

No. 44203-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY EDWARD CHENAULT,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE COURT ERRED IN EXCLUDING
EVIDENCE OF J.D.'S MENTAL HEALTH
PROBLEMS

The State contends evidence of J.D.'s mental health problems was not relevant to the central issues in the case—whether she was incapable of consenting to sexual intercourse, and whether she appeared to Mr. Chenault to be incapable of consent. The State cites no authority for its argument that the *reason* for a person's alleged or apparent incapacity is irrelevant to the question of whether the person actually was incapacitated, or actually appeared to be incapacitated. To the contrary, the evidence was highly relevant.

The defense should have been able to present evidence of J.D.'s mental health problems because that evidence could have helped to explain J.D.'s behavior. The defense expert, Dr. Julien, testified J.D.'s reported behavior of being unable to remember portions of the incident, and being unable to move during periods when she was conscious, could not be explained by the amount of alcohol she had drunk. RP 1297-98, 1300-01, 1306, 1313. The defense expert who was not allowed to testify, McNeil, would have said that much of J.D.'s behavior that night was more likely caused by her mental health

disorder than by intoxication. RP 291-92, 1002. Thus, the evidence tended to show that J.D. was not incapacitated and unable to consent due to alcohol ingestion. Evidence of her mental health disorder was relevant to provide an alternative explanation for her behavior. As such, it was relevant to the question of whether she actually lacked capacity. It was relevant to support the defense theory that she could meaningfully understand what was happening and consent to sexual intercourse.

The evidence was also relevant to the central question of whether J.D. appeared to Mr. Chenault to be incapable of consent. Mr. Chenault testified J.D. appeared “tipsy” but not so intoxicated that she could not consent to sex. RP 1161. She did not seem incapable of doing anything, although he did note she seemed a bit odd. RP 1167, 1172, 1178-79. Evidence that J.D.’s behavior might have been caused in part by her mental health disorder was relevant to support his theory of the case. Logically, if her behavior was not entirely caused by intoxication, she might not have appeared to a reasonable person to be too intoxicated to consent.

The State faults Mr. Chenault for citing no authority for his argument. To the contrary, in the opening brief, Mr. Chenault cited

ample authority for the proposition that he had a constitutional right to present relevant evidence in support of his defense and to confront his accuser. That exclusion of evidence relevant to Mr. Chenault's defense would violate these fundamental constitutional rights should not be in dispute.

2. THE PROSECUTOR COMMITTED
PREJUDICIAL MISCONDUCT

The State concedes that, during closing argument, the prosecutor argued a fact not in evidence. SRB at 18. The State contends that defense counsel's objection was not timely and therefore the stricter standard of review applies. SRB at 19-20. This Court should reject that contention.

Counsel's objection was timely. The prosecutor made the statements at issue during her initial closing argument. RP 1440. When she finished her initial closing, the jury departed. RP 1463. Defense counsel then objected and presented argument to the court. RP 1463. The court overruled the objection, based on its own misunderstanding of the evidence. RP 1465-66. The jury then returned, defense counsel provided his argument, and then the prosecutor followed with rebuttal.

Counsel's objection was timely. The purpose of requiring a "timely" objection is "to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012). Objections are also required so as to avoid potential abuse of the appellate process. Id. If the party were not required to object, he could "simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." Id. (quotation marks and citation omitted). The central question on appeal is whether the prejudice caused by the prosecutor's improper comments could be cured by the trial court. Id. Thus, an objection is necessary to allow the trial court an opportunity to cure the prejudice.

Counsel's objection was timed so that the court could have corrected the prosecutor and cautioned the jurors against being influenced by the misrepresentation of the testimony. Therefore, the purposes of requiring a timely objection were met. The court did not caution the jurors because the court itself was mistaken about what the testimony was.

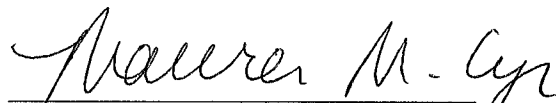
The State contends the prosecutor did not misstate the evidence when she said Cameron testified Mr. Chenault offered a beer to J.D. SRB at 24. But Cameron never identified Mr. Chenault. He testified he was with J.D. for about one hour and during that time saw a “black man” offer her an “Earthquake.” RP 1356. He never said that black man was Mr. Chenault.

The prosecutor’s comments about the “Earthquake” beer, which misrepresented the evidence, were prejudicial because they insinuated that Mr. Chenault tried to offer J.D. beer while she was in an incapacitated state. This suggested to the jury that he was deliberately trying to increase her intoxication. As such, the comments were highly prejudicial.

B. CONCLUSION

For the reasons given above and in the opening brief, the conviction must be reversed and remanded for a new trial.

Respectfully submitted this 18th day of February, 2014.



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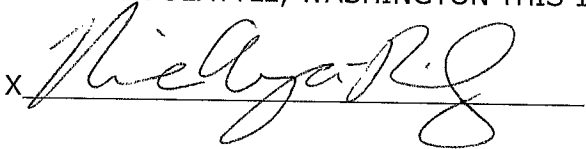
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)	
Respondent,)	
)	NO. 44203-5-II
v.)	
)	
TIMOTHY CHENAULT,)	
)	
Appellant.)	

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