

65678-3

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No. 65678-3-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN PEGUES,

Appellant.

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

The Honorable Theresa Doyle

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE EVIDENCE AT TRIAL SUPPORTED
ISSUANCE OF PEGUES' SELF-DEFENSE
INSTRUCTION, WHICH THE STATE
CONCEDES WAS LEGALLY APPROPRIATE.

The State appropriately concedes that Kevin Pegues had the right to act in self-defense against the deadly force of a police dog that was attacking him. Br. Resp. at 10. The State claims, however, that the evidence did not support issuing his proposed self-defense instruction. The State is wrong.

a. The evidence viewed in the light most favorable to Pegues supported the inference that he was in actual danger when he defended himself. When determining whether a requested jury instruction should be given, the court must view the evidence in the light most favorable to the party that asked for the instruction. Br. Resp. at 10; State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 3 P.3d 1150 (2000). In the context of self-defense, the defendant merely must produce "some evidence" demonstrating self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). However, "there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of jurors on that issue." State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495

(1993) (quoting State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)). Moreover, this evidence need not be produced by the defendant. Rather, “there need only be some evidence admitted in the case from whatever source which tends to prove [the defendant acted] in self-defense.” McCullum, 98 Wn.2d at 488 (emphasis added). Once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. Id.

The State correctly notes that in order for an accused person to be permitted to claim self-defense against an assault by a law enforcement officer, the officer must be using force that creates an actual imminent danger of serious injury or death. Br. Resp. at 11 (citing State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985)). The State claims that the evidence did not meet this predicate. Br. Resp. at 14. The State’s claim is meritless.

The State asserts, for example, that it was “almost completely uncontested” that after Officer Sturgill gave the dog the “out” command, the dog let go of Pegues, and that Pegues stabbed the after dog after it released him. Br. Resp. at 13-14. In actuality, no witness other than Officer Sturgill made this claim.

Jay Sease, the officer who shot and paralyzed Pegues, testified,

[as] soon as the dog got towards the frontal portion of Mr. Pegues, kind of his head, upper body portion, I immediately observed Mr. Pegues' hand shoot up, and I couldn't tell if he physically grabbed the dog or just kind of boxed him in, and then I saw the knife come from this direction and slam into the left side of the dog's neck.

6RP 99-100.

Sease also testified that when he fired at Pegues, because of the dog's proximity, he had to "angle off" in order to avoid shooting him. 6RP 134.

Cameron Murtazayev, a grocery helper at the Tukwila Trading Company, testified, "police dog, he attacked [Pegues] and I saw him stabbing the dog." 7RP 14-15.

Officer Chris Danninger testified that Pegues was "on the ground" when the dog approached him. 7RP 78. He said, "[t]he K-9 went up to the defendant, the defendant got up to his knees and . . . threw . . . kind of a punch, towards the K-9's neck area." Id

Mitchell Johnson, a security officer at the Tukwila Trading Company, testified that when the dog entered the scene, "it looked like he was going for [Pegues'] head" but then he heard the dog yip and saw him fall over. 7RP 111. He said it looked like the dog "got

close” to Pegues but he was unable to tell whether the dog bit him or not. Id. Johnson also said that when the dog was released Pegues was on all fours. 7RP 129.

Officer Joshua Vivet testified that he saw the dog enter and appear to make contact with Pegues and then observed what appeared to be a struggle between Pegues and the dog. 9RP 10-11. Vivet said that the struggle was in the “upper body” area and that it lasted “five to ten seconds.” 9RP 22.

Officer Brian Jordan, who had approached Pegues to handcuff him after tasing him, testified that “K-9 Gino made contact” and after a couple of seconds Pegues rose to his knees and tried to wrestle with the dog. 9RP 47-48. Jordan said that the dog bit Pegues “[i]n and around the head and upper extremity.” 9RP 48. He said the struggle lasted approximately “three or four seconds.” Id. Jordan explained that he backed up “to let the dog do his job” and observed the struggle from a distance of seven to ten feet. 9RP 48-49. He stated that when Pegues stabbed the dog, his knees were on the ground while his “upper body was . . . trying to wrestle with the dog.” 9RP 49, 82. He said that Pegues then took the dog into a headlock and stabbed him. 9RP 49, 83.

