

No. 42575-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JESS J. VARNELL,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Katherine Stolz, Judge

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Jess Varnell was deprived of his state and federal constitutional rights to public trial when several jurors were dismissed after a closed session in chambers.
2. The prosecutor committed prejudicial misconduct in closing argument by repeatedly denigrating counsel and his role.
3. The trial court erred and Varnell's Sixth Amendment and Article I, § 22 rights to effective assistance of counsel were violated when the court failed to sufficiently inquire into a breakdown in communication and complaints raised by Varnell.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is a violation of a defendant's rights to a public trial to close any part of voir dire without first conducting a required analysis, weighing the important factors relevant to whether the closing is legally warranted. Were those rights violated where part of the voir dire proceedings were conducted off the record, in chambers, without the court having conducted any of the required analysis?
2. It is misconduct for a prosecutor to disparage defense counsel or their role in closing argument. Did the prosecutor violate this prohibition in repeatedly suggesting to the jury that counsel was trying to obscure the true nature of the facts or the law in a fashion common to defense attorneys in criminal cases?
3. After trial but before sentencing, Varnell brought his concerns about counsel's performance to the trial court's attention, moving for judgment notwithstanding the verdict or a mistrial because counsel had failed to secure and present evidence which would have significantly impeached the prosecution's main witnesses against Varnell. He also told the court there had been a complete breakdown in communication between himself and his counsel.

Did the trial court err and were Varnell's rights to effective assistance violated when the court failed to adequately inquire in order to determine the merits of Varnell's claims and whether new counsel might need to be appointed?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jess J. Varnell was charged by information with two identical counts listed as alternate means of committing first-degree escape. CP 1-2; RCW 9A.76.110(1). Pretrial and trial proceedings were held before the Honorable Judge Katherine M. Stolz on July 25-28, 2011, after which the jury found Varnell guilty as charged. 1RP 1, 97-99, 2RP 1<sup>1</sup>; CP 45. On September 9, 2011, Judge Stolz ordered Varnell to serve a standard-range sentence of 33 months in custody. 1RP 114; CP 86-96.

Varnell appealed and this pleading follows. CP 82.

2. Testimony at trial

Joan Spencer, a case manager for a program in Pierce County which used to be called “Breaking the Cycle” testified about the program and procedures generally used in its administration. 1RP 21, 2RP 13. The program is available for nonviolent offenders to avoid jail time and instead serve their time in the community while going to work, being with their family and engaging in treatment. 1RP 21.

Spencer testified that a person is admitted into the program after their lawyer submits paperwork to the Pierce County Sheriff’s Department (PCSD), so that it can be determined if the person qualifies for the program. 1RP 21-22. The person also has to enter a plea in their case “instead of taking court time,” and has to receive a felony with a sentence

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<sup>1</sup>The verbatim report of proceedings consists of two volumes which are not chronologically paginated. The volume containing the proceedings of July 25, 27, 28 and September 9, 2011, will be referred to herein as “1RP.” The volume containing the proceedings of July 26, 2011, will be referred to herein as “2RP.”

of a year or less. 1RP 22. The program is voluntary and requires clients to “constantly check in with the case manager,” either by telephone or by “coming in and signing in to prove that they’re here.” 1RP 23.

Spencer, who had been a case manager since about the beginning of 2010, testified that her duties were to do “orientation,” intake of new clients, assessments, education classes, help “clients” get treatment and monitor them during the program. 1RP 21-22.

Spencer testified that people usually arrive in the BTC office by way of a “deputy with Alternative,” who picks people up from jail and drives them to “Pierce County Alliance” where they are given an orientation, sign paperwork and required to leave a urine sample. 1RP 31. The alliance is where a number of programs are run, including BTC and a drug court. 2RP 44. Spencer also said such people are “set up with an interview date or intake date” so Spencer could review the paperwork to see if a person needed an assessment. 1RP 31. She said that such people are told to go to the DOC office to “check in and get an intake date from them” if they have DOC custody orders, too. 1RP 31.

Spencer opined that a person in BTC was “always in custody” and that people released on the program would “show” as being in custody in Pierce County Jail if someone “were to look them up” in court records. 1RP 23. There was a “verification form” with address information on it that Spencer testified clients would be “told during orientation” about, which she said meant that they could “change their cell” i.e., change their address, but that they would have to fill out the verification form and turn it in. 1RP 23-24.

