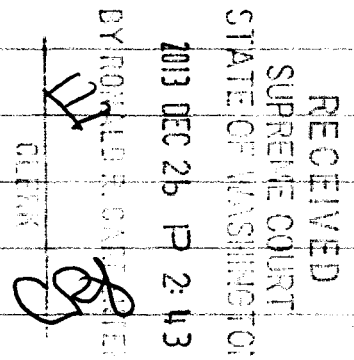
NO. 89577-5

Washington State Supreme Court

State of Washington
Respondent,

v.

Appellant
DAVID D. OGDEN



Motion for Discretionary Review

Court of Appeals No. 68613-5-I
Consolidated with #68614-3

DAVID D. OGDEN
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99362

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1. The trial court erred in denying appellant's right to present evidence in his defence necessary to rebut the State's evidence; and the right to a fair trial.

2. The State's reply and Court of Appeals (COA) argument that uses ER 103(a)(3) is not applicable to this case.

3. The evidence Sought was of high probative value and relevant.

4. Review is proper under RAP 2.5(a)(3).

B. Issues pertaining to Assignments of error

1. Did the trial court's exclusion of evidence deny the appellant his constitutional right to present a defense and a fair trial?

2. Was the State's argument that used ER 103(a)(3), and the COA's use of that rule applicable to this case?

3. Was the evidence Sought of high probative value and relevant?

4. Is review proper under RAP 2.5(a)(3)?

C. Statement of Facts

i Procedural facts

The State charged appellant with first degree robbery (count one) attempted first degree robbery (Count two), and attempted second degree robbery (count three) for three incidents occurring on the 9th and October 12th 2010. CP 1-5, 165-70. Following a jury trial at which appellant's primary defense was diminished capacity, he was convicted as charged. CP 55-57.

The court sentenced appellant to concurrent standard range terms based on offender score of 9 and community custody on each count. CP 145-53, 174-82; 8RP 27-28, 35. Appellant appeals.

ii Diminished capacity defense, rebuttal, and State's theory of motive.

Psychologist, Anthany Eusanio evaluated appellant's ability to form intent to commit the crimes. 4RP 416; see CP 85 (Instruction 19 on diminished capacity). Appellant had incomplete memories of the incidents and confused details with those of similar incidents occurring in California years earlier. 5RP 433, 471. Mr. Eusanio opined that at the time of the incidents, appellant was suffering from an impaired state of consciousness that likely interfered with his ability to act with intent. 5RP 416, 420.

Mr. Eusanio testified at the time of the incidents appellant was suffering from post-traumatic stress disorder (PTSD) and was also impaired by the

interaction of several perscription medications. 5RP 419-21, 432, 441. The P.T.S.D. may have caused a condition known as "substance induced delirium." Eusanio relied in part on the report of pharmacology expert Dr. Robert Julien. 5RP 520-21. Julien testified that as of the month before the incidents, appellant was prescribed methadone (narcotic pain-reliever), hydroxyzine, Oxycodone (another narcotic pain reliver), Ambien ("knockout" sleeping pill), Robaxin (sedative muscle relaxant), Klonopin (tranquilizar similar to Valium), Neurontin (sedative used in treatment of chronic pain) and Wellbutrin (anti-depressant). The combination of all or some of these medications could have inhibited appellant's ability to form memories, which would also suggest severely impaired thinking. 6RP 561-80.

Like Dr. Eusanio, Dr. Julien acknowledged oxycodone is habit-forming and that appellant reports indicated that on 9-27-10, that he was told he would not be prescribed more. 5RP 500; 6RP 624-25. While appellant would likely be able to obtain the medication through illicit means, it would cost more than prescribed. 5RP 500; 6RP 626. Julien acknowledged appellant apartment building was also a "shelter" for indigent men and therefore Julien assumed, appellant was not "of means". 6RP626. This information came out on cross-examination by the prosecution.

On redirect, defense counsel asked Julien whether, based on the 1,000 pages of appellant's medical

records, appellant was "disabled." 6RP 627. The State objected that such testimony went beyond the scope of cross-examination, but defense counsel argued the evidence was necessary to establish that because of his disability, appellant had a sourch of income. 6RP 628. The court sustained the objection without comment. 6RP628.

D. ARGUMENT

Standard of Review

The Supreme Court reviews a trial court's decision on the admission or exclusion of evidence for abuse of discretion. State V. Thomas, 150 Wn. 2d 821, 83 P. 3d 970 (2004) Discretion is abused when it is exercised on untenable grounds, for untenable reasons, In re Det. of Coe, 175 Wn. 2d 482, 492, 286 P. 3d 29 (2012).

