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Court of Appeals
Division I
State of Washington

No. 72941-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARIO ONTIVEROS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **By excluding a key expert who would have testified to specific police techniques used in the taped interview that elicit false confessions, the trial court violated Mario Ontiveros's right to present a defense.**

Mario Ontiveros's convictions should be reversed because the trial court's exclude his expert on false confessions, after the State introduced a tape-recorded interview of Mario with a police detective, in violation of Mario's constitutional right to present a complete defense. Dr. Connolly would have testified that, due to interview techniques utilized by the detective, the resulting admissions should be viewed with caution. Without the expert, the jury had no reason to doubt the detective's approach or Mario's admissions.

The State argues the trial court's exclusion was proper because Mario's expert's conclusion was vague. Resp. Br. at 8. But the State overlooks that Dr. Connolly would have pointed to specific examples in the police interrogation of Mario to demonstrate where techniques call the reliability of the confession into question. Dr. Connolly's written report pointed out where Detective Martin rejected Mario whenever he denied guilt and continued to question him about allegations he had denied. CP 804-06. She explained that when an interviewer like

Detective Martin assumes a person is guilty, he is likely to ignore or reject evidence to the contrary. CP 806.

Contrary to the State's contention, Dr. Connolly's written report specifically points out other interview techniques used by Detective Martin, which are designed to elicit a confession:

- He asked Mario why KW would say that he had molested her, but rejected Mario's explanation as nonsensical. CP 804.
- He used sequential requests for admissions combined with statements minimizing the seriousness of the actions or providing excuses for them. CP 805-06.
- He praised Mario for any incriminating statements, then encouraged Mario to "take responsibility" and "get it off his chest," and presented options for Mario to explain his actions, but all of the options were consistent with guilt. CP 805-06.

These were all specific examples of the type of techniques designed to elicit a confession. If Mario had been allowed to present Dr. Connolly's testimony, the jury could have assessed the confession in light of her expert opinion.

Mario also sought to introduce Dr. Connolly's opinion that Mario was susceptible to the detective's interview techniques, as many

of his admissions occurred immediately or shortly after a statement by the detective minimizing the actions or posing options. CP 807. Mario was also willing to agree to at least one of Detective Martin's statements even if he did not understand all of the words. CP 806. It was for all these specific reasons that Dr. Connolly concluded that the jury should treat Mario's statement with "great caution." CP 807.¹

This testimony was critical to Mario's defense because confessions are extremely powerful evidence and because of the centrality of this taped confession to the State's case against Mario. "Evidence surrounding the making of a confession bears on its credibility' as well as its voluntariness." Crane v. Kentucky, 476 U.S. 683, 688, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting Jackson v. Denno, 378 U.S. 368, 386 n.13, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)). Mario had a "prerogative to challenge the confession's *reliability* during the course of [his] trial." Id. at 688. Due process and the right to present a defense thus mandate that Mario could

¹ Dr. Connolly's proffered testimony would have drawn on the susceptibility of Mario, unlike the excluded evidence that was upheld in State v. Rafay, 168 Wn. App. 734, 786-87, 285 P.3d 83 (2012) (upholding exclusion of expert testimony in part because proffered experts would not have addressed defendants' susceptibility). On this basis and on the other grounds set forth in the opening brief, Rafay is distinguishable and should not control the outcome here. Op. Br. at 19-23.

“familiarize” his jury “with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.” Id. (quoting Lego v. Twomey, 404 U.S. 477, 485-86, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972)).

The Supreme Court made clear in Crane, “the physical and psychological environment that yielded the confession” can be “of substantial relevance to the ultimate factual issue of the defendant’s guilt or innocence.” 476 U.S. at 689. Where the trial court’s exclusionary ruling “stripped” Mario “of the power to describe to the jury the circumstances that prompted his confession,” he was “effectively disabled from answering the one question every rational juror needs answered: If [Mario] is innocent, why did he previously admit his guilt?” Id. Mario sought to answer this question through Dr. Connolly’s testimony. “[A] defendant’s case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.” Id. That is precisely the evidence that the trial court prevented Mario from presenting to the jury that ultimately convicted him. The convictions cannot stand.

