

NO. 35681-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CECIL EMILE DAVIS,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
07 OCT -1 AM 9:08  
STATE OF WASHINGTON  
BY *[Signature]*

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

The Honorable Kathryn J. Nelson, Judge

2007 SEP 20 PM 3:34  
COURT OF APPEALS  
DIVISION II

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Evidence appellant previously had been convicted of murder and sentenced to death violated his right to due process and a fair trial.

2. Appellant was denied his constitutional right to effective representation when his attorney repeatedly failed to enforce a pretrial order precluding evidence of the other murder.

3. The trial court erred when it denied a motion for mistrial.

4. When denying the motion for mistrial, the trial court erred in entering the following findings:

“Up until Ms. Taylor testified, there was no mention of the defendant being involved in any other incident or investigation.” CP 67.

“the jury will likely consider Ms. Taylor’s unsolicited remark about ‘death row’ to be hyperbole rather than true.” CP 69.

“no other witness made any comment even close to Ms. Taylor’s, so the jury heard nothing that would support any possible conclusion that her comment related to this case or even to this defendant (Ms. Taylor testified that she had several other brothers besides the defendant).” CP 69.

based on the trial evidence, “the comment could not have any effect on the jury in deliberating this case.” CP 69.

5. Prosecutorial misconduct during closing argument also denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. In a separate murder case, appellant was convicted and sentenced to die. Prior to trial, defense counsel moved to preclude any reference to that case and the motion was granted. Inexplicably, however, counsel failed to enforce that order. Jurors repeatedly heard evidence that appellant had killed before. Was appellant denied the effective assistance of counsel and a fair trial?

2. Counsel finally objected when a witness informed jurors that appellant had been sentenced to death for the other murder. The court sustained the objection but denied a motion for mistrial. In light of the incurable prejudice from this evidence, was a mistrial the only adequate remedy?

3. In refusing to declare a mistrial, the court made several key findings that are contradicted by the record. Are these findings erroneous?

4. In 1998, the State chose not to prosecute appellant in this case because he had already been sentenced to death in the other case. In 2005, however, charges were finally filed. During closing argument, prosecutors focused on the ten-year delay

between the murder and trial, implying that appellant was somehow responsible for delayed justice. This misconduct misled jurors and urged them to convict on improper grounds. Is reversal required?

5. During closing argument, the prosecution also misstated the standard for reasonable doubt and converted the presumption of innocence into a presumption of guilt. Does this also require reversal?

B. STATEMENT OF THE CASE

1. Procedural Facts.

This appeal stems from Cecil Davis' conviction for Murder in the Second Degree in connection with the death of Jane Hungerford-Trapp. CP 1, 207-216.

Hungerford-Trapp was killed in April of 1996. CP 1-2. Although police initially did not have a suspect in the case, they eventually focused on Davis based on information obtained while investigating him for a subsequent homicide -- that involving Yoshiko Couch, who was killed in January 1997. RP 73-76; CP 2, 220. Police also investigated Davis' involvement in the death of a third individual, Georgia Ahrens. RP 76.

On February 3, 1997, the Pierce County Prosecutor's Office charged Davis in the Couch case with Aggravated Murder in the First

Degree. He was subsequently convicted and sentenced to death. See In re Davis, 152 Wn.2d 647, 668-69, 101 P.3d 1 (2004). In light of that conviction and sentence, the State chose not to charge Davis in the Hungerford-Trapp case. CP 22.

On November 4, 2004, however, the Washington Supreme Court reversed Davis' death sentence in the Couch case. In re Davis, 152 Wn.2d at 702-705. Subsequently, on January 12, 2005, the Pierce County Prosecutor's Office charged Davis in the Hungerford-Trapp case. CP 1.

The trial deputies agreed with defense counsel that there should be no mention of the other cases -- Yoshiko Couch or Georgia Ahrens during trial. RP 389. Unfortunately, as discussed in detail later in this brief, jurors learned that Davis was investigated for another murder, convicted, and sentenced to die. See RP 562, 581, 584, 593, 597, 613, 618-19, 634-35, 656, 660, 677, 705, 710.

Davis was found guilty of murdering Hungerford-Trapp and sentenced to life in prison without the possibility of parole. CP 193-204. He timely filed his Notice of Appeal. CP 207-216.

2. Substantive Facts.

a. Facts pertaining to the offense

On the morning of April 14, 1996, a passerby found Jane Hungerford-Trapp's body on a staircase in a Tacoma neighborhood. RP 415-420. She had suffered significant trauma and there were bloody footprints around the body. RP 422-23, 455, 729.

An autopsy revealed that Hungerford-Trapp had multiple blunt force fractures to the bones in her face, skull, and ribs. In addition, she suffered multiple abrasions and lacerations, including defensive injuries. RP 751-773. There was also evidence of strangulation, which -- in conjunction with the blunt force injuries -- caused her death. RP 773-784.

Police documented the footprints left on and around the body. RP 492-505. For some of those prints, the word "DieHard" was completely or partially visible and stamped into the soles of the shoes responsible for the prints. RP 835-843, 848-49, 853-55. Hungerford-Trapp's purse, including her identification and other personal items, was found on a trail frequented by homeless people, four to five blocks from where she was killed. RP 805-09, 922-31.

