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STATE OF WASHINGTON

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C. J. JUDY

Court of Appeals No. 39790-1-II  
Clark County No. 08-1-01148-8

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**KRYSTA MARIE USKOSKI**

**Appellant.**

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**BRIEF OF APPELLANT**

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08-11-9 WJ

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**A. ASSIGNMENTS OF ERROR**

**I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION.**

**II. PROSECUTORIAL MISCONDUCT DENIED MS. USKOSKI A FAIR TRIAL.**

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**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

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**C. STATEMENT OF THE CASE**

Krysta Uskoski is an alcoholic who took her first drink at age eight, and began binge drinking at age thirteen. RP II-B, p. 281 326. She was subjected to repeated rapes beginning at age nine and continuing for two years by an older neighborhood girl. RP II-B, p. 274. She was threatened by this girl and believed she would get in trouble if she

reported it, so she did not tell anyone until years later. RP II-B, p. 275. Then, when she was in eighth or ninth grade, she was raped again by a young man while drunk at a party. RP II-B, p. 276. She did not report that rape but it was witnessed by two of her friends who walked in while it was happening. RP II-B, p. 276.

On April 7<sup>th</sup>, 2008 Krysta and her boyfriend Chris had just signed a lease on a new apartment and went out for a night of drinking and watching basketball at a sports bar. RP II-B, p. 277. They went to a bar called the Tip Top Tavern and she shared a pitcher of Guinness beer with Chris and had a drink called a Cuba Libra. RP II-B, p. 278. Later they went to a bar called Tommy O's and she drank two Blue Moons and a glass of wine. RP II-B, p. 279. While there, they met up with Dave, the apartment manager at their new building. Id. She began to feel intoxicated at Tommy O's. RP II-B, 280. From there, they went to a bar called Mojo's and they all shared several bottles of wine. RP II-B, p. 280. She believed she may have had another drink, possibly a shot, while there as well. RP II-B, p. 281.

At some point she went to the bathroom and when she came out she couldn't find Chris and thought he left, so she started walking back to her apartment. RP II-B, p. 283. She remembered walking there although it was a bit of a blur. RP II-B, p. 283. She stumbled as she was walking

and somebody came up behind her and grabbed her arm and said “show me your tits.” RP II-B, p. 283. He also put a hand on her jeans and tried pulling them down. RP II-B, p. 283. She struggled to get away and as she did she saw him holding his penis in his hand. RP II-B, p. 283-84. She was desperate to find Chris and went up to what she thought was there apartment. RP II-B, p. 285. She began trying her key and knocking on the door and calling out for Chris. RP II-B, p. 285.

Gerardo Calderon lived in the apartment Krysta was trying to get in to. RP I, p. 96. He and his wife heard someone open the screen door. RP I, p. 96. They looked outside and saw a drunk woman. RP I, p. 97. They called 911. RP I, p. 96. She continued trying to open the door and when they looked out again they saw her with her pants down. RP I, p. 97. They didn't hear her say anything. RP I, p. 98. They did not see her face, but Mr. Calderon, in response to a leading question by the State, said she did not appear “scared.” RP I, p. 97, 103. They heard an officer arrive and tell her firmly to pull her pants up. RP I, p. 98. She was drunk and having a hard time keeping her balance and standing up. RP I, p. 103-104.

Officer Janisch of the Vancouver Police Department responded to the Columbia apartments on April 8<sup>th</sup>, 2008 sometime between one and two in the morning. RP I, p. 41-42. He encountered a woman who was

“very intoxicated” with her pants down. RP I, p. 43. It appeared she had just urinated on the porch. Id. The woman was Krysta. Id. He described Krysta as “severely under the influence of intoxicants,” based on the fact that she couldn’t stand very well, couldn’t speak very well, was very unsure and it took “forever” to get information from her. RP I, p. 44. Despite her severe intoxication, Janisch did not feel the need to take her to the hospital or to a detox facility, where he would take people “can’t care for themselves.” RP I, p. 45. Instead, he wanted to call someone who could respond to the scene and care for her. RP I, p. 45. She told him she lived there in apartment 8 but her key did not work in apartment 8’s door, although her key for the secured door on the sidewalk did work. RP I, p. 45-46. He asked dispatch to get ahold of the manager but they were unable to do so. RP I, p. 46.

When he returned to where he had left Krysta he saw that she left the scene and was almost a block away, “stumbling down” the sidewalk. RP I, p. 46-47. Despite having just testified that she was not so intoxicated as to warrant a trip to the hospital or to detox, he testified that he was concerned for her safety because due to her level of intoxication, she could barely walk. RP I, p. 47. He went to retrieve her and when he got to her, her attitude changed. RP I, p. 47. She physically resisted him, telling him “don’t touch me unless you’re gonna arrest me.” RP I, p. 47.

