

63241-8

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Nos. 63241-8-I  
63709-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CURTIS SHANE THOMPSON,

Appellant.

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

The Honorable Palmer Robinson

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF ARGUMENT IN REPLY

Curtis Thompson was denied his Sixth Amendment and article I, section 22 right to the assistance of counsel and to self-representation when the trial court denied Thompson's requests for substitute counsel, and to represent himself.

In response, the State asserts that the record did not support the substitution of counsel. The State ignores defense counsel's many representations that the conflict between himself and Thompson was profound and intractable, and Thompson's own complaints that his attorney was "working against him."

The State also claims that Thompson's requests to represent himself were equivocal, but in so contending, the State disregards controlling decisions of the Washington Supreme Court. The State's alternative contention – that Thompson forfeited this right – is contrary to settled federal law.

Numerous other errors infected Thompson's three trials. This Court should reverse his convictions.

B. ARGUMENT IN REPLY

1. UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22, THE CONFLICT BETWEEN THOMPSON AND APPOINTED COUNSEL NECESSITATED SUBSTITUTION OF COUNSEL.

An accused person has the fundamental right under the Sixth Amendment and article I, section 22 to conflict-free counsel. Holloway v. Arkansas, 435 U.S. 475, 481, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). A denial of this right violates due process, and can never be harmless. Wood v. Georgia, 450 U.S. 261, 271-72, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); Chapman v. California, 386 U.S. 18, 23 & n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

a. Hicks' representation of Thompson violated

Thompson's right to conflict-free counsel. The State contends that the trial court did not abuse its discretion in denying Thompson's requests for substitute counsel. The State makes two alternative, not entirely compatible arguments: (1) that Thompson's reasons for wanting new counsel were predicated upon his frustration that Hicks would not pursue his desired mental defense, and (2) that Thompson would not have gotten along with any other lawyer. Br. Resp. at 60-63; 68-69.<sup>1</sup> The first

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<sup>1</sup> The State contends that it took 18 months before "signs of significant trouble" in Hicks' relationship with Thompson surfaced. Br. Resp. at 36 n. 15. The record does not support the State's assumption that

argument begs the question whether a conflict under the Sixth Amendment existed. The second is a species of harmless error argument. Neither is pertinent to the ultimate question whether there was a conflict such that Thompson's Sixth Amendment right to conflict-free counsel was violated.

The State avoids this fundamental question, choosing to focus instead upon Thompson's conduct during the proceedings. In its entire discussion of the circumstances, the State does not mention that Hicks himself believed a conflict existed necessitating his withdrawal as counsel. But Hicks told the court that communications between Thompson and himself had irretrievably broken down. 10/8 & 10/15/07 RP at 19-20, 26, 32, 85-89. Hicks consulted with ethics experts and other seasoned attorneys and relayed to the court their advice that substitution was necessary to ensure Thompson received a fair trial. 10/8 & 10/15/07 RP at 19-20.

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the relationship was untroubled during this period. For the first nine months of the representation, Thompson was being evaluated for competency to stand trial. 3/17/06 RP 2, 9; 11/30/06 RP 3; 1CP 38-42, 43-44. By August 2007, Thompson exhibited distrust of Hicks by filing requests to be co-counsel so that necessary case investigation could be conducted. 1CP 45. When Hicks and Thompson appeared in court on the joint motion for new counsel in October 2007, Hicks intimated that the difficulties in their relationship had been present for a long time and were profound and intractable. He stated that their relationship had deteriorated "to the point that the acrimony between us now is so great that I have determined, based on the case law I have studied, that I simply cannot provide him with effective assistance." 10/8 & 10/15/07 RP 30-31.

On October 15, 2007, Hicks made a compelling case for substitution of counsel, contending that Thompson would be prejudiced if the relationship were permitted to continue:

I want him to have other counsel. But if not that, I am almost willing to think he would be better off going pro se for one simple reason: a jury is going to see me. They are going to see me unable to articulate what I want to articulate and do what I want to do, because he won't communicate with me, and they are going to see that.

They are going to see a lawyer looking weak, unprepared, and it is only going to prejudice Mr. Thompson at his trial -- not to mention what is going to happen -- we all know what is going to happen, we have all been around. He is going to act out; he is going to turn over tables; he is going to toss stuff. It is going to be a disaster.

I do ask you to reconsider giving him new counsel and allowing me to withdraw from the case. I don't do that lightly. I never have before -- except one time when I felt I had to to accommodate a much older lawyer's position I had with Matthew Bolar's case. I have never done it before.

Id. at 86-87.

Hicks reiterated his request to withdraw at every subsequent opportunity. See e.g. 2/15/08 RP 16; 2/28/08 RP 23. Finally, after repeatedly having his motion denied, Hicks noted a "running motion" to withdraw. 2/28/09 RP 23.