According to Spencer, the first 30 days of the program was the hardest, because people “have to come in” and “sign our sheet” every day “by noon, Monday through Friday,” excluding holidays unless they were excused by their case manager to come in later on a particular day, for example if they have a doctor’s appointment. 1RP 36. She said that was explained in the orientation. 1RP 37. She admitted that, with another document, the “Day Reporting Schedule,” she really only discussed “Phase 1,” the first 30 days, with people, although she has everyone initial all parts of the document discussing the different phases as if they were explained. 1RP 46, 2RP 35. She leaves it up to people to review the rest and “see what the other phases are” if they “take the packet home.” 1RP 47. She also said she explained that, as people got closer to phase 2, she would then explain it to them. 2RP 5. Spencer said that she only explained phase one but would explain other phases if people asked about it or when they got close to phase two. 2RP 35.

On the document, phase one indicated that people had to sign in five times a week for 30 days by noon, but does not list any exceptions except holidays. 2RP 57. Spencer admitted that there was not anything on the document saying that the rules allow case managers to make changes but she said there was some other document which said that. 2RP 57. She said the document saying they were required to be there five times a week for 30 days by noon, that was “a guideline.” 2RP 57. She claimed the document was not misleading about the requirements because she explained it in orientation and there was some other paper somewhere which said the case manager can “give you flexibility” on some things,

although she could not recall which paper that was. 2RP 58.

Spencer refused to say that the paperwork did not actually accurately inform people of what was required but she said she thought that people would rather do “phase one over jail.” 2RP 59.

Spencer identified a document, entered as Exhibit 1, called “Program Guidelines,” which she said tells people that they have to report to DOC, have to avoid firearms, drugs, etc., are not allowed to bring children to appointments, and other requirements. 1RP 32. According to Spencer, she goes over the form “during orientation and intake,” both. 1RP 33.

Spencer said that, in general, she goes over “each and every” part of the document with the rules and conditions during the orientation and then also during the “interview intake time,” which is one-on-one. 1RP 40. Because she has clients who cannot read, Spencer said, she also reads the documents to them. 1RP 40-41. Spencer said that people usually did not take copies of the paperwork they were signing home with them, because they were too anxious to get home, but some people did make the request and she would tell them, “after everyone leaves I’ll make a copy for you.” 2RP 37.

The requirements on the paperwork to check in with DOC were not actual requirements of BTC, Spencer admitted, but instead “[v]ery strong suggestions,” trying to keep people in compliance with court requirements. 2RP 23. Nevertheless, the paperwork said “I must report,” making it seem like a requirement when in fact it was not. 2RP 25.

Spencer admitted that she had people initial that section even if

they did not have a DOC reporting requirement. 2RP 25. When asked why that would seem to misinform people, Spencer said that some of them were told in jail they did not have DOC ordered but their paperwork indicated that they do, so they would need to go to DOC anyway. 2RP 25. She said “we’re just asking them to sign it, and I tell them not to worry about it.” 2RP 25. She said that she had people initial all of the paragraphs even if they did not apply to those people because it was “just easier that way,” but that people would be told individually what did not apply to them and that “the initial will not affect them.” 2RP 26.

Spencer said that, because people who were in the program were just being released from jail, most of them were “desperate” to get home as fast as possible and would not even take the paperwork for BTC with them when they leave. 2RP 27. She denied telling people to initial everything as fast as possible with the intent of going over things later but instead said she always went over the requirements slowly, saying “please initial.” 2RP 27.

Spencer admitted that, just because a person initialed each section did not mean she had gone through them in detail, but that it was “there for them to read if they want to read it.” 2RP 35-36.

Another inconsistency between what Spencer said were the rules and what the paperwork said was that nowhere on the paperwork does it say that people are not allowed to leave Pierce County. 2RP 24. Spencer, however, maintained that it was a “program requirement” that they live at the listed address or they would fail the BTC program. 2RP 24.

In general, Spencer said, the assigned deputy, Spencer and the

prospective clients are there during orientation. IRP 6-7.

Spencer testified that she had Jess J. Varnell on her caseload and that he had signed a document which she thought meant he “did his orientation on November 24<sup>th</sup>,” the day before Thanksgiving, in 2010. IRP 34, 47.<sup>2</sup> She testified that she went over another document, admitted as Exhibit 2, during his “intake or orientation.” IRP 35. Spencer described that document as containing “rules and conditions” and talking about the “escape policy.” IRP 35. She said “we explain to them that the first rule is: If they fail to maintain a verifiable address in Pierce County” then they will have “failed the program” and will be returned to the jail to complete their sentence. IRP 36. Also on the form it says violation or failing to report will result in going back to jail. IRP 37. Spencer testified that, if someone does not come back as instructed, an escape warrant will be issued “just as if you had been in the jail, and you escaped from the jail.” IRP 38. She said there was a place on the document which says there will be a “brand-new charge” of escape filed, too. IRP 38.