So Officer Janisch arrested her. RP I, p. 47-48. Although he felt he had probable cause to arrest her for urinating in public and indecent exposure, his reason for arresting her was “to keep her safe.” RP I, p. 47. He had no intention of maintaining the arrest or pursuing a case for the charges on which he arrested her, as he felt that he didn’t think it would be appropriate to throw her in the “drunk tank.” RP I, p. 48, 54-55. Instead, he used his statutory power of arrest to force her back to the patrol car so he could find someone to care for her. RP I, p. 48. Because she was physically resisting, he handcuffed her. RP I, p. 48. He wanted to contain her in the patrol car so she couldn’t walk away again. RP I, p. 49.

Janisch went through her purse and found her identification, and began making efforts to contact her mother, which Krysta did not want him to do. RP I, p. 50-51. Another officer on scene, who didn’t testify, was able to get her mom’s phone number, according to Janisch, but when he called it she went “berserk.” RP I, p. 51. When he reached her mother she agreed to come and get Krysta. RP I, p. 51. Janisch was clearly annoyed by the amount of time he spent with Krysta, testifying that he was pleased when he reached Krysta’s mom because he was able to resolve the matter without having to take Krysta to jail (which takes time) and that he had been forced to spend an hour doing something that in his view should have taken ten minutes. RP I, p. 52.

While waiting, a man walked up on the sidewalk and was staring at them for a long time in a very “bug eyed” way. RP I, p. 52. Janisch found this odd and contacted him. RP I, p. 52. Janisch asked him if he was the apartment manager, David, and he said no, he wasn’t David, had never heard of David, and was not the apartment manager and did not know Krysta. RP I, p. 52-53, 64. When Janisch informed Krysta that the man was denying being David, Krysta insisted that it was, in fact, David. RP I, p. 64. Janisch went back to the man and he eventually admitted that he was, in fact, David, that he was the apartment manager, that he had been out drinking with Krysta, and that he had given her the wrong apartment key. RP I, p. 53, 63-64. David had the correct key to apartment number 8 that Krysta would have needed to get home. RP I, p. 63. Janisch did not investigate why David had flat-out lied to him and tried to disavow knowing Krysta, apparently being incurious about how bizarre that is. RP I, p. 64.

Krysta has very little memory of her contact with Officer Janisch. RP II-B, p. 286. She remembered being handcuffed and she remembered lots of people being on the street. RP II-B, p. 286. She also remembered curling up in a ball in the back of the patrol car. RP II-B, p. 287. When Krysta’s mom arrived she immediately noticed “some crazy person, really creepy guy across the street, just laughing his head off” about what was

occurring. RP II-B, p. 385. Krysta's mom found this concerning. Id. Janisch told Krysta's mom that he had been more forceful than usual due to Krysta's behavior. RP II-B, p. 385-86. Krysta was very upset when her mom arrived and her mom was determined to find out why. RP II-B, p. 386. Krysta's mom pressed her and Krysta told her that someone had held her down and tried to rape her. RP II-B, p. 388. Krysta recalled that her mom, at that point, began demanding to know who, and asked if it was Chris. RP II-B, p. 287. Krysta's mom asked numerous times who it was, and finally asked "was it the cop?" RP II-B, p. 287. Krysta said "yes." RP II-B, p. 287.

Krysta's mom insisted that she go report it, but Krysta just wanted to go home. RP II-B, p. 287, 388. Krysta's mom refused to take her home, insisting that she shouldn't just let it go and that she must report it. RP II-B, p. 388. Krysta's mom called 911 and told them that her daughter was the victim of an attempted rape and that it may have been the police officer, and she was instructed to take Krysta to the sheriff's office. RP II-B, p. 388-89. She drove Krysta, against her will, to the sheriff's office. RP II-B, p. 288, 389. Krysta's mom figured they would just have someone talk to her and find out why she was so upset. RP II-B, p. 389. Her mom was upset because she wanted to know what was going on but

she couldn't find out what it was, and because she felt like her daughter had been hurt. RP II-B, p. 389.

When they arrived at the station, Krysta was interrogated by deputies Koch and Sgt. McCabe. RP I, p. 75, RP II-B, p. 390. They arrived at about three in the morning. RP I, p. 75, 112. Krysta was intoxicated, expressed a desire to leave, and sat on the floor, slumped down in the corner, rather than a chair. RP I, p. 75, 77. McCabe described Krysta as "severely intoxicated." RP I, p. 85. McCabe described her behavior as bizarre and that observed that Krysta was very emotional. RP I, p. 88, 89, 90. After getting her name and initial information Sgt. McCabe left the interrogation room and allowed Deputy Koch to conduct the interview. RP I, p. 77.

