FILED
COURT OF APPEALS
DIVISION II

10 MAR -1 PM 2:04

STATE OF WASHINGTON

BY _____
DEPUTY

NO. 39395-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

State of Washington, Respondent

v.

Kevin Vinsonhaler,

In the Matter
Of
Darquise Cloutier, Appellant

REPLY BRIEF OF APPELLANT

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I. ISSUE PRESENTED

Does the record support the trial court's finding of contempt, or, did the court abuse its discretion and base its decision on untenable grounds or reasons?

II. SUMMARY OF ARGUMENT

The trial court abused its discretion. There is no basis in the record to support the trial court's decision finding the defense attorney in contempt.

III. ARGUMENT IN REPLY

Respondent argues that there is "ample" evidence in the Findings of Fact setting forth "exactly" the areas that were of concern to the trial court and were the basis of its decision to find the attorney in contempt. Yet respondent is unable to cite any examples of such.

The trial court's Findings indicate that it granted the State's motion in limine as to the "hearsay" statement of permission made by Tim Grace to the Defendant. CP 63, RP 10-11. The Findings also state that the defense attorney "repeatedly violated the Court's order," without however providing examples of such. The Findings only include one excerpt from counsel's closing argument.

The Findings mischaracterize the record, stating that "the jury had to be excused on several occasions in order for the Court to revisit its prior

ruling." CP 63, RP 10-11. In fact arguments by counsel regarding the evidence occurred prior to entry of the jury into the courtroom.

The Findings also inaccurately state that the Court "had to re-state its prior ruling before allowing the trial to re-commence" on the second day of trial. In fact, the Court reviewed its ruling in response to defense attorney's motion to reconsider.

The Court of Appeals in *State v. Berty*, 136 Wn.App. 74, 147 P.3d 1004 (2007) stated that "we won't disturb a trial court's contempt ruling absent an abuse of that discretion." "A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons." Here, a careful review of the record shows that the trial court did indeed base its decision on untenable grounds or reasons.

Of note is that the trial court's ruling prohibiting what it denoted the "hearsay" statement was murky, confusing, and changed during the course of the trial. (This ruling was also incorrect as a matter of law, [state of mind]) The State had sought and received an order that "hearsay" from the decedent was inadmissible at the trial. As trial progressed, this ruling expanded to then prohibit the defendant from testifying as to his belief that he had permission to enter the mobile home and take the water heater.

Adding to the confusion, the Court's ruling then expand further, to prohibit any mention of the decedent.

The trial court's ruling was confusing, and it varied over time, making it easy to misunderstand. Defense counsel attempted to avoid any inadvertent violation of the ruling, by repeatedly seeking guidance and clarification from the court. It appears there was no mutual understanding of the parameters of the ruling by any of the parties involved. Importantly, neither the Findings nor Respondent's brief can point to specific examples of the defense counsel violating the trial court's order.

What is clear is that the defense attorney did not violate the trial court's order during its opening statement nor during witness examination. The state, however, did intentionally violate the court's order by introducing the decedent's hearsay statement into evidence on cross examination of the defendant, as follows:

> Q: And your statement now today is that you told the officer when you were arrested that somebody named Tim gave you permission to take the water heater – is that right?
>
> A. Yes. The – the man – that was acting maintenance – that was in the second trailer on the left.
>
> CP 63, RP 354-55; 364-365

The trial court did not sanction the State for intentionally violating the order; nor did it direct the jury to ignore or disregard the evidence brought before it by the State.

During a closing argument, a party may refer to any evidence introduced at trial and is allowed to argue reasonable inferences from that evidence. The Defense, therefore, properly referred to the "hearsay" evidence, which was introduced by the State, during its closing argument.