Spencer identified initials on the exhibit she said were Varnell’s. IRP 39. She identified Varnell’s signature on the “Day Reporting Schedule,” dated November 24, 2010. 2RP 5, 47. She said the initials indicated that Varnell had been told what was on the documents and offered a copy. IRP 39. She conceded, however, that although Varnell’s paperwork had a box “checked” which said “accepted a copy,” that did not necessarily mean that Varnell had actually received a copy because he

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<sup>2</sup>The relevant documents are being transmitted to the Court via a supplemental designation of clerk’s papers, filed this date.

might have changed his mind or left without it. 2RP 54.

Spencer admitted she did not have time to really decide whether people are able to understand the conditions of BTC, although she said she and the others usually do their “utmost best” to explain. 1RP 41. She opined that, when she signed the documents with Varnell’s name on them, she was satisfied that she had explained everything to Varnell. 1RP 42. She conceded, however, that her signature was not on the address verification form with Varnell’s. 1RP 45.

Spencer claimed that she was present when Varnell went through the orientation process with on November 24, 2010. 2RP 8. She said the relevant deputy, Wellington Hom, who was assigned at that time “always” went through “all the steps” with orientation classes. 2RP 7-8.

Spencer admitted, however, that she did not remember if Hom was actually there on November 24, 2010. 2RP 47-48. She said if it was a different deputy present, she would go through everything herself during the orientation. 2RP 48.

Deputy Hom testified that, generally, when he brought inmates over from the jail in order for them to start on BTC, gives them a “quick orientation” of the facility and personally handles two documents with people, which he said were the “rules and condition [sic] form.” 2RP 86. He said he discusses “[a]ll nine of the rules” and usually uses some kind of “real-world example.” 2RP 87. One example would be if someone got a traffic infraction, “would that be considered a failure” and what if it became a “warrant for failure to appear.” 2RP 87-88. Hom testified that he would elicit an answer from the people and then, depending upon the

answer they gave, he would then “expand on that to clarify whether it’s a violation.” 2RP 88. One of the rules was about maintaining a verifiable address in the county and he also went over the next to the last one which is “you may be given a charge of escape.” 2RP 90. Hom said he told people if he “can’t find them” after “reasonable attempt[s],” he would “then submit a report recommending that the charge of escape be - - be filed on the individual.” 2RP 91. He said if it “appears that they are evading my attempt to contact them,” that was when he filed a police report. 2RP 92.

Hom testified that he recalled being present on November 24, 2010, at the BTC orientation. 2RP 88. He said he remembered Varnell and was there, explaining, “[b]ecause I have numerous contacts subsequent to that.” 2RP 89. He said he had gone over the address verification form with Varnell, that Varnell was “very cooperative” and, in general, had maintained “very good communication” with him over the time he was on the program. 2RP 94.

Hom admitted that there would be a physical document he would have to sign at jail to be able to take people to Pierce County Alliance. 2RP 118. He believed such a document would indicate that he was present on November 24, the day Varnell was supposedly given orientation. 2RP 118. He did not, however, have the document. 2RP 118-19.

Hom said that there was a point near Christmas when it appeared that there was a possibility Varnell was “on the bubble of failing the program,” so Hom “worked one-on-one with him.” 2RP 94. Hom said

they would talk in the hallway and he got to know Varnell “a little clearer detail, say, with the other clients.” 2RP 94. Hom conceded that Varnell was responsive to phone calls and would call back “relatively quick.” 2RP 95.

Hom first claimed to have talked with Varnell about escape and what escape would mean. 2RP 105-106. When asked if there was any such conversation other than just the general orientation, however, Hom could not “recall specifically.” 2RP 105-106. Hom said he discussed “a lot of things” with Varnell over the time that he was “actively in the program.” 2RP 106.

Hom testified sometime in “the January time frame of 2011,” he received communication from Spencer so he attempted to contact Varnell by calling the phone number on the address verification form. 2RP 97. Someone answered but it was not Varnell. 2RP 97. Hom said he left a message with that person for Varnell to call the deputy back. 2RP 98. Varnell called back two days later and left a message, saying he knew Hom was trying to get ahold of him and he was supposed to come in. 2RP 98. According to Hom, Varnell’s message said he had “failed the program,” that he knew it and wanted some time to get “his things together before going back to jail, and he did not want an escape charge.” 2RP 99, 124-27.

