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Court of Appeals
Division I
State of Washington

No. 72565-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ASHANTE GARRETT,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove all of the elements of felony harassment beyond a reasonable doubt, in violation of Mr. Garrett's constitutional due process rights.

2. The erroneous admission of ER 404(b) prior misconduct violated Mr. Garrett's constitutional right to a fair trial.

3. The deputy prosecutor committed misconduct by urging the jury to consider matters not in evidence, and by disparaging the defense in closing argument.

4. The trial court violated Mr. Garrett's constitutional right to be present at all critical stages of trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove the crime of felony harassment, the State must prove beyond a reasonable doubt not only that the defendant uttered a threat to kill, but also that the threat caused the listener to fear the defendant would kill her. Did the State sustain its burden of proof, where there was insufficient evidence of a threat causing the alleged victim to fear Mr. Garrett made an actual threat to kill?

2. Before propensity evidence may be introduced at trial pursuant to ER 404(b), the court must determine that the evidence is relevant and

more probative than prejudicial. Here, where the trial court admitted propensity evidence consisting of a municipal court docket which did not satisfy the criteria of ER 404(b), was Mr. Garrett deprived of his right to a fair trial?

3. The State's duty to ensure a fair trial precludes a deputy prosecutor from employing improper argument and tactics during trial. Where the deputy prosecutor encouraged jurors to consider evidence outside the record, did this constitute misconduct? And did the deputy prosecutor's disparagement of the defense constitute misconduct, requiring reversal?

4. An accused has a fundamental right to be present at all critical stages of a trial. Did Mr. Garrett's absence from the material witness hearing violate his constitutional right to be present at all critical stages of the trial?

C. STATEMENT OF THE CASE

Factual Background

In the fall of 2014, Ashante Garrett was involved in a relationship with a young woman named Amanda Guzman. RP 156-57, 173. Ms. Guzman had a history of suffering from panic attacks and post-traumatic stress disorder (PTSD), as a result of an abusive former boyfriend. RP

155, 279.¹ She had been under the care of a psychiatrist, and had been prescribed medication for the panic attacks, as well as for bipolar disorder, from which she had suffered since childhood. RP 156-57. She stopped taking her medication for the panic attacks shortly before she met Mr. Garrett. Id.

Just before midnight on March 7, 2014, Ms. Guzman called 911, reporting that Mr. Garrett had pushed and choked her. When Auburn police officers responded, she refused to give a written statement. RP 217, 232. When officers explained to Ms. Guzman the meaning of the word “choking,” she denied that she had been choked. RP 234, 253-54. Ms. Guzman said that Mr. Garrett was acting jealous and that he slapped her during an argument. RP 205. She also said that he threatened her with a fork and pushed her onto the bed. RP 207. Ms. Guzman refused medical attention, and officers took photographs of Ms. Guzman’s face and neck, which showed that she had no injuries. RP 217, 234. The officers left the home after about 15 minutes. RP 235-36.²

¹ Ms. Guzman testified to suffering from panic attacks since her former boyfriend, Douglas Darvis, had assaulted her several times in 2007. RP 155.

² Ms. Guzman also told officers that Mr. Garrett took some of her money during the first incident, but that when she ran after him and confronted him, Mr. Garrett threw the money back at her in the driveway. RP 209, 213.

At about 2:45 a.m. on the same night, Ms. Guzman called 911 again. Id. She said that Mr. Garrett had re-entered the house through an unlocked sliding glass door. RP 237-38. When police arrived, they found Ms. Guzman very upset and with a new red mark on her face. Id. Ms. Guzman told police that she awoke to find Mr. Garrett in her room. Id. She told police that during the second incident, Mr. Garrett hit her in the face and took \$140 and her cell phone, before leaving the house. RP 237-40.

Police officers stated that they found Ms. Guzman to be extremely emotional at the scene for almost an hour, particularly following the second incident. RP 237-39. She was described by officers as hyperventilating and in a panic, which made it difficult to interview her. RP 278-79, 298-03.

Officers had Ms. Guzman set up a meeting with Mr. Garrett at a local hotel, where officers waited with her for Mr. Garrett to arrive. 7/22/14 RP 244-45. Upon arresting Mr. Garrett, who identified himself, officers stated they could see Ms. Guzman's cell phone in the console of his car. Id. at 245-47. Officers also recovered approximately \$280 in

cash from Mr. Garrett's pockets, half of which he agreed to give to Ms. Guzman, along with her phone. Id. at 247-50.³

Mr. Garrett was charged with two counts of felony violation of a court order, one count of residential burglary, and one count of felony harassment -- all with a domestic violence aggravator. CP 9-11.⁴

The Trial

At trial, the State introduced ER 404(b) evidence consisting of a certified copy of a Kent Municipal Court docket, over Mr. Garrett's objection. 7/16/14 RP 14, 40; 7/23/14 RP 265-73, 315. The docket referred to a prior matter in which the municipal court had issued a no-contact order requiring Mr. Garrett to stay 1000 feet from Ms. Guzman. RP 315. The municipal court matter had been dismissed. Id.

