COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Adams District Court Honorable C. Vincent Phelps Case Number: 07CR1574	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Edward Arthur Vigil Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender MICHAEL C. MATTIS, #37869 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 08CA1748
REPLY BRIEF OF MR. EDWARD ARTHUR VIGIL	

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The reply brief complies with C.A.R. 28(g).

Choose one:

☑ It contains 3,179 words.

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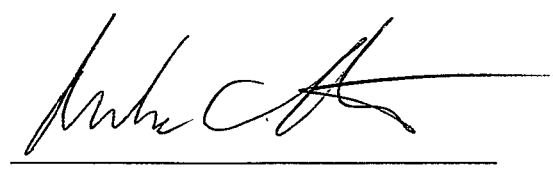

In response to matters raised in the State's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Mr. Vigil submits the following Reply Brief.

ARGUMENT

I. The Trial Court Erred When It Granted Two Of The State's Challenges For Cause. The Dismissed Jurors Were Exactly The Kind Of Jurors That Would Have Ensured That Mr. Vigil Received A Fair Trial By Evaluating All The Evidence And Determining Whether The Teenaged Witness's Were Telling The Truth, As Opposed To Automatically Believing The Teenaged Witness's Because They Persisted In Reporting Their Allegations To Police Officers, Counselors, Family Members And Lawyers.

A. Standard of Review and Preservation.

Contrary to the State's claim, the record indicates that McCarthy objected to both of the prosecutor's challenges for cause.(*See* Ans. Br., p8).

After the prosecution challenged Case and Latoski for cause, the court asked McCarthy if he had an objection to the challenges.(v9, pp43-44). McCarthy clearly objected. *Id.* The fact that after his objection he talked about one singular juror does not negate the fact that he objected to both challenges at the outset.

B. Law and Analysis.

Next, the State claims that the court did not abuse its discretion when it dismissed Case and Latoski for cause. However, the State is incorrect.

Potential juror Latoski indicated at the beginning of voir dire that she could be a fair and impartial juror, that she could "listen, analyze, deliberate, and render a verdict of guilty or not guilty," and that she would hold the prosecution to the correct burden of proof and follow the law.(*See* v4, Jury Questionnaire, Juror Nos. 40, 54; v8, pp140, 168, 174). Although her later comments could be construed as a preference that the burden of proof be higher in sex assault cases, (*see* v8, p168), the prosecution did not challenge her on that basis, and therefore this Court cannot consider these comments upon review of this issue. *See People v. Cevallos-Acosta*, 140 P.3d 116, 121 (Colo. App. 2005)(where this Court held that the trial court did not abuse its discretion when it refused to dismiss a purportedly police-biased juror for cause, and refused to consider whether that same juror should have been excused because he was an employee of a public law enforcement agency—because the defense did not challenge him on that basis). Latoski's other comments concerning mental illness, her comfort level with judging credibility, and the difficulty inherent in judging a teenager's credibility were too innocuous to justify the court's decision to dismiss her for cause.

As for potential juror Case, the State claims that the court properly dismissed her for cause because Case indicated that (1) she "could not fairly evaluate the testimony of the teenage victim in this case due to [the victim's] age and [her]

preconceived beliefs that teenagers lie;" and (2) she believed "a teenage girl would report a sexual assault just to get attention."(Ans. Br., p10). However, the State's description of Case's actual comments is exaggerated and taken out of context.

First, Case did not indicate that she could not fairly evaluate the testimony of teenaged witness's because of their age. She merely disagreed with the prosecutor's view that, in every case, teenaged witness's who reported allegations of sexual assault to police officers, counselors, family members, and lawyers, are always telling the truth. Case actually told the court, contrary to the State's view, that her credibility determination would be based on the evidence—not on assumptions.(*See* v8, pp189-90).

Moreover, Case did not have a preconceived belief "that teenagers lie." Again, Case said that some teenagers—not "all" teenagers—could "go to the extreme point where the truth comes out . . . *depending on her situation.*"(*See* v8, pp189-90)(emphasis added). Notably, it was the prosecutor that said Case's comments were "strong" and that she felt that teenagers were "fundamentally dishonest"—however, Case neither said nor implied such a thing.

Second, Case did not say that she believed "a teenage girl would report a sexual assault just to get attention" in every case, as the State implies.(*See* Ans. Br., p10). In fact, her statement is riddled with language that indicates she was uncertain about the

different motivations of the witnesses in the case and she was willing to listen to the evidence and make her credibility determination thereafter:

> **[Prosecutor]:** Does it make sense to you that a 15-or-16-year old girl, for attention's sake, would report it to police officers, counselors, family members, lawyers?
>
> ****
>
> **[Juror Case]:** *It all depends* because [L.M.] was in a treatment center. *Who knows* what she was wanting or needing. *I don't know* how long she was in there, *if* she was still, I wouldn't call it still, recovering from being addicted to something, wanting something, missing compassion from her family, wanting compassion. *Maybe* [Mr. Vigil] offered her something.

