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No. 68604-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN BRANDICH, JR.,

Appellant.

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

The Honorable Michael Trickey

APPELLANT'S REPLY BRIEF

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A. **ARGUMENT IN REPLY**

Richard Brandich raised a diminished capacity defense to the charges of attempted first-degree robbery and attempted escape based upon his ingestion of heroin and a number of prescription drugs, which caused him to enter a blackout state. He presented the testimony of Dr. Robert Julien, one of the few experts available for hire by indigent defendants at the rate of pay offered by the King County Office of Public Defense. At trial, over defense counsel's strenuous objection, the prosecutor established that Dr. Julien had worked with defense counsel and given testimony favorable to the defense in other very similar cases. As the trial court found, this cross-examination impugned the integrity of defense counsel and was misconduct. Mr. Brandich's convictions should be reversed.

1. **The civil authorities cited by the State are irrelevant and inapplicable given the constitutional rights at stake in a criminal prosecution.**

Relying on civil cases, the State asserts that the questions were not improper. Br. Resp. at 19. The civil authorities cited by the State are of questionable relevance to

the issue presented here. See e.g. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595-96, 113 S.Ct. 2786, 125 L.Ed.2d 496 (1993) (in case abolishing "general acceptance" standard for admission of scientific testimony, court lists cross-examination, presentation of contrary evidence, and careful instruction as means of challenging scientific evidence); Elm Grove Coal Co. v. Director, O.W.C.P., 480 F.3d 278, 301-03 (4th Cir. 2007) (Fourth Circuit Court of Appeals holds that in some instances attorney work product provided to expert witnesses may be discoverable).

Ma'ele v. Arrington, 111 Wn. App. 557, 45 P.3d 557 (2002), one of the two Washington cases cited by the State on this point, does not relate to the question presented here, as the issue was whether, in a civil tort action, the trial court erred in permitting an expert to testify where the party calling the expert did not comply with a discovery order. Id. at 564. In holding that the complainant was not prejudiced, the court noted that the complainant was able to establish the expert's bias by eliciting testimony that the expert

worked primarily in defense cases and earned a substantial amount of money doing so. In no way can this holding be said to create a license for the kinds of questions posed by this prosecutor in this criminal matter.

Brown v. Spokane Fire Protection Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983), likewise involved a challenge to limitations upon the scope of cross-examination. Id. at 202-03. In holding that the court's restrictions were proper, the Court noted that the petitioner had been permitted to elicit evidence that the expert had previously been retained by the same attorney. Id. This civil case does not announce a rule of general application, and the Court did not pass upon the propriety of such questions in a criminal case.

Civil cases do not implicate the Sixth Amendment right to the assistance of counsel, nor are civil litigants guaranteed a fundamentally fair trial by the due process clause. For a similar reason, the State's citation to Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), is inapt, as Davis dealt with the constitutional right of an

accused person to confrontation. Davis, 415 U.S. at 315-17. The State does not possess a constitutional right to confrontation.

The State cannot identify any criminal cases where Washington courts have sanctioned questions like those posed by the prosecutor here.[1] To the contrary, as established in Mr. Brandich's opening brief, Washington courts zealously guard the right of an accused person to the assistance of counsel and do not hesitate to reverse convictions procured by misconduct that undermines the integrity of defense counsel. See Br. App. at 16-17.

Other jurisdictions concur that conduct like the prosecutor's behavior in Mr. Brandich's trial is reversible misconduct. See People v. McBride, 228 P.3d 216, 223 (Colo. App. 2009) (improper to denigrate defense by insinuating that expert concocted or colored his testimony in exchange for his fee and the prospect of future work); State v. Nelson, 803 A.2d 1, 28 (N.J. 2002) (prosecutor's repeated

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[1] Perhaps for this reason, the State does not cite any authority for its statement, "The State is not precluded from challenging experts in criminal cases by this traditional means and did not act in bad faith by doing so in this case." See Br. Resp. at 19.

suggestion that experts were part of the defense team and "wore the same color jersey" improperly "insinuated that the experts' testimony was contrived and that they had colluded with the defense"); State v. Hughes, 969 P.2d 1184, 1197-98 (Ariz. 1998) (prosecutor's repeated suggestion that defense-retained psychologists and psychiatrists had fabricated their testimony in collusion with defense counsel improperly implied unethical conduct on the part of the expert and impugned integrity of defense counsel, preventing defendant from receiving fair determination on insanity defense); State v. Vines, 412 S.E.2d 156, 162-63 (N.C. App. 1992) (prosecutor's comments that "you can get a doctor to say just about anything these days" and physician's testimony was motivated by "pay" attacked integrity of expert and defense counsel and was of such "gross impropriety" as to merit reversal even absent objection); State v. Rose, 548 A.2d 1058, 1091 (N.J. 1988) (prosecutor's insinuation that expert's testimony was fabricated or contrived with the assistance of defense counsel was misconduct that warranted reversal of death sentence); People v. Tyson, 377

N.W.2d 738, 743 (Mich. 1985) (prosecutor's suggestion that defense expert lacked integrity and was testifying to insanity defense because he had a business interest in getting his fee was misconduct warranting reversal).

