No. 44633-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LESTER
Appellant.

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

REPLY BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ARGUMENT

1. The admission of testimonial statements of a nontestifying witness violated Mr. Lester's Sixth Amendment right to confrontation and violated the rules of evidence.

Over Joseph Lester's objection, the trial court allowed a witness to testify Keisha Lewis claimed that when she had previously stabbed she was acting in self-defense. RP 85, 220. The court concluded the statement was admissible under ER 804 as a statement against Ms. Lewis's penal interest. RP 85. Again over Mr. Lester's objection, the court also allowed Ms. Barnes to testify that a few days prior to her death, Ms. Lewis claimed to be afraid of Mr. Lester. RP 75-76, 185.

ER 804(b) provides in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> (3) . . . . A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. **In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement**

(Emphasis added.)

Mr. Lester has argued Ms. Lewis's statement was exculpatory and that the State failed to offer any corroboration of its trustworthiness. The State's brief does not address this argument in any way. Thus, the State has not identified any corroborating circumstances which clearly indicate the trustworthiness of Ms. Lewis's statement. The State does not address cases which hold that statements which seek to minimize the declarant's liability are not truly against the declarant's penal interest. *State v. St. Pierre*, 111 Wn.2d 105, 116, 759 P.2d 383 (1988).

> A statement conceding a minor role to declarant and attributing to another the major responsibility resembles more an attempt to foist blame on the other while minimizing the declarant's responsibility, and thus the statement as a whole advances far more than it impairs the interest of the declarant . . . .

State v. Whelchel, 115 Wn.2d 708, 719-20, 801 P.2d 948 (1990) (quoting 4 D. Louisell & C. Mueller, *Federal Evidence* § 489, at 1141 (1980)).

Here, as with the statements in *Whelchel* and *St. Pierre*, Ms. Lewis's claim of self-defense was plainly self-serving and made with exculpatory intent. But the State's brief does not address any of this. Ms. Lewis's exculpatory statement was not properly admitted as a statement against her penal interest.

Moreover, as set forth in Mr. Lester's initial brief, assuming the statement was actually against Ms. Lewis's penal interest it must then be

testimonial. The essence of the hearsay exception is that because of the criminal penalty which can flow from them, such statements would not be made if not true. If that is the case, a reasonable person would understand that the statement was "potentially relevant to later criminal prosecution." *See State v. Mason*, 160 Wn.2d 910, 918, 162 P.3d 396 (2007) *cert. denied*, 553 U.S. 1035 (2008). The admission of Ms. Lewis's testimonial statements violated Mr. Lester's right to confrontation. *Bullcoming v. New Mexico*, _ U.S. _, 131 S. Ct. 2705, 2713, 180 L. Ed. 2d 610 (2011). The court erred in admitting the statement.

2. Trial counsel's proposal of an instruction which misstates the State's burden of proof deprived Mr. Lester of a fair trial.

"When a defense 'negates' an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense." *State v. Deer*, 175 Wn. 2d 725, 734, 287 P.3d 539 (2012), *cert. denied*, 133 S. Ct. 991 (2013).

> The State is foreclosed from shifting the burden of proof to the defendant . . . "when an affirmative defense *does* negate an element of the crime."

Smith v. United States, __ U.S. __, 133 S. Ct. 714, 719, 184 L. Ed. 2d (2013) (quoting *Martin v. Ohio*, 480 U.S. 228, 237, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987)).

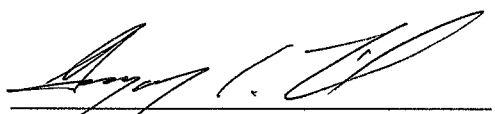
"Diminished capacity . . . negates one of the elements of the alleged crime." *State v. Nuss*, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988); *see also State v. Gough*, 52 Wn. App, 619, 622, 768 P.2d 1028 (1989) (diminished capacity differs from insanity because diminished capacity "allows a defendant to undermine a specific element of the offense"). Because it negates an element the State must disprove the defense. *Deer*, 175 Wn. 2d at 734; *Smith*, 133 S. Ct. at 719.

As argued in Mr. Lester's opening brief, by proposing an instruction which relieved the State of its burden of proof defense counsel's performance was deficient and prejudicial to Mr. Lester.

B. CONCLUSION

For the reasons above, and those argued previously, this Court should reverse Mr. Lester's convictions.

Respectfully submitted this 28th day of April, 2014.



GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. JOSEPH LESTER, Appellant.	)))))))))	NO. 44633-2-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KAWYNE LUND, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
[X] JOSEPH LESTER 305123 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF APRIL, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

April 29, 2014 - 3:49 PM

Transmittal Letter

Document Uploaded: 446332-Reply Brief.pdf

Case Name: STATE V. JOSEPH LESTER

Court of Appeals Case Number: 44633-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us