Hom admitted that he did not record the message he said Varnell left on the phone. 2RP 121.

Hom called the phone number back and no one answered. 2RP 99. Hom said he called every number he knew for Varnell and, when there

was no response, went to the address he had for Varnell. 2RP 99. Hom said no one appeared to be there. 2RP 100. After that, Hom did not try to go back to the place or call but filed a report “for escape.” 2RP 102. Hom said Varnell did not come turn himself or call again. 2RP 102.

Hom admitted that it was not “technically” a program requirement that he be able to contact people on BTC, but rather that they need to be at the address they say they are and it needs to be verifiable. 2RP 111. He also said that, while people do not have to be at the address 24 hours a day, they need to be sleeping there eventually because “this is technically their cell.” 2RP 112.

Spencer said that the last time Varnell signed in was on January 5, 2011. 2RP 8-9. Spencer said she had concerns that Varnell then “wasn’t in compliance” because of that and “other problems.” 2RP 10. Spencer called the last phone number she had for Varnell and explained to his roommate that Varnell needed to come in and that it was important. 2RP 11-12. She thought she had told the roommate that Varnell could be subject to an escape charge, too. 2RP 11-12.

D. ARGUMENT

1. VARNELL’S RIGHTS TO A PUBLIC TRIAL UNDER ARTICLE 1, SECTION 22 AND THE SIXTH AMENDMENT WERE VIOLATED

Under both the Sixth Amendment and Article I, § 22 of the Washington Constitution, a criminal defendant has a right to a public trial. State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995); see State v. Strode, 167 Wn.2d 222, 225, 217 P.3d 310 (2009). In this case, reversal is required because the trial court violated Varnell’s right to a

public trial by conducting a portion of jury selection in chambers.

a. Relevant facts

During trial, with the jury out, the prosecutor reminded the court of a “little counsel in chambers” that had occurred the previous day, “during jury selection where we discussed that [sic] number 6 and number 26?” 2RP 77. Counsel corrected that it was “28” and the following exchange then occurred:

[PROSECUTOR]: 28 should be excused for cause. And I don’t think we ever put that on the record.

THE COURT: I don’t think we did either.

[PROSECUTOR]: Thank you.

THE COURT: So we were excusing 6 and 28 for cause. That was because both of them had employment and other issues that would not allow them to sit on the jury.

2RP 77. There was no further discussion about the part of jury selection which had been handled in closed chambers.

b. Varnell’s rights to public trial were violated

The court erred and violated Varnell’s rights to public trial under the Sixth Amendment and Article 1, § 22. Whether such a violation has occurred is a question of law, reviewed de novo by this Court. See State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Further, “[i]t is well settled that a criminal defendant’s right to a public trial is an issue of constitutional magnitude that may be raised for the first time on appeal,” even if the defendant does not object or assert the right at trial. State v. Duckett, 141 Wn. App. 797, 806, 173 P.3d 948 (2007). And the trial court is also burdened with “an independent obligation to consider public trial

rights before closing all or a portion of the proceedings,” under Brightman and Bone-Club. Duckett, 141 Wn. App. at 806.

This is because state and federal rights to a public trial not only ensure a fair trial but also foster public understanding of and trust in the justice system, as well as providing a “check” to judicial power through public scrutiny. See Duckett, 141 Wn. App. at 803. Although the rights are not “absolute,” because of their importance they are “strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual [of] circumstances.” Strode, 167 Wn.2d at 226.

As a result, before a court may close any part of a criminal trial - including jury selection - it must go through a five-part analysis taken from State v. Bone-Club, including looking at whether there is some showing of a compelling interest in closure, whether the proposed limitation on public access to the court is the “least restrictive means available for protecting the threatened interests,” a balancing of the interests of “proponents of closure and the public,” and other considerations. See Bone-Club, 128 Wn.2d at 258-59. After such consideration, the trial court should enter specific findings on the record to justify the closure. State v. Momah, 167 Wn.2d 140, 148-49, 217 P.3d 321 (2009).

In all but the most exceptional of circumstances, a plurality of the Supreme Court has held, a trial court’s decision to close voir dire without conducting the required Bone-Club analysis is considered “structural error,” so serious that it compels reversal and remand for a new trial. See Strode, 167 Wn.2d at 223, 236; see also State v. Hummel, 165 Wn. App. 749, 266 P.3d 269 (2012) (following this rule of automatic reversal).