The State attempts to minimize the gravity of the conflict by implying that the motion for substitution of counsel was Thompson's

alone. For example, the State contends, “this was hardly a mutual breakdown, rather it was Thompson who repeatedly refused to speak with, or cooperate in any way with, Hicks.” Br. Resp. at 60. The State cites no authority for its novel proposition that a breakdown must be “mutual” in order to constitute a conflict under the Sixth Amendment. And in fact, the State’s characterization is incorrect. Hicks intensely feared and distrusted his client, to the point where he placed a physical barrier between himself and Thompson in open court. 8/12/08 RP 5, 29.

Tellingly, the State does not address the Supreme Court precedent dictating that a lawyer’s opinion as to the existence of a conflict must be given substantial deference. See Holloway, 435 U.S. at 485 (“[A]n attorney’s request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted[.]”); Mickens v. Taylor, 535 U.S. 162, 168, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (reaffirming that “a defense attorney is in the best position to determine when a conflict exists . . . he has an ethical obligation to advise the court of any problem, and . . . his declarations to the court are ‘virtually made under oath.’” (citing Holloway, *supra*)).

The State suggests that Hicks agreed Thompson would have difficulty with any lawyer, citing to a speculative comment made by Hicks during a hearing on October 15, 2007. Br. Resp. at 41, 66-67 (citing

10/15/07 RP at 29-30). This is a straw man argument. It sidesteps the question whether a conflict between Hicks and Thompson existed, and instead conflates the inquiry with the question of whether the error was prejudicial. Moreover, the State emphasizes this comment, but ignores a statement made at a hearing a week earlier, when Hicks told the court, “just about any lawyer may be able to do better.” 10/8 & 10/15/07 RP at 26. Thompson himself advised the court, “Your honor, my main conflict is with this attorney. If this attorney is removed from representing me, there will be no conflict no more.” 7/11/08 RP 5.

b. Counsel’s performance is irrelevant to the question of the existence of a conflict and hence to whether the court’s ruling constructively denied Thompson the right to counsel.<sup>2</sup> “[T]o compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.” Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) (quoting Brown v. Craven, 424 F.2d 1126, 1130 (9th Cir. 1970)).

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<sup>2</sup> The State does not contend that Thompson waived or forfeited the right to counsel; instead, the State essentially asks this Court to disregard the conflict and instead conduct an independent assessment of whether the trial was “fair.”

The State does not contest that the rancor between Thompson and Hicks was such that Hicks feared and resisted interactions with Thompson. 1CP 256; 1CP 547-50. This type of breakdown in communications causes the attorney to “perform[] his duty under the gravest handicap.” Brown v. Craven, 424 F.2d at 1160. As noted in Thompson’s opening brief, the Supreme Court holds that when the right to counsel is violated, prejudice is presumed. Penson v. Ohio, 488 U.S. 75, 88, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988); Chapman, 386 U.S. at 23 n. 8.

The State quarrels with this assertion, although it is not clear from the context of the State’s brief whether the State disagrees that forcing an accused person to trial with an attorney with whom he has a conflict results in the constructive denial of counsel, or that the denial of counsel can never be harmless. See Br. Resp. at 68. Neither claim is reasonably subject to dispute, however. See Daniels v. Woodford, 428 F.3d 1181, 1197-98 (9th Cir. 2005); see also id. at 1197 (“We have applied the constructive denial of counsel doctrine to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court refuses to grant a motion for substitution of counsel”).<sup>3</sup>

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<sup>3</sup> In Daniels, the Court also relied upon the decisions cited by Thompson in his opening brief, which the State tries to argue are “inapposite.” See Daniels, 428 F.3d at 1197 (citing Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), and United States

The State essentially contends that because Hicks did a “good job” the conflict between him and Thompson does not matter.<sup>4</sup> The Ninth Circuit repudiated a similar argument, finding the court’s opinion as to trial counsel’s abilities a non sequitur to the question of whether the conflict between the defendant and counsel warranted substitution:

There is no question in this case that there was a complete breakdown in the attorney-client relationship. By the time of trial, the defense attorney had acknowledged to the Court that Nguyen “just won’t talk to me anymore.” In light of the conflict, Nguyen could not confer with his counsel about trial strategy or additional evidence, or even receive explanations of the proceedings. In essence, he was “left to fend for himself,” in violation of his Sixth Amendment right to assistance of counsel. Nonetheless, the District Judge ignored the problems between Nguyen and his attorney, commenting that Nguyen’s “strike” was not ground for a continuance, explaining to Nguyen that “the Federal Public Defenders provide very good representation to defendants,” and remarking that he was “totally comfortable” with the public defender representing Nguyen. The issue in this case is the attorney-client relationship and not the comfort of the court or the competency of the attorney.

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v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), for the proposition that a defendant’s inability to communicate with his lawyer during key trial preparation periods violates the Sixth Amendment) and at 1199 (citing Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), for the principle that the constructive denial of counsel gives rise to a presumption of prejudice).

