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No. 96017-8

No. 75072-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID MORGAN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. After the State provoked a mistrial, dismissal of the charges against Mr. Morgan was required.

- a. The trial court should have dismissed the charges under CrR 4.7(h)(7)(i) and CrR 8.3(b) because the State's conduct was outrageous and because Mr. Morgan was prejudiced.

David Morgan's home caught fire and his ex-wife, Brenda Welch, was found severely injured in the garage. RP 1599, 1645. The State repeatedly and intentionally elicited from one of its experts that the fire at Mr. Morgan's home was the result of a deliberate act, despite not revealing this opinion to the defense in discovery, as required by CrR 4.7(a)(2)(ii). RP 950-51.

The prosecutor first asked if the expert, Mikael Makela, believed the fire was incendiary, or deliberately set, and Mr. Makela answered, "[y]es, I do." RP 950. The prosecutor then used an exhibit to bolster Mr. Makela's opinion, having Mr. Makela acknowledge he observed certain evidence suggesting the fire was intentionally set. RP 950. Finally, the prosecutor asked again, "do you have an opinion as to whether this is an intentionally set fire?" RP 951. Mr. Makela indicated that he did, and then stated: "Yes. It is an incendiary fire." RP 951.

Mr. Mikala further testified that he had informed the prosecutor of this opinion several months before trial and had spoken with the prosecutor about this conclusion “maybe three or four times.” RP 951-52.

Taken by surprise by this evidence, the defense moved for a mistrial. RP 954. The court granted the mistrial but denied Mr. Morgan’s subsequent motion to dismiss the charges, allowing the State to retry him. RP 1000-02.

The prosecutor offered two explanations for his behavior, both of which were false. First, the prosecutor claimed the State provided the required discovery to the defense. RP 957-58. When this claim was disproven, the prosecutor filed an affidavit under penalty of perjury asserting that, “in the flow of direct examination,” he “asked a “concluding question” that “was sloppy, inartful, unfocused” and had “elicited far more” than he had innocently intended. CP 152. As the trial court found, the record revealed the prosecutor’s self-serving claim was untrue. RP 999.

On appeal, the State concedes, as it must, that the prosecutor committed misconduct. Resp. Br. at 17. However, it claims the retrial was permissible because there was no prejudice to Mr. Morgan and in

fact Mr. Morgan *benefited* from the State's misconduct because, at the retrial, the State was properly precluded from eliciting the evidence it failed to disclose. Resp. Br. at 17. *See State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997) (dismissal of the charges is appropriate under CrR 8.3(b) where the defendant shows the State committed misconduct and the defendant's right to a fair trial was prejudiced).

The State's claim is misguided and should be rejected by this Court. When the prosecutor deliberately elicited an expert opinion he later admitted he knew he had failed to disclose to the defense, Mr. Morgan was harmed. The State's misconduct forced Mr. Morgan to choose between proceeding with a jury that had been purposely and unfairly tainted by the State or losing the jury he had carefully selected, which was of particular consequence given the media coverage of Mr. Morgan's case.¹ RP 982; *see State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003) (“[t]he defendant has the right to have his case determined by the jury that has been selected and sworn”).

¹ Defense counsel initially also expressed concerns about prejudice to Mr. Morgan because he would be forced to waive his speedy trial rights. CP 164. However, it appears the mistrial did not require an additional waiver of his speedy trial rights. *See* CP 485; RP 1030.

Furthermore, when the State's conduct is outrageous, it exceeds the bounds of fundamental fairness and dismissal is required. *State v. Martinez*, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004). Here, the State intentionally elicited a critical expert opinion it knew it had failed to disclose to the defense and, when confronted, drafted an affidavit designed to justify its misconduct, which the trial court found was false. RP 999. This conduct is outrageous.

Despite this egregious conduct, the State faced no consequences as a result of its actions, as the trial court ultimately declined to impose sanctions against the prosecutor. RP 1002, 2864. In its response, the State claims it is "absurd" to suggest there were no consequences to the State because it had to retry the case, which "entailed great expense" and was "a waste of time." Resp. Br. at 20. Furthermore, because Mr. Morgan was indigent, "the State paid increased costs for his defense as well." Resp. Br. at 20.

