

62537-3

62537-3

NO. 62537-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH KORTUS,

Appellant.

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

The Honorable John M. Meyer, Judge

REPLY BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUL 28 PM 3:53

TABLE OF CONTENTS

	Page
A. <u>ISSUES IN REPLY</u>	1
B. <u>ARGUMENT IN REPLY</u>	1
1. THE STATE IGNORES ESTABLISHED CASE LAW IN ARGUING THE APPELLANT FAILED TO PRESERVE HIS OBJECTION TO THE STATE’S MISCONDUCT.....	1
2. IN ITS ATTEMPT TO EXCUSE IMPERMISSIBLE, INFLAMMATORY ARGUMENT THAT APPELLANT’S CONDUCT SPIT IN THE FACE OF GOD, THE STATE MISCHARACTERIZES THE DEFENSE CLOSING ARGUMENT.....	2
3. THE STATE IGNORES THE “LAW OF THE CASE” DOCTRINE IN ARGUING THIS COURT SHOULD AFFIRM APPELLANT’S INCEST CONVICTIONS.....	3
C. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Cronin</u> 142 Wn.2d 568, 14 P.3d 752 (2000).....	4
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	3, 4
<u>State v. Stamm</u> 16 Wn. App. 603, 559 P.2d 1 (1976) <u>review denied</u> , 91 Wn.2d 1013 (1979)	1

RULES, STATUTES AND OTHER AUTHORITIES

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 46.06 (3rd ed. 2008).....	3
-----------------------------------------------------------------------------------------------------	---

A. ISSUES IN REPLY

1. Was defense counsel's objection to the prosecutor's speaking objection timely, based on established authority ignored by the State?

2. Should this Court reject the State's misleading characterization of defense counsel's closing argument?

3. Has the State failed to address the controlling authority supporting reversal of appellant's incest convictions?

B. ARGUMENT IN REPLY

1. THE STATE IGNORES ESTABLISHED CASE LAW IN ARGUING THE APPELLANT FAILED TO PRESERVE HIS OBJECTION TO THE STATE'S MISCONDUCT.

The State suggests Kortus failed to preserve his prosecutorial misconduct claim by failing to instantly object to the prosecutor's objection to defense closing argument. BOR at 29-30. The State is mistaken.

As discussed in the opening brief, the accused may preserve a claim of prosecutorial misconduct by either (1) contemporaneously objecting to the conduct or (2) later moving for a mistrial. As a matter of law, both options provide an opportunity for the trial court to ameliorate the prejudice, assuming the conduct is curable. BOA at 23 (citing, inter alia, State v. Stamm, 16 Wn. App. 603, 614, 559 P.2d 1 (1976), review denied, 91 Wn.2d 1013 (1979)). The trial court chose in this instance not

to avail itself of that opportunity. 6RP 115-16. Under established law the State ignores, however, Kortus preserved his objection to the State's misconduct by timely moving for a mistrial and not gambling on the jury's verdict. 6RP 112-14; Stamm, 16 Wn. App. at 614.

2. IN ITS ATTEMPT TO EXCUSE IMPERMISSIBLE, INFLAMMATORY ARGUMENT THAT APPELLANT'S CONDUCT SPIT IN THE FACE OF GOD, THE STATE MISCHARACTERIZES THE DEFENSE CLOSING ARGUMENT.

On rebuttal, the prosecutor argued in part: "Are [Kortus's] actions with his daughter a way of not only getting away with a sexual thrill, but also a way of spitting in the face of the other churchgoers, of God, of doing it in church? 6RP 107. The State argues such inflammatory rebuttal argument was a permissible response to Kortus's closing. According to the State, defense counsel argued, "[I]t would be unreasonable that a person had done the acts before God." BOR at 37 (citing three instances in closing wherein defense counsel mentions "God").

The State mischaracterizes Kortus's closing argument. While defense counsel did mention "God" in closing argument, he made no such argument. Instead, Kortus's references to "God" or "house of God" occurred in other contexts. 6RP 91, 97, 105 (attached as Appendix). As explained in the appellant's opening brief, the State's inflammatory, prejudicial closing argument denied Kortus a fair trial.

3. THE STATE IGNORES THE “LAW OF THE CASE” DOCTRINE IN ARGUING THIS COURT SHOULD AFFIRM APPELLANT’S INCEST CONVICTIONS.

Jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). The State assumes the burden of proving otherwise unnecessary elements when it fails to except to such elements in the "to convict" instruction. Id. at 102. The State’s brief ignores Hickman. BOR at 38-41.

The pertinent to-convict instructions provide:

To convict [Kortus] of the crime of incest in the second degree . . . each of the following elements of the crime must be proven beyond a reasonable doubt:

- (1) That . . . [Kortus] engaged in sexual contact with [K.];
- (2) That at the time, [Kortus] was *related to* [K.] as a descendant;
- (3) That at the time, the defendant knew [K.] was so related to him; and
- (4) That any of these acts occurred in the State of Washington.

CP 192-93 (emphasis added).