Ms. Guzman refused to testify at trial, but the State subpoenaed her and brought her to court in handcuffs as a material witness. RP 111, 126. Ms. Guzman adamantly refused to answer all but the most basic biographical questions at trial. RP 111-58. The deputy prosecutor ultimately asked for permission to treat her as a hostile witness. RP 148.

³ At trial, Mr. Garrett did not move to suppress either these items under CrR 3.6.

⁴ Although Mr. Garrett was originally charged as a rapid recidivist under RCW 9.94A.535(3)(t), the trial court sustained Mr. Garrett's constitutional

Mr. Garrett objected, arguing Ms. Guzman had a right to counsel, and furthermore, that such continued questioning was futile, and was prejudicial to Mr. Garrett. RP 140-41.

Following a jury trial, Mr. Garrett was found guilty as charged. 7/25/14 RP 8-12; CP 47-50. The jury also found that Mr. Garrett and Ms. Guzman were in a dating relationship, in response to the special verdict form. CP 51.

Mr. Garrett appeals. CP 102-12.

D. ARGUMENT

1. THE STATE DID NOT PROVE ALL OF THE ELEMENTS OF FELONY HARASSMENT, AS THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SHOW AN ALLEGED THREAT TO KILL THAT CAUSED MS. GUZMAN TO FEAR FOR HER LIFE.

An essential element of the crime of felony harassment is that the threat placed the person threatened in reasonable fear the threat to kill would be carried out. RCW 9A.46.020(1)(b). Because the State did not prove this element beyond a reasonable doubt, presenting insufficient evidence to show Ms. Guzman was afraid for her life, the conviction for felony harassment must be reversed and the charge dismissed.

challenge to this aggravator, and Mr. Garrett ultimately received a standard range sentence. 7/25/14 RP 8-9.

- a. To convict for felony harassment, the State must prove that the threat placed the person threatened in reasonable fear the threat to kill would be carried out.

It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

Mr. Garrett was charged with and convicted of felony harassment, RCW 9A.46.020(1), (2). CP 9-11; 44-51. The statute provides that a person is guilty of harassment if “[w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person,” and “[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1), CP 87-88. To “threaten” is “to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person.” RCW 9A.04.110(27)(a). The crime is elevated to a felony if the threat to cause bodily injury is a threat “to kill the person threatened or any other person.” RCW 9A.46.020(2)(b).

Thus, in order to prove the elements of harassment, the State must show the defendant's words or conduct placed the person threatened in reasonable fear the threat would be carried out. State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001); RCW 9A.46.020(1). The State must show the person threatened was placed in reasonable fear of the actual threat made. State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (“the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out.”). Thus, because felony harassment requires proof that the threat made was a threat to kill, the State must also show the person threatened was placed in reasonable fear the threat to kill would be carried out. Id. at 609-10, 612. In other words, the State must show the threat caused the victim actually to fear the defendant would kill her. Id. It is not enough for the State to show the threat caused the victim to fear some generalized lesser harm, such as the threat of injury. Id.

In addition, felony harassment also requires the State to prove an accused knowingly threatened to kill the listener, and that the threat was reasonably interpreted as “a serious expression of intention to inflict bodily harm upon or to take the life” of another. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2005). Because the First Amendment

protects free speech, only “true threats” are proscribed by law. Id. at 49; State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

The State's burden to prove the threat to kill actually caused the victim to fear for her life arises from the Legislature's primary purpose in criminalizing threats -- to address the harm caused to the victim. C.G., 150 Wn.2d at 610-12. A person placed in fear of being killed is, in general, harmed more than a person threatened with bodily injury. Id. This greater harm accords with the Legislature's elevation of a threat to kill to a felony. Id. Thus, in order to prove the felony, the State must show the threat actually caused the victim to fear being killed. Id. (reversing felony harassment conviction, finding victim’s generalized “concern” or fear that defendant might harm someone in future was insufficient proof of threat to kill).

b. The State did not prove all the elements of felony harassment, as the State did not prove Ms. Guzman feared being killed by Mr. Garrett.