Appellant has Constitutional Rights to Present A Defense and A Right to A fair Trial

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the States accusations. Chambers V. Mississippi, 410 US. 284, 294 (1973). A defendant's right to an opportunity to be heard in defense, including to examine witnesses against him

and to offer testimony, is basic in our system of jurisprudence. Id. State V. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010) See U.S. Const. Amend. 6 and Wash. Const. art. 1, sec. 22.

In order to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy, the Sixth Admendment mandates the right to present a defense. Consistent with this right, the Sixth Amendment requires deference to the defendant's strategic decision.

We must remember that "the integrity of the truth-finding process and [a] defendant's right to a fair trial" One important considerations. State V. Hudlow, 99 Wn.2d 1, 15, 659 P.2d (1983). We have therefore noted that for high probative value it appears no State interest can be compelling enough to preclude it's introduction consistant with Sixth ~~Ad~~ Amendment and const. art. 1, sec. 22 Id. 99 Wn.2d art. 16, 659 P.2d 514.

The right to present a complete defense... means (s) that State-law evidentiary restrictions that are arbitrary or disproportionate to the purposes they are design to serve must yield to a defendant's right to present a defense. State V. Sanchez, 171 con. App. 518, 554, 288 P.3d 351 (2012). In Holmes V. South Caroling, 547 U.S. 315 (2006), the court held that "[A] criminal defendant's rights are violated by an evidentiary rule under which the defendant may not introduce evidence."

Here the evidence the defendant was attempting to admit, rebutted the State's obvious motive for committing the crime, i.e., defendants indigency. Had he been allowed to question Dr. Julien, who the defendant confided in, he would have been able to show that 1.) defendant was in fact disabled because of grievious wounds received during military service and was receiving a pension from the Veterans Admin.

ii THE STATES REPLY, AND COURT OF APPEAL (COP) ARGUMENT THAT USES ER 103 (a)(2) IS NOT APPLICABLE TO THIS CASE.

ER 103(a)(2) reads:

(a) Error may not be predicted upon a ruling which admit or excludes evidence unless a substantial right of the party is affected, and

(2) In case that ruling is one excluding evidence, the substance of the evidence was made known to the court or was apparant from the context within which questions were asked. (emphasis added)

the use of ER 103 (a)(2) is in error because, 1) appellant was attempting to admit evidence, 2.) it was the State's duty "to offer proof" why it

should be excluded, and 3) even if it was appellant's duty, he did in fact offer proof why that evidence was necessary.

iii THE EVIDENCE SOUGHT WAS RELEVANT AND OF HIGH PROBATIVE VALUE

Appellant argues that because the evidence sought would have diminished the State's motive for the crime, it was of high probative value.

ER 104 reads in pertinent part:

> Preliminary questions concerning the qualifications of... or the admissibility of evidence shall be determined by the court, subject to the provisions of section s(b) In making it's determination it is not bound by the rules of evidence except those with respect to priviliges.
>
> (b) When the nelevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidance to support a finding of the fulfillment of the condition. (emphasis added)

Appellant argued that because defense counsel informed the court why he wanted that evidence admitted for the jury's consideration, the court abused it's discretion when that evidence was excluded under ER 103(a)(2) when defense counsel was attempting to admit that evidence in his defense. It was the State's duty to offer proof why that evidence was prejudicial because appellant's diminished capacity defense was attached to the State's theory that indigency was a motivation for the crimes.

The constitutional right to present a defense is subject only to the following limitations. (1) the evidence sought to be admitted must be relevant; and (2) the accused's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. Washington V. Texas, 410 U.S. 14, 16 (1967); Hudlow, 99 Wn. 2d, 15, 659 P.2d 514 (1983); State V. Gallegos, 65 Wn. App. 230, 236-37, 828 P. 2d 37.

In other words, a court must permit an accused to present even minimally relevant evidence unless the State demonstrates a compelling reason for exclusion, but no State interest is compelling enough to preclude evidence with high probatative value. State V. Darden, 145 Wn. 2d 612, 621, 41 P. 3d. 1189 (2002); Hudlow 99 Wn. 2d at 16; State V. Reed, 101 Wn. App. 704, 715, 6 P. 3d 43 (2000). Here, the State's only objection, with no offer of proof, was that defense counsel's question on re-direct went beyond

the scope of such examination, eventhough it was the State who opened the door by asking the witness about the defendant's indigency.