Officer James Devlin had approached Pegues after Jordan tased him and was about to place him in handcuffs when he saw the dog approaching. 10 RP 61-62. He testified that he took a couple of steps back and the dog “contacted” Pegues around the back of his neck and shoulder. 10RP 62-63. He said that the dog then let go but continued to circle Pegues “like he was going to come back in for an arm.” 10RP 63. It was at this point that Pegues stabbed the dog. Id.

Sturgill testified that when he arrived, Pegues was facing Officer Jordan, who was giving Pegues commands. 9RP 119, 121. Sturgill opened the door of his vehicle, the dog came out, and Sturgill saw Jordan tase Pegues. 9RP 122. The dog charged at Pegues and attacked his head, and Sturgill saw that Pegues was not fighting back and instead was putting his hands above his head to protect himself. 9RP 123. Sturgill claimed that he gave the dog the “out” command and that when Pegues stabbed Gino, the dog was sitting and staring at him. 9RP 127.

As the above recitation demonstrates, the State’s claim that it was “almost completely uncontested” that the dog had heeded a command to release Pegues is simply not true. In fact, only one witness other than Sturgill, Devlin, stated that the dog ever released

Pegues. Devlin, however, in opposition to Sturgill, believed that the dog was going to attack Pegues again.

Devlin's testimony must be contrasted with that of Jordan, who also was standing seven to ten feet away from Pegues. Jordan testified that the dog was still biting Pegues when he stabbed him. Further, of the many law enforcement officers who testified, no witness testified to hearing Sturgill give the "out" command.

Sturgill's claim that the dog had backed off is also inconsistent with the other circumstances. Sturgill stated that the dog had already been released to attack Pegues when Jordan tased Pegues. 9RP 122. The taser fully and effectively incapacitated Pegues, who fell forward face-down. 6RP 94; 7RP 77, 90-92; 8RP 24; 9RP 28-29, 45-46. The dog began biting Pegues around the head and neck, and Pegues was forced to bring his hands up to protect himself. 9RP 123. Pegues' struggle with the dog lasted a few seconds. Two witnesses said they saw Pegues manage to place the dog in a headlock at which point he stabbed it. 6RP 99-100; 9RP 49, 83. No witness described seeing Pegues crawl after the dog, as would have been likely if the dog had in fact backed off of Pegues and sat down. Indeed, given

Pegues' condition after being tased, and the fact that the dog's attack happened mere moments after Pegues fell to the ground, it is not plausible that he would have been able to pursue a creature that had backed away and was sitting staring at him, or that the other witnesses who saw the attack would not have noticed this.

In sum, there is abundant evidence that Pegues was in actual, imminent danger of serious bodily injury or death when he stabbed the dog in his own defense. The State's claim to the contrary is without merit.

b. Pegues had the right to defend himself against the deadly force of the police dog. The State offers the alternative and novel contention that if the police were justified in using deadly force to subdue Pegues, then he had no right to defend himself, even to protect his own life. Br. Resp. at 11-15. Unsurprisingly, the State offers no authority for this unusual argument. The argument is erroneous and contrary to decisional law.

In State v. Bradley, 141 Wn.2d 731, 10 P.3d 358 (2000), the Court explained that an arrestee's "right to freedom from arrest without excessive force that falls short of causing serious injury or death can be protected and vindicated through legal processes whereas loss of life or serious physical injury cannot be repaired in

the courtroom.” Id. at 737 (quoting State v. Westlund, 13 Wn. App. 460, 467, 536 P.2d 20 (1975)); see also State v. Garcia, 107 Wn. App. 545, 549, 27 P.3d 1225 (2001) (“The ‘arrest rule’ [of self-defense] allows the use of reasonable force to resist arrest, whether lawful or unlawful, only if the ‘arrestee is actually about to be seriously injured or killed.’”); State v. Cadigan, 55 Wn. App. 30, 37, 776 P.2d 727 (1989) (an arrestee may use force to defend himself during a lawful arrest if officer’s use of force “places the arrestee in actual danger of serious injury”), review denied, 113 Wn.2d 1025 (1989).

According to the State, because the police may have been entitled to use force to subdue Pegues, he had no right to act to protect himself while a 100-pound dog tore at his face and neck, even if it meant he might be blinded or killed. This argument is nonsensical and contrary to law, and should be rejected.

