92534-8
FILED
NOV
COURT OF APPEALS
STATE OF WASHINGTON
By

No. 32059-6-III

SUPREME COURT OF THE

STATE OF WASHINGTON

FILED
DEC 1 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL W. ROBISON, PETITIONER

PETITION FOR REVIEW FROM THE COURT OF APPEALS, DIVISION III

PETITION FOR REVIEW

November 16. 2015

Tracy Scott Collins
Attorney for Petitioner
1312 N. Monroe
Spokane, Washington 99201
(509)326-1020

TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

IDENTITY OF PETITIONER 2

COURT OF APPEALS DECISION 2

ISSUES PRESENTED FOR REVIEW 3

STATEMENT OF CASE 4

ARGUMENT FOR REVIEW 8

CONCLUSION 16

TABLE OF AUTHORITIES

United States Constitution

Fourth Amendment 11

Fifth Amendment 11

Washington State Constitution

Article one, Section 9 11

Cases

United States Supreme Court

Doyle v. Ohio, 426 U.S. 610, 617-619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) 11

Washington

State v, Berube, 286 P.3d 402, 411 (2012) 15

State v, Emery, 174 Wn.2d 741, 760, 278 P.2d 653 (2012) . . 14

State v. Gallagher, 112 Wn. App. 601, 609, 51 P.3d 100 (2002) 8
State v. Hartzell, 156 Wn. App. 918, 932, 237 P.3rd 928 (2010) 8
State v. Koss, 158 Wn. App. 8, 241 P.3d 415 (2010) 8
State v. Modica, 18 Wn App. 467, 569 P.3d 1161 (1977) 11
State v. Thang, 145 Wn.2d 630 (2002) 10
State v. Unga, 165 Wn.2d 95, 196 P.3d 645 (2008) 11

Washington Pattern Jury Instructions

401 .... 14, 15

Evidence Rules

404(b) 10

A. IDENTITY OF PETITIONER

Michael W. Robison asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISIONS

Michael W. Robison asks this court to review the decisions of the Court of Appeals determining:

1. That during the trial Michael Robison had "opened the door" or allowed the door to be opened to extremely prejudicial

evidence on drug abuse to be introduced to the jury after making a pre-trial ruling that the evidence was prejudicial and thus inadmissible;

2. That Michael Robison's Constitutional right to remain silent was not violated by the State's repeated questioning of the Detective regarding the collection of DNA by application for a search warrant over defense objection;

3. That the Trial Court giving the Jury Instruction, formerly 401, that included the bracketed phrase "If, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt", to the jury over objection by both the State and Michael Robison violated Mr. Robison's right to a fair trial.

Issued on October 20, 2015. A copy of the decision is in the Appendix at pages A- 1 to 14.

C. ISSUES PRESENTED FOR REVIEW

1. Did Michael Robison "open the door" in a legal context or allow the door to be opened to extremely prejudicial evidence on drug abuse to be introduced to the jury after the trial court had made a pre-trial ruling that evidence was prejudicial and thus inadmissible?

2. Was Michael Robison's Constitutional right to remain

silent violated by the State's repeated questioning of the Detective regarding the collection of DNA by application for a search warrant over defense objection?

3. Did the Trial Court commit reversible error by giving the Jury Instruction, formerly 401, that included the bracketed phrase "If, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt", to the jury over objection by both the State and Michael Robison.

D. STATEMENT OF THE CASE

On October 28, 2013, Appellant's trial on one count of robbery in the first degree began in Spokane County Superior Court. At issue was a robbery that occurred on January 9, 2011, at the Baskin and Robbins on Fourteenth and Grand in Spokane Washington. RP 115 - 118. A lone man wearing a full face ski mask and sweat pants entered that location and brandished what later was discovered to be a fake air soft pistol while demanding cash. RP 116 & 180. The hat, sweat pants and pistol were discovered by a dog track behind a building immediately to the north of the Baskin and Robbins under a sign stashed in a snow bank. RP 301 - 302. All those items were admitted at trial. RP 174 - 183. No suspect was apprehended at the time of the

crime. RP 271.

