



Appellant Dawn Cooper submits the following issues for consideration by the Court in conjunction with the Appellant's Opening Brief by counsel, as a Statement of Additional Grounds per RAP 10.10.

#### ASSIGNMENTS OF ERROR

These are in addition to appellant's counsel's grounds:

1. (Appellant's Opening Brief, Ground 3.) Appearance of Fairness Doctrine, Cumulative Error, Prosecutorial Misconduct and Manifest Abuse of Discretion

The trial court committed numerous errors including denying the defense a fair opportunity to present opening statements and a fair defense; the prosecutor committed misconduct including objection during opening statements, which the trial court erroneously sustained. The court then made statements regarding the requirements and limitations in opening statements and further denied the defense an opportunity to outline its defense. The appellant was denied the right to call as a witness the "victim", who could have given material exculpatory evidence. The appellant contends that the use of the *Castle* instruction, especially when combined with the other errors, improperly raised or reversed the burden of proof to the defense, and that the combined errors denied the appellant a fair trial, and the opportunity to present a fair and adequate defense.

2. (Appellant's Opening Brief, Ground 1.) Joinder of Defendants for Trial was Error.

Co-defendants were joined by mistake by a void order of joinder. The cases were not joined by operation of the court rule; the cases should have been tried separately. Improper joinder resulted in violation of Ms. Cooper's right to a speedy trial.

## STATEMENT OF THE CASE

The Appellant essentially concurs with counsel's statement of the case.

## ARGUMENT

1. (Appellant's Opening Brief, Ground 3.) Appearance of Fairness Doctrine, Cumulative Error, Prosecutorial Misconduct and Manifest Abuse of Discretion

The Appellant's trial began with the Court delivering the controversial and, "problematic" *Castle* instruction<sup>1</sup>. The appellant contends that its wording from the definitions in, *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), that a "real possibility", as opposed to the constitutional, "reasonable doubt" standard that must be met, has raised or reversed the burden of proof. The *Bennett* court defined,

"[A] 'real possibility' is a genuine possibility, as opposed to an imaginary or conjectural one." *Id.* at 58. (quoting Webster's Third New International Dictionary 1890 (1976))." *Bennett*, at 314.

The Court also stated, "The *Hunt* court noted that "the 'real possibility' language serves to distinguish a 'genuine possibility' from an 'imaginary or conjectural one.'" *Id.* At 540 (quoting *Castle*, 86 Wn.App. at 58.) The, "real possibility" language requires or implies that the defendant must give physical evidence of innocence to rebut any evidence or inference of guilt by the State.

<sup>1</sup>Named for the first Washington case in which it appeared. *State v. Castle*, 86 Wn.App. 48, 935 P.2d 656 (1997).

The “reasonable doubt” standard which is an enumerated right of the accused, is held as the guide for the jury, to whom is given the solemn responsibility of weighing the evidence in favor of guilt or innocence literally asks for “reasonable doubt”. This is not a statement one has need to produce physical evidence to reach, but relies on the judgment of the jury. Doubt literally refers to a “feeling” or “conviction” of a juror regarding the *lack of evidence produced by the State, it’s insufficiency, or the possibility that the defendant’s version of events is true, and by judging the credibility of all the proffered testimony and evidence.*

Webster’s II New Riverside University Dictionary<sup>1</sup> defines doubt as,

“1. To be *skeptical* or *undecided* about; 2. *Disbelieve*; 3. To *suspect*: *fear*; To be *undecided*.”

Emphasis mine.

This definition shows that all of the things that go into a jury’s consideration of reasonable doubt are feelings, not real in the sense of *tangible proof*, necessarily. The word “real” implies that it cannot be their “feeling”, “opinion”, or “belief” after carefully weighing evidence, and judging which witness(es) seemed more credible.

<sup>1</sup>This is the only Webster’s dictionary the appellant had available to her.

To then change the standard to one where the jury feels obligated to require proof produced by the defense, they have impermissibly shifted the burden, and have violated the constitutional right of the defendant to a fair trial. The State Supreme Court held that this instruction should be avoided in favor of the reasonable doubt instruction over a year before this trial. We contend that this denied the appellant a fair trial and the opportunity to present a fair defense.

The record shows that immediately after the delivery of the Castle instruction, the prosecution was allowed to give an opening statement to the jury. But when defense counsel first began his opening statement, the State objected on the ground that he was arguing. RP 06/19/08 p.4 (App. I). Defense counsel properly groomed his opening statement after statements of the prosecutor, *in reference to*, but *not in argument with*, and stated what he believed in good faith the evidence would show,

“I will tell you, however, that the evidence will show that much of what these three defendants are going to present as their defense or contest in the State’s defense is similar or very close to the same thing, if not identical.

