

No. 67219-3-I

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

**DIVISION ONE**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**TREVOR COLLIN SNOW,**

**Appellant.**

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**ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY**

**The Honorable Ira J. Uhrig, Judge**

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**REPLY BRIEF OF APPELLANT**

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TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| A. PROCEDURAL FACTS .....                                       | 3           |
| B. ARGUMENT   |             |
| 1. DEFENSE COUNSEL’S INEFFECTIVE ASSISTANCE OF<br>COUNSEL ..... | 3           |
| 2. PROSECUTOR MISCONDUCT .....                                  | 7           |
| 3. THE TRIAL COURT’S ERROR .....                                | 8           |
| C. CONCLUSION .....   | 9           |

TABLE OF AUTHORITIES

| <u>Washington Cases</u>   | <u>Page</u> |
|---|-------------|
| <u>In State v. Boehning</u><br>127 Wn.App. 511, 111 P.3d 899 (2005) | 7           |
| <u>Passovoy v. Nordstrom</u><br>52 Wn. App. 166 (1988)              | 5, 8        |
| <u>State v. Jackson</u><br>102 Wn2d 689m 689 P2d 76 (1984)          | 9           |
| <br><u>Rules, Statutes and Others</u>                               |             |
| CrR 4.7   | 4           |
| ER 401  | 16          |
| ER 403  | 5, 8        |
| ER 608  | 7           |
| ER 801  | 5, 8        |
| ER 901  | 4           |

## **A. PROCEDURAL FACTS**

On January 26, 2011, Appellant Trevor Snow was convicted of Child Molestation in the 1<sup>st</sup> degree following a 3-day jury trial in Whatcom County Superior Court. Mr. Snow filed notice of intent to appeal on June 1, 2011, after motion for a new trial was denied by the trial court. Appellant filed opening brief with the Court of Appeals, Division I on February 15, 2012. Appellant's brief argued inadequate assistance of counsel as well as errors by the prosecutor and trial court. The state responded on April 15, 2012, denying Mr. Snow's trial counsel's conduct did not sufficiently prejudice Mr. Snow and neither the prosecutor nor trial court erred to the level warranting a new trial.

## **B. ARGUMENT**

### **1. INEFFECTIVE ASSISTANCE OF COUNSEL**

The state responds to Appellant's allegation of ineffective assistance of counsel by arguing that based on the record below, the trial attorney's conduct and decisions could not result in sufficient prejudice to warrant a new trial.

The state argues that the trial attorney made no error by failing to object to the production of Michelle Mortiz' declaration the morning of

trial. The trial court had previously ruled a phone conversation between Detective Harris and Trevor Snow as inadmissible evidence as Detective Harris testified he could not identify the voice as Mr. Snows. (RP page 32). ER 901. The court did state “If the State has some other cases, you can present them tomorrow morning before we start.” (RP page 50). The state argues in their brief that the presenting of new evidence, Michelle Mortiz’s declaration, comported with the court’s allowance of additional authority. The production of a declaration, of a witness with material information, being considered at trial is in direct violation of CrR 4.7, and trial counsel had a duty to protect Mr. Snow by objecting to its consideration as violating the discovery rules.

The state further argues that Mr. Snow’s trial attorney performed reasonably by not asking for a continuance or recess to confirm the contents of the declaration, because the admission of the declaration was “inevitable” for authentication purposes. Michelle Mortiz was not on the state’s witness list for trial, this was a new witness with new information. Mr. Snow’s trial attorney had a duty to contact her to see if the declaration was her testimony (as it was written by Detective Harris). The prosecutor at that time hadn’t even provided Ms. Mortiz’s contact information to defense counsel. That in itself warrants further investigation by any competent trial attorney.

The state's brief dismissed the Court's requirement in Passovoy v. Nordstrom, 52 Wn. App. 166 (1988), that a separate inquiry is needed to resolve the issue if a hearsay exception exists. The Court states that unless some hearsay exception is applicable, the statements (in *Passovoy's* instance statements in an affidavit) were properly disregarded by the court. In our case that inquiry was not done, there was no questioning by Mr. Snow's trial attorney on how the state intended to overcome the statements in the phone conversation being inadmissible hearsay under ER 801(c). Evidence of this deficiency was made clear when Detective Harris testified to inadmissible hearsay later in the trial. (RP page 305). Mr. Snow's trial attorney then tried to correct the problem by objecting to the testimony of the hearsay statements, but at that point the jury had heard multiple comments about Mr. Snow's drug use. Mr. Snow's drug use was completely prejudicial (ER 403), as Mr. Snow himself eloquently describes in his statement of additional grounds. The introduction of such facts was foreseeable at pre-trial and completely avoidable by any reasonable trial attorney.

