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NO. 72263-8-I

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

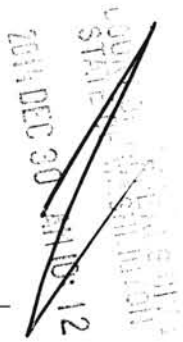
STATE OF WASHINGTON,

Appellant,

v.

SAYIDEN K. MOHAMED,

Respondent.



BRIEF OF APPELLANT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Appellant

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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> The court committed an error of law in permitting the State to cross-examine defense's expert with the defendant's prior criminal convictions.

3. The trial court erred in entering conclusion of law no. 2:

> In accordance with CrR 7.5(a)(6), a new trial is granted because of an error of law occurring at trial and objected to at the time by the defendant.

4. The trial court erred in entering conclusion of law no. 3:

> Given current case authority, this court is compelled to grant a new trial, because this case cannot be significantly distinguished from State v. Lucas.

II. ISSUES

A defense expert based his opinion on statements made by the defendant. The expert acknowledged that the validity of his opinion depended on the accuracy of those statements. The court instructed the jurors that they could decide what weight or credibility to give the defendant's statements. Were these statements admitted as proof of the matters asserted, so as to allow the expert to be cross-examined about the defendant's prior convictions?

III. STATEMENT OF THE CASE

A. INTRODUCTION.

The defendant (respondent) was charged with two counts of third degree assault. CP 111. At trial, a defense expert testified that he had based his conclusions on information given to him by the defendant. 7/1 RP 56. The State was allowed to cross-examine the expert about the defendant's prior convictions for crimes of dishonesty. 7/1 RP 69.

A jury found the defendant guilty as charged. CP 86-87. The court then granted a new trial. The court concluded that it had committed an error of law in permitting this cross-examination. The court believed that this error compelled it to grant a new trial. CP 1-2. The State has appealed from the order granting a new trial. CP 3.

B. STATE'S EVIDENCE.

On the evening of April 4, 2014, Everett Police Officers Michael Keith and Jeff Klages responded to a series of 911 calls placed by the defendant. (The substance of these calls was excluded from evidence. 6/30 RP 31.) They detained the defendant during their investigation, but they then released him. He returned to his house. 6/30 RP 75-78, 103-05.

Shortly afterwards, the officers learned that there was a arrest warrant for the defendant. Around that time, another person arrived at the house. The officers asked this person to ask the defendant to come back outside. When the defendant complied, the officers placed him under arrest. 6/30 RP 79-80, 106.

The officers placed the defendant in handcuffs and tried to search him. The defendant began yelling at them and physically resisting. 6/30 RP 81-84, 106-07. While resisting, the defendant spit directly in the face of Officer Klages. He then spit directly in the face of Officer Keith. 6/30 RP 85-87, 108-09.

The officers got the defendant onto the ground. He continued to struggle with them. He yelled at them to let him go. He said that he wanted to spit on them. 6/30 RP 89. The officers obtained a spit mask and placed it on the defendant's head. 6/30 RP 89-91. The defendant told them to take off the mask so he could spit on them some more. 6/30 RP 92.

The officers managed to get the defendant into Officer Keith's patrol car. While being transported to jail, the defendant spit on the Plexiglass screen separating him from Office Keith. He continued yelling at Officer Keith. He said that his people would kill

the officer's family, and that the officer's family would burn in hell. 6/30 RP 111-13.

C. DEFENSE EVIDENCE.

At trial, the defendant's sole witness was a pharmacologist, Dr. Robert Julien. Dr. Julien based his testimony on information that he received during a telephone conversation with the defendant. The defendant told him that he had ingested eight 24-ounce cans of a beer that contained 8.1% alcohol. The defendant also said that he had ingested most of a pint of vodka. He said that he had no memory of subsequent events, until he found himself in jail. 7/1 RP 53, 56. Based on this information, Dr. Julien estimated that the defendant's blood alcohol level was about .40%. 7/1 RP 54-55.

Dr. Julien testified that at level above .30%, virtually everybody will be in a state of alcohol-induced dementia or "blackout." 7/1 RP 46-48. In such a state, the person's frontal cortex will be impaired as well. "So we use inability to form memory as an index of the inability to have executive functioning with judgment, insight, decision making, understanding consequences, everything that goes along with an organic dementia." 7/1 RP 46-49. Based on this impaired frontal lobe activity, Dr. Julien believed that the defendant "could not meet the legal definition of intent." 7/1 RP 58.

