NO. 46638-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

COLE RIFE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The court's violation of the appearance of fairness doctrine entitles Mr. Rife to a new trial.

The State argues the appearance of fairness doctrine was not violated. State's Reply at 7. It is true that the fact that a trial court may know the litigants who appear before it does not necessarily mean that the court must recuse itself. However, where that familiar relationship impacts the appearance of fairness, it is the court's obligation to step aside. Here, where the court acknowledged that it should not have presided over Mr. Rife's trial, the appearance of fairness doctrine was violated and Mr. Rife is entitled to a new trial.

While the State focuses on the court's disclosure prior to trial to demonstrate that the appearance of fairness doctrine was not violated, the State does not address the court's statement that it should not have heard the case. It needs to be emphasized that at sentencing, the court regretted hearing Mr. Rife's trial. 7/17/2014 RP 18. The court stated:

> [H]ad I any alternative other than to be the judge presiding over this case, I would not have chosen to do it. I would have had one of the other judges do it. Unfortunately, by the time that I realized just exactly who this defendant was, none of the other judges were available to do the trial, so I'm the one who ended up presiding over it.

7/17/2014 RP 18.

The impact that the court's relationship with Mr. Rife's family had on the court was made clear in this statement. After hearing this statement, it is difficult to argue that a reasonably prudent and disinterested person would not question the impartiality of the court. *State v. Carlson*, 66 Wn. App 909, 918, 833 P.2d 463 (1992). "Where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). This is why the Canon's of Judicial Conduct require judicial officers to recuse themselves from a case where they may be partial, regardless of whether a motion to disqualify is filed. CJC Canon 2.11, comment 2; *see also*, *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 599 (1992).

The appearance of fairness doctrine is in fact not limited to judges who are biased, but rather focuses on judges who may be potentially interested or biased. *City of Hoquiam v. Public Employment Relations Comm'n of Wn.*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. " *State v. Madry*, 8 Wn. App. 61, 68, 504

P.2d 1156 (1972) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The elimination of actual bias from this standard avoids requiring courts to attempt to determine whether they can be fair despite a potential bias, something that all persons, including judges, have a difficult time doing. *See*, Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 Geo. J. Legal Ethics 55, 70 (2000); Jennifer Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?,* 41 Monitor on Psychol. 24, 24 (2010).

While the State cites the court's sentence within the standard range as evidence of the court's fairness, the State also concedes that Mr. Rife is entitled to a new sentencing hearing because the Court "refused to exercise discretion". State's Reply at 46. It is especially difficult to argue that a reasonably prudent and disinterested person would have considered the sentencing hearing to have been fair, especially after the court announced its regret in having heard Mr. Rife's case at all. 7/17/2014 RP 18.

2. It was an abuse of discretion to allow the late filing of the third information.

Courts must scrutinize cases closely where a defendant is forced to choose between the right to a speedy trial and the need to properly

defend against amended charges. *State v. Michielli*, 132 Wn.2d 299, 245, 937 P.2d 587 (1997). While the State may amend at any time, the court must scrutinize late amendments to determine whether a defendant has been treated fairly. *State v. Whitney,* 96 Wn.2d 578, 580, 637 P.2d 956 (1981); *see also* CrR 8.3. The failure of the prosecutor to speak to his witnesses until immediately prior to trial and then amend the information to add new and unrelated charges against Mr. Rife resulted in a Hobson's choice for Mr. Rife, between asking for a continuance and having an attorney who was unprepared. *State v. Sherman,* 59 Wn. App. 763, 769, 801 P.2d 274 (1990). Instead, the court should have granted Mr. Rife's motion for severance, so that he could have fully investigated the new charges while defending himself against those charges he was prepared to face.

The State is incorrect in stating Mr. Rife did not object to the mismanagement at trial. In fact, Mr. Rife made a clear objection to the amended information. 1 RP 5. Rather than seeking dismissal, he sought a severance so that the original charges could be tried within speedy trial and the new charge could be addressed after he was prepared. 1 RP 9. Mr. Rife was entitled to understand the charges he was facing. The

failure of the State to inform him of these charges in a timely manner should result in reversal.

The court should also reject the argument the original information contained sufficient fact for Mr. Rife to prepare for trial on uncharged acts. Instead, the information alleges "Crump also reported Cole called him and apologized for his actions." CP 3-4. There was no reason to believe that this was tampering. Mr. Rife was not required to anticipate every possible charging decision the State could have made and prepare for it and failure to give proper notice left him without adequate time to prepare for the new charge. *State v. Jones*, 26 Wn. App. 1, 6, 612 P.2d 404 (1980).