The reasons I say that there are serious and severe gaps in the evidence in the State’s case. The State has just suggested to you that this was an organized plan to go collect a debt from a guy through the use of force, violent force, I guess, but you won’t hear any evidence actually that anybody ever made such a plan, because there wasn’t one.”

It is generally accepted that defense's opening statement should be,

“[n]ot inconsistent with a theory of his defense, accused is not necessarily required to remain strictly within the literal scope of the defense outlined therein. It should be brief and general, rather than detailed, and while the trial court should not so restrict or interrupt the statement as to deprive accused of a fair opportunity to outline his defense, its exact scope and extent rest largely in the discretion of the trial court. Accordingly, a proper effort to limit counsel to an outline of the proposed proof and the avoidance of an argumentative and detailed recital of anticipated testimony by accused is not a denial of the right to make an opening statement.”

C.J.S. Criminal Law, § 1244. Opening Statement for Defense

Here, we see that it is proper to avoid a detailed and argumentative recital of all of the expected events of the upcoming trial. What the trial court did, however, is allow an objection by prosecution and sustained it, which was called argument, but was only a reference to a statement made. In fact, he only stated the truth. That, “the State has just suggested to you that this was an organized plan to go collect a debt from a guy...”. He prefaced this with the statement that there are serious holes in the State's case. This is a statement about the defense of the charge - reasonable doubt. Defense counsel was properly within their right to address this issue, and the trial court abused its discretion by then denying the defense the right to state the nature of her defense and the evidence she intends to offer to sustain it, or the reasonable doubt they might find. Mr. Finlay stated,

“I’m entitled to point out the evidence or lack of evidence. That’s exactly what I did.”

The trial court then went even further, and by their own words stated,

“I think the basis for opening statement at this point is to tell the jury what evidence is expected to be presented. You have heard the State’s opening statement as to what they intend to present.

*You certainly can comment as to what the State’s evidence, as presented so far, would show, but as to what other evidence might or might not be presented, I think it’s premature for that, and I think that needs to wait until closing argument. So to that extent, I will uphold the objection”.*

Mr. Finlay then replied,

“I’m not quite sure I understand the Court’s ruling.

The Court then continued it’s abuse of discretion until the defense was robbed of its opportunity to present opening statements, and was unfairly limited in being able to make an absolutely proper statement about the expectation of reasonable doubt,

“I think it’s premature to talk about holes in evidence.”

Mr. Finlay,

Your Honor, I have to disagree with you on that, and I think I need to be heard on the record. This puts me in a position where I can’t make an opening statement, because that’s what our defense is all about.”

The Court said

You can talk about what the evidence is supposed to show. You can ask the jury to look at that closely, and at the end of the case, you can tell them that you will be pointing out what wasn't shown."

Mr. Finlay tried again,

"Okay. Well, let me try this: Let's look at the evidence that Mr. Bruneau stated that you would hear. Three guys, Mr. Waller, Mr. Reading, and Mr. Afo, went looking for a guy by the name of Nate we don't know much more about than his name. Apparently, he owed somebody some money.

So what did they do? They went and tried to find him; they didn't find him; they left. That's it. Then they ran when the police started chasing them. You will hear evidence, I think, I think the driver of the car and maybe one of the other guys may have had warrants out for the, which is why they ran.

What does that prove? Ask yourself that as you are hearing all of the evidence today. Is this evidence of anything? What is this evidence proving? What is the purpose of bringing it in.

Let's see. This supposed violent confrontation, debt-collection procedure was performed in broad daylight, 9 o'clock in the morning—

Whereupon the prosecution objected again to "argument".

Defense counsel stated,

"I'm stating facts, your Honor. This is not argument, and I would object to Mr. Bruneau's repeated interruption."

To the best of the Appellant's recollection, most of this took place in front of the jury.

In State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976), the court held that, 2 L. Orland, Wash. Prac§ 213 (3d ed. 1972), “The opening statement is based upon the anticipated evidence and the reasonable inferences which can be draw therefrom.” State v. Aiken, 72 Wn.2d 306, 351, 434 P.2d 10 (1967). “A reference in opening statement to anticipated testimony of a witness who subsequently is not called does not prejudice the defendant if no bad faith is involved and the jury is instructed that opening statement does not constitute evidence, State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982), cert. den. 459 US 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). “Either party may, in the opening statement, refer to admissible evidence expected to be presented at the trial”, State v. Piche, 71 Wn..2d 583, 585, (1967) (quoting State v. Gellerman, 42 Wn.2d 742, 259 P.2d 371 (1953).