Koch testified that Krysta said "a police officer tried to stick his penis in my butt. He tried—tried to penetrate my orifices." RP I, p. 116. Krysta told Koch that she was walking with her boyfriend Chris, her apartment manager Dave, and another man named Rob when she was stopped by a police officer. RP I, p. 117. She described him as a white male, five nine to six foot, with hefty muscular build, aged thirty to thirty-seven with strawberry blonde hair. RP I, p. 117-18. She said he was wearing a khaki shirt. RP I, p. 118. She said that her boyfriend Chris was talking to Janisch and that Janisch accused her of being naked in the

apartment complex. RP I, p. 118, 130. She said that she denied that but that the officer than handcuffed her and pushed her against the back of the car and tried to rape her. RP I, p. 118. She said he then pulled down his pants, pulled out his penis and tried to put it in her orifices. RP I, p. 119. Koch asked Krysta how far he pulled her pants down and she pointed to the side of her hip, about three or four inches from the belt line. RP I, p. 120. Krysta said that her boyfriend was present for the entire event, standing across the street along with the other men. RP I, p. 122, 130-31. The prosecutor asked Koch to read Krysta's written statement, which was admitted as Exhibit 1, for the jury. RP I, p. 125-26. When he read it, he claimed that Krysta wrote that "the other officer asked me to step out and asked to see my breasts." RP I, p. 126. However, this was not correct. Krysta's statement says nothing about another officer, and at no time did she accuse more than one officer of a crime. See Exhibit 1 at page 2, and Report of Proceedings. Koch confirmed that Krysta was highly emotional and intoxicated. RP I, p. 128.

Krysta insisted throughout the interrogation that she wanted to leave but, according to her and her mother, she was told that she had to fill out a statement form before she could go. RP II-B, p. 290, 390. Krysta asked her mom to take her home but her mom refused to drive her home until she cooperated and made a statement. RP II-B, p. 290. Krysta

recalled slamming the pencil down several times and asking to leave, and being told that she could leave after she finished her statement. RP II-B, p. 291, 390. So she finished the statement so that she could go home. RP II-B, p. 291. At one point during the interrogation Krysta went to the bathroom and threw up. RP II-B, p. 390. Krysta was given a portable breath test while at the station but the State did not admit any evidence of it. RP II-B, p. 291, 391.

Sgt. McCabe went to the Vancouver Police Department to meet with Officer Janisch at around 5:30 that morning. RP I, p. 81. He described for the jury that he didn't see, in looking at Janisch's uniform, anything that indicated a struggle such as torn clothing or "unusual stains." RP I, p. 81. Officer Janisch declined to speak with McCabe, invoking his right to counsel. RP I, p. 82. According him a benefit that no other suspect is accorded, McCabe encouraged Janisch to get an attorney and did not ask any questions. RP I, p. 82.

Krysta and her mom finally arrived at her mom's home at around six in the morning. RP II-B, p. 391. Krysta went to bed. RP II-B, p. 292. She woke up many hours later to her mother telling her that a Detective was there to speak with her. RP II-B, p. 292. She immediately told her mother that it wasn't the officer who tried to rape her. RP II, p. 293.

When Krysta met with Detective Harper the first thing she told him was that the officer did not try to rape her, did not expose himself to her and did not ask to see her breasts. RP II-A, p. 205-06. Krysta said that she was unsure of why she accused Officer Janisch of raping her, but later said she accused Officer Janisch because he was the last face she had seen. RP II-A, p. 207. After leaving Mojo's and trying to head home to find Chris, Krysta said things got fuzzy. RP II-A, p. 215. She recalled that as she was walking somebody grabbed her arm and told her he wanted to see her breasts. RP II-A, p. 216.

Harper testified that she initially said she could not see the assailant but that as they spoke more, she recollected more about his appearance. RP II-A, p. 216-254. The prosecutor asked "How many times did you go over this story with her?" Harper replied that they went over it four or five times. RP II-A, p. 216. Krysta then gave Detective Harper a statement which was partially recorded. RP II-A, p. 254. He testified that he doesn't record the entire interview because he wants to "pin them down to a specific story or series of events." RP II-A, p. 254. Krysta steadfastly maintained, throughout the entire recorded and unrecorded interview, that some person had, in fact, accosted her, she merely clarified that it was not Officer Janisch. RP II-A, p. 216-254.

The prosecutor asked the following questions of Harper:

Prosecutor: "And you—you've already described to us you wait to do the recorded interview until you think you've gotten a consistent story."

Harper: "Correct."

Prosecutor: "And was the version of events you received once you were recording the defendant consistent with what she had told you when you orally interviewed her?"

Harper: "No."

...

Prosecutor: "Was her recounting of whether or not Officer Janisch, in fact, raped her or sexually assaulted her in any way consistent throughout your entire interview?"