3. There is no indication Mr. Rife was present during when jurors were selected in an off the record bench conference.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796, 799-800 (2011). The right to be present extends to voir dire and the jury selection process. Id. at 883-84. There is no indication or reason to believe that he was part of this process and every indication that the selection process was conducted in a way that did not include him. 1 RP 39. The process did not take place in open court and there is

no indication that counsel traded the strike sheet between each other while sitting at their desks in a way in which Mr. Rife could have participated. CP 82-83. Instead, it appears the court held a private bench conference and no evidence suggests Mr. Rife participated in it. 1 RP 39.

The State has the burden to demonstrate beyond a reasonable doubt that this error was harmless. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). With no indication Mr. Rife was present during the selection process, this Court must remand for a new trial.

4. Because no record of challenges to the jury pool exists, the right to a public trial was violated.

The Supreme Court recently issued *State v. Love*, which held that for cause challenges at a bench conference and peremptory challenges on a written list does not constitute a closure. 183 Wn.2d 598, 354 P.3d 841, 846 (2015)[1]. Importantly, while challenges in both *Love* and this case were made in a bench conference, the selection process in *Love* was made in the presence of the court reporter so that it could be reviewed later. *Id.* at 843.

[1] Citations are made to P.3d because there is no pagination yet in Wn.2d.

Here, no such record exists. 1 RP 39. Instead, the court went off the record and any conversations which might have occurred between the attorneys cannot be reviewed. This is an important distinction and is at odds with the purpose of the rule. *State v. Brightman,* 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (purpose of the rule is to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury).

Because the right to a public trial is only overcome where there is an overriding interest that is based upon findings closure was essential and narrowly tailored, this Court should reverse. *See, State v. Sublett*, 176 Wn.2d 58, 70, 292 P.3d 715 (2012). Unlike Love, where it is possible to determine whether the rights of an accused person were violated, where there is no record, this is not possible. This is structural error and because this Court is not able to review the unpreserved record of the challenges in Mr. Rife's case, it should reverse. *State v. Wise*, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012).

5. There is insufficient evidence of attempted burglary in the first degree.

Intent to commit a crime inside the burglarized premises is an essential element of burglary in the first degree. RCW 9A.52.020.

Intent may be inferred only where the conduct of the defendant is "plainly indicated as a matter of logical probability." *State v. Johnson*, 159 Wn. App. 766, 774, 247 P.3d 11 (2011). Even where a defendant may be acting unlawfully within a building, this behavior may not lead to sufficient criminal intent to establish a burglary. *See e.g., State v. Woods*, 63 Wn. App. 588, 592, 821 P.2d 1235 (1991) (evidence insufficient where two boys found trying to kick in door of one of their former apartments, claiming they only entered unlawfully to look for a rain coat).

While the State argues sufficient evidence exists to establish Mr. Rife intended to commit a burglary, the facts do not bear this out. Whether Mr. Rife was permitted to be in the house prior to the assault is inconsequential to the analysis. The State's witnesses made clear that Mr. Rife and his friends were asked to leave the house and they did. 1 RP 88. The record further indicated that no conflict occurred within the house and that they parties were "calm at that point." 1 RP 89. No evidence contradicted that Mr. Rife and his friends left the house when asked. 1 RP 89, 1 RP 95, 1 RP 177, 1 RP 195.

Considerable evidence established that a fight occurred outside and at least one of the State's witnesses made clear Mr. Rife said at one

point "come outside and fight me." 1 RP 136. No evidence suggested Mr. Rife ever attempted to return to the house. While a number of witnesses testified that there was banging on the door after the fight began, they also testified this was because Mr. Crump was injured and needed assistance. 1 RP 101, 142, 198. No evidence established Mr. Rife ever tried to get back inside the house once the fight began.

The State argues that the words between Mr. Rife's puffing of his chest, using profanity and his entreaty to fight Mr. Smolko establishes his intent to commit a burglary. Clearly, this testimony established his intent to commit an assault and even to commit an assault outside the residence at 512 Maple Street. It also demonstrates his lack of intent to commit a burglary. It is important to emphasize that at no time during these altercations did Mr. Rife attempt to enter the house. Instead, these facts would indicate a lack of intent to commit a burglary. See, 1 RP 164, 173, 174.

