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NO. 62071-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH JOHN THORGERSON,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 APR 21 AM 10:35

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF CASE IN REPLY

The state designated the Affidavit of Probable Cause as part of the Clerk's Papers. Resp. Br. at 2-3 n.1.

The Affidavit of Probable Cause may properly be part of the record on appeal. RAP 9.1, 9.6. The state may not rely on its contents, however, to support its characterization of the substantive facts of the case. Resp. Br. at 2. The Affidavit was never presented to the jury. It is not admissible evidence at trial. The jury could not have relied on it to reach its verdict.¹

To the extent the state relies on the contents of the Affidavit of Probable Cause to support its Statement of the Case, appellant objects and moves to strike.

B. ARGUMENT IN REPLY

1. THE HOLDING IN STATE v. BOEHNING SQUARELY CONTROLS THIS CASE.

The state claims the prosecutor's argument was appropriate because defense counsel reviewed people to whom Danielle had reported the alleged abuse,

¹ See State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) (reversible error to argue to jury that court established probable cause; impossible for jury instructions to cure).

and asked Danielle whether she had been consistent every time she told someone.² Danielle responded she had been consistent. RPII 92-99; Resp. Br. at 23-24.

From this evidence, the prosecutor properly could have argued Danielle's out-of-court statements were all consistent **because she said they were**. That's not what he argued.

The prosecutor argued instead that the jury could rely on the Rules of Evidence to conclude that Danielle only made consistent statements to others. He argued that the hearsay rules prevented him from presenting the content of Danielle's statements to others, but the rules permitted defense counsel to present any inconsistent statements; and since the defense failed to point out enough inconsistencies, the jury could conclude all her other statements were consistent with her testimony, and so it was the truth. RPIII 174-75.

This argument improperly shifted the burden of proof to the defense: if the defense didn't prove inconsistencies, **the law** says you can believe

² None of these reports occurred at the time the abuse allegedly occurred. They were all since her initial report to her boyfriend.

Danielle. State v. Miles, 139 Wn. App. 879, 889, 162 P.3d 1169 (2007); State v. Thomas, 142 Wn. App. 589, 598, 174 P.3d 1264 (2008).

This argument also was improper for arguing the rules of evidence and their effect. The rules of evidence are procedural rules intended to assure that only reliable evidence gets before the jury. The jury is to make its decision only from the evidence admitted; it is not to concern itself with the reasons for any evidence being admitted or not admitted. It is improper for the state to call the jury's attention to the rules of evidence.

This argument also was improper because the prosecutor called on the jury to rely on evidence he could not and did not present -- the contents of Danielle's statements to others.

He then went further to expound on all the people Danielle had told, going beyond even the list defense counsel had reviewed with her. He went yet further to explain she had spoken to people **in his office**, not otherwise identified. RPIII 174-75.

With this argument, the prosecutor vouched for Danielle's credibility by implying he knew

personally what other statements she had made, although the jury did not hear them. The jury should believe her because he and "people in [his] office," who did not testify, knew what she had said.

Thus he bolstered her testimony with inferences that there was other evidence the state had that the jury could not hear, but that it should rely on it anyway to believe Danielle was telling the truth.

This is the same factual scenario as in State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005):

- (1) As here, in Boehning the allegations were of abuse that reportedly had happened several years earlier. Id. at 514-15.
- (2) As here, there was no evidence the abuse occurred except the complaining witness's testimony. Id. at 515-17.
- (3) As here, the defendant testified and denied the accusations. Id. at 516-17.
- (4) As here, the state presented witnesses to whom the complaining witness had reported the alleged abuse. Id. at 515-16.
- (5) As here, defense counsel had the opportunity to cross-examine the complaining witness about her previous statements to others. Id. at 520.
- (6) As here, the prosecutor argued to the jury that because the defense failed to establish the complaining witness's various reports of abuse were

inconsistent, "the jury could infer that each of H.R.'s statements was consistent and that she was a credible witness." Id. at 517.

As in Boehning, the argument in this case was flagrant and ill-intentioned. This record shows the prosecutor knew precisely how the hearsay rules limited what he could present. He actually set up the argument in his opening statement, referring to the hearsay rules not permitting him to present the content of Danielle's statement to her boyfriend.
RPI 161.

The prosecutor also argued:

It's a very simple basic question that you have to decide to determine the outcome of this case.

And that is, is here any credible, reasonable explanation that's supported by the evidence to doubt what Danielle said? Look at it this way: If it didn't happen, why is she saying it did? Start from that perspective. If it didn't happen, why is she saying it did?

RPIII 164.

Look, if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case. So don't say we believe her but.

RPIII 168.

With these arguments, the prosecutor misstated the jury's role and the burden of proof. He negated the presumption of innocence, saying the

jury should start its analysis by presuming Danielle was telling the truth. This argument places the burden of proving she is not telling the truth on the defense.

The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony.

State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (court's emphases), review denied, 131 Wn.2d 1018 (1997).

As in Boehning, this improper argument requires reversal and a new trial.

