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STATE OF WASHINGTON
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No. 35042-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Covarrubias,

Appellant.

Clallam County Superior Court

Cause No. 05-1-00079-1

The Honorable Judge George L. Wood

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT VIOLATED MR. COVARRUBIAS'S RIGHT TO DUE PROCESS BY ADMITTING INTO EVIDENCE A TAINTED IDENTIFICATION.

Jon Sonnabend's identification testimony was tainted by his exposure to newspaper photographs identifying Mr. Covarrubias as the suspect in Ms. Carter's death. RP (4/12/06) 98-162. The testimony should have been excluded.

Taint created by suggestive photographs requires application of the *Neil v. Biggers* totality-of-the-circumstances test. *State v. Maupin*, 63 Wn. App. 887 at 896-897, 822 P.2d 355 (1992); *see Neil v. Biggers*, 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972). Respondent claims that unreliable identification testimony is admissible if the problem is not caused by state action. *See* Brief of Respondent, pp. 32-33, *citing State v. Knight*, 46 Wn.App. 57, 729 P.2d 645 (1986). No published Washington case has considered the issue since *Knight* was decided in 1986; that case should be re-examined.

Due process requires that evidence be reliable. *See e.g. State v. Strauss*, 119 Wn.2d 401 at 418-419, 832 P.2d 78 (1992) ("The due process clause requires that a defendant in a sentencing hearing be given an opportunity to refute the evidence presented and that the evidence be

reliable.”) *See also State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999) (hearsay evidence at parole revocation hearing must be demonstrably reliable); *State v. Kisor*, 68 Wn. App. 610 at 620, 844 P.2d 1038 (1993) (“Evidence presented at restitution hearings...must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented, and being reasonably reliable.”)

Under the due process clause, an unreliable identification must be excluded from a criminal trial even in the absence of state action.¹ *Thigpen v. Cory*, 804 F.2d 893 at 895-896 (6th Cir. 1986). This is so because the likelihood of misidentification itself violates due process; accordingly, “only the effects of, rather than the causes for, pre-identification encounters [are] determinative of whether the confrontations were unduly suggestive.” *Thigpen v. Cory*, at 895. *See also United States v. Bouthot*, 878 F.2d 1506 at 1516 (1st Cir. 1989) (“Because the due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that federal courts should scrutinize all suggestive identification procedures, not just those

¹ But see “Admissibility of In-Court Identification as Affected by Pretrial Encounter that Was Not Result of Action by Police, Prosecutors, and the Like,” 86 ALR5th 463 (noting that the majority of courts require state action).

orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process.”)

Courts are “obligated to review every pre-trial encounter, accidental or otherwise, in order to insure that the circumstances of the particular encounter have not been so suggestive as to undermine the reliability of the witness' subsequent identification.” *Green v. Loggins*, 614 F.2d 219 at 223 (9th Cir. 1980). *See also Commonwealth v. Jones*, 423 Mass. 99 at 109, 666 N.E.2d 994 (1996) (“If a witness is involved in a highly suggestive confrontation with a defendant and that witness's in-court identification of the defendant is not shown to have a basis independent of that confrontation, the admissibility of the witness's proposed testimony identifying the defendant should not turn on whether government agents had a hand in causing the confrontation. The evidence would be equally unreliable in each instance.”)

Sonnabend's identification testimony should have been excluded under the totality of the circumstances as required by *Neil v. Biggers*: he viewed the suspect for a very short time, at night, under poor lighting conditions, after consuming alcohol, at a time when he may not have been taking his medications, and his attention was not specifically engaged. RP (4/12/06) 103-110, 155, 157, 166, 170-173. He did not contact the police or provide a description prior to viewing the photograph in the newspaper,

he was never able to describe the girl he saw, and he was not certain of the identification at the time he saw the newspaper photograph, which was more than one month after the event. RP (4/12/06) 109-116.

Furthermore, since Sonnabend made a cross-racial identification, the likelihood of error was increased; this is especially true given his comment that all Mexicans look alike and his admission that he is not good with faces. RP (4/12/06) 125-126, 159-160. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984); *see also Arizona v. Youngblood*, 488 U.S. 51 at 72 n.8, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (noting studies indicating that "[c]ross-racial identifications are much less likely to be accurate than same race identifications.")

Furthermore, even if state action *is* a prerequisite to a constitutional challenge of the sort raised here (as Respondent suggests), tainted identifications should still be excluded on evidentiary grounds. *See, e.g.*, ER 403; *see also Commonwealth v. Jones, supra* (suppressing identification under basic common law ideas of fairness and under the evidentiary rule excluding probative evidence if unfairly prejudicial).