Harper: "Yes, that part was consistent."

RP II-A, p. 255-56.

Harper felt that Krysta was inconsistent based on his report, which he read into the record and said this:

"Krysta initially said she did not see the man at all, just heard his voice. Krysta said she did not see who grabbed her. She assumed it was a male because of the voice.

"As she retold the story, she said that she saw the man's shoes and the bottoms of his pants leg. Krysta said that the man's shoes were black but not shiny, so she knew it was not Dave.

“Krysta later said that she saw the man holding his penis in one hand.

“Krysta’s final version was that she saw some of the man’s face but could not describe him. Krysta said the man was wearing a darker-colored jacket, had a thinner, muscular build, and had darker-colored hair that, quote, ‘I think not long and about one inch to two inches in length.’

“She said the man was wearing a silver-colored watch but was not sure what arm he had the watch on.

“She was not sure...with which hand the man was holding his penis.”

RP II-A, p. 258-59.

Dr. Kenneth Muscatel testified as a psychological expert. He examined Krysta as well as reviewed all of the police reports. RP II-B, p. 322-23. He administered psychological testing to her and found that she had characterological disturbance, which is to say disturbance in the structure of her personality, as well as naïve and emotionally rigid, lacking in psychological insight and sophistication and limited self-awareness. RP II-B, p. 324. She also had problems with authority figures and discord in her family past. *Id.* He diagnosed her with alcoholism. RP II-B, p. 325. She became an alcoholic by the age of fourteen or fifteen. RP II-B, p. 326. Dr. Muscatel testified that one way alcohol affects the brain is it

affects memory such that a person may not process the information she receives accurately and it won't come out in a coherent manner. RP II-B, p. 329. Alcohol also can affect the part of the brain that consolidates and stores memories. RP II-B, p. 329. Dr. Muscatel testified that an alcoholic blackout can result in a spotty or sporadic recollection of a period of time. RP II-B, p. 330. Krysta told Dr. Muscatel that after she left Mojo's she was walking down the street and was accosted by a person who partially pulled down her pants and tried to rape her on the street. RP II-B, p. 333.

Dr. Muscatel testified that Krysta manifested symptoms consistent with trauma from having been the victim of sexual abuse. RP II-B, p. 335. Krysta recalled encountering Office Janisch, but only recalled being put in the back of her patrol car and her mom coming to get her. RP II-B, p. 336. His review of the police reports revealed that Krysta was in a very emotional and agitated state when she was questioned by deputies Koch and McCabe. RP II-B, p. 337. Dr. Muscatel testified that he would never evaluate someone while they were intoxicated because intoxicated people are disorganized and they may be confused and speak impulsively. RP II-B, p. 337. He testified that as a psychologist, he would not have conducted the interview that Deputy Koch conducted while Ms. Uskoski was so intoxicated. RP II-B, p. 340.

Dr. Muscatel testified that logically and psychologically there are two alternatives which would explain Krysta's erroneous accusation against Officer Janisch: First, that she was agitated, upset and angry about how the officer treated her and made up a story to get back at him; second, that she confabulated elements of the rape and the contact with Janisch and, because of the alcohol, came up with a memory that wasn't true but that she believed to be true at the time. RP II-B, p. 341-42. He testified that you can remember things reasonably accurately and then start meshing things together and then, when you come out of the agitated state, start remembering things in a reasonably accurate manner. RP II-B, p. 347.

Dr. Muscatel testified it was not unreasonable for Krysta to have difficulty initially recalling the physical description of her assailant, when she spoke to Detective Harper, but to be able to recall more as she continued to talk about it. RP II-B, p. 160. He said: "...[S]ometimes people's memories either get jogged and they start remembering things or they start confabulating, they start putting pieces together that aren't really there." RP II-B, p. 361.

During cross examination, the prosecutor asked Dr. Muscatel about whether Ms. Uskoski had referred to the police as the "fucking police," and he replied that she had and that the context of her comment was that

she was upset that the police would not investigate the attempted rape committed against her because of her erroneous accusation against Officer Janisch. RP II-B, p. 359. The exact quotation was “The fucking police never even tried to find the guy who attacked me.” RP II-B, p. 375-76.

