Supreme Court No.: 96017-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DAVID MORGAN,

Respondent

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The State's petition for review of the Court of Appeals' unpublished decision should be denied because the court conducted a straightforward analysis of the "plain view" exception and the State misstates the record when it claims the court made a factual error in conducting its analysis of the "exigent circumstances" exception. The State fails to present any valid basis for review under RAP 13.4(b).

B. ISSUES PRESENTED

1. The State seized Mr. Morgan's clothing from his hospital room without a warrant. At the resulting suppression hearing the State presented one witness. This officer who testified did not make the decision to seize the clothing and could provide no specific information about why it was necessary to do so without a warrant, including what chemicals might have been on the clothing or at what rate those chemicals might dissipate. The Court of Appeals properly determined the plain view and exigent circumstances exceptions did not apply and reversed after finding the State did not, and could not, show the error in admitting the clothing was harmless. Has the State failed to demonstrate review is appropriate under RAP 13.4(b)?

2. The State's misconduct at Mr. Morgan's trial led to a mistrial. Double jeopardy protects the right of the defendant to be tried by the jury

he selected. Under the Court of Appeals' decision in *State v. Rich*,[1] retrial is barred where (1) the defendant did not consent to the mistrial and no emergency justified the mistrial or (2) where the defendant consented but the prosecutor's conduct was committed in bad faith. If the Court decides to grant review, should it also review whether the Court of Appeals failed to comply with its prior holding in *Rich* where Mr. Morgan only requested a mistrial because he had no other choice, and the prosecutor acted in bad faith? RAP 13.4(b)(2), (4).

3. The trial court has the authority to dismiss an action under CrR 4.7(h)(7)(i) and CrR 8.3(b) when a party fails to comply with a discovery order or rule. If the Court decides to grant review, should it also review whether the trial court should have dismissed under the criminal rules rather than permit a retrial?

4. Under the Fifth Amendment, an individual must be informed of his right to remain silent and his right to the presence of counsel during any custodial interrogation. Detectives failed to advise Mr. Morgan of these rights and confronted Mr. Morgan in his hospital room with serious allegations while an officer stood guard outside Mr. Morgan's room. The detectives did not inform him that he was free to terminate the

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[1] 63 Wn. App. 743, 746, 821 P2d 1269 (1992).

questioning. If the Court decides to grant review, should it also review whether the interrogation was custodial under the totality of the circumstances and his statements should have been suppressed? RAP 13.4(b)(4).

5. Under *State v. Smith*,[2] an individual charged with arson is entitled to have the jury instructed that where a building is burned, it is presumed that the fire was caused by accident or natural causes rather than a deliberate act of the defendant. If this Court grants review, should it also review the Court of Appeals' failure to apply *Smith*? RAP 13.4(b)(1), (4).

C. STATEMENT OF THE CASE

David Morgan's home caught fire and his ex-wife, Brenda Welch, was found severely injured in the garage. RP 1599, 1645. Both Mr. Morgan and Ms. Welch were treated at the scene and transported to a hospital. RP 1918, 2003, 2015, 2109. Ms. Welch required surgery and has no memory of what happened that night. 3/29/1RP 169; 2439. Mr. Morgan appeared confused and lethargic. RP 1537. His hair was singed by the fire and he had an abrasion on his forehead. RP 2034.

Detectives questioned Mr. Morgan in his hospital room and he explained he had fallen asleep that afternoon and awoke after being struck

[2] 142 Wash. 57, 57, 252 P. 530 (1927).

in the head twice. RP 1764. He heard a voice, and went downstairs to find the house filled with black smoke and Ms. Welch on fire. RP 1765. He ripped off her sweater and attempted to put out the flames, but was unsuccessful. RP 1765. He ran from the house, only realizing after he was outside that Ms. Welch was not with him. RP 1807, 1827. He attempted to spray the house with water, and at some point realized Ms. Welch might be in the garage. RP 1827-28.

