her down." RP 564. Defense counsel objected that there was no evidence anything like that occurred. Id. The court then instructed the jury,

> And, members of the jury, as I advised you earlier, what the attorneys say is not evidence in the case. It's up to you as the jury to reach the facts from the evidence you have heard. That includes closing argument here. So whether something is a part of the evidence or is not would be up to you to conclude. Counsel are certainly not to suggest something that they don't believe or think that the evidence did present, but it is up to you to reach those conclusions.

Id.

C. ARGUMENT

1. LAWLER'S CONSTITUTIONALLY PROTECTED RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED BY THE PRESENCE OF A BIASED JUROR ON THE PANEL.

a. The trial court's failure to excuse the biased juror requires reversal.

A criminal defendant is guaranteed the right to trial by an impartial jury by the Sixth Amendment to the United States Constitution and article 1, section 22, of the Washington Constitution. State v. Fire, 145 Wn.2d 152, 164, 34 P.3d 1218 (2001); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995); State v. Gonzales, 111 Wn. App. 276, 277, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). To protect this right, a juror will be excused for cause if his views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

The failure to provide a defendant with an impartial jury violates due process. State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). The trial court must excuse a juror who demonstrates actual bias. CrR 6.4(c); RCW 4.44.170(2). Actual bias is defined as "the existence of

a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the challenging party...." RCW 4.44.170(2).

Where a juror who should have been dismissed for cause is seated, the defendant's conviction must be reversed. United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); Fire, 145 Wn.2d at 158. A defendant need not use a peremptory challenge on the biased juror in order to preserve the issue; the mere fact that the juror served on the jury is sufficient evidence that the defendant was denied a fair and impartial jury. Fire, 145 Wn.2d at 158; Gonzales, 111 Wn. App. at 280-82 (conviction reversed where defense used all but one peremptory challenge and biased juror was seated).

A juror is not disqualified because he holds certain preconceived ideas, provided he can put those ideas aside and decide the case on the basis of the evidence presented at trial and the law given by the court. Where the juror is unable to set aside his preconceived ideas and be impartial, however, he must be excused for cause. Gonzales, 111 Wn. App. at 282.

In Gonzales, a juror stated during voir dire that she would have a hard time disbelieving police officers. She was brought up to believe they

were honest unless proven otherwise, and if it came down to believing a police officer or the defendant, she would presume the police officer was telling the truth. She did not know if she could follow the court's instruction to presume the defendant was innocent in light of her belief about police officers. Gonzales, 111 Wn. App. at 278-79. Because this juror admitted a bias in favor of police officers which would likely affect her deliberations, and she admitted she did not know if she could follow the court's instructions, her presence on the jury denied the defendant a fair and impartial jury, and his conviction was reversed. Id. at 281-82. See also State v. Witherspoon, 82 Wn. App. 634, 637-38, 919 P.2d 99 (1996), review denied, 130 Wn.2d 1022 (1997) (juror demonstrated actual bias in belief that African Americans deal drugs).

In this case, as in Gonzales, Juror Shipman demonstrated actual bias that was likely to affect his deliberations. He related extensive personal experience with domestic violence situations, including a niece who, while living with Shipman, was mentally and physically abused by a boyfriend. Voir Dire RP 30-31. When asked whether his experiences would affect his ability to be fair and impartial, Shipman candidly admitted that he could not be objective, given his past experiences. When asked whether he could follow instructions from the court to set aside his

experiences and judge the case on its merits, he said he did not think he would be able to do that. Id. at 32-33.

Shipman was not rehabilitated through further questioning, and he continued to indicate that he felt uncomfortable sitting on this jury. Voir Dire RP 78. At no time did he express confidence in his ability to remain impartial. In fact, he made it clear through his responses that he would not be able to deliberate fairly in a case, so similar to his own experience, where the defendant was charged with the emotional and physical abuse of his girlfriend. Because Shipman demonstrated actual bias, he should have been excused for cause. Lawler was denied his constitutionally protected right to a fair and impartial jury, and his conviction must be reversed.

b. Trial counsel's failure to challenge the biased juror for cause constitutes ineffective assistance of counsel.

Should this Court determine that the trial court did not err in failing to excuse Shipman because Lawler's attorney did not challenge the juror for cause, then Lawler received ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. The Washington State Constitution similarly provides "[i]n criminal prosecutions the accused shall have the right to appear and defend in

person, or by counsel...." Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)) .

A defendant is denied his right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993). As argued above, Juror Shipman clearly demonstrated actual bias in his responses to questions about the

nature of the charges in this case. Counsel's failure to challenge him for cause in light of his clearly expressed inability to remain fair and impartial fell below the performance of a reasonably effective attorney, given the merit of such a challenge.