The State called Detective Harper in rebuttal, although most of his testimony was not in rebuttal to anything raised by the defense. Detective Harper testified that he had, in fact, investigated the alleged assault on Krysta. RP III, p. 405. He testified that he looked at her clothing for evidence and looked at the bruise on her arm. RP III, p. 405. He looked for stains that would be consistent with seminal fluid or blood or any other source of DNA and found nothing. RP III, p. 406. He looked for abrasions or dirt on her clothing and found none. *Id.* He found no ripping of the clothing to indicate that it had been forcibly pulled on or torn. *Id.* No laboratory examination was ever conducted on Krysta’s clothes. RP III, p. 416. He testified he found “no stains consistent with a sexual assault” and no tears that were consistent with a sexual assault. RP III, p. 419. He also testified that if there was anal penetration (which Krysta never once alleged) that there might be fecal matter or blood or torn skin. RP III, p. 407. He said he looked for such evidence and didn’t find any, notwithstanding the fact that he never examined Krysta’s anus, either according to her testimony or his own, for torn skin. RP III, p. 407. He

said he didn't find "anything that would be consistent with that type of material." RP III, p. 407.

The prosecutor asked him if it's standard procedure to contact witnesses at the scene of an alleged rape, and he said it was. *Id.* Asked if he did that, and he said "Yes, I spoke to a number of people who reside in the apartment complex that Krysta said this occurred within the vicinity of, so...None of the witnesses identified any other persons in the area except a police officer who contacted Krysta after she was pounding on the door and after she was urinating there on the sidewalk, so..." RP III, p. 407-08. None of these witnesses, except for Mr. Calderon, was identified or called to testify by the State, and Krysta was never given an opportunity to cross examine these alleged witnesses. Report of Proceedings.

Harper was asked by the prosecutor whether he relied upon the statements of an alleged victim in investigating a rape, and he replied that he did because she would be the only source of information as to where they might find evidence. RP III, p. 408. He testified he found no evidence to "corroborate her story." RP III, p. 409. The prosecutor also asked him if getting a consistent story from the victim was important to the rape investigation, and he replied that it was. *Id.* He testified that if you don't get a "consistent story" then you don't know where to look for

evidence or how to look for corroboration. Id. The prosecutor asked: “Based on the statements the defendant had made to you as far as the stranger assault, were you able to pursue your investigation any further than what you’ve already described?” RP III, p. 410. He replied: “I was not able to pursue an investigation into a sexual assault or an attempted sexual assault.” RP III, p. 410. The prosecutor asked “Why not?” Detective Harper replied “The statements that Krysta--,” at which point defense counsel stated “Your Honor—,” but Detective Harper talked over defense counsel and finished his answer, stating “—gave were not consistent—,” at which point defense counsel said “Your Honor, I’d object.” RP III, p. 410. The objection was sustained but the comment was not stricken and the jury was not instructed to disregard the remark. RP III, p. 411.

During rebuttal closing argument, the prosecutor argued to the jury that Krysta made up her allegation of assault out of whole cloth in order to “get out of trouble.” RP III, p. 456, 481. The prosecutor argued that rather than “fess up” to what she had done, she decided to shift the blame. RP III, p. 481. The prosecutor made the following statement to the jury:

I’m asking you to hold the defendant accountable for the choices she made, choices that could have ruined an officer’s career, choices that will still affect that officer for the rest of his life. This allegation is out there--.”

Defense counsel immediately objected and the Court told the jury, sua sponte, “You’re not to consider the consequences of the litigation.” RP III, p. 482. When the jury was excused defense counsel moved for a mistrial based on the prosecutor having argued to the jury that they needed to convict Krysta in order for the officer to restore his reputation. RP III, p. 484. The Court denied the motion, stating the remark was “tied in with the testimony” about Janisch having been placed on administrative leave right after the accusation and that it was not unduly prejudicial. RP III, p. 485.

The jury convicted Krysta of malicious prosecution of a felony, of which she was charged by Second Amended Information. CP 1, 28. This timely appeal followed. CP 40.

#### **D. ARGUMENT**

##### **I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MS. USKOSKI CAUSED OR ATTEMPTED TO CAUSE OFFICER JANISCH TO BE ARRESTED OR PROCEEDED AGAINST FOR A FELONY CRIME.**

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing

the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

The elements of malicious prosecution, under RCW 9.62.010, are that a person is guilty of the offense if he or she maliciously and without probable cause therefore, causes or attempts to cause another to be arrested or proceeded against for any crime of which he or she is innocent.

Ordinarily, a challenge to sufficiency of the evidence involves citation to cases which address the question of sufficiency of the evidence for the particular crime in question. In this case, while there is a rich body of civil case law addressing the tort action for malicious prosecution, there are a grand total of two cases dealing with criminal convictions for malicious prosecution. They are *State v. Smith*, 85 Wash. 352, 148 P. 25 (1915); *State v. Todd*, 145 Wash. 647, 261 P. 397 (1927). *Smith* dealt with

the question of whether the information was sufficient and not with the sufficiency of the evidence. *State v. Smith*, 85 Wash. 352. *Todd* dealt with the question of whether a defendant can agree to the discharge of the jury and then be heard to complain about double jeopardy on appeal. *State v. Todd*, 145 Wash. 647.

