

I. ARGUMENT

A. Ms. Richard's Testimony On Direct Examination That She Told Another Prosecutor the Same Things She Testified To In Front of the Jury Was Prejudicial and Inadmissible Hearsay.

Under ER 801(d)(1), a witness' prior statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . .

ER 801(d)(1) (2010).

Here, Ms. Richard's prior statements were not offered to rebut any express or implied charge of fabrication or improper influence or motive. The prior statements were elicited during the direct exam of Ms. Richard—before a charge of fabrication or improper influence or motive could have been asserted by the defense. RP 199.

In this case, the question is whether Ms. Richard's out-of-court statement to Mr. Lee on December 6, 2007 rebutted the alleged link between her desire for leniency from the Grant County Prosecuting Attorney's Office and her testimony. The date of Ms. Richard's motive to fabricate was at its peak on December 6, 2007, *i.e.*, the date she made the

prior “consistent statements.” A prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive is admissible only if the statement had been made before the alleged fabrication, influence, or motive came into being. Tome v. United States, 513 U.S. 150, 156, 115 S.Ct. 696 (1995). In other words, “the consistent statements must have been made *before* the alleged influence, or motive to fabricate arose.” Tome, 513 U.S. at 158. (Emphasis added)

The State’s assertion that it was simply trying to provide “background and context for how the allegations against Defendant came to light, and why and when law enforcement began investigating” is rather disingenuous. Resp.’s Brief at 19. It is undisputed that “the case first came to the attention of law enforcement” a year before Ms. Richard’s conversation with Mr. Lee in the courtroom. RP 275. In fact, “the case first came to the attention of law enforcement” on December 5, 2006 when Mr. Lee and Mr. Chow reported it to law enforcement and ordered them to investigate. RP 275.

Moreover, the State was well aware that Ms. Richard had given inconsistent versions of events. And the State knew that Mr. Stansfield would attempt to highlight Ms. Richard’s inconsistencies, and attack her

memory and credibility. This was the reason for the State's efforts to bolster Ms. Richard's testimony.

That Mr. Stansfield was "afforded the opportunity to cross-examine" Ms. Richard about her statement is immaterial. Resp.'s Brief at 19. A witness' credibility can only be bolstered if the witness testifies and is subject to cross-examination.

The State claims that it "limited any potential 'bolstering'" by not asking either Ms. Richard or Mr. Lee to repeat verbatim what Ms. Richard told Mr. Lee but simply had Ms. Richard "describe the events that occurred in 2006, and then testify that she reported those events to Lee in 2007." Resp.'s Brief at 20. But that's not what happened. Rather, the State had Ms. Richard describe the events of 2006, and then elicited from her that she had consistently related her version of events. The State specifically asked Ms. Richard in two consecutive questions whether she told Mr. Lee the same version of events that she just related to the jury.

Q. And did you tell him *anything different* than what you've told us here today?

.....

Q. When you talked to Mr. Lee a year after the trial and you told him why you didn't come to court, did you tell him *the same thing* that you've told us here today?

RP 199.

In fact, Ms. Richard had already testified that she told Mr. Lee why she didn't come to court immediately before these questions. RP 199.

Q. Did you tell Mr. Lee why you didn't come to court?

A. Yes.

RP 199.

The State's next two questions went far beyond what was necessary.

In sum, the State's questions were unnecessary to explain why law enforcement got involved initially. They went above and beyond providing background or context for law enforcement's investigation. The record shows the State elicited Ms. Richard's testimony in order to bolster her credibility.

Also, the cases relied upon by the State pertain to confrontation rights, not bolstering a witness' credibility with prior consistent statements.

2. The Error Was Not Harmless.

Ms. Richard's testimony was not "an inconsequential moment in the trial." Resp.'s Brief at 20. Mr. Stansfield's vigorous and numerous objections to the State's line of questioning are a strong indication that it

was a very important “moment in the trial.” Again, Ms. Richard’s credibility, bias and memory were central issues during the trial.

