

62442-3

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No. 62442-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KAREN PEACEY,

Appellant.

2009 JUL 17 AM 10:46

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

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

The Honorable Judge Thorpe

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. REPLY ARGUMENT

A majority of the State's Response to the Appellant's Opening Brief is predicated on its assertion that Ms. Peacey confessed to improperly using business funds to pay for personal acquisitions and that a drug problem was her excuse for this behavior. The record does not support this argument.

Defense counsel alerted the Court to the issue raised in this Appeal prior to Opening Statements when he moved in limine to prohibit testimony concerning the defendant's alleged dependency on prescription drugs. The colloquy of the argument on that motion follows:

MR. DENES: Your Honor, we would move to exclude any testimony of regarding Karen Peacey's alleged drug use, use of narcotics. There has been no discovery provided to substantiate those claims and those claims have nothing to do with this trial. The probative value of that testimony is greatly outweighed by the prejudice by the jury.

THE COURT: Counsel?

MS. NIPERT: Well, your Honor, it does go to motive. And while I don't have access to the defendant's medical records, I can't provide proof of that. I do have witnesses who know she went into rehab for a drug addiction, and it does go to her motive to steal this incredible amount of money.

THE COURT: And didn't she tell Dalziel that she did?

MS. NIPERT: Yes, those were her prior statements.

THE COURT: You seek to have Dalziel prohibited from testifying to what the defendant told him with respect to her addiction and checking into in-patient.

MR. DENES: Your Honor, I don't believe that those things are substantiated.

THE COURT: Well, I don't care if they are substantiated or not, she may have been lying her head off, but I mean if that's what she told him, it's a statement against interest, it seems to me. The State won't be prohibited from eliciting testimony of what the defendant told people about her addiction, but other than that, we are not going to have people testifying about all her drug use and that sort of thing.

Her employer testified, over defense objection as follows:

I talked to her on Monday, when I received the \$2,000 cashier's check back from her, I talked to her and she was crying and said that her problem means that she is so kind of screwed up, that it's the methadone, because of all the pain. (RPI – 62).

He further explained what Ms. Peacey said concerning the charge on the business credit card and her issues with drugs, stating:

My memory says on the 15th we confronted her. On the 15th she admitted it. That was a Wednesday. The following Monday, I had a cashier's check on my desk. I went into her office and talked to her and she started crying and said part of her problem is that she has become addicted to prescription pain medication and that she needed to go get fixed. And I think that Wednesday she admitted herself into drug rehab, Swedish Hospital in Ballard somewhere.

This was not a confession, nor an admission that she improperly used or embezzled money from the business. While, according to her employer, she did admit to making the charge on the business credit card, it appears that he interpreted this alleged statement to be her excuse for her charging the \$2,000.00 on the business credit card. During Ms. Peacey's testimony the State never asked her any questions regarding the alleged statement to her employer, her alleged drug problem, nor in patient treatment for drug dependency. Ms. Peacey did

testify that she had been allowed on multiple occasions to use the business credit card for personal purchases and that she had always paid the company back.

The record is clear. As pointed out in the Appellant's Opening Brief, having justified the admittance of Ms. Peacey's problems with methadone, well known to the public as a "heroin" substitute, the State abandoned its declared rationale that the drug problem was Ms. Peacey's declared motive for misappropriating funds. (RPIII-39)

Whether the Court examines this assignment of error as a violation of ER 403 or ER 404(b) or some other provision of the Rules of Evidence is somewhat immaterial.¹ The practical effect of admitting testimony concerning her alleged drug abuse and need for treatment was to undermine her credibility and deprive her of a fair trial. Having contradicted the State's case through defense witnesses and testimony, the ultimate decision for the jury was who to believe. If Ms. Peacey was believed the jury should have acquitted her. If the jury believed the State's witnesses beyond a reasonable doubt, it would convict. By its verdict the jury did not believe Ms. Peacey. The Appellant contends that the improper

¹ The State correctly points out that after Appellant filed her opening brief, our Supreme Court reversed *State v. Powell* 166 Wash.2d 73, 82-85, 206 P.3d 321, 327 - 328 (Wash.,2009). However, only 4 of the Justices found that the assignment of error had not been properly preserved. The two additional votes to reverse believed, as did the 3 dissenting justices, that the defendant had properly preserved the error when he argued that the proposed testimony was unduly prejudicial, but that any error was harmless.

admission of the drug and rehab testimony improperly undermined her credibility in the minds of the jurors.

Testimony that one suffers from a drug dependency on an opiate serious enough to result in admittance to a hospital can only diminish that person's credibility and reliability as a witness in the eyes of the jurors. The rationale as to why this type of evidence should not be admitted, absent some causal relation to the crime, was explained in State v. Renneberg, 83 Wash.2d 735, 522 P.2d 835 (1974). In that case the State introduced testimony of the defendant's addiction only after the defendant offered character evidence. The Supreme Court, in reviewing the trial court's decision to allow this testimony analyzed it under two different scenarios: attacks on credibility and/or to contradict character evidence offered by the accused. While the Court in Renneberg held that the State's testimony was admissible to contradict the defendant's character evidence, it would not have allowed it to impeach the veracity of the defendant had she not offered character evidence. It explained its reasoning as follows:

The Court of Appeals recognized the division in the authorities but felt bound by our decision in Lankford v. Tombari, 35 Wash.2d 412, 213 P.2d 627 (1950), wherein a terse holding concluded that drug use or addiction is relevant to veracity. In view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror. Additionally there is no proof before the court connecting addiction to a lack of veracity. If such medical or scientific proof were made, it might well be admissible as relevant to credibility. Absent such proof its relevance on credibility or veracity is an unknown factor while its prejudice is within common knowledge.

The Lankford v. Tombari decision is limited accordingly by our view herein.

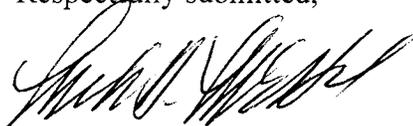
83 Wash.2d at 737.

In the case at bar Ms. Peacey did not put her character into issue. The testimony offered by Mr. Dalziel seems to be based on his inference that the \$2,000.00 charge was the result of problems that Ms. Peacey was experiencing with prescription drugs. The testimony that she spent several days in Swedish Hospital being treated for dependency on an opiate served only to prejudice the jury against Ms. Peacey by painting her as an addict. In a case in which the credibility of the defendant was crucial to the defense, testimony of drug addiction and hospitalization denied her a fair trial.

II. CONCLUSION

The admission of testimony that Ms. Peacey suffered from a dependency on opiates so severe that she checked into a hospital for treatment under the guise that it was relevant to her motive improperly undermined her credibility and deprived her of a fair trial. For that reason, together with the other issues raised and argued in Appellant's Opening Brief, this Court should reverse the conviction and remand for a new trial.

Respectfully submitted,



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