In January 1997, police interviewed Davis' relatives in connection with a different case. RP 581, 584, 597, 634, 940. Two of Davis' sisters and several of Davis' nieces and nephews lived in a home owned by Davis' mother -- Cozetta Taylor. And Davis himself stayed there from time to time. RP 1078-79. While interviewing Davis' family at the home, one of Davis' sisters -- Lisa Taylor -- indicated to a detective that she wished to speak with him privately. RP 632, 635, 940-41.

On January 29, detectives surreptitiously picked up Lisa Taylor from the home and interviewed her at the police station. RP 942. She provided information linking her brother to the Hungerford-Trapp case. RP 954. Prior to this date, detectives had no information linking Davis to that case. RP 1034.

According to Taylor's taped interview, Davis arrived home one evening covered in blood and claiming "he had to kill some crack-headed white bitch." RP 696, 699. Davis had turned his clothes inside out and was wearing his work boots. RP 696-97. Taylor told detectives that Davis admitted stomping a woman with his boots, strangling her, and stabbing her. RP 697, 1033. She also claimed that Davis had repeatedly washed his clothes to remove the blood. RP 698.

Detectives interviewed another sister – Pearlie Cunningham – who told police that the day before Hungerford-Trapp’s body was discovered, she was with her brother and last saw him shortly after 10:00 p.m. RP 554, 564-65. After 1:00 a.m., Cunningham saw an individual who looked like her brother heading in the direction of the stairwell where Hungerford-Trapp’s body was found the next day. RP 565-571. But she was a few blocks away from the individual and could not be certain it was Davis. In fact, when she called to the individual, he did not respond. RP 565-66, 568.

Police also interviewed several of Davis’ nieces and nephews, who were between twelve and fifteen years old at the time. RP 575-78, 582, 612-13, 647, 675. In 1997, these individuals made statements incriminating their uncle. RP 580-81. Specifically, Davis’ niece – Lisa Hubley – testified that Davis claimed he had killed a woman by choking her and had pointed out the stairwell where it happened. RP 593-95. Another niece – Jessica Cunningham – told police the same thing. RP 618-21. A third niece – Miesha Smith – added that Davis was bloody when he came home and admitted stabbing the woman. RP 654-662. A nephew – Kylo Cunningham – told police that his uncle admitted strangling a woman. RP 676-683.

Police obtained a search warrant for Cozetta Taylor's home and confiscated a pair of Sears DieHard boots from the downstairs/basement area. RP 795-802, 1034.

At trial in 2006, Lisa Taylor testified she did not remember providing much of the information linking her brother to the homicide. Moreover, she attributed some comments to the fact she was angry with her brother at the time. RP 638-39, 690, 704. She disavowed her taped statements and called them a lie. RP 701-02.

As adults, Davis' nieces and nephews also distanced themselves from their 1997 statements. Hubley had no memory of what she told police at the time and testified her answers to the detectives' questions would be different today. RP 596-598. Jessica Cunningham similarly did not recall telling detectives anything captured on her taped interview. RP 621-22. Miesha Smith testified she had lied to detectives in 1997 and was just repeating what others told her at the time. RP 656, 659, 665-67. Kylo Cunningham also testified that his 1997 statement was not true; Davis had never confessed to killing anyone and Cunningham had simply told police what he heard from others. RP 677, 681-82, 685.

The Washington State Patrol Crime Lab examined the boots

retrieved from Cozetta Taylor's home and concluded that the sole on the right boot matched a print found at the murder scene. RP 810-811, 843-48. The lab also concluded that the sole on the left boot was consistent with a print found on Hungerford-Trapp's body, although it was impossible to be certain whether this boot was the source of that print. RP 848-853.

The lab dismantled the boots and located trace blood on the right boot, but none on the left. RP 888-913. Using DNA analysis in early 1998, analysts determined that the blood matched a sample from Hungerford-Trapp. RP 975, 989-90. The probability blood on the shoe would match an individual randomly selected from the population was calculated to be 1 in 5,500. RP 990-91. DNA analysis was repeated in 2004. Using improved methods, the probability of a random match was calculated to be 1 in 840 trillion. RP 991-1006.

Davis testified in his own defense at trial. He flatly denied any involvement in Hungerford-Trapp's murder. RP 1089, 1128. He also denied ever telling his family he had killed her and denied showing relatives the staircase where it happened. RP 1135-37. He suspected his sister Lisa made up the allegations because she was angry with him at the time and he believed she was also the

source of information in the other family members' statements to police. RP 1139.

Davis testified that on the evening Hungerford-Trapp was murdered, he worked as a bouncer at a party house. RP 1076-78, 1081-83. He only left that house once, at around 10:00 p.m., to buy beer and did not leave again until 6:00 a.m. the next morning. RP 1083-84. He denied he was the individual his sister Pearlie saw on the street after 1:00 a.m. RP 1100-01. He also denied owning or ever seeing the DieHard boots found at his mother's home. He had been wearing Reebok sneakers at the time. RP 1087-89, 1114-15.

Regarding blood on his clothing, Davis explained that while on his way from the party house to his mother's home the morning of April 14, 1996, three gang members attempted to rob him. RP 1107-09. While fending off the attack, he injured one of the men and got blood on his hands and clothes. RP 1110-1113. But he was not covered in blood and he did not turn his clothes inside out. RP 1113-14.