This assertion is flawed for two reasons. First, it conflates the Snohomish County Prosecuting Attorney's Office with the county's taxpayers and citizens, a group in which Mr. Morgan is included. The State is remiss in forgetting it is the public that incurred the extra expense of Mr. Morgan's retrial as a result of the prosecutor's

misconduct, not the prosecuting attorney's office that willfully committed the misconduct. *See also State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (because the defendant is among the people the prosecutor represents in the search for justice, he "owes a duty to defendant to see that their rights to a constitutionally fair trial are not violated").

Second, this Court has held that where a prosecutor knows the most severe consequence for his misconduct is to try the case twice, he "will hardly be seriously deterred from such conduct in the future." *Martinez*, 121 Wn. App. at 36. Retrial is not an effective deterrent for a prosecutor who seeks to elicit critical evidence he failed to properly disclose during the discovery process, particularly a prosecutor who believes he can justify his actions in a sworn affidavit that directly contradicts the record. CP 151.

Here, the State's outrageous conduct exceeded the bounds of fundamental fairness, and Mr. Morgan demonstrated prejudice. This Court should reverse and dismiss the charges pursuant to CrR 4.7(h)(7)(i) and CrR 8.3(b).

b. Under the standard adopted by this Court, the prohibition against double jeopardy required dismissal.

Even under circumstances in which the first trial is not completed, “a second prosecution may be grossly unfair.” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L. Ed. 2d 717 (1978). Thus, “as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” *Id.* at 505.

In order to evaluate whether a retrial is barred by the constitutional prohibition against double jeopardy this Court has held that, after finding jeopardy attached, it must determine whether the defendant consented to the mistrial. *State v. Rich*, 63 Wn. App. 743, 747, 821 P.2d 1269 (1992). However, as this Court explained in *Rich*, a defendant may be faced with a “Hobson’s Choice,” in which there is “no real alternative.” *Id.* at 748. The State claims *Rich* is inapplicable here because in *Rich* the State failed to prove the identity of the individual who committed the crime and Mr. Rich objected to permitting the State to reopen its case or a mistrial. *Id.* at 746. Instead, he sought only dismissal of the charges. *Id.* However, Mr. Morgan was faced with the same “Hobson’s Choice,” in that his request for a mistrial was no choice at all. Mr. Morgan’s only other option was to proceed to trial with a jury the State had irreparably prejudiced by its

misconduct. Under those circumstances, retrial is barred absent a showing of “manifest necessity,” which cannot be shown where the State’s misconduct caused the mistrial. *Juarez*, 115 Wn. App. at 889; Op. Br. at 22.

Furthermore, even if this Court were to find Mr. Morgan’s motion qualifies as “consent,” retrial is permitted only where “the mistrial results from judicial or prosecutorial error that is not motivated by bad faith.” *Juarez*, 115 Wn. App. at 888. Relying on *State v. Hopson*, the State argues bad faith is not sufficient, the defendant must show the prosecutor “intended to ‘goad’ the defendant into moving for a mistrial.” 113 Wn.2d 273, 278, 778 P.2d 1014 (1989). However, *Hopson* specifically declined to reach this issue, noting that this narrow standard, articulated in *Oregon v. Kennedy*, 456 U.S. 667, 680, 102 S.Ct. 2083, 72 L. Ed. 2d 416 (1982), may be impossible for a defendant to ever satisfy. *Hopson*, 113 Wn.2d at 279, 283.

Instead, following *Hopson*, this Court has continued to rely on the standard cited in *Rich*: a second trial is barred where the “prosecutor’s conduct was motivated ‘in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal.’ ” 63 Wn. App. at 747 (quoting *State v. Jones*, 33 Wn. App.

865, 870, 658 P.2d 1262 (1983); *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L. Ed. 2d 267 (1976)); *see Juarez*, 115 Wn. App. at 888.

Here, the prosecutor acted in bad faith, in order to prejudice Mr. Morgan's prospects for acquittal, when he elicited the undisclosed expert opinion at trial and submitted an affidavit with false information in an attempt to justify his actions. Retrial was barred under the prohibition against double jeopardy. *Rich*, 63 Wn. App. at 747; U.S. Const. amend. V; Const. art. I, § 9. This Court should reverse.

2. The State's warrantless seizure of Mr. Morgan's clothing, and subsequent search, violated article I, section 7.

a. Exigent circumstances did not justify the warrantless seizure of Mr. Morgan's clothing.

At the hospital, Mr. Morgan's clothing was placed in plastic bags in his room. RP 154. Officers seized the clothing without asking Mr. Morgan's permission or obtaining a warrant. RP 162. The trial court erroneously found the officers' actions were constitutional under the exigent circumstances exception to the warrant requirement. RP 182.