<sup>4</sup> See Br. Resp. at 68 (asserting that “counsel performed admirably”). It is not clear by what measure the State assesses counsel’s performance. Counsel did not pursue Thompson’s desired trial strategy, moved for a severance of counts over Thompson’s objection, and did not seek limiting instructions that Thompson believed were necessary.

United States v. Nguyen, 262 F.3d 998, 1004 (9th Cir. 2001) (internal citation omitted); see also United States v. Amore, 56 F.3d 1202, 1206 (9th Cir. 1995) (“we should not affirm a denial of a motion to substitute counsel simply because we believe that the original counsel’s performance was adequate), overruled on other grounds by United States v. Garrett, 179 F.3d 1143 (9th Cir. 1999).

The State asserts that in Daniels, the Court held that “in order for the reviewing court to find an irreconcilable conflict, a defendant must have a ‘legitimate reason’ for his refusal to cooperate with counsel, and may not refuse to cooperate because of ‘unreasonable contumacy.’” Br. Resp. at 69. This distillation of the Court’s holding is not entirely accurate. The pertinent portion of Daniels reads:

Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. This is true even where the breakdown is a result of the defendant’s refusal to speak to counsel, unless the defendant’s refusal to cooperate demonstrates “unreasonable contumacy.”

Daniels, 428 F.3d at 1198 (quoting Brown v. Craven, 424 F.2d at 1169).

Thus, when an accused person has legitimately lost trust in his attorney and the court does not grant a motion for substitute counsel, he is constructively denied the right to counsel. The Court will apply this

principle even if the breakdown is solely due to the defendant's refusal to speak to his attorney, unless the defendant's refusal to speak to counsel is unreasonable.

The State claims the conflict was "due primarily to Hicks' unwillingness to present a mental defense that lacked any legal or factual merit." Br. Resp. at 69. While Thompson's frustration over Hicks' unwillingness to present his desired defense was a component of his dissatisfaction with Hicks' performance, the State's claim that this was the primary source of the conflict is simply incorrect. See e.g. 1CP 61 (Thompson alleges new counsel is needed because of a "breakdown in communication; non-investigation; not allowing me to see evidence"); 1CP 65 (Thompson contends Hicks was "seeking to force [a] guilty plea"). Thompson disliked and distrusted Hicks and believed that Hicks was working against him, and Hicks felt that the relationship had so degenerated that it was not possible for him to provide effective assistance.<sup>5</sup> The denial of Thompson's motion for substitute counsel constructively denied him the right to the assistance of counsel.

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<sup>5</sup> Hicks' many statements to this effect stand in sharp contrast to the State's cavalier assertion that Hicks "performed admirably."

2. THE DENIAL OF THOMPSON'S FUNDAMENTAL  
RIGHT TO GO *PRO SE* VIOLATED ARTICLE I,  
SECTION 22 AND THE SIXTH AMENDMENT.

With respect to Thompson's many requests to go pro se, the State offers two responses: first, that the motions were "equivocal" and second, that he waived the right. Neither claim has merit.

a. The fact that Thompson sought to go pro se as an alternative to being appointed substitute counsel does not render his unambiguous requests equivocal. Thompson made numerous oral and written motions to go pro se throughout the proceedings, commencing in September 2007. 10/8 & 10/15/07 RP 23, 32, 41; 11/5/07 RP 36; 2/15/08 RP 3, 9; 5/23/08 RP 14; 6/27/08 RP 9; 1CP 50, 91-93, 97. It is true that when Thompson initially moved to represent himself, the motion was coupled with an alternative request for new counsel. Contrary to the State's assertions, however, this does not make the request equivocal. See Br. Resp. at 71-72. "[A]n unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel." State v. Madsen, 168 Wn.2d 496, 507, 229 P.3d 714 (2010).

The State analogizes this case to State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). The analogy is inapt. The excerpted record in the Court's opinion in Stenson suggests that the issue of self-representation came up only once. See 132 Wn.2d at 740. After the court denied

Stenson's motion to discharge counsel, Stenson told the court, "I would formally make a motion then that I be able to allow [sic] to represent myself. I do not want to do this but the court and the counsel that I currently have force me to do this." Id. When the court sought to clarify Stenson's request, Stenson did not dispute the court's statement: "I also find based upon your indications that you really do not want to proceed without counsel." Id. (italics deleted).<sup>6</sup> At the request of the court, Stenson put his request in writing. Id. at 742. Stenson's written request did not mention any desire to go pro se, further supporting the Court's conclusion that although the pro se motion was conditional, it was equivocal. Id.

