

NO. 41684-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SHARIE RAMSEY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Sharie Ramsey's trial suffered from two constitutional errors, each of which independently requires reversal of her convictions. First, Ms. Ramsey twice moved to discharge her counsel prior to jury selection. In each instance the court conducted no inquiry. When provided a limited opportunity to explain pro se her distrust of counsel, Ms. Ramsey informed the court that her attorney was not relying on exculpatory evidence and also expressed general distrust of her attorney. The court thus violated her right to counsel by denying her motions.

Second, in closing argument the prosecutor relied on facts not in evidence to argue that Ms. Ramsey supplied a false name for herself and her family. The argument was not only unsupported but appealed to the jury's prejudice and passion by implying that Ms. Ramsey lied about her last name to conceal her criminal conduct. The prosecutor's misconduct denied Ms. Ramsey a fair trial.

## B. ASSIGNMENTS OF ERROR

1. The trial court violated Ms. Ramsey's right to counsel under the Sixth Amendment<sup>1</sup> and Article I, Section 22<sup>2</sup> by denying her motions to discharge counsel.

2. Ms. Ramsey was denied her constitutional right<sup>3</sup> to a fair trial when the prosecutor committed misconduct during closing argument.

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused's constitutional right to counsel is violated where she is forced to proceed with an attorney with whom she has an irreconcilable conflict, i.e., where there is a serious breakdown in communication. When a motion to discharge counsel is raised, the trial court must inquire of the nature and extent of the alleged conflict. Ms. Ramsey moved to discharge counsel twice. On the first request, the court made no inquiry and provided no ruling. On the second request, the court allowed Ms. Ramsey to argue her motion but asked her and her counsel no questions. Was Ms.

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<sup>1</sup> The Sixth Amendment provides in relevant part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

<sup>2</sup> Article I, Section 22 provides in relevant part that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ." Const. art. I, § 22.

<sup>3</sup> U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Const. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

Ramsey's right to counsel violated when the trial court denied her motions to discharge counsel after conducting insufficient inquiry?

2. A prosecutor, as a quasi-judicial officer, has an obligation to seek a verdict based upon reason, and the duty to see that the accused is given a fair trial before an impartial jury. Here, the prosecutor appealed to the passions of the jury and relied on facts not in evidence. Did the prosecutor's closing argument thus deprive Ms. Ramsey of a fair trial?

#### D. STATEMENT OF THE CASE

Sharie Rose Ramsey is the mother of twin girls. 1/13/11RP 60.<sup>4</sup> She maintained sole custody of her daughters and raised them in Washington. See 12/28/10RP 52, 54. In 2008, the girls' father filed an action in Clallam County Superior Court seeking the right to visit with his daughters. 12/28/10RP 106-07; 1/13/11RP 40, 60. The court granted him visitation rights starting with telephone

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<sup>4</sup> The verbatim reports of proceedings are referenced herein by the first date transcribed in each volume. Thus,

- "12/16/10RP" refers to the volume of proceedings on December 16, 2010.
- "12/18/10RP" refers to the consolidated volume of proceedings on December 28, 2010, January 12, 2011, January 13, 2011 (morning session), January 14, 2011 and January 18, 2011.
- "1/13/11RP" refers to the volume of proceedings on January 13, 2011 (afternoon session).

calls and increasing to in-person visits. 12/28/10RP 108; 1/13/11RP 6-7. Ms. Ramsey was ordered not to leave the county with the girls without notifying the court. 12/28/10RP 26; 1/13/11RP 39; Exhibit 4.

From September 2009 to November 2010 the girls failed to appear for their visits. 1/13/11RP 16. Ms. Ramsey and her daughters could not be located. 1/13/11RP 16, 46. In February 2010, the Clallam County Superior Court entered a parenting plan granting full custody of the girls to their father. 1/13/11RP 18; Exhibit 12. Ms. Ramsey was not present at the hearing. 1/13/11RP 27-28, 61-62, 64.

In November 2010, authorities believed Ms. Ramsey and the girls, who were then 14 years old, were staying at a home in Grays Harbor. 12/28/10RP 84; 1/13/11RP 20, 65. At approximately 9:30 p.m., Sergeant Don Kolilis was dispatched to the home. 12/28/10RP 84-86, 91. After he spoke with the homeowners, Ms. Ramsey came downstairs and Sergeant Kolilis informed her he had a writ from Clallam County to take her daughters into custody. 12/28/10RP 86-88, 101-02. The officer also spoke directly with the girls, who were already in their pajamas, and explained the writ to them. 12/28/10RP 88, 93. The girls then went back upstairs to

pack their belongings. 12/28/10RP 88. When the officer went upstairs to find them a “substantial” amount of time later, the girls were no longer there. 12/28/10RP 89.

