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DIVISION II

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STATE OF WASHINGTON  
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No. 40341-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Antwaun Owens,**

Appellant.

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Clark County Superior Court Cause No. 08-1-01864-4

The Honorable Judge Barbara Johnson

**Appellant's Reply Brief**

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## ARGUMENT

### **I. OFFICER DONALDSON’S TESTIMONY THAT HE BELIEVED MS. GOMEZ WAS AN ALMOST EXPLICIT OPINION THAT MR. OWENS WAS GUILTY.**

The outcome of Mr. Owens’s case turned on whether the jury believed Ms. Gomez’s testimony (that she had made a false report) or her out-of-court statements (that she had been raped). *Compare* RP 259-260, 262, 264, 268, 281-283 *with* RP 210-214, 264-267, 305-307, 321-324, 352-353, 400-403, 519-523; Exhibit 56A. Officer Donaldson was permitted to testify that Ms. Gomez “stated calmly that she was very afraid of the suspect and I believed her.” RP 352.

In context, this statement amounted to a nearly explicit opinion on Mr. Owens’s guilt, and violated his state and federal jury trial rights. U.S. Const. Amend. VI and XIV; Wash. Const. Article I, Sections 21 and 22; *State v. Kirkman*, 159 Wash.2d 918, 937, 155 P.3d 125 (2007). It also constituted improper vouching. *State v. Chavez*, 76 Wash.App. 293, 299, 884 P.2d 624 (1994) (cited with approval by *State v. Korum*, 157 Wash.2d 614, 651, 141 P.3d 13 (2006)).

Respondent fails to address the disputed testimony. Ignoring Donaldson’s statement that he believed Ms. Gomez, Respondent argues that evidence of her fear was relevant in light of her testimony. Brief of Respondent, pp. 1-4. This may be true, but it is irrelevant to Mr. Owens’s

argument. The inadmissible opinion testimony was Donaldson's opinion—"I believed her"—not Ms. Gomez's statement that she was afraid. *See* Appellant's Opening Brief, at pp. 21-25.

The improper admission of this testimony created a manifest error affecting Mr. Owens's constitutional right to a jury trial, and is presumed prejudicial. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). Without citation to the record, Respondent asserts that the untainted evidence "is so overwhelming that it leads necessarily to a finding of guilt." Brief of Respondent, p. 4. This is incorrect.

The error was not trivial, formal, or merely academic; instead, it went to the heart of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The outcome of trial hinged on which version of Ms. Gomez's story jurors believed. A rational juror could have entertained a reasonable doubt about the truth of Ms. Gomez's out-of-court statements. Donaldson's opinion testimony was an improper weight on the scale. Because the error was not harmless beyond a reasonable doubt, the convictions must be reversed and the case remanded for a new trial. *Id.*

## **II. MR. OWENS WAS DENIED A FAIR TRIAL BY FOUR INSTANCES OF PROSECUTORIAL MISCONDUCT.**

The prosecutor's closing argument contained four instances of misconduct. She told jurors (1) that certain testimony had been admitted as substantive evidence because it was "deemed" to be "trustworthy," (2) that victims of domestic violence were "more likely than not going to come in and have to alter [their] testimony," (3) that an assault could be committed by violence menaced (as opposed to violence actually begun), without proof of a reasonable apprehension of bodily injury and without proof of intent, and (4) that jurors should vote guilty to protect Ms. Gomez from future harm. RP 645-701, 732-757. The prosecutor's statements conflicted with the court's instructions and urged jurors to consider improper factors in reaching their verdict. *See* Appellant's Opening Brief, pp. 18-20, 25-36.

In response to the first instance of misconduct, Respondent provides a lengthy summary of the facts, and concludes, without analysis, that "there is nothing inappropriate" in the prosecutor's statement. Brief of Respondent, p. 14. Respondent apparently intends to rely on Division III's decision in *Sandoval* (Brief of Respondent, p. 8) but makes no effort to counter Mr. Owens's arguments regarding that case. *See* Brief of

Appellant, pp. 28-30 (discussing *State v. Sandoval*, 137 Wash.App. 532, 540-41, 154 P.3d 271 (2007)).<sup>1</sup>

Respondent fails to address the remaining instances of misconduct, even in a conclusory manner. *See* Brief of Respondent, pp. 14-22.

