

NO. 65054-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

FILED
APPELLATE DIVISION
COURT OF APPEALS
STATE OF WASHINGTON
JAN 11 11 11 AM '07

STATE OF WASHINGTON,

Respondent,

v.

REGINALD SPEACH

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR.

1. The trial court erred by excluding evidence central the defendant's theory of the case that the allegations were contrived in order to manipulate the complaining witness's foster care placement.

2. The trial court abused its discretion by excluding evidence of Mr. Speach's absence of criminal history or prior arrests.

3. The trial court improperly commented on the evidence and bolstered the credibility of the prosecution's police witnesses.

4. The trial court erred in denying Mr. Speach's motion for new trial where he received constitutionally inadequate representation.

5. The cumulative effect of the errors at trial served to deprive Mr. Speach of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. An accused person is constitutionally entitled to present evidence in support of his theory of defense. Where he contends that the allegations have been contrived in order to manipulate the complaining witness's foster care placement, he sought to present evidence of her earlier misconduct engaged in to produce a similar

result. Did the trial court err in excluding such evidence where it was central to proving the defendant's theory at trial?

2. Persons accused of crimes are permitted by rule, practice and constitutional law to present evidence demonstrating their law abiding nature to rebut the allegations of unlawful conduct. Where Mr. Speech sought to introduce evidence he had never been arrested and had no criminal history to rebut the allegation of his immoral conduct and explain his demeanor when contacted by police, did the trial court err in excluding such evidence?

3. The Washington Constitution bars judges from commenting on the evidence or bolstering the credibility of witnesses. Where the trial judge, prior to a prosecution police witness's testimony, makes supportive references regarding the shooting of four law enforcement officers in an adjoining county the previous day, did the judge's statements constitute a comment on the evidence and violate the appearance of fairness?

4. The state and federal constitutions each separately guarantee the right to counsel in criminal proceedings, but that representation is only adequate if it provides meaningful adversarial testing of the substance of the prosecution's allegations. Where defense counsel, through oversight rather than informed choice, fails to challenge crucial aspects of the State's case with readily

available evidence and argument, has counsel provided constitutionally inadequate representation?

5. Where the cumulative effect of multiple trial court errors serve to deny an accused the right to a fair trial, he may be entitled to relief from his conviction. Did the several errors complained of here serve to deprive Mr. Speech of his constitutional right to a fair trial, requiring reversal of his conviction?

C. STATEMENT OF THE CASE.

Reginald Speech, a retired United States Army veteran and youth football coach, was arrested by Federal Way Police in January 2007, after a report of potential sexual abuse involving a foster child in his home, S.M. (dob 7/5/92).¹ 11/23/09RP 70, 74, 85, 101, 119; 11/24/09RP 10, 38, 43; 12/1/09RP 134-37. At the time, S.M. had lived with Mr. Speech and his wife, Madelynn, in foster care since June 2006, more than six months. 11/24/09a.m.RP 44-45.² Although Mr. Speech was subsequently

¹ Mr. Speech explained that as a result of damage to his knees during his service he had endured a series of surgeries and continues to experience pain. 12/1/09RP 150. He had also been diagnosed with depression and post-traumatic stress syndrome, spending most of his time at home in his room and did not interact with the children. 12/1/09RP 145-46.

² Mrs. Speech is referred to at various times as Madelynn, her first name, Lorraine, her middle name, and Ms. Scott, her maiden name. 11/30/09RP 5.

charged with violating RCW 9A.44.079 based on S.M.'s allegations, a jury found he was not guilty.³ CP 18-20, 97-99, 101.

At the same time, Mr. Speech was also alleged to have communicated with another foster child in his home, T.K. (DOB 8-13-91), for an immoral purpose. T.K. had returned to the Speech home a few months before the allegations as part of a long series of foster and group home placements.⁴ 11/30/09RP 14-17, 27. T.K. alleged that after school one day, in January 2007, she went into Mr. Speech's room and said "Dad, I need to talk about the birds and the bees." 11/30/09 35, 37, 55, 72. During their subsequent conversation, Mr. Speech reportedly asked "sexual questions about my past," and then "[h]e was like, [c]an I hit it?"⁵ 11/30/09RP 36.

When Mr. Speech was contacted by police a few days later, he vehemently denied the allegations of improper conduct. 12/1/09RP 147-48. At the time of his arrest, he provided a statement under oath specifically declaring that "[he] never said anything wrong to [T.K.]." CP 109. "As God is my witness I never

³ S.M.'s allegations arose under suspicious circumstances and were riddled with inconsistencies. 12/2/09RP 37-70 (defense closing argument).