Ms. Ramsey was arrested for obstructing enforcement of the court order. 12/28/10RP 97. She was later charged with two counts of custodial interference in the first degree. CP 1-3. Her daughters were located the next morning. 12/28/10RP 104.

After a jury trial, Ms. Ramsey was acquitted of both counts of custodial interference in the first degree but found guilty of the lesser-included crime of custodial interference in the second degree on both counts. CP 94-97.

Additional facts are set forth in the relevant argument sections below.

#### E. ARGUMENT

1. THE TRIAL COURT VIOLATED MS. RAMSEY'S RIGHTS UNDER THE SIXTH AMENDMENT AND ARTICLE 1, SECTION 22 BY DENYING HER MOTIONS TO DISCHARGE COUNSEL.

At the conclusion of testimony on defendant's Criminal Rule 3.5 motion, defense counsel conceded that Ms. Ramsey's statements to Sergeant Kolilis were admissible. 12/16/10RP 18. Ms. Ramsey immediately asked to address the court: “Excuse me.

I would like to say something. I would like to dismiss [my attorney].”  
12/16/10RP 19. The trial court requested no further information  
and refused to entertain the motion. The court simply stated “I am  
at recess, thank you.” 12/16/10RP 19.

Prior to voir dire, Ms. Ramsey again moved to discharge her  
counsel. 12/28/10RP 78. Ms. Ramsey addressed the court and  
reported that her relationship with counsel had broken down. She  
informed the court she had provided her attorney information  
supporting her innocence on several occasions. 12/28/10RP 78.  
But her trial attorney did not meet with her again or review the  
information she provided. 12/28/10RP 78-79. Ms. Ramsey  
emphasized that her attorney was not defending her by using the  
evidence she had provided to support the statutory defense of  
abandonment. 12/28/10RP 79-81; see RCW 9A.40.080(2)(b).  
During Ms. Ramsey’s argument, the trial court interrupted her to  
instruct her not to “litigat[e] her case,” but did not ask any pointed  
questions regarding her relationship with defense counsel.  
12/28/10RP 79-81.

- a. A court must honor the accused's constitutional right to counsel when considering a motion to discharge.

A trial court has the discretion to grant or deny a motion for substitution of counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001). However, this discretion is constrained by the accused's constitutional rights. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002). A claim of denial of counsel is reviewed de novo. United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998).

Both the federal and state constitutions guarantee the right to counsel in criminal proceedings. U.S. Const. amend. VI; Const. art. I, § 22. The right to counsel is violated where a defendant is forced to proceed with an attorney with whom she has an irreconcilable conflict, even if the attorney is competent. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); Nguyen, 262 F.3d at 1003-04. An irreconcilable conflict exists where there is a "serious breakdown in communications." Nguyen, 262 F.3d at 1003 (citing United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000)). As set forth in Nguyen,

A defendant is denied his Sixth Amendment right to counsel when he is "forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and

with whom he [will] not, in any manner whatsoever, communicate.”

Id. (citing Craven, 424 F.2d at 1169). Where “the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant’s] Sixth Amendment right to effective assistance of counsel.” Moore, 159 F.3d at 1158.

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers: (1) the adequacy of the trial court’s inquiry into the conflict, (2) the extent of the conflict between the accused and his attorney and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724 (citing Moore, 159 F.3d at 1158-59).

b. The court violated Ms. Ramsey’s constitutional right by denying her motions to discharge counsel.

An evaluation of the three factors in this case shows the denial of Ms. Ramsey’s two motions to discharge counsel was improper. First, the court failed to conduct any inquiry into the conflict. “For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant ‘privately and in depth.’” Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). “[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking

specific and targeted questions.” United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2002). An inquiry is adequate if it “ease[s] the defendant’s dissatisfaction, distrust, and concern and provide[s] a sufficient basis for reaching an informed decision.” Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing Adelzo-Gonzalez, 268 F.3d at 777).

Here, the court made no inquiry. When Ms. Ramsey first moved to discharge counsel, the trial court abruptly dismissed the request. Without providing Ms. Ramsey any opportunity to explain the nature of the conflict or the basis for her motion, the trial court simply recessed the proceedings: “I am at recess, thank you.” 12/16/10RP 19. Upon Ms. Ramsey’s second motion, the court allowed her to pro se argue her motion. See 12/28/RP 78-81. However, the court still conducted no inquiry. It merely allowed her to “make [her] record.” 12/28/10RP 79.