The Seventh Circuit Court of Appeals reversed where similar evidence about false confessions was excluded. United States v. Hall,

93 F.3d 1337 (7th Cir. 1996). Like Dr. Connolly, Mr. Hall's excluded experts "would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." *Id.* at 1345. The Seventh Circuit held this information was not necessarily within the common knowledge of lay persons on the jury and that accepted social science can play a critical role in assessing reliability. Accordingly, the exclusion of Mr. Hall's experts required remand. *Id.* at 1339, 1346. The same result is compelled here.

Mario's defense was critically prejudiced when the trial court prohibited him from presenting an expert on interrogation techniques that contribute to false confessions, thus depriving the jury of evidence necessary to objectively evaluate Mario's statement to a police detective. Despite having the burden to show the error was harmless beyond a reasonable doubt, the State concedes the issue by not addressing it in its response brief. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (State concedes point by not responding); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *see* Resp. Br. at 11. Mario's jury received his taped confession, one of the most powerful pieces of evidence against an

accused, without any tools to analyze its veracity. Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1986) (White, J., dissenting)). Not only was the confession powerful evidence, other evidence was lacking: There was no physical evidence, KW's hearsay statements lacked detail, her testimony concerning the four child molestation charges was especially vague, she was impeached in several areas, and adults were normally present when KW stayed in the home yet neither heard anything unusual nor suspected anything improper. Op. Br. at 26-28. The trial court's decision to exclude Dr. Connolly's testimony directly affected Mario Ontiveros's constitutional right to present a defense. This Court cannot be convinced beyond a reasonable doubt that Mario would have been convicted of the five offenses if the jury had heard Dr. Connolly's testimony.

2. The trial court also violated Mario Ontiveros's constitutional right to be present when it discussed responses to seven jury questions without him.

The trial court violated Mario's constitutional right to be present by discussing and answering seven questions from the jury regarding the evidence, lack of evidence, and charging decisions. CP 270-76;

10/31/14RP 2-5, 7. “It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant.” State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983) (citing, e.g., State v. Shutzler, 82 Wash. 365, 367-68, 144 P. 284 (1914)); accord State v. Russell, 25 Wn. App. 933, 947-48, 611 P.2d 1320 (1980). Yet this is precisely what occurred here: the court decided upon responses to jury questions and sent those communications back to the jury in Mario’s absence.

The State turns the record on its head to argue that the jury’s questions involved legal matters to which Mario had no right to be present. Resp. Br. at 12-13. But five of the seven jury questions were distinctly factual in nature. The jury queried why no one contacted the internet service provider to retrieve deleted emails between KW and the detective; why KW’s therapist did not submit a report; what were the contents of KW’s 5th grade sex education class; what videos games did KW and Mario play; and why KW’s physical development was significant. CP 271-74, 276. As the court’s response demonstrates, these were factual inquiries for the response to which Mario should have been present to assist counsel. Id. (characterizing the jury’s inquiries as “Questions about the facts of the case concern[ing]

evidence”); accord Resp. Br. at 6 (acknowledging these questions “asked about specific facts related to the case”).

The other two questions involved the prosecutor’s charging decisions. CP 270, 275. While the trial court responded that it could not comment, CP 270, 275, the question of how the prosecutor selects the number of counts at least has factual components. Mario should have been present for discussions of and responses to all these questions.