Finally, Sonnabend's in-court identification should have been suppressed, even absent his exposure to suggestive newspaper photographs. The in-court identification was tainted because it was itself

conducted under suggestive circumstances: Mr. Covarrubias was seated at the defense table and was clearly the accused in this case. RP (4/12/06) 136-137. Furthermore, Sonnabend knew that defense counsel was not the accused, because he'd been previously represented by the public defender's office. RP (3/16/06) 16. *See, e.g., Kennaugh v. Miller*, 289 F.3d 36 at 47 (2d Cir. 2002). The *Biggers* factors, when applied to the in-court identification, require exclusion.

Admission of Sonnabend's identification testimony violated Mr. Covarrubias's constitutional right to due process. The conviction must be reversed and the case remanded for a new trial. *Thigpen, supra*.

II. MR. COVARRUBIAS WITHDRAWS HIS ARGUMENT RELATING TO DELAYED *MIRANDA* WARNINGS.

Mr. Covarrubias argued that his Fifth Amendment privilege against self-incrimination was violated by the admission of unwarned custodial statements. *See* Appellant's Opening Brief, pp. 33-38. Although the testimony is unclear, Respondent has set forth a viable reading of the record that suggests *Miranda* could have been properly administered prior to interrogation. Brief of Respondent, pp. 38-39. Accordingly, Mr. Covarrubias withdraws the argument.

III. THE SUPREME COURT'S RULING IN *STATE V. BENNETT* SHOULD BE REEXAMINED (ISSUE INCLUDED FOR PRESERVATION OF ERROR).

After Mr. Covarrubias's Opening Brief was filed, the Supreme Court issued an opinion rejecting the *Castle* instruction on reasonable doubt as "problematic," but finding no constitutional violation arising from its use. *State v. Bennett*, 161 Wn.2d 303 at 318, 165 P.3d 1241 (2007).

The Supreme Court's decision in *Bennett* should be reexamined. The Court noted that "the instruction emphasizes what the State need not prove, instead of describing the State's burden of proof." *Bennett*, at 318. It also injects into the jury room undefined phrases like 'possible doubt' and 'real possibility,' despite the fact that "every reasonable doubt is a possible doubt." *Bennett* at 318.

It makes little sense to criticize as "problematic" an instruction that defines "the bedrock upon which the criminal justice system stands," and yet find its use constitutionally permissible. *Bennett*, at 315. Accordingly, *Bennett* should be reexamined. *See Bennett at 318-322* (Sanders, J., dissenting.)

IV. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

- A. Respondent applies the wrong legal standard in evaluating Deborah Kelly's misconduct relating to the *Castle* instruction.

Elected prosecutor Deborah Kelly committed reversible misconduct. She defied the trial judge's ruling rejecting her proposed instruction, ignored his specific admonishment to confine her argument to the law set forth in the court's instructions, and read from the *Castle* instruction on reasonable doubt even after a defense objection was sustained. RP (4/20/06) 132, 177-179.

In a jury trial, the court's instructions must be the jury's sole source of law. *See State v. Davenport*, 100 Wn.2d 757 at 760, 675 P.2d 1213 (1984); *State v. Huckins*, 66 Wn. App. 213 at 218-219, 836 P.2d 230 (1992). The legal correctness of statements not contained in the instructions is immaterial; it is improper for a prosecutor to try and slip such statements into the jury room.² *Davenport*, at 760. Such misconduct is a "serious irregularity having the grave potential to mislead the jury." *Davenport*, at 764. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury's verdict. *State v.*

² Respondent's primary focus is on whether or not the *Castle* instruction is a misstatement of the law. Brief of Respondent, p. 35. Under *Davenport*, this is irrelevant.

Boehning, 127 Wn. App. 511, 111 P. 3d 899 (2005); *Davenport*, at 762.

The phrase ‘substantial likelihood’ has not been defined; however, the Supreme Court reverses convictions whenever misconduct “may have influenced” the jury. *Davenport*, at 762.

Here, the trial judge rejected the *Castle* instruction and specifically admonished the parties to confine their remarks to the definition of reasonable doubt as set forth in the instructions. RP (4/20/06) 132, 138. The prosecutor committed grievous misconduct when she violated the court’s ruling by displaying the instruction, by commenting in front of the jury that it was a correct statement of the law, and by reading from it even after the court sustained a defense objection. RP (4/20/06) 138, 177-179. This is especially so because the instruction, which the Supreme Court has described as “problematic,” defines “the bedrock upon which the criminal justice system stands.” *Bennett*, at 315, 318.