Finally, Stenson makes clear that the record must be considered as a whole. Id. at 741-42; see also Madsen, 168 Wn.2d at 505 (noting each separate request must be evaluated on its own merits). This the State has not done. An evaluation of the record as a whole shows that Thompson renewed his motion to go pro se at every possible opportunity, both orally and in writing. In short, there is no basis to conclude that Thompson's

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<sup>6</sup> The portion of Stenson on which the State relies also appears to be dicta, as the Supreme Court initially found that Stenson's request to go pro se was untimely. 132 Wn.2d at 739-40. Statements in a case that "are unnecessary to decide the case constitute obiter dictum, and need not be followed." Ass'n of Wash. Bus. v. Dep't of Revenue, 120 P.3d 430, 442, 120 P.3d 46 (2005).

motions to go pro se were “equivocal.” The State’s claim to the contrary is wholly frivolous and should be rejected.

b. The State’s contention that Thompson waived his right to go pro se conflicts with Madsen. The State alternatively contends that Thompson waived his right to go pro se by his conduct. Missing from the State’s discussion is any reference whatsoever to Madsen.

Madsen establishes that the State’s arguments are meritless. In Madsen the Court stressed: “The value of respecting this right [to represent oneself] outweighs any resulting difficulty in the administration of justice.” Madsen, 168 Wn.2d at 509 (emphasis added). Thus, the Court was untroubled by the lower courts’ findings that Madsen was “extremely disruptive” and engaged in “persistent disruptions [that] impaired the orderly administration of justice.” 168 Wn.2d at 502, 509. The Supreme Court emphasized, “It must be remembered . . . that a criminal defendant’s right to pro se status cannot be denied simply because affording the right will be a burden on the efficient administration of justice.” Id. at 509.

The State relies heavily on State v. Hemenway, 122 Wn. App. 787, 95 P.3d 408 (2004), a case that pre-dates Madsen. The Court in Hemenway wrongly concluded that a defendant’s in-court behavior is not just a pertinent factor in deciding whether a request to go pro se, but absolutely germane to the inquiry. See Hemenway, 122 Wn. App. at 795

(remarking, “courts upholding a defendant’s right to self representation involve a record completely absent of any disruption or disrespect by the defendant”). Citing Hemenway, the State asserts, “[a] defendant can waive the right to self-representation by disruptive words or conduct.” Br. Resp. at 73. In light of Madsen, this statement is no longer good law. Madsen makes clear that a defendant’s disruptive behavior is not a legitimate reason to deny an unequivocal request to go pro se. 168 Wn.2d at 509. Thompson did not waive the right to go pro se by his conduct.

c. In order to honor Thompson’s constitutional right to represent himself, the request to go pro se had to be granted. The crux of the State’s argument appears to be that although other defendants seeking to represent themselves may be disruptive to court proceedings, Thompson was especially disruptive. Br. Resp. at 75-79.<sup>7</sup> The State suggests that for this reason, the trial court did not err in finding that Thompson waived his right to go pro se. Id. Madsen makes clear that such an approach violates the article 1, section 22 guarantee.

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<sup>7</sup> The State also claims that Thompson’s disruptions were done with the purpose of obstructing the trial court proceedings. Br. Resp. at 76. Given Thompson’s mental health issues – which three times prompted the court to refer Thompson for competency evaluations – this Court should not share the State’s confidence that Thompson’s behavior reflected a deliberate campaign to sabotage the proceedings.

Even particularly difficult defendants have an unabridged right to represent themselves. “A court may not deny pro se status . . . because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency.” Madsen, 168 Wn.2d at 509. Again, the value of respecting the right to self representation “outweighs any resulting difficulty in the administration of justice.” Id. (emphasis added).

Thus, to give substance to our state constitutional mandate, Madsen makes plain that a timely and unequivocal request must be granted, without reference to the defendant’s in-court behavior. Id. Only once the motion to go pro se has been granted is it proper for the court to take the defendant’s misbehavior into account:

After pro se status is granted, the court retains power to impose sanctions for improper courtroom behavior. The court may also appoint standby counsel or allow hybrid representation and even terminate pro se status if a defendant is sufficiently disruptive or if delay becomes the chief motive.

Id. at 509 n. 4 (emphasis added).

The Court did not honor Thompson’s fundamental right, but rather preemptively found that he had waived the right, and at the same forced him to proceed to trial with a lawyer in whom he had utterly lost confidence.

If Thompson had been granted pro se status, this Court cannot speculate that he would have continued to act out. Nevertheless, the remedy for such misbehavior could have been sanctions, the appointment of standby counsel or hybrid representation, or, as a last resort, termination of pro se status. Under Madsen, Thompson's conduct was no basis to disregard his right to self-representation. Thompson's convictions must be reversed, and an order entered allowing Thompson "to defend in person as guaranteed by the Washington Constitution." Madsen, 168 Wn.2d at 510.

3. IN ORDERING THOMPSON BE RESTRAINED FOR HIS TRIALS, THE COURT DID NOT ADDRESS LESS ONEROUS MEASURES TO SAFEGUARD THOMPSON'S RIGHT TO BE PRESUMED INNOCENT.