The State’s response fails for another reason: our courts bar the communication between court and jury outside the defendant’s presence. E.g., Caliguri, 99 Wn.2d at 508; Shutzler, 82 Wash. at 367-68; Russell, 25 Wn. App. at 947-48. Our long-settled case law in this area does not distinguish between legal and factual matters where the communication is between the court and a deliberating jury. For example, in Russell, the deliberating jury asked about the interpretation of a particular jury instruction. 25 Wn. App. at 947. The bailiff communicated the question to the judge, who told the bailiff to respond “that the instruction meant exactly what was written in the instruction.” Id. The Russell court’s holding that this communication was in error turned on the fact that it was a communication between the court and

the jury done outside the defendant's presence, not whether it was a "purely legal matter." Compare id. at 947-48 with Resp. Br. at 12-13 (arguing jury questions regarding "purely legal matters" can be resolved without the defendant present).

The State's assertion that any error was harmless because the court's responses did not communicate affirmative information is wrong in two regards. Resp. Br. at 14-15. First, this Court should not focus exclusively on what the court's response actually was, but should look also to how it might have been different if Mario had been present. There is a difference between saying the court cannot comment on charging decisions and instructing the jury that charges are not evidence. See 10/31/14 RP 2-5. Likewise, referring the jury back to the burden of proof instruction affirmatively re-communicates the State's burden in a criminal case. Notably, in Russell, 25 Wn. App. at 948, and State v. Safford, 24 Wn. App. 783, 794, 604 P.2d 980 (1979), the courts did not evaluate alternative responses proposed by the absent defendant. See Resp. Br. at 14-15 (relying on these cases). Accordingly, those cases do not assist the State here.

Second, where the State's evidence had flaws (particularly KW's uncorroborated testimony) and the jury's questions exposed its

concern about at least some of those gaps, referring the jurors to the reasonable doubt instruction (as Mario ultimately suggested) may have impacted the jury's reasoning process and the ultimate outcome of the case. The State cannot meet its burden to show Mario's absence was harmless beyond a reasonable doubt.

3. The trial court erroneously admitted irrelevant and prejudicial evidence of KW's self-harm and her opinion that it was caused by Mario Ontiveros.

In his opening brief, Mario contested the trial court's admission of evidence regarding KW's self-harming behavior, suicidal tendencies, and mental health issues. Op. Br. at 39-44. This evidence came in both through KW and a holistic marriage and family associate, Logan Roth. See 10/27/14 RP 107-08. The State presents only a single case to argue the evidence was admissible. Resp. Br. at 15-16. But State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987) does not support the State's argument. The Black court held that lay testimony on psychological or emotional trauma in the victim is admissible in a rape case if the jury is free to evaluate it like any other evidence. 109 Wn.2d at 349. However, Black holds that it is unfairly prejudicial and inadmissible for an expert to suggest that because the complainant exhibits emotional or psychological symptoms, she was more likely to have in fact been

raped. Id. The State’s claim that Ms. Roth did not testify as an expert is belied by the record. See Resp. Br. at n.4. The State requested and received an expert opinion jury instruction because it believed Ms. Roth offered opinion testimony it intended to rely upon. CP 283; 10/29/14 RP 162-63. Ms. Roth’s testimony, accordingly, was imbued with the authority of an expert (an “aura of special reliability and trustworthiness”) despite her limited credentials and the lack of scientific evidence.² Black, 109 Wn.2d at 349 (quoting California v. Bledsoe, 36 Cal.3d 236, 281, 681 P.2d 291, 203 Cal. Rptr. 450 (1984)).

The State next argues that KW’s therapist’s testimony as to the causes of these mental health issues and behaviors was permissible because Mario opened the door to causation testimony. Resp. Br. at 16-17. Mario’s attorney asked Ms. Roth if there are “a lot of different reasons” for self-harm behavior, to which the witness responded affirmatively. 10/27/14 RP 166. Counsel continued questioning along this line to demonstrate the alleged abuse might not be the basis for the self-harm behaviors:

² Ms. Roth was not only allowed to testify but ultimately qualified as an expert for purposes of the jury, yet Mario’s false confessions expert was excluded in total. See Section 1, supra. The court’s uneven rulings stacked the deck well against Mr. Ontiveros.