Mr. Morgan appeared to have blood on his clothing and one of his hands. RP 2008, 2980-81. The detectives quickly decided Mr. Morgan was responsible for Ms. Welch's injuries and the fire. RP 100. They directly confronted him with these allegations but did not advise Mr. Morgan of his *Miranda*[3] rights. Without obtaining a warrant, they seized his clothing in the hospital room and months later, performed a blood splatter pattern analysis of the clothing. RP 154, 182; 3/29/16 RP 73. The State charged Mr. Morgan with attempted first degree murder, first degree assault, and first degree arson, and alleged that they were crimes of domestic violence. CP 182.

[3] *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602 (1966).

Ed Hardesty, the deputy fire marshal who investigated the fire, concluded the cause of the fire was undetermined. RP 2140. However, at Mr. Morgan's first trial, the supporting fire investigator, Mikael Makela, testified that he believed the fire was intentionally set. RP 951. Because this testimony directly contradicted the summary of Mr. Makela's opinion the State provided to the defense in discovery, the trial court granted Mr. Morgan's motion for a mistrial. RP 1001. Mr. Morgan was retried after the trial court denied Mr. Morgan's motion to dismiss the charges. RP 1002.

At Mr. Morgan's second trial, the deputy prosecuting attorney argued to the jury that defense counsel had failed to fulfill his obligation to attend witness interviews and that Mr. Morgan's account of what happened that night, as presented to the detectives at the hospital, failed to answer all of the questions raised by the State's case. RP 2802, 2805. Mr. Morgan objected to these statements, but the trial court overruled his objections. RP 2802, 2805.

When deciding how to instruct the jury, the trial court denied Mr. Morgan's request for an accidental fire instruction. RP 2649. The court also instructed the jury that it need not be unanimous as to the means by which Mr. Morgan committed first degree arson. CP 81.

The jury found Mr. Morgan guilty as charged. CP 58-60, 62. The Court of Appeals reversed after finding evidence of Mr. Morgan's

clothing should have been suppressed and was improperly admitted at trial. Slip Op. at 1.

D. ARGUMENT

1. The State has failed to establish a basis for review.

Mr. Morgan's clothing was seized at the hospital without a warrant. The trial court rejected the State's argument that the "plain view" exception applied and the Court of Appeals agreed. RP 179-81; Slip Op. at 27.

The State argues this Court should grant review to evaluate whether, under the plain view exception, the discovery of evidence must be inadvertent, and the incriminating nature of the evidence must be immediately apparent. Petition at 1. The State's petition ignores the facts of Mr. Morgan's case and provides no valid basis for review.

a. As the Court of Appeals properly found, the facts presented by the State at the CrR 3.6 hearing did not demonstrate the "plain view" exception applied.

The evidence presented at the CrR 3.6 hearing in no way satisfied the plain view exception. *See* Slip Op. at 26 (noting that no authority had applied the plain view exception under the factual pattern presented in Mr. Morgan's case). Only one witness, Officer Christopher Breault, testified at the suppression hearing. Slip Op. at 18. Officer Breault did not make the decision to seize Mr. Morgan's clothing, which had been placed in

"several plastic shopping like bags" in Mr. Morgan's hospital room. RP 154; Slip Op. at 26. Instead, Officer Breault "testified he may have been directed by other officers – none of whom testified at the hearing – to seize the bag." Slip Op. at 26. His testimony revealed "that instead of making the independent decision to seize incriminating evidence in plain view, he assisted another officer who came to collect the clothing in a special arson bag." Slip Op. at 26.

