No. 32254-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAMES AUSTIN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The trial court's exclusion of Professor Connolly's opinion testimony violated Mr. Austin's constitutional right to present a defense.

a. The theory offered by Professor Connolly was generally accepted in the relevant scientific community.

Mr. Austin sought to present testimony from forensic psychologist Deborah Connolly at trial about the impact the Reid Technique has on a suspect's willingness to "confess," and identify factors present during Mr. Austin's interrogation that put him at risk for falsely "confessing." CP 125; 9/5/13 RP 175. The trial court allowed Professor Connolly to discuss the Reid Technique generally, but did not allow her to explain how the technique contributes to false "confessions" or testify that some of the detective's minimization statements could be interpreted as promises of leniency. CP 214. It held there was an "insufficient basis of reliability" for her opinion testimony and that this testimony "would be highly speculative." CP 214. In other words, the trial court found that this testimony failed to meet the Frye[1] standard because it was not based upon an explanatory

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

theory generally accepted in the scientific community. CP 214; State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996).

In its response, the State claims the trial court's ruling was proper because the "jury would not have been aided by Dr. Connolly's testimony beyond what the court permitted." Resp. Br. at 19. This is plainly incorrect. Evidence that use of the Reid Technique results in an increase of both true and false "confessions" would have been useful to the jury and the trial court did not find otherwise. CP 214.

Instead, the trial court excluded the testimony because it was unreliable and speculative. CP 214. This finding is not supported by the record. Professor Connolly testified the scientific paper she relied on to explain how the Reid Technique increases the incidence of false "confessions" is considered to represent the views of the American Psychology and Law Society, the largest North American society made up of those who work on issues at the intersection of psychology and the law. 9/5/13 RP 164. It was the first scientific review paper, which Professor Connolly explained is a type of scientific paper subjected to a particular rigorous review process, that the journal had accepted for publication in 42 years. 9/5/13 RP 163-65. Thus, her undisputed testimony showed this theory was generally accepted in the scientific

community. See State v. Martin, 169 Wn. App. 620, 626, 281 P.3d 315 (2012) ("General acceptance may be found from testimony that asserts it, from articles and publications, from widespread use in the community, or from the holdings of other courts.").

b. The trial court's exclusion of Professor Connolly's testimony was reversible error.

The State's claims the testimony was properly excluded because Professor Connolly had no knowledge of anything "unusual" about Mr. Austin. See Resp. Br. at 16-18. This is irrelevant. Professor Connolly clearly stated she was unable to offer an opinion about whether Mr. Austin's "confession" was false. 9/5/13 RP 175. She did not need information about whether there was anything "unusual" about Mr. Austin in order to offer the jurors evidence the Reid Technique increases the likelihood of obtaining a false "confession" and explain how the technique contributes to false "confessions." CP 125; 9/5/13 RP 175. Indeed, the absence of anything unusual about Mr. Austin only further suggests the research upon Professor Connolly relied was particularly relevant and should have been presented to the jury.

The State, like the trial court, seems to confuse the difference between being unable to testify about whether Mr. Austin's "confession" was false, or estimate the incidence of false "confessions"

generally, with the ability to testify that certain factors increase the likelihood an individual will falsely "confess." See Resp. Br. at 18. This distinction is critical, as it is the latter evidence that Mr. Austin showed was generally accepted in the relevant scientific community, yet the trial court improperly found was unreliable and speculative.

In making this error, the trial court failed to apprehend the fundamental scientific principle that performing research studies in controlled environments allow scientists to draw conclusions about human behavior. The judge expressed confusion when he stated he "didn't know of any generally accepted principle that you conduct – a study of university students somehow can extrapolate to being applied to suspects in criminal cases without knowing which ones falsely confessed and which ones didn't." See 9/5/13 RP 186-87; Op. Br. at 22. Professor Connolly fully addressed the court's concern, explaining that in order to "say that x caused y" it was necessary to randomly assign people to different conditions, which is impossible in the real world. 9/5/13 RP 186-87. Regardless of any reservations the court had about this idea, it should have deferred to Professor Connolly on this basic scientific principle. "[J]udges do not have the expertise required to decide whether a challenged scientific theory is correct" and courts

must therefore "refer this judgment to scientists." Copeland, 130 Wn.2d at 255 (quoting State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)).