When confronted with the fact he told detectives in January 1997 that he owned DieHard boots, Davis testified that he had been confused by the interrogation and was high at the time he

spoke to the detectives. RP 1118-19, 1152-54. He did not deny making the statement, but he had no memory of doing so. RP 1140-42.

b. Evidence of other murders

As previously noted, the State agreed jurors should not hear evidence concerning the other cases in which Davis had been convicted or was a suspect. RP 389. It did not take long, however, for this information to make its way to the jury.

Early in the trial, during a lunch break, a juror overheard individuals discussing a newspaper article regarding the fact Davis was already serving time for murder. RP 517. On agreement of the parties, the juror was excused. RP 520-25. Unfortunately, this was just the beginning. As trial continued, jurors continually heard evidence making it clear Davis was involved in more than just a single homicide.

Jurors would have sensed something was being kept from them relatively early on. For example, when the trial deputy questioned Davis' sister – Pearlie Cunningham – about her interview with detectives in 1997, his manner of focusing her on the Hungerford-Trapp homicide surely gained the jurors' attention:

I want to talk to you specifically and only about the

conversations that you had with them about information you may have had relating to an investigation where a woman was found on the stairwell on South 27th, okay?

RP 562. Defense counsel did not object.

Shortly thereafter, when examining Davis' niece – Lisa Hubley – about her 1997 statements to detectives, the following exchange took place:

Q: Is there any reason, Ms. Hubley, why you would lie to the police about information . . . to make things worse for your uncle?

A: Well, I didn't know anything, it was, like, serious like that. I don't know. Like I said, they didn't straight – whoever interviewed me didn't say, well, do you know you're down here for a homicide of a lady that was found dead on any stairs. It was nothing like that. When they brought us down here, it was for something totally different.

RP 581. Defense counsel did not object to Hubley's non-responsive answer. And rather than stay clear of this subject, the prosecutor continued:

Q: Okay. The police interviewed you about a separate investigation, right, Ms. Hubley?

A: Yes, they did.

Q: And during that interview, the subject changed and you talked about an incident with the woman who was found on the stairs, right?

A: Yeah.

RP 581. Again, there was no defense objection. In fact, during defense counsel's cross-examination, Hubley repeated her statement that police brought family members to the station "for something totally different." RP 597.

The prosecutor also read from a transcript of the 1997 interview, during which the detective told Hubley, "I want to switch gears a little bit here and talk about another case." RP 584. And, as he had done with Pearlie Cunningham, the prosecutor specified interest only in that portion of Hubley's statement pertaining to "the woman who was found on the stairs . . . ." RP 593. As before, defense counsel did nothing.

If jurors harbored any doubt about the nature of the "other investigation," it dissipated when the prosecutor examined another niece – Jessica Cunningham – about her 1997 interview:

Q: Did you realize that, when you were talking to the detectives, it was about serious subject matters?

A: No.

Q: Did you think it was a joke that you were down here talking about cases?

A: I mean, then, yeah, it was kind of funny to me.

Q: It was?

A: Yeah.

Q: Even though the subject you were talking about was homicide cases?

A: Yeah.

RP 613 (emphasis added). Defense counsel did nothing.

The prosecutor then had Cunningham read from her 1997 interview. He read the detective's questions and Cunningham read her responses:

Q: And then just – I want to take you back to April of last year. Did Cecil tell you about having killed some woman?

A: The one where he was drenched in blood?

Q: Yes.

A: He talked about it but never really to me.

RP 618-19 (emphasis added). Defense counsel sat silently.

The prosecutor's examination of Miesha Smith elicited similar information. He had Smith confirm that in 1997 she had spoken to detectives about "several different subjects" and the first portion of the interview focused on something other than the current murder charge. RP 651, 654. The prosecutor then read a portion of that interview where the detective said, "Miesha, you were speaking to me after we stopped the tape that your uncle

Cecil had made some comments to you about another murder that occurred in the city. Can you tell me about that?" RP 656 (emphasis added). Still later in that 1997 interview, in another portion read to jurors, the detective sought to clarify whether one of Miesha Smith's claims (that Davis said he stabbed the victim) pertained to "the lady at 27th Street or a different lady." RP 660. Again, defense counsel did nothing.

Along these same lines, when examining Kylo Cunningham, the prosecutor asked him if reviewing a transcript of his 1997 interview refreshed his "memory about the things that you said about the woman whose body was found on 27th on the stairwell." RP 677.

But the most harmful information came from Davis' sister – Lisa Taylor. Prior to her testimony, and outside the jury's presence, the prosecutor expressly told Taylor he was not interested in talking about the Couch or Ahrens homicides. RP 630.

But in the jury's presence, the prosecutor asked Taylor to confirm that "initially, the police contacted you at your house about a different investigation that they were doing." RP 634. Taylor indicated that she could not recall, and while explaining her reason for asking to speak with detectives privately, she revealed that her

brother (Davis) had just been “arrested for murder” at the time. RP 635.

Matters only got worse for Davis. Specifically, during defense counsel’s cross-examination of Taylor, she described the stairwell as “where they found another body . . . .” RP 705 (emphasis added). And while describing the circumstances of the 1997 interview, Taylor mentioned the Georgia Ahrens’ case:

Yeah, they had pictures of stuff on the table. There was – had a yellow envelope. When I wasn’t saying what they wanted me to say, they will get me back to another subject, left the pictures on the table, walk out. I can prove to you this. They had Ms. Georgia’s pictures on the table. How would I know the way she was when I wasn’t there? And then nobody said about how she passed away at her trial, so how would I would have known about her head being put between the head –

RP 707. At this point, the court (rather than defense counsel) interrupted and indicated the need to stick to the subject at hand. RP 707.