“When the defense will not introduce any evidence, then defense counsel must use the opening statement to emphasize the concept of reasonable doubt and thereby prepare the jury for both defense’s cross examination of the state’s witnesses and defense’s closing argument. Emphasizing the concept of reasonable doubt means more than just telling the jury that the state has the burden of proving each and every element of the crime beyond a reasonable doubt. *It also means telling the jury that defense counsel is going to demonstrate that there are many uncertainties in the state’s case. Defense counsel should specify those areas in which defense counsel expects such uncertainties.*”

13 Wash. Prac. § 4207.

This is proper, it is allowed, and this is precisely what defense counsel did. The trial court, having denied the defense an opportunity to do so, prejudiced the appellant by not allowing the defense to explain all of the things listed above, especially taken in context of all of the errors, and the conduct of the judge toward defense counsel. It was abuse of discretion to repeatedly allow interruptions, objections, and to rule contrary to law and accepted practice.

The combined effect of implying to the jury that the defense must be required to produce evidence in proof of innocence, then denying the defense the right to state the nature of the defense, which was reasonable doubt, also had the effect of making the jury think counsel had done something wrong. This enhanced the first error, making it appear that the defense had no “real possibility” to offer, then following this with denying the appellant the opportunity to call to the stand the alleged victim, who could provide material exculpatory evidence, in total denied the appellant every effort to present a defense.

2. (Appellant's Opening Brief, Ground 1.) Joinder of Defendants for Trial was Error.

Co-defendants were joined by mistake by a void order of joinder. The cases were not joined by operation of the court rule; the cases should have been tried separately. Improper joinder resulted in violation of Ms. Cooper's right to a speedy trial.

In addition to Appellant counsel's Opening Brief, the Appellant submits the following additional authority:

In much similarity to the case at bar, the case of State v. Iniguez, 143 Wn.App. 845, 852 180 P.3d 855 (2008), found after many delays,

“CrR 3.3(b) requires that a defendant in custody be brought to trial within 60 days of the commencement date of the action. The commencement date is the date of arraignment... Certain periods are excluded from the computation of the speedy trial deadline, including continuances granted by the court pursuant to CrR 3.3(f), and CrR 3.3(e)(3). CrR 3.3(f) permits the court to grant continuances (1) upon written agreement of the parties or (2) when a delay is required in the administration of justice and the defendant will not be prejudiced, so long as the parties agree in writing or on motion from a party or the court. When a period of time is excluded under CrR 3.3(e), the allowable time for trial “shall not expire earlier than 30 days after the end of that excluded period.” CrR 3.3(b)(5).

“When determining whether delay is unconstitutional, the court considers the length of the delay, the reason for the delay, whether the defendant asserted the right, the prejudice to the defendant, and such other circumstance as may be relevant.” State v. Iniguez, 143 Wn.App. 845, 855 (2008) (quoting State v. Whelchel, 97 Wn.App. 813, 823-24, 988 P.2d 20 (1999)).

They also held that the manner of the, “final (and under *Doggett*, the most intensive) delay”, was not reasonable. That delay was the State’s failure to inform a witness of a new trial date until less than a week before the date. The court properly took into consideration that the delay was not the fault of the defendant, as here, it can be laid entirely at the feet of the improperly joined codefendants. It was also ruled as such under the weight of a great many cases stating that the invocation of a defendant’s speedy trial right should have taken precedence and brought caution and close scrutiny. This was denied the appellant.

The *Iniguez* court held, “When delay is caused by a codefendant joined by the government, a delay is generally acceptable except when the accused demands a speedy trial, *United States v. Grimmond*, 137 F.3d 823, 828-29 (4<sup>th</sup> Cir. 1998). In that case, **“a defendant’s invocation of his Sixth Amendment right to a speedy trial...would trump” the policy of joining the trials of defendants who are indicted together.** *Id.* at 828. That is the case here.” *Iniguez*, at 856.

It is triply so in the case before the bar. 1) As the Appellant’s Opening Brief shows, the cases *were not* joined by indictment. 2) The defendant invoked her right to a speedy trial and timely objected for the record. 3) The defendant had no notice and the order was therefore void.

This made the trial court's decision to continue the trial date for reasons the *Iniguez* court also held unexcusable delay (and its supporting cases), as well as without foundation in the record – the charging information – or notice and due process manifest abuse of discretion. This denied the Appellant her Sixth Amendment right to a speedy and separate trial.