(*See* v8, pp189-90)(emphasis added).

Thus, Case did not indicate that she would be biased against either side, or that she could not render a fair and impartial verdict according to the laws and evidence presented at trial. Moreover, Case's comments were proper and should not have disqualified her from sitting as a juror in Mr. Vigil's case.

As the record does not adequately support the court's decision to dismiss potential jurors Case and Latoski for cause, the court abused its discretion. *See People v. Loggins*, 981 P.2d 630, 633 (Colo. App. 1998)(decision should be reversed if the record does not adequately support the trial court's decision to grant the challenge for cause).

Reversal is therefore required. *See People v. Lefebre*, 5 P.3d 295, 304-05 (Colo. 2000).

II. The District Court Reversibly Erred When It Did Not Inquire Into The Circumstances Surrounding Mr. Vigil's Dissatisfaction With His Attorney, Did Not Allow Mr. Vigil To Obtain Substitute Counsel, And Forced Mr. Vigil To Go To Trial With Unprepared And/Or Incompetent Counsel.

A. Standard of Review and Preservation.

The State claims that the issue of whether the trial court erred when it failed to inquire into the reasons for Mr. Vigil's dissatisfaction with counsel is reviewed for an abuse of discretion, and if an abuse of discretion is found, the error is analyzed for harmlessness.(Ans. Br., p12). Again, the State is incorrect.

First, to support its abuse of discretion argument the State confuses the issue of whether a court failed to inquire with the issue of whether the court erred when it refused to substitute counsel.(*See* Ans. Br., p12 (citing *People v. Jenkins*, 83 P.3d 1122, 1125 (Colo. App. 2003)(reviewing refusal to grant defendant substitute counsel for an abuse of discretion); *People v. Hodges*, 134 P.3d 419, 425 (Colo. App. 2005)(same)).

Whether a trial court inquired into the reasons for a defendant's dissatisfaction with counsel must be reviewed de novo. *See, e.g., People v. Kelling*, 151 P.3d 650, 655 (Colo. App. 2006). This must be the case because when a defendant expresses dissatisfaction with counsel, the trial court **must** inquire into the reasons for the dissatisfaction. *See People v. Arguello*, 772 P.2d 87, 94 (Colo. 1989). As the trial court

does not have the discretion to refuse to inquire under these circumstances, it follows then that this Court cannot evaluate whether the court abused that non-existent discretion on appeal.

Second, assuming arguendo that the error is not structural, the error concerns a defendant's constitutional rights to counsel and a fair trial, and therefore constitutional harmless error applies.

Finally, the remedy here is not a remand because a remand would be unnecessary and duplicitous. *Cf. People v. Miranda-Olivas*, 41 P.3d 658, 661 (Colo. 2001)("where the record below reveals no conflicting evidence regarding the details of the encounter, remand is unnecessary where the appellate court can apply the correct legal standard"). Mr. Vigil's allegations are undisputed, sufficient, supported by McCarthy's comments, and are clear from the existing record. Thus, this Court can apply the correct legal standard and decide this case.

B. Law and Analysis.

In its Answer Brief, the State claims that "the trial court had no duty to further inquire into [Mr. Vigil's] dissatisfaction with counsel," presumably because Mr. Vigil "placed in the record [his] reasons for dissatisfaction with counsel" and could not identify "any other reason for dissatisfaction that would have been elicited through a formal inquiry."(*See* Ans. Br., pp17-19). Moreover, the State argues that any error was

harmless because (1) McCarthy's failure to subpoena Jones and McCollum was a tactical decision rather than the result of unprepared and/or incompetent counsel; (2) Mr. Vigil's "reasons for dissatisfaction with counsel did not qualify as good cause for substituting counsel;" and (3) Mr. Vigil did not assert a conflict of interest and did not request to dismiss McCarthy.(*See id.*). However, the State is incorrect on all three points.