Shackling and prison garb are "inherently prejudicial" because they are "unmistakable indications of the need to separate the defendant from the public at large." Holbrook v. Flynn, 475 U.S. 560, 567-68, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). Requiring the defendant to appear in restraints before the jury conveys the impression that he is a dangerous man and undermines the presumption of innocence, in derogation of due process. State v. Finch, 137 Wn.2d 792, 845, 975 P.2d 967 (1999); U.S. Const. amend. XIV; Const. art. I § 3.

The State devotes little effort to responding to Thompson's argument that the order that he be restrained for his trials violated his right

to be presumed innocent. As a consequence of the court's ruling, Thompson was forced to testify from counsel table, and was prevented from rising from his seat to show respect for the jury and witnesses. Thompson has contended that the court devoted insufficient attention to other safety measures, such as an increased number of courtroom deputies, so that Thompson's testimony could be evaluated on a par with that of other witnesses.

The State simply responds, without citation to authority, that "no rational court would have allowed Thompson to testify from the witness stand unrestrained." Br. Resp. at 84. Arguments made without citation to authority should not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

This Court should conclude that by failing to consider alternative security measures, such as increasing the number of sheriff's deputies in the courtroom, the trial court failed to meaningfully exercise its discretion. As a result, Thompson's rights to be presumed innocent and to a fair trial were violated.

4. THOMPSON WAS DEPRIVED HIS RIGHT TO A  
UNANIMOUS JURY VERDICT IN THE  
RICE/KRELL/BLUE TRIAL.

a. The evidence established neither a continuing course of conduct nor alternative means, but separate acts. An accused person is

constitutionally entitled to a unanimous jury verdict. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); Wash. Const. art. 1, §§ 21, 22.

“When the prosecution presents evidence of multiple acts . . . any one of which could form the basis of a count charged, either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.” State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); Petrich, 101 Wn.2d at 572.

The State alleges no unanimity instruction was required because the conduct in question did not involve separate acts but a continuing course of conduct. Br. Resp. at 86-87. The State correctly sets forth the pertinent test for determining whether criminal behavior may be a continuing course of conduct. Id. (citing State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989)). However the State has cited no authority for the proposition that a court may find a continuing course of conduct where the charged offenses involve multiple victims.<sup>8</sup>

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<sup>8</sup> State v. Marko, 107 Wn. App. 215, 27 P.3d 228 (2001), which the State does not cite, is not on point. There, the Court held that multiple threats directed at two witnesses were a continuing course of conduct. 107 Wn. App. at 221. Our Supreme Court has held that the unit of prosecution for intimidation of a witness is “the ongoing attempt to persuade a witness not to testify in a proceeding.” State v. Hall, 168 Wn.2d 726, 734, 230 P.3d 1048 (2010) (see also id. at 733-34 (“repetition is an element of the substantive crime” (emphasis in original))). Here, by contrast the crimes with which Thompson was charged had to be predicated on distinct acts.

The State also claims that no unanimity instruction was necessary for the assault charges because the predicate felonies necessary to elevate the offenses to assaults in the second degree were alternative means of committing the offenses. The State again has failed to provide authority for its claim.

However, “a unanimity instruction [must] be given when separate identifiable instances of criminal conduct are introduced in support of a single charge and there is conflicting testimony such that a rational juror could reasonably doubt whether one or more incidents actually occurred.” Coleman, 159 Wn.2d at 513. Although the jury convicted Thompson of attempted indecent liberties, the jury did not conclude the charged assaults were committed with sexual motivation. This conflicting verdict gives rise to a legitimate concern that the jury was not unanimous as to which felony formed the predicate for the elevated charge. Thompson’s right to a unanimous jury verdict was violated.

b. The State did not make an election. With regard to the sexual motivation findings for the unlawful imprisonment convictions, the State does not dispute that multiple acts could have supported the finding. However, the State asserts, “The State’s closing argument shows that the State was relying on Thompson’s demand that Krell remove her blouse and bra as the act supporting the sexual motivation enhancement.” Br.

Resp. at 89 (citing RP (8/30/08) 59-60). This simply is not an accurate representation of the trial prosecutor's closing argument.

During the referenced argument, the prosecutor addressed the substantial step element of the indecent liberties charge, not the sexual motivation element of the unlawful imprisonment charges. And the prosecutor, in fact, discussed multiple acts:

What substantial step did [Thompson] take? We only need proof of one, but there's way more than one. Ordering Megan Krell to take off her blouse is a substantial step that shows his intent to commit the crime of indecent liberties. Threatening to kick her head through the wall if she didn't comply with him is a substantial step. Ordering her to take off her bra is a substantial step. Threatening to kick her head through the wall if she didn't take off her bra is a substantial step. Members of the jury, each one of these acts alone is a substantial step toward the commission of the crime of indecent liberties, and all of them taken together overwhelmingly establishes his intent and the crime he was about to commit.