Reversal is required because this egregious misconduct “may have influenced the jury.” *Davenport*, at 762. First, the *Castle* instruction is confusing. As the Supreme Court noted in *Bennett*, it places emphasis on what the state need not do instead of on the state’s burden of proof, and it introduces the phrases ‘possible doubt’ and ‘real possibility’ without defining them. *Bennett, supra*, at 315-318. Second, the prosecutor stated (in the presence of the jury) that the instruction was a correct statement of

the law. RP (4/20/06) 177-179. Third, although the court sustained defense counsel's initial objection, the jury was not admonished to disregard the argument, and the prosecutor was permitted to read the disfavored *Castle* instruction to the jury. *See Davenport at 764* (the trial court's admonition "failed to inform the jury that the State's comment was improper and not to be considered.") RP (4/20/06) 177-179.

Because the prosecutor used a visual aid, argued (in the jury's presence) that the instruction was a correct statement of the law, and insisted on reading the instruction even after the court sustained an objection, her misconduct "may have influenced" the jury. *Davenport, supra, at 762*. If even one juror was affected by the prosecutor's misconduct, the conviction must be reversed. *See, e.g., State v. Johnson*, 137 Wn. App. 862 at 868 n. 3, 155 P.3d 183 (2007) (In a case involving juror misconduct, "if the information changed even one juror's mind, it prejudiced the verdict.") *See also Dyas v. Poole*, 309 F.3d 586, 588 (9th Cir. 2002) ("[I]f even one juror is biased by the sight of the shackles, prejudice can result.")

Respondent's assertion that "the [*Castle*] language is not a misstatement of the law" is irrelevant. Brief of Respondent, p. 35. When introduced by the prosecutor rather than through the court's instructions, a

correct statement of the law requires reversal if it may have influenced the jury. *Davenport, supra*.

Respondent incorrectly claims that any prejudice was cured by the court's general instruction about the attorneys' "remarks, statements and arguments." Brief of Respondent, p. 35-36. This is untrue because general instructions are insufficient to ameliorate the effects of this sort of misconduct. The trial court's failure "to correct the improper statements at the time they were made cannot be salvaged by the later generalized jury instruction reminding jurors that a lawyer's statements during closing argument do not constitute evidence." *United States v. Weatherspoon*, 410 F.3d 1142 at 1151 (9th Cir. 2005). To be effective, a curative instruction should be given immediately after the damage is inflicted and should mention the specific statements of the prosecutor to be neutralized. *Weatherspoon*, at 1151.

Because the prosecuting attorney introduced into the jury room a "problematic" instruction on reasonable doubt, and because her misconduct "may have influenced" the jury, Mr. Covarrubias's conviction must be reversed and his case remanded to the Superior Court for a new trial. *Davenport, supra*.

B. The elected prosecutor committed misconduct by inserting her personal opinion into the case.

When Clallam County's elected prosecutor Deborah Kelly clearly expressed her personal opinion that Mr. Covarrubias raped and killed the decedent, she violated his constitutional right to a fair trial and prejudiced the jury against him. RP (4/19/06) 140, 154-155. Respondent does not suggest that Ms. Kelly's remarks were not misconduct; instead, Respondent argues that the misconduct was harmless.

Comments such as those made by Ms. Kelly pose two dangers: they "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Weatherspoon, supra, at 1147-1148, citations, internal quotation marks, and emphasis omitted.*

Contrary to Respondent's assertion that "[n]o grounds exist for a new trial" (Brief of Respondent, p. 37), the prosecutor's statements here "may have influenced" the jury. *Davenport, supra, at 762.* First, Ms. Kelly, Clallam County's elected prosecutor, expressed her personal

opinion during Mr. Covarrubias's testimony, which was his only chance to tell the jury his side of the story. RP (4/19/06) 140, 154. Second, the clear import of her comments was that he was guilty of rape, murder, and lying to the jury. Third, although the court sustained objections to each comment, no curative instructions were given. RP (4/19/06) 140, 154. Fourth, Mr. Covarrubias's defense was wholly based on his credibility: he testified that he had consensual sexual contact with Ms. Carter, and denied raping or killing her. RP (4/19/06) 48-162. Attacks on his integrity, including the misconduct at issue here, directly undermined this defense.

