

COURT OF APPEALS
CO. 37828-1-II
STATE OF WASHINGTON
BY _____
COA NO. 37828-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LONI VENEGAS,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick Fleming, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT VIOLATED VENEGAS' RIGHT TO PRESENT A COMPLETE DEFENSE IN PROHIBITING J.V.'S TREATING PHYSICIAN FROM OPINING J.V.'S ACCOUNT OF THE INJURY COULD NOT HAVE HAPPENED AS HE DESCRIBED.

The State claims the trial court did not abuse its discretion because the doctor was allowed "to testify as to an expert opinion as to the causation of J.V.'s injury." BOR at 17. The record shows otherwise. In responding to the State's objection to the opinion portion of Dr. Attig's proposed testimony, the court plainly ruled "[h]e can testify *except* as to causation." 2RP 2032 (emphasis added).

The State recognizes Venegas has a constitutional right to present a complete defense consisting of relevant evidence not otherwise inadmissible but nevertheless asserts Dr. Attig's opinion was inadmissible because the offer of proof did not establish a sufficient basis for the opinion under ER 702.¹ BOR at 14, 17-18. The State did not argue this basis for inadmissibility below because it was not an issue. It only argued the opinion was inadmissible because it was not timely notified that Dr. Attig would give an expert opinion. 2RP 2020-21. This Court will not

¹ ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

affirm on the basis of a theory that the State argues for the first time on appeal. State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997).

Application of this rule is especially compelling here. The State's objection on appeal goes to a foundational matter that could have been fully developed in the offer of proof had the State timely challenged Dr. Attig's opinion on that ground. Instead, the State waits until appeal to claim an insufficient foundation existed to allow for admission of the expert opinion. The record shows that the impetus for the decision to exclude was the court's concern that the State was prejudiced by the late endorsement of Dr. Attig as an expert witness. The record does not suggest the court or the State thought Dr. Attig was unqualified to give the opinion or that the opinion was otherwise unhelpful under ER 702.

"An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). In making an adequate offer of proof, ER 103(a)(2) "does not require that the details of the testimony be apparent" but only "that the substance of the testimony be apparent from the record." Id. at 539. The offer of proof informed the

trial court of the substance of Dr. Attig's testimony. Nothing more was needed.

The State claims Dr. Attig's testimony in the offer of proof "was devoid of the basis for this opinion." BOR at 18. The allowable bases of an expert's opinion are set forth in ER 703, which specifies the facts upon which an expert relies may be those perceived by the expert.² The offer of proof established Dr. Attig personally treated J.V. for his injury. 2RP 2028-29. No further basis for the opinion was needed and the State did not object to his opinion on grounds of ER 703 below.

Contrary to the State's assertion, the doctor's opinion went beyond conjecture and speculation. Dr. Attig had been a practicing family physician for over 30 years after graduating from medical school, and treated both children and adults. 2RP 2026-27. Dr. Attig plainly testified being stomped on the head did not cause J.V.'s injury and that he held this opinion to a reasonable degree of medical certainty. 2RP 2030-31; see State v. Bottrell, 103 Wn. App. 706, 717-18, 14 P.3d 164 (2000) (reversible error to exclude defense expert opinion held with medical certainty); State v. Shepherd, 110 Wn. App. 544, 551, 41 P.3d 1235

² ER 703 provides: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(2002) (medical expert must express opinion on "more likely than not" basis). The State simply ignores these aspects of the doctor's testimony.

Dr. Attig's corollary opinion that the injury was "possibly" but unlikely due to being stomped on the head does not diminish the certainty with which he held the opinion that the injury was not caused by being stomped on the head. 2RP 2030-31. An expert witness is not required to state an opinion in absolute terms before the jury is allowed to hear it.

Finally, ER 104, which addresses the qualifications of a person to be a witness, allows a party to introduce primary evidence conditioned on the later admission of foundational evidence. ER 104(a) and (b); State v. Soper, 135 Wn. App. 89, 98, 143 P.3d 335 (2006). Thus, even if an inadequate foundation for the opinion was laid during the offer of proof, the opinion remained admissible subject to a proper foundation being laid during the doctor's actual testimony before the jury. Application of ER 104 to this case is sound, given that the court expressed no concern about foundation during the offer of proof and the State did not raise any objection below on that ground.

The State also contends Venegas was able to present a complete defense because "defendant was not deprived of Dr. Attig's testimony." BOR at 18. This argument misses the mark. Expert opinion is admissible precisely because it is helpful to the trier of fact. ER 702. The jury here

was deprived of the doctor's expert opinion. The State cites no authority for the proposition that a defendant is able to present a complete defense even though the defense expert is precluded from offering probative expert opinion on a crucial issue at trial. When an expert witness is available and prepared to testify that an injury was not caused in the manner in which the accusing witnesses says it was, doing without the opinion is like fighting with only one hand.

The State does not even attempt to argue the extraordinary remedy of exclusion was justified for a discovery violation under the factors set forth in State v. Hutchinson, 135 Wn.2d 863, 881-83, 959 P.2d 1061 (1998). The State does not dispute defense counsel's opening statement put the State on notice regarding the substance of Dr. Attig's expert testimony some three weeks before the State raised objection due to supposed lack of notice. BOA at 19.