The State claims the error was harmless because, “after defense counsel’s vigorous cross-examination challenging the credibility of Richard’s trial testimony, the State would have been permitted (and was permitted—RP 233-234) to introduce prior consistent statements to rehabilitate her on redirect examination.” Resp.’s Brief at 20. This is incorrect. Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. Tome, 513 U.S. at 157. ER 801 allows a party to rebut an alleged motive, not bolster the veracity of the story told. Tome, 513 U.S. at 157-58.

It was error to allow the State to bolster the credibility of Ms. Richard by eliciting earlier statements. The statements should have been excluded as inadmissible hearsay. As such, this Court should reverse the convictions and remand for a new trial.

B. Ms. Richard's Testimony That Mr. Stansfield's Comment to Her That She Was Not Supposed To Be At Home On the Day of Trial Was the Same As Telling Her To Not Attend Court Is Improper Opinion Testimony on the Ultimate Issue Which Deprived Mr. Stansfield of His Constitutional Right To a Fair Trial.

ER 704 provides that “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Thus, opinion testimony may not be excluded under ER 704 on the basis that it encompasses ultimate issues of fact. However, it must be “otherwise admissible” and is therefore subject to the requirements of ER 403, ER 701, and ER 702. State v. Farr-Lenzini, 93 Wn.App. 453, 460, 970 P.2d 313 (1999) (Div. II). An opinion which lacks proper foundation or is not helpful to the trier of fact is not admissible under ER 701 or 702. Farr.-Lenzini, 93 Wn.App. at 460. An otherwise admissible opinion may be excluded under ER 403 if it is confusing, misleading, or if the danger of unfair prejudice outweighs its probative value.

1. ER 701.

a. Ms. Richard's lay opinion is not helpful to the trier of fact.

“The general rule is that a witness must testify to facts, not opinions; that whenever the question to be determined is to be inferred

from particular facts which can be readily produced before the jury, and the inference to be drawn therefrom is within the common experience of men in general, requiring no special knowledge, skill, or training, the inference or conclusion is to be drawn by the jury and not the witness.” Johnson v. Caughren, 55 Wash. 125, 127, 104 P. 170 (1909).

In the case at bar, any witness having an opinion on the question of what Mr. Stansfield meant by stating “you were supposed to stay out of town” must have acquired it from observing his conduct, manner, and demeanor while speaking to Ms. Richard. These matters could be related to the jury by Ms. Richard substantially as they were observed by her—and which she in fact related. The jury was just as capable of drawing just inferences from them as was Ms. Richard herself. The question called for a conclusion which was the right of the jury to determine from the facts proven, and Ms. Richard could not properly testify as to her opinion upon the fact, but should have related the facts and allowed the jury to draw the conclusion. This being so, it was the province of the jury to draw the inference, and it was error to let Ms. Richard draw it for them.

- b. Ms. Richard's testimony lacked any proper foundation because she neither knew Mr. Stansfield nor based her opinion on a factual basis.

Ms. Richard was not familiar nor “personally acquainted” with Mr. Stansfield. Ms. Richard testified she never met Mr. Stansfield in person, (RP 187). She further testified that, prior to December 5, 2006, she had only spoken with him once, which was via telephone. RP 189.

The factual bases supporting Ms. Richard’s opinion were: (1) Mr. Stansfield asked her “why are you back in town”; (2) Mr. Stansfield’s demeanor was “upset;” and (3) in a prior telephone conversation, Mr. Stansfield told her not to come to court. These limited facts provide slim support for Ms. Richard’s opinion as to what Mr. Stansfield truly meant when he told her “you were supposed to stay out of town.” See, e.g., Farr-Lenzini, 93 Wn.App. at 460 (“the closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be.”).