The State does not contest the Court of Appeals' recitation of the facts presented at the CrR 3.6 hearing. Petition at 8. Because the officer who made the decision to seize Mr. Morgan's clothing did not testify, the facts presented at the CrR 3.6 hearing did not show what that officer knew or observed before making his decision. *See* Slip Op. at 26. Thus, even if the State were correct in its argument that the plain view exception does not require the discovery of the evidence be inadvertent or that the officer immediately know the evidence is incriminating, the facts relevant to this analysis were not presented at the suppression hearing. Review is not warranted under these circumstances.

b. <u>The Court of Appeals properly applied the law when evaluating the "plain view" exception.</u>

In addition, the State's analysis is misguided. It argues the Court of Appeals was wrong to rely on the language in *State v. Hudson*, 124 Wn.2d

107, 115, 874 P.2d 160 (1994), to find "the incriminating character of the evidence must be immediately apparent." Petition at 10; Slip Op. at 27. It claims the analysis was different in *Hudson* because that case involved this Court's analysis of the "plain feel" doctrine. Petition at 10. But the standard in *Hudson* was no different from the standard articulated in this Court's plain view cases.

In each instance, the Court requires the nature of the evidence be immediately apparent to the officer, either by sight or touch. *See, e.g. State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005). As the Court of Appeals properly determined, the nature of the evidence was not immediately apparent to Officer Breault because the clothing was bagged in opaque shopping bags and Officer Breault had detected no odor of gasoline or other accelerant coming from the bags. Slip Op. at 27.

Similarly, the State's argument that the "inadvertence" requirement of the plain view exception is no longer required under article I, section 7, relies on an unpublished decision that mischaracterizes this Court's decision in *State v. O'Neill*, 148 Wn.2d 564, 582, 62 P.3d 489 (2003). *See*

Petition at 6 (citing *State v. Bunn*, 197 Wn. App. 1004, 2016 WL 7109125 (2016)).[4]

In its unpublished decision in *Bunn*, the Court of Appeals stated this Court had "omitted the inadvertent discovery requirement from its analysis when it applied the plain view exception to the warrant requirement under article I, section 7" in *O'Neill*. 197 Wn. App. 1004, 2016 WL 7109125 at *5. In fact, in *O'Neill* this Court actually stated: "The State does not argue for a different analysis under the state constitution than applies under the federal constitution, and accordingly we apply the 'plain view' analysis that applies under the federal constitution." 148 Wn.2d at 582. This unequivocal statement cannot be reconciled with the analysis is *Bunn* or the State's argument. The State's claim is meritless and review is not warranted.

c. <u>The State misquotes the Court of Appeals' opinion in order to claim the court made a "serious factual error" in evaluating the "exigent circumstances" exception.</u>

The Court of Appeals relied on its prior decision in *City of Seattle v. Pearson*, 192 Wn. App. 802, 369 P.3d 194 (2016), to find the "exigent circumstances" exception did not apply to the unlawful seizure of Mr.

[4] The State also relies heavily on *State v. Myers*, but in *Myers* the court stated the inadvertent discovery of the evidence was a requirement of the plain view doctrine. 117 Wn.2d 332, 346, 815 P.2d 761 (1991); Petition at 6-8.

Morgan's clothing. Slip. Op. at 21. It found the State presented no evidence of what chemicals it suspected might be on the clothing or what the dissipation rates of those chemicals might be. Slip Op. at 23. In addition, it found the State could have easily obtained a telephonic warrant before seizing the clothing. Slip Op. at 22-23. The court's analysis was thoughtful and correct, and the State acknowledges the court applied the correct legal standard. Slip Op. at 21-25; Petition at 12.

Instead, the State argues the court made a factual error when it found Mr. Morgan was "constantly in the presence of police officers" during the time he remained in the hospital room with his bagged clothing. Petition at 13. However, while making this claim the State also concedes the Court of Appeals actually stated Mr. Morgan "was *almost* constantly" in their presence. Petition at 12 (emphasis added).

As the State explains, the officers occasionally stepped out of the room so that medical personnel could attend to Mr. Morgan. Petition at 13. Presumably this is why the Court of Appeals stated Mr. Morgan was "almost constantly" in the officers' presence rather than "constantly" in the officers' presence. *See* Slip Op. at 23, 25. In general, it is not this Court's role to resolve a petty factual dispute, but in this instance the claimed "serious factual error" does not even exist. This Court should deny the State's request for review.