First, the State cannot argue on the one hand that Mr. Vigil placed in the record his reasons for dissatisfaction with counsel and did not identify "any other reason for dissatisfaction that would have been elicited through a formal inquiry"—and on the other—fault Mr. Vigil for not asserting a conflict of interest or requesting to dismiss McCarthy. It has to be one or the other. For example, if this Court believes that Mr. Vigil's comments were tantamount to a request for new counsel, then the question here is whether the court abused its discretion when it denied Mr. Vigil's request.(*See* Op. Br., Section III). Contrarily, if this Court believes that Mr. Vigil's comments were not tantamount to a request for new counsel, then the court had a duty to make a more "formal inquiry" into Mr. Vigil's dissatisfaction and discover more information—for example, the substance of Jones and McCollum's testimony, and the remedy Mr. Vigil sought to address the situation. *See Kelling, supra.*

Moreover, it is unfair to blame Mr. Vigil, a person untrained in the law, for not asserting a conflict of interest or requesting to dismiss McCarthy. Mr. Vigil tried to tell the court his concerns, but before he could request any relief, the court cut him off and shut him down, stating, "We're done. Seal it up."(*See* v17, pp2-4).

Second, McCarthy's failure to subpoena Jones and McCollum was obviously not a tactical decision. Rather, all the facts indicate that McCarthy had intended on calling Jones and McCollum to testify in Mr. Vigil's defense, but did not because he was unprepared and/or incompetent. For example, (1) a month before trial, McCarthy requested a continuance to secure Jones and McCollum; (2) before voir dire, McCarthy told the potential jurors that "the witnesses we'll have in this case, in addition to Mr. Art Vigil, will be Terrance Jones . . . and Mr. John McCollum;" and (3) on the first day of trial, McCarthy again requested a continuance to secure Jones and McCollum.(v8, p17).

Third, Mr. Vigil's reasons for dissatisfaction with counsel clearly qualified as good cause for substituting counsel. At the time when Mr. Vigil expressed dissatisfaction with counsel, the court knew that (1) McCarthy was unprepared and/or incompetent because he requested a continuance six months before trial so he could contact Jones and McCollum, but did not; (2) McCarthy still had not contacted Jones and McCollum on the first day of trial; (3) Mr. Vigil was on trial for an offense that

would require the court to sentence Mr. Vigil to what amounts to life in prison if the jury found him guilty; and (4) Jones and McCollum's testimony was "favorable" and a "major part" of Mr. Vigil's defense.(Supplemental CD, 5/5/08 hearing, pp6-8; v17, pp2-4).

Moreover, the cases cited by the State concerning good cause are inapplicable here.(Ans. Br., pp17-18). In *Guyton v. State*, 642 S.E.2d 67, 73 (Ga. 2007), the attorney failed to subpoena the defendant's family members to testify **at sentencing**. Similarly, in *Bryant v. State*, 115 P.3d 1249, 1258 (Alaska App. 2005), the attorney failed to subpoena a witness that the court was not even sure was "necessary." Here, McCarthy failed to subpoena Jones and McCollum to testify at a **sex assault trial**, and there was no question that their testimony was necessary to Mr. Vigil's defense.

In sum, Mr. Vigil clearly expressed dissatisfaction with counsel which triggered the court's duty to inquire. However, the court erroneously did not inquire. The State did not—and cannot—prove that this error was harmless beyond a reasonable doubt.

Contrarily, if this Court finds that the court did not have a duty to inquire because Mr. Vigil had otherwise placed in the record his reasons for dissatisfaction with counsel, then the court erred when it refused to allow Mr. Vigil substitute counsel and forced him to go to trial with unprepared and/or incompetent counsel.(*See* Op. Br., Section III).

In either case, reversal is required.

III. The District Court Reversibly Erred When It Violated Mr. Vigil's Right To Counsel Of His Choice And Forced Him To Go To Trial With Unwanted, Unprepared, And/Or Incompetent Counsel.

The State's Answer Brief warrants no further response from Mr. Vigil on this issue. Thus, Mr. Vigil rests on the arguments and authorities provided in his Opening Brief.(*See* Op. Br., pp30-33).

IV. The Interests Of Justice Required The Trial Court To Grant Mr. Vigil A New Trial.

A. Standard of Review and Preservation.

The State claims that in all cases "the standard of review [in reviewing a trial court's decision to deny a motion for new trial] is abuse of discretion because trial courts have broad discretion in deciding motions for new trial."(Ans. Br., p21). However, the State is incorrect.

In cases such as here, where there is a mixed question of law and fact, (*see, e.g.*, Op. Br., pp37-40), this Court applies the abuse of discretion standard to the court's finding of fact, and reviews the court's conclusions of law de novo. *See People v. Hill*, 228 P.3d 171, 173 (Colo. App. 2009)(generally, the decision to grant or deny a new trial is reviewed under an abuse of discretion, but in cases where the ruling is based on a question of law, this Court must review de novo); *People v. Whitman*, 205 P.3d 371, 386 (Colo. App. 2007)(same).