8/30/08 RP 59-60.

During the rest of his lengthy summation, the prosecutor discussed the sexual motivation element only one other time. See 8/30/08 RP 99. The prosecutor did not elect any act that supported the sexual motivation element at that time either. This Court should reject the specious claim that the prosecutor made an election. Thompson's convictions must be reversed.

4. THE STATE DID NOT PROVE THE SEXUAL  
MOTIVATION ELEMENT WITH REGARD TO  
RICHARD BLUE.

Thompson has argued that the State did not prove the sexual motivation element with regard to count VIII of the amended information, alleging unlawful imprisonment count of Richard Blue. Br. App. at 85-89. The State seems to deliberately misstate Thompson's argument. See Br. Resp. at 90-91 ("Thompson also appears to argue that the sexual motivation finding does not apply to a crime unless the defendant intends to sexually assault the victim of that crime.")

Thompson in fact argued that under State v. Halstien, 122 Wn.2d 109, 120, 857 P.2d 270 (1993), the State must prove the sexual motivation allegation is tied to the "underlying felony," rather than the defendant's general criminal scheme. See Br. App. at 86-87; Halstien, 122 Wn. App. at 120. "[T]he finding of sexual motivation [must] be based on some conduct forming part of the body of the underlying felony." Halstien, 122 Wn. App. at 120.

The State does not respond to Thompson's actual argument. Instead, the State cursorily disposes of its fictional version of Thompson's argument. As noted in the Brief of Appellant, Halstien makes clear that to survive a due process challenge, a sexual motivation allegation must be tied to the underlying felony. Br. App. at 88. Otherwise every crime

incidental to a sex offense could be enhanced with a sexual motivation finding. But this is not the law. Insufficient evidence existed to support the sexual motivation allegation with regard to Richard Blue. The special verdict must be reversed and dismissed.

5. THE JURY INSTRUCTION DEFINING PERMISSION DIRECTED THE JURY'S VERDICT ON THE TAKING A MOTOR VEHICLE COUNT IN THE BERNADETTE MCDONALD PROSECUTION; WITHOUT THE INSTRUCTION, INSUFFICIENT EVIDENCE SUPPORTED THIS ESSENTIAL ELEMENT OF THE CRIME.<sup>9</sup>

a. The jury instruction defining "permission" was a comment on the evidence. The Washington Constitution expressly prohibits judicial comments on the evidence. Const. art. IV; § 16. This prohibition is violated not only when a judge expressly conveys her personal opinion regarding the merits of the case, but also when her views are merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

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<sup>9</sup> Believing his arguments challenging the admission of evidence under RCW 10.58.090 and ER 404(b) to be well-presented in the Brief of Appellant, Thompson offers no further argument in this reply. As the State has noted, the Supreme Court has granted review of this Court's decisions in State v. Schermer, 153 Wn. App. 621, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010) and State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010), on the question of whether RCW 10.58.090 is unconstitutional.

The State claims that the jury instruction defining “permission” for the taking a motor vehicle charge in the Bernadette McDonald prosecution was not a comment on the evidence, but a correct statement of the law.<sup>10</sup> Br. Resp. at 116. The State is wrong.

As the State concedes, “permission” is not defined by statute. Id. Nor can the State cite to a case defining permission for purposes of taking a motor vehicle. The Washington Pattern Instructions Committee recommend a definition of “permission” be given in a prosecution for taking a motor vehicle.

Because of the absence of statutory or common law authority for the definition provided by the trial court, the State looks to a patchwork of sources: dictionaries, “consent” as it is defined in the context of sexual assault prosecutions, and search and seizure law. Br. Resp. at 116-17. Extrapolating aspects from each of these, the State arrives at a “definition” of consent that conveniently mirrors the State’s theory in the McDonald trial and the instruction given by the trial court. Id. The State concludes that the trial court did not abuse its discretion in giving the instruction. Br. Resp. at 117.

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<sup>10</sup> The instruction read, “Permission means to consent to the doing of an act which, without such consent, would be unlawful. In order to consent to an act or a transaction, a person must act freely and voluntarily and not under the influence of threats, force, or duress.” 1CP 598.

Although the two cases cited by the State indicate that a trial judge has discretion to define words of common understanding to the jury, they sound a cautionary note. See State v. Scott, 110 Wn.2d 682, 692, 757 P.2d 492 (1988) (“Trial courts should exercise sound discretion to determine the appropriateness of acceding to requests that words of common understanding be specifically defined”); State v. Amezola, 49 Wn. App. 78, 87-88, 741 P.2d 1024 (1987) (no error where trial court refused to define “dominion and control” for the jury), abrogated in part by State v. McDonald, 138 Wn.2d 680, 981 P.2d 443 (1999).