But Taylor was not finished. During the prosecutor’s redirect examination, and in response to the prosecutor’s assertion that detectives had treated her with respect in 1997, Taylor said:

How, when you take me and my mama and my nieces and nephews down to the police station, had us out there until 2 or 3 o’clock in the morning. You know, little kids, and you all questioning everybody

without a lawyer being there, you know, and then you made all these leads. Ten, eleven years old. You know, you guys know better than that. And then to put my brother on death row for this stuff.

RP 710 (emphasis added).

Defense counsel finally objected and the objection was sustained. Counsel then moved for a mistrial. RP 710-12. The prosecutor conceded that individuals are not placed on death row unless convicted, but argued that jurors would be able to disregard the fact Davis had already been sentenced to die in another case. RP 712-713. The motion for mistrial was denied. RP 714. Defense counsel declined the court's offer to have the comment stricken or to attempt a curative instruction. CP 68.

c. Prosecutorial misconduct

As previously noted, it was the State's decision not to file charges against Davis until 2005. CP 22. Nonetheless, during closing argument, the trial deputies twice focused on how long it had taken to bring Davis to trial, necessarily implying that someone else (Davis) was responsible for the long delay. During the State's initial argument to jurors, the trial deputy said:

That's Jane Hungerford-Trapp on April 12th of 1996. And that's Jane Hungerford-Trapp after the defendant was through with her [showing photos to jury].

It's November 2nd, 2006, and ten and a half years is a very long time to wait for justice. But justice is finally here, justice not only for Jane Hungerford-Trapp. Justice for Cecil Davis. . . .

RP 1197 (emphasis added).

During the State's rebuttal closing, the trial deputies again reminded jurors of the long wait. After repeating that Hungerford-Trapp had been killed in April 1996, the deputy said, "It's been over ten years, and that's a long time. The State would ask you to return a verdict that holds the defendant accountable for what he did on that stairwell back in 1996." RP 1230.

The other act of misconduct occurred when one of the trial deputies discussed reasonable doubt with jurors. The prosecution used a PowerPoint presentation during closing argument. Supp. CP \_\_\_\_ (State's PowerPoint Presentation, filed 11/6/06). And one portion of that presentation focused on the definition of "reasonable doubt." A slide indicated the following:

#### WHAT IT SAYS

A doubt for which a reason exists.

In order to find the defendant not guilty, you have to say:

"I doubt the defendant is guilty,

and my reason is \_\_\_\_\_.”

And you have to fill in that blank.

Supp. CP \_\_\_\_ (State’s PowerPoint Presentation, at 16).

While jurors looked at the slide, the prosecutor discussed the State’s burden:

What is says is that there is a doubt for which a reason exists, and that means, while you’re deliberating, if you want to find the defendant not guilty, you need to say I believe he’s not guilty. I’m sorry. I doubt he’s not guilty. That’s what you should say. I doubt he’s guilty, and here’s why. And you have to fill in that blank.

RP 1194-95.

Jurors declined “to find the defendant not guilty.” See CP

60. Davis now appeals.

C. ARGUMENT

1. EVIDENCE THAT DAVIS WAS SUSPECTED OF KILLING ANOTHER WOMAN, CONVICTED OF THAT OFFENSE, AND THEN SENTENCED TO DEATH DENIED HIM A FAIR TRIAL.

Although the trial court granted defense counsel’s motion in limine to prohibit evidence Davis had killed more than once, jurors repeatedly heard this evidence during trial. The primary reason jurors heard this evidence was defense counsel’s incompetence. He did not seek enforcement of the pretrial ruling, thereby denying Davis

his right to effective representation. But jurors also heard the evidence because Lisa Taylor refused to stick to the subject at hand. In combination, this evidence denied Davis a fair trial.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

More specifically, a defendant claiming ineffective assistance based on counsel's failure to object to the admission of criminal history evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met.

a. There was no legitimate tactic

Counsel's repeated failure to object to evidence Davis was involved in another homicide is not a legitimate tactic. Washington's Rules of Evidence prohibit the introduction of other criminal acts to prove criminal propensity:

**(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. . . .

ER 404(b). But there is also a constitutional prohibition.

The Due Process Clause of the Fourteenth Amendment guarantees every criminal defendant a fundamentally fair trial. McKinney v. Rees, 993 F.2d 1378, 1380 (9th Cir.) (citing Gideon v. Wainwright, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)), cert. denied, 510 U.S. 1020 (1993). Due process is violated where "the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." Dowling v. United States, 493 U.S. 342, 353, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

In McKinney v. Rees, the Ninth Circuit Court of Appeals recognized that the erroneous introduction of "other acts" evidence

may violate due process. Citing the “historically grounded rule of Anglo-American jurisprudence” prohibiting propensity inferences, the court held that violation of this prohibition risks impermissibly tainting a trial and rendering it fundamentally unfair. McKinney, 993 F.2d at 1381, 1384-86. This risk is present where there are no permissible inferences to be drawn from the offending evidence. Id. at 1384 (citing Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991)).