Instead, Respondent quotes the prosecutor's statement and outlines the law, without any discussion. Respondent provides no analysis or application of the law to the facts. Brief of Respondent, pp. 14-22.

The four instances of misconduct, whether considered separately or cumulatively, created a manifest error affecting Mr. Owens's constitutional rights to a jury trial and to due process. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *United States v. Ayala-Garcia*, 574 F.3d 5, 16 (1st Cir. 2009). The misconduct was also flagrant, ill-intentioned, and prejudicial. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000). Because of this, his convictions must be reversed and the case remanded for a new trial. *Id*; *State v. Davenport*, 100 Wash.2d 757, 675 P.2d 1213 (1984).

### **III. THE PROSECUTION MISMANAGED ITS CASE AND DENIED MR. OWENS A FAIR TRIAL.**

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<sup>1</sup> Although relying on *Sandoval*, Respondent seems not to understand how that case relates to the prosecutor's misconduct in closing. *See* Brief of Respondent, p. 14 (criticizing Appellant for failing to give "examples of where this conflict would appear in the closing statement given by our prosecutor.")

Two days before trial, the prosecutor amended the Information to add new charges of first-degree rape (elevated from second-degree rape), tampering with a witness, violating a no-contact order, and obstructing a law enforcement officer. CP 10-18. The prosecutor also added four previously uncharged deadly weapon enhancements. CP 10-18. The prosecutor provided no justification for the delay. RP 17-30, 70-90.

Contrary to Respondent's assertion, defense counsel did move to continue the trial. RP 85-86, 89; *see* Brief of Respondent, p. 23. This motion, occasioned by the amendment, was consistent with his ethical duties and constitutionally-imposed obligations. *See, e.g., State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010); *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982).

The prosecution mismanaged its case and thereby prejudiced Mr. Owens. Accordingly, his convictions must be reversed and the case dismissed with prejudice. CrR 8.3(b); *State v. Brooks*, 149 Wash.App. 373, 384, 203 P.3d 397 (2009). In the alternative, the case must be remanded for a new trial.

**IV. THE TRIAL COURT ERRED BY ADMITTING INADMISSIBLE EVIDENCE THAT PREJUDICED MR. OWENS.**

- A. The trial court erroneously admitted telephone conversations (and associated transcripts) without proper foundation.

Mr. Owens rests on the argument set forth in the Opening Brief.

See Appellant's Opening Brief, pp. 40-42.

- B. The trial court erroneously admitted, for impeachment, prior statements without proper foundation, and improperly failed to limit the jury's consideration of such evidence.

Extrinsic evidence of a prior statement allegedly made by Ms. Gomez was introduced without proper foundation and without a limiting instruction. In particular, two officers testified (over defense objection) that Ms. Gomez told them Mr. Owens was not allowed in her house. RP 346, 519. This testimony, admitted as a prior inconsistent statement, was critical to the burglary charge, which required proof of unlawful entry. RP 346, 519; Instructions 13, 14, CP 56-57.

The prosecutor did not confront Ms. Gomez with her alleged statement, and she had no opportunity to explain or deny it; accordingly, the extrinsic evidence should not have been admitted. ER 613(b); *State v. Horton*, 116 Wash.App. 909, 914, 68 P.3d 1145 (2003); *State v. Dixon*, 159 Wash.2d 65, 76, 147 P.3d 991 (2006). Furthermore, reversal is required because the court failed to give a limiting instruction. RP 526; *State v. Russell*, 154 Wash. App. 775, 784, 225 P.3d 478, review granted, 169 Wash. 2d 1006, 234 P.3d 1172 (2010).

The prior statements admitted through the two officers were not related to the *Smith* affidavit. Accordingly, Respondent's arguments

regarding the *Smith* affidavit are misdirected. *See* Brief of Respondent, p. 30, 31-32.