⁴ T.K. had previously lived in the home for almost a year on an earlier placement from the end of 2003 to approximately June 2004. 11/17/09RP 114; 12/1/09RP 67.

⁵ T.K. testified she understood this to be a contemporary colloquialism meaning, "can I have sex with you, when can I hit it? When can I have sex with

touch[ed], talked or anything to them. I love them as if they were my own daughters.” CP 111.

Several witnesses testified on Mr. Speech’s behalf including another former foster child, Lucinda Holland, who described her positive relationship with the Speechs, whom she called Mom and Dad, as well as Mr. Speech’s practice of remaining in his room and not interacting with the children. 12/1/09RP 9-16. DaShawn Jackson, Mr. Speech’s stepson, described his trust in Mr. Speech and Mr. Speech’s practice of remaining in his room. 12/1/09RP 31-36, 53.

Mr. Speech’s wife, Madelynn, described her history working with more than ten foster children, her positive relationship with T.K., the absence of any reports of concern by the children, and the fact Mr. Speech was never alone with the children. 12/1/09RP 59-64, 92, 114-16. Ms. Speech further explained that Mr. Speech stayed in his room during a significant portion of the time at issue because his recent knee surgery required him to use crutches or a cane, which he was reluctant to do. 12/1/09RP 126-28.

Mr. Speech was found guilty of the gross misdemeanor and appeals. CP 99, 131-36.

you.” 11/30/09RP 40. Mr. Speech testified this was a phrase he was not familiar with until these proceedings began. 12/1/09RP 168.

D. ARGUMENT.

1. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF T.K.'s PRIOR INTENTIONAL MISCONDUCT DESIGNED TO EARN A SCHOOL SUSPENSION FOR THE PURPOSE OF ALTERING HER FOSTER CARE PLACEMENT

a. Evidence of T.K.'s prior efforts to manipulate the foster care placement was central to the defense theory. Mr. Speach contended at trial that these allegations had been contrived by T.K. and S.M. in order to achieve a particular result within the foster care system. 11//17/09RP 114-16. Defense counsel therefore sought to present evidence of a similar effort during T.K.'s prior foster placement in the Speachs' home:

[T.K.] was under pressure from her family members to get back with people who were biologically related to her. There was some discussion about ultimate placement.

The CPS was not interested in doing that, and she, Ms. Speach believes that she took a drastic action to get suspended from school because that was part of the contract—if she wasn't in school, she couldn't stay at their home—in order to get transferred to be able to facilitate that.

11/17/09RP 114-15.⁶ Defense counsel then outlined the

⁶ Defense counsel further explained:

We believe all of these things are interrelated. It is my understanding from Mr. Speach, Ms. Speach and Ms. Holland, all talked to her like, what are you doing? If you want to leave, if you wanted to leave we could work it out.

It is my understanding that her caseworker, who I believe is Ms. Weaver, either Mr. Luna or Ms. Weaver had indicated that, no you are in a stable place, we are not going to move you.

relationship to the theory of this case:

Our theory of the case is that these two young women are very, very, very—these two young women are women that have unfortunately grown up in the foster care system and have learned to do whatever it takes in order to make something happen.

My client is indicating that that actually she was told she couldn't leave at this last stage when they were preparing, until my client and Ms. Speach moved.

So we believe that the jury needs to know the whole dynamics of what was going on in the house, and that includes both [T.K.], and [S.M.] for that matter, what was going on both inside and outside of the house, because it informs, being able to judge knowing where they were and what their behavior was informs when they were home, what opportunities my client would have to commit the crimes.

11/17/09RP 115-16. The relationship of the evidence of this prior plan and current motive to fabricate these allegations was also outlined:

It also explains the entire system of how, what motives. And the motives aren't that I didn't like somebody. It's that these young women have been taught very well by the foster care system that, you know, if you are in, if you are being disapproved of or in any sort of trouble, you quickly deflect the attention away to someone else and be able to get yourself as someone who has been hurt, and that's what they do very well.

Then when that destabilized by her getting suspended, that enabled her to be removed. So, that all goes to the fact that this young woman, having been through the system for very, very long—I think Ms. Woo misstates our theory of the case.

11/17/09RP 114-16.

11/17/09RP 115-16.

The trial judge ruled that T.K.'s prior suspension from school and prior attendance were "prior bad acts" which would be excluded at trial. 11/17/09RRP 116;⁷ 11/18/09RP 72. This evidence was both relevant and admissible and its exclusion significantly compromised Mr. Speach's right to a fair trial.

b. The evidence of a prior plan to manipulate their foster placement was relevant to and admissible. Evidence Rule 401 defines "relevant evidence" as:

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably that it would be without the evidence.