The State attempts to rely on the trial court's misguided concern, citing to the fact the research subjects were college students and adding that Professor Connolly "admitted that there is not even a statistically adequate sample on which to base her opinions." Resp. Br. at 16. However, this misstates the record. See Resp. Br. at 16; 9/5/13 RP 176. Professor Connolly agreed with the deputy prosecutor's statement that she could not "say that [Mr. Austin's] confession or any particular confession was false because you don't have enough data." 9/5/13 RP 176. The cite provided by the State does not support an assertion that Professor Connolly did not have a statistically adequate sample upon which to base her opinion at issue here: that use of the Reid Technique has been shown to increase the likelihood of obtaining a false "confession."

In addition, the State's reliance on State v. Rafay is misplaced. 168 Wn. App. 734, 285 P.3d 83 (2012); Resp. Br. at 17-18. As Mr. Austin explained in his opening brief, there was no question in Rafay that the theory at issue was generally accepted in the scientific

community. 168 Wn. App. at 784. Instead, the issue on appeal in Rafay was whether the expert testimony would have been helpful to the trier of fact. Id. The Court's analysis in Rafay is further limited by the fact that significant additional research on the Reid Technique has been performed since the Court's decision in that case. See Op. Br. at 23; 9/5/13 RP 213-215; CP 169.

Professor Connolly's testimony was clear and undisputed. Her opinion that use of the Reid Technique increased the likelihood of false "confessions," and therefore increased the likelihood of Mr. Austin falsely "confessing," based on particular factors, was based on a theory generally accepted in the scientific community and therefore met the Frye standard. The trial court erred when it misapprehended a basic scientific principle and excluded a portion of the expert's testimony. Because this error violated Mr. Austin's constitutional right to present a defense and was not harmless beyond a reasonable doubt, this Court should reverse. See State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 149 (2014); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Op. Br. at 24-26.

2. The legal costs imposed against Mr. Austin should be stricken and the case remanded because the court failed to consider Mr. Austin's resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3).

Our Supreme Court recently held "RCW 10.01.160(3) requires the record to reflect the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs." State v. Blazina, __ Wn.2d __, 344 P.3d 680, 685 (2015). In Blazina, the judgment and sentence contained boilerplate language, almost identical to the boilerplate language in Mr. Austin's judgment and sentence, stating the trial court considered the defendant's financial resources, likelihood his status would change, and found he had the ability, or likely future ability, to pay the discretionary legal financial obligations imposed. Id. at 681-82; CP 9. However, just as in Blazina, the trial court imposed discretionary costs without examining Mr. Austin's ability to pay on the record. Id. at 681. In total, Mr. Austin was required to pay $3,910 in legal financial obligations, which included discretionary costs of $450 for a court appointed attorney and $2860 in court costs. CP 65. The court ordered Mr. Austin to begin making monthly payments of $25 per month within 60 days. CP 275.

As the court recognized in Blazina, legal financial obligations accrue interest at a rate of 12 percent, and may accumulate collection fees when they are not paid on time. __ Wn.2d __, 344 P.3d at 684. "[O]n average, a person who pays $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. Mr. Austin is serving an indeterminate life sentence. CP 272. Even if released at some point, a conviction for first degree child molestation will significantly hinder his ability to find employment, particularly employment that allows him to pay more than $25 per month.

Although Mr. Austin did not challenge the imposition of legal financial obligations at the trial level, this Court should exercise its discretion under RAP 2.5, and remand Mr. Austin's case for a new sentencing hearing. See Blazina, __ Wn.2d __ , 344 P.3d at 682, 685.

3. Mr. Austin's conviction should be reversed because the State's closing denied Mr. Austin a fair trial and because the jury was improperly given an exhibit with the State's highlighting that was prejudicial to the defense.

For the reasons set forth in Mr. Austin's opening brief, the cumulative effect of the deputy prosecutor's misconduct during closing argument mandates reversal. See Op. Br. at 27-33. In addition, as explained in Mr. Austin's opening brief, his conviction should be

reversed because the jury was improperly provided with an exhibit that contained markings prejudicial to the defense. See Op. Br. at 34-37.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse.

DATED this 8th day of May, 2015.

Respectfully submitted,

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Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	EDWARD STEVENSEN, DPA CHELAN COUNTY PROSECUTOR'S OFFICE PO BOX 2596 WENATCHEE, WA 98807-2596	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON, THIS 8TH DAY OF MAY, 2015.

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