What is notable about both cases is that the defendant in each case had personally filed a criminal complaint charging another with a crime. See *Todd* and *Smith*. Krysta did not file a criminal complaint against Officer Janisch, nor did the prosecutor. Krysta did two things: She rambled on like a confused drunk and answered her mother's leading question about whether the officer was the one who tried to rape her, and she wrote out an unsworn, un-certified written statement while, in the words of Officer Janisch and Sgt. McCabe, "severely under the influence of intoxicants."

Presumably, the evil the legislature sought to deter with this statute is the malicious *pursuit* of a criminal case by a person against another person whom he or she knows to be innocent. The benchmark of the crime is that the victim is arrested or proceeded against, or in jeopardy of being arrested or proceeded against, otherwise this statute would not be materially different from the statute proscribing the making of a false

statement to a law enforcement officer under RCW 9A.76.175, which provides:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Here, the evidence presented was insufficient to prove that Krysta either caused Officer Janisch to be arrested or proceeded upon, or attempted to cause him to be arrested or proceeded upon. The evidence, taken in the light most favorable to the State, demonstrates that Officer Janisch was not, at any time, at risk of being arrested or in jeopardy of being "proceeded upon," meaning criminally prosecuted. Krysta's allegation that Officer Janisch attempted to rape her was absurd on its face, if for no other reason than no officer who was otherwise inclined to commit such a crime would do so on a sidewalk in plain view of the world. According to what she told Deputy Koch she was sexually assaulted on a sidewalk by a police officer in the presence of several witness, including her boyfriend. As defense counsel noted during closing argument, certain elements of her story were preposterous. Further, Detective Harper confirmed that no person, be it Officer Janisch or a

stranger, would be arrested or proceeded upon (charged) for sexually assaulting her because he did not believe she had been sexually assaulted.

Ms. Uskoski's defense in this case was that she actually was assaulted but misidentified her assailant due to her extreme intoxication. Because such a belief on her part negates the suggestion that she acted without probable cause or maliciously, the State went to great lengths to establish, through Detective Harper, that she had not, in fact, been assaulted by anyone. While the majority of this testimony was a flagrantly improper comment on Krysta's credibility (argued in Part II, below), it established that Detective Harper concluded, rather quickly, that not only would no one (Janisch or anyone else) be arrested or prosecuted for assaulting Krysta, he would not investigate the case or pursue it any way because Krysta wholly lacked credibility in his eyes. The State presented no evidence that Officer Janisch was arrested or proceeded upon. Although the State elicited evidence that Officer Janisch's employer placed him on administrative leave, which is standard when officers are accused of a crime, that is a private action instituted at the discretion of his employer and does not constitute being "proceeded against" within the meaning of the statute. The only basis on which to sustain Krysta's conviction is if there is substantial evidence that she attempted to cause Officer Janisch to be arrested or proceeded against.

The evidence is insufficient to support the State's contention here. The centerpiece of the State's case was Exhibit 1, Krysta's written statement. This statement is not made under the penalty of perjury and was not notarized. See Exhibit 1. Indeed, the boilerplate language on this form should be disregarded in its entirety because the majority of it is demonstrably false. For example, the boilerplate says that the writer has been advised of her rights (which Krysta wasn't) and that the writer understands that anything she writes may be used against her in a court of law (of which Krysta was never advised). Ex. 1. The boilerplate says that the writer is "sober" and of "sound mind," which was patently false. The State's own witnesses described Krysta as "severely intoxicated" and crouched on the floor in the corner of the interrogation room. The State's witnesses described her as highly emotional and agitated. Exhibit 1 cannot be viewed as a serious attempt by Krysta to institute a criminal prosecution against Officer Janisch. Krysta never made any statement expressing a desire that Officer Janisch be arrested or prosecuted. She never stated she sought such an outcome. She only stated, after making a statement that was plainly coerced by her domineering mother, that she wanted to go home. When she woke from her extreme drunken stupor, she immediately recanted her statement that Officer Janisch was the person who assaulted her. If the government actually believed Krysta,

Officer Janisch would have been arrested that night. But they didn't (likely due to the fact that he statement was absurd at its inception), and he wasn't.

The State failed to present sufficient evidence that Krysta caused, or attempted to cause, Officer Janisch to be arrested or proceeded against and her conviction should be reversed and dismissed.

**II. REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DEPRIVED MS. USKOSKI OF A FAIR TRIAL.**

Ms. Uskoski was denied a fair trial when the prosecutor elicited testimony from Detective Harper which commented on her credibility and when the prosecutor argued that to the jury that Officer Janisch needed them to convict Krysta in order to restore his reputation.