The "open door doctrine" permits a party to conduct otherwise improper cross-examination and to introduce inadmissible evidence to explain or contradict the initial evidence. State V. Avendano-Lopez, 79 Wn. App. 206, 714, 904 P.2d 324 (1995) (citation omitted), rev. denied, 129 Wn.2d 1007 (1996). The doctrine is rooted in fairness, "It would be a curious rule of evidance which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." Avendano-Lopez, 79 Wn. App. at 714 (quating State V. Gefeller, 76 Wn.2d. 449, 455, 458 P.2d 17 (1969).

Here the State presented evidence that appellant, who suffered a serious arm injury, had been cut off from prescribtion pain killers a few weeks before the charged crimes. 5 RP 500; 6 RP 625-26. The State used this to support a theory that appellant needed money to secure the drugs through more costly illicit channels. The State was correspondingly, allowed to suggest to the jury that appellant was in dire financial straits and therefore had an incentive to rob the banks and restaurant. But when the defense sought to introduce evidence suggesting that, in fact, appellant had a reliable source of income, the court sustained the State's

objection. 6RP 627-28.

It is well established that an accused must be permitted to rebut the States evidence with relevant evidence and to present the full story to avoid misleading the jury. Gefeller, 76 Wn.2d at 455. As the Gefeller court stated, Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

Id. The court's ruling, which it did not explan, denied appellant the right to present a defense. State V. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State V. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The trial court prevented appellant from presenting evidence that his situation was not as dire as the State portrayed it, infact far from it. The State's argument was a crucial component in rebutting appellant's diminished capacity defense. 5RP 500 (cross-examination of Dr. Easanio reguarding motivation to obtain money for oxycodone and reguarding his apparant financial status); 7RP 751

(Closing argument acknowledging that while the State did not have to prove motive, appellant's need for money to supply his oxycodone habit provided the motive for the robberies). As a result, the State can not prove beyond a reasonable doubt that the jury would have rendered a guilty verdict had appellant been permitted to rebut the State's claims. Guloy, 104 Wn 2d. at 425. Even under a non-constitutional harmless error standard, there is a reasonable likelihood that such evidence could have led to a different resultion to all charges. See State V. Fankhouse, 133 Wn. App. 689, 695, 138 P.3d 140 (2006) (Trail Court's ruling excluding testimony was not harmless because it hampered defendant's ability to challenge credibility of key State witness and inproperly permitted jury to conclude, "once a dealer, always a dealer."

Reviews Proper Under RAP 2.5 (a)(3).

iv. RAP 2.5 (a) (3) reads in pertinent part;

a.) The appellant court may refuse to review any any claim of error which was not raised in the trial court, however, a party may raise the following claimed erros for the first time in the appellant court:

(3) manifest error affecting a constitutional right, a party or the court may raise at any time the question of appellate court jurisdiction.

See also: State V. Bertrand, 185 Wn. App. 393, 416-17, 267 P. 3d 511 (2011), Two separate burdens are placed on an appellant seeking review under the exception in RAP 2.5 (a)
(3) for a review of an unpreserved error, first a defendant must establish that a "manifest error" occurred and, second, a defendant must establish that the error affected a constitutional right. In reviewing alleged errors brought pursuant to RAP 2.5(a)(3). Courts should determine whether the appellant has met the burden of showing that a manifest error occurred before addressing the appellant's constitutional claims Id. Appellant has done so.

E. Conclusion

Wherefore all of the above reasons, this Honorable Court should grant Appellant review.

Date: 12-22-13 by: David D. Ogden
DAVID DOUGLAS OGDEN

Certificate of Mailing

I declare that I mailed a true and correct copy of the enclosed Motion for Discretionary Review, on the below date, in the internal mail system of the Washington State Penitentiary and made arrangements for postage, addressed to:

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date: 12-22-13 by: Daniel D. Ogden

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

STATE OF WASHINGTON, Respondent, v. DAVID D. OGDEN, Appellant.	)	No. 68613-5-I consolidated with No. 68614-3-I UNPUBLISHED OPINION FILED: September 23, 2013

VERELLEN, J. — David Ogden appeals his convictions on charges of first degree robbery, attempted first degree robbery, and attempted second degree robbery. First, Ogden contends that the trial court erred by precluding him from introducing evidence necessary to rebut the prosecution theory that he had a financial motivation for the offenses. Because Ogden's trial counsel made no offer of proof as to the matter he intended to prove, this issue was not preserved for appellate review. Second, Ogden asserts, and the State concedes, that his sentence contains errors. We affirm the convictions, but remand for resentencing to correct the miscalculated offender score, incorrect community custody term, and sentence in excess of the statutory maximum.