“Courts also consider whether there is a rational alternative answer to the question addressed by the witness’ opinion. In that circumstance, a lay opinion poses an even greater potential for prejudice.” Farr-Lenzini, 93 Wn.App. at 463. Here, it is likely Mr. Stansfield was extremely stressed due to conducting a jury trial during the past two days. It’s also likely he

was “upset” and frustrated over the judge’s questionable ruling granting the State’s motion for recess during mid-trial in order to locate a witness—a witness whom Mr. Lee told Mr. Stansfield and the judge would not be testifying. RP 252-253; RP 503. Mr. Stansfield asked Ms. Richard why she was back in town because he was surprised to learn she was at her home due to her telling him that she was going to be in Seattle for a doctor’s appointment that day. RP 507.

The State asserts that Ms. Richard’s testimony was not an opinion of Mr. Stansfield’s state of mind, but was merely “[Ms.] Richard’s ‘interpretation’ or ‘perception’ of what Defendant meant when he told her that she ‘wasn’t supposed to be in town’.” Resp.’s Brief, at 22. But this is inconsistent with the words used in the question and answer. The State plainly asked for an opinion: “When you told Sergeant Bohnet that the defendant told you to stay out of town . . . how is that different from - - staying out of town different from not showing up in court?” Ms. Richard responded: “That is the same.” RP 236. The question went beyond mere perceptions of the witness and addressed the very heart of Mr. Stansfield’s guilt or innocence. A lay witness’ interpretation or perception of a defendant’s conduct can constitute an improper opinion as to the defendant’s guilt or innocence. See, e.g., State v. Read, 100 Wn.App. 776,

998 P.2d 897 (2000). Here, the opinion or “perception” addressed the major contested issue at trial, whether Mr. Stansfield was attempting to induce Ms. Richard to absent herself from trial. As such, the questions solicited opinions that, at least by inference, went directly to the issue of Mr. Stansfield’s state of mind, and thus his guilt.

In addition, it should be noted that Ms. Richard never testified that Mr. Stansfield told her she was “supposed to stay out of town.” RP 233, 235. The record shows Ms. Richard only testified that Mr. Stansfield asked her “why are you back in town.” RP 194. The statement that she was supposed to stay out of town was read from the transcript of Ms. Richard’s recorded statement by the State. The transcript was never admitted into evidence. RP 233, 235.

Further, that statement of Ms. Richard’s is inadmissible hearsay. So, what happened here is the State was allowed to recite Ms. Richard’s prior out-of-court statement and then elicit Ms. Richard’s opinion as to the meaning of that statement. But if the prior statement itself was inadmissible hearsay, it is bewildering how an opinion as to an alternative meaning of the same hearsay statement can be admissible.

2. ER 702.

ER 702 states:

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.

Here, the question posed to Ms. Richard required her to give an expert opinion as to linguistic similarities between the statements “you were supposed to stay out of town” and “don’t come to court.” RP 236. The question didn’t ask for Ms. Richard to clarify or explain her statement. Nor did it ask for her “interpretation” or “perception” of what Mr. Stansfield meant. It simply asked what the semantic differences were between two phrases. But Ms. Richard is not an expert in English linguistics—at least, no more than the jury. Therefore, such an opinion is not helpful to the trier of fact because the semantic similarities between these two plain statements requires no expert knowledge. It is a question of fact within the common understanding of the ordinary jury. Accordingly, her opinion is inadmissible under ER 702.

3. ER 403.

ER 403 provides, in pertinent part:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .

By itself, the State's reading from the excerpts of Ms. Richard's recorded statement was misleading and confusing for the jury. It must have been misleading and confusing for the jury just to figure out what was Ms. Richard's testimony and what was not. Yet the State went even further by eliciting Ms. Richard's opinion that her prior statement meant something other than what it said. RP 236. This further compounded the juries' confusion. For example, the jury convicted Mr. Stansfield on a separate count of Witness Tampering based on his phone call to Ms. Richard on December 5. But the only evidence on this count was Ms. Richard's testimony that Mr. Stansfield asked her why she was back in town. The jury must have believed Mr. Stansfield told Mr. Richard that she "was supposed to stay out of town," even though that statement was not evidence. And, the jury must have further believed Ms. Richard's alternative meaning of her prior statement.