“In order to establish prosecutorial misconduct, [a defendant] must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where ““there is a substantial likelihood the instances of misconduct affected the jury's verdict.”” *Dhaliwal*, 150 Wash.2d at 578 (quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).” *State v. Boehning*, 127 Wash.App. 511, 518, 111 P.3d 899 (2005).

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). In determining whether the misconduct warrants reversal, reviewing courts considers its prejudicial nature and its cumulative effect. *State v. Suarez-Bravo*, 72 Wash.App. 359, 367, 864 P.2d 426 (1994); *Boehning* at 518-519.

**a. Comment on Krysta’s credibility**

The prosecutor elicited repeated statements from Detective Harper that Krysta’s statements to him on April 8<sup>th</sup> were inconsistent. Some of the questions were objected to, most were not. Here, defense counsel clearly should have objected to this obviously improper testimony, and his failure to do so, if it be deemed a waiver of this error, constituted ineffective assistance of counsel.

The question of whether Krysta’s evolving description of her assailant rendered her statements inconsistent was a question to be decided by the jury. It was improper for Harper to personally opine that these descriptions were inconsistent and therefore unreliable.

Allowing one witness to testify about the truthfulness of another witness invades the fact-finding process of the jury and violates a defendant's right to a jury trial. *State v. Dolan*, 118 Wn.App. 323, 73 P.3d 1011 (2003). In *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), the Supreme Court outlined five factors a reviewing court should look at to determine whether testimony constitutes impermissible opinion testimony. Those factors are: (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. *State v. Demery* at 759. Regarding the type of witness, the Court noted that such testimony from law enforcement officers is especially prejudicial because it carries a special aura of reliability. *Demery* at 765. With regard to the second prong, the nature of this testimony was especially damaging to Krysta because her belief that she was, in fact, nearly sexually assaulted by someone was the centerpiece of her defense and Detective Harper was the only witness to testify about the investigation that was done (to the extent it can be said one was done at all) on her claim. As the State went to great pains to point out, her statement to Detective Harper was her opportunity to prove that she acted without malice and she failed that test in Harper's mind. As to the third prong, the nature of the charge, Harper's testimony was fatal to Krysta's defense because the acts she alleged were

committed against her were necessarily the type that would not be accompanied by independently verifiable evidence. She did not allege penetration of any kind, nor did she allege any injury beyond the bruise on her arm. She did not allege that her clothes were torn. Her allegation that the assailant partially pulled down her pants could not be verified or ruled out because the only two witnesses who saw her (Janisch and Calderon) saw her with her pants all the way down. Her allegation that the assailant asked to see her breasts of course cannot be proven or disproven.

As to the fourth prong, the nature of the defense, as already argued the nature of Krysta's defense was that she did not act with malice, and without probable cause, because she actually was the victim of an attempted sexual assault but, due to her extreme intoxication, she confabulated the true identity of the assailant with Officer Janisch, the last face she remembered seeing. Testimony by Harper that he didn't believe Krysta's claim of assault necessarily destroyed every aspect of that defense. With respect to the fifth prong, the other evidence before the trier of fact, there again Harper's testimony prejudiced Krysta because the very nature of her accusation would not ordinarily include physical evidence. As such, there was no other evidence the jury could look to beyond Krysta's credibility, which was destroyed by Harper's expression of his personal opinion that she lacked credibility.

The rule prohibiting witnesses from commenting on the credibility of other witnesses applies with equal force whether the witness opines another witness is lying or is truthful. *State v. Kirkman*, 159 Wn.2d 919, 155 P.3d 125 (2007). Here, the State committed misconduct by repeatedly eliciting testimony from Detective Harper about Krysta's credibility, an ultimate issue to be decided by the jury. This misconduct was flagrant and ill-intentioned, as evidenced by the fact that the State repeatedly returned to this line of questioning even after objections to such questions were sustained. See RP III, p. 410-411. This misconduct caused enduring prejudice which could not have been obviated by a curative instruction.

**b. Closing argument to the jury**

The State argued to the jury that Officer Janisch needed them to convict Krysta of this crime in order to restore his reputation. This argument was so flagrantly improper that the Court did not even bother to say "sustained," opting to go straight to a curative instruction in which the jury was told they could not consider the outcome of the litigation. The curative instruction, however, was not adequate to reverse the extreme prejudice caused by this outrageous remark. This Court has observed:

We begin our discussion with an obvious truism: Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial.

*Boehning* at 518.