When Detective Hill received the case for investigation on October 10, 2011, there was not a suspect in the case. RP 341. There were no fingerprints found on the fake pistol. RP 345. On February 28, 2011, crime lab results for DNA analysis came back with an "unknown individual A" as the primary contributor of the sample taken from the ski mask recovered at the crime scene. RP 347. There was no DNA profile matching this primary contributor in the databases kept by law enforcement known as CODIS. RP 347. No suspect was identified from this evidence. RP 347. With no further evidence, Detective Hill suspended the case. RP 348.

On approximately October 4, 2011, a Breanne Snyder came forward to prosecutors and detectives claiming that Appellant committed the robbery. RP 326 - 335, 349. Because Ms. Snyder was involved in the robbery she was allowed a free talk to provide her information without the possibility of prosecution in the case. RP 88, 327 - 333. Ms. Snyder's record of criminal behavior was horrendous including several crimes of dishonesty. RP 82 - 86. All those crimes were put in a diversion or deferred prosecution after she came forward with the information against Appellant. RP 86.

With the evidence from Ms. Snyder, Detective hill was

able to narrow down his case to Appellant as the suspect. RP 349. Appellant was cooperative. RP 351. Detective Hill testified that he was granted a search warrant to get a DNA sample from Appellant. RP 350. The State asked specifically "Without the search warrant, could you have forced Mr. Robinson to give you DNA". RP 350. Detective Hill's response was a simple "I could not". RP 350. During direct examination of the defendant the State made a speaking objection stating that "He (the Appellant) was ordered to give a sample of DNA. The misgivings are irrelevant". RP 377. The Washington State Crime Lab was able to match Appellants DNA to "unknown individual A". RP 225, 352.

Prior to the beginning of trial the court had ruled that Ms. Snyder could testify that she and the Appellant needed the money for drugs. RP 18. Ms. Snyder testified at trial that she was an "opiate" addict and she and Appellant needed to rob to get money for pills. RP 41, 43. Further, over objection she was allowed to testify that the money from the robbery was used to purchase oxycotton. RP 61. Direct examination of Appellant did not bring up any drug addiction or use. During cross examination of Appellant the State questioned him extensively regarding his use of opiates until the flagrant violation of the court's pre-trial ruling forced an objection to the entire line of

questioning. RP 381 - 383. The court overruled the objection saying "The door is opened". 383. The State continued with the line of questioning, RP 383, and again in cross examination. RP 395.

In the State's closing argument it used the drug abuse by both Ms. Snyder and the Appellant with effectiveness to characterize the relationship between the two, RP 445, 455, 463, and to argue that their drug abuse together was the motive for the Appellant to rob the Baskins and Robbins. RP 453.

At the conclusion of the evidentiary portion of the trial the court provided what it considered a correct version of the jury instructions. RP 426. Both the State and the Appellant objected to the inclusion of the bracketed material for WPIC 401 "abiding belief in the truth of the crime charged" language. RP 426. In closing arguments the State argued "You folks are the ones charged with figuring out what is important." RP 452. Further, that the State's version of what happened on January 9, 2011, is the only "reasonable" explanation. RP 458. In fact, the State's entire argument focused extensively on reasonableness. RP 463 - 470.

On October 31, 2014, Appellant was found guilty of robbery in the first degree by jury verdict.

E . ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. The Court of Appeals decision that the State's Continuous Use of Mr. Robison's Drug Addiction at Trial was not a Flagrant Violation of the Trial Court's Pre-trial Ruling and the "door was opened" by Mr. Robison's and Witness testimony is in Conflict with prior Supreme Court and Appellate Court Rulings Pursuant to RAP 13.4 (b) (1) & (2).

Beginning with State v. Gallagher, 112 Wn. App. 601, 609, 53 100 (2002), there has been an exception to pre-trial rulings that preclude evidence if the "door is opened" by testimony offered by the beneficiary of the ruling by proffering testimony on the subject matter that has been excluded. The point being to prevent a false impression regarding the evidence excluded pre-trial by the party that opens the door. Id. 610. That rule has continued in tact through the present day. State v. Hartzell, 156 Wn. App. 918, 932, 237 P.3rd 928 (2010). The caveat, however, has always remained that the original proponent of the evidence that was excluded by pre-trial ruling cannot "open the door" to its later introduction by asking the very questions that are meant to elicit the excluded evidence or testimony. Gelleher, supra at 609, State v. Koss, 158 Wn. App.