In McKinney, the defendant was charged with killing his mother, who was found in the bathtub with her throat slit. McKinney, 993 F.2d at 1381. Police found McKinney at the scene of the murder. His pants – found in a nearby den – were covered in blood. Id. at 1385. Although the murder weapon was never identified, at trial jurors heard evidence that McKinney had an extensive knife collection, including knives capable of inflicting the type of wounds suffered by the victim. There was also evidence that McKinney frequently carried a knife on his belt, wore camouflage pants, and once used a knife to scratch the words “Death is His” on a closet door. Id. at 1381-82.

The Ninth Circuit concluded that evidence concerning McKinney’s interest in knives, most of the knives themselves, the door carving, and his habit of wearing camouflage was irrelevant to

any fact of consequence and, instead, was character evidence giving rise to a propensity inference. *Id.* at 1382-84. Noting that McKinney had never confessed to the murder and there was no clear motive (only a vague financial one), the court found “his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair. . . .” *Id.* at 1385-86. The court granted McKinney a writ of habeas corpus. *Id.* at 1386.

The violation of Davis’ right to a fair trial was even more egregious. Prior to trial, the prosecution agreed, and the trial court ordered, “that there would be no reference during the State’s case to the other incidents that were discussed with Mr. Davis and/or that Mr. Davis has been charged with and convicted of or suspected of.” RP 389, 391.

Throughout trial, however, defense counsel utterly failed to enforce this prohibition. The State’s questions to its witnesses made the fact of another investigation apparent. Prosecutors repeatedly asked the witnesses to focus on “the woman found on the stairs,” letting jurors know that Hungerford-Trapp was not the only victim. See RP 562 (focusing on “an investigation where a woman was found on the stairwell on South 27th”), 593 (focusing on “the woman who was found on the stairs”), 677 (witness asked if transcript

refreshed his memory about “the woman whose body was found on 27th on the stairwell”). Not once did defense counsel lodge an objection or move to strike.

Other questions and answers were even more to the point, leaving no doubt in jurors’ minds that Davis had killed before.

Specifically, prosecutors:

- asked questions revealing that one witness was initially interviewed “about a separate investigation” before the subject changed to the “woman who was found on the stairs.” RP 581;
- read from an interview transcript where the detective said, “I want to switch gears a little bit here and talk about another case.” RP 584;
- asked about an interview pertaining to the “homicide cases.” RP 613 (emphasis added);
- read from an interview transcript wherein the detective’s question prompted the witness to clarify if the detective was talking about “[t]he one where [Davis] was drenched in blood” or some other. RP 618-19;
- had a witness confirm that “initially, the police contacted you . . . about a different investigation they were doing.” RP 634;
- asked a question that resulted in a witness indicating Davis had already been arrested for murder *before* detectives received information connecting him to Hungerford-Trapp. RP 635;
- read from an interview transcript indicating Davis “made some comments . . . about another murder that occurred in the city.” RP 656 (emphasis added); and

- asked whether a witness's testimony pertained to "the lady at 27th Street or a different lady." RP 660.

Defense counsel did not object and did not move to strike any of these offending questions, answers, or comments.

Nor did counsel move to strike the witnesses' answers – elicited in response to his own questions – revealing that police took family members to the police station "for something totally different," that the stairwell was where police had found "*another* body," or that detectives had placed the photos of another victim ("Ms. Georgia") on the table when interviewing Lisa Taylor about her brother. RP 597, 705 (emphasis added), 707.

In past cases, this Court has recognized that counsel's failure to object to evidence of other crimes falls below an objective standard of reasonable attorney conduct. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to evidence of prior convictions); State v. Dawkins, 71 Wn. App. 902, 908-910, 863 P.2d 124 (1993) (failure to object to evidence of uncharged crimes).

The same is true here. Having successfully obtained an order precluding any references to other investigations, counsel consistently failed to seek enforcement of that order. Not until Lisa

Taylor indicated that her brother had already been placed “on death row for this stuff” did counsel finally stir. RP 710-11.

There was no legitimate tactic behind these failures. Counsel permitted jurors to hear evidence in violation of ER 404(b) and constitutional due process guarantees. No objectively reasonable attorney would have performed so miserably.

b. Objections would have been sustained

There is no doubt objections would have been sustained. As just discussed, the trial court excluded this evidence when it granted the defense motion in limine. Indeed, at one point -- when Lisa Taylor was speaking about another murder (that of “Ms. Georgia”) -- it was *the court*, rather than counsel, that finally interceded and stopped her. See RP 707. Moreover, when defense counsel finally did lodge an objection (when Lisa Taylor told jurors her brother had been sentenced to death), the trial court sustained the objection. RP 710-11. Other objections also would have been sustained.

c. Davis suffered prejudice

To show prejudice, Davis need not show that counsel’s performance more likely than not altered the outcome of the proceeding. State v. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability that the outcome would have

been different but for counsel's mistakes, *i.e.*, "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Evidence relating to a defendant's prior criminal conduct is particularly unfair as such evidence impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden inference . . . ." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (Prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes."). It is now well accepted, by scholars and courts, that the probability of conviction increases dramatically once the jury becomes aware of prior crimes or convictions. See Hardy, 133 Wn.2d at 710-711.

