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FILED  
COURT OF APPEALS  
DIVISION I

No. 64039-9-I

10 APR 16 PM 5:01

STATE OF WASHINGTON

BY \_\_\_\_\_

DIVISION I OF THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

PEI EN WU,

Appellant,

vs.

KEITH MATHEWS,

Respondent.

APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR KING COUNTY

Cause No. 06-2-40509-9KNT

2010 APR 20 AM 10:50

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON

REPLY BRIEF

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ORIGINAL

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u> . . . . .	ii
<u>STATEMENT OF THE CASE</u> . . . . .	1
<u>ARGUMENT</u> . . . . .	1
<b>I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT OVERRULED PLAINTIFF'S OBJECTION DURING DEFENSE'S CLOSING ARGUMENT</b> . . . . .	1
A. <u>Plaintiff properly objected to misconduct during closing.</u> . . . . .	1
B. <u>Defense counsel's conduct constitutes misconduct.</u> . . . . .	3
C. <u>Plaintiff's counsel was incapable of requesting a curative instruction and requesting a curative instruction would have created a redundancy.</u> . . . . .	3
D. <u>Counsel's misconduct was material, not cured, and warrants a new trial.</u> . . . . .	4
<b>II. THE COURT SHOULD HAVE INCLUDED PLAINTIFF'S INSTRUCTION #19</b> . . . . .	4
<u>CONCLUSION</u> . . . . .	6

TABLE OF AUTHORITIES

	<u>Page</u>
<u>STATE CASES:</u>	
<u>Fritsch v. J.J. Newberry's, Inc.</u> , 43 Wn.App. 904, 907, 720 P.2d 845 (1986) . . . . .	2
<u>State v. Anderson</u> , 153 Wn.App 417, 220 P.3d 1273 (2009) . . . . .	2, 3
<u>State v. Boehning</u> , 127 Wn.App 511, 111 P.3d 899 (2005) . . . . .	1

STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in her opening brief.

ARGUMENT

**I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT OVERRULED PLAINTIFF'S OBJECTION DURING DEFENSE'S CLOSING ARGUMENT**

A. Plaintiff properly objected to misconduct during closing.

Plaintiff's counsel preserved the issue presented by defense counsel's closing argument. Counsel's objection was clear and is acknowledged by respondent. See, Respondent's Brief at 14, 16.

Defense counsel's closing argument indeed referenced evidence outside the record. A review of the entire trial transcript reveals no evidence was ever introduced by either side that addressed the discussions That defense counsel reported to the jury that he had with his client.

Referencing evidence outside the record is misconduct. (A prosecutor commits misconduct when he references evidence outside the trial record during his closing argument. See, State v. Boehning, 127 Wn.App 511, 519-523, 111 P.3d 899 (2005).) ("[T]he injection of evidence outside the record during jury deliberations affecting a

material issue in the case constitutes misconduct." Fritsch v. J.J. Newberry's, Inc., 43 Wn.App. 904, 907, 720 P.2d 845 (1986).) The following from State v. Anderson, 153 Wn.App 417, 424, 220 P.3d 1273 (2009), is instructive:

At trial, during closing arguments, the prosecutor explained to the jury:

[T]he purpose of closing argument [is] to take the facts that you heard from the witness stand and fill in the law as it has now been given to you.

The goal of closing argument is to point you toward a just verdict; not just a verdict,.. but a just verdict . . .

4 RP at 308-09. At this point, defense counsel objected to the prosecutor's use of the word "just." 4 RP at 309.

The trial court responded, "I'm going to allow it. It is closing argument."

Id.

This relatively vague objection was sufficient to preserve the matter of misconduct during closing argument for the appellate court's review. In fact, the Anderson court engaged in analysis that separated conduct during closing to those of objected misconduct and those of misconduct not objected to. The above example,

obviously, constituted an objection sufficient for the court to entertain analysis despite its vague nature. See, State v. Anderson, 153 Wn.App at 427-432.

In the instant case, the plaintiff's objection was clear, unambiguous and on point. Objecting to evidence outside the trial record is synonymous to raising the issue of misconduct, albeit more professional choice of language, and is sufficient to preserve the record for appeal.

B. Defense counsel's conduct constitutes misconduct.

Petitioner relies on the authority and argument from its opening brief that defense counsel's conduct was in fact prejudicial misconduct. It is important to note that in its opening memorandum Respondent has failed to articulate any possibility that defense counsel's argument actually was supported by the trial record. See, Brief of Respondent.

C. Plaintiff's counsel was incapable of requesting a curative instruction and requesting a curative instruction would have created a redundancy.

As noted throughout both parties briefs, upon Plaintiff's timely and sufficient objection to

Defense counsel's misconduct referencing matters outside of evidence, the court (1) overruled the objection, and (2) gave a curative instruction. RP 7/7/2009, 92-93.

Because the objection was overruled, logic dictates that short of subjecting himself to misconduct of his own, the court's ruling restricted counsel from requesting a curative instruction. In other words the court's ruling meant in the court's eyes there was nothing to cure. Nevertheless, the court in fact gave a curative instruction. Therefore, Respondent's concerns for a curative instruction were met by the court's sua sponte act.

D. Counsel's misconduct was material, not cured, and warrants a new trial.

In short, Defense counsel's action during closing argument was properly preserved for this court's review, constituted misconduct, and was of such magnitude that Ms. Wu deserves a new trial. See Appellant's Opening Brief.

**II. THE COURT SHOULD HAVE INCLUDED PLAINTIFF'S INSTRUCTION #19**

Petitioner relies upon its opening brief to support this argument. The matter was properly

preserved by Plaintiff's record during the discussion of the court's jury instructions. And the record could not be clearer that the defense expert's testimony included fact supporting the notion that Ms. Wu was in the roadway. See Brief of Petitioner. Under authority cited by Appellant, this was sufficient to require the trial court to utilize Instruction 19 while instructing the jury.

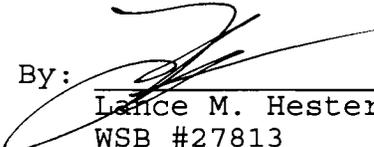
Respondent's reliance on "invited error" is misplaced. Appellant made a clear record taking exception to the court not giving the instruction. Discussing a particular fact that occurred in a certain context during the colloquy does not invoke the "invited error" doctrine. As the court is no doubt aware, invited error occurs when counsel asks the court to include or exclude an instruction that is inconsistent with the law, and then try to argue later that it was error to do so. That was not how things unfolded in the instant case. In fact, by referring to this issue as "invited error," Respondent's argument only suggests that it was error when the court failed to include the instruction.

CONCLUSION

For the reasons cited above and the authority cited herein, Appellant requests the relief requested in its opening memorandum.

RESPECTFULLY SUBMITTED this 16th day of April, 2010.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 16<sup>th</sup> day of April, 2010.

  
\_\_\_\_\_  
Lee Ann Mathews

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