In Mr. Speach's case the proffered evidence would have a tendency to show that T.K. could contrive a set of circumstances sufficient to effect her placement within the social welfare system. 11/17/09RP 115-16. There was no reason to exclude this relevant and highly probative evidence which was essential to Mr. Speach's defense against the allegations.

Certainly ER 403, permitting exclusion of some relevant evidence, was not implicated because there was no risk the

⁷ See also 11/17/09RP 90-100 regarding T.K.'s general reputation for dishonesty at school.

probative value of the evidence would be outweighed any unfair prejudice or confusion of the issues. On the other hand, there was no other compelling State interest to balance against sufficient to justify excluding relevant evidence.

The result of this balancing is compelled by the Sixth Amendment and Art 1, sec 22 of the Washington Constitution which each grant criminal defendants the right to present evidence in one's own defense and the right to confront witnesses.⁸ State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). These rights are only limited by the requirement that (1) the evidence must be relevant, and (2) the right to introduce evidence must be balanced against the need to preclude evidence so prejudicial as to disrupt

⁸ The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article 1, sec. 22 (amend 10), provides in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases:....

the fact-finding process. State v. Darden, 145 Wn.2d 612 621, 41 P.3d 1189 (2002). The more essential the witness is to the prosecution's case, the more latitude the defense must be given to explore fundamental elements of the case such credibility and motive to lie. Id. at 619.

The right to present a defense is among the most fundamental components of due process of law. Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967).

The right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies....This right is a fundamental element of due process of law.

388 U.S. at 19. See also State v. Maupin, 128 Wn.2d 913, 924, 913 P.2d 808 (1996); State v. Roberts, 80 Wn.App. 342, 351, 908 P.2d 892 (1996). The right to present a defense is so fundamental that it must take precedence over rules and procedures, which in other instances would govern the admission or exclusion of the evidence. See e.g. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973) (hearsay rule prohibiting impeachment of own witness precluded defendant from examining witness who had confessed to the crime); Rock v. Arkansas, 483 U.S. 44, 97 L.Ed.2d 37, 107 S.Ct. 2704 (1987) (evidentiary

rule excluding post-hypnosis testimony unconstitutionally burdened defendant's right to testify).

A defendant on trial must, therefore, be permitted to present evidence in support of his defense unless the prosecutor can demonstrate a compelling need for exclusion. State v. Reed, 101 Wn.App. 704, 715, 6 P.3d 43 (2000). Where the credibility of the complaining witness is crucial, her potential motive to lie is not a collateral issue. State v. Roberts, 25 Wn.App. 830, 834-35, 611 P.2d 1297 (1980); State v. Whyde, 30 Wn.App. 162, 166, 632 P.2d 913 (1981). Under these circumstances, no State interest could have been compelling enough to exclude this highly probative evidence.

c. Evidence of motive and a prior history of manipulating foster care placement was central to the defense. As counsel indicated, the theory of the defense case was that knowing the girls would not be moved from their current placement while the Speachs remained in Washington, they contrived the allegations in order to accelerate a new placement. 11/17/09RP 114-16. Whyde illustrates the proper application of the evidence rule in this case most effectively. Whyde and his wife managed an apartment building where a tenant alleged rape by Whyde . After they declined to refund her security deposit, the complaining witness

threatened to sue. 30 Wn.App. at 164. The appellate court reversed the trial court's suppression of this evidence noting the ruling prevented the defense from making a record on which to base its contention the rape allegation was fabricated for a financial benefit. Id. at 165-67.

Similarly, evidence of prior conduct such as T.K.'s is specifically admissible for the purpose of proving there was a particular scheme or plan and thereby relevant to prove an element of the defense. Cf ER 404(b); State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). The exclusion in this case, where it was directly relevant to Mr. Speech's theory of defense, was an abuse of discretion requiring a new trial. Darden, 145 Wn.2d at 621; Reed, 101 Wn.App. at 715.

d. The error was prejudicial and requires reversal. In a case where the jury is called upon to evaluate the credibility of two opposing descriptions of the events, the appellate court cannot speculate whether the jury would have weighed the witness' testimony had proper cross examination occurred requires the Court to presume the truth of the report. Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974); Whyde, 30 Wn.App. at 167. Reversal and remand for a new trial is required.

2. TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE OF MR. SPEACH'S LACK OF CRIMINAL HISTORY OR PRIOR ARRESTS.

a. Appellant sought to admit evidence of his lack of criminal history to rebut the allegations. The prosecutor moved in limine to exclude evidence that Mr. Speech had no criminal history on the theory that it was prohibited as "specific instances of conduct" to prove character. 11/17/09RP 101, *citing* ER404(b); State v. O'Neill, 58 Wn.App. 367, 793 P.2d 977 (1990). Mr. Speech argued however that this evidence was relevant both for specific purpose of explaining his demeanor when he was contacted by police as well as the broader issue of his good character as a law abiding citizen who would not commit the unlawful activity alleged. 11/17/09RP 102-03.

The fact that Mr. Speech had never been arrested, let alone shackled to table as he was on this occasion, was central to explaining his conduct in responding to the allegations. 11/17/09RP 102-03. The jury's ability to fairly judge his credibility required a complete explanation of the circumstances, including his unfamiliarity of such an extraordinary situation, and long history of law-abiding behavior. 11/17/09RP 100-05.

The trial judge ruled, however, that evidence of the Mr. Speech's lack of criminal history or prior arrests was irrelevant, unless the police officers testified that he was nervous and "all these sorts of things." 11/18/09RP 50. Rather than risk the admission of this exculpatory evidence, the prosecutor indicated she would not inquire about Mr. Speech's demeanor while he was shackled to a table and interrogated in the early hours of the morning. 11/18/09RP 60.

Nevertheless, Mr. Speech contends the evidence remained relevant and should have been admissible. The evidence of his lack of prior arrests or any criminal history was both independently admissible as background evidence and specifically admissible under ER 404 and ER 405.

b. Lack of criminal history was relevant evidence for the jury's consideration. The admission of this evidence first and foremost is a mere extension of the customary practice of introducing evidence concerning the background of a witness, such as education and employment. O'Neill, 58 Wn.App. at 371 (Forrest, J. dissenting). "Such evidence is routinely admitted without objection, and testimony that an accused has never been arrested is commonly admitted as part of this background evidence." Id.

The relevance of the evidence flows from “the common sense notion that it is helpful for the trier of fact to know something about the defendant’s background when evaluating his culpability.” Id.⁹ The trial court erred, therefore, in excluding Mr. Speech’s testimony regarding his absence of criminal history or prior arrests under this general theory of admissibility.

c. The was also admissible under the more narrow constraints of ER 404 and ER 405. Evidence Rule 404 provides in pertinent part:

(a) **Character Evidence Generally.** Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of his character offered by an accused or by the prosecution to rebut the same[.]

Evidence Rule 405 describes the manner of proof.¹⁰

⁹ As Judge Forrest explained in his dissent:

A defendant’s education, work experience, marital status, church affiliation, none of which are technically relevant to guilt or innocence, are routinely admitted. The reason is that the jury is trying a flesh and blood defendant, not a hypothetical abstraction such as we them to consider in assessing negligence on the reasonable man standard. The arrest history falls easily into this category.

O’Neill, 58 Wn.App. at 371, citing Government of Virgin Islands v. Grant, 775 F.2d 508, 513 (3rd Cir. 1985).

¹⁰ After considerable discussion of the topic, defense counsel ultimately informed the court they would not offer reputation evidence. 11/30/09RP 6. Mr. Speech contends however that the evidence remains admissible as specific

(a) **Reputation.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct.

A defendant may introduce character evidence whenever the evidence tends to prove a character trait that is pertinent to rebut the nature of the charge. See Comment to ER 404; State v. Jackson, 46 Wn.App. 360, 365, 730 P.2d 1361 (1986). In Washington a defendant's law abiding behavior and peacefulness is relevant, and a "pertinent character trait" in cases where specific intent is at issue. Kennewick v. Day, 142 Wn.2d 1, 5-6, 11 P.3d 304 (2001) (holding defendant may offer evidence of his character in order to persuade the jury "that one of such character would not have committed the crime charged"); see also State v. Eakins, 127 Wn.2d 490, 902 P.2d 1236 (1995); State v. Callahan, 87 Wn.App. 925, 943 P.2d 676 (1997).

Judge Forrest explained clearly why this evidence was both relevant and admissible:

instances of conduct under the prosecution's theory and under general principles of admissibility as background information regarding the accused. See O'Neill, 58 Wn.App. at 371-73 (Forrest J. dissenting).

The [O'Neill] majority recognizes the defendant's right to introduce evidence to prove a character trait which is pertinent to rebut the nature of the charge...In my view, the admission is not doubtful because the character of being law-abiding is pertinent to rebut any criminal charge.

....