The State also claims that the police deployed the dog in a “non-lethal manner.” Br. Resp. at 14. Again neither the law nor the evidence supports this contention. As noted in Pegues’ opening brief, an attacking police dog qualifies as a deadly weapon in Washington and in other jurisdictions. Br. App. at 12-14. Furthermore, the law does not require Pegues to show that he was

in danger of being killed, i.e., that the deployment of the dog literally was “lethal force.” All he needed to show was actual danger of serious injury. Garcia, 107 Wn. App. at 549; Cadigan, 55 Wn. App. at 37.

There is no suggestion that the deployment of the dog did not, at a minimum, create a danger of serious injury. Vivet testified that officers must wear “bite suits” to avoid injury when training police dogs. 9RP 16. Once a police dog has latched onto a suspect, it will not release him or her until commanded to do so by its handler. 9RP 17, 148. Both Vivet and Jordan also testified that a K-9 unit will frequently be deployed as part of an escalation of force technique when a weapon is involved in an arrest. 9RP 24, 47.

When Sturgill released the dog, it charged at Pegues “full force.” 9RP 143. Sturgill admitted that Gino was “a pretty fast dog.” Id. The dog bit Pegues around the head, neck and shoulders. 9RP 49, 82, 148. Under these circumstances, and in light of Washington’s recognition of the deadly capability of a large, powerful dog, Pegues easily established that he was in actual danger of serious injury, if not death.

c. The failure to instruct the jury on self defense

prejudiced Pegues. The State last asserts that even under the constitutional harmless error standard, any error in failing to instruct the jury was harmless. Br. Resp. at 15-17. The State makes two contentions in support of its harmless error argument: first, that Pegues was somehow better off under the instructions given by the court than if the jury had been informed he had the right to claim self-defense, and second, that because the court may have been obliged to give an aggressor instruction, Pegues' self-defense claim would have failed. Id. Neither contention has merit.

i. The instructions given by the trial court

relieved the State of its burden of proving the absence of self-defense beyond a reasonable doubt. The State asserts,

[T]he instructions that were given are arguably more favorable to Pegues than the self-defense instruction he proposed, because he could argue his theory of the case without having to convince the jury that he was in actual imminent danger of serious injury or death or that the police were using excessive force.

Br. Resp. at 16.

The State's argument is based upon a false premise: namely, that in the context of self-defense an accused person has to "convince" the jury of anything. Rather, once a person

establishes that he was in actual danger of serious injury during the course of an arrest and acted in his own defense, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. Bradley, 141 Wn.2d at 740; State v. Miller, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997).

The State suggests that because “malice” was an element of the charged offense, and the jury convicted Pegues as charged, it would also have convicted him even if proper self-defense instructions had been given. Br. Resp. at 15-16. Again, this argument evinces a misunderstanding of the State’s burden. If the jury had concluded the State did not prove the malice element beyond a reasonable doubt, it would have been obligated to acquit. But if the court had given self-defense instructions, the jury would also have been obligated to acquit if it concluded the State did not prove the absence of self defense beyond a reasonable doubt, even if it found the State had proven the malice element.

The State’s argument is no different from the claim that because a jury found an assault was intentional, the failure to give self-defense instructions supported by the evidence was not an error. But this type of argument has repeatedly been rejected by Washington appellate courts:

When a defendant raises the issue of self-defense in an assault case, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. . . Jury instructions, taken as a whole, must unambiguously inform jurors that the State bears this burden, and the better practice is for the trial court to give a separate instruction on the burden of proof. . . Allowing the defense attorney to argue that his client acted in self-defense does not adequately inform jurors of the burden of proof.

Miller, 89 Wn. App. at 367 (internal citations omitted). Indeed, a finding that a defendant acted intentionally is a necessary predicate for self-defense instructions to be given. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997).