2. If the Court grants review, it should grant review of all of the issues presented in Mr. Morgan's appeal.

a. The prohibition against double jeopardy and criminal rules required dismissal of the charges against Mr. Morgan following the mistrial.

The State repeatedly and intentionally elicited from one of its experts that the fire at Mr. Morgan's home was the result of a deliberate act, despite not revealing this opinion to the defense in discovery, as required by CrR 4.7(a)(2)(ii). RP 950-51; Slip Op. at 10-11.

Mr. Mikala further testified that he had informed the prosecutor of this opinion several months before trial and had spoken with the prosecutor about this conclusion "maybe three or four times." RP 951-52.

The prosecutor offered two explanations for his behavior, both of which were false. First, the prosecutor claimed the State provided the required discovery to the defense. RP 957-58. When this claim was disproven, the prosecutor filed an affidavit under penalty of perjury asserting that, "in the flow of direct examination," he "asked a "concluding question" that "was sloppy, inartful, unfocused" and had "elicited far more" than he had innocently intended. CP 152. As the trial court found, the record revealed the prosecutor's self-serving claim was untrue. RP 999.

The court granted the defense's request for a mistrial but denied Mr. Morgan's subsequent motion to dismiss the charges, allowing the State to retry him. RP 954, 1000-02. On appeal, the question of whether the State committed misconduct is undisputed, but the Court of Appeals declined to reverse and dismiss after failing to apply the reasoning it previously articulated in *State v. Rich*, 63 Wn. App. 743, 746, 821 P2d 1269 (1992); Slip Op. at 12-15.

Double jeopardy protects the right of the defendant to be tried by the jury he selected. *State v. Juarez*, 115 Wn. App. 881, 887, 64 P.3d 83 (2003) (citing *State v. Jones*, 97 Wn.2d 159, 162, 651 P.2d 708 (1982)). Under the Court of Appeals' prior decision in *Rich*, the Court must determine whether the defendant consented to the mistrial in order to evaluate whether dismissal is required. *Id*.

In *Rich*, the defendant failed to initially appear for his trial and the court ordered the parties to proceed over defense counsel's objection. 63 Wn. App. at 745. Mr. Rich appeared after the State rested its case, and defense counsel moved to dismiss on the grounds that the State had failed to prove the identity of the person who committed the alleged crime. *Id*. at 746. The trial court forced Mr. Rich to choose between a mistrial or permitting the State to reopen its case. *Id*. Mr. Rich resisted both options and the trial court granted a mistrial sua sponte. *Id*.

This Court found Mr. Rich was faced with a "Hobson's Choice," meaning no actual choice at all, because allowing the State to reopen its case would clearly prejudice his prospects for acquittal. *Id.* at 748. It held that "[h]is failure to select either of two unfavorable options cannot be considered consent to the declaration of a mistrial." *Id*. Similarly, here, Mr. Morgan moved for the mistrial, but he did so only because his other option was to proceed with a jury that the State had irreparably prejudiced. The State's misconduct forced him to choose between giving up his right to have his trial completed by the particular tribunal he had selected, or permitting the State's actions to prejudice his prospects for acquittal. As in *Rich*, Mr. Morgan was faced with no genuine alternative.

The Court of Appeals distinguished *Rich* because Mr. Rich refused to consent to a mistrial. Slip Op. at 13. But, at its core, the issue in Mr. Morgan's case was no different. Like *Rich,* Mr. Morgan faced an impossible choice. Because Mr. Morgan had no option but to request the mistrial, retrial is barred unless "manifest necessity" prompted the court's ruling. *Juarez*, 115 Wn. App. at 889. However, the State cannot commit misconduct and then claim its own actions created a "manifest necessity." *Id*. Because the State's actions, rather than an emergency, necessitated the discharge of the jury, retrial was barred under the Court of Appeals' prior decisions. *Rich*, 63 Wn. App. at 748; *Juarez*, 115 Wn. App. at 889.