B. Law and Analysis.

The State claims that the trial court did not abuse its discretion when it denied McCarthy's motion for new trial because (1) the court properly relied on the Rules of Civil Procedure to find that McCarthy's subpoenas were invalid; and (2) the motion was not sufficiently particular in that it "did not give the court any indication of what [Jones and McCollum] were purportedly going to testify to at trial."(Ans. Br., pp25-26). Again, the State is incorrect.

First, Crim. P. 57(b) only allows a court to rely on the Rules of Civil Procedure when "no Rule of Criminal Procedure exists" or "no procedure is prescribed by [criminal] rule." *See, e.g., People v. Griffin*, 224 P.3d 292, 295 (Colo. App. 2009)(where no rule of criminal procedure existed that allowed the admission of attorneys pro hac vice, it was proper for the court to rely on the civil rules). Here, a rule of criminal procedure exists, *see* Crim. P. 17 entitled "Subpoena," and subsection (e) of that rule, entitled "Service," clearly sets out the procedure for the service of subpoenas—and does not contain a time limit. Thus, there is no need to rely on the civil rules, and the court's reliance on the civil rule to impose a non-existent time limit was improper.

Moreover, assuming arguendo that the court properly relied on C.R.C.P. 45(c)'s forty-eight hour requirement, rule 45(c) does not mandate, as the trial court believed, that the court quash all subpoenas that are not filed in compliance with the rule. Rule

45(c) states, in pertinent part: "*Unless otherwise ordered by the court for good cause shown*, such subpoena shall be served no later than forty-eight hours before the time for appearance set out in said subpoena."(emphasis added). Here, McCarthy clearly demonstrated good cause. McCarthy admitted that (1) he erroneously assumed, without actually speaking to Jones and McCollum, that they would voluntarily show up to testify for Mr. Vigil; (2) even though Jones and McCollum did not return his call, he did not subpoena them until the end of the trial; (3) the failure to subpoena Jones and McCollum was not a strategic choice; and (4) Jones and McCollum's testimony was "favorable" and a "major part" of Mr. Vigil's defense. Thus, had the court correctly interpreted the civil rule it was relying on, it would have been forced to acknowledge that there was good cause—Mr. Vigil's right to counsel and fair trial—to uphold the validity of the subpoena even though it was filed less than forty-eight hours before the testimony.

As an aside, it is interesting to note that when there was a possibility that two of the prosecution's witnesses were going to disobey their subpoenas and not show up to testify, the court did not require an offer of proof, or even request any action from the prosecutor. The court sua sponte told the prosecutors that, "if [the witnesses] don't show up, I'll solve that problem."(v11, p26).

Thus, the court erred when it did not consider that Jones and McCollum refused to appear despite the fact that McCarthy issued them valid and enforceable subpoenas when it decided on McCarthy's motion for new trial.

Second, while it is true that McCarthy's motion did not tell the court exactly what Jones and McCollum were going to testify to at trial, the court admitted that it knew the substance of Jones and McCollum's testimony at the time it was considering the motion because it read the affidavit for arrest warrant that was attached to the PSI. Hence, Mr. Vigil is not arguing that the "trial court should have known" the substance of Jones and McCollum's testimony—he is arguing that the trial court knew the substance of Jones and McCollum's testimony but denied the motion nevertheless.(Ans. Br., pp25-26).

Finally, the State's argument that, even if the court did read the arrest affidavit, it did not know the testimony of Jones and McCollum because "an inference can be drawn that the witnesses would not have testified in a manner anticipated by the defendant" from the fact that they "did not appear voluntarily or following service of the subpoenas," is unpersuasive.(*Id.*). This argument is extremely speculative, as there could have been many reasons—other than a change in the substance of their testimony—that Jones and McCollum chose to ignore their subpoenas. For example,

they may have been ordered by their employer, Arapahoe House, who was being sued by L.M.'s family, not to voluntarily testify.

Thus, the court erred when it did not consider the substance of Jones and McCollum's testimony—as presented in the affidavit for arrest warrant—when it decided McCarthy's motion for new trial.

Under the circumstances here, the "the interests of justice" require this Court to grant Mr. Vigil a new trial. *See* Crim. P. 33(c).

CONCLUSION

Mr. Vigil rests on the reasons and authorities presented in his Opening Brief for the arguments stated in the State's Answer Brief not addressed here. THEREFORE, based on the arguments and authorities presented in Mr. Vigil's Reply and Opening Briefs, Mr. Vigil respectfully requests that this Court vacate his convictions and reverse and remand his case for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on December 23, 2010, a copy of this Reply Brief was served on Rebecca A. Adams of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us:

K. Root