2. DISPARAGING THE ROLE OF DEFENSE COUNSEL IS IMPROPER.

This record contains nothing to suggest that Mr. Thorgerson's counsel engaged in anything other than the presentation of a vigorous defense. Yet the prosecutor referred to him using "sleight of hand," "bogus" arguments, and arguing out of "desperation." RPIII 171-72, 195-96.

This argument was a direct, unprovoked and false allegation of duplicity on the part of

defense counsel. A prosecutor may not disparage or impugn the role of defense counsel.³

This argument attacked both the integrity of the attorney and the very legitimacy of challenging the state's evidence. To attack that role is to attack the integrity of the adversary system. It is the prosecutor's duty to protect that system and "to seek a verdict free of prejudice and based on reason." State v Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

³ State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (improper to refer to a "number of mischaracterizations" in defense counsel's argument as "an example of what people go through in a criminal justice system when they deal with defense attorneys," and to describe the defense argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing"). See also: State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003) (improper to argue prosecutor's oath is to seek justice, defense counsel's to represent accused); State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988) (recognizing that attacks on defense counsel's integrity may be reversible misconduct); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (improper for prosecutor to argue that defense counsel is being paid to twist the words of a witness).

In Warren, the state conceded the argument was improper. This Court⁴ and the Supreme Court both held the concession was appropriate. The Court affirmed Warren's conviction, finding the misconduct was not so "flagrant and ill-intentioned" that no instruction could have cured it. "Given the weight of the properly admitted evidence against Warren, he has failed to show that he was prejudiced by the prosecutor's comments." Warren, 165 Wn.2d at 29-30.

Unlike Warren, in this case the state's evidence was not at all strong. The trial came down to the credibility of the complaining witness and the defendant. The prosecutor acknowledged he was worried about an acquittal. RPS 11. The judge noted the jury could have gone either way. RPS 25; App. Br. at 21.

On this record, there is a substantial likelihood the prosecutor's misconduct affected the outcome.

Furthermore, unlike Warren, this record establishes the prosecutor's comments were ill-

⁴ State v. Warren, 134 Wn. App. 44, 68-69, 138 P.3d 1081 (2006), aff'd, 165 Wn.2d 17, 195 P.3d 940 (2008).

intentioned. CP 76-77; App. Br. at 20 & n.6. This was not a spontaneous response in the emotional heat of argument. The prosecutor revealed his careful plan and strategy to make exactly the "sleight of hand" argument. He claimed it was in response to the defense evidence of Mr. Thorgerson's extensive commitment to his daughter's athletic career and providing for her. The prosecutor's plan demonstrates how ill-intentioned it was. His argument included the improper questioning of Mr. Thorgerson on cross-examination, which the court permitted despite objection. RPIII 150-52.⁵

3. CROSS-EXAMINATION OF THE DEFENDANT WAS IMPROPER.

The state cites no authority approving a prosecutor asking the defendant in cross-examination why his lawyer asked him the questions he did on direct. Resp. Br. at 22-23. There can be no relevance. Defense counsel's strategies are not facts within the witness's knowledge -- the

⁵ See Gonzales, supra, 111 Wn. App. at 283-84 (court overruling defense objection further "compounded" the effect of prosecutor's improper argument, allowing prosecutor "to continue to develop her theme--in effect giving additional credence to the argument").

proper goal and purpose of examination. State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927); see App. Br. at 35-36.

The prosecutor also used this cross-examination to shift the burden of proof to the defense. With his questions he argued that Mr. Thorgerson's good acts as a parent: would not make up for molesting his daughter; had nothing to do with whether he molested his daughter; and had nothing to do with the accusation or trial. RPIII 150-52; App. Br. at 15-16, 34-36.

These questions argued to the jury that the defendant's testimony had not proven he did not molest his daughter.

The prosecutor candidly explained to the court at the motion for new trial that he intentionally did not object to defense counsel's questions about Mr. Thorgerson's commitment to Danielle's softball and his behavior as a parent. He believed the evidence was irrelevant,⁶ but rather than object

⁶ This evidence was not "irrelevant" as the prosecutor argued. It was an appropriate response to the state's theory that Mr. Thorgerson somehow made life more miserable for Danielle after she rejected his alleged sexual advances when she was 12. RPII 14.

and exclude it, he deliberately chose to argue to the jury it was a defense tactic of "sleight of hand." CP 76-77; App. Br. at 20 & n.6.

This planned strategy, and its method, were expressly disapproved in State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307 (2008), quoted in App. Br. at 35. The Jones court expressly rejected the state's claim that the defense "opened the door" to the impropriety. Although the facts of Jones were different than here, the principles for proper prosecutorial conduct remain the same:

Because this "opening the door" doctrine pertains to the admissibility of evidence, it must give way to constitutional concerns such as the right to a fair trial. ... Thus, even if Jones had "opened the door" to evidence or examination of a particular *subject* at trial, the prosecutor is not absolved of her ethical duty to ensure a fair trial by presenting only competent evidence on this subject.

Jones, 144 Wn. App. at 298.