Moreover, the probative value of informing the jury of what Ms. Richard told Sgt. Bohnet over a year ago is slight. Likewise, the probative value of informing the jury of Ms. Richard's semantic elucidation of an alternative meaning of her plain statement to Sgt. Bohnet is negligible.

As such, the probative value, if any, of Ms. Richard's opinion was substantially outweighed by the risk of misleading the jury and confusing the issues. As such, it was inadmissible under ER 403.

E. The Trial Court Abused Its Discretion In Refusing To Permit the Defense To Re-Open Its Case To Admit Evidence and Impeach the State's Witnesses Because It Resulted In Substantial Restriction On Mr. Stansfield's Ability To Cross-Examine and Confront the Witnesses, and Thereby Prevented Him From Presenting a Complete Defense.

“The determination of whether the trial court's decision to allow the State to reopen constitutes an abuse of discretion depends to some extent on the potential for unfairness to the complaining party.” State v. Brinkley, 66 Wn.App. 844, 850, 837 P.2d 20 (1992) (Div. II).

Here, the State did not even suggest that it would potentially suffer prejudice if Mr. Stansfield was allowed to reopen his case. RP 617-618. The State indicated only that both sides had rested; that Mr. Stansfield already had the opportunity to question Mr. Lee when he was on the witness stand the day before; and that, as a result, Mr. Stansfield forfeited his right to cross-examine Mr. Lee “on all of those things.” RP 617-18. But if this were the standard, then very few motions to reopen could be

granted without the trial court abusing its discretion. The trial court in Brinkley would have certainly abused its discretion under such a standard.

Mr. Lee's testimony would not have carried a distorted importance merely by being introduced after a reopening. Since neither closing arguments nor jury instructions had yet been delivered, Mr. Lee's testimony would have been heard in the orderly flow of the defense testimony. But even assuming that the testimony might have derived undue emphasis from its appearance subsequent to all parties resting, a cautionary instruction by the trial court might have remedied that potential problem. See, e.g., United States v. Larson, 596 F.2d 759, 779 (8th Cir. 1979).

Moreover, there is no suggestion in the record, the trial court did not find, and the State did not urge below and does not argue now, that the State let any potential rebuttal witnesses go on the assumption that the evidence was closed and that Mr. Lee would not be re-called to testify, or that any such witnesses had for any reason become unavailable after the defense rested the afternoon before. RP 617-619.

Also, we are not here concerned with the testimony of many additional witnesses, but of one more defense witness whose testimony would be strictly limited to a specific subject matter.

There is no indication that Mr. Stansfield took the action he did to put the State at a disadvantage. Nor is there any indication that he engaged in trickery or made a strategic decision to hold evidence back. Defense counsel did not admit that he purposefully chose not to cross-examine Mr. Lee on this subject. Resp.'s Brief at 29-30. The State's assertion that "Defense counsel knew that Lee, like Chow, would easily explain why he did not notice or speak to Richard during the times they were in a district courtroom together" is sheer speculation. Resp.'s Brief at 30.

Like Brinkley, the State was faced with evidence which could have been presented during Mr. Stansfield's case in chief and there is no suggestion that the impact of this additional evidence was intensified due to the timing of its presentation. Significantly, the State presented no rebuttal witnesses after Mr. Stansfield rested.¹

Both sides rested at 4:20 p.m. on May 27. RP 573. At the commencement of the very next day of trial, and before the jury was instructed or closing statements delivered, Mr. Stansfield made his motion to reopen. The delay in bringing the motion to reopen was minor. RP 617. Except for the loss of a small part of one afternoon, the timing of the

¹ That is to say, the State attempted to have recall Mr. Lee in rebuttal but the trial court

motion to reopen amounted to little more delay than would have been caused by Mr. Lee taking the stand on May 27.

