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NO. 70801-5-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

DALLAS BARNES,
Appellant,

vs.

THE STATE OF WASHINGTON, through
WASHINGTON STATE UNIVERSITY,
Respondent.

APPELLANT'S REPLY BRIEF

ANDREA J. CLARE, WSBA #37889
MATHEW W. PURCELL, WSBA #46219
LEAVY, SCHULTZ, DAVIS, CLARE & RUFF, P.S.
Attorneys for Appellant
2415 W. Falls Avenue
Kennewick, WA 99336
509-736-1330
509-736-1580 Fax

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I. ARGUMENT

A. Dallas Barnes is not seeking to “re-try the facts of this case before the appellate courts” but instead requests review by this court to ensure justice was exercised at the trial court level.

The State of Washington, through counsel for Washington State University, asserts that Dallas Barnes is attempting to “re-try the facts of this case before the appellate courts”. Respondent’s Brief, page 9. Such a claim could not be further from the truth. Dallas Barnes’ appeal is the only re-course when a trial court improperly, unjustly, and prejudicially excludes relevant evidence from the trier of fact. Substantial and cumulative errors were observed and repeated throughout the course of Dallas Barnes’ jury trial. Unfortunately, the State’s response strives to present a picture that fails to accurately represent the totality of relevant and critical facts in order to support the trial court’s erroneous decisions. However, since the jury was shielded from *all* the relevant facts offered by Dallas Barnes, they failed to render a fully educated verdict.

In terms of relevance, those facts offered can include direct or circumstantial evidence of any element of a claim or defense. *State v. Weaville*, 162 Wash.App. 801, 818, 256 P.3d 426 (2011). Under the modern rules of evidence, the threshold to admit said relevant evidence is low such that even minimally relevant evidence is deemed admissible.

Kappelman v. Lutz, 167 Wash.2d 1, 8, 217 P.3d 286 (2009); *State v. Gregory*, 158 Wash.2d 759, 836, 147 P.3d 1201 (2006); *State v. Darden*, 145 Wash.2d 612, 621, 41 P.3d 1189 (2002). Dallas Barnes met such standards and the trial court erred by rejecting critical evidence. Indeed, the court's cumulative, prejudicial errors justify a new trial to ensure justice was achieved.

B. The testimony of Dallas Barnes' expert witness, Marc Brenman, served to assist the jury in understanding the unique and specialized employment environment within a University. Likewise, Marc Brenman's testimony would have shown that Dallas Barnes' prior legal action negatively impacted the University's future treatment of him. Prohibiting Brenman's testimony in its entirety further prejudiced Barnes from obtaining fair trial.

The State's support for Brenman's exclusion is misplaced when his opinions, taken as a whole, would assist the trier of fact in understanding the culture and nature of academia. Expert testimony is admissible if the witness qualifies as an expert and the expert testimony would be helpful to the jury. *State v. Hayward*, 152 Wash.App. 632, 649, 217 P.3d 354 (2009). Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading. *Moses v. Payne*, C.A.9 (Wash.) 2009, 555 F.3d 742, 756 (2009); *State v. Groth*, 163 Wash.App. 548, 564, 261 P.3d 183 (2011).

Here, there was no question that Marc Brenman qualified as an expert. His opinions would have assisted the jury in presenting a full,

complete, and accurate picture of the environment created not just at Washington State University but in academia as a whole. Marc Brenman's credentials provide him powerful insight of the various accepted practices and patterns routinely observed in the higher educational employment setting. Specifically, the jury would have benefitted from his opinions and conclusions surrounding Dallas Barnes' lengthy employment history with WSU.

Dallas Barnes' complaint is grounded in the specialized environment of academia. Marc Brenman was well suited to explain those intricacies based upon his vast knowledge and experience with discrimination occurring in higher education administration.

Understanding the inner workings of academia and the effect of Dallas Barnes' prior legal suit against Washington State University would have been helpful to the jury in order to fully understand the employment environment of a University. Brenman testified that such specialized information is not known by the general public with a common experience or perception of the workplace. Marc Brenman would have assisted the jury in understanding that the decisions made and practices employed by a university are unique to academia culture/administration. The jury would have benefitted from Brenman's testimony and could have weighted it according to the standard expert instruction.