As discussed, to prove the charge of felony harassment, the State was required to prove beyond a reasonable doubt that the threats caused Ms. Guzman reasonably to fear for her life, and that the words constituted a “true threat.” C.G., 150 Wn.2d at 612; Kilburn, 151 Wn.2d at 43.

In reviewing the sufficiency of the evidence to uphold the conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Even when viewed in the light most favorable to the State, the evidence is insufficient to prove felony harassment in this case. When Ms. Guzman testified at trial, what limited testimony she provided fell far short of showing fear resulting from Mr. Garrett's alleged words. Ms. Guzman, testifying under a material witness order, refused to say anything about the alleged incident at the trial. 7/21/14 RP 148. In what little she did reveal about Mr. Garrett or their relationship, she said nothing about any statements or comments allegedly made by him. Id. at 154 (responding "yes" to only one question during entire direct examination, regarding the room in which the incident took place).

Even the testimony provided by the responding officers was vague when referring to any alleged threatening statements made by Mr. Garrett to Ms. Guzman. 7/22/14 RP 208-12. Officer Walker testified that Ms. Guzman reported that she had felt threatened, but the officer's

testimony failed to tie this fear to an actual threat to kill by Mr. Garrett.

7/22/14 RP 208-09.

This is because the alleged threat was not an actual threat to kill, but was, instead, hyperbole, which the jury heard through Officer Walker: “something to the point of, ‘If I’m going to go to jail, I might as well go to jail for killing you.’” *Id.* at 208 (emphasis added). Officer Walker then testified Ms. Guzman told him she thought Mr. Garrett “might kill her.” *Id.* at 210. Since Ms. Guzman never testified about the incident in court, there was no clarification of whether she believed Mr. Garrett “might” kill her in connection with the incident that evening, or whether it was an off-hand remark said in the heat of a two-way argument. *Id.* at 213-14 (noting the context of the alleged threat, after which Ms. Guzman chased Mr. Garrett into the street to argue with him about money).

c. Because the State failed to prove an essential element of felony harassment, reversal with prejudice is required.

Ms. Guzman was not afraid that Mr. Garrett would kill her, and did not testify to such a fear at trial. 7/21/14 RP 111-58. As in C.G., the level of “concern” expressed second-hand through Ms. Guzman’s vague statements to officers that Mr. Garrett “might” -- at some point -- kill her, are insufficient to convict. 150 Wn.2d at 608; 7/22/14 RP 209. Even if

Mr. Garrett actually made the comment attributed to him, that he “might as well” kill Ms. Guzman, this does not rise to the level required to convict of felony harassment , which requires a specific threat to kill. See C.G., 150 Wn.2d at 612; Kilburn, 151 Wn.2d at 43; Schaler, 169 Wn.2d at 283-84. As the Supreme Court held in C.G., without a reasonable fear that a threat to kill will be carried out, the State has only proved fear of bodily injury, a misdemeanor. C.G., 150 Wn.2d at 611. And lastly, the First Amendment prohibits the State from criminalizing language that may resemble a threat, but is in fact, merely idle talk or hyperbole. Schaler, 169 Wn.2d at 283-84; See Kilburn, 151 Wn.2d at 49.

Because the State failed to prove the essential element of a threat to kill, the conviction for felony harassment must be reversed and the charge dismissed.

2. THE TRIAL COURT ERRED WHEN IT ADMITTED A PREJUDICIAL AND IRRELEVANT COURT DOCKET RELATING TO A DISMISSED CASE.

- a. Evidence Rule 404(b) prohibits the admission of propensity evidence.

The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (citing State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995)).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

Where the only relevance of the other acts is to show a propensity to commit similar bad acts, the erroneous admission of prior bad acts may result in reversal. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character, and showing a person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Before admitting such evidence, a trial court must first find the prior act occurred, and then: (1) identify the purpose for introducing such evidence; (2) determine whether the evidence is relevant to an element of the current charge; and (3) find that the probative value of the evidence outweighs its inherently prejudicial value. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). If prior bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must

also be “relevant and necessary to prove an essential ingredient of the crime charged.” State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In doubtful cases, such evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. Id.

Here, over objection, the trial court admitted evidence of Mr. Garrett’s prior arrest for a malicious mischief misdemeanor, through a Kent Municipal Court docket. 7/23/14 RP 315; Ex. 33. By motion in limine, the State had moved to admit reference to this prior incident under ER 404(b). 7/16/14 RP 11-14. Mr. Garrett objected, arguing that the admission of the prior incident would be highly prejudicial, and that it was not relevant, considering the no-contact order was already admissible. Id. at 15, 20.⁵

Following argument, the trial court admitted the prior incident, in order to show “the victim’s state of mind and credibility, proving reasonable fear prong of the Felony Harassment charge, and to provide a fuller picture of the parties’ relationship.” Id. at 40.