FACTS

The State charged Ogden with first degree robbery for an October 9, 2010 incident in which he robbed a Seattle bank of $250,[1] attempted first degree robbery for an incident later that day in which he demanded money from a teller at a different Seattle bank, but left without taking money,[2] and attempted second degree robbery for an October 12, 2010 incident in which he attempted to rob a Seattle restaurant by telling a cashier he had a gun, but fled before obtaining money.[3] At trial, the State presented the testimony of the bank tellers and restaurant employees who observed the incidents, and the police officers and detectives who investigated the offenses. The jury was also shown extensive physical evidence that Ogden committed the offenses, including his clothing seen in video from the bank robberies which was later found by police in his apartment.

Ogden's defense to each incident was diminished capacity due to a combination of pharmacological and psychological factors. He presented the expert testimony of Dr. Anthony Eusanio, who diagnosed him with posttraumatic stress disorder and other medical disorders. Dr. Eusanio opined that a combination of medications prescribed to Ogden may have interacted and, in combination with his medical and psychological

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[1] This incident was recorded to video by the bank's video system; a copy of the video was played to the jury.

[2] This incident was also recorded and the recording was played for the jury.

[3] Ogden was pursued and apprehended by an employee of the restaurant, then taken into custody by police officers.

conditions, caused a "delirium."[4] Defense expert Dr. Robert Julien, who specialized in pharmacology, also testified that Ogden had been prescribed medications that could have caused drug-induced dementia or amnesia. Dr. Julien opined that Ogden was likely in a state of diminished capacity when he committed the offenses, but noted that his opinion depended on unknown factors, including which medications Ogden had actually taken.

To address the diminished capacity defense, the State presented the testimony of psychologist Dr. Ray Hendrickson and neuropsychologist Dr. Brett Parmenter. Dr. Hendrickson testified that Ogden was likely not in a substance-induced delirium at the time of the offenses based on his clinical observations of Ogden and review of the video recordings and witness accounts of the incidents. Dr. Parmenter testified that Ogden was likely exaggerating his symptoms based on his forensic mental health evaluation of Ogden.

The jury convicted Ogden as charged. The trial court imposed standard range sentences for each count.

Ogden appeals.

ANALYSIS

Dr. Julien's Testimony

Ogden contends that the trial court denied his right to present a defense by excluding evidence needed to rebut the State's theory that his indigency was the motive

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[4] Report of Proceedings (RP) (Dec. 15, 2011) at 418. Dr. Eusanio also testified that Ogden scored in "the top one percent" on a scale indicating likely malingering or exaggerating his symptoms. Id. at 463.

for the offenses. Specifically, he contends that the trial court erred by excluding evidence that he was eligible for disability benefits. But the record demonstrates that Ogden's statement of the issue does not accurately describe the nature of the testimony offered at trial. Moreover, the record reveals that he failed to preserve the issue for appellate review by making an adequate offer of proof to the trial court.

Ogden's argument relies on a single trial court ruling sustaining the prosecutor's objection to testimony Ogden sought to elicit from pharmacology expert Dr. Julien. On redirect examination, Ogden's counsel asked Dr. Julien whether, based upon the medical records, "Mr. Ogden [is] disabled."[5] The prosecutor objected, arguing that the testimony was beyond the scope of the State's cross-examination. In response, Ogden's counsel argued that the evidence concerned only a potential source of income to Ogden, based on his indigency: "Your Honor the question was, based upon the doctor's review of the medical records, whether or not Mr. Ogden was disabled. *It goes to the question of source of income,* to the indigency issue raised by the State.[6] The trial court sustained the objection. Ogden made no further argument.

Ogden poses the issue as a violation of his state and federal constitutional rights to present a defense and due process protections,[7] as well as his right under the rules

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[5] RP (Dec. 19, 2011) at 628.

[6] Id. (emphasis added).

[7] The Sixth and Fourteenth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee an accused the right to defend against the State's allegations. This right is also recognized as a fundamental element of state and federal due process protections. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

of evidence to present relevant evidence.[8] These constitutional rights have limitations, however, including the requirement that the evidence sought to be admitted must be relevant.[9] But Ogden failed to persuasively present any basis for a determination that the evidence of whether or not Dr. Julien considered him disabled was relevant to the question of his indigency or to establish that he received income as a result of any disability.