Q. Okay. And it would be impossible to actually state with any degree of certainty why somebody is doing something like cutting?

A. That would have to come from them directly.

Q. But even that, there's so many different reasons why people might cut, right?

A. I'd say that there -- that pain relief is a common way that people use cutting.

Q. And when somebody cuts, it's typically something they do in private, right?

A. I would say that that is typical.

Q. And they're doing it just to make themselves feel better in that moment?

A. Yes.

10/27/14 RP 167. Upon further cross-examination, Ms. Roth admitted KW had reported other troubling events, such as her dog bleeding in front of her, and that people cut themselves to cope with depression.

10/27/14 RP 168-70, 172. In other words, counsel cross-examined Ms. Roth to minimize the harm from the court's admission of KW's self-harm behavior as much as counsel could. Mario did not open the door; the court let this evidence in both from Ms. Roth and from KW herself.

KW's problems in school and self-harming behavior after the events at issue were not relevant to the jury's determination of whether Mario Ontiveros molested or communicated with her for immoral

purposes in 2006. As counsel argued below, this evidence was also prejudicial because it was likely to produce sympathy for KW and elicit an emotional response from the jurors. The State also used the testimony to bolster KW's credibility: in eliciting KW's psychological problems and problems in school, the State sought to foster the conclusion these problems were characteristics of abused children and proof that KW was abused.

Due to the lack of physical evidence in this case and the other issues discussed in sections one and two, there is a reasonably possibility that testimony from KW and Ms. Roth that KW's problems were the result of sexual abuse prejudiced the jury and thus affected the jury verdict. Mario Ontiveros's convictions should be reversed.

4. The trial court violated Mario Ontiveros's right to a jury trial by forbidding defense counsel from asking the prospective jurors questions about wrong convictions.

Though the defendant "should be permitted to examine prospective jurors carefully, 'and to an extent which will afford him every reasonable protection[,]'" the trial court prohibited Mario's attorneys from asking questions about wrongful conviction cases in voir dire unless the cases were first brought up by a prospective juror. State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984) (quoting

State v. Tharp, 42 Wn.2d 484, 499, 256 P.2d 482 (1953)); 10/20/14 RP 86-87. Mario's defense depended upon convincing the jury that his admissions to Detective Martin were not reliable due to the interview techniques the detective utilized. Learning the prospective jurors' feelings and beliefs about a famous case where an innocent person was exonerated would have assisted the defense in exercising their peremptory challenges and may even have revealed a bias that was deserving of a challenge for cause. It is through intense and expansive voir dire that bias and prejudice are revealed and the changes of seating an impartial jury improved. Sydney Gibbs Ballesteros, Don't Mess With Texas Voir Dire, 39 Hous. L. Rev. 201 (2002).

The State argues that "At most, [such questioning] might produce information that could influence counsel's decision to exercise a peremptory challenge." Resp. Br. at 18. The State's argument is pure speculation, made without authority or basis in the record. See id.

The trial court abused its discretion by prohibiting Mario from raising the subject of wrongful convictions in the jury selection process. As a result, this Court cannot be convinced that Mario Ontiveros received a trial by the "impartial" jury guaranteed by the Washington

constitution. On this independent basis, Mario's conviction should be reversed and remanded for a new trial. See Op. Br. at 44-47.

B. CONCLUSION

On each of the four grounds set forth here and in the Opening Brief, Mario Ontiveros's convictions should be reversed and the matter remanded for a new trial. In sum, Mario was denied the constitutional right to call witnesses and present a complete defense when his expert was excluded; he was denied the federal and state constitutional right to be present when jury questions and responses were discussed in his absence; highly prejudicial evidence was admitted in contravention of ER 403; and restrictions in voir dire impeded his ability to obtain a constitutionally-required impartial jury.

DATED this 14th day of April 2016.

Respectfully submitted,

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STATE OF WASHINGTON,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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