Being law-abiding is part of good character. If evidence of good character can create reasonable doubt in the minds of the jury, it must be "pertinent" for the purposes of ER 404(a) and therefore admissible.

O'Neill, 58 Wn.App. at 372 (Forrest J. dissenting) (footnotes omitted).¹¹

The relevance was even more acute in Mr. Speech's case because of the nature of the allegation, i.e. communicating with a minor for an immoral purpose. Guilt here specifically turned on the improper and unlawful intent of the accused, requiring proof of an "immoral purpose of a sexual nature." CP 20. The proffered evidence was directly relevant to rebutting this essential element.

[For the same reason] that being a law-abiding citizen is a pertinent trait of character in any criminal trial, it is also my view that it is an essential element of defense in any criminal trial under ER 405(b). Clearly, if being law-abiding is considered an essential element of defense, testimony as to having never been arrested or convicted would be admissible as a specific instance to support the charger train in question.

¹¹ See also United States v. Hewitt, 624 F.2d 277, 279 (5th Cir. 1981) where the court held that evidence establishing the defendant's character as a law abiding citizen is always relevant in a criminal case. Michelson v. United States, 335 U.S. 469, 476, 93 L.Ed. 168, 69 S.Ct. 213 (1948) (holding evidence of law abiding character admissible in bribery prosecution).

O'Neill, 58 Wn.App. at 373 (original emphasis).

Where being law abiding is relevant, it should have been admitted. The fact that Mr. Speech had never had contact with law enforcement was also relevant to explain his initial comments to the officers. 11/17/09RP 102. As counsel argued below, Mr. Speech's interactions and reactions need to be judged as what they were, someone who has never experienced this devastation and otherwise lived an exemplary life. Id. As in this case, where the prosecutor begins its examination with a litany and life story of each officer, this evidence serves to give the jury perspective regarding the most important defense witness.

d. Exclusion of this relevant and admissible evidence was prejudicial to Mr. Speech's ability to obtain a fair trial. Mr. Speech's lack of criminal history and law-abiding nature were relevant and admissible evidence to rebut the allegation he communicated with T.K. for an immoral purpose and give context to his interactions with investigating officers. 1/18/09RP 51-56. Because the prosecution has made an accusation of immorality, it was imperative he be permitted to rebut the charge with the best evidence available. That would be the absence of any such history. See ER 405; State v. Mercer Drummond, 128 Wn.App.

625, 633, 116 P.3d 454 (2005) (Bridgewater J. dissenting) (agreeing with the dissent in O'Neil). Excluding this evidence further hamstrung Mr. Speech's ability to present his defense and impinged on his constitutional rights.¹² Davis v. Alaska, supra. In light of the jury's rejection of the bulk most of the allegations, it is highly probably that this allegation would have been rejected as well had the most pertinent evidence on the point been admitted. Mr. Speech should be provided a new trial at which he can make that challenge.

3. THE JUDGE'S SUPPORTIVE REFERENCES TO LAW ENFORCEMENT WERE IMPROPER COMMENTS ON THE EVIDENCE AND VIOLATED THAT APPEARANCE OF FAIRNESS DOCTRINE

a. The judge's statements improperly bolstered the State's police witnesses. While Mr. Speech's trial was ongoing, on Sunday morning, November 29, 2009, four police officers were shot and killed in Lakewood, Pierce County. When the trial resumed on Monday morning, November 30th, the judge began the proceedings before the jury as follows:

¹²Although excluding crucial evidence in support of the argument i.e. the absence of criminal history, the court did conclude defense counsel could argue in closing that Mr. Speech was "a good guy" 11/18/09RP 62-64. This did not mitigate the prejudice, however, because argument without support in the evidence is meaningless and the jury was specifically encouraged to disregard it. CP 76-77.

Welcome back. I hope you all had a nice Thanksgiving. We had read bad news for the State, four officers being killed yesterday, and the Defense and the Prosecution wanted me to let you know that they share in your mourning.

So we left off with Officer Walsh last week. We interrupted his testimony. He has not been cross examined by the Defense.

So, Officer Walsh, will you please raise your right hand?

....

THE COURT: Please be seated.

Okay, [defense counsel] Mr. Adams, you may cross examine.

11/30/09RP 8-9.

Defense counsel objected to this extraneous interjection of support for the State's witnesses as an improper comment on the evidence and subsequently moved for a new trial. 11/30/09RP 93-94; CP 102-06.¹³

¹³ Defense counsel noted specifically:

The last thing, you Honor, we wanted to note for the record—and it is certainly target gone by.