Further, counsel's failure to challenge Juror Shipman cannot be deemed a tactical decision. A tactical decision renders an attorney's representation constitutionally adequate only if it is a reasonable decision. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (defense counsel's strategic or tactical decisions must be reasonable). Counsel's decision not to challenge Shipman was not a reasonable tactical decision in light of his demonstrated bias against Lawler and his admitted inability to follow the court's instructions to decide the case fairly. Counsel's actions constituted deficient performance.

Lawler was prejudiced by counsel's failure to challenge Shipman for cause. Had counsel challenged Shipman, the court would necessarily have had to excuse him for cause. Because of counsel's deficient performance, Lawler was tried by a jury which included a biased juror who was unable to deliberate fairly and impartially. Without Shipman and his actual bias against Lawler, there is a reasonable probability the jury

would not have convicted Lawler. Lawler's conviction must be reversed and the case remanded for a new trial.

2. THE TRIAL COURT VIOLATED LAWLER'S CONSTITUTIONAL RIGHT TO CROSS EXAMINE THE STATE'S KEY WITNESS ABOUT HER MOTIVE TO LIE.

The Sixth Amendment and Const. art. 1, § 22, guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974); State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995). Confrontation is a fundamental "bedrock" protection in a criminal case. Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004). See Davis v. Alaska, 415 U.S. at 315. The primary and most important component of the constitutional right of confrontation is the right to conduct a meaningful cross examination. Davis, 415 U.S. at 316; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

The purpose of cross examination is to test the perception, memory, and credibility of witnesses, thus assuring the accuracy of the fact finding process. Davis, 415 U.S. 316; Darden, 145 Wn.2d at 620. "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question.... As such, the right to

confront must be zealously guarded." Darden, 145 Wn.2d at 620 (citations omitted). Because cross examination is so integral to the adversarial process, "a criminal defendant is given extra latitude in cross examination to show motive or credibility, especially when the particular prosecution witness is essential to the State's case." State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

In Davis, the defense sought to question a key prosecution witness concerning the fact that he was on probation as a juvenile offender and thus could be under pressure from the police to shift the blame from himself and identify a perpetrator. The trial court disallowed this cross-examination, on the basis of a statute protecting the secrecy of juvenile records. Davis, 415 U.S. at 311, 313-14. The Supreme Court reversed, holding that the defendant's Sixth Amendment right of confrontation was violated when the court's ruling prevented him from establishing the factual record necessary to argue his bias theory. Davis, 415 U.S. at 318-20.

As the Supreme Court explained, "[c]ross examination is the principle means by which the believability of a witness and the truth of his testimony are tested." Davis, 415 U.S. at 316. The jury was entitled to have the benefit of the defense theory so that it could make an informed judgment as to the weight to place on the key witness's testimony. Thus,

defense counsel should have been permitted to expose the jury to facts from which it could determine the reliability of the witness. Davis, 415 U.S. at 318. The Court held that since the juvenile was a key witness for the state, and the excluded evidence would have raised serious questions as to his credibility, the defendant's right of confrontation was paramount to the state's interest in protecting the juvenile offender. Davis, 415 U.S. at 319.

In this case, as in Davis, the court excluded evidence which would have established the State's key witness's motive to lie. MDJ admitted in her defense interview that she had been asking for pain medications up to the time of her rendezvous with Lawler at the motel, and she was given multiple doses of pain medication at the hospital after reporting that she had been assaulted. RP 47. The defense theory was that MDJ made up many of the details of the story she told at the hospital in order to obtain the pain medication she had been seeking for the past few days. She maintained those lies throughout the trial. MDJ's motive to lie was a critical element of this theory, and the jury was entitled to hear evidence of that motive so that it could determine the reliability of the State's witness. Since drug use was already a part of the case, the State's interest in excluding the evidence to prevent prejudice based on drug use was not compelling enough to overcome Lawler's right of confrontation. See

State v. McDaniel, 83 Wn. App. 179, 184-85, 920 P.2d 1218 (1996) (exclusion of victim's motive to lie about drug use on day of assault violated defendant's right of confrontation), review denied, 131 Wn.2d 1011 (1997).

Violation of the defendant's rights under the confrontation clause is constitutional error and therefore presumed prejudicial. McDaniel, 83 Wn. App. at 187. Reversal is required unless the State proves beyond a reasonable doubt that the error was harmless. Constructional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

Here, the State's case as what to transpired in the motel room rested on MDJ's testimony. Her story changed over time, and many of her claims were not consistent with the other evidence. Her reports of screaming loudly and repeatedly throughout the night were called into question by the absence of any noise complaints at the motel. Her claims that she was strangled multiple times were not consistent with the lack of petechiae. Her complaints of pain at the hospital were offered to corroborate her reports of what happened in the motel room, but the jury never heard she had a motive to lie about those complaints. Without those

complaints, the remaining evidence is not so overwhelming that it necessarily leads to a finding of guilt, and Lawler's convictions must be reversed.