There is a reasonable probability that the erroneous admission of the extrinsic evidence and the failure to provide a limiting instruction materially affected the outcome of trial. *See State v. Asaeli*, 150 Wash.App. 543, 579, 208 P.3d 1136 (2009). The convictions must be reversed and the case remanded to the trial court for a new trial. *Id.*

**V. MR. OWENS'S FELONY HARASSMENT CONVICTION VIOLATED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO ADEQUATE NOTICE, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.**

Mr. Owens stands on the argument set forth in his Opening Brief. *See* Appellant's Opening Brief, pp. 44-46.

**VI. MR. OWENS WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

When Mr. Owens complained about his attorney and asked to have a new attorney appointed, he was ignored. RP 21-28. Respondent suggests that Mr. Owens should have directed his complaints and his request for new counsel to the judge presiding over his jury trial. Brief of Respondent, pp. 34-35. Nothing in the record suggests that this was explained to Mr. Owens. Instead, the judge ignored Mr. Owens and continued to arraign him on amended charges. RP 21-28. After this process was complete, Judge Harris directed that any motions would be

taken up by Judge Johnson; however, no one explained to Mr. Owens that his request was being deferred and not denied, or that his complaint qualified as a “motion.” RP 28. Because the judge failed to inquire into Mr. Owens’s complaint, the convictions must be reversed, and the case remanded for a new trial. *See* Appellant’s Opening Brief, pp. 47-51.

Respondent addresses Mr. Owens’s remaining ineffective assistance claims by arguing that they are “cumulative,” and by suggesting that any errors made by counsel were “invited.” Brief of Respondent, pp. 37-39. Respondent is incorrect on both counts.

First, Mr. Owens’s ineffective assistance claims complement the arguments with which they overlap: counsel’s failure to object and/or raise certain issues may result in waiver; thus a claim of ineffective assistance might be the only avenue available to Mr. Owens. Second, invited error is not a bar to a claim of ineffective assistance. *See, e.g., State v. Kylo*, 166 Wash.2d 856, 861, 215 P.3d 177 (2010) (“If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review.”)

Respondent’s arguments are without merit. Accordingly, Mr. Owens stands on the argument set forth above, in the Opening Brief, and in the Supplemental Brief. *See* Appellant’s Opening Brief, pp. 51-61; Appellant’s Supplemental Brief, pp. 1-5.

**VII. THE TRIAL JUDGE SHOULD NOT HAVE DISCHARGED THE JURY WITHOUT FINDING A MANIFEST NECESSITY, BASED ON EXTRAORDINARY AND STRIKING CIRCUMSTANCES, THAT SUBSTANTIAL JUSTICE COULD NOT BE OBTAINED WITHOUT DISCONTINUING THE TRIAL.**

Respondent apparently concedes that retrial on the dismissed counts would violate Mr. Owens's Fifth and Fourteenth Amendment right to be free from double jeopardy. Brief of Respondent, p. 39.

Accordingly, Mr. Owens stands on the argument set forth in the Opening Brief. *See* Appellant's Opening Brief, pp. 61-66.

**VIII. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT MR. OWENS'S CURRENT OFFENSES WERE NOT THE SAME CRIMINAL CONDUCT.**

Mr. Owens rests on the argument set forth in the Opening Brief. *See* Appellant's Opening Brief, pp. 66-70.

**CONCLUSION**

Mr. Owens's convictions must be reversed and the case remanded for dismissal, retrial, or resentencing.

Respectfully submitted on January 30, 2011.

**BACKLUND AND MISTRY,**

  
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CERTIFICATE OF MAILING

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

Antwaun Owens, DOC #869900  
Coyote Ridge Corrections Center  
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Connell, WA 99326

and to:

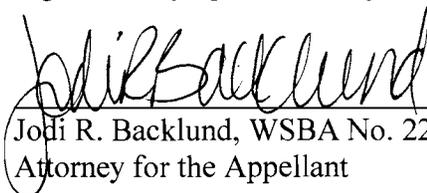
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 30, 2011.

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

Signed at Olympia, Washington on January 30, 2011.

  
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