8, 241 P.3d 415 (2010). In every case on 'opening the door" the defendant introduced evidence through his own witness that either took advantage of the pre-trial exclusion of evidence or brought it to the jury's attention.

A proponent of the evidence cannot create the circumstance necessary to violate a pre-trial ruling then take advantage of that deception by walking through that door. In Mr. Robison's case the pre-trial ruling by the court was clear. The State could elicit testimony that she and Mr. Robison needed the money for drugs. The State, however, wishing to emphasize the need for "motive" in the case, RP 10, and lacking any other on Mr. Robison's part, repeatedly brought up the drugs and drug addiction at every opportunity. Mr. Robison mentioned nothing of his use of drugs in direct examination. In flagrant violation of the court's pre-trial order, the State pushed Mr. Robison into admitting a drug addiction to opiates, and repeatedly made a connection to the crime and that addiction. Upon defense objection, the court ruled simply that the "door had been opened". The State repeatedly raised it again during its closing argument.

Mr. Robinson's drug addiction was certainly not relevant or admissible at trial, as the trial court had correctly ruled in its pre-trial motions. Mr. Robison did nothing to "open the door"

to the admission of that evidence. In effect what happened was Mr. Robison was denied a fair trial because the court excluded the evidence until a point where the Mr. Robison could not have lessened the damage to the jury by admitting his addiction of his own accord. And the State, with the collusion of the court, was able to violate a argued and ruled upon motion that the defense had adhered to religiously in order to paint a picture of the Mr. Robison that he was the drug addicted architect of a robbery scheme to get money for drugs.

The scenario described above is exactly what happened in this case. This circumstance was a flagrant violation of the Mr. Robinson's right to have a strategy for his presentation of his case, based on the court's pre-trial ruling, and to be protected by Evidence Rule 404(b)'s introduction of irrelevant and inadmissible bad acts. To argue, as the Court of Appeals does, that Mr. Robison waived the issue by not objecting enough is counter intuitive. The damage was already done over defense objection. This same argument by the same Appellate Court was frowned upon under <u>State v. Thang</u>, 145 Wn.2d 630, 646 (2002). The Trial Court cannot put defense counsel into a hobson's choice and then have its erroneous decision sustained by the argument that the error is harmless because the tactical decision by counsel abetted in the improperly admitted

evidence. Deception occurred in this case. The trial court had already weighed the State's arguments and found them wanting. In spite of that, the jury was told Mr. Robison was a drug addict and a bad influence on the witness that came in and testified that she had helped commit the robbery. Mr. Robison was deprived of a fair trial. Appellant respectfully requests this court recognize this violation and reverse the decision of the Court of Appeals.

2. The Court of Appeals ruling that the State did not Violate Mr. Robison's Right to Remain Silent and not to Incriminate Himself when it repeatedly referred to the Fact that He had been Court Ordered to Submit to a Buccal Swab for DNA Evidence Makes Review by the Supreme Court Appropriate Under RAP 13.4 (1)(2) & (3).

The Fifth Amendment to the United States Constitution as well as Article one, section nine of the Washington State Constitution guarantee that no person in a criminal case shall be compelled in any criminal case to give evidence against himself. State v. Unga, 165 Wn.2d 95, 196 P.3d 645 (2008). In State v. Modica, 18 Wn App. 467, 475, 569 P.3d 1161 (1977), the Court quoted the United States Supreme Court in Doyle v. Ohio, 426 U.S. 610, 617-619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), in

stating ". . . it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial".