The State argues Mr. Morgan unnecessarily focuses on its failure to show, through the evidence presented at the CrR 3.6 hearing,

that the officers were authorized to seize clothing without a warrant because the chemicals on the clothing might otherwise dissipate.² Resp. Br. at 22. It claims the exigent circumstances exception was satisfied because there was danger of cross-contamination and or that “trace evidence could be deposited from some other source.” Resp. Br. at 22.

The problem with the State’s claim is that it is unsupported by the record. The State argues the clothing could have been contaminated by hospital personnel or destroyed by Mr. Morgan. Resp. Br. at 22. The State offers no citations to the record for this theory, and the officer who testified at the CrR 3.6 hearing did not suggest this was the reason he needed to seize the clothing. The officer indicated he was concerned about “cross-contamination,” but only addressed this issue as it pertained to the potential *chemicals* on the clothing, which the officer admitted he knew nothing about. RP 155-58, 161.

For example, the officer engaged in the following exchange with the prosecutor:

[Prosecutor]: Did you have any kind of sense of urgency in doing this?

² As explained in Mr. Morgan’s opening brief, the State’s only witness at the CrR 3.6 hearing had no knowledge of what chemicals might have been on Mr. Morgan’s clothing as a result of the fire or the chemicals’ rate of dissipation. Op. Br. at 27; RP 161.

[Officer]: I know through my training and experience that if we didn't do it quickly that we had the potential of losing evidence.

[Prosecutor]: And how was that?

[Officer]: Because if we let that evidence or clothing remain open, we were going to possibly lose some of the accelerant or other type of chemicals that could be on that clothing in the bag.

RP 156.

The officer's concern about "cross-contamination" was related to the fact that each piece of clothing should be placed in a separate bag in order to preserve any chemicals. RP 157, 168. The officer testified, "my experience in working with those types of cases, whether it be with blood evidence, that if we start mixing clothing together or pieces of evidence together, we could get cross-contamination and there could be some problems." RP 168. Contrary to the State's claim, the officer did not testify the clothing needed to be seized to prevent Mr. Morgan from tampering with it or because it was subject to cross-contamination by the hospital staff.

Thus, the case upon which the State relies, *State v. Welker*, 37 Wn. App. 628, 683 P.2d 1110 (1984), is inapposite. In *Welker*, the Court found exigent circumstances permitted officers to enter the

downstairs of a home where they had reason to believe a rape suspect was hiding from them and was likely to quickly destroy any evidence of the rape left on his person. 37 Wn. App. at 634-35. Here, the officer claimed warrantless seizure of the clothing was necessary because the chemicals on the clothing might dissipate or mix together, but admitted he knew nothing about what chemicals might require preservation or the chemicals' rate of dissipation. RP 155-58, 161. The State did not establish the exigent circumstances exception permitted it to seize the clothing in the absence of a warrant.

b. The trial court correctly determined the plain view doctrine was inapplicable.

The State argues, in the alternative, that the plain view doctrine permitted the warrantless seizure of Mr. Morgan's clothing, but the trial court properly rejected that argument below. RP 179-81. As our supreme court explained in *State v. Kull*, the requirements for the plain view exception to the warrant requirement are "(1) a prior justification for the intrusion, (2) inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the officer that he had evidence before him." 155 Wn.2d 80, 85, 118 P.3d 707 (2005).

The State claims the trial court was wrong to consider whether the discovery was inadvertent because the United States Supreme Court

has rejected this requirement under the Fourth Amendment. Resp. Br. at 25 (citing *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L. Ed. 2d 112 (1990)). But *Kull* analyzed the defendant's rights under article I, section 7, not the Fourth Amendment. 155 Wn.2d at 85. And contrary to the State's claim, our supreme court has continued to require the discovery of the evidence be inadvertent to satisfy the plain view exception under article I, section 7, despite recognizing no such requirement exists under the Fourth Amendment. See e.g., *State v. Reep*, 161 Wn.2d 808, 816, 167 P.3d 1156 (2007). *Kull* remains the controlling authority, and the trial court was correct to adhere to its analysis.

Furthermore, the officer's testimony at the CrR 3.6 hearing does not support the State's argument that the discovery of Mr. Morgan's clothing was inadvertent or that it was immediately clear to the officer that he had the clothing before him. Mr. Morgan's clothing had been placed in "several plastic shopping like bags," which the trial court found were presumably opaque. RP 154, 158, 180. The officer who testified at the suppression hearing did not make the decision to seize the clothing or notify other officers about any observations. RP 160. Instead, the order to seize the clothing came from detectives, who asked

another officer to come to the hospital and seize the clothing. RP 159-60. The testifying officer simply assisted the officer in collecting the clothing in accordance with the detectives' directions.