The state even argues it was appropriate for the prosecutor to argue what the school counselor *would have answered if he had asked her a question he admitted he didn't ask.* Resp. Br. at 28; RPIII

196-97.⁷ The jury may not draw a "reasonable inference" of what a witness would have testified to if she had been asked a question not put to her.

The "prosecuting attorney is entitled to make a fair response to defense counsel's arguments," Resp. Br. at 28; but only within the evidence presented to the jury. Boehning, supra.

The prosecutor's repeated reliance on matters outside the evidence was flagrant and ill-intentioned, and most certainly had a prejudicial effect on the outcome of the case.

4. THE MISCONDUCT IN OPENING STATEMENT, WHEN COMBINED WITH THE OTHER IMPROPER ARGUMENTS, WAS FLAGRANT AND ILL-INTENTIONED.

Appellant does not ask this court to reverse these convictions based solely on the prosecutor's improper statements in opening. Nonetheless, they were improper. Combined with the other misconduct through this record, they also were flagrant and ill-intentioned.⁸

⁷ Again, defense counsel's objection as arguing matters outside the record was overruled. RPIII 197.

⁸ The state argues appellant did not "assert" these comments were flagrant and ill-intentioned. Resp. Br. at 21-22.

In opening, as again later in closing and rebuttal arguments, the prosecutor told the jury about evidence they **would not** hear or see. Telling the jury about inadmissible evidence has no purpose except to urge them to consider matters outside the record.

The state cites no authority to show such an argument is proper.

The state cites one case to support the prosecutor's injection of emotion in opening statement: State v. Pirtle, 127 Wn.2d 628, 689, 904 P.2d 245 (1995) "(arguments that evoke an emotional response are appropriate so long as they are restricted to the circumstances of the crime)." Resp. Br. at 19-20.

Pirtle was a death penalty case involving the brutal murders of two people whose bodies were found in a Burger King, one in the cooler. Their heads were crushed, there were multiple wounds to their throats and necks, as if someone attempted to behead them. There was no question a crime had occurred and what sort of crime it was.

In this case, the entire issue was whether a crime had occurred. There were no dead bodies.

The prosecutor's attempt to portray the "difficulty" his witness would have testifying -- a difficulty that appears nowhere in her testimony -- was an improper appeal to the jury's sympathy before any evidence was even presented.

Similar arguments about a complaining witness's difficulty in testifying in a child molestation case were disapproved in Boehning, 127 Wn. App. at 517.

5. THE COURT'S GENERAL INSTRUCTIONS COULD NOT HAVE CURED THE PROSECUTOR'S FLAGRANT MISCONDUCT; A SPECIFIC INSTRUCTION COULD NOT HAVE OVERCOME THE CUMULATIVE EFFECT OF THIS MISCONDUCT.

The state quotes a small portion of the court's introductory instructions to the jury at the beginning of the case. Resp. Br. at 6; RPI 149-58. This language is taken from the Washington Pattern Instructions. 11 Wash. Practice, Pattern Jury Instr. Crim. WPIC (3d Ed. 2008). It routinely is given in every case, orally at the beginning of trial, WPIC 1.01, and in writing at the end of trial, WPIC 1.02.⁹

⁹ "Use this general instruction in every case. This instruction is the first of the written instructions given to the jury at the end of the trial." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.02 (3d Ed. 2008), Note on Use.

It thus is presumed to have been given in State v. Boehning, State v. Jones, State v. Miles, State v. Stith, and State v. Fleming, supra, and the many other cases in which the courts have found the prosecutor violated due process by making improper argument and have reversed the convictions. See generally authorities cited in Appellant's Brief. As in those cases, the misconduct here was so flagrant and ill-intentioned it is unlikely even a specific instruction could have cured the effect.

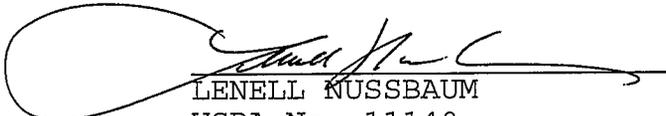
As in those cases, this Court should reverse the convictions and order a new trial.

C. CONCLUSION

For the reasons stated in this Reply Brief and the Brief of Appellant, Mr. Thorgerson respectfully asks this Court to reverse his convictions and remand the case for a new trial.

DATED this 20th day of April, 2009.

Respectfully submitted,



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DIVISION ONE

STATE OF WASHINGTON,)	
)	COA NO. 62071-1-I
)	
Plaintiff,)	
v.)	DECLARATION OF SERVICE
)	FOR REPLY BRIEF OF
)	APPELLANT
KENNETH THORGERSON,)	
)	
Defendant.)	

I declare that on this date I served on the party listed below an original and a copy of Reply Brief of Appellant, by depositing the same in the United States Postal Service, postage prepaid, addressed as follows:

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I declare that on this date I served on the parties listed below a copy of Reply Brief of Appellant, by depositing the same in the United States Postal Service, postage prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

April 20, 2009 Seattle, WA
Date and Place


HEATHER MUWERO
Legal Assistant to Lenell Nussbaum