The State does recognize the defendant's right to present relevant evidence may only be limited by compelling government interests. BOR at 15 (citing State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without

the evidence." ER 401. All facts tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978). The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. Darden, 145 Wn.2d at 621.

The court here did not exclude the doctor's opinion testimony based on lack of relevance. Because Dr. Attig's opinion was relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Id. at 622; Hudlow, 99 Wn.2d at 15-16. That is, the State must demonstrate a compelling state interest to exclude a defendant's relevant evidence. Hudlow, 99 Wn.2d at 15-16; Darden, 145 Wn.2d at 621. Even so, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000). The Supreme Court has stated no State interest can be compelling enough to preclude introduction of highly probative evidence. Hudlow, 99 Wn.2d at 16.

The State did not have a compelling reason to prevent admission of evidence relevant to Venegas' defense and it makes no effort to present one on appeal. This evidence would not have disrupted the fairness of the fact-finding process. Neither the prosecutor nor the court explained how

the doctor's opinion would impede the search for truth. Its assertion that lack of timely endorsement of Dr. Attig as an expert witness justified the exclusion of his expert testimony must be rejected for the reasons set forth in the opening brief. BOR at 17; Brief of Appellant (BOA) at 16-22.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. Darden, 145 Wn.2d at 619. A trial court abuses its discretion when applies the wrong legal standard or bases its ruling on an erroneous view of the law. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007); State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). "It is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (quoting Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987)) (internal quotation marks omitted). The trial court's implicit endorsement of the opposite view ignores its overriding responsibility "to interpret the rules in a way that advances the underlying purpose of the rules, which is

to reach a just determination in every action." Burnet, 131 Wn.2d at 498 (citing CR 1).³

In Hudlow, minimally relevant evidence of the victim's prior sexual history evidence was properly excluded because it would prejudice the truth-finding function of the trial. Hudlow, 99 Wn.2d at 16. In this case, the evidence was much more than minimally relevant and there was no reason why its introduction would impair the truth-finding function of the trial. The court erred in excluding probative defense evidence without a compelling interest.

The denial of the right to present a defense is constitutional error. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996). It cannot be said beyond a reasonable doubt the error was harmless. "The jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses." State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). As sole judges of witness credibility, jurors were entitled to have the benefit of the defense theory before them so that they

³ CR 1 provides " These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." CrR 1.2 similarly provides: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay."

could make an informed judgment regarding the believability of J.V.'s accusation. Criminal defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). This Court cannot determine the jury would necessarily have reached the same result if the jury had heard evidence tending to impeach J.V.'s believability. The denial of Venegas' constitutional right to present a complete defense corrupted and distorted the fact-finding process.

2. THE STATE PUT VENEGAS' BAD CHARACTER ON TRIAL — AN AVALANCHE OF UNFAIRLY PREJUDICIAL EVIDENCE DETAILING HER DISGRACEFUL ACTS NECESSITATES A NEW TRIAL.

The State claims evidence of Venegas' bad acts were admissible under the *res gestae* exception to ER 404(b). BOR at 19-20. It cites authority that a defendant cannot insulate herself by committing a string of connected *offenses* and then argue the evidence of *other uncharged crimes* is inadmissible. BOR at 19-20 (citing State v. Lillard, 122 Wn. App. 422, 431, 93 P.3d 969 (2004)). In this vein, the State asserts evidence of bad acts was admissible because the State needed to prove a "pattern and practice of assault" under Count I. BOR at 20. The bad acts specified on appeal do not constitute assaults or uncharged crimes. The State's *res gestae* argument is therefore misplaced. The State wanted to make

Venegas look like a horrible person and it succeeded by placing a litany of disgraceful actions in front of the jury.

The State contends defense counsel's failure to object to bad character evidence was a legitimate tactic because, by allowing its admission, counsel was able to elicit favorable evidence from witnesses about how well Venegas treated J.V. BOR at 38-39. The contention is spurious. Defense counsel did not need to allow inadmissible bad character evidence in order to elicit other evidence contradicting J.V.'s story about the quality of his home life. A legitimate tactic was to attack J.V.'s credibility by eliciting evidence that undermined his story while objecting to unduly prejudicial bad character evidence.

3. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION FOR ER 404(b) EVIDENCE.

In claiming defense counsel was not ineffective in failing to request a limiting instruction for ER 404(b) evidence, the State does not dispute such evidence permeated the proceedings as part of the State's theory of the case and that such instruction would not have "reminded" the jury of it. BOA at 44. Instead, the State claims counsel was not deficient because requesting a limiting instruction that the State's evidence only went to motive or pattern would not allow the defense to use the same evidence for credibility. BOR at 40. Again, the State's contention is

spurious. Limiting instructions can specify evidence is to be considered for one purpose or multiple limited purposes. Just because it is admissible for one purpose does not mean it is inadmissible for another. The ER 404(b) evidence went to credibility, motive, and pattern. Competent counsel would have limited the jury's consideration of bad act evidence to these proper purposes rather than allowing the jury to treat her bad acts as evidence of Venegas' propensity to commit the charged crimes.

D. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the convictions and remand for a new trial.

DATED this 21st day of July 2009.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 37828-1-II
)	
LONI VENEGAS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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x Patrick Mayovsky

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