Based on the evidence the State elected to present at the CrR 3.6 hearing, there was no basis upon which to find the discovery of Mr. Morgan's clothing was inadvertent or that it was immediately clear to the officer he had evidence before him. The testifying officer claimed he had concerns about the clothing once he realized what the bags contained, but did not elaborate on this further. RP 159. He admitted his only role was assisting the officer who was ordered to collect the evidence. RP 160. Based on these facts, the plain view exception to the warrant requirement was not satisfied.

- c. Because the State's application for the search warrant relied on the unlawful seizure of Mr. Morgan's clothing, the evidence should have been suppressed.

As explained in Mr. Morgan's opening brief, several months after the State seized his clothing, it asked a forensic scientist to analyze the appearance of the stains on the clothing. Op. Br. at 29; CP 133. It later obtained a search warrant, relying on the observations made of Mr. Morgan's clothing subsequent to the unlawful seizure. Op. Br. at 30. The State does not dispute that if the clothing was

unlawfully seized, the splatter analysis of his clothing must be suppressed. *See* Op. Br. at 29-31. Because the error was not harmless, this Court should reverse.

3. Mr. Morgan's statements to the detectives should be suppressed because they did not advise Mr. Morgan of his *Miranda* rights and the totality of the circumstances demonstrates the interrogation was custodial.

The police must inform a suspect of his right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602 (1966); *State v. Richmond*, 65 Wn. App. 541, 544, 828 P.2d 1180 (1992); U.S. Const. amend. V; Const. art. I, § 9. The State does not contest that Mr. Morgan was interrogated by agents of the State when detectives questioned him in his hospital room. The only remaining dispute is whether Mr. Morgan was in custody at the time of the interrogation. As explained in Morgan's opening brief, the totality of the circumstances demonstrates the police engaged in a custodial interrogation when they questioned him at his bedside in the hospital. Op. Br. at 35-39.

The State wrongly suggests the factors adopted in *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008),³ are inapplicable because in *Craighead*, the court was examining an interrogation conducted in the defendant's home. Resp. Br. at 31. However, these factors are not limited to an evaluation of an interrogation that take place in a home. The court found they were appropriate for evaluating the "totality of the circumstances" to determine whether an interrogation "effected a police-dominated atmosphere," in a location outside of a police station. *Craighead*, 539 F.3d at 1083-84. In fact, contrary to the State's suggestion, an interrogation in the home is *less* likely to be deemed custodial, as opposed to an unfamiliar environment outside of the police station, because the element of compulsion "is less likely to be present where the suspect is in familiar surroundings." *Id.* at 1083.

Applying the four *Craighead* factors, the State concedes the fourth factor, whether the police informed the individual he was free to leave or terminate the interview, supports a finding the interrogation was custodial because the police failed to inform Mr. Morgan of these

³ As explained in Mr. Morgan's opening brief, these factors are: (1) the number of law enforcement personnel present and whether they were armed; (2) whether the individual was restrained by force or threats; (3) whether the individual was isolated from others; and (4) whether the individual was informed he was free to leave or terminate the interview. *Craighead*, 539 F.3d at 1082-88.

basic rights. Resp. Br. at 33. It cites to *State v. Rotko*, 116 Wn. App. 230, 241, 67 P.3d 1098 (2003), as an example of a case in which this Court determined an individual questioned in a “family quiet room” at a hospital was not in custody, even though he was not advised he was free to leave. Resp. Br. at 34. However, the circumstances presented in *Rotko* were very different than the circumstances in Mr. Morgan’s case.

In *Rotko*, a detective asked to speak with a parent whose baby appeared severely malnourished. 116 Wn. App. at 234. They talked in a “family quiet room” about the care and health of the baby, but as soon as the detective suspected the parent had engaged in criminal mistreatment, she read the parent his *Miranda* rights. *Id.* at 235. The detective’s actions in *Rotko* stand in stark contrast to the actions the detectives took in this case.

As explained in Mr. Morgan’s opening brief, multiple armed officers were present during the interrogation. Two conducted the interrogation while one stood immediately outside the hospital room door. RP 73, 76, 97, 118, 123. The State argues that officers often work in pairs and they did “not greatly outnumber the suspect or fill all the spaces within the hospital.” Resp. Br. at 32. However, one officer

described the hospital room as “pretty small,” suggesting that two detectives may in fact have filled the room. In addition, three officers certainly outnumbered Mr. Morgan.