“Permission” is a word of common understanding. Nevertheless, the court chose to give a definition of the term. The definition utilized was not the dictionary definition of the term cited by the State in its brief. Br. Resp. at 116. Nor was it modeled on the definition of “consent” contained in RCW 9A.44.010. Instead, it expressly narrowed the jury’s consideration of the concept of lack of “permission” to consent given “under the influence of threats, force, or duress.” 1CP 598.

In State v. Hermann, 138 Wn. App. 596, 158 P.3d 96 (2007), discussed in Thompson’s opening brief, the Court held that an instruction stating that retail price might be sufficient to establish value “improperly invaded the province of the jury by effectively directing it to calculate the jewelry’s value based on the purchase price, to the exclusion of other

competent evidence of value.” Id. at 607. The injection of the directive, “in order to consent to an act or transaction, a person must act freely and voluntarily and not under the influence of threats, force, or duress” into the instructions similarly directed the jury to focus their deliberations on the influence of force or duress. The instruction had the likely effect of inducing the jury to discount the fact that Thompson never asked McDonald for the car; she offered it to him. This Court should conclude the instruction was a comment on the evidence.

b. The comment prejudiced Thompson. The State contends that even if the instruction was an impermissible comment, it was not prejudicial. The State points to the fact that McDonald had been bound, assaulted, and raped, following which she offered her car to her assailant. From these facts, the State avers that “no one could realistically conclude” that McDonald’s consent was freely given. Br. Resp. at 118. The State would be on better footing if McDonald’s assailant had demanded the use of her car, but he did not. McDonald testified that she offered Thompson her car and told him where to find it. 2/17/09 RP 66. The State cannot prove beyond a reasonable doubt that the comment did not prejudice Thompson.

c. There was insufficient evidence to prove that the motor vehicle was taken without McDonald’s “permission.” The State insists

that because of the circumstances of the rape, McDonald's decision to offer her assailant her car was somehow made under duress. Br. Resp. at 119-20. This is a meritless argument. McDonald's assailant may have taken her car, but he took it after she offered it to him of her own free will. She may well have perceived that this would be the best way to save her own life, or to save herself from future injury. If so, she is to be congratulated on her resourcefulness. Nevertheless, she made a decision, on her own, to offer her assailant her car. The evidence was insufficient to prove the car was taken without permission.

**6. THE PROSECUTOR NEVER PROPERLY COMPLETED HIS IMPEACHMENT OF THOMPSON, AND THUS COMMITTED MISCONDUCT IN HIS CROSS-EXAMINATION AND CLOSING ARGUMENT.**

The State asserts that the prosecutor did not commit misconduct in his cross-examination of Thompson because the prosecutor's questions "were based on confessions that Thompson gave to the police." Br. Resp. at 123. But the prosecutor did not introduce the confessions into evidence. Nor did the State limit its use of Thompson's prior statements to impeachment. Instead, the State used the statements as substantive evidence. This was misconduct.

"[T]he purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at

different times.” State v. Newbern, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999) (citing 1 John William Strong, McCormick on Evidence § 34, at 114 (4th ed.1992)). However, “[s]uch evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true.” State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). “If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach.” Newbern, 95 Wn. App. at 293.

Thompson testified generally about the circumstances that caused him to be arrested in 1985. Thompson did not testify about Virginia Bing. He explained that he did not commit the offenses he pleaded guilty to, but he did not deny making the confessions. Rather, he said he had been “coerced and intimidated into confessing to things I did not do.” 2/25/09 RP 90. Thompson also denied remembering the events the prosecutor questioned him about. 2/25/09 RP 100-01, 118-19. Under these circumstances, there was nothing to impeach.

At the same time, the prosecutor knew that Virginia Bing was unwilling to testify at Thompson’s trial. Thus, there was no way for the prosecutor to introduce the details of her sexual assault as substantive evidence. The evidence of this sexual assault, which was far more brutal than the assault sustained by McDonald, was introduced for no purpose

other than to prejudice the jury against Thompson.<sup>11</sup> This Court should reject the State's claims that the prosecutor's cross-examination was not flagrant misconduct.

7. THE AMENDMENT OF THE INFORMATION TO ALLEGE SEXUAL MOTIVATION VIOLATED DUE PROCESS AND THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE.

a. The amendment violated due process and separation of powers principles. Thompson challenges the order permitting the State to amend the information to add a sexual motivation allegation as violating his right to due process and the constitutional separation of powers doctrine. In response, the State claims that because Thompson did not object to the amendment of the information to allege felony murder, a non-sex offense, he "cannot show prejudice from the addition of the sexual motivation allegation." Br. Resp. at 129.

The State mistakes Thompson's argument. Thompson does not argue that his due process right to fair notice was violated, but rather that the amendment – which transformed the charged offense into a sex offense, triggering the application of RCW 10.58.090 – denied him his due process right to a fair trial. See Br. App. at 136-44.