In this case the question of consent was personal. The State was relentless in its pursuit of the fact that Mr. Robison was forced by a court order to provide a sample of his DNA. Detective Hill was asked if "Without the search warrant could you have obtained DNA from Mr. Robison? Let me state that question a better way. Without the search warrant could you have forced Mr. Robison to give you DNA?" Detective Hill answered "I could not". The State went on "Was the search warrant granted?" Detective Hill "Yes it was". Then again within minutes the prosecutor asked the same question, "Were you able to get a lawful search warrant in this case to collect DNA from Mr. Robison?" Defense counsel objected "asked and answered". The court "I will permit that". Detective Hill: "I did". RP 350. During direct examination of Mr. Robison he was asked if he had any misgivings about giving a sample of his DNA? Appellant responded "I didn't commit the crime I had no . . ." then he was abruptly cut off by the State's speaking objection that "He was ordered to give a sample of DNA. The misgivings are irrelevant". (Emphasis Added)

Prior to all this parlance there was never any evidence

offered as to whether or not Mr. Robison was ever "forced by the order" to give a sample of his DNA. For the State to ask him if he had refused to voluntarily give his DNA would have been a clear violation so the prosecutor skirted that issue entirely by merely asserting that he was forced to give his DNA. It must be kept in mind that other than the "free talk" with Ms. Snyder, a potential co-defendant and a career offender with no less than six prior offences hanging in the balance, there was no suspect in this case. She was not a reliable witness to stand on her own. The DNA was the kicker that corroborated a weak case, and the State knew full well it had to concentrate on it and give the jury the impression that Mr. Robison had some thing to hide and he knew it. Hence the repeated over emphasis on the unknown fact that he was forced to provide a sample of his DNA. This makes this case unique in the fact that Mr. Robison was compelled to be a witness against himself by the repeated overt, and finally direct" references to his "refusal" to provide a sample of his DNA.

Based on this flagrant violation of Mr. Robison's rights as outlined above he respectfully requests the court reverse the Court of Appeals decision upholding his conviction in the trial court.

D. The Inclusion of the Bracket Language regarding "Abiding Belief in the Truth of the Crime Charged" in WPIC 401 Deprived Mr. Robison of a Fair Trial Making Review Appropriate Under RAP 13.4 (1)(2)(3) & (4).

Washington Pattern Jury Instruction 401, when including the bracketed material reads thus:

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. (If, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt.)

In State v. Emery, 174 Wn.2d 741, 760, 278 P.2d 653

(2012), and <u>State v. Berube</u>, 286 P.3d 402, 411 (2012), both courts determined that the State's argument that a jury's job is to search for the truth is impermissible. The bracketed material in WPIC 401 inexorably connects the concepts of truth and being satisfied beyond a reasonable doubt. To argue or distinguish otherwise is to defy all logic. "If . . . you have an abiding belief in the truth of the crime charged you are satisfied beyond a reasonable doubt". The State in this case confined its argument to reasonableness of the evidence, but how can a juror be expected to not equate reasonableness with his or her abiding belief in the truth of the crime charged when they are desperately searching for a definition for "reasonable doubt", and the bracketed material gives them the only clear explanation.

This case differs significantly in that both the State and Defense Counsel objected to the giving of the bracketed sentence. The court gave the instruction over both objections. The question must be asked why? The only reasonable explanation must be that the court deems the connection between belief in the truth of the crime charged and being convinced beyond a reasonable doubt. Which is only reasonable, but it is improper.

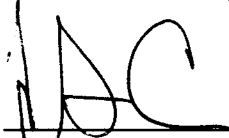
Based on the courts including the bracketed material in

the final jury instructions over the objection of both counsel and the danger of infusing the search for truth vs reasonableness into the jury deliberations, Mr. Robison respectfully requests this Court grant review and reverse the ruling by the Court of Appeals.

F. CONCLUSION

Based on the foregoing, Michael W. Robison respectfully requests the Court grant review and reverse the Court of Appeals rulings on the grounds set forth above.

Respectfully Submitted this 16th, day of November, 2015.