In addition, because the State's conduct was outrageous and Mr. Morgan was prejudiced by the loss of the tribunal he selected, reversal was also required under CrR 4.7(h) and CrR 8.3(b). *See* Op. Br. at 10-18.

If this Court grants review of the State's petition, it should also grant review under RAP 13.4(b)(2) and (4) because the dismissal of the charges was required under the prohibition against double jeopardy and the criminal rules.

b. Mr. Morgan's statements to the detectives should be suppressed because they did not advise Mr. Morgan of his *Miranda* rights and the totality of the circumstances demonstrates the interrogation was custodial.

The police must inform a suspect of his right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602 (1966); *State v. Richmond*, 65 Wn. App. 541, 544, 828 P.2d 1180 (1992); U.S. Const. amend. V; Const. art. I, § 9. The Court of Appeals determined suppression of Mr. Morgan's responses during the interrogation in his hospital room was not required because he was not in police custody at the time. However, in reaching this decision, the Court of Appeals misconstrued the holding of *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008). Slip Op. at 33.

The Court of Appeals found the totality of the circumstances test presented in *Craighead* inapplicable because in *Craighead* the interrogation took place in the home.[5] Slip Op. at 33. However, these factors are not limited to an evaluation of an interrogation that takes place in a home. The *Craighead* court found they were appropriate for evaluating the "totality of the circumstances" to determine whether an interrogation "effected a police-dominated atmosphere," in a location outside of a police station. *Craighead*, 539 F.3d at 1083-84. In fact, the court noted an interrogation in the home is *less* likely to be deemed custodial, as opposed to an unfamiliar environment outside of the police station, because the element of compulsion "is less likely to be present where the suspect is in familiar surroundings." *Id*. at 1083.

Here, multiple armed officers were present during the interrogation. Two conducted the interrogation while one stood immediately outside the hospital room door. RP 73, 76, 97, 118, 123. The detectives quickly suspected Mr. Morgan was criminally responsible for his ex-wife's injuries but rather than terminate the interrogation, they

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[5] Under this test the relevant factors are: (1) the number of law enforcement personnel present and whether they were armed; (2) whether the individual was restrained by force or threats; (3) whether the individual was isolated from others; and (4) whether the individual was informed he was free to leave or terminate the interview. *Craighead*, 539 F.3d at 1082-88.

questioned him Mr. Morgan in an increasingly confrontational manner and contacted the on-duty homicide deputy prosecutor to determine how best to proceed. RP 100, 102-03.

Mr. Morgan was also completely isolated in the hospital. Even when medical staff were allowed access to Mr. Morgan, they did so only with the detectives' permission, further contributing to a police-dominated atmosphere. *See Craighead*, 539 F.3d at 1083-84.

Finally, the Court of Appeals improperly disregarded the fact that Mr. Morgan was tethered to medical equipment that made it difficult for him to get out of bed without assistance. CP 13 (Finding of Fact 12). While this Court has not determined whether medical constraints may be considered when determining whether an individual is in custody, other jurisdictions have found that they may. *See e.g., State v. O'Loughlin*, 270 N.J. Super 472, 485-86, 637 A.2d 553 (1994) (suspect in custody where she was not physically restrained but told to "wait" at the hospital); *People v. Turkenich*, 137 A.D.2d 363, 367, 529 N.Y.S.2d 385 (1988) (concluding "the hospital interrogation was conducted in an atmosphere and in physical surrounding which were inherently coercive").

Here the atmosphere in Mr. Morgan's hospital room was coercive. Multiple armed officers were present in a small room, an officer was stationed outside Mr. Morgan's door, he was in bed tethered to medical

equipment, and the detectives directly accused him of attempting to kill his ex-wife. All of these facts created a custodial, police-dominated atmosphere. *See Craighead*, 539 F.3d at 1083-84. This Court should accept review under RAP 13.4(b)(4).

c. The trial court committed reversible error when it denied Mr. Morgan's request to instruct the jury it must presume the fire was the result of an accident or natural causes.