Here, there were not such exceptional circumstances. For example, this was not a case where, as in Momah, the defendant “affirmatively asserted to the closure” of the courtroom, even arguing for “its expansion” after being specifically consulted about it. See Momah, 167 Wn.2d at 151-52. Instead, here, the closure apparently simply occurred despite any exceptional circumstances - or even a goal of preserving jurors’ privacy. There was no discussion of Varnell’s rights to public trial, let alone the “detailed review that is required in order to protect the public trial right.” Strode, 167 Wn.2d at 228.

Nor is there any evidence that Varnell made any knowing, voluntary and intelligent waiver of the public trial right. See, e.g., State v. Applegate, 163 Wn. App. 460, 463, 259 P.3d 311 (2011).

Because Varnell’s rights to a public trial were violated by the court’s decision to conduct a part of the juror voir dire in chambers, and because the error is “structural” and not subject to “harmless error” analysis, reversal is required.

2. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AND THERE IS A REASONABLE LIKELIHOOD IT AFFECTED THE VERDICT

A prosecutor is a “quasi-judicial” officer who enjoys special status in our community and is tasked to act with the dignity becoming such a status to comply with special duties not placed on other attorneys. See State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Among those duties is the duty to act at trial in the interests of justice, instead of as a heated partisan, trying to “win” a conviction through improper means. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied sub

nom Washington v. Huson, 393 U.S. 1096 (1969). Instead, as representatives of the state, they must seek convictions based solely upon the evidence. Reed, 102 Wn.2d at 145.

In this case, the prosecutor fell far short of her duties, committing serious misconduct in repeatedly denigrating defense counsel in general and counsel for Varnell in particular. Further, because the court repeatedly overruled counsel's objections, reversal is required because there is a substantial likelihood the misconduct affected the jury's verdict.

a. Relevant facts

The prosecutor began rebuttal closing argument by declaring:

Ladies and gentlemen, there's a saying in the criminal law community, and that saying is: If the facts are against you, if you have bad facts, what you need to do is argue the law. There's a technical reason that the - - that the defendant is not guilty; or - -

1RP 86. Counsel then said, "[y]our Honor, I object. I think that makes me a personal issue in this case, and I don't believe that that would be appropriate." 1RP 87. The court told the prosecutor to "try rephrasing it," and the following exchange then occurred:

[PROSECUTOR]: Okay. All right. Ladies and gentlemen, there - - there's a trend in the - - in the community; and that is, if the laws are against you, then you look at the facts.

[COUNSEL]: Again, I object, Your Honor. I think it personalized - -

THE COURT: It's closing argument, Counsel. She's not making any personal aspersions on you.

[PROSECUTOR]: And - - and if the law is against you, you look at the facts and say, well, these facts are bad. These facts don't really fit into the law; or on the other hand, if the law is against you, you can look at the facts and say, well,

these facts don't meet with the law; and if they are both against you, then you have to find some other scapegoat. In this case, that seems to be Ms. Spencer, doesn't it?

1RP 87.

b. This prejudicial misconduct also compels reversal

There can be no question that the prosecutor committed misconduct in making her aspersions about defense counsel personally and in general. It is misconduct for a prosecutor to suggest that counsel for defendants in criminal cases are unscrupulous, dishonest, or somehow less honorable than the prosecutor herself. See State v. Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003); see also, State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

Thus, in State v. Warren, 162 Wn.2d 17, 195 P.3d 940 (2008), it was improper for the prosecutor to say that there were a number of “mischaracterizations” in counsel’s version of events, that this was something people had to deal with when they dealt with defense attorneys in criminal cases, and that counsel’s arguments were a “classic example” of taking the facts and twisting them “to their own benefit” and hoping that jurors not smart enough “to figure out what in fact they are doing.” 165 Wn.2d at 30. The comments were improper because they “commented on defense counsel’s role.” Id. Because counsel had not objected, however, the Court decided that, under the facts of the case, the misconduct was not so flagrant and ill-intentioned that it could not have been cured by instruction, as required when no objection has been made.

Id.; see, e.g., State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994) (detailing the “flagrant and ill-intentioned” standard and its application when there was no objection).