In short, the State's claim that the existing instructions somehow permitted Pegues to argue his self-defense claim to the jury is based upon a misconception of the State's burden and the law of self-defense generally. Pegues was prejudiced by the failure to give his proposed instructions.

ii. The State cannot prove a first aggressor instruction was warranted by the evidence or that the jury would have found Pegues to be the first aggressor. The State alternatively contends that the State would have been entitled to a "first aggressor" instruction, and further alleges that it is "beyond

any rational dispute that Pegues was the first aggressor.”¹ Br. Resp. at 16-17. Again, the State omits key features of the law of self-defense from its analysis. Where a person “in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action” then an aggressor instruction is not warranted. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Although Pegues allegedly waved a knife at the officers who were pursuing him, he then attempted to flee, clearly signaling his intent to withdraw from combat. 9RP 37-38. Jordan was able to cut him off before he reached the exit. Id. Jordan then shot him with a taser. 9RP 43-45. It was a “good tase” and Pegues “fell immediately.” 9RP 45, 80. Jordan did not recall seeing a knife at that point. 9RP 80.

While Pegues was face-down on the ground and still immobilized by the taser, Jordan approached him and placed his foot on his back in preparation for handcuffing him. 9RP 45. It was

¹ Despite its claim that it is “beyond any rational dispute” that Pegues was the first aggressor, the State notes later in its response brief that the evidence could have been construed to support the inference that Pegues did not move aggressively toward the officers with the knife and instead was trying to escape from them. Br. Resp. at 23.

at this point that the dog charged at Pegues and started biting him around the upper extremities. 9RP 45-48. Even the dog's handler conceded that it appeared Pegues was simply trying to protect his head and face from injury before Pegues ultimately stabbed the dog. 9RP 123.

Based upon this evidence, a reasonable juror could have found that Pegues had withdrawn from combat when the dog attacked him. The State's claim that the jury would have concluded beyond a reasonable doubt that Pegues was the first aggressor is without merit. This Court should hold that Pegues was denied his right to a defense when the court refused to instruct the jury on his self-defense claim, and reverse his conviction for maliciously injuring a police dog.

2. *GRIER* DOES NOT FORECLOSE PEGUES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Pegues argued on appeal that his lawyer's failure to request lesser included offense instructions on the misdemeanor of unlawful display of a weapon constituted ineffective assistance of counsel. Br. App. at 22-32. In response, the State contends that State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), decided after

Pegues' opening brief was filed, forecloses his ineffective assistance of counsel claim. The State is incorrect.

In Grier, the Supreme Court overruled State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004), and abrogated the three-part test adopted in that decision for assessing ineffective assistance of counsel claims related to the failure to request a lesser included offense instruction. Grier, 171 Wn.2d at 36-39. In its response, the State essentially contends, however, that a defense attorney's failure to request a lesser included offense instruction will almost never constitute ineffective assistance of counsel. To the extent that the State's argument asks this Court to endorse such an extreme position, it should be rejected.²

To prevail on a claim of ineffective assistance of counsel, an accused person must establish (1) that his lawyer's performance was deficient and (2) prejudice, i.e., that but for his lawyer's act or omission there is a reasonable probability that the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

² Indeed, in Grier, the Court considered the ineffective assistance of counsel claim on its merits based on the facts adduced at trial, rather than announcing a bright-line rule. 171 Wn.2d at 43-46.

Although a reviewing court must start from the presumption that counsel was effective, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Strickland, 466 U.S. at 688. The focus is on whether counsel’s decision “was itself reasonable.” Wiggins v. Smith, 539 U.S. 510, 523, 125 S.Ct. 2527, 176 L.Ed.2d 471 (2003). Thus, as the Court in Grier recognized, “[n]ot all strategies or tactics on the part of defense counsel are immune from attack. ‘The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.’” Grier, 171 Wn.2d at 33-34 (quoting Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)).

However, in asserting that counsel mounting a claim of ineffective assistance of counsel “bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel’s performance,”³ the Court in Grier distorted the pertinent standard. For example, [i]n Wiggins v. Smith, the Court looked to the record of the proceedings, which suggested that counsel’s omission “resulted from inattention, not reasoned strategic judgment” and so was not reasonable. Id. at 526. The Court

³ Grier, 171 Wn.2d at 42 (emphasis in original).

further criticized the hypothetical “strategic decision” advanced by the lower courts and the government as a “post hoc rationalization.”

Id.

In Pegues’s case, the State’s hypothetical justification for counsel’s failure to request a lesser included offense instruction on unlawful display of a deadly weapon suffers from the same deficiency. The State claims, for example, that because defense counsel contended Pegues was trying to escape, “[i]f the jurors had had a reasonable doubt as to whether Pegues had moved aggressively toward the officers with the knife . . . they would have acquitted Pegues of both second-degree assault charges.” Br. Resp. at 23. This is simply not true.