Each of the witnesses the State references make clear that Mr. Rife did not intend to commit a burglary but rather intended to fight someone *outside* 512 Maple Street. Mr. Burk testified that "they asked us to leave, and we left and then we were outside the house." 1 RP 88. Mr. Atchinson told the jury Mr. Rife or another person yelled at them

to "Come outside." 1 RP 137. Ms. Huff testified that she did heard someone say "If you want to do this fight, let's fight." 2 RP 158. While her timeline is significantly different from all of the other witnesses, she also testified that approximately 15-30 minutes elapsed between when there was banging on the door and when the fight took place. 2 RP 157. Mr. Reopelle said that there was "mutual shoving on the porch" after Mr. Rife and his friends had gone outside. 2 RP 170. While Mr. Mr. Smolko stated that he believed Mr. Rife was trying to get into the house "as far as I was concerned," he also stated that Mr. Rife was involved in a "verbal back and forth" with Mr. Reopelle when they were both outside. 2 RP 174, 175. He testified that after they left the house, "they were down the street" and that is when he heard yelling. 2 RP 178. He did not witness the fight nor was he able to say why there was banging on the door. Those witnesses who did see the fight testified the later banging on the door was in order to get assistance for Mr. Crump. 1 RP 101, 1 RP 142, 1 RP 198.

There is a fundamental difference between intending to commit a crime outside a house and intending to enter the house in order to commit a crime. Because the State only established the first and not the second, the State has failed to establish Mr. Rife intended to commit a

burglary. This Court should find insufficient evidence and dismiss this charge.

6. The prosecutor committed misconduct[2] by invading the province of the jury, testifying as to facts not in evidence, vouching for witnesses and shifting the burden to the defense.

"'[A prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.'" Hon. Alex Kozinski, Criminal Law 2.0, 44 Geo. L.J. Ann. Rev. Crim. Proc xxii (2015) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). Judge Kozinski further points out that there "are distressingly many cases where such [prosecutorial] misconduct has been documented" and cites *The Open File Blog* and the Center for Prosecutorial Integrity.[3] Our Supreme Court has made clear a "'[f]air trial' certainly implies a trial in which

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[2] The State has argued that this Court adopt the term "error" rather than "misconduct" when describing "prosecutorial misconduct." This argument has been rejected by the Supreme Court and should not be adopted here. *State v. Ish*, 170 Wn.2d 189, 195 fn. 6, 241 P.3d 389 (2010) ("While certainly some errors are unintentional and some instances of prosecutorial misconduct are more egregious than others, we decline to start drawing fine lines between error and misconduct.")

[3] The Open File Blog, http://www.prosecutorialaccountability.com/ (chronicling nationwide instances of prosecutorial misconduct) (last visited 10/1/15); Registry Database, Center For Prosecutor Integrity, http://www.prosecutorintegrity.org/registry/database/ (last visited 10/1/15).

the attorney representing the State does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011).

When the prosecution began his cross examination of the defense case with an improper question, he set a tenor for the rest of his case. 2 RP 233. By asking whether Mr. Rife's brother had seemed to see something that "no one else saw", he invaded the province of the jury by asking the witness whether other witnesses were lying. *State v. Casteneda–Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, review denied, 118 Wn.2d 1007, 822 P.2d 287 (1991).

Had this been his only improper comment, the error would have been harmless, but the prosecutor then attempted to minimize the punishment faced by Mr. Rife by suggesting Mr. Burk had not, when charged as a co-conspirator, faced a prison sentence for his conduct. *See e.g. Caldwell v. Missippi*, 472 U.S. 320, 329-30, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). By stating in front of the jury that Mr. Burk had not been facing a prison sentence, when he certainly would have had he chosen to go to trial like Mr. Rife and suggesting Mr. Rife was not facing a prison sentence, the State improperly misled the jury. The

appropriate place for such an argument would have been outside the presence of the jury, so that they would not be misled about the sentence either Mr. Burk or Mr. Rife were facing. Instead, by testifying through his objection that Mr. Burk was not facing a prison sentence, the State improperly influenced the jury's verdict.

During closing, the prosecutor then committed incurable misconduct by vouching for the testimony of Mr. Burk. While it would not have been improper to state that the evidence established Mr. Burk would have been guilty, it is disturbing that the State then discussed that Mr. Burk had an attorney who advised him to take a deal. 3 RP 474. There are no circumstances where the suggestion that Mr. Rife should have also taken a deal because "these guys both are guilty of Second Degree Assault" is proper. 3 RP 474. This misconduct resulted in improper vouching, an impermissible shift of the burden and impugned the role and integrity of defense counsel. *See State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014).