We would note an objection to the Court's, and we certainly join the Court in concern for the officer who lost their lives in Tacoma over the weekend.

We are, we would not an objection, however, that it was brought to the Jury's attention. The Jury's attention was specifically drawn to that before Mr. Adams' cross examination of an officer, and an examination, which we had respectfully waited for five days before we actually did allow it to be taken out of order.

We would object to it. We believe that it constitutes a comment of the evidence. I didn't object at the time because I believe it would make me look churlish, and I don't wish to do so in front of the jury.

11/30/09RP 93-94.

b. Judges are precluded from commenting on the evidence at trial. An improper judicial comment on the evidence occurs when a reasonable juror hearing the statement in the context of the case would see it as creating an inference of the court's evaluation of a disputed issue. State v. Hansen, 46 Wn.App. 292, 300, 730 P.2d 670 (1986). Such a practice is expressly barred by Art IV, sec 16 of the Washington Constitution which provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). In order to avoid this possibility, courts vigorously enforced the prohibition and presume prejudice where there is a violation. State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995), citing State v. Bogner, 62 Wn.2d 247, 253-54, 382 P.2d 254 (1963). The burden therefore rests on the State to affirmatively show that no prejudice could have resulted from the comment. Lane, 125 Wn.2d at 839

c. The judge's interjection was reasonably perceived as a comment on the evidence. In Mr. Speech's case, the judge contravened this fundamental constitutional precept by effectively implying that the State's police witness and particularly the next witness's testimony was entitled to particular deference on part of the jury and the parties. The expression of support and condolence inevitably served to bolster the witness's credibility in the jury's eyes based on this judicial show of support. In doing so, the judge violated Art. IV, sec 16, by commenting on the evidence being presented by the State's witness which was intended to prohibit "a judge from conveying to the jury his or her personal attitudes toward the merits of the case." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

d. The presumption of prejudice requires reversal. The purpose of this important constitutional provision is "to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." State v. Sivins, 138 Wn.App. 52, 58, 155 P.3d 982 (2007) *citing* State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981). In fact the mere implication of the judge's feelings about a case are sufficient to constitute and impermissible comment on the evidence. State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136

(2006). In Mr. Speech's case the judge's expressions of support, particularly in reintroducing a police witness in this trial, appeared to signal his particular view regarding the credibility of the State's witnesses.¹⁴ It, therefore, violated Art IV, sec 16 and warrants reversal of the conviction.

4. APPELLANT WAS DENIED HIS
CONSTITUTIONAL RIGHT TO THE EFFECTIVE
ASSISTANCE OF COUNSEL WHEN HIS
ATTORNEY FAILED TO ELICIT CRUCIAL
TESTIMONY AND PRESENTIMPORTAT
RELATED EXCULPATORY THEORIES TO THE
JURY.

a. Defense counsel failed to act with reasonable diligence in presenting Mr. Speech's defense. Prior to sentencing, Mr. Speech moved for a new trial and relief from judgment pursuant to CrR 7.5 and CrR 7.8. CP 102-11; 2/4/10RP 5-7. Defense counsel's supporting affidavit noted that as part of the discovery, he had received a copy of a written statement provided by Mr. Speech on the night of his arrest, but failed to offer it into evidence. CP 103. In that statement, Mr. Speech explained that prior to his arrest he had called home and spoken to his wife. CP 109. Mrs. Speech told him that the police were there and T.K.; "said I had said something out of place but I told my wife what is

¹⁴ Judge Heavey asserted in response to the motion for new trial that he made the comments because the shooter had been identified as an African-American man, as is Mr. Speech, and he was still at large at the time. 2/4/10RP

going on with that.” CP 109.¹⁵ It was only after that short conversation Mr. Speech spoke to Officer Villanueva and, therefore, knew the reason the officers were there. CP 110.

This became significant during the course of the trial because in the State’s case-in-chief, Federal Way Police Officer Oscar Villanueva testified that Mr. Speech had, when asked on the telephone if he knew why the police wanted to talk to him, made reference to an inappropriate comment to T.K. 11/24/09RPa.m. 10-11; CP 103. The deputy prosecutor then seized on this knowledge of why the police were looking for him to argue Mr. Speech’s knowledge of his own guilt during her closing argument. 12/2/09RP 20-21.¹⁶

9.

¹⁵ The police officers that initially went to the Speechs’ home confirmed that Mrs. Speech had spoken to Mr. Speech when he called before turning the telephone over to Officer Villanueva. 11/23/09RP 119; 11/24/09RP 10; CP 104.