Although Mr. Covarrubias may have damaged his own credibility by lying to investigators (when he denied sexual contact with Ms. Carter), he provided a reasonable explanation consistent with his defense at trial. Specifically, he told the jury that he'd had consensual sex with Ms. Carter, but denied it to the officers because he did not wish to be prosecuted for statutory rape. RP (4/19/06) 91-93. Absent Ms. Kelly's misconduct, the jury would have been faced with the task of evaluating Mr. Covarrubias's testimony, including the reasonableness of his initial denial of sexual contact with Ms. Carter. The prosecutor's misconduct implied that she had special knowledge not available to the jury, and also carried "the imprimatur of the Government." *Weatherspoon, supra*, at 1148. Ms. Kelly's comments were especially prejudicial because she is the elected

prosecutor for Clallam County; her personal opinions presumably carry more weight with the public (and thus with jurors) than those of her deputies.

The prosecutor's comments did in fact produce a "prejudicial effect... beyond the damage [Mr. Covarrubias's] answers already inflicted." Brief of Respondent, p. 37. The conviction must be reversed and his case remanded to the trial court for a new trial. *Davenport, supra*.

V. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. COVARRUBIAS OF FIRST DEGREE FELONY MURDER BASED ON FORCIBLE RAPE.

Contrary to the state's assertion, there was insufficient evidence that Ms. Carter's death occurred in the course of a forcible rape committed by Mr. Covarrubias.³ Taken in a light most favorable to the state, circumstantial and direct evidence showed that the two had sex, that Carter was strangled at some point, and that a struggle occurred at the place her body was found.⁴ But the evidence did not suggest that force was used

³ The state's argument is based in part on a misunderstanding of the facts. For example, the state asserts that Sonnabend heard Ms. Carter yell. Brief of Respondent, page 23. But Sonnabend did not identify the woman he saw (and heard) at the Waterfront Trail as Ms. Carter. Indeed, he was unable to give anything but the most generic description of the woman. RP (4/12/06) 107-109, 155. According to the record on the page cited by Respondent, Sonnabend said only that he heard a woman yell. RP (4/12/06) 112. Sonnabend never testified that he saw Melissa Carter. RP (4/12/06) 97-162.

⁴ While women's clothing was found, men's clothing was also discovered at the scene, including boxer underwear. RP (4/11/06) 142. This does not support the state's

during sex, that the sex was connected with her death, or that the sex occurred where the struggle and the death took place. RP (4/5/06) 133-135, 157-159, 166-167, 175. It is equally likely that the two had consensual sex at another location and that the death occurred long after the sexual encounter was over.⁵ Or it is possible that Mr. Covarrubias first killed Carter and then violated her remains.

Respondent suggests that the presence of torn clothing, the naked state of the corpse, and the fact of death are sufficient to establish a forcible rape. But this argument conflates the elements of the charged crime, and excuses the prosecution from proving each of the essential elements. The state was required to prove more than a sexual encounter plus a death following a struggle. Instead, conviction required proof that the sexual encounter was forcible rape, and that the death occurred “in the course of or in furtherance of... or in immediate flight [from]” the forcible rape. RCW 9A.32.030; CP 34. In other words, the state was required to connect the sexual encounter with the struggle and the death.

conclusion that the clothing being strewn was the result of a struggle. In addition, while all of the experts opined that Ms. Carter died where she was found, that opinion represented a change from what had been given to the defense in discovery. RP (4/4/06) 13-81; RP (4/5/06) 12-49. Despite this, the defense did not ask for a continuance based on this significant new conclusion.

⁵ For example, it is possible that Carter’s boyfriend Travis Criswell killed her after discovering that she’d had sex with Mr. Covarrubias.

The state derides Appellant's sufficiency argument by calling it 'speculative.' But that word is more fairly applied to the state's case against Mr. Covarrubias: the jury was asked to speculate rather than to evaluate the evidence. Because the evidence was insufficient, the conviction must be reversed and the case dismissed.

VI. TWO EXPERTS INVADED THE PROVINCE OF THE JURY BY TESTIFYING THAT THE DEATH WAS A CLASSIC OR TYPICAL MURDER WITH SEXUAL ASSAULT.

It is improper for an expert to offer an opinion on the guilt of the accused. *State v. Demery*, 144 Wn.2d 753 at 759, 30 P.3d 1278 (2001). The Supreme Court has held that "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, *whether by direct statement or inference.*" *State v. Black*, 109 Wn.2d 336 at 348, 745 P.2d 12 (1987), *emphasis added*. Admitting such evidence violates the accused's right to a jury trial, including the independent determination of the facts by the jury. *Demery*, 144 Wn.2d at 759. Both Dr. Selove and Dr. Reay provided expert opinions that Mr. Covarrubias was guilty. RP (4/5/06) 65, 77; RP (4/18/06) 126. This invaded the province of the jury, and requires reversal. *Black, supra*.