Similarly, in State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011), it was misconduct for the prosecutor to accuse the defense of engaging in “sleight of hand” tactics, call the defense “bogus” and “desperation,” and say the entire defense was “[l]ook over here, but don’t pay attention to there. . . [d]on’t pay attention to the evidence.” Although the court of appeals held that the arguments were not misconduct in their entirety, the Supreme Court disagreed, believing that, with the comments:

the prosecutor impugned defense counsel’s integrity, particularly in referring to his presentation of his case as “bogus” and involving “sleight of hand.” In particular, “sleight of hand” implies wrongful deception or even dishonesty in the context of a court proceeding. The prosecutor went beyond the bounds of acceptable behavior in disparaging defense counsel.

172 Wn.2d at 451-52. The Court nevertheless held that the remarks, while “entirely inappropriate,” did not have a substantial likelihood of affecting the jury’s verdict under the facts of the case. 172 Wn.2d at 452.

Here, the prosecutor similarly made comments which were “entirely inappropriate,” repeatedly implying that criminal defense attorneys in general and this attorney in particular try to manipulate cases by trying to distract the jury from either “bad facts” or “bad law” and, if that does not work, to “find some other scapegoat.” IRP 86-87. The entire purpose of this theme of the prosecutor was to try to sway the jury against defense counsel and imply deception or dishonesty in the course of the proceeding.

Further, under the proper, applicable standard, reversal is required. Because counsel repeatedly objected, the question is whether there is a substantial likelihood the misconduct could have affected the jury's verdict, not whether the misconduct was "so flagrant and ill-intentioned" it could not have been cured by instruction. See, e.g., Gonzalez, 111 Wn. App. at 283. Here, there is more than such a likelihood. The prosecutor's argument put the weight of the prosecutor's office and the respect the public has for the office behind the idea that defense counsel in general and specifically here will try to obfuscate and deceive the jury about the facts or the lab if they are unfavorable or difficult. Those arguments tainted the entire process and the jury's ability to fairly consider the arguments counsel then made.

Indeed, where, as here, the court specifically overrules objections to misconduct denigrating counsel, the prejudice is only "compounded." Gonzalez, 111 Wn. App. at 283.

Because the prosecutor committed serious misconduct in repeatedly denigrating counsel, and because there is more than a substantial likelihood that misconduct affected the verdict, this Court should reverse.

\_\_\_\_\_ 3. THE TRIAL COURT ERRED AND VARNELL'S RIGHTS TO COUNSEL AND DUE PROCESS WERE VIOLATED WHEN THE COURT FAILED TO INQUIRE SUFFICIENTLY INTO THE APPARENT CONFLICTS AND BREAKDOWN IN COMMUNICATION

\_\_\_\_\_ Finally, reversal and remand for new proceedings is required because of the violations of Varnell's rights to effective assistance of counsel and the trial court's failure to sufficiently inquire about counsel's

performance when brought to the court's attention.

\_\_\_\_\_ a. Relevant facts

Shortly after trial, Varnell filed a letter with the trial court, asking for a judgment notwithstanding the verdict or a mistrial on several grounds. CP 62-67. He told the court that Hom and Spencer had not, in fact, been present on the date that Varnell was oriented and that there was evidence to prove it. CP 63. Varnell asked for the court's assistance in subpoenaing certain information to prove his claims, saying, "I was there, and it was Georgia Robinson" rather than Spencer who did the orientation that day. CP 66. Varnell said Robinson instructed everyone to just sign the documents, saying that they would be explained at a later date, but that never occurred. CP 67. Varnell also attached a document he thought showed that Spencer had not been present on the orientation day. CP 68.

About two days after filing that letter, but still before sentencing, Varnell sent another letter, this time detailing efforts he had made to get his attorney and the attorney's supervisor to seek and present the relevant evidence, such as the transportation records for the inmates on the relevant day. CP 70-74. Again, he asked for the court's help to get subpoenas and evidence his attorney had failed to get. CP 70-74. He said he was not given a fair trial, asking for a "mistrial." CP 74.

Another letter, sent a few days later, told the court that the Washington State Bar Disciplinary committee, Washington State Commission on Judicial Conduct, U.S. Attorney's Office, "Federal Assigned Counsel Dennis Carrol" and "Wa State Health Dept. License Holder to BTC Counselor's Disclosure" needed "testimony [sp] +

transcripts” to support what he was saying about Spencer and Hom not being present - and thus having been mistaken or lying when they testified to the contrary. CP 76-77. He asked for specific transcripts and again told the court that he had asked his attorney to subpoena the records showing that Hom and Spencer were not there. CP 76-80. He also said he had asked his attorney to list Georgia Robinson as a witness. CP 78-78.

In addition, Varnell told the court he had a “total communication breakdown,” and repeated many of his claims from his previous letters. CP 75-80. He did much the same in another letter, sent a few days later to a different judge. CP 169-74.