This danger is at its highest when the prior criminal act is similar to the crime for which the defendant now stands trial. State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987); Dickson v. Sullivan, 849 F.2d 403, 407 (9th Cir. 1988) ("[T]he danger of prejudice to the defendant is exacerbated where the prior offense is

similar to the offense being tried.”); see also Marshall v. United States, 360 U.S. 310, 311-313, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959) (at trial for unlicensed dispensing of drugs, jurors learn of prior convictions for similar offense despite ruling prohibiting evidence; new trial required); United States v. Keating, 147 F.3d 895, 900, 903-04 (9th Cir. 1998) (jurors’ knowledge that defendant had been convicted in state court of similar offenses required new trial).

Like the Ninth Circuit Court of Appeals decision in McKinney, this Court has recognized that improper evidence of other, similar crimes can deny the defendant due process. In State v. Escalona, 49 Wn. App. at 252, the defendant was charged with second-degree assault while armed with a deadly weapon, a knife. Pretrial, the court granted a defense motion in limine precluding evidence that Escalona had previously committed a similar offense. Id. Despite the prohibition, in a non-responsive answer, a witness testified that Escalona already had a record for stabbing someone. The court instructed jurors to disregard the testimony, but denied a motion for mistrial. Id. at 253.

This Court reversed. Noting the similarity between the prior and current charges, this Court reasoned “no instruction can ‘remove the prejudicial impression created [by evidence that] is inherently

prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.” Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). Because the remark denied Escalona his right to a fair trial, a mistrial was required. Escalona, 49 Wn. App. at 192.

Undersigned counsel was unable to find another Washington case where, during a defendant’s murder trial, jurors learned that the defendant had already been convicted of murder. An opinion from Connecticut, however, State v. Jones, 234 Conn. 324, 662 A.2d 1199, 1201 (1995), is instructive. Jones was charged with capital murder. During jury selection and trial, jurors learned that Jones had previously been convicted of murder. Id. at 1205-06. Although the prosecution was required to prove the prior murder as an element of the capital offense, the Connecticut Supreme Court held that the inherent prejudice resulting from evidence of the prior murder required that jurors not hear evidence of that crime until after they had found the defendant guilty of the current offense. The State had to present its case in a bifurcated trial. Id. at 1206-1212.

Several eyewitnesses had seen Jones shooting the victim and identified him as the killer. Id. at 1201-02. Moreover, the trial judge had given jurors a detailed instruction prohibiting them from using

evidence of the prior murder to conclude Jones had committed the current offense. *Id.* at 1212 n.14. The Connecticut Supreme Court nonetheless ordered a new trial, reasoning:

It is beyond dispute that in this case the jury was subjected to facts and considerations having no legitimate bearing on the actual murder at issue. Furthermore, the risk that the defendant was prejudiced is manifest. That the jury was unaware of the specifics of the prior homicide could not detract from the reasonable conclusion that the defendant was predisposed to kill. [Jurors knew] the defendant was sentenced in 1976 to a minimum of eighteen years and a maximum of lifetime incarceration. From this the jurors learned that the defendant was a murderer, that he had already spent much of his life in prison prior to his arrest for yet another homicide, and that another court had already determined that incarceration or its threat should hang over the defendant's head for the rest of his natural life.

*Id.* at 1210.

Of course, at Davis' trial, jurors learned that he was not even deemed worthy of a life sentence. A previous jury had determined that death was the only suitable outcome. Jurors knew that whatever the precise details of the prior crime, it warranted the ultimate penalty.

Lisa Taylor's testimony that her brother had been sentenced to death requires a different analysis than the other offending evidence. Since defense counsel *did* object to this testimony and

moved for a mistrial, the issue does not fall under ineffective assistance of counsel. Instead, it is akin to the trial irregularity in Escalona.

In determining whether a trial irregularity (here, a non-responsive answer) requires a mistrial, this Court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254. Denial of a motion for mistrial is reviewed for an abuse of discretion. Johnson, 124 Wn.2d at 76. An examination of the above criteria reveals an abuse of discretion here.

First, it is difficult to conceive of a more serious error. Recognizing the inherent prejudice that would result from jurors learning that Davis had previously been convicted of murder, the trial deputies agreed this information would be kept from them. RP 389. And when one juror accidentally overheard information about the Couch case, that juror was dismissed by agreement of the parties. RP 520-25.

Davis was on trial for murder. And his jury learned that he had been investigated, convicted, and sentenced to death for

another murder. It is common knowledge that death is reserved for society's worst offenders. And Davis' jury knew that he had already been placed in that category. It is a vast understatement to say the evidence was "inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn. App. at 255. This was devastating to the defense. Once jurors heard this, Davis' conviction on the current charge was preordained.

Second, this evidence was cumulative, but only cumulative of the other improper evidence defense counsel had allowed over the course of the trial by failing to seek enforcement of the court's pretrial in limine ruling. Critically, it was not cumulative of any proper evidence.

Third, there was no curative instruction. Some errors simply cannot be fixed with a curative instruction. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); Escalona, 49 Wn. App. at 255-56; see also Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

There is no curative instruction known to man capable of removing the taint that necessarily results from learning an individual on trial for murder has murdered before and been sentenced to die.