An opinion as to guilt need not be simple and direct to violate the constitutional right to a jury trial. *Black, supra*, at 348. For example, in *Black, supra*, a rape counselor described "rape trauma syndrome" to the

jury, and testified that the complaining witness fit the profile. *Black*, at 348. Such testimony, the Supreme Court explained, “carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped... It constitutes, in essence, a statement that the defendant is guilty of the crime of rape.” *Black*, 349. The testimony was improper even though the counselor did not mention the accused by name or directly opine that he was guilty. *Black*, at 348-349.

To determine whether a statement constitutes an impermissible opinion on the guilt of the accused, a reviewing court should consider (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Demery*, at 759, quoting *Seattle v. Heatley*, 70 Wn. App. 573 at 579, 854 P.2d 658 (1993).

The testimony here was equivalent to that in *Black*. First, the testimony came from expert witnesses and thus carried extra weight and an aura of special reliability and trustworthiness. *Black*, at 349.

Second, as in *Black*, the experts concluded that Ms. Carter’s death fit a generalized profile. Dr. Selove testified that this was a “typical” strangulation during sexual assault, “and that sexual assault as the activity or events [sic] leading up to this type of killing is classical and typical...”

RP (4/5/06) 65, 77.⁶ Similarly, Dr. Reay answered in the affirmative when asked if he would “describe the scene as being one of classic homicide with sexual assault...” RP (4/18/06) 126; *see Black, supra*. Third, the charge (felony murder based on rape) related directly to the subject of each expert’s testimony. Fourth, the testimony directly undermined Mr. Covarrubias’s defense that he had consensual sex with Ms. Carter prior to her death. Fifth, the other evidence before the jury included the fact that Mr. Covarrubias’s semen was found in Ms. Carter’s throat, and his acknowledgement of sexual contact with her. RP (4/5/06) 133; RP (4/19/06) 50. Under these circumstances, the two opinions were equivalent to testimony that Mr. Covarrubias was guilty, as in *Black, supra*.

Respondent incorrectly characterizes the testimony as opinions about the “crime scene.” Brief of Respondent, p. 39. The testimony was improper, whether given as an opinion about the crime itself (as Dr. Selove’s was) or in response to a question about “the scene” (as Dr. Reay’s was). *Black, supra*; RP (4/5/06) 77; RP (4/18/06) 126.

Respondent also incorrectly argues that “[n]either doctor suggested who did it....” Brief of Respondent, p. 40. The experts’ characterization

⁶ Appellate counsel unintentionally misquoted this testimony in the Opening Brief; however, the meaning of the statement was accurately conveyed. *See* Appellant’s Opening Brief at p. 11.

of the crime (as a classical or typical sexual assault and homicide), combined with the presence of Mr. Covarrubias's semen and his acknowledgement of sexual contact, amounted to a statement that Mr. Covarrubias raped and murdered Ms. Carter.

Finally, Respondent incorrectly claims that "[n]either doctor suggested... whether a rape occurred." Brief of Respondent, p. 40. This is wrong for two reasons. First, Dr. Selove testified that Ms. Carter was "probably raped." RP (4/5/06) 167. Second, the phrase "sexual assault" equates to rape when considered in conjunction with the presence of semen in the throat.

These two experts opined that Mr. Covarrubias was guilty of rape and murder. This invaded the province of the jury and violated Mr. Covarrubias's constitutional right to a jury trial. *Black, supra*. The conviction must be reversed and the case remanded for a new trial.

VII. THE TRIAL COURT ERRED BY ALLOWING HEARSAY TESTIMONY ABOUT MS. CARTER'S STATE OF MIND MORE THAN SIX MONTHS PRIOR TO HER DEATH.

Respondent apparently concedes that Ms. Carter's statements about oral sex were not admissible as habit or character evidence under ER 404, ER 405, and ER 406. Instead, Respondent contends the evidence was admissible to establish Ms. Carter's state of mind. Brief of

Respondent, p. 40-41, *citing* ER 803(a)(3) *and State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007).

Juries are likely to misuse hearsay admitted to show state of mind. *State v. Redmond*, 150 Wn.2d 489 at 496, 78 P.3d 1001 (2003).