¹⁶ The prosecutor argued in part:

We also know that the Defendant made that statement to [T.K.] because he admitted it and acknowledged it when he was asked by Officer Villanueva on the day he was arrested.

Remember Officer Villanueva came to the home; he wasn’t there. The Defendant wasn’t there. And when the Defendant called the house, Officer Villanueva had an opportunity to speak to him over the telephone.

How are you doing, Mr. Speech?

Not so good.

Why is that. Do you know why we are here?

And the Defendant says, Yes, it has something to do with me saying something inappropriate to [T.K.].

Right. And he even told you the Defendant told you that when he was having that conversation, well, it wasn’t really clear what the Defendant was saying.

Did he know it was the police or did not know it was the

Defense counsel acknowledged, however, that he failed to elicit testimony during his direct examination of Mr. Speach confirming that Mr. Speach had spoken with his wife before speaking with the officer. CP 104. Although defense counsel's own notes indicated his intention to inquire, he failed to do so. CP 104. Nor was an inquiry made by defense counsel about the first sentence of Mr. Speach's written statement to Officer Martin. CP 104-05; 12/2/10RP 37-70. In the motion for new trial, defense counsel candidly acknowledged he had no tactical reason for failing to address this crucial evidence in his closing argument, or for his failure to develop the testimony regarding the source of Mr. Speach's knowledge more extensively during his direct examination. CP 105.

Furthermore, counsel acknowledged based on his ten years of criminal law experience that this oversight left his representation far below the standards necessary to provide effective assistance of counsel. CP 106. Under these circumstances, the representation Mr. Speach received fell below the standards set by our state and federal constitutions.

police? Whatever it was, he knew it had something to do with the inappropriate conversation he had with [T.K.].

He is caught, and he might as well come home and talk to the police about it.

b. Accused persons are entitled to competent representation sufficient to ensure adversarial testing of the allegation. The right to the effective assistance of counsel is fundamental to our concept of ordered liberty and guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article 1 §§ 3 and 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010).¹⁷ In a challenge to the effectiveness of his counsel's representation, Mr. Speach bears the burden of showing (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's deficient effort prejudiced him. State v. MacFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland, 466 U.S. at 688. Because claims of ineffective assistance of counsel present mixed questions

12/2/09RP 20-21.

¹⁷ The 14th Amendment provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

Article 1, sec. 3 similarly provides:

No person shall be deprived of life, liberty, or property, without due process of law.

of law and fact, they are reviewed de novo. A.N.J., 168 Wn.2d at 109.

The effective assistance of counsel includes the obligation to competently advocate the defendant's cause by bringing to bear the skill and knowledge necessary to render the trial a reliable adversarial testing of the allegations. Strickland, 466 U.S. at 688; Cuyler v. Sullivan, 446 U.S. 335, 346, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980). This constitutional guarantee requires more than the mere presence of an attorney at trial. The attorney must perform to the standards of the profession and "a lawyer who fails to adequately investigate and introduce evidence that demonstrates his client's factual innocence, or that raises sufficient doubt that undermines confidence in the verdict, renders deficient performance." Riofta v. State, 134 Wn.App. 669, 693, 142 P.3d 193 (2006) citing Avila v. Galaza, 297 F.3d 911, 919 (9th Cir.2002).

In Mr. Speach's case, the failure to introduce readily available evidence to demonstrate he did not have prior knowledge of purpose of the officers' concern served no purpose and substantially undermines any confidence the Court should have in that verdict.

c. There was no legitimate trial strategy involved in failing to present evidence and argument on this point. To prevail,

Mr. Speach must show an absence of legitimate strategic reasons to support challenged conduct. Whether an attorney's action or inaction was based on a strategic choice is a factual question. Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994). In this case, Mr. Randolph explained, without contradiction, that the failure to inquire of the appropriate witnesses or to offer Mr. Speach's statement at the time of his arrest, and to challenge the assertions of the deputy prosecutor in closing, were not tactical considerations. CP 105. Instead they represented fundamental deficiencies in counsel's representation of a constitutional magnitude.

Other courts have readily found ineffective assistance of counsel where the evidence establishes that the failure to act on an important matter was a product of inattention. See e.g. Earls v. McCaughtry, 379 F.3d 489 (7th Cir. 2004) (counsel indicated his failure to object to impermissible expert testimony was "an oversight...[that] slipped by him," and he failed to redact portions of videotape interview, as both sides had agreed, simply because "he had 'forgotten.'") The attorney's explanation should be treated as the best evidence of why he acted as he did where the attorney admits to negligence. Here, where counsel failed to present key

evidence and argument that supported Mr. Speach's explanation, the representation is constitutionally deficient.¹⁸

d. Counsel's oversight leaves the reliability of the verdict in doubt. Counsel's failure to elicit this crucial evidence regarding Mr. Speach's basis of knowledge as to why the police were looking for him was crucial to the jury's determination. It was certainly central to the prosecutor's analysis for the jury. 12/2/09RP 20-21.