Contrary to the State's assertion, Mr. Stansfield did not object to Mr. Lee being called in rebuttal. As the record shows, Mr. Stansfield merely objected to the subject matter of Mr. Lee's proposed rebuttal testimony. RP 570-573.

Also, the State attempts to distinguish State v. Brinkley from this case—as it must. But its attempts are ineffective. First, WPIC 4.66 had nothing to do with the issue of reopening the evidence. WPIC 4.66 related only to Mr. Brinkley's argument that “it was error for the trial court to ‘transmit’ the juror's question to both counsel.” Brinkley, 66 Wn.App. at 846. Second, the State in Brinkley “had ample opportunity to cross-examine and re-cross-examine” the victim and the police officers during its case in chief. Resp.'s Brief at 29. The parties in Brinkley excused the victim and police officers earlier in the trial. The State in Brinkley could have called the victim and/or the officers in rebuttal.

In sum, allowing Mr. Stansfield to reopen his case would not have put the State at an unfair disadvantage nor cause it unfair prejudice. On the other hand, denial of the motion prejudiced Mr. Stansfield. As such,

did not allow the State to elicit the testimony it desired from Mr. Lee. RP 572-573.

the trial court abused its discretion in denying Mr. Stansfield's motion to reopen.

G. The Trial Court Abused Its Discretion In Refusing To Dismiss Pursuant To CrR 8.3(b) Due To the State's Arbitrary Action and/or Misconduct or Mismanagement which Substantially Prejudiced Mr. Stansfield's Constitutional Right to a Fair Trial.

These days, plea bargains for defendants' "cooperation" with the prosecuting attorney's office are not made by express agreements. Nor are any terms or conditions negotiated. Prosecutors have learned not to make such express agreements, whether oral or written. These days, such plea bargains are made by way of unstated but nonetheless mutually understood agreements, or "tacit agreements."

In Grant County, one of the most common methods of making such tacit "cooperation agreements" is by the prosecutor telling the defense attorney (normally in the courtroom but off the record) that the defendant is a witness in another criminal matter, followed by the suggestion to continue the defendant's case for a certain period of time, *e.g.*, usually about six months. All Grant County criminal defense attorneys know what it means when a prosecutor makes these statements to them.

In the case at bar, Mr. Chow “approached” Brett Hill, Ms. Richard’s attorney, during Ms. Richard’s court hearing of June 12, 2008. RP 565. Mr. Chow informed Mr. Hill that Ms. Richard was “cooperating on a prosecution with the prosecutor’s office,” and suggested that they continue the court hearing for four months “rather than deal with the case at the time.” RP 565. But Ms. Richard’s pending criminal case was completely unrelated to the investigation of Mr. Stansfield on this matter. There was no necessity to continue her case for four months simply because she was “cooperating” with the prosecutor’s office on another matter.

Eventually, Ms. Richard and Mr. Chow agreed to settle that criminal matter with the imposition of no jail time or fines.”² RP 569.

Furthermore, the record demonstrates that the Grant County Prosecuting Attorney’s Office conferred beneficial treatment on Ms. Richard from December 2007 through Mr. Stansfield’s trial. For example, from October 2008 through November 2008, Ms. Richard missed at least three consecutive pretrial hearings. CP 61 at 125-128, 130-131. The State did not seek a bench warrant until Ms. Richard failed to appear for a fourth consecutive pretrial hearing, *i.e.*, a bench warrant was issued at the

² Waiving all fines is an extremely unusual in criminal cases.

pretrial hearing of November 19, 2008. CP 61 at 130-131. Moreover, after the bench warrant was issued and while the bench warrant was still active, Ms. Richard appeared in Grant County District Court for several hearings spanning more than three months yet the prosecuting attorney failed to arrest her or quash the warrant. Nothing was done on the warrant until Deputy Attorney General Hillman found out about it on January 21, 2009. CP 69 at 206.