The State claims the "related to" language informed jurors they were required to find K. was Kortus’s descendant. It also asserts the pattern instruction’s “Note on Use” supports such a reading. BOR at 40-41; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 46.06, at 862-63 (3rd ed. 2008).

Kortus disagrees. The State flips the parties to the clause. The plain language of the instruction requires the jury to find *Kortus* was the descendant. The State did not prove this, and reversal is required. Hickman, 135 Wn.2d at 99, 101-02.

In addition, whether the State relied on or was confused by the pattern instruction's "Note on Use" is of no consequence. Pattern instructions, let alone notes on use, are not sacrosanct. See, e.g., State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) (pattern accomplice liability instruction found to be erroneous).

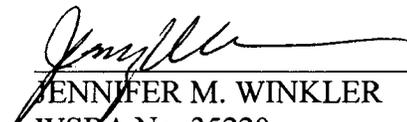
C. CONCLUSION

For the reasons stated above and in Kortus's opening brief, this Court should grant the relief requested.

DATED this 28th day of July, 2009.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

APPENDIX

1 were to see in church, in the house of God on the Sabbath,
2 somebody masturbating, that would be an upsetting experience
3 for most reasonable people. That explains the upsetting of
4 these witnesses and it also explains their animus if they
5 misinterpreted what may have been happening as molestation.
6 I'm going to tell you right now that masturbation is not
7 molestation under the law, under the instructions that you
8 get.

9 I agree with the prosecutor that you've got folks
10 who are biased. Obviously Joe has a reason to be biased,
11 he's sitting in the hot seat, and you've got Cassie and
12 Patti who think they saw a molestation. Think about who was
13 the least bias individual here who testified. Kelby. The
14 other ones were demonstrating their bias, too. One of them
15 was looking over at the prosecutor all the time while I was
16 trying to talk to her and ask her questions, repeatedly
17 looking over at the prosecutor, and one of them had a very
18 selective memory when I was asking questions and knew in
19 rapid-fire succession the answers to every question the
20 prosecutor had. I don't know what reason they would to have
21 bias against Joe other than that they think that he's a
22 child molester and that they made that observation, but
23 their bias was certainly on display up here, right up here
24 on the stand. But what did Kelby ultimately say? Kelby
25 ultimately said, and what we can gather from her, is that

1 smut look like, if any of you have seen them: Playboy,
2 Penthouse, Playgirl, Hustler, close-ups of genitalia,
3 centering on genitalia. It's not here. It doesn't exist
4 here.

5 I kind of chuckled when I heard from our young
6 detective, Detective Thompson, that he took about two hours
7 going through these thousands of photographs at the station
8 to find 37 questionable pictures and to present to you 14 of
9 these thousands. Do the math. What does that tell you
10 circumstantially about what is important in Joe's life? You
11 think about it. According to Detective Thompson, it's a
12 heck of a lot of pictures of Kelby and this of a
13 questionable character. Is that the mark of a child
14 molester, the mark of somebody who is molesting in public
15 his natural daughter in church, in a house of God on the
16 Sabbath? Boy, that's weird. Is this that weird? All of
17 that, to get that. (Indicating.) I submit to you that
18 child molesters, when they have photographic photography of
19 their victims, that it's special to them, that they horde
20 it, that they separate it, that they put it in a place of
21 easy access where they can do things to it, do things to
22 themselves while they look at it. But what was the evidence
23 that we have? The evidence that we had was that Joe
24 permitted the detective, our young Detective Thompson, to
25 search his home. Here's the computer. Take the computer.

1 those sorts of things in public until they're told not to.
2 They learn to conform their behavior and learn that maybe if
3 those things are going to happen, maybe they should happen
4 in private. Of course there's a big, broad view that people
5 have about the issue of masturbation. Some people think
6 it's an abomination before God and other think it's a
7 natural thing. You have to be convinced beyond a reasonable
8 doubt that the purpose for what this contact was, was that
9 he wanted to titillate her or she wanted -- or he wanted to
10 titillate himself. There's no evidence whatsoever that he
11 was titillated by this. I submit to you that these
12 pictures, if you just look at these in a vacuum, you might
13 think he's got a problem. The family doesn't seem to have a
14 particular problem with it. People's sensibilities about
15 this sort of thing can be very differing. CPS might get
16 involved if you're not watching your kid bathing at a
17 certain age: Two, three, one. They might drown. You might
18 be in this very room facing charges of manslaughter because
19 you weren't in the bathtub or in the bathroom when they were
20 taking a bath. At some point in their age they get more
21 privacy, at some point, and it varies. Looking at these
22 pictures, have these children really reached the age where
23 they're real self-conscious about their bodies? No. Six to
24 seven, seven to eight; that's in that gray area. It's fine
25 with the family. In a vacuum you might think that this is

• • • •

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 62537-3-1
)	
JOSEPH KORTUS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

- [X] JOSEPH KORTUS
DOC NO. 322297
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

FILED
COURT OF APPEALS OF THE STATE OF WASHINGTON
2009 JUL 28 AM 3:53

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JULY 2009.

x. *Patrick Mayovsky*