State v. Berty

Respondent relies on *State v. Berty* but fails to point out the differences between it and the case at bar. In *Berty*, the trial court had previously warned the attorney, and then notified him during closing that his comments were sanctionable. No warning was given here. No notice was given to defense attorney that her comments might be sanctionable, or might even approach contempt. The attorney was not admonished, nor was she advised that her conduct was unprofessional or lacked respect for the court. No mention of contempt or sanctions was made during the trial, and the issue was first brought up with defense counsel when it appeared that the jury was hung.

In the *Berty* Findings, the trial court cited very specific instances of violations of the court's ruling, which served as "clear examples" of violation of trial court's order. 136 Wn. App. 74 at 86. The attorney in

Berty was directly warned by the trial court that he had crossed the line to sanctionable conduct. 136 Wn. App. 74 at 79. The trial court found that when the attorney again made a similar prohibited comment during closing, sanctionable conduct had occurred.

Here, unlike *Berty*, it was not defense attorney who disregarded the court's ruling on the questioning of witnesses. Rather, it was the State who did so in its cross examination of Defendant.

Abuse of discretion

The trial court abused its discretion in the case at hand. There is no proper basis to uphold the finding of contempt, and no clear instances in the record support the finding of contempt. The trial court's decision to sanction defense counsel was unfair and arbitrary. The prosecuting attorney, who directly and intentionally violated the court's order, was not sanctioned. The court allowed this evidence to be brought before the jury and then instructed the jurors to decide the case based on the evidence introduced at trial. Once this occurred, defense counsel had both the right and the duty to discuss the evidence. Allowing the State to intentionally violate the court's order and introduce excluded evidence at a time of its choosing is unfair and undermines the trial process.

Had defense counsel known that the "hearsay" evidence would be admitted (either by court so ruling, or by the state declaring its intent to

violate court's order during trial), then defense counsel could have discussed the matter during opening statement and altered its cross-examination strategy during the state's case.

The trial court's suggestion that defense counsel's "improper" argument affected the jury's failure to reach a verdict is unsupportable, given that the evidence was admitted, and the jurors were told to consider it. Additionally, the pattern instructions expressly direct the jury to consider arguments of counsel only insofar as they are supported by evidence in the record.

Inherent vs. statutory contempt powers

Also confusing is that the trial court stated that it was proceeding under its "inherent" authority, deciding that the summary contempt statute was inadequate. This may be a misinterpretation of the contempt powers. In any event, sanctions were not warranted here under either inherent nor statutory contempt authority.

No basis to support finding of contempt

The record is devoid of any no clear instances to substantiate the finding of contempt. Otherwise, Respondent would be able to point to them in its brief.

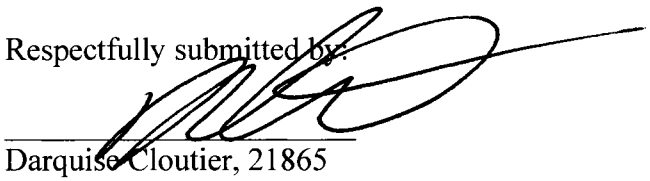
Here, the trial court exercised its discretion in a manifestly unreasonable manner, basing its decision on untenable grounds or reasons.

Defense counsel's behavior did not constitute contempt. During trial, Counsel repeatedly requested clarification and guidance as to the trial court's ever-changing ruling. That the state's attorney blatantly disregarded the trial court's ruling, and received no reprimand, is additional evidence of the abuse of discretion by the trial court.

IV. CONCLUSION

Sustaining a finding of contempt against the defense attorney subsequent to such a murky and confusing ruling by the trial court, would have a nefarious and chilling effect on the rights and obligations of lawyers to advocate for their clients. Appellant respectfully requests that this Court find that the trial court abused its discretion in finding and ordering contempt sanctions, vacate the contempt order and dismiss the sanctions imposed.

Respectfully submitted by:



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CERTIFICATE

I certify that I mailed, by U.S. postal service, in a properly stamped and addressed envelope directed to the below-named persons, a copy of the foregoing Reply brief of appellant, on February 26, 2010

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Dated this 26 day of February, 2010

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