Accordingly, before a statement comes in under ER 803(a)(3), the prosecution must establish and the court must find (1) some degree of necessity to use the statement and (2) circumstantial probability that the statement is trustworthy. *State v. Haack*, 88 Wn. App. 423 at 439-440, 658 P.2d 1001 (1997), *citing State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980). If the circumstances do not suggest trustworthiness, the statements should not be admitted absent corroborating evidence. *Haack, supra*, at 440. *See also State v. Alvarez*, 45 Wn. App. 407 at 410-411 (majority) and at 421 (dissent), 726 P.2d 43 (1986).

Respondent has made no attempt to meet these two conditions, and the trial judge did not engage in the required analysis. Brief of Respondent, pp. 40-41; *see* RP (4/19/06) 163-174; RP (4/20/06) 7-15. The record does not suggest a need for statements made more than six months prior to Ms. Carter's death. Nor did the circumstances suggest the

statements were trustworthy: Ms. Carter may have lied to her friends (to convince them she was not promiscuous).⁷

Even if admissible under ER 803(a)(3), the statements must still qualify as relevant under ER 401. Respondent claims the statements (made at least 6 months prior) were relevant to show Ms. Carter's state of mind. Brief of Respondent, p. 41. But ER 803(a)(3) addresses the declarant's state of mind at the time the statement is made, not some future state of mind. In *Athan*, for example, the declarant told her friends the defendant was "creepy" and that she would not date him just days before he claimed they had a consensual sexual relationship. Assuming Ms. Carter's statements accurately conveyed her state of mind six months prior to her death when she had never met Mr. Covarrubias, her state of mind during that timeframe was not relevant to any issue at trial. Accordingly, the statements should have been excluded under ER 401.

Finally, ER 403 excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

⁷ Indeed, Ms. Carter apparently did not reveal to Ms. Oldfield that she'd had oral sex at age 13. RP (4/20/06) 26-28, 31-35.

Whatever minimal probative value Ms. Carter's statements may have had is substantially outweighed by the danger of unfair prejudice. As noted earlier, juries often misuse state of mind evidence. The problem is magnified when the jury is asked to extrapolate from statements made at least six months prior to the relevant time period. The statements should have been excluded under ER 403.

Because the trial judge erroneously admitted stale hearsay, Mr. Covarrubias's conviction must be reversed and the case remanded to the trial court for a new trial.

VIII. MR. COVARRUBIAS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE MULTIPLE CONFLICTS OF INTEREST ADVERSELY AFFECTED HIS ATTORNEYS' PERFORMANCE.

The existence of a conflict is a question of law, reviewed *de novo*.⁸ *State v. Vicuna*, 119 Wn. App. 26 at 30, 79 P.3d 1 (2003). In this case, the trial court undoubtedly made a sincere effort to inquire into defense counsels' conflicts.⁹ Respondent erroneously implies that this Court

⁸ This is also true of ineffective assistance claims generally. *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

⁹ Unfortunately, the conflict issue was not raised until one month prior to trial. RP (2/23/06) 20, 36-40. At that time, both the court (responsible, in part, for administering public funds) and defense counsel (who had worked on the case for more than a year) were predisposed to view the continued representation as proper. Finding a conflict would mean the time and money already spent on Mr. Covarrubias's defense would be wasted and the trial would have to be delayed.

should defer to the trial judge's conclusions. Brief of Respondent, pp. 27-28. This is incorrect: under the *de novo* standard, the trial court's determination is not entitled to deference.¹⁰ *Vicuna, supra*.

This court need not inquire into an "actual" conflict, separate and distinct from an adverse effect. *State v. Jensen*, 125 Wn.App. 319 at 330-331, 104 P.3d 717 (2005). Mr. Covarrubias need only show that a conflict seems to have influenced the attorneys' performance. *Jensen at 330-331*; *Lewis v. Mayle*, 391 F.3d 989 at 999 (9th Cir., 2004). Respondent's suggestions to the contrary are incorrect. Brief of Respondent, p. 26.

Mr. Covarrubias did not waive his right to conflict-free counsel. First, reviewing courts must indulge every reasonable presumption against waiver of fundamental constitutional rights. *Glasser v. United States*, 315 U.S. 60 at 70, 62 S. Ct. 457, 86 L. Ed. 680 (1942); *State v. Elliott*, 121 Wn. App. 404 at 409, 88 P.3d 435 (2004). Second, the waiver was based on incomplete information: no one reviewed the public defenders' files to

¹⁰ In part, this is because the trial judge's inquiry was necessarily prospective; this Court has the advantage of a historical record to examine. As the U.S. Supreme Court has noted, a trial court "must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials." *Wheat v. United States*, 486 U.S. 153 at 161-162, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988).