Finally, the *Iniguez* court also held, “Prejudice “should be assessed in the light of the interests...the speedy trial right was designed to protect.” *Barker*, 407 U.S. at 532. These interests include: (1) preventing oppressive pretrial incarceration, (2) minimizing the anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *Id.* Of these interests, “the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.*; *See also Doggett*, 505 U.S. at 654.” *Iniguez*, at 857-58.

The appellant did not have the same charges as her codefendants. Had she been tried separately and timely, with the opportunity to present an opening statement properly explaining the expected case to the jury, without being yelled at in an unprofessional manner by the judge repeatedly, if she had been able to call Nathan Hoffman – a material exculpatory witness, and without the jury hearing all of the innuendo presented against the other defendant's, there is every reason to believe that a jury would have found insufficient evidence, and reasonable doubt.

While the court held that Iniguez had a valid claim of prejudice on the first two interests, but lacked evidence of the last, it is not the case here. The first issue explained here lays out that very evidence, clearly shown in the record. This proves that the Appellant was denied every effort to prepare and present a fair and adequate defense, and that the Appellant did not receive a fair, separate, or timely trial. The Appellant's conviction should therefore be reversed, and no other remedy is adequate.

CONCLUSION:

These issues, presented in conjunction with counsel's opening brief, show without any doubt what can only be described as an old-fashioned "railroad" job of a conviction. The combined errors are glaring. 1) The record presented by the State does not show sufficient evidence under the law and the constitution of each and every element of the crime charged; 2) the judge violated the fairness doctrine; 3) the trial court abused its discretion by joining the defendant's in trial and 4) violating the appellant's speedy trial rights as well as 5) denying the appellant an opening statement; 6) her codefendant's counsel had a clear conflict of interest in regard to the material witness that the appellant needed; 7) the prosecutor blatantly, repeatedly and knowingly gave the jury improper opinion testimony, and; 8) finally and obviously, the cumulative effect of these errors

The prejudice to the Appellant is undeniable and inescapable. The result is shameful. We respectfully ask this court to reverse the case for the aforementioned reasons, and thank the court for its consideration.

Respectfully Submitted,

  
Dawn Cooper 850717  
Washington Corr. Center for Women  
9601 Bujacich Rd. NW  
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**APPENDIX I**  
**STATEMENT OF ADDITIONAL GROUNDS OF**  
**DAWN COOPER**

**RP 06/19/08 PAGES 1 - 6**

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

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STATE OF WASHINGTON,	)	
	)	THURSTON COUNTY
Plaintiff,	)	CAUSE NO.
	)	07-1-02053-9,
vs.	)	07-1-02060-2,
	)	07-1-02074-2
DONALD WALLER,	)	
DAVID READING,	)	CONSOLIDATED
DAWN COOPER,	)	COURT OF APPEALS
	)	CAUSE NO.
Defendants.	)	38008-1-II
	)	
	)	Excerpt from
	)	Mr. Finlay's
	)	Opening Statement

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VERBATIM REPORT OF PROCEEDINGS

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BE IT REMEMBERED that on June 19, 2008, the  
above-entitled matter came on for hearing before the  
HONORABLE CHRIS WICKHAM, Judge of Thurston County  
Superior Court.

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Reported by: Sonya Messing, Official Reporter,  
CCR#2112  
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Olympia, WA 98502  
(360) 786-5571  
messins@co.thurston.wa.us

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For the Defendant  
Dawn Cooper:                         BRUCE FINLAY  
                                          Attorney at Law  
                                          P.O. Box 3  
                                          Shelton, Washington 98584

CERTIFICATE OF REPORTER

STATE OF WASHINGTON )

COUNTY OF THURSTON )

I, SONYA L. MESSING, RPR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 12th day of March, 2009.

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SONYA L. MESSING, RPR  
Official Court Reporter  
Certificate No. 2112

[The following is part of Mr. Finlay's opening statement excerpted from the complete Verbatim Report of Proceedings]

MR. FINLAY: All right. Thank you, your Honor. I will make an opening statement on behalf of Ms. Cooper, and for the benefit of the ladies and gentlemen of the jury, I only represent Ms. Cooper. This is kind of hard to keep track of sometimes. These guys are not my clients, so whatever I say really doesn't have anything to do with their case. We are all sitting at the same table, because that's the room we have to work with, but we are not necessarily all on the same team.