TRACY SCOTT COLLINS
WSBA# 20839
Attorney for Michael W. Robison

Appendix A

FILED
OCTOBER 20, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 32059-6-III
Respondent,	)	
	)	
v.	)	
	)	
MICHAEL W. ROBISON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, C.J. — Michael Robison appeals his conviction of first degree robbery, arguing that the court erred in permitting the State to elicit prejudicial testimony about his drug use that it had earlier excluded; that his Fifth Amendment Right against self-incrimination was violated when the State implied that Mr. Robison had refused a request to provide a DNA[1] sample; and that the court's use of optional "abiding belief" language in its instruction on the burden of proof impermissibly implied that the jury must search for the truth. We find no error or abuse of discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

On an evening in January 2011, a lone employee working at an ice cream parlor on Spokane's South Hill was robbed by a man who entered the store brandishing a gun

[1] Deoxyribonucleic acid.

and wearing what the employee described as "a red stocking cap" with holes for his eyes and mouth "pulled down over his face" and a dark sweatshirt with the hood pulled up. Report of Proceedings (RP) at 121. After the employee complied with the robber's order to hand over all the cash in her register, the robber left the store and the employee called 911.

Responding police officers were unable to locate any suspect but did find a discarded red ski mask, an Airsoft pistol,[2] and a sweatshirt in a nearby alley. A pair of knit gloves and sweatpants were also found discarded near the store.

The recovered evidence was submitted to the Washington State Patrol Crime Laboratory, where it was analyzed for wearer DNA. DNA profiles created for an individual who was a major contributor to the DNA on the knit gloves and the individual who was a major contributor to the DNA on the red ski mask matched each other.

Since there was no suspect against whom to compare the wearer profile, the DNA profiles were attributed to "Unknown individual A." RP at 219. They were entered into CODIS, a DNA database,[3] but did not produce a match. Lacking any information to pursue, investigation into the robbery was suspended.

---

[2] At trial, witnesses described the Airsoft pistol as a BB gun that looks like a real weapon. An orange tip on the pistol used in the robbery had been painted black to make it look more like a real firearm.

[3] A forensic scientist with the Washington State Patrol explained during her testimony that "CODIS is a national and state level database that we can put DNA typing

Later that year, Breanne Snyder was charged with a number of felonies, including burglary, trafficking in stolen property, and unlawful issuance of a bad check. She spoke with her defense lawyer about providing information about a first degree robbery as a possible means of getting charges against her reduced. Her lawyer arranged for her to provide information to detectives in a "free talk."[4] RP at 327. According to Ms. Snyder, she and the defendant, Michael Robison, had been living together on the day of the January 2011 robbery, and Ms. Snyder, who was then addicted to opiates, had been suffering through withdrawals. She and Mr. Robison had arrived at a plan for Mr. Robison to rob the ice cream parlor to get money to buy opiate pills. They anticipated, correctly, that an ice cream parlor would not have many customers on a winter evening. Ms. Snyder claims to have dropped Mr. Robison off near the store, saw him commit the robbery through the store's windows, and later picked him up.

---

profiles into from case work. . . . And those are continuously searched against different databases, such as convicted offender databases and things like that." RP at 219.

[4] The detective who engaged in the free talk with Ms. Snyder explained, "A free talk can be one of up to two or three different things. But, generally it is someone whom has been charged or could potentially be charged with a crime. Through their attorney, they contact the prosecutor's office and say that they want to provide information . . . . If you are interested in that information, they want consideration back on the charges or potential charges they may face." RP at 327.

The information provided by Ms. Snyder led the State to charge Mr. Robison with first degree robbery. The State obtained a search warrant for his DNA and analysis produced a DNA profile that matched the profile of "Unknown individual A."

Before trial, the court ruled on a State motion in limine asking the court to admit evidence of Mr. Robison's alleged addiction to opiates at the time of the robbery. No record of that motion or the resulting order is in our record, other than the State's description when it raised the issue again on the first day of trial. At that time, the prosecutor explained:

> [T]he court had earlier ruled that we were not going to be talking about what particular drug Mr. Robison was using and the fact that, in at least Ms. Snyder's mind, he was addicted to that drug. The drugs we are talking about are opiate based pills and heroin.
>
> Based on the information and the interview that we had with Ms. Snyder on Friday . . . she said at the time of this incident while neither one of them were high, they were both withdrawing from their opiates and that placed them on edge. I do think that that is relevant to the motive for the crime in this case.
>
> I don't want to—I still don't think I have to talk about the defendant himself being addicted to heroin or opiates, but I do think it is relevant for her to say that, We were coming down from those on this particular day and that made us desperate and on edge to get money in order to be able to get high again.
>
> So I am asking the court to look at that ruling again and broaden it slightly for the [S]tate.