determine what confidential information could be found there.¹¹ RP (3/21/06) 6-30; RP (3/22/06) 4-31. Third, the waiver was based on incorrect advice: the record reveals that both Mr. Ritchie and Mr. Anderson misunderstood the potential for conflict. RP (3/22/06) 10-12, 100. *See* Appellant's Opening Brief, pp. 61-88. Fourth, the waiver was not voluntary. Despite being obvious from the outset, the conflict issue was raised just before trial. Mr. Covarrubias sat in jail for over a year waiting for trial; had he refused to waive, the trial would have been significantly delayed, as was made clear. RP (3/3/06) 14; RP (3/16/06) 21-23, 47-49, 52-53; RP (3/21/06) 27. With his attorneys reassuring him that there was no conflict, and with the prospect of longer delay, Mr. Covarrubias had a significant incentive to sign the waiver.

Finally, this Court should review the conflict argument, even if the waiver was proper. *See Wheat v. United States*, 486 U.S. 153 at 161-162, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988) ("Nor does a waiver by the defendant necessarily solve the problem, for we note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain

¹¹ Instead, Mr. Anderson and Mr. Gasnick relied on their own lack of recollection and on a screening procedure not authorized by the Rules of Professional Conduct. RP (3/8/06) 10-11; RP (3/16/06) 23, 29.

ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel.”)

Respondent has not addressed the facts under a *de novo* standard, and has failed to respond to Mr. Covarrubias’s specific arguments. Because numerous conflicts seem to have influenced defense counsel’s performance, Mr. Covarrubias was denied the effective assistance of counsel. *Lewis v. Mayle, supra*. The conviction must be reversed and the case remanded for a new trial. *Jensen, supra*.

IX. MR. COVARRUBIAS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEYS’ DEFICIENT PERFORMANCE PREJUDICED HIM.

A. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys’ failure to request instructions on the inferior degree offense of Murder in the Second Degree.

An accused is free to pursue inconsistent defenses at trial. *State v. Fernandez-Medina*, 141 Wn.2d 448 at 455, 6 P.3d 1150 (2000). Nothing in this case prevented defense counsel from offering instructions on the lesser offense of Murder in the Second Degree. Respondent does not contend that Mr. Covarrubias was not entitled to the instruction. Instead, Respondent erroneously contends that by requesting a lesser included instruction, defense counsel “would have suggested to the jury that he was not innocent...” Brief of Respondent, p. 42.

An accused's request for an instruction is not conveyed to the jury. The court provides the jury with its instructions; jurors have no way of knowing which were proposed by the defense, and which by the prosecution. Respondent's argument that simply by requesting instructions on the lesser offense, Mr. Covarrubias would have been making "a major concession [that] completely undercut his testimony" is simply wrong. Brief of Respondent, p. 42.

Mr. Covarrubias's trial strategy involved acknowledging sexual contact while denying involvement in Carter's death. This strategy would have remained the same whether the charge was Murder in the First Degree or Murder in the Second Degree.

Respondent apparently concedes there is a significant difference in penalty between the two crimes and that relying on the defense strategy for an outright acquittal was risky. Brief of Respondent, pp. 42-43. Because of this, defense counsel was ineffective for failing to seek a lesser instruction. *State v. Pittman*, 134 Wn. App. 376 at 386, 166 P.3d 720 (2006); *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004). The conviction must be reversed and the case remanded for a new trial.

C. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys' failure to seek exclusion of certain evidence.

1. Defense counsel should have moved to exclude Mr. Covarrubias's statement under the *corpus delicti* rule.

To establish the *corpus delicti* of a particular crime, independent evidence must support an inference that the charged crime was committed. *State v. Brockob*, 159 Wn.2d 311 at 329, 150 P.3d 59 (2007). This evidence must also exclude any hypothesis of innocence (that is, any possibility inconsistent with the charged crime.) *Brockob*, at 329. To establish the *corpus delicti* of murder of any degree,¹² the prosecution was required to produce independent evidence (1) supporting an inference that Mr. Covarrubias murdered Carter, and (2) excluding the possibility that her death was manslaughter, excusable homicide, or justifiable homicide.

The independent evidence here is insufficient to establish the *corpus delicti* of murder because it does not exclude other hypotheses. Respondent's argument (that the *corpus delicti* "was the crime scene [sic]") is therefore incorrect. Brief of Respondent, p. 43.