In refusing to declare a mistrial, the trial court made several key findings that are contrary to the evidence and therefore erroneous. See Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (findings of fact not supported by substantial evidence are erroneous), cert. dismissed, 479 U.S. 1050 (1987).

The court found that, "Up until Ms. Taylor testified, there was no mention of the defendant being involved in any other incident or investigation." CP 67. This is simply wrong. Ms. Taylor was one of the State's later witnesses. By the time she told jurors Davis had been sentenced to death, jurors were already well aware – from the testimony of many family members, the prosecutors' questions, and portions of the 1997 interview transcripts – that Davis had been investigated for another murder. Taylor's comment came *after* every other family member had testified. See RP 710. Contrary to the court's finding, evidence of the other murder investigation had already permeated this trial.

Because jurors heard substantial evidence of another murder investigation before Taylor told them Davis received the

death penalty, two other findings also fail. The court found that “the jury will likely consider Ms. Taylor’s unsolicited remark about ‘death row’ to be hyperbole rather than true” and “no other witness made any comment even close to Ms. Taylor’s, so the jury heard nothing that would support any possible conclusion that her comment related to this case or even to this defendant (Ms. Taylor testified that she had several other brothers besides the defendant).” CP 69.

These findings also assume Taylor’s testimony was an isolated remark. While it is true Taylor’s comment was the most egregious violation of the pretrial order, the comment was not made in a vacuum. Since many other witnesses had already alerted jurors to the fact of another murder, jurors would have deduced (correctly) that Taylor was talking about Davis. There is no other reasonable conclusion they could have reached. The notion jurors might have mistakenly assumed Taylor was speaking about some other brother strains credulity.

Finally, the court found that based on the strength of the State’s case, “the comment could not have any effect on the jury in deliberating this case.” CP 69. But this finding (like the others) is

premised on the court's mistaken belief Taylor had made an isolated remark.

While there was evidence linking Davis to the crime scene, his conviction for second-degree murder was not a foregone conclusion. No one saw him associate with Hungerford-Trapp, no one saw her murder, Davis consistently denied the killing, and Davis' family members largely divorced themselves from their 1997 statements to police. Moreover, while witnesses claimed Davis admitted stabbing Hungerford-Trapp, she was never stabbed. Under these circumstances, and where Davis' "trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair. . . .," due process was violated and reversal is the only adequate remedy. See McKinney v. Rees, 993 F.2d at 1385-86.

At the very least, without evidence of the prior murder and death sentence, jurors may have found Davis guilty only of first-degree manslaughter. Prosecutors understood this possibility because they requested an instruction on that lesser charge. RP 1162; CP 51-54. Prosecutors recognized that without a witness to the murder, jurors might not find that Davis intentionally killed Hungerford-Trapp. See RP 1167, 1169-1170 (prosecutor concedes intent is disputed issue). But any such chance

disappeared once jurors heard about the prior murder and death sentence.

Alone, or in combination, counsel's deficient performance and Taylor's testimony violated Davis' right to due process. His murder conviction must be reversed and the case remanded for a new and fair trial.

2. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT ALSO DENIED DAVIS A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Consistent with their duties, prosecutors must not misstate the law or otherwise mislead the jury. To do so is a serious irregularity. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Nor may prosecutors urge a guilty verdict on improper grounds. Belgarde, 110 Wn.2d at 507-508.

At Davis' trial, prosecutors violated these prohibitions.

a. Prosecutors Suggested Davis Was Responsible For The Delay In Bringing The Case To Trial

While displaying photos of Hungerford-Trapp, prosecutors told jurors “ten and a half years is a very long time to wait for justice” and while asking jurors to hold Davis accountable, they noted “[i]t’s been over ten years, and that’s a long time.” RP 1197, 1230. This was misleading and suggested jurors convict on improper grounds.

It was the *State’s* decision not to prosecute Davis until January of 2005. CP 1, 22. And the trial deputies knew this full well because they had defended the delay in response to a defense motion to dismiss for preaccusatorial delay. See CP 4-22, 219-236. Indeed, in their response to that motion, the trial deputies stated, “For a number of reasons, the elected prosecutor at the time, John Ladenburg, decided not to file charges [even though the State had DNA results back in 1998].” CP 223.

In State v. Huson, 73 Wn.2d 660, 662-63, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969), the prosecutor resorted to several “reprehensible” statements during his closing argument, including an allegation the defendant “has been a criminal for twenty-five years. And he has got away it.” The Huson court did not reverse because it found that defense counsel had consciously

decided not to object to the prosecutor's statements, thereby allowing him to argue (which he did) that this tirade against his client demonstrated the prosecution had no interest in a fair trial. Huson, 73 Wn.2d at 664.

There was no similar tactic at Davis' trial, only further inaction on his attorney's part. And there was significant prejudice. The trial deputies' statements implied that Davis was somehow responsible for the ten-year delay in the case. Jurors would have naturally wondered why it took so long for the State to bring the case to trial. Indeed, during voir dire, prosecutors asked what venire members thought about the ten-year delay. Several indicated it was unfair if Davis had been required to sit in jail waiting for trial. See RP 302-04.

Sensing that jurors could hold the delay against the State, the deputies decided to use that delay to their advantage. When prosecutors showed photos of Hungerford-Trapp and pointed out "it had been a very long time to wait for justice," no juror would interpret this as self-admonition. Prosecutors deflected blame to Davis. And what better way to instill anger against a defendant than suggest he had "gotten away with it" for a decade?