RP at 10-11.

The court stood by its original ruling, explaining that discussion of addiction and coming down from withdrawals "has a little bit more of an edge to it," and "I am not

persuaded that we need to go there. I have already indicated that she could testify that they needed the money for drugs. That I think is beyond sufficient, and I don't think we need to go beyond that." RP at 18.

Among witnesses called by the State at the time of trial were Ms. Snyder, the clerk who was robbed, police detectives, and a DNA analyst.

The defense theory was that while Ms. Snyder and one of her other junkie friends might have committed the robbery, Mr. Robison was not with Ms. Snyder on the day of the robbery. His lawyer argued that in providing information to the State to alleviate some of her own criminal problems, Ms. Snyder had falsely named Mr. Robison, from whom she was estranged, rather than the actual robber. Mr. Robison testified on his own behalf, telling the jury that he never lived with Ms. Snyder but stayed with her on occasion and that he had left some clothing at her home. He testified that he and Ms. Snyder spent time outdoors during the winter and that he had worn her red ski mask in the past.

During cross-examination, Mr. Robison was asked about Ms. Snyder's drug use and testified that he was trying to help her to "change her ways" by "[t]ry[ing] to get her to go to meetings and not hang out with people she was hanging out with." RP at 381. When the prosecutor then asked, "Like you?", Mr. Robison testified "I am not a drug addict." *Id.* The prosecutor's questioning about drugs continued and defense counsel

eventually objected, citing "a pre-trial ruling by the court." RP at 383. The court responded, "The door is opened. Overruled." *Id.*

At the conclusion of the evidence, the jury returned a verdict of guilty. Mr. Robison appeals.

ANALYSIS

Mr. Robison assigns error to a trial court ruling that testimony by Mr. Robison had "opened the door" to examination about his drug use, that the State's questioning of a police officer was an unconstitutional comment on his silence, and that the burden of proof instruction misstated the law. We address the assignments of error in turn.

Trial court ruling that Mr. Robison's testimony "opened the door"

Mr. Robison first argues that he was denied a fair trial when the court admitted evidence contrary to its own pretrial ruling on the rationale that Mr. Robison's testimony had "opened the door."

Our record on appeal does not include the original motion or ruling on the State's request that it be permitted to offer evidence that Mr. Robison was addicted to opiates at the time of the robbery. But the argument and ruling when the State renewed the motion on the first day of trial suffices to establish that the trial court had ruled that it would admit evidence that Mr. Robison was alleged by Ms. Snyder to have committed the

robbery to obtain money for drugs.[5] What the court excluded was evidence that Mr. Robison was addicted or was going through withdrawals at the time of the crime. The court also excluded any reference of opiates being the type of drug Mr. Robison wanted to purchase. Consistent with the ruling, the State only asked about Ms. Snyder's drug use up until the point at which Mr. Robison volunteered that he was not a drug addict.[6]

Moreover, when the State relied on that opening to inquire further, including into "what . . . [Mr. Robison] use[d]," defense counsel did not initially object based on the pretrial ruling. Mr. Robison testified without objection that he used opiate pills, specifically "Roxy and Oxy" prior to any objection by his lawyer. RP at 381-82. After defense counsel objected, the prosecutor posed only a couple more, inconsequential questions about drug use:

> Q. (BY MR. MARTIN) You would use these items with Ms. Snyder?

---

[5] The State asks us to refuse to review this claimed error because Mr. Robison has not provided an adequate record or record citations, in violation of RAP 10.3(a)(5) and (6). We find Mr. Robison's citations sufficient for review.

[6] The following questions preceded Mr. Robison's statement:

> Q. So why were you dating somebody who was addicted to drugs?
> A. I was hoping she would change her ways.
> Q. What steps were you taking to help her change her ways?
> A. Try to get her to go to meetings and not hang out with people she was hanging out with.
> Q. Like you?
> A. I am not a drug addict.

RP at 381.

> A. On occasions.
> Q. How did you think that using these items with Ms. Snyder was going to assist her in getting her over her drug addiction?
> A. I don't know.