2. **The prosecutor's questions were not probative of bias and impugned the integrity of both the defense expert and Mr. Brandich's defense counsel.**

The State alternatively suggests the questions were probative of "bias" and therefore proper. As the criminal cases referenced above show, however, the right of an accused person to the assistance of counsel and to a fair trial prohibit a prosecutor from impugning the integrity of counsel or undermining the right to a defense. It is worth reemphasizing that the State has not cited a criminal case in which questions like those posed by the prosecutor here were deemed permissible.[2]

Furthermore, the prosecutor in this case was afforded ample latitude to cross-examine Dr. Julian regarding his bias. She established that Dr. Julien was primarily a

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[2] Given the many decisions finding similar questions and arguments improper, the State's claim that there was "nothing negative" about the prosecutor's questions, Br. Resp. at 22, is unpersuasive.

defense expert and had testified on behalf of criminal defendants on more than 50 occasions. 4RP 40-41. She elicited evidence that Dr. Julien had been retained by the defense, that he was being paid $150 per hour, that he had spent between eight and ten hours working on the case, and that his travel expenses were paid. 4RP 46-47. She was also permitted to question Dr. Julien about whether he believed that serving as an expert in defense cases was lucrative. 4RP 45-46.

Setting aside for the moment the impropriety of the questions, the State cannot show why, in light of this extensive cross-examination on bias, the State should also have been allowed to question Dr. Julien about having worked with Mr. Brandich's public defender on similar cases presenting identical issues.[3] In short, the questions were not permissible to show "bias," and they were not necessary given the prosecutor's extensive and thorough exploration of this topic. The State's argument is without merit.

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[3] For this reason, the State's assertion that the prosecutor's object in asking the questions about Mr. Wolfe was to show "that Julien had a financial interest that created a potential bias toward the defense," Br. Resp. at 26, is unconvincing. The prosecutor was fully able to develop this theme without having to also impugn defense counsel.

3. **The court's instruction to the jury did not cure but rather aggravated the problem.**

The State last argues that the trial court's curative instruction solved the problem. The State is wrong. The court's instruction emphasized that a "relationship," or "cooperation," between defense counsel, Mr. Wolfe, and Dr. Julien existed, but told the jury to disregard it. 4RP 124. The court told the jury:

> During the cross-examination this morning, there were several references made to an alleged relationship or cooperation between the defense counsel and the witness. I'm now going to sustain the objections to that. I'm going to strike all of that question and testimony, and you are instructed to disregard any allegations or inferences of any kind of relationship between defense counsel and the witness.

4RP 124.[4]

Although courts generally presume that jurors follow the court's instructions, jurors are human, and courts recognize that in some circumstances a curative instruction cannot dispel the prejudicial effect of certain kinds of

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[4] The State asserts in its Statement of the Facts that Mr. Brandich did not object to the wording of this curative instruction, Br. Resp. at 17, but this assertion is inaccurate. See 4RP 122 (defense counsel states, "I've very real concerns about whether or not that limiting instruction is sufficient"). The assertion is also a red herring, as Mr. Wolfe believed the only remedy for the prosecutor's misconduct would be a mistrial.

evidence. State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968); accord State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). As is extensively argued in Mr. Brandich's opening brief, the prosecutor's misconduct told the jury that Mr. Brandich's diminished capacity defense was a ploy concocted between and apparently previously used to successful effect by Mr. Wolfe and Dr. Julien. The court's instruction confirmed this impression.

The question the jury was being asked to decide was not whether Mr. Brandich had committed the offense, but whether Mr. Brandich's ability to form intent was diminished by his consumption of narcotics. It was thus of critical importance that the jury believe Dr. Julien's testimony. No curative instruction could have caused the jurors to decide to believe the truth of his testimony after they were supplied extrinsic evidence suggesting that he was a charlatan and in collusion with defense counsel. Mr. Brandich's conviction should be reversed.

4. **The State wrongly couches the issue as solely having to do with whether a mistrial should have been granted, even though Mr. Brandich's assignments of error separately challenge the misconduct as a stand-alone basis for reversal.**

A final point bears mention. Although in its response the State briefly references the standard of review of prosecutorial misconduct, Br. Resp. at 27-28, the State attempts to couch the issue on appeal as whether the court abused its discretion in denying a mistrial. See Br. Resp. at i (State's Table of Contents) and 1 (State's statement of Issues Presented). This characterization is misleading.

Mr. Brandich separately assigned error to the prosecutor's misconduct and the denial of the motion for mistrial, and briefed the misconduct as a stand-alone error. See Br. App. at 1 (Assignments of Error); and 15-22, 24-25 (arguing for reversal based on misconduct). This Court should not be misled into believing that the only question to be decided is whether Judge Trickey should have granted a mistrial. Although Mr. Brandich has also made this argument, see Br. App. at 23, the misconduct is preserved

for review by Mr. Wolfe's specific and timely objections and is an independent basis to reverse his convictions.

B. **CONCLUSION**

This Court should conclude that the prosecutor committed misconduct that denied Mr. Brandich his right to a fair trial and to a defense and impugned the integrity of defense counsel when she questioned the defense expert about his work with counsel on other cases presenting similar facts and defenses. This Court should further conclude that no curative instruction could have alleviated the error, and that the instruction that was given by the trial court exacerabated the problem. The remedy is reversal of Mr. Brandich's convictions.

DATED this 4th day of February, 2012.

Respectfully submitted:

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2013, 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:

[X] DONNA WISE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF FEBRUARY, 2013.

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