Dr. Julien acknowledged that his conclusions depended on the accuracy of the information he had been given. 7/1 RP 56. If the information he was given was "garbage," than his conclusions were likewise "garbage." He had not attempted to judge the truth of the defendant's statements. "I have to leave it to the jury, to the trier of fact, to determine the accuracy, or lack thereof, of this individual." 7/1 RP 68-69.

D. IMPEACHMENT OF DEFENDANT'S STATEMENTS.

The defendant had prior convictions for crimes of dishonesty. The parties agreed that if the defendant testified, these convictions would be admissible for impeachment. 6/30 RP 18-20.

Before Dr. Julien testified, the prosecutor asked permission to cross-examine him concerning the defendant's prior convictions. 7/1 RP 21-22. The court ruled that limited cross-examination would be allowed. The prosecutor would be allowed to ask if Dr. Julien was aware of the defendant's prior convictions. He could then ask how those convictions affected Dr. Julien's opinions. 7/1 RP 19-20.

The court suggested an instruction limiting the use of the defendant's statements: "Statements made by the defendant to Dr. Julien are being offered only for the limited purpose of seeking to help explain Dr. Julien's opinions and are to be considered by you

only for that limited purpose." 7/1 RP 30. Defense counsel told the court, however, that he was not asking for that instruction. The court therefore did not give the instruction. 7/1 RP 30-32.

The prosecutor cross-examined Dr. Julien in accordance with the court's ruling:

> Q. So if you knew that the defendant had been convicted of multiple crimes of dishonesty, like two felony theft convictions and multiple misdemeanor theft convictions, and that he had been dishonest in the past, would you take that into consideration when you come before a jury and stake your reputation by giving the conclusion that you just did?
>
> A. Not in my report. That is not my responsibility to do. It's to report the results of my interview with him. And it's up to others to make the determination of his reliability or lack thereof.

7/1 RP 69-70.

At the conclusion of trial, the court gave the following instruction concerning the prior convictions:

> You may consider information that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's statements, and for no other purpose.

CP 94, inst. no. 4. Defense counsel expressly agreed to this instruction.[1] 7/1 RP 105-08.

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[1] In discussing this instruction, the court referred to it as proposed instruction 3A. It was later renumbered as instruction 4. 7/1 RP 112.

E. GRANT OF NEW TRIAL.

Following the verdicts, defense counsel filed a motion for new trial citing State v. Lucas, 167 Wn. App. 100, 271 P.3d 394 (2012). CP 81-84. The court had not previously been aware of that decision. The court believed that this case could not be significantly distinguished from Lucas. The court therefore concluded that allowing the cross-examination of Dr. Julien was error. Based on this error, the court felt compelled to grant a new trial. 7/30 RP 13-17; CP 1-2.

IV. ARGUMENT

A. BECAUSE THE GRANT OF A NEW TRIAL WAS BASED ON AN ASSERTED ERROR OF LAW, THE TRIAL COURT'S RULING SHOULD BE REVIEWED DE NOVO.

"A trial court's decision granting a new trial will not be disturbed on appeal unless it is predicated on erroneous interpretations of the law or constitutes an abuse of discretion." State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). "[A] court necessarily abuses its discretion where it bases a ruling on an erroneous view of the law." Questions of law are reviewed de novo. In re Marriage of Herridge, 169 Wn. App. 290, 296-97 ¶14, 279 P.3d 956 (2012). Moreover, "[f]ailure to exercise discretion is an

abuse of discretion." Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

Here, the trial court granted a new trial because it believed that it had committed an error of law at the trial. The court felt "compelled" to do so by case law. CP 2; 8/7 RP 5. Whether the trial court committed an error of law is reviewed de novo. If the court did commit an error of law, than the grant of a new trial was proper. On the other hand, if there was no error of law, the court abused its discretion by basing its ruling on an erroneous legal standard.

This court is thus presented with a single legal issue: could the defense expert properly be cross-examined about the defendant's prior convictions for crimes of dishonesty? This issue should be reviewed de novo. If the answer is "yes," than the order granting a new trial was based on an erroneous view of the law and should be reversed.