RP at 383.

"Otherwise inadmissible evidence is admissible on cross examination if the witness 'opens the door' . . . and the evidence is relevant to some issue at trial." *State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998) (footnote omitted). Once Mr. Robison offered what might be considered evidence of his good character, the State apparently concluded that he had opened the door for the State to rebut this evidence. ER 404(a)(1). "[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

Even if the State's initial assessment was wrong, the testimony given thereafter—before any defense objection—opened the door widely. A timely defense objection was required. Mr. Robison prevailed on the pretrial in limine argument when the trial court ruled that the State could offer only evidence "that they needed the money for drugs . . . I don't think we need to go beyond that." RP at 18. "In a situation where a party prevails on a motion in limine and thereafter suspects a violation of that ruling, *the party has a*

duty to bring the violation to the attention of the court and allow the court to decide what remedy, if any, to direct. A standing objection to evidence in violation of a motion in limine, preserving the issue for appeal, is allowed *only* to the party losing the motion." *A.C. v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 525, 105 P.3d 400 (2004) (footnotes omitted).

In light of all of the testimony by Mr. Robison about his use of opiates before any objection by the defense, the trial court did not abuse its discretion in concluding that the door had been opened to the State's examination.

Fifth Amendment right to remain silent

Mr. Robison next argues that the State violated his right to remain silent when State questioning implied that he would have refused to provide a buccal swab for DNA analysis had the court not issued a search warrant.

"The right against self-incrimination is protected by the Fifth Amendment, which provides that no person 'shall be compelled in any criminal case to be a witness against himself.'" *City of Seattle v. Stalsbroten*, 138 Wn.2d 227, 232, 978 P.2d 1059 (1999) (footnote omitted) (quoting U.S. CONST. amend. V). "Because taking a DNA sample constitutes a search . . . individuals have a constitutional right to refuse consent to warrantless sampling of their DNA." *State v. Gauthier*, 174 Wn. App. 257, 263, 298 P.3d 126 (2013). In *Gauthier*, the court held that it was error to admit evidence of a defendant's refusal to consent to a DNA test, concluding that our Supreme Court

indicated in *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010) that "using refusal to consent to a search as evidence of guilt is unconstitutional." *Gauthier*, 174 Wn. App. at 266.

The examination about which Mr. Robison complains does not support his characterization, however. He relies on the following examination by the State of a detective assigned to investigate the robbery:

> Q. What happened in terms of furthering your investigation after the charges were filed by the county prosecutor's office?
> A. At the time of the filing, and I spoke with Prosecutor Steinmetz, I explained to him that I would want him to obtain a sample of DNA from Mr. Robison. At that point, I wrote what is called a search warrant, requesting the court to grant me permission to obtain and—to contact Mr. Robison to obtain a DNA sample, and that was done.
> Q. Without the search warrant, could you have obtained DNA from Mr. Robison? Let me state that question a better way. Without the search warrant, could you have forced Mr. Robison to give you DNA?
> A. I could not.
> Q. Was the search warrant granted?
> A. Yes, it was.
> . . . .
> Q. Were you able to get a lawful search warrant in this case to collect DNA from Mr. Robison?
> [DEFENSE COUNSEL]: Objection. Asked and answered.
> THE COURT: I will permit that.
> A. I did.
> Q. What does it mean to execute a search warrant?
> A. It means that I, as a detective, and the judicial person authorized to sign the search warrant authorized me so much time to collect the evidence. In this case, I was able to contact Mr. Robison's attorney. I made arrangements and advised them that I had a search warrant for a buccal swab, and we made arrangements to meet and obtain the buccal swab.
> Q. Was Mr. Robison cooperative in that endeavor?

A. Absolutely, he was.

RP at 349-51.

The evidence does not suggest that Mr. Robison would have refused to provide a DNA sample; to the contrary, the detective characterized Mr. Robison as cooperative. The State did not impermissibly imply that Mr. Robison refused to consent to a DNA test.