Where, as here, defense counsel fails to object to misconduct, reversal is still required where "the misconduct was so

flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice.” State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Given that the trial deputies defended the charging delay in pretrial motions, only ill intention can explain such flagrant misconduct. They knew Davis had nothing to do with the delay. Moreover, this was not the sort of misconduct that could have been fixed with an instruction to disregard. The seed had been irretrievably planted that Davis was responsible for delayed justice.

b. Prosecutors Misstated Reasonable Doubt And Destroyed The Presumption of Innocence

The presumption of innocence and requirement that the State prove every defendant’s guilt beyond a reasonable doubt are bedrock principles of due process and fundamental to a fair trial. State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977)(citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). The two principles are intimately related, as the proof beyond a reasonable doubt standard “provides concrete substance for the presumption of innocence . . . .” McHenry, 88 Wn.2d at 214 (quoting Winship, 387 U.S. at 363). Indeed, the failure to properly instruct jurors on these principles is structural error and requires reversal.

Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 192 (1993); McHenry, 88 Wn.2d at 212-215.

Misconduct that directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. Fleming, 83 Wn. App. at 216.

During closing argument, prosecutors violated Davis' right to due process by misstating the reasonable doubt standard and turning the presumption of innocence on its head. With the assistance of a PowerPoint slide, the deputy prosecutor told jurors:

In order to find the defendant not guilty, you have to say:

"I doubt the defendant is guilty,  
and my reason is \_\_\_\_\_."

And you have to fill in that blank.

Supp. CP \_\_\_\_ (State's PowerPoint Presentation, at 16).

Although Davis should have had the benefit of the

presumption of innocence, this slide indicates that “in order to find the defendant not guilty,” jurors must be able to supply a reason for any doubt. In other words, the prosecutor employed a presumption of guilt, thereby saddling the defense with the burden to provide a doubt as to that guilt. This is the equivalent of a “to not convict” instruction.

Moreover, the trial deputy’s inarticulate argument accompanying the slide only made things worse. He told jurors:

while you’re deliberating, if you want to find the defendant not guilty, you need to say I believe he’s not guilty. I’m sorry. I doubt he’s not guilty. That’s what you should say. I doubt he’s guilty, and here’s why. And you have to fill in that blank.

RP 1194-95.

By telling jurors what they must do “if you want to find the defendant not guilty,” the deputy reinforced the notion of a presumption of guilt. He then articulated three different standards that would allow jurors “to not convict” Davis -- belief he’s not guilty, doubt he’s not guilty, and doubt he’s guilty. The prosecutor effectively destroyed the presumption of innocence and castrated proof beyond a reasonable doubt.

Some misstatements of the law can be overlooked because they are relatively minor and jurors are instructed to disregard any

argument not supported by the court's instructions. See CP 43 ("You must disregard any remark, statement, or argument that is not supported by . . . the law in my instructions."). But some misstatements are not so easily dismissed, particularly those pertaining to the State's burden and proof requirements. See Fleming, 83 Wn. App. at 213-14 (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill intentioned," and required a new trial).

The instructions at Davis' trial encouraged jurors to consider the lawyers' remarks when applying the law. See CP 43 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law."). Jurors would have followed the prosecutor's suggested approach because his comments and visual aid had the ring of truth. To a layperson, the prosecutor's description of reasonable doubt – what must occur to find the defendant "not guilty" – sounds correct and provided a simple (albeit mistaken) way for jurors to decide guilt or innocence.

It would have been particularly tempting for jurors to follow the prosecutor's approach because the standard reasonable doubt instructions are not a model of clarity. See State v. Bennett, \_\_\_\_\_

Wn.2d \_\_\_\_, 165 P.3d 1241, 1248 (2007) (recognizing that even under the WPIC instructions, “the concept of reasonable doubt seems at times difficult to define and explain,” making it tempting to expand the definition).

The State cannot show, as it must, that its misconduct was harmless beyond a reasonable doubt. By misstating reasonable doubt and rendering the presumption of innocence inapplicable, prosecutors eased their constitutional burden. This increased the odds jurors would convict Davis of second-degree murder rather than acquit him outright or convict him of first-degree manslaughter.

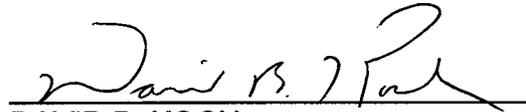
D. CONCLUSION

Evidence that Davis had killed before and been sentenced to death denied him due process. Davis was denied his right to competent representation because his attorney failed to keep this evidence from jurors. When counsel finally did object, the court erred in failing to declare a mistrial. Prosecutorial misconduct during closing argument also denied Davis a fair trial and requires reversal.

DATED this 28<sup>th</sup> day of September, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH,  
WSBA No. 23789  
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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 35681-3-II
	)	
CECIL DAVIS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF SEPTEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- KATHLEEN PROCTOR  
PIERCE COUNTY PROSECUTING ATTORNEY  
930 TACOMA AVENUE SOUTH  
ROOM 946  
TACOMA, WA 98402
  
- CECIL DAVIS  
DOC NO. 920371  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS  
DIVISION II

07 OCT -1 AM 9:08

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2007.

x Patrick Mayovsky

2007 SEP 28 PM 3:34