Courts have held that evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is relevant evidence. *Hayes v. Wieber Enterprises, Inc.*, 105 Wash.App. 611, 617, 20 P.3d 496 (2001). Courts generally interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases. *State v. Groth*, 163 Wash.App. 548, 564, 261 P.3d 183 (2011); *Moore v. Hagge*, 158 Wash.App. 137, 155, 241 P.3d 787 (2010). Thus, the court erred by precluding Brenman from testifying.

The opinions relied upon in the State's brief plainly miss the point of Brenman's expert testimony. In *Kolta*, the California Court of Appeals case, the facts are so unique and detailed that the court reasoned 'no learned professional could relate the employer's actions to patterned behavior recognizable by an expert'. *Kolta v. Regents of Univ. of California*, 115 Cal. App. 4th 283, 8 Cal. Rptr. 3d 898 (2004). In *Kolta*, the expert based his opinion of retaliatory termination on a very tight six-month timeline of unique facts where no behavioral patterns had time to develop. *Id.*

Conversely, the facts relating to Dallas Barnes' complaints span nearly two decades, and the testimony of expert Brenman purports to reveal that the State's actions are not unique. Rather, they follow patterns

familiar to expert Brenman – patterns he observed during nearly twenty-two years of evaluating civil rights claims and issues in academia with the Office for Civil Rights of the United States Department of Education. To relate the testimony in *Kotla* to the testimony proposed by the Dallas Barnes unfairly disregards expert Brenman’s ability to identify behavioral patterns and provide the jury with relevant, specialized information that they themselves would not be able to understand without the assistance of an expert.

Additionally, the Ninth Circuit Court of Appeals case offered in the State’s brief is similarly misleading. In *Ward v. Westland*, the court began its discussion of the expert testimony by discounting the trial court’s reasoning in denying the testimony. *Ward v. Westland Plastics, Inc.*, 651 F.2d 1266, 1270 (“Ward’s attack on the legal correctness of the court’s reasoning is not without merit”). In *Ward*, the appellate court was reluctant to supplant trial court discretion in disallowing evidence where the plaintiff offers limited authority in defense of her position. *Id* at 1271. Furthermore, the *Ward* court determined that “[t]he prejudice Ward suffered from the omission is not obvious.” Here, Dr. Barnes faces clear prejudice – without expert Brenman’s testimony, the jury has no insight

into patterns of civil rights abuses within academia; an area so complex “as to require the aid of an expert.” *Id.*

Unfortunately, Dallas Barnes was deprived of his right to provide the trier of fact with relevant evidence pertaining to his theories and claims. Preventing Dallas Barnes from presenting such evidence is a clear abuse of discretion when viewed in light of decades of precedent regarding relevance and expert testimony concerning a party’s complaint. Consequently a new trial is the only appropriate remedy.

C. Dallas Barnes’ case was irreparably harmed and unjustly prejudiced by the State’s opening statement. The trial court’s refusal to allow Barnes an opportunity to refute the statements amounted to an unfair double standard which further compounded the error.

In its responsive brief, the State provides an illogical conclusion in its attempt to clarify the purpose of the opening statement and witness testimony regarding Mr. Contreras’ racist comments about himself. The State argues it was intended to portray Mr. Contreras as an equal opportunity discriminator whose animus was so self-deprecatory as to be harmless. As the record now stands, it is alleged that his animus appears so unfocused that it could not have motivated his specific maltreatment of the Dallas Barnes.

By granting the State's motion to exclude testimony regarding Mr. Contreras' racist comments about Dallas Barnes' colleagues, the trial court unfairly eliminated Dallas Barnes' opportunity to rebut the State's opening statement and show that Mr. Contreras' animus was squarely focused on champions of civil rights and critics of discrimination – individuals who deserve the court's protection, individuals such as Dallas Barnes.

Thus, in its briefing, the State fails to respond to Dallas Barnes' contention that he was unfairly denied the right to rebut the defense's strategy of labeling Mr. Contreras as a harmless, self-deprecating duffer. The State adamantly argues against any broad contextualization of Mr. Contreras' racist tendencies, yet it proceeded to elicit testimony about Mr. Contreras' usage of racist slurs that, at worst, characterizes Mr. Contreras as a man who manages contentious issues with humor and humility. Because of the trial court's ruling, Dallas Barnes has no way to establish a contrary image of Mr. Contreras – an image of a man steeped in animus towards champions of civil rights; a reactionary leader who squelches opposing voices with racially charged insults and demeaning professional demotions.