⁵ “Your Honor, as long as the State has a properly certified copy, I believe, pursuant to statute, [the NCO] would be admissible on its face.” 7/16/14 RP 20.

b. The trial court erred by finding that evidence of the prior conduct was relevant to the offense charged.

In the context of ER 404(b),

[t]he trial court must first consider the relevance of prior bad acts by deciding whether the evidence makes the existence of any fact that is of consequence to the determination of the action more or less probable.

State v. Schaffer, 63 Wn. App. 761, 768, 822 P.2d 292 (1991), aff'd 120 Wn.2d 616 (1993) (citing ER 402); ER 401. Even where the evidence is relevant, the court must balance the probative value against the prejudicial effect of the evidence before admitting it. Schaffer, 63 Wn. App. at 768 (citing ER 403). To be admissible, evidence must be logically relevant, that is, necessary to prove an essential element of the crime charged. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000) (citing State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982)).

Here, the trial court admitted a docket of a dismissed Municipal Court case, over Mr. Garrett's objection. 7/23/14 RP 274; Ex. 33. The docket was not required to show the existence of the no-contact order between the parties, since the State had a certified copy, and the NCO was admitted on consent. 7/16/15 RP 20; 7/21/14 RP 16. Moreover, the court docket was irrelevant to the trial court's stated ER 404(b) purpose,

which was to corroborate the “victim’s state of mind and credibility, prov[e] reasonable fear prong of the Felony Harassment charge, and to provide a fuller picture of the parties’ relationship.” 7/16/14 RP 40.

Here, the trial court made insufficient efforts to balance the probative value against the prejudicial effect of admitting the court docket relating to a dismissed case, as required by ER 404(b). After overruling the defense objections to testimony concerning the prior act, the court failed to perform a sufficient ER 404(b) balancing test of prejudicial and probative value concerning the negligible value of a dismissed court docket, when the State already had the certified copy of the no-contact order ready to admit into evidence on consent. 7/16/14 RP 20.

Such actions are not the “careful and thoughtful” balancing test envisioned by ER 404(b) and our Supreme Court. Gresham, 173 Wn.2d at 420; Saltarelli, 98 Wn.2d at 362; Tharp, 96 Wn.2d at 597. By failing to perform such a balancing test, the court abused its discretion in admitting the evidence.

c. Erroneous admission of the 404(b) evidence affected the outcome of the trial, requiring reversal.

An appellate court should reverse on ER 404(b) grounds if it determines within reasonable probabilities the outcome of the trial would have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Tharp, 96 Wn.2d at 599.

Here, the introduction of the court docket affected the verdict. Since Mr. Garrett exercised his constitutional right to remain silent and the jury had heard nothing regarding his criminal history, the ER 404(b) testimony regarding his arrest was the only context the jury heard for Mr. Garrett's past.

The admission of these alleged bad acts was irrelevant, cumulative, and highly prejudicial, and inevitably affected the verdict; thus, Mr. Garrett's conviction should be reversed and remanded. Gresham, 173 Wn.2d at 420; Freeburg, 105 Wn. App. at 501, 507.

3. MR. GARRETT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT.

a. Mr. Garrett has the right to due process.

The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. The right to a

fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The Fourteenth Amendment also “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial – has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

b. Prosecutors have special duties which limit their advocacy.

A prosecutor’s improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595,

598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

c. The prosecutor engaged in misconduct, urging the jury to consider matters not in evidence, disparaging the defense, and denying Mr. Garrett his right to a fair trial.

The deputy prosecutor’s opening statement contained one of the most damaging pieces of evidence that the State apparently believed it

would be able to prove against Mr. Garrett: that Mr. Garrett held a fork over Ms. Guzman and asked, “Have you ever been stabbed a thousand times?” 7/21 RP 100. Later, during the trial, Ms. Guzman refused to testify about the events of March 7-8, 2014, and the State relied upon Ms. Guzman’s statements to police that night, over a standing hearsay objection). 7/23/14 RP 273-74. Officer Walker testified to his conversation with Ms. Guzman at the scene, but did not testify to the “stabbed a thousand times” threat. 7/22/14 RP 211-13. Although the deputy prosecutor attempted to refresh the officer’s recollection with his report, Officer Walker maintained that Mr. Garrett did not say anything else to Ms. Guzman. Id.