At sentencing, the parties did not discuss Varnell’s requests or complaints, instead discussing sentencing matters. IRP 108-111. When the court finally turned to Mr. Varnell and asked if he had anything to say, Varnell told the court that he had written the bar association and others about the fact that Spencer and Hom were not, in fact, present on November 24, 2010, when they claimed to have conducted his orientation and signed documents with him. IRP 111.

Varnell said he had been asking his attorney “since day one” and even his attorney’s supervisor to get certain documents “suppressed.” IRP 112. Varnell also said that the prosecutor had used perjured testimony because Hom and Spencer had testified that they were present on November 24, 2010, and had conducted Varnell’s orientation, even when it was not so. IRP 112. Varnell said he had been “trying to put this to the court” for “five months” and had held his tongue during trial but needed to let the court know about it, based on what he had been told by people such

as “the Washington Judicial Conduct[.]” IRP 112-13.

The court first told Varnell “[w]ell, I have no jurisdiction and nothing to do with that.” IRP 113-14. The court then noted its belief that there had been evidence at trial of documents that Varnell had signed which the court thought showed he would be charged with escape if he did not comply with BTC. IRP 113-14. Varnell pointed out that Spencer and Hom were “agents of the state” but ultimately, the trial court said Varnell’s argument made no sense and it was “not here to deal with that.” IRP 114.

After Varnell asked the court for copies and told the court he could not get them from his attorney, the sentencing judge told Varnell that matters of trial strategy are left to the “judgment of the attorney” and that “[i]f your attorney determines that none of this is relevant to the issue in front of the jury,” that was up to the attorney. IRP 115. The trial court said it was not an appellate court and, when Varnell repeated his belief that he had evidence that Hom and Spencer committed perjury in their testimony, the judge said, “there’s nothing, at this point, to demonstrate that that is perjury; so - - .” IRP 115.

Varnell made a few more comments and asked how he was supposed to deal with the “improprieties” that he had raised with the bar, which had told him to bring it to the court. IRP 118. Varnell’s attorney said, “[w]ell, nobody thinks there was any [improprieties] except for you.” IRP 118. Varnell then said the bar association told him to put things in the record. IRP 118. He and his attorney argued about the meaning of one of the documents and, at some point, Varnell objected that he had not said anything during the trial but when he finally stood up for himself he

was being told he could not talk but would be forced to sign documents:

I signed and agreed to BTC because I was guilty. I'm not guilty of escape. They didn't orientate me. They violated my due process rights. That's all I'm saying. If - - if the courts - -

1RP 119. Counsel then advised Varnell to “stop talking because you’re not helping yourself because you just confessed to being on BTC.” 1RP 119. Varnell attempted to speak several more times and the court advised him to listen to his attorney, saying “I gave you the low end” but “I haven’t signed the papers” and “could just go back with my original decision, which was middle of the range[.]” 1RP 119. The prosecutor used Varnell’s attempts to speak as “evidence of his resistance to any sort of legal process” or “being told what to do or anything,” after which the court said Varnell should not have “wasted. . . time trying to get treatment” but his “stupid choices” were not the court’s “problem.” 1RP 119-20. After some further discussion about whether Varnell would sign the document (he declined), Varnell complained again that the testimony against him was “perjured.” 1RP 120-21. The court reminded him that counsel had told him to “shut up” and said, “I would endorse that.” 1RP 121. When Varnell said he was talking to his attorney, the court said, “you don’t talk to your attorney on the record” and “[t]he fact that you don’t seem to be able to foresee things very far is one of the reasons you’re here.” 1RP 121.

- b. The court failed to conduct an adequate inquiry into Varnell’s concerns about his attorney and the apparent breakdown in their communication

The court erred and violated Varnell’s rights to counsel and due process in failing to adequately inquire into the concerns Varnell raised about counsel. Further, that failure violated Varnell’s due process rights.

There is no question that the state and federal rights to counsel do not guarantee an indigent defendant the attorney of his choice. See State v. Price, 126 Wn. App. 617, 631, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005); see Wheat v. U.S., 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Nevertheless, he is certainly entitled to counsel who is at least reasonably effective and with whom he can reasonably communicate. See Price, 126 Wn. App. at 631. As a result, a criminal defendant who is dissatisfied with appointed counsel is entitled to new appointed counsel if he can show “good cause” for such substitution. See State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Good cause exists, *inter alia*, when there has been a “complete breakdown in communication between the attorney and the defendant.” 132 Wn.2d at 734. The question of whether a defendant’s dissatisfaction with appointed counsel warrants a new attorney being appointed is one within the court’s discretion, which is exercised by looking at factors such as 1) the reasons given for the dissatisfaction, 2) the court’s own evaluation of counsel, and 3) the effect of any substitution on the scheduled proceedings. See State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); Stenson, 132 Wn.2d at 734.