The state refutes Mr. Snow's claim that his trial attorney was deficient because he declared he had not seen the First Amended Information read by the court during jury selection. (RP, pages 63, 71). The state in their brief says "nothing in the record suggests Snow or his

attorney did not fully understand the nature of the charge against Snow...”. (Br. of State at 17). How would that present itself in the court record? What type of evidence would be present in the trial transcript in regards to either person’s understanding? Mr. Snow’s statement of additional grounds shows clearly he had not been advised as to all the particulars of the charge, seeing as he was first advised of his “indeterminate sentence” in prison by a counselor. (page 4).

The state rejects Mr. Snow’s claim of ineffective assistance of counsel when defense counsel obtained a declaration from Kathleen Baldwin in support of his motion for a new trial but failed to have the witness document how the phone call affected her testimony at trial. (RP, page 5). The state claims there is nothing in the record supporting this allegation. The judge asked defense counsel specifically “Did you inquire of her directly whether anything she heard from an outside source had an impact on her testimony?” (RP, page 5). The trial court denied the defense motion for new trial for lack of sufficient evidence her testimony was effected by the uncontroverted fact someone called her to impact her testimony at trial. (RP, page 14). The prosecutor at the motion for new trial argued that substantial justice had been done, stating that defense counsel had the opportunity to ask Kathleen Baldwin about any inconsistent testimony at trial, citing no such questioning done by defense

counsel. (RP, page 10). The prosecutor's own argument shows that had Mr. Snow's trial attorney properly cross-examined Kathleen Baldwin or documented the effects of the phone call on her testimony, there would be evidence requiring a new trial. (RP, page 10).

## **2. PROSECUTOR MISCONDUCT**

The prosecutor in pre-trial motions argued "under Evidence Rule 608, an opinion on whether not any other witness is telling the truth or not is flat out barred and that's just, that's the law." (RP, page 17). Later in closing arguments the same prosecutor stated "Tristen, my argument to you is credible. He remembers some details, down to the white stripes on the sweat pants." (RP, page 436). The court sustained the defense's objection to such impermissible argument. The prosecutor again states "My argument to you is based on the evidence T.B. tell a credible story about what happened to him," quickly met with another objection, sustained by the court. (RP, page 437). In State v. Boehning, 127 Wn.App. 511, 111 P.3d 899 (2005), the Court of Appeals decided the prosecutor's questions to the defendant whether the child made up the allegations "for no reason at all" were labeled "flagrant misconduct" because the question impermissibly asked the defendant to express an opinion on the child's credibility. In the present case, the prosecutor

himself stated an opinion on the child's credibility, and thereby should similarly be found as misconduct.

### **3. TRIAL COURT ERROR**

As discussed earlier, although *Passovoy* may have assisted the state's argument for authentication of voice recognition, there was no separate inquiry as whether the statements qualified as admissions under ER 801(d)(2) or any other hearsay exception. The improper admission of the phone conversation prejudiced Mr. Snow's case in that rules of evidence were not followed allowing impermissible hearsay to be presented to the jury. Some of those statements fell within ER 403 and were prejudicial in nature.

### **B. CONCLUSION**

In this case, the many errors, either individually or cumulatively, denied Mr. Snow a fair trial. Mr. Snow is entitled to a new fair trial because the errors were not harmless and that within a reasonable probability the outcome of the trial would have been different had the errors not occurred. *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984).

Appellant respectfully submits that his conviction should be reversed and remanded for retrial.

DATED this 14<sup>th</sup> day of June, 2012.

Respectfully submitted,



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Attorney for Mr. Snow

1  
2 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

3 DIVISION I

4 TREVOR COLLIN SNOW,

5 Defendant/Appellant,

6 vs.

7 STATE OF WASHINGTON,

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**PROOF OF SERVICE**

9  
10 **CERTIFICATE OF SERVICE**

11 I certify that I sent a copy of the foregoing **Reply Brief of Appellant** via method  
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17 **Clerk of Court of Appeals**

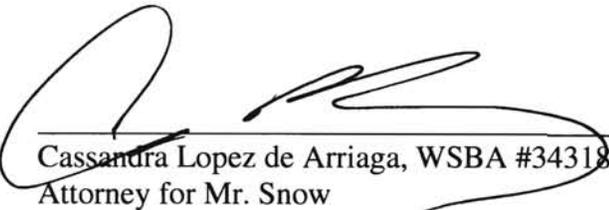
18 Richard D. Johnson, Clerk  
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