¹² The Supreme Court's *Brockob* opinion suggests a departure from the traditional rule that the degree of the crime may be established by considering the defendant's confession. If the *corpus delicti* rule now requires the degree of the charged crime to be established by independent evidence, Appellant's argument applies with even greater force. The prosecution's independent evidence here is insufficient to even raise an inference that Murder in the First Degree was committed.

For example, the two could have engaged in consensual asphyxiophilia (erotic asphyxiation), resulting in Carter's accidental death (which could be either excusable homicide or manslaughter.)¹³ It is also possible that Carter attacked her killer, who lawfully exercised force in self-defense, resulting in justifiable homicide. Nothing about the independent evidence excludes either possibility.

Respondent apparently concedes the absence of a legitimate strategy and a prejudicial effect. Brief of Respondent, p. 43-44. If, as Appellant argues, a *corpus delicti* objection was appropriate, Mr. Covarrubias was denied the effective assistance of counsel. His conviction must be reversed and the case remanded for a new trial. *State v. Saunders*, 91 Wn. App. 575 at 578, 958 P.2d 364 (1998)

2. Mr. Covarrubias withdraws his ineffective assistance argument relating to *Miranda v. Arizona*.

As noted above, Respondent has suggested an alternate reading of the record of the CrR 3.5 hearing. If Respondent's interpretation of the record is correct, defense counsel was not ineffective for failing to argue a *Miranda* violation.

¹³ This depends on one's interpretation of RCW 9A.16.030 and the degree of care exercised.

3. Defense counsel should have moved to suppress Mr. Sonnabend's out-of-court identification of Mr. Covarrubias from a newspaper photograph.

Respondent has not addressed this ineffective assistance claim.

Accordingly, Mr. Covarrubias stands on the argument set forth in his opening brief.

4. Defense counsel should have moved to exclude expert testimony that this was a "typical" and/or "classic" rape and murder case.

Respondent has not addressed this ineffective assistance claim.

Accordingly, Mr. Covarrubias stands on the argument set forth in his opening brief.

D. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys' failure to offer evidence that Mr. Criswell had harbored thoughts of killing Ms. Carter.

Respondent has not addressed this ineffective assistance claim.

Accordingly, Mr. Covarrubias stands on the argument set forth in his opening brief.

X. CUMULATIVE ERROR REQUIRES REVERSAL OF MR. COVARRUBIAS'S CONVICTION.

Respondent has not addressed Mr. Covarrubias's argument regarding cumulative error. Accordingly, appellant stands on the argument made in the opening brief.

CONCLUSION

Respondent suggests that Mr. Covarrubias's constitutional rights should bow to the "realities of criminal practice in a small town." Brief of Respondent, p. 44. But the constitution applies equally in all areas of the state, and no person accused of a crime should be denied due process or the right to the effective assistance of counsel simply because the crime is alleged to have occurred outside a major metropolis.

Mr. Covarrubias was convicted based on tainted and inadmissible evidence. His attorneys, who were hampered by numerous conflicts of interest, failed to provide the effective assistance of counsel guaranteed by the constitution. Finally, his trial was marred by egregious misconduct committed by the elected prosecutor herself. In the absence of all these errors, the jury would have been able to see that the evidence produced was insufficient to prove beyond a reasonable doubt that he was guilty of the crime charged.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Robert Covarrubias, DOC #40652
New Hampshire State Prison
P.O. Box 14
Concord, NH 03302

and to:

Clallam County Prosecuting Attorney
203 East 4th Ave., Suite 11
Port Angeles, WA 98501-1189

and to:

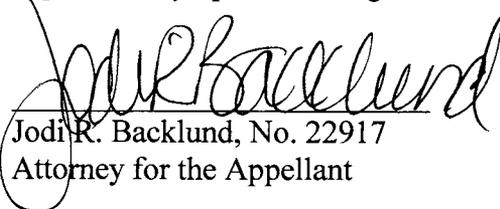
Philip James Buri
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 12, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 12, 2008.


Jodi R. Backlund, No. 22917
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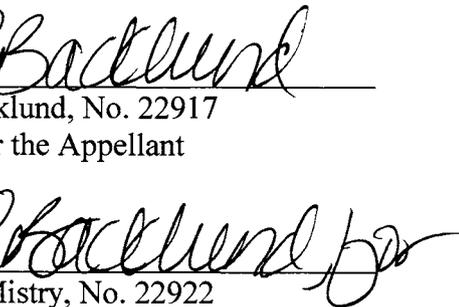
For all these reasons, the conviction must be reversed and the case dismissed with prejudice. In the alternative, if dismissal is not ordered, the case must be remanded to the trial court for a new trial.

Respectfully submitted on January 12, 2008.

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