In this case, while Varnell never said the actual words, “I want a new attorney,” his complaints made his concerns and the need to determine if new counsel was needed clear. Varnell repeatedly told the court he had told his attorney about the evidence, which would have shown that both Spencer and Hom were at the very least completely mistaken when they claimed to have been the ones who interacted with

and conducted the BTC orientation with Varnell on November 24, 2010. CP 62-80, 169-74. And he told the court that there had been a “breakdown” in communication.

Further, Varnell specifically asked the court for its help in getting this exculpatory evidence because his attorney would not do so, thus again letting the court know that there were some serious issues between attorney and client. CP 62-80, 169-74. And he asked the court to enter a judgment notwithstanding the verdict or a mistrial (i.e., some legal remedy), based upon the evidence he was trying to submit himself because counsel had not gotten it. CP 62-70.

Yet the court did not engage in sufficient examination of Varnell’s concerns. Rather than asking questions to clarify what Varnell was so inartfully saying about the potentially relevant evidence which could have impeached the state’s main witnesses against Varnell, the court first said it had no “jurisdiction” over Varnell’s complaints, then that it was “not here to deal with that,” and ultimately that matters of “trial strategy” were left to attorneys. But the court had not established whether Varnell was raising issues of trial strategy or valid concerns about his counsel failing to conduct adequate investigation and present evidence which would have impeached the state’s main witnesses. 1RP 113-16.

Where a court is faced with a situation such as the one presented here, the court is required to engage in an analysis which “must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court.” State v. Cross, 156 Wn.2d 580, 610, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). As one court has

declared, the point is to make sufficient effort as “might ease the defendant’s dissatisfaction, distrust, and concern.” United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9<sup>th</sup> Cir. 2001), quoting, United States v. Garcia, 924 F.2d 925, 926 (9<sup>th</sup> Cir. 1991). Further, such inquiry ensures that the court has a sufficient basis upon which to make its decision. Adelzo-Gonzalez, 268 F.3d at 777.

Here, the trial court did not make such an inquiry. Instead, it simply told Varnell that the issues he was trying to raise were not before it and dismissed them as likely “trial strategy.” IRP 115-16. That failure to adequately inquire was an abuse of discretion. See, e.g., In re Addleman, 151 Wn.2d 769, 92 P.3d 221 (2004) (failure to follow applicable rules or consider appropriate factors); State v. Fleger, 91 Wn. App. 236, 242, 955 P.2d 87 (1998), review denied, 137 Wn.2d 1003 (1999).

Further, had the court inquired, it would likely have appointed new counsel for Varnell. At the least, the documents Varnell submitted raised serious questions about whether counsel had failed to adequately investigate a potential line of defense. And the evidence that Varnell was concerned about would have been significant, because it would have impeached the credibility of Hom and Spencer, the two crucial witnesses against Varnell. Deputy Hom’s testimony alone provided the evidence that Varnell had called Hom, admitted he was guilty of escape and asked for time to get things together before he turned himself in. Hom’s testimony was thus extremely important for the prosecution, because it amounted to reporting a quasi-confession of guilt for the crime for which Varnell was then on trial.

And indeed, in closing argument, the prosecutor specifically relied on Hom's testimony on this point in arguing Varnell's guilt and that Varnell had been made aware of the BTC requirements by Hom, who testified that this had occurred. 1RP 62, 66-67, 93-94. Moreover, Hom's credibility was so important that the prosecutor took care to bolster it, describing Hom as "a sworn officer. . . supposed to uphold the law. . . supposed to implement the court orders" who had no reason to just be "making this stuff up." 1RP 90-91.

The trial court's failure to adequately inquire into Varnell's concerns about his attorney was an abuse of discretion and a violation of Varnell's rights to effective assistance of appointed counsel which independently supports reversal and remand for a new trial. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial, with different counsel.

DATED this 25th day of April, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to Mr. Jess Vamell, DOC 819012, Coyote Ridge CC, P.O. Box 769, Connell, WA., 99326.

DATED this 25th day of April, 2012.

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# RUSSELL SELK LAW OFFICES

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