The State also argues Mr. Morgan was not “under guard” during this time, suggesting instead that the officer simply took a break in the hallway to give the detectives privacy. Resp. Br. at 27. However, this claim conflicts with the trial court’s finding that an officer was stationed outside Mr. Morgan’s door during his stay at the hospital. RP 13 (Finding of Fact 9). The presence of the officer stationed outside Mr. Morgan’s door, including during the interrogation, suggested Mr. Morgan was not free to leave.

In addition, as in *Rotko*, the detectives quickly suspected Mr. Morgan was criminally responsible for his ex-wife’s injuries. RP 100. However, unlike in *Rotko*, where the officer immediately informed the suspect of his *Miranda* rights, the detectives here continued to interrogate Mr. Morgan in an increasingly confrontational manner and, during a break in the interrogation, contacted the on-duty homicide deputy prosecutor to determine how best to proceed. RP 102-03.

Mr. Morgan was also completely isolated in the hospital. The State disputes this fact because the detectives “allowed medical staff

access to him” and at one point left the room so that a nurse could assist Mr. Morgan in using the bathroom. Resp. Br. at 33. However, the State’s own argument indicates it was the detectives who controlled the situation, creating a police-dominated atmosphere in which Mr. Morgan’s access to others was subject to the detectives’ consent. *See Craighead*, 539 F.3d at 1083-84.

Finally, as the trial court found, Mr. Morgan was tethered to medical equipment that made it difficult for him to get out of bed without assistance. CP 13 (Finding of Fact 12). He was wearing an oxygen mask and required assistance to use the bathroom. CP 14 (Finding of Fact 22); RP 69, 104. While these restraints were not put in place by law enforcement, they aided the detectives’ ability to create a coercive atmosphere without physically restraining Mr. Morgan themselves.⁴ The medical equipment ensured that he was not able to easily get past the detectives around his bed or the officer stationed at his door.

Contrary to the State’s suggestion, our supreme court has not held that medical restraints in a hospital room are irrelevant when

⁴ Contrary to the State’s claim, Mr. Morgan specifically addressed his assignment of error to Finding of Fact 20, to the extent the trial court found Mr. Morgan was “not restrained,” on page 37. *See* Resp. Br. at 29.

evaluating the totality of the circumstances. *See* Resp. Br. at 30. The State relies upon *State v. Kelter*, 71 Wn.2d 52, 54-55, 426 P.2d 500 (1967), for this assertion, but in *Kelter*, our supreme court found *Miranda* was “not completely applicable” because the case was tried before the United States Supreme Court had rendered its opinion. In addition, the court found, without discussing the facts of the case, that “there was no compelling atmosphere in the questioning of the defendant in his hospital room” before affirming the trial court’s admission of his pretrial confession. *Kelter*, 71 Wn.2d at 54.

In addition, while the State cites to some jurisdictions that have found individuals interrogated in hospitals were not in custody, other jurisdictions have reached the opposite conclusion. *See e.g.*, *State v. O’Loughlin*, 270 N.J. Super 472, 485-86, 637 A.2d 553 (1994) (suspect in custody where she was not physically restrained but told to “wait” at the hospital); *People v. Turkenich*, 137 A.D.2d 363, 367, 529 N.Y.S.2d 385 (1988) (concluding “the hospital interrogation was conducted in an atmosphere and in physical surrounding which were inherently coercive”).

Here, the atmosphere in Mr. Morgan’s hospital room was coercive. Multiple armed officers were present in a small room, an

officer was stationed outside Mr. Morgan's door, he was in bed tethered to medical equipment, and the detectives directly accused him of attempting to kill his ex-wife. All of these facts created a custodial, police-dominated atmosphere. *See Craighead*, 539 F.3d at 1083-84. The trial court erred when it denied Mr. Morgan's motion to suppress the statements to the two detectives.

4. Mr. Morgan was denied a fair trial when the deputy prosecutor shifted the burden of proof to Mr. Morgan and impugned defense counsel during closing argument.

A prosecutor is obligated to ensure a defendant's right to a fair trial is not violated. *Monday*, 171 Wn.2d at 676; *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The prosecutor failed in his duty when he informed the jury, over defense objection, that defense counsel did not appear at witness interviews and Mr. Morgan's theory of the case failed to answer all of the jury's questions. RP 2802, 2805.