Furthermore, the State continually submits that testimony about Mr. Contreras' widespread slur usage would effect a mini-trial within Dallas Barnes' trial. The state and trial court, mistakenly evaluated the

nature of the testimony proposed by Dallas Barnes. Rather than deciding an entirely separate claim (as the State suggests), the jury would simply hear and evaluate first-hand testimony regarding Mr. Contreras' widespread usage of slurs and his administrative actions toward Dallas Barnes. Such testimony directly relates to Mr. Contreras' motivation behind his maltreatment of Dallas Barnes – a critical issue at trial. Indeed, this matter was suppressed at a point markedly advantageous to the State. In the interest of justice, Dallas Barnes deserves the opportunity to expose the half-truths that have provided that advantage. *State v. Gefeller*, 76 Wash. 2d 449, 458 P.2d 17 (1969).

As such, the State would like to believe it can proffer any opening statement it wishes, including the presentment of misinformation, and Dallas Barnes is powerless to do anything about it. However, case law dictates that where the State goes beyond mere argument in their opening statement then they can, and should, be subject to answering to those assertions whether it be direct examination or the presentment of relevant, rebuttal evidence through lay and expert testimony.

Courts should evaluate comments issued in opening statements on an individual basis. In determining any alleged misconduct on the part of the State in their opening statement, each case must stand by itself and must be considered in light of all particular circumstances. *State v. Hart*,

26 Wash.2d 776, 795, 175 P.2d 944 (1946). Parties may refer in opening statement to admissible evidence expected to be presented at trial. *State v. Mellis*, 2 Wash.App. 850, 860, 470 P.2d 558 (1970); *State v. Piche*, 71 Wash.2d 583, 585, 430 P.2d 522 (1967). However, the opposite occurred in Barnes' trial as the State repeatedly made references to issues and evidence that it knew were precluded by the trial court's orders in limine. Thus, the State deliberately crossed the line. The court then perpetuated the problem by denying Barnes any opportunity to correct the statement and/or offer evidence to the contrary.

It is well founded that one party should not be free to paint a false picture. *State v. Gallagher*, 112 Wn.App. 601, 610, 51 P.3d 100 (2002). Yet the State did precisely that. Unfortunately, the trial court not only permitted the State to distort the truth, it denied Barnes objections and/or ability to counter the inaccurate comments, thus allowing counsel's 'arguments' to go unchecked.

The Rules of Evidence are designed to aid in establishing truth. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17, 20 (1969). An attorney may anticipate testimony in opening argument as long as there is a good-faith belief that testimony will be produced at trial. *State v. Grisby*, 97 Wash.2d 493, 499, 647 P.2d 6 (1982); *Frazier v. Cupp*, 394 U.S. 731, 735 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). Here, contrary to the Rules of

Evidence, the State's order in limine precluded Dallas Barnes from aiding in establishing truth. Rather, the State was able to discuss issues and make assertions that they knew Dallas Barnes would be prohibited from disproving through expert testimony and the presentment of relevant evidence through lay witnesses.

II. CONCLUSION

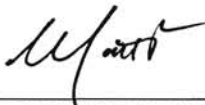
The Court of Appeals should order a new trial based on any one of the multiple assignments of errors presented by Dallas Barnes.

Alternatively, based on the cumulative impact of the court's erroneous decisions, Dallas Barnes should be afforded a new trial to ensure justice is achieved without prejudice.

DATED this 11th day of September, 2013.

Respectfully Submitted,

LEAVY, SCHULTZ, DAVIS, CLARE & RUFF, P.S.
Attorneys for Dr. Dallas Barnes




ANDREA J. CLARE, WSBA NO. 37889
MATHEW W. PURCELL, WSBA NO. 46219

CERTIFICATE OF SERVICE

I, Kristi Flyg, hereby certify that on the 11th day of September, 2013, I caused to be served a true and correct copy of Appellant's Reply Brief by the method indicated below, and addressed to the following:

- | | | |
|-------------------------------------|------------------|----------------------------|
| <input type="checkbox"/> | Hand-delivered | PAUL TRIESCH |
| <input type="checkbox"/> | First-Class Mail | ATTORNEY GENERAL'S OFFICE |
| <input checked="" type="checkbox"/> | Overnight Mail | 800 Fifth Avenue, Ste 2000 |
| <input type="checkbox"/> | Facsimile | Seattle, WA 98104 |



KRISTI FLYG
of Leavy, Schultz, Davis, Clare & Ruff, P.S.

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