3. LAWLER WAS DENIED HIS RIGHTS TO A FAIR TRIAL AND TO A VERDICT BASED ON THE EVIDENCE BY ARGUMENT AND INSTRUCTION ALLOWING THE JURY TO CONSIDER HIS DEMEANOR AT TRIAL.

Article I, section 22 explicitly recognizes a defendant's rights to appear at trial, present a defense, and testify, establishing a broader right to participate in the proceedings than the Sixth Amendment. State v. Martin, 171 Wn.2d 521, 531, 252 P.3d 872 (2011); U.S. Const. amend. VI; Wash. Const. art. I, § 22. These are rights of "great importance." Id.

The prosecution may not use its closing argument as the platform for asking the jury to draw negative inferences about the defendant's presence at trial. Id. at 535-36. While a jury may draw inferences from a defendant's demeanor when he testifies, it is improper for the prosecution to ask the jury to infer that the defendant's behavior in the courtroom is evidence it may consider against him. Id.; See State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000).

A defendant's demeanor during trial is not evidence. State v. Barry, 179 Wn. App. 175, 178, 317 P.3d 528, review granted, 180 Wn.2d 1021 (2014). A prosecutor may not "comment on a defendant's

demeanor" while in the courtroom, or "invite the jury to draw from it a negative inference about the defendant's character." Klok, 99 Wn. App. at 85.

In Klok, the prosecutor pointed out to the jury during closing argument that the defendant was "the guy who has been laughing through about half of this trial." Id. at 82. The defense did not object to the remark. The Court of Appeals ruled that it was improper for the prosecutor to comment on Klok's demeanor and to imply that the jury should draw a negative inference about his character from his conduct in the courtroom, although without an objection the court found the error harmless. Id. at 85. The court noted that had the defendant objected to the prosecutor's reference to his demeanor and the judge overruled it, the effect would be "legitimizing the improper argument." Klok, 99 Wn. App. at 85. The lack of objection in that case, however, showed that the defense attorney, who would be "acutely attuned to perceive the possible prejudice of the prosecutor's remarks" did not find the argument "unfair or untrue" to the defense. Id.

Like the prosecutor in Klok, the prosecutor in this case sought to bolster the State's case by reference to the defendant's courtroom demeanor. Unlike in Klok, defense counsel objected to this comment on Lawler's demeanor and the suggestion that it was evidence from which the

jury could draw a negative inference. RP 564. Rather than making it clear that Lawler's courtroom demeanor was not evidence and that the reference to it should be disregarded, the court instructed the jury,

> And, members of the jury, as I advised you earlier, what the attorneys say is not evidence in the case. It's up to you as the jury to reach the facts from the evidence you have heard. That includes closing argument here. So whether something is a part of the evidence or is not would be up to you to conclude. Counsel are certainly not to suggest something that they don't believe or think that the evidence did present, but it is up to you to reach those conclusions.

Id. By telling the jury it could consider Lawler's demeanor against him if it concluded that the prosecutor's description was accurate, the court legitimized the prosecutor's improper argument.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 S. Ed. 2d 424 (1965). Because Lawler did not testify, his demeanor was never made part of the evidence at trial, and the jury should not have been permitted to consider it. By instructing the jury it could consider Lawler's courtroom demeanor when he had exercised his right not to testify, the trial court impacted both his privilege against self incrimination and his right to a verdict based solely on the evidence. Because the court's error impacts Lawler's constitutional rights, it is presumed prejudicial and reversal is

required unless the prosecution proves the error is harmless beyond a reasonable doubt. See State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). The State cannot meet that burden.

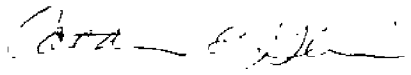
The defense argument was that, while something happened at the motel, as evidenced by injuries to both MDJ and Lawler, MDJ had not told the same story twice. Moreover, her trial testimony was not consistent with the other evidence. While she said she ran into the lobby with Lawler chasing after her, the desk clerk said they came in together. While she testified that she screamed for a half hour at a time throughout the night, the clerk testified that there were no noise complaints. And while she said she was strangled to the point of passing out several times, there was no evidence of petechial hemorrhaging which would be the expected result. RP 571-75. The State argued, however, that MDJ should be believed because she was able to testify while Lawler was staring her down. There is a reasonable likelihood that this improper comment on Lawler's presence and demeanor in the courtroom, unremedied by the court's erroneous instruction, led to Lawler's convictions. The error was not harmless beyond a reasonable doubt, and Lawler's convictions must be reversed.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Lawler's convictions and remand for a new trial.

DATED May 12, 2015.

Respectfully submitted,



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Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Catherine E Glinski - Email: glinskilaw@wavecable.com

A copy of this document has been emailed to the following addresses:

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