No testimony of this purported threat was admitted into evidence during the trial. Despite this, the deputy prosecutor continued to argue to the jury that, in fact, Mr. Garrett made this threat – despite an utter lack of evidence. 7/23/14 RP 356 (“You know what it feels like to be stabbed 1,000 times?”). By his argument, the deputy prosecutor urged the jury to consider evidence outside the record – an alleged threat that the jury never heard, other than from the prosecutor’s own mouth. This misconduct cannot be condoned.

Lastly, the deputy prosecutor also disparaged the defense by referring to Mr. Garrett's counsel's comments in closing argument as a "red herring," a "distraction," and "muddying the waters." 7/23/14 RP 374-75. This Court has found such archaic rhetoric tantamount to implying that defense counsel is engaging in trickery, or is operating smoke and mirrors in order to "get a client off" – and highly improper. See, e.g., State v. Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (reversing where prosecutor disparaged defense counsel by stating that while the defense has an obligation to his client, the prosecutor only seeks "justice"). The prosecutor's argument also undermines the concept of reasonable doubt – implying that the cornerstone of the American legal tradition and a fundamental right is just another defense trick to be pulled out of defense counsel's hat.

Due to the flagrant and ill-intentioned nature of the prosecutor's remarks, Mr. Garrett may raise this particular misconduct for the first time on appeal. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); RAP 2.5(a).

d. Reversal is required.

The cumulative effect of these various instances of prosecutorial misconduct violated Mr. Garrett's right to a fair trial. State v. Reeder, 46

Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the deputy prosecutor's misconduct in the closing argument, there is a substantial likelihood the cumulative effect affected the jury's verdict; therefore, this Court should reverse Mr. Garrett's convictions. Reed, 102 Wn.2d at 146-47; Fleming, 83 Wn. App. at 214.

4. THE TRIAL COURT VIOLATED MR. GARRETT'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONDUCTING THE MATERIAL WITNESS HEARING WHILE EXCLUDING HIM FROM COURT.

"A criminal defendant has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id.⁶

Our Supreme Court has defined a "critical stage" as one at which a defendant's "presence has a relation, reasonably substantial, to the fullness [sic] of his opportunity to defend against the charge." Matter of Pers. Restraint of Benn, 134 Wn.2d 868, 920-21, 952 P.2d 116, 143

⁶ In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by Due Process. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

(1998) (quoting Gagnon, 470 U.S. at 526). Although Washington courts have not recognized a mere request for a continuance as a critical stage requiring the defendant's presence, see id., other hearings, particularly post-jury selection, demand closer scrutiny. See Rushen v. Spain, 464 U.S. 114, 117-18, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (following jury selection, ex parte communications in defendant's absence subject to harmless error review).

After the jury was impaneled and sworn, a hearing was conducted on the record from which Mr. Garrett was excluded. 7/21/15 RP 91-96. Ms. Guzman was brought into court to testify, and a short hearing took place in which the State asked the trial court to find Ms. Guzman a material witness. 7/21/15 RP 91-92. Ms. Guzman's custody status was discussed, since she had been brought to the courthouse involuntarily. Id. At this hearing, defense counsel also explained his need to interview Ms. Guzman before the commencement of trial, since Ms. Guzman had thus far evaded both defense and State subpoenas. Id. None of this could be heard by Mr. Garrett, however, since he was not permitted to attend this hearing. Id. at 92 ("Just if the record can reflect that I am present in court, but my client is not present for this hearing that the State is bringing regarding the material witness").

A violation of a defendant's right to be present at all critical stages of the proceedings is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Id. at 886. Here, it is unknown and unknowable what input or suggestions Mr. Garrett might have had for his defense counsel at the material witness hearing, since he was excluded from participating.

Accordingly, the State cannot show that Mr. Garrett's absence during this critical stage was harmless beyond a reasonable doubt. Reversal and a new trial are required. Irby, 170 Wn.2d at 886-87.

E. CONCLUSION

For the above reasons, Mr. Garrett's convictions should be reversed and the matter dismissed. In the alternative, due to the due process violations, the matter should be reversed and remanded for a new trial.

Respectfully submitted this 24th day of July, 2015.

s/ Jan Trasen

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

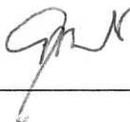
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 72565-3-I
)	
ASHANTE GARRETT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF JULY, 2015, I CAUSED THE ORIGINAL **OPENING 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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[X] ASHANTE GARRETT 309446 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF JULY, 2015.

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