Moreover, the right to effective assistance of counsel may, in a particular case such as this, be violated by even by an isolated error if that error is sufficiently egregious and prejudicial that it undermines confidence in the result. Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Where the jury had already rejected the bulk of the allegations brought against Mr. Speach, bringing the credibility of the primary State's witnesses into doubt, the failure to rebut this evidence was likely fatal.

"[F]ailing to provide adversarial testing as to a single issue, when that issue is critical to a finding of guilt, may in itself produce a breakdown in the adversarial process." 3 LaFave, Isreal, King,

¹⁸ The failure to present crucial evidence available to counsel is certainly as egregious as the failure to investigate in the first place. Cf Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992) (counsel failed to locate and interview sole witness to defendant's allocution); Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987) (failure to interview single alibi witness); Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992) (failure to investigate information that would explain lack of gun powder on decedent and thereby support defendant's version of the case).

CRIMINAL PROCEEDURE, 622-23 (2d ed. 1999). It is the defendant's burden to show that:

...there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Thomas, 109 Wn.2d 222, 226, 732 P.2d 816 (1987). The breakdown in the adversarial process and the impact of the officers' testimony became fully apparent after the verdict when several jurors made a point of noting they found the officer's testimony the most credible and indicated it seems that they based their verdict almost wholly on the initial telephone statement made by Mr. Speech. CP 104-05. Under the facts of this case, Mr. Speech has met this burden to show he was severely prejudiced by his attorney's negligent omissions and anew trial is required.

5. THE CUMULATIVE EFFECT OF THE EVIDENTIARY AND CONSTITUTINOAL ERRORS RESULTED IN A VIOLATION FO THE RIGHT TO A FAIR TRIAL

The result of the trial court's erroneous rulings precluding Mr. Speech from proving his good character, while barring him from demonstrating the pattern of misconduct by his accusers, was to mislead the jury and deny him a fair trial. This was a prosecution built entirely on the unsubstantiated allegations of two teenagers

with a history of misconduct and a complete absence of any physical or forensic evidence. It was essential that Mr. Speach be able to document his own credibility in this matter, and challenge the credibility of his accusers, but the court's rulings prevented that.

11/18/09RP 70-71.

The due process clauses of the federal and state constitutions provide that a criminal defendant receive a fair trial. Therefore reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be insufficiently prejudicial to require reversal. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (reversing based on numerous evidentiary errors and discovery violations).¹⁹

If the Court concludes none of the foregoing errors independently require reversal of Mr. Speach's conviction, the combination of errors still requires a new trial. Cumulatively, the errors substantially undermine confidence in the jury's ability to fully and fairly evaluate the case. By excluding evidence central to demonstrating T.K.'s motive and capacity to contrive these

¹⁹ In State v. Alexander, the reviewing court ordered a new trial based upon (1) a counselor impermissibly suggesting the victim's story was truthful, (2) the prosecutor impermissibly eliciting defendant's identity from the complaining witness's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony. State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250

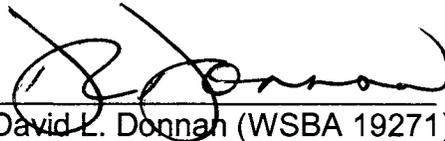
allegations, limiting Mr. Speech's ability to demonstrate he would not commit such an offense, while failing to present a crucial piece of evidence and the related argument, and then enduring the trial judge's bolstering of the State's police witness, represents the form of cumulative error which transcends the impact of any single one. These errors were so prejudicial in the overall impact as to violate Mr. Speech's due process right to a fair trial and "[o]nly a fair trial is a constitutional trial." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert den. 393 U.S. 1096 (1969).

E. CONCLUSION.

Mr. Speech was denied a fair trial and the effective assistance of counsel. He requests, therefore, that this Court reverse his conviction and remand the case for a new trial before a different judge.

DATED this 8th day of October 2010.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

(1992).

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65054-8-I
)	
REGINALD SPEACH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] REGINALD SPEACH 3911 HERITAGE OAKS DE SW HIRAM, GA 30541	(X) () ()	U.S. MAIL HAND DELIVERY _____

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COURT OF APPEALS
STATE OF WASHINGTON
FILED

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF OCTOBER, 2010.

X _____ 

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