B. BECAUSE THE COURT ALLOWED THE JURY TO CONSIDER THE DEFENDANT'S STATEMENTS AS PROOF OF THE MATTERS ASSERTED, THE STATE WAS PROPERLY ALLOWED TO IMPEACH THOSE STATEMENTS.

The issue in this case involves application of ER 806:

> When a hearsay statement ... has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any

> evidence which would be admissible for those purposes if declarant had testified as a witness.

It was conceded that, if the defendant testified at trial, his prior convictions for crimes of dishonesty would be admissible for impeachment. 6/30 RP 18-20; see ER 609(a)(2). Consequently, they were equally admissible if the defendant's hearsay statements were admitted.

What constitutes a "hearsay statement" is defined by ER 801:

> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> ...
>
> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Here, the defense introduced evidence of the defendant's oral assertions concerning two subjects: his memory of the events, and the amount of alcohol he had consumed. 7/1 RP 53-54. These statements were not made while testifying at the trial. Consequently, the sole dispositive question is whether these statements were admitted "to prove the truth of the matter asserted." If they were, the defendant's assertions were "hearsay

statements," so the defendant's credibility as declarant was subject to attack under ER 806 and 609.

Several aspects of the present case show that the defendant's statements were admitted for the truth of the matters asserted. First and foremost, the court instructed the jury that it could consider the statements for that purpose:

> You may consider information that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's statements, and for no other purpose.

CP 94, inst. no. 4. Earlier in the trial, the defense *rejected* a proposed instruction that would have admitted the statements "only for the limited purpose of seeking to help explain Dr. Julien's opinions." 7/1 RP 29-31.

If *no* limiting instruction had been given, the jurors would have been free to consider the statements for any relevant purpose. When hearsay evidence is admitted without objection, it may be considered by the trier of fact for its probative value. State v. Whisler, 61 Wn. App. 136, 139, 810 P.2d 540 (1991). It cannot be assumed that jurors will limit their consideration of evidence, if no one ever tells them about any limitation.

Here, however, the court did more than simply remain silent about permissible uses of the defendant's statements. Rather, the court affirmatively told the jurors that they could decide "what weight or credibility to give to the defendant's statements." CP 94. Under this instruction, it was proper for the jury to decide that the facts set out in those statements were true. This makes the statements "hearsay" under ER 801(c).

Even apart from the court's instructions, the expert's testimony made it clear that he was considering the defendant's statements for their truth. On direct examination, the expert acknowledged that his opinion assumed the truth of the defendant's statements:

> **Q.** So your opinion about the fact that he was around a .4 and in a blackout state, that's based on the representations that Mr. Mohamed made to you about how much he drank, is that right?
>
> **A** Yes. As I stated, that is self-report as is the extent of his memory loss.
>
> **Q.** And if that is wrong or inaccurate, your final conclusions could change?
>
> **A.** Most certainly.

7/1 RP 56.

On cross-examination, the expert pointed out the need to assess the veracity of those statements:

> I cannot judge and do not attempt to judge the truth or fallacy [sic] of his statements to me. Even the best of the psychologists are really unable to do that. I have to leave it to the jury, to the jury of fact, to determine the accuracy, or lack thereof, of this individual.
>
> **Q.** So if the individual is feeding you garbage, then your conclusions at the end of the day amounts to garbage, doesn't it?
>
> **A.** They would, yes.

7/1 RP 68-69.

The conclusion is inescapable – the defendant's statements were offered in evidence to prove the truth of the matters asserted. The court told the jury that it could assess the credibility of those statements. Moreover, the defense expert expressly acknowledged that the validity of his conclusions depended on the statements' truth. This being so, the jury was entitled to consider information that was relevant to determining the credibility of those statements. Under ER 806 and 809, the defense expert was properly cross-examined about facts that impeached the defendant as a declarant. The court therefore erred in granting a new trial because of that cross-examination.

C. THE HOLDING OF DIVISION TWO IN LUCAS CANNOT PROPERLY BE APPLIED TO CASES IN WHICH A DEFENDANT'S STATEMENTS ARE ADMITTED WITHOUT LIMITATION.