I will tell you, however, that the evidence will show that much of what these three defendants are going to present as their defense or contest in the State's defense is similar or very close to the same thing, if not identical.

The reasons I say that is there are serious and severe gaps in the evidence in the State's case. The State has just suggested to you that this was an organized plan to go collect a debt from a guy through the use of force, violent force, I guess, but you won't hear any evidence actually that anybody ever made such a plan, because there wasn't one.

MR. BRUNEAU: I'm going to object to the argument of counsel. This is supposed to be an opening statement, not an argument.

MR. FINLAY: I'm entitled to point out the evidence or lack of evidence. That's exactly what I did.

THE COURT: I think the basis for opening statement at this point is to tell the jury what evidence is expected to be presented. You have heard the State's opening statement as to what they intend to present.

You certainly can comment as to what the State's evidence, as presented so far, would show, but as to what other evidence might or might not be presented, I think it's premature for that, and I think that needs to wait until closing argument. So to that extent, I will uphold the objection.

MR. FINLAY: I'm not quite sure I understand the Court's ruling.

THE COURT: I think it's premature to talk about holes in evidence.

MR. FINLAY: Your Honor, I have to disagree with you on that, and I think I need to be heard on the record. That puts me in a position where I can't make an opening statement, because that's what our

defense is all about.

THE COURT: You can talk about what the evidence is supposed to show. You can ask the jury to look at that closely, and at the end of the case, you can tell them that you will be pointing out what wasn't shown.

MR. FINLAY: Okay. Well, let me try this: Let's look at the evidence that Mr. Bruneau stated that you would hear. Three guys, Mr. Waller, Mr. Reading, and Mr. Afo, went looking for a guy by the name of Nate we don't know much more about than his name. Apparently, he owed somebody some money.

So what did they do? They went and tried to find him; they didn't find him; they left. That's it. Then they ran when the police started chasing them. You will hear evidence, I think, I think the driver of the car and maybe one of the other guys may have had warrants out for them, which is why they ran.

What does that prove? Ask yourself that as you are hearing all of the evidence today. Is this evidence of anything? What is this evidence proving? What is the purpose of bringing it in.

Let's see. This supposed violent confrontation, debt-collection procedure was performed in broad daylight, 9 o'clock in the morning --

MR. BRUNEAU: I'm going to object to the argument, your Honor.

MR. FINLAY: I'm stating facts, your Honor. This is not argument, and I would object to Mr. Bruneau's repeated interruption.

THE COURT: The objection is sustained insofar as it seeks to prevent counsel from arguing what the facts do or do not show. You will have an opportunity to do that in closing argument.

[END REQUESTED EXCERPTED TESTIMONY]

FILED  
COURT OF APPEALS  
DIVISION II

09 APR -6 AM 9:30

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

IN THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF Pierce

THE STATE OF WASHINGTON )  
COUNTY OF PIERCE ) ss. DECLARATION OF MAILING

I, Dawn Cooper, state that on this 2 day of April,  
2009, I deposited in the mail of the United States of America a properly stamped  
envelope containing a copy of the following described documents:

Statement of additional grounds in the  
prison legal mail system per PR 3.1

I further state that I sent these copies to the following addresses:

court of appeals division II      Thurston County prosecutors office  
950 Broadway Ste. 300      Appellate Division  
Tacoma, wa.      2000 Lake Ridge Dr. S.W.  
98402-3694      Olympia, wa. 98502

Dated: 4-2-09

Dawn Cooper      Signature  
Dawn Cooper 850717      Print Name & DOC

Washington Correction Center for Women  
9601 Bujacich Rd. N.W.  
Gig Harbor, Washington 98332-8300

FILED  
COURT OF APPEALS  
DIVISION II

09 APR -6 AM 9:30

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

IN THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

THE STATE OF WASHINGTON )  
COUNTY OF PIERCE ) ss. DECLARATION OF MAILING

I, DAWN COOPER, state that on this 2 day of APRIL,  
~~2009~~, I deposited in the mail of the United States of America a properly stamped  
envelope containing a copy of the following described documents:

STATEMENT OF ADDITIONAL GROUNDS IN THE  
PRISON LEGAL MAIL SYSTEM PER GR 3.1

I further state that I sent these copies to the following addresses:

Bruce Finlay Atty  
PO Box 3  
Shelton, wa  
98584

Dated: 4-2-09

Dawn Cooper  
Signature

Dawn Cooper 850717  
Print Name & DOC

Washington Correction Center for Women  
9601 Bujacich Rd. N.W.  
Gig Harbor, Washington 98332-8300