The lesser included offense of unlawful display of a weapon would have required the jury to find that Pegues did “carry, exhibit, display, or draw any . . . weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” RCW 9.41.270. The crime, therefore, requires an inference of aggression that falls short of assault.

Further, because counsel failed to seek lesser-included offense instructions, Pegues faced a minimum prison term of 84 months as opposed to a maximum sentence of a year in jail for unlawful display of a weapon. In addition, a conviction for assault in the second degree was a second “strike” for Pegues. RCW 9.94A.030; CP 72. Under these circumstances, it was not objectively reasonable for counsel to pursue a “strategy” of outright acquittal. This Court should conclude that Pegues was denied the right to the effective assistance of counsel when his lawyer failed to request lesser included offense instructions.

3. PROSECUTORIAL MISCONDUCT DENIED PEGUES A FAIR TRIAL.

Pegues also argued that the trial prosecutor’s closing argument, which distinguished between “spoken” and “unspoken” defenses and disparaged his general denial defense as an “unspoken defense” was misconduct. The State claims that the arguments were a “fair reply.” The State’s claims are untenable.

a. The State’s disparagement of Pegues’ general denial defense was misconduct. Pegues claimed a general denial defense, and in closing argument identified the several reasons to doubt the State’s case. In response, the prosecutor argued,

[I]t's really easy in this line of work to cut into witnesses. Really easy. That's why there's what we call spoken defenses. And spoken defenses are things such as self-defense. He's going to attack me, so I attacked him first. Then there is an alibi defense, it wasn't me, I was at home with my mom. My mom's going to testify. Diminished capacity. Well, I wasn't all there. I was too hammered to know what I was doing and I blacked out. Insanity. I did it, but I'm crazy, forgive me. Those are spoken defenses.

And when you start throwing out unspoken defenses like in this case, when you start cutting into the credibility of the officers, and that one question, do you believe Officer Devlin, do you believe Officer Jordan, they're saying, no, you shouldn't. No, you shouldn't believe what they're saying.

...

What has to be true for these officers to be making this up? Or to be – well, what is counsel really saying? She's saying one of three things. One, these officers are confused. They don't really know what happened here. Two, she is either saying they are confused or these officers are mistaken. Or three, she's saying the officers fabricated the whole story. You tell me, any one of them seem confused about anything? Or mistaken about anything?

...

So what are we really saying? If we were to do an analysis, what they're implying, the unspoken defense, is they are fabricating. Right? They are making this up. Really? Because what has to be true for all these officers to be making this up? They had to have conspired together. They had to have really wanted to get this guy on a conviction for Assault in the Second Degree. They had to plan together. They had to get their stories straight. And in fact, they had to come up with something convincing enough, like this, where it's not the exact same story, some say shiny, some say later, some say I saw the knife – let's make this believable to the jury, let's make up this great story so we

can be really convincing, corroborating each other. Really? Are they that sophisticated to do that? Why would they do that? You are telling me every officer got up here and made something up just for the sake of the charges? They must really, really want to get Mr. Pegues. They must really be out for him. Did you see any evidence of that? What would be motivation for the officers to fabricate this story? That is ridiculous.

12RP 80-82.

The appellate prosecutor tries to characterize this inflammatory argument as a “fair reply” to Pegues’ discussion of the reasons to doubt the State’s evidence. See Br. Resp. at 27-28. This is a specious claim. A “fair reply” to Pegues’ argument would have addressed each of the individual points raised by Pegues, who did not claim that the officers had “fabricated a story.” Cf., State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 207 (2008) (“A criminal defendant can ‘open the door’ to testimony on a particular subject matter, but he does so under the rules of evidence. A defendant has no power to “open the door” to prosecutorial misconduct.”). But this was not the prosecutor’s tack. Instead, the prosecutor sarcastically suggested to the jurors that Pegues’s general denial defense was less worthy of credence than a so-called “spoken” defense.