The trial court believed that a contrary conclusion was compelled by Division Two's decision in Lucas. There, a psychiatrist testified in support of the defendant's claim of diminished capacity. The psychiatrist's opinion was based in part on the defendant's statements. The trial court allowed the prosecutor to cross-examine the psychiatrist about the defendant's prior conviction for robbery. Division Two held that this cross-examination was improper. Because the defendant's statements were not offered as "substantive proof," ER 806 did not allow impeachment of the declarant. Lucas, 167 Wn. App. at 109 ¶ 8.

The opinion in Lucas does not indicate whether any limiting instruction was given to the jury in connection with the defendant's statements. If such an instruction was given, the decision may be correct: because the jury was precluded from considering the statements for their truth, there may have been no need for the jury to determine the statements' credibility. If this is the rationale for the Lucas decision, its analysis does not apply to the present case, where no limiting instruction was given.

On the other hand, if no limiting instruction was given in Lucas, the decision is wrong. Division Two's rationale was that the trial court did not admit the statements for the truth of the matter asserted. It makes no difference, however, what purpose was in the trial judge's mind. If no limitation was conveyed to the jurors, they were free to consider the statements for any purpose they saw fit – including considering them as proof of the truth of the matters stated.

As interpreted by the trial court in the present case, Lucas turns experts into magic filters that screen out impeachment. If the defendant made his statements to any other kind of person, and that person recounted the statements in court, the State could impeach the defendant with his prior convictions. Under the trial court's analysis, however, the defendant cannot be impeached if he makes the statements to an expert, and the expert recounts them. This remains true even though the expert relied on the facts in the defendant's statements, without making any effort to assess their credibility. This makes no sense. If the expert's opinion is based on the defendant's statements, the jury must be given the tools to assess the credibility of those statements.

In the present case, the trial court properly allowed the expert to be cross-examined about facts affecting the defendant's credibility as a declarant. The court erred as a matter of law when it later decided that the cross-examination was improper. This erroneous decision was the sole basis for granting a new trial. The order granting a new trial was therefore an abuse of discretion.

V. CONCLUSION

The order granting a new trial should be reversed. The case should be remanded with instructions to enter judgment on the jury verdicts.

Respectfully submitted on December 29, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Appellant

CL16640437

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

STATE OF WASHINGTON, Plaintiff;	)	No. 14-1-00900-8
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER GRANTING NEW TRIAL
SAYIDEN H. MOHAMED, Defendant.	)	

This matter came before the court for consideration of the defendant's motion for mistrial/new trial. The court considered the motion, the State's response, and the arguments of counsel. Being fully advised, the court granted the motion for new trial on July 30, 2014. As required by CrR 7.5(d), the court now enters the following reasons of law and fact supporting this order. (The Court's reasoning is further elaborated in its oral ruling of July 30, 2014.)

I. FINDINGS OF FACT

1. On the second day of trial, the State raised the issue of cross examining the defense's expert with the defendant's prior theft convictions under ER 806.

2. This issue was not raised in other pleadings during motions in limine.

3. The court was called to make a quick decision Tuesday morning.

4. The court was not aware of the relevant case law, State v. Lucas, 167 Wn.App. 100(2012) until the next morning after the jury was deliberating.

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5. When the court considered the State's motion it thought there was no controlling authority and was an issue of first impression.

6. The court was not provided with the analysis of the opinion in State v. Lucas. If it had, the court's actions would have been different.

8. On Wednesday morning when the court became aware of State v: Lucas, it became clear that the issue was not of first impression.

II. CONCLUSIONS OF LAW

1. The court committed an error of law in permitting the State to cross examine defense's expert with the defendant's prior criminal convictions.

2. In accordance with CrR 7.5(a)(6), a new trial is granted because of an error of law occurring at trial and objected to at the time by the defendant.

Given current case authority, this court is compelled to grant

3. ~~The court has no discretion in granting~~ a new trial, because this case cannot be significantly distinguished from State v. Lucas.

4. The court has found that the State did not engage in mismanagement. The State is not barred from retrying Mr. Mohamed.

Entered this 7th day of August, 2014.

JUDGE DAVID A. KURTZ

Presented by:

Sarah Silbovitz – WSBA # 41924
Attorney for Defendant

Approved for entry:

WSBA # 18289
Deputy Prosecuting Attorney

Snohomish County Public Defender Association
2722 Colby Avenue, Ste. 200
Everett, WA 98201
(425) 339-6300