This has held that reversal is required where the trial court refuses to instruct the jury that, when a building is burned, it is presumed the fire was caused by accident or natural causes rather than by an intentional act of the accused. *State v. Smith*, 142 Wash. 57, 59, 252 P. 530 (1927). Here, Mr. Morgan requested this instruction and the trial court denied it, erroneously relying on the fact no pattern instruction was available to deny Mr. Morgan's request. RP 2648; *See State v. Zimmerman*, 130 Wn. App. 170, 182-83, 121 P.3d 1216 (2005) (holding that despite the Washington Supreme Court Committee on Jury Instructions' recommendation against the instruction at issue, the instruction was properly given because it was an accurate statement of the law). Instead, it claims the holding in *Smith* is limited to those cases "in which there is substantial evidence of accidental causation." Resp. Br. at 51.

The Court of Appeals refused to reverse in the absence of "evidence in the record that would support the presumption that the fire

was of accidental or natural causes." Slip Op. at 35. But as Mr. Morgan explained in his opening brief, cases that have limited this Court's holding in *Smith* have done so in error. *See State v. Kindred*, 16 Wn. App. 138, 140-41, 553 P.2d 121 (1976); *State v. Picard*, 90 Wn. App. 890, 903, 954 P.2d 336 (1998); Op. Br. at 53-55. Indeed, *Smith* warned against the dangers of withholding the instruction in any case where the State sought to prove the cause of the fire, explaining that the trial court should not examine the sufficiency of the evidence first. 142 Wash. at 58. As the court held, "[t]here is always a presumption that a fire is of accidental origin where the origin is a *contested* issue." *Id.* (emphasis added).

Pursuant to this Court's holding in *Smith*, because Mr. Morgan disputed the origin of the fire, he was entitled to the instruction on the presumption. *Smith*, 142 Wash. at 58. This Court should accept review under RAP 13.4(b)(1) and (4) because the Court of Appeals' decision conflicts with *Smith*.

d. Mr. Morgan was denied a fair trial when the deputy prosecutor shifted the burden of proof to Mr. Morgan and impugned defense counsel during closing argument.

A prosecutor is obligated to ensure a defendant's right to a fair trial is not violated. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The

prosecutor failed in his duty when he informed the jury, over defense objection, that defense counsel did not appear at witness interviews and Mr. Morgan's theory of the case failed to answer all of the jury's questions. RP 2802, 2805.

The Court of Appeals did not reach this issue because it reversed Mr. Morgan's convictions. Slip Op. at 29. However, if this Court accepts review, it should accept review to determine whether reversal is required due to the State's misconduct during closing argument.

The prosecutor discussed the inconsistencies between Mr. Morgan's statements to detectives and the evidence, but improperly shifted the burden to Mr. Morgan when he told the jury, "[t]he one question that [Mr. Morgan's] explanation that you've heard does not provide for us, was this self-inflicted?"

This statement to the jurors, and the prosecutor's statements elaborating on this question, suggested they should find Mr. Morgan guilty because his statements to police failed to explain what happened that night. Because a defendant has no duty to present evidence, the prosecutor's statements to the jury constituted misconduct. *See State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011); *United States v. Preston*, 873 F.3d 829, 843 (9th Cir. 2017).

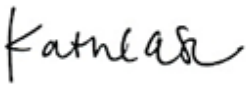
In addition, the prosecutor's statement to the jury that defense counsel had failed to show up for the witness interviews suggested to the jury that defense counsel had failed to fulfill his investigatory obligations when he did not attend witness interviews. This statement both shifted the burden to Mr. Morgan and maligned defense counsel. *See State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014) (prosecutorial statements that malign defense counsel are impermissible). This Court should accept review. RAP 13.4(b)(4).

F. CONCLUSION

The State has failed to satisfy the criteria of RAP 13.4(b) and its petition for review should be denied. If this Court grants review, it should also review of the other issues presented by Mr. Morgan on appeal.

DATED this 24th day of August, 2018.

Respectfully submitted,



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