A **prosecutor** may commit **misconduct** by asking a jury to return a guilty verdict to send a message to the **community** or to act as the **conscience** of the **community**. *State v. Powell*, 62 Wn.App. 914, 918-19, 816 P.2d 86 (1991). Here, the prosecutor asked the jury to convict the jury so that it could perform a function not properly before it: To restore Officer's Janisch's perceived loss of his good name. This was highly inflammatory and designed to play on the average citizen's desire to avoid acts which might upset law enforcement. It is plainly obvious that the State brought these charges solely because the (momentarily) accused person was a police officer, contrary to the prevailing school of thought among prosecutors that victims of sexual assault and domestic violence should *never* be prosecuted for recanting their allegations because such prosecutions chill the reporting of violent crime and cause further victimization. Had Krysta mistakenly accused one of the bartenders or bouncers she encountered that night she categorically would not have been prosecuted for this crime. The State's argument confirmed its motivation in bringing this particular charge, however restoring Officer Janisch's perceived loss of reputation and good name was *not* a proper function for this jury to perform and the State acted with flagrant ill-will in making such an argument. Once the prosecutor said it, this bell could not be

unrung. Even assuming it could, the Court's curative instruction lacked the force and emphasis required to do so. The prosecutor's remark caused enduring prejudice which destroyed Krysta's ability to receive a fair trial. Her conviction should be reversed and her case remanded for a new trial.

**III. MS. USKOSKI'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE STATE ELICITED TESTIMONY THAT UNNAMED WITNESSES GAVE STATEMENTS WHICH CONTRADICTED HER BELIEF THAT SHE WAS ASSAULTED.**

It is now well-settled that a "testimonial" statement to the police is inadmissible unless the accused person is afforded the opportunity to confront and cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354 (2004). A statement to the police officer in the course of a police investigation is the "core class" of statements considered testimonial. *Crawford* at 68-69; *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 (2006). Statements made in response to formal police questioning, for which the primary purpose is not to explain an on-going emergency, are testimonial and confrontation is mandated under the Sixth Amendment.

Here, Detective Harper's testimony about his "investigation" of Krysta's assault, and his conclusion that her claim was baseless, was central to the State's bizarre theory that Krysta accused Officer Janisch of assault to "get out of trouble." (This theory was bizarre because by the

time Krysta got into her mother's car, she no longer was in trouble. Janisch had un-arrested her and declined to issue her any citations. To the extent the State was referring to trouble Krysta might be in with her mother for being unbelievably drunk, that ship had sailed. Krysta's mother already knew she was drunk by the time she arrived to pick her up. What "trouble" was Krysta trying to get out of?) In the course of debunking Krysta's belief that she had been the victim of an attempted sexual assault, the State elicited testimony from Harper that he had spoken to a number of witnesses who directly contradicted her claim that she was engaged in a struggle on the sidewalk with an assailant. The State never identified these alleged witnesses nor afforded Krysta an opportunity to cross examine them. This was a classic Sixth Amendment trial error.

Further, this error was not harmless because, as noted above, refuting Krysta's substantive and continuing claim that she was the victim of an attempted sexual assault (by someone she now knows was not Officer Janisch) was the centerpiece of the State's theory that Krysta made up this story maliciously and out of whole cloth. Krysta's claim that she was the victim of an attempted sexual assault by an assailant whose face she can't recall was not nearly as specious as the State would have this Court believe. Officer Janisch confirmed that he and Krysta were being creepily stared down by a strangely behaving man who turned out to be

one of the men Krysta had been drinking with that night at Mojo's (the bar she was at just before she encountered Officer Janisch). Yet, this man lied about his identity (it was Dave, her new apartment manager) and lied about knowing Krysta. Officer Janisch evidently felt this bizarre behavior was not bizarre enough to warrant any kind of investigation, nor even a simple question or two about why Dave would feel the need to tell Janisch at least three provable lies in order to distance himself from Krysta. Could it be that Dave was the man who grabbed Krysta from behind and asked to see her breasts and tried to pull her pants down? Of course, we'll never know because Detective Harper, acting as the gatekeeper of whether this alleged crime against Krysta will be pursued, has decided that her "inconsistencies" preclude any further investigation of her claim. However, this error cannot be deemed harmless where it lent untested credence to the State's central theory of the case. Krysta's conviction should be reversed and her case remanded for a new trial.

**E. CONCLUSION**

Ms. Uskoski's conviction should be reversed and dismissed due to insufficient evidence. Alternatively, her conviction should be reversed and her case remanded for a new trial.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June, 2010.

  
ANNE M. CRUSER, WSBA No. 27944  
Attorney for Ms. Uskoski

**CERTIFICATE OF MAILING**

I certify that on 06/11/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Mike Kinnie, P.O. Box 5000, Vancouver, WA 98666; (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; and (3) Ms. Krystal Uskoski, 2620 NE 58<sup>th</sup> St. Vancouver, WA 98663

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## **APPENDIX**

### **1. 9.62.010. Malicious prosecution**

Every person who shall, maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he or she is innocent:

- (1) If such crime be a felony, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years; and
- (2) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor.

### **2. 9A.76.175. Making a false or misleading statement to a public servant**

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.