In their own, each of these instances of misconduct warrant reversal. Taken cumulatively, this Court should find that the misconduct entitles Mr. Rife to a new trial. *State v. Weber*, 159 Wn.2d 252, 149 P.3d 646 (2006). Because these acts of misconduct require

prejudiced Mr. Rife and affected jury's verdict, he is entitled to a new trial.

7. Defense counsel was ineffective for failing to object when the state elicited improper evidence during testimony and for failing to object to improper comments during closing argument.

The error created by the misconduct entitles Mr. Rife to a new trial. Should the court find the misconduct was curable, Mr. Rife is entitled to a new trial because his counsel failed to object to the State's argument. No legitimate strategy existed for failing to object to the questions the State posed to Mr. Burk that he had pled guilty upon the advice of counsel and that he had pled guilty because his attorney had advised him to do so. 3 RP 405, 474.

The arguments made by the State that Mr. Burk had pled guilty upon the advice of counsel were improper. *Ish*, 170 Wn.2d at 196. Suggesting that Mr. Rife should have also pled guilty impugned the integrity and the role of defense counsel. *Lindsay*, 180 Wn.2d at 431. The law is clear that making such statements is improper and no conceivable legitimate tactic explains why they were not objected to. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The failure to object to the prosecutor's statements falls below an objective standard of reasonableness. Because these statements and the testimony

of Mr. Burk was critical to the State's case, the failure to object also resulted in prejudice to Mr. Rife. As a result, he is entitled to a new trial.

8. The jury was not properly instructed upon the law of self-defense.

When Mr. Rife properly raised the issue of self-defense it became an element of the crime which the State had to prove beyond a reasonable doubt. *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977). The jury instructions must more than adequately convey the law. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), *abrogated in part by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). The failure to properly instruct the jury on Mr. Rife's duty by using jury instructions inapplicable in this case and by denying Mr. Rife's request to have instructions relating to the facts of the case did not adequately convey the law and Mr. Rife is entitled to a new trial. Mr. Rife specific requests that the court instruct the jury on jury on the lawful use of force (WPIC 17.02), actual danger (WPCI 17.04), and the duty to retreat (WPIC 17.05) would have adequately conveyed to the jury Mr. Rife's duties and the State's burden. The failure to properly instruct the jury on these instructions requires the Court to order a new trial.

The error was not cured by instead offering to instruct the jury on the necessity defense for justifiable homicide. WPIC 160.05. Instead, where there is supporting evidence to give instructions on a party's theory of the case, it is reversible error when the refusal prejudices the party. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010), *citing Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266–67, 96 P.3d 386 (2004). Here, there was considerable dispute as to how the fight got started and whether Mr. Rife had acted in self-defense when he fought with Mr. Crump. Mr. Rife established he was in imminent fear of harm, his belief was objectively reasonable and he exercised no greater force than was necessary. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). There was sufficient evidence to warrant a self-defense instruction consistent with the assault statute. Providing WPIC 16.05 was insufficient to satisfy this standard under the facts of this case.

9. The court abused its discretion at sentencing by refusing to consider a sentence below the standard range.

While the State agrees that Mr. Rife is entitled to a new sentencing hearing, it is important to emphasize that his right to a new sentence is also consistent with recent decisions of the Supreme Court. *See, State v. O'Dell*, --- Wn.2d ---, No. 90337-9, 2015 WL 4760476, at

*9 (Wash. Aug. 13, 2015) (We hold that a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is). In addition to sentences being upheld for youthfulness, sentences have also been upheld for "failed defenses", including self-defense. *See State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993); *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). The illustrative list of factors a court may consider also include a good faith effort to compensate the victim of the criminal conduct for any damage or injury sustained. RCW 9.94A.535(1)(b). All of these factors were present in Mr. Rife's case and entitled him to have the court consider a sentence below the standard range.

Because the court abused its discretion in failing to consider a sentence below the standard range, Mr. Rife is entitled to a new sentencing hearing. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); *State v. Garcia-Martinez*, 88 Wn. App 322, 330, 944 P.2d 1104 (1997).

B. CONCLUSION

The errors committed at the trial and sentencing of Mr. Rife require reversal. Mr. Rife's conviction should be reversed and a new trial ordered. In the alternative, a new sentencing hearing should be ordered.

DATED this 6th day of October, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. COLE RIFE, Appellant.	)	NO. 46638-4-II

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