

NO. 45826-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

AYALNEH M. ANEBO,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Christine Schaller, Judge
Cause No. 13-1-00443-1

REPLY BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in admitting evidence in violation of Anebo's right of confrontation.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether admission of State's Exhibit 16, a map displaying a building labeled "Olympic View Elementary School," violated Anebo's right of confrontation?

C. STATEMENT OF THE CASE

Appellant Ayalneh Anebo incorporates and adopts by reference the statement of the case and law set forth in his opening brief filed May 31, 2014. On July 23, the State filed its respondent's brief. For purposes of this reply brief, Anebo limits his argument to the following.

D. ARGUMENT IN REPLY TO STATE'S RESPONSE

THE ADMISSION OF STATE'S EXHIBIT 16, A MAP DISPLAYING A BUILDING LABELED "OLYMPIC VIEW ELEMENTARY SCHOOL," VIOLATED ANEBO'S RIGHT OF CONFRONTATION.

For the reasons fully set forth in Anebo's opening brief, the admission of State's Exhibit 16 violated his right of confrontation. In arguing to the contrary, the State, citing State v. Lui, 179 Wn.2d 457, 315 P.3d 493 (2014), claims there was no violation "because

the only analyst who compiled inculpatory evidence testified at trial.” [Brief of Respondent at 2]. A careful reading of Lui suggests otherwise.

Lui was charged with second degree murder. Lui, 179 Wn.2d at 464. The State presented testimony from Dr. Richard Harruff, chief medical examiner, identifying the manner of death and the fact that the deceased was dressed postmortem, which was based on the examiner’s review of the autopsy report and photographs taken at the autopsy, which the examiner had not preformed. Id., at 465, 494. The examiner also testified to the conclusions of a toxicology report prepared by another analyst and to temperature readings of the deceased’s body taken by another doctor, which the examiner used to estimate a range for the time of death. Id., at 465. Additionally, Gina Pineda, supervisor of a DNA laboratory, testified regarding DNA testing she had not performed. Lui objected on hearsay and confrontation grounds. Id., at 466.

The court examined Lui’s claims solely under the Sixth Amendment, finding that article I, section 22 of the Washington Constitution provided no more protection under the facts of the case with regard to Lui’s right of confrontation. Id., at 467-470. Acknowledging that a majority of the United States Supreme Court has yet to “provide a controlling rule on cases like Lui’s that involve expert witnesses(,)” the court turned to the plain language of the Sixth Amendment: one charged

with an offense has the right to be confronted with “the witnesses against him.” Id. at 469. From this, a five-member majority of the court articulated a “working rule” for confrontation of expert witnesses: if a declarant makes a factual statement to the tribunal he or she is a witness; and if the witness’s statements inculcate the defendant, then the witness is a witness against the defendant and the confrontation clause applies. Id. at 480.

The court applied its newly fashioned “working rule” to the admissibility of the testimony regarding (1) the results of the DNA testing, (2) the temperature readings, and (3) the toxicology and autopsy reports. Addressing the former two, the court held there was no confrontation violation in either instance because the testifying witness had brought his or her expertise to bear on the data compiled by others in order to reach the conclusion presented the jury. Regarding the DNA evidence presented through supervisor Pineda, rather than the analysts who had conducted the testing, the court reasoned that the testing process does not become inculpatory and invoke the confrontation clause until an analyst employs

his or her expertise to interpret the machine readings and create a profile. Pineda used her expertise to create a factual profile that incriminated Lui, and therefore Pineda was the appropriate witness to introduce the DNA.

Id., at 486. Same thing for the temperature readings. The Sixth Amendment lies dormant “without the intervening analysis of an expert. Because Harruff used his expertise to turn raw data into a conclusion that inculpated Lui, it is Harruff and not (the person who took the temperature readings) with whom the confrontation clause is concerned.” Id., at 493.

Different result with the toxicology and autopsy reports, where statements taken from the reports were used for the purposes of identifying the cause and manner of death and to prove that the deceased was dressed postmortem. Id., at 494. The chief medical examiner “did not bring his expertise to bear on the statements or add original analysis—he merely recited a conclusion prepared by nontestifying experts.” Id. Citing Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705, 180 L.Ed. 2d 610 (2011), the court held this evidence violated Lui’s right of confrontation, but the error was harmless given the overwhelming untainted evidence of his guilt. Id., at 495-97.

In this case, Alfaro-Haugen provided no original analysis and brought no expertise to bear on the map displaying a building labeled “Olympic View Elementary School.” Like the chief medical examiner in Lui addressing the toxicology and autopsy reports, Alfaro-Haugen testified to information about which she had no personal knowledge: “I was able to find Olympic View Elementary School in relationship to

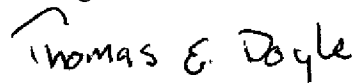
(Uon's) house, because I was given an address of the school." [RP 226].

Boiled down, Alfaro-Haugen merely recited conclusions prepared by nontestifying witnesses. The point being made is this: Alfaro-Haugen brought no expertise to bear on the information on the map, which, by itself, inculpated Anebo, for the map, State's Exhibit 16, constituted statements of fact used to prove the sentence enhancement. All of which was derived from information provided from an unknown source designating the name and location at issue. Admission of the information violated Anebo's right of confrontation.

E. CONCLUSION

Based on the above, Anebo respectfully requests this court to vacate his sentencing enhancements.

DATED this 20th day of August 2014.


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CERTIFICATE

I certify that I served a copy of the above reply brief on this date as follows:

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