The appellate prosecutor's contention that the trial prosecutor's argument responded to Pegues' claim that the officers were not credible also sidesteps the question why the prosecutor's discussion and negative characterization of Pegues's defense was in any way germane to the issues before the jury. They were not. They were not an appropriate or fair response to Pegues' discussion of the inconsistencies in the State's evidence. They were not pertinent to the jury's consideration of the facts. The prosecutor's irrelevant characterization of Pegues' general denial defense as an "unspoken defense" wrongly implied that Pegues had a duty to present an affirmative defense to the charge. If this Court endorses the State's assertion to the contrary, it would give prosecutors a blank check to make similar improper arguments any time a defense attorney questioned the State's evidence, even though identifying the reasons to doubt the State's evidence holds the State to its burden and is required by counsel's obligation to provide effective assistance of counsel.

This Court should conclude that the argument undermined the State's burden and Pegues' right to be presumed innocent of the charge. The misconduct requires reversal of Pegues' conviction.

b. The State's claim that prosecutorial misconduct that infringes on constitutional rights should not be evaluated under a constitutional harmless error standard misstates the law. The State also claims that if the argument was misconduct, it should not be evaluated under the standard of review for constitutional harmless error, even though the argument infringed upon Pegues' right to the presumption of innocence and proof beyond a reasonable doubt. The State alleges that in State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148, rev. denied, 1006 Wn.2d 107 (1986), this Court failed to understand a footnote in State v. Davenport, 100 Wn.2d 757, 685 P.2d 1213 (1984). Br. Resp. at 31-34. The State suggests that in Traweek this Court misunderstood a parenthetical reference to State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981). See Davenport, 100 Wn.2d at 761 n. 1; Br. Resp. at 32-33. The State apparently assumes that in writing its published opinion in Traweek, this Court did not bother to read, or was not familiar with, recent decisions of the Washington Supreme Court. The State assumes too much.

In State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007 (2009), also cited by the State for the proposition that a constitutional harmless error standard may not be

applied, Br. Resp. at 31 n. 10, the Court allowed for the possibility that in some instances, a constitutional harmless error standard may be appropriate:

Warren urges us to apply . . . a constitutional harmless error analysis because the misconduct in this case touches on constitutional rights. Perhaps if a prosecutor violated an accused's right of silence by improperly blurting out the accused had exercised his constitutional right, the constitutional harmless error standard would be appropriate. But Warren's jury was properly instructed on the presumption of innocence. Before us is trial counsel's argument over the application of the instructions and the trial judge's prompt intervention with a curative instruction. We decline to reach the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right.

Warren, 165 Wn.2d at 26 n. 3 (emphasis added).

Two conclusions can be drawn from this footnote: first, that the Court was not inclined to rule out the possibility that a constitutional harmless error standard could apply to certain kinds of misconduct that infringe upon a constitutional right. Second, to the extent that the State believes the Court opined on the propriety of the standard, the State is incorrect, as the referenced portion of the opinion is pure dicta:

The word 'dicta' . . . is the plural of dictum, defined in Black's Law Dictionary, 4th ed., p. 541, as follows:

“The word is generally used as an abbreviated form of obiter dictum, ‘a remark by the way;’ that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.”

State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 89, 273 P.2d 464

(1954). “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.” Ass’n of Wash. Bus. v. Dep’t of Revenue, 155 Wn.2d 430, 442 n. 11, 120 P.3d 46 (2005).

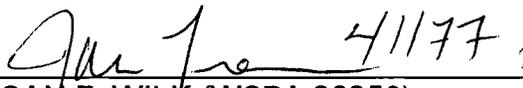
“The standard for overruling precedent is strict: the earlier decision must be both incorrect and harmful.” State v. Stalker, 152 Wn. App. 805, 808, 219 P.3d 722 (2009). The State has met neither predicate. This Court should reject the State’s suggestion that it overrule its prior decisions holding a constitutional harmless error standard applies to misconduct that infringes upon constitutional rights.

B. CONCLUSION

For the foregoing reasons and for the reasons argued in his opening brief, Kevin Pegues requests this Court reverse his convictions.

DATED this 19th day of May, 2011.

Respectfully submitted:

 41177 for SW

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65678-3-I
v.)	
)	
KEVIN PEGUES,)	
)	
Appellant.)	

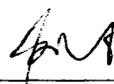
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MAY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF MAY, 2011.

X _____ 



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