Mr. Stansfield does not dispute that there was no “formal” express promise of leniency made to Ms. Richard. But neither Bagley, nor Giglio requires such a formal understanding or agreement. The Court in Giglio held that “any *understanding* or agreement as to a future prosecution” was sufficient. See, Giglio v. United States, 405 U.S. 150, 155, 92 S.Ct. 763 (1972). Here, there was, at a minimum, a tacit understanding between Ms. Richard and the Grant County Prosecuting Attorney’s Office.

I. The Combined Effect Of The Accumulation Of Errors Is Of Sufficient Gravity To Constitute Grounds For Reversal Or A New Trial.

Courts have used the cumulative error “doctrine where ‘(t)he combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial.’” State v. Oughton, 26 Wn.App. 74, 85, 612 P.2d 812 (1980) (quoting, State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859, 864 (1963)). “This court has applied the doctrine even where, as here, valid grounds exist for reversal, in the hope that such other errors will not be repeated on remand.” Oughton, 26 Wn.App. at 85.

Here, even if each error standing alone would otherwise be considered harmless, the hearsay testimony of Ms. Richard, her opinion testimony and the State’s false denials of any leniency agreement with Ms. Richard, when combined with the trial court’s denial of Mr. Stansfield’s motion to reopen and the State’s failure to fix false testimony, prevented Mr. Stansfield from obtaining a fair trial. See, State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992).

Accordingly, the Court must reverse the judgment and remand for a new trial.

II. CONCLUSION

For the reasons stated above, Mr. Stansfield respectfully requests that the Court reverse his convictions and order a new trial.

DATED this 27th day of JANUARY 2011.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "B. Chase", with a long horizontal flourish extending to the right.

BRIAN CHASE, WSBA#: 34101
Attorney for Appellant

COURT OF APPEALS
11 JAN 11 11:12
STATE OF WASHINGTON
BY _____
DEPT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

**NO. 39825-7
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Defendant, v. MARK E. STANSFIELD Appellant.	DECLARATION OF SERVICE
--	-------------------------------

I, Kelly Nunamaker, declare:

That I am now and was at all times hereinafter mentioned of legal age, not a party to this action, and that on or about the 27th day of January 2011, I caused to be enclosed in an envelope an original REPLY BRIEF OF APPELLANT in the above entitled cause, sealed the same, and addressed to the following:

State of Washington
Court of Appeals Division II
950 Broadway, Suite 300
Tacoma, WA 98402

LAW OFFICES OF BRIAN CHASE
Professional Limited Liability Companies
209 S. CENTRAL AVE.
Quincy, WA 98848
(509) 787-9000
FAX 787-9040

And a true copy to:

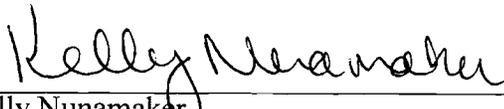
1 John Hillman
2 Attorney General's Office
3 Criminal Justice Division
4 800 Fifth Avenue, Suite 2000
5 Seattle, WA 98104-3188

3 and on said day caused the same to be deposited so addressed, with the postage thereon
4 prepaid, in the United States Post Office in the City of Quincy, State of Washington.

4 I declare under penalty of perjury under the laws of the State of Washington that the
5 foregoing is true and correct.

6 DATED this 27 day of January 2011, at Quincy, Washington.

7 LAW OFFICES OF BRIAN CHASE, P.L.L.C.s

8 
9 _____
10 Kelly Nunamaker
11 Legal Assistant

12
13
14
15
16
17
LAW OFFICES OF BRIAN CHASE
Professional Limited Liability Companies
209 S. CENTRAL AVE.
Quincy, WA 98848
(509) 787-9000
FAX 787-9040