Burden of proof instruction

Finally, Mr. Robison complains that over the objections of his lawyer and the State, the court provided the jury with the pattern burden of proof instruction for criminal trials, including its bracketed, optional final sentence. The entire instruction read:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State, is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Clerk's Papers (CP) at 39; *see also* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL § 4.01, at 85 (3d ed. 2008) (WPIC). Relying on cases holding that the State may not argue that a jury's job is to search

for the truth, Mr. Robison argues that the final sentence of the instruction "inexorably connects the concepts of truth and being satisfied beyond a reasonable doubt." Br. of Appellant at 22.

We review "a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Language speaking of an "abiding belief" or an "abiding conviction" in "the truth of the charge" has withstood challenge in Washington for more than a half century. In *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988), this court upheld the almost identical concluding statement in WPIC 4.01, as revised in 1982, the only difference being the former instruction's use of the expression "*after* such consideration" rather than "*from* such consideration." The court observed that the instruction "was approved essentially in *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959),[7] and was also approved as modified in *State v. Walker*, 19 Wn. App. 881, 578 P.2d 83 [1978]." *Id.* It pointed out that "[w]hen reviewing 'reasonable doubt' instructions, courts have refused to isolate a particular phrase and have instead construed them as a whole." *Id.*

---

[7] The instruction given in *Tanzymore* included the statement, "If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." *Tanzymore*, 54 Wn.2d at 291 n.2. In rejecting the defendant's argument that his own proposed instruction should have been given, the court said that the standard instruction given by the court, "has been accepted as a correct statement of the law for so many years, we find the assignment without merit." *Id.* at 291.

In *Pirtle*, our Supreme Court addressed a challenge to a trial court's modification of the concluding sentence to sharpen the focus on a juror's doubt by stating, "If, after such consideration[,] you *do not* have an abiding belief in the *truth* of the charge, [then] you *are not* satisfied beyond a reasonable doubt." 127 Wn.2d at 656 (emphasis added) (first alteration in original). The revised instruction was still upheld:

> Without the last sentence, the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster. The addition of the last sentence does not diminish the definition of reasonable doubt given in the first two sentences, but neither does it add anything of substance to WPIC 4.01. WPIC 4.01 adequately defines reasonable doubt. Addition of the last sentence was unnecessary but was not an error.

Pirtle, 127 Wash. 2d at 658.

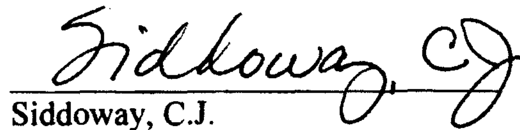
Mr. Robison contends that more recent decisions in *State v. Emery*, 174 Wn.2d 741, 278 P.2d 653 (2012) and *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012) require us to reconsider this longstanding precedent. In *Emery*, our Supreme Court held that it was prosecutorial misconduct for the State to suggest in argument that the jury's job is to solve the case, because "[t]he jury's job is not to determine the truth of what happened; a jury therefore does not speak the truth or declare the truth." *Emery*, 174 Wn.2d at 760 (internal quotation marks omitted) (quoting *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009)). Similar improper argument was made in *Berube*, in which this court stated that "[a]rguing that the jury should search for truth and not for reasonable doubt misstates the jury's duty and sweeps aside the State's burden. The

question for any jury is whether the burden of proof has been carried by the party who bears it." *Berube*, 171 Wn. App. at 120.

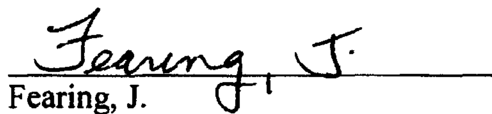
The last sentence of WPIC 4.01 is not tantamount to telling the jury that it must "solve the case" or "find the truth." *Pirtle* remains controlling authority that without the last sentence, the pattern instruction adequately defines reasonable doubt and that inclusion of the optional sentence "does not diminish the definition." *Pirtle*, 127 Wn.2d at 658.

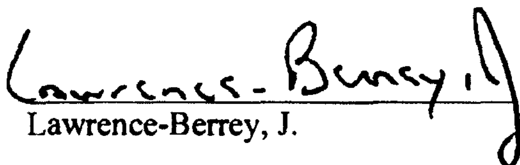
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, C.J.

WE CONCUR:


Fearing, J.


Lawrence-Berrey, J.