Although Ogden argued that Dr. Julien's testimony that he was "disabled" was relevant to the question of whether he had a "source of income,"[10] he failed to make an adequate, timely offer of proof, as ER 103(a)(2) requires.[11] When error is predicated on a ruling that excludes evidence, it is the duty of a party offering evidence "to make clear to the trial court what it is that he offers in proof, *and the reason why he deems the offer admissible* over the objections of his opponent, so that the court may make an informed ruling."[12]

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[8] Ogden cites ER 401, which provides that evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[9] State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37 (1992).

[10] RP (Dec. 19, 2011) at 628.

[11] State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1260 (1991) ("An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.").

[12] Id. at 539 (emphasis added).

Although an offer of proof is not required "if the substance of the excluded evidence is apparent from the record,"[13] here, the substance of the testimony is not apparent. Unlike Ray, here there was no "extended colloquy" between the trial court and counsel, that "revealed the substance of the evidence . . . and the theory under which it was offered."[14] Ogden's counsel did not explain why Dr. Julien's potential testimony that Ogden was either disabled or not was relevant to the issue of his indigency, or how Dr. Julien could make such a determination "based upon the doctor's review of the medical records."[15] Even assuming that Dr. Julien could opine that Ogden was disabled, it was never explained to the trial court if, or how, Dr. Julien would know whether Ogden received income due to his disability.[16]

This issue was not adequately preserved for review.

Sentencing

Ogden identifies three errors relevant to his sentence. The State concedes the errors occurred. The record demonstrates that the State's concessions are well taken.

First, Ogden's offender score included a prior Colorado burglary conviction. Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, a foreign conviction is included in a defendant's offender score if it is comparable to a Washington felony.[17]

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[13] Id.

[14] Id.

[15] RP (Dec. 19, 2011) at 628.

[16] Ogden also did not explain that the "indigency issue" he referenced in argument concerned the State's theory of a financial motive.

[17] RCW 9.94A.030(11), .525(3); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).

Because no comparability analysis occurred, the conviction was erroneously included in Ogden's criminal history.

Second, Ogden's 36-month term of community custody on the first degree robbery conviction was based on the classification of his first degree robbery as a "serious violent offense." First degree robbery is a violent offense," but not a "serious violent offense."[18] The term of community custody imposed was in excess of that allowed by statute.[19]

Third, the 18-month term of community custody imposed on the attempted second degree robbery conviction was based on the classification of attempted second degree robbery as a "violent offense." Attempted second degree robbery is not a "violent offense."[20] On remand, the community custody term must be stricken.

The sentence for attempted first degree robbery,[21] 128 months of confinement and 18 months of community custody, was in excess of the statutory maximum 120 months.[22] On remand, the sentence must not exceed 120 months.

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[18] Compare RCW 9.94A.030(45), with RCW 9.94A.030(54).

[19] RCW 9.94A.701(2).

[20] State v. Becker, 59 Wn. App. 848, 851-55, 801 P.2d 1015 (1990).

[21] RCW 9.94A.701(9). Attempted first degree robbery is a class B felony. RCW 9A.28.020(3)(b). The standard range sentence for attempted first degree robbery is 96.75 to 128.25 months. RCW 9.94A.510; RCW 9.94A.515 (first degree robbery has a seriousness level of IX);RCW 9.94A.533(2) (standard range for criminal attempt is 75 percent of the standard range).

[22] RCW 9A.20.021(1)(b).

Statement of Additional Grounds for Review

Finally, Ogden submitted a statement of additional grounds for review.[23] However, he does not present any reasoned argument or analysis to identify any specific claim of error. This statement is inadequate to inform us of the nature and occurrence of alleged errors and is, accordingly, unreviewable under RAP 10.10(c).[24]

We affirm the convictions and remand to correct the sentence.

WE CONCUR:

[23] The statement of additional grounds consists of a chart with three columns headed "prosecutor misconduct," "ineffective [counsel]," and "judge misconduct," page citations to the verbatim report of proceedings in each column, and a list of authorities.

[24] While a defendant is not required to cite to the record or authority in a pro se statement of additional grounds, he must still inform the court of the nature and occurrence of alleged errors. State v. Thompson, 169 Wn. App. 436, 493, 290 P.3d 996 (2012).