The State argues the prosecutor's comments do not constitute misconduct when placed "in context," but this claim lacks merit. Resp. Br. at 35. The prosecutor discussed the inconsistencies between Mr. Morgan's statements to detectives and the evidence, but improperly

shifted the burden to Mr. Morgan when he told the jury, “[t]he one question that [Mr. Morgan’s] explanation that you’ve heard does not provide for us, was this self-inflicted?”

This statement to the jurors, and the prosecutor’s statements elaborating on this question, suggested they should find Mr. Morgan guilty because his statements to police failed to explain what happened that night. Because a defendant has no duty to present evidence, the prosecutor’s statements to the jury constituted misconduct. *See State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011); *United States v. Preston*, 873 F.3d 829, 843 (9th Cir. 2017) (finding “it was plain error” for the prosecutor to suggest there was no testimony contradicting the alleged victim’s testimony because the jury would have immediately inferred that they did not hear testimony from the defendant).

In addition, the prosecutor’s statement to the jury that defense counsel had failed to show up for the witness interviews suggested to the jury that defense counsel had failed to fulfill his investigatory obligations when he did not attend witness interviews. This statement both shifted the burden to Mr. Morgan and maligned defense counsel. *See State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014)

(prosecutorial statements that malign defense counsel are impermissible).

The State claims this statement did not impugn defense counsel because the prosecutor immediately followed its accusation against defense counsel with the statement, “[a]nd that’s fine.” Resp. Br. at 37; RP 2802. However, as explained in Mr. Morgan’s opening brief, the damage was done, as the prosecutor’s statement signaled to the jury that it was *not* fine. The State’s literal interpretation of the prosecutor’s comments is disingenuous, as even from the “cold record” it is clear the State suggested to the jury that defense counsel had not failed to perform his duties. This misconduct prejudiced Mr. Morgan and this Court should reverse. *See* Op. Br. at 45.

5. The trial court committed reversible error when it denied Mr. Morgan’s request to instruct the jury it must presume the fire was the result of an accident or natural causes.

Our supreme court has held that reversal is required where the trial court refuses to instruct the jury that, when a building is burned, it is presumed the fire was caused by accident or natural causes rather than by an intentional act of the accused. *State v. Smith*, 142 Wash. 57, 59, 252 P. 530 (1927). Here, Mr. Morgan requested this instruction and the trial court denied it. RP 2648.

The State does not dispute the trial court erroneously relied on the fact that no pattern instruction was available to deny Mr. Morgan's request. *See State v. Zimmerman*, 130 Wn. App. 170, 182-83, 121 P.3d 1216 (2005) (holding that despite the Washington Supreme Court Committee on Jury Instructions' recommendation against the instruction at issue, the instruction was properly given because it was an accurate statement of the law). Instead, it claims the holding in *Smith* is limited to those cases "in which there is substantial evidence of accidental causation." Resp. Br. at 51.

As Mr. Morgan explained in his opening brief, cases that have limited the holding in *Smith* have done so in error. *See State v. Kindred*, 16 Wn. App. 138, 140-41, 553 P.2d 121 (1976); *State v. Picard*, 90 Wn. App. 890, 903, 954 P.2d 336 (1998); Op. Br. at 53-55. Indeed, *Smith* warned against the dangers of withholding the instruction in any case where the State sought to prove the cause of the fire, explaining that the trial court should not examine the sufficiency of the evidence first. 142 Wash. at 58. As the court held, "[t]here is always a presumption that a fire is of accidental origin where the origin is a *contested* issue." *Id.* (emphasis added).

This Court later found that the instruction was appropriate where the cause of fire was contested and substantial evidence suggested the fire was accidental. *Kindred*, 16 Wn. App. at 140-41. In *Kindred*, the Court found the trial court properly refused the instruction because there was “no evidence that the fire was accidentally or naturally caused.” *Id.* at 141.

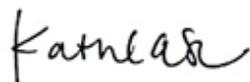
This limitation finds no support in *Smith*. Because Mr. Morgan disputed the origin of the fire, he was entitled to the instruction on the presumption. *Smith*, 142 Wash. at 58. The trial court erred when it denied Mr. Morgan’s request for the instruction, and this Court should reverse.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Morgan’s convictions.

DATED this 7th day of November, 2017.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 75072-1-I
)	
DAVID MORGAN,)	
)	
Appellant.)	

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