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<sup>11</sup> The State also alleges that Thompson does not argue that his confessions were more prejudicial than probative. Br. Resp. at 123. This is incorrect. Thompson specifically argued that the evidence of his prior bad acts was inadmissible under ER 403. Br. App. at 115-16.

The State avers that “[w]hile Deborah Byars could not testify, the evidence at the scene spoke loudly of Thompson’s sexual motivation in murdering her.” Br. Resp. at 130. This assertion stands in stark contrast to the statements of the prosecutor below. The trial prosecutor conceded that “the forensic evidence establishes nothing more than that [Thompson] had consensual sexual contact with her, and that when he left her residence, she was alive and well.” 2CP 79. The trial prosecutor recognized that without the evidence of other bad acts, he was unlikely to obtain a conviction on the charged offense. It was for this reason that he battled so vigorously for the amendment. As argued in the Brief of Appellant, the prosecutor manipulated the rules of evidence and exceeded his authority under former RCW 9.94A.835. This Court should conclude the ruling authorizing the amendment violated due process and separation of powers principles.

b. The evidence was not admissible under ER 404(b). The State alternatively contends that the evidence was admissible to show identity through a distinct modus operandi. The State utterly fails to address the substantial dissimilarities between the prosecutor’s theory of modus operandi in the McDonald trial as opposed to the Byars trial. See Br. App. at 138-141; compare 12/17/08 RP 38-39 (prosecutor’s recitation of the modus operandi evidence in the McDonald trial) with 2RP (Vol.2)

23-24 (prosecutor's offer of proof of modus operandi evidence in the Byars matter). As noted in the Brief of Appellant, nearly every substantive similarity identified by the prosecutor in the McDonald matter was not present in the Byars matter. Byars was in her late thirties, not her twenties. Although she was attacked in her home, she was awake when the attack began. There was no physical evidence that pointed to a sexual assault. Simply put, without the prior bad acts evidence, there was no reason to conclude that Byars had not had a consensual sexual encounter with Thompson and been murdered by someone else.

Like the trial prosecutor, the appellate prosecutors make much of the presence of bleach in Byars' home. Br. Resp. at 134-35. The State speculates that Thompson may have intended to use it as it was used on McDonald, but the State as much as acknowledges that there is no evidence whatsoever to support this theory. Br. Resp. at 135 ("it is possible that Thompson planned to use it . . .")

In fact, the presence of bleach, a common household item, in Byars kitchen, is probative of nothing at all. The kitchen was not the room where Byars' body was discovered. Beside the bleach, the police found a bottle of ammonia. 2RP (Vol. 4) 97. The State does not explain how the ammonia fits in with its theory of how Byars' assailant intended to use the bleach. See Br. Resp. at 135.

Likewise, the State's citation to State v. Jenkins, 53 Wn. App. 228, 766 P.2d 499, review denied, 112 Wn.2d 1016 (1989), does not help the State dispel the problem it faces of two dissimilar so-called "modus operandis."

When evidence of other bad acts is introduced to show identity by establishing a unique modus operandi, the evidence is relevant to the current charge "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged."

State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002) (citation omitted).

Because the allegedly "unique" methods employed in the commission of the McDonald and Byars offenses differed according to the State's own offer of proof, by definition there is no unique modus operandi. The evidence could not be admitted under ER 404(b).

c. The error in admission of the evidence was prejudicial.

The State last claims that any error in admitting the evidence was harmless because "the evidence that Thompson murdered Deborah Byars was strong." Br. Resp. at 139. It must be remembered that the trial prosecutor took a different view. He acknowledged that "the forensic evidence

establishes nothing more than that [Thompson] had consensual sexual contact with her, and that when he left her residence, she was alive and well.” 2CP 79.

The evidence that the appellate prosecutors identify in support of their claim that the error was harmless does not point to the conclusion that Thompson murdered Byars. Dr. Richard Harruff, the State’s medical examiner, could not state with certainty that the telephone cord found in Byars’ apartment was used as a ligature. 2RP (Vol. 6) 48-49. No ligature marks were found on Byars’ hands and wrists. Id. at 74. The presence of Thompson’s DNA on Byars’ thighs was consistent with consensual sex. Id. at 155. Likewise, the presence of Thompson’s DNA on Byars’ wrists and under her fingernails was not inconsistent with consensual sexual intercourse. Further, no one saw scratch marks on Thompson consistent with defensive injuries. 2RP (Vol. 7) 168. Finally, the DNA of another person who was not Byars or Thompson was found under her fingernail. Id. at 157.

The State’s effort to portray the error in the admission of the evidence as “harmless” is unpersuasive. This Court should conclude the other acts evidence prejudicially denied Thompson a fair trial.

C. CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief of Appellant, this Court should reverse Thompson's convictions. On remand, he should be appointed new counsel or, in the alternative, he should be permitted to represent himself.

DATED this 28th day of February, 2011.

Respectfully submitted:



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