The trial court’s lack of inquiry on each occasion, and cumulatively, was even more egregious than in Nguyen, where the Ninth Circuit reversed the conviction. In Nguyen, the trial court “asked [the defendant] and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses.” Nguyen, 262 F.3d at 1005. Similarly, in Moore,

while “[t]he court did give both parties a chance to speak and made limited inquiries to clarify what was said, ... the court made no inquiries to help it understand the extent of the breakdown.” 159 F.3d at 1160. On review, the Ninth Circuit reversed based in part on the lower court’s lack of inquiry. Id. at 1161.

Because the trial court here conducted *no* inquiry, this factor cuts in favor of reversal.

Second, though the court’s lack of inquiry prevented full development of a record on the irreconcilability of the conflict, the conflict between Ms. Ramsey and her attorney was clearly substantial. Ms. Ramsey had completely lost trust in her attorney. See 12/28/10RP 78-81. Her first motion was brought immediately following trial counsel’s concession that her statements to Sergeant Kolilis were all admissible. See 12/16/10RP 18-19. In her second motion, when the court provided an opportunity for her to argue, Ms. Ramsey explained further that she did not feel her attorney was representing her interests or using the exculpatory evidence she provided him. 12/28/10RP 78-81..

Moreover, Ms. Ramsey complained of lack of contact with her attorney. Compare 12/28/10RP 78-79 (counsel did not meet with her); Nguyen, 262 F.3d at 1000 (irreconcilable conflict found

even though attorney visited client 6-7 times) with Stenson, 142 Wn.2d at 728, 730 (no irreconcilable conflict where attorney visited client twice a week for 8 months—approximately 34 times total). The breakdown in the attorney-client relationship between Ms. Ramsey and her lawyer, to the extent developed in the record despite the court's lack of inquiry, constituted a substantial conflict that should have been addressed by granting the motion to discharge counsel. See Moore, 159 F.3d at 1160.

Third, Ms. Ramsey's motions were timely. She moved first to discharge counsel at the conclusion of the CrR 3.5 hearing. 12/16/10RP 19. Ms. Ramsey did not appear to require a continuance. Though the court did not entertain her first motion, Ms. Ramsey renewed it before the start of voir dire. 12/28/10RP 78. In Moore, defendant's motions were held timely when made one month and again two weeks before trial. 159 F.3d at 1159, 1161. Moreover, in Nguyen, the motion was timely when it was made the day trial was set to begin. 262 F.3d at 1003. This factor also weighs in favor of reversal.

In sum, the trial court violated Ms. Ramsey's constitutional right to counsel by denying her motions to discharge and forcing

her to work with an attorney with whom she had a serious breakdown in communication.

c. Reversal is required.

The erroneous denial of a motion to discharge counsel is presumptively prejudicial and requires reversal. Nguyen, 262 F.3d at 1005; Moore, 159 F.3d at 1161. Here, the trial court erred in denying Ms. Ramsey's repeated motions to discharge counsel. This error requires reversal and remand for a new trial. See Nguyen, 262 F.3d at 1005.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED MS. RAMSEY A FAIR TRIAL.

During closing argument, the prosecutor argued that Ms. Ramsey supplied a false name to the homeowners where she was located in November 2010: "She was introduced to [Clifford Thieme] with the name Sharie Rose. Sharie Rose is the last name, the Rose and Rose children. She uses a fake name." 12/28/10RP 126. The evidence at trial, however, does not support the prosecutor's remarks. Mr. Thieme, the homeowner, testified he was not sure what name Ms. Ramsey told him but a friend introduced her to him as Sharie Rose and Ms. Ramsey did not offer

him any last name for her daughters. 12/28/10RP 99, 104. “Rose” is Ms. Ramsey’s middle name.

Thus, the prosecutor’s argument did not comport with the evidence in three regards: that Ms. Ramsey (1) used a fake name (2) implied or stated her last name was Rose and (3) communicated any information regarding the children’s last name.

- a. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions.

As a representative of the State, a prosecuting attorney has the obligation to ensure due process in a criminal case.

Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and “to act impartially in the interest only of justice.” State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); accord State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor’s obligation to ensure an accused person receives a fair and impartial trial.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, \_\_ P.3d \_\_, 2011 WL 2277151, \*5-6 (June 9, 2011); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 22.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

A defendant who fails to object to an improper remark may assert prosecutorial misconduct where the prosecutor's argument was so "‘flagrant and ill intentioned' that it causes enduring and resulting prejudice that a curative instruction could not have remedied." State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)); accord State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996).

- b. The prosecutor committed flagrant misconduct when she argued facts not in evidence, appealing to the jury's passions.

Although counsel has wide latitude in argument to draw and express reasonable inferences from the evidence presented at trial,

she may not mislead a jury by misstating the evidence or arguing facts not in the record. State v. Grover, 55 Wn. App. 923, 936, 780 P.2d 901 (1990). “Comments meant to appeal to the jury’s prejudice and encourage it to render a verdict on facts not in evidence are improper.” State v. Smith, 67 Wn. App. 838, 844, 841 P.2d 76 (1992). When the prosecutor argues facts not in evidence, she becomes an unsworn witness against the defendant. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). For this reason, the prosecutor’s argument in Belgarde describing the American Indian Movement as a terrorist organization was improper not only because it was inflammatory, but also because it was based upon facts not before the jury. 110 Wn.2d at 508-09.

The prosecutor’s argument here also was not based on facts in evidence. Ms. Ramsey never provided Mr. Thieme with any last name, let alone a false one. See 12/28/10RP 99. The name Mr. Thieme knew her by was her actual first and middle name, Sharie Rose. Mr. Thieme also testified that Ms. Ramsey did not tell him any last name for her daughters, nor is there any evidence he inquired. 12/28/10RP 104. Consequently, the prosecutor’s argument was not based on the evidence. 12/28/10RP 126 (“Sharie Rose is the last name, the Rose and Rose children. She

uses a fake name.”). Rather, the prosecutor drew on facts not in evidence to appeal to the jury’s prejudice that because Ms. Ramsey used a false name (which, according to the evidence she did not), she had something to hide.

c. The prosecutor’s misconduct prejudiced Ms. Ramsey’s due process right to a fair trial, requiring reversal of her convictions.

Prosecutorial misconduct may be addressed for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), (citations omitted). “[T]he issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” Belgarde, 110 Wn.2d at 508.

Here, the prosecutor falsely accused Ms. Ramsey of lying about her name, thus implying Ms. Ramsey’s conduct indicated she had something to hide. The prosecutor’s argument not only relied on facts not in evidence but sought to play on the passion and prejudice of the jury so carefully safeguarded by other court rules. E.g., ER 404 (generally excluding propensity evidence). Rather than a simple case of misstating evidence, the prosecutor here

used the unsupported story to imply Ms. Ramsey was dishonest and acted covertly.

Notably, the prosecutor's improper comments were not ideas which could have been mitigated by a curative instruction. A "bell once rung cannot be unring." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977). In Fleming, notwithstanding trial counsel's failure to object, this Court concluded that "the misconduct [of misstating the law and misrepresenting the burden of proof and role of jury] . . . rose to the level of manifest constitutional error, which we cannot find harmless beyond a reasonable doubt given the nature of the evidence at trial." 83 Wn. App. at 216. Here, similarly, this Court should conclude the prosecutor's argument was flagrant misconduct that prejudiced Ms. Ramsey's right to a fair trial. Her convictions must be reversed.

#### F. CONCLUSION

Ms. Ramsey's convictions should be reversed because her constitutional right to counsel was violated when the trial court failed to conduct a proper inquiry into or grant her motion to discharge counsel. In the alternative, the convictions should be

reversed because the prosecutor's closing remarks relied on facts not in evidence to appeal to the jury's passion and prejudice.

DATED this 25th day of August, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MLZ', is written over a horizontal line.

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 41684-1-II
	)	
SHARIE RAMSEY,	)	
	)	
APPELLANT.	)	

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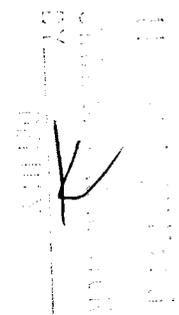
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF AUGUST, 2011 I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GERALD FULLER ATTORNEY AT LAW GRAYS HARBOR CO. PROSECUTOR'S OFFICE 102 W. BROADWAY AVENUE, ROOM 102 MONTESANO, WA 98563-3621	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SHARIE RAMSEY (NO MAILING ADDRESS) E-MAIL: SHARIEROSE@HOTMAIL.COM	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL PER APPELLANT'S REQUEST

**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF AUGUST, 2011.

X \_\_\_\_\_  

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