

FILED
NOV 16 2011
CLALLAM COUNTY
WA

NO. 41234-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER AHLSTEDT,

Appellant.

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

The Honorable Kenneth Williams, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT EXPERT TESTIMONY NEEDED TO LINK BEAUCHESNE'S USE OF METHAMPHETAMINE TO HIS AGGRESSIVE BEHAVIOR.

Ahlstedt's attorney was ineffective in preparing, but then failing to present expert testimony that would have explained the circumstances and corroborated his version of events. Ahlstedt testified Beauchesne became inexplicably belligerent and came at him in an odd, unprovoked altercation. 6RP 146, 163. As the State points out, Ahlstedt did not claim to have stabbed Beauchesne in self-defense. Brief of Respondent at 23. Ahlstedt testified he merely pushed or threw Beauchesne away from him and was unaware any injury resulted. 6RP 146, 163. The clear implication from his testimony is that Beauchesne's injury must have occurred accidentally. Beauchesne and his girlfriend testified it was Ahlstedt who was inexplicably belligerent and Beauchesne was calm. 5RP 25, 58. Thus, the jury was in the position of deciding whom to believe.

Although there was evidence Beauchesne had consumed methamphetamine, Flynn's testimony would have directly connected that drug to the oddly aggressive behavior Ahlstedt described. CP 54. Flynn's expert testimony was both relevant and crucial because it would have

provided a plausible reason for events to have unfolded just as Ahlstedt described.

The State argues Flynn's testimony would not explain anything a lay witness could not. Brief of Respondent at 22 (citing State v. Thomas, 109 Wn.2d 222, 231-32, 734 P.2d 816 (1987)). But Thomas actually demonstrates the importance of the expert testimony in this case and the prejudice caused by counsel's failure to present it.

In Thomas, the issue was Thomas's own intoxication in the context of a diminished capacity defense due to voluntary intoxication. Thomas, 109 Wn.2d at 231-32. Thomas herself testified she was extremely intoxicated, but there was a danger the jury would see her testimony as self-serving and lacking in credibility. Id. at 232. The court concluded expert testimony explaining how alcohol can affect the brain to cause black-outs would have assisted the jury and counsel was deficient in failing ascertain the witness's qualifications. Id. at 231-32. Thomas conviction was reversed because that failure undermined confidence in the outcome of the trial. Id. at 232.

As in Thomas, the expert testimony in this case was necessary to provide a credible explanation for a witness' conduct. As in Thomas, the defense's lay witnesses were likely to be seen as self-serving and lacking in credibility. As in Thomas, the requisite expert, who could corroborate the reasonableness of the defense account of events, was not called because

counsel failed to ascertain he was qualified. As in Thomas, confidence in the outcome is undermined, and Ahlstedt's conviction should be reversed.

2. THE CRIME RE-ENACTMENT BY THE PROSECUTOR AND POLICE OFFICER DURING CLOSING ARGUMENT WAS IMPROPER BECAUSE IT WENT BEYOND THE EVIDENCE.

Improper prosecutorial argument is not immunized merely because it occurs in response to the defense's argument. State v. Francisco, 148 Wn. App. 168, 178, 199 P.3d 478 (2009). A response to defense argument may not be reversible error "as long as the remarks do not 'go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them.'" Id. (quoting State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005)).

The demonstration here went beyond the evidence presented at trial. No one testified as to what direction Beauchesne fell or how he fell. 6RP 60-61, 72, 80-81, 145-48, 161-62. Defense counsel merely argued he may have fallen on his knife, that was one possible explanation for his injuries. This was not a case like State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1977). In that case, an expert testified marks on the victim's body were consistent with a specific bodily position and the prosecutor during argument was permitted to illustrate the position the expert testified to. Id. at 845-46; see

also Moore v. State, 154 S.W.3d 703, 706-07, 709, (Tex. App. 2004) (prosecutor permitted to shake doll during closing argument in the manner appellant admitted was how the detective demonstrated it during testimony). Here, there was no specific testimony regarding the precise positions of the parties.

A demonstration that goes beyond the evidence should be presented as evidence, not during closing argument. State v. LiButti, 146 N.J. Super. 565, 572-73, 370 A.2d 486 (App. Div. 1977). Even if this re-enactment were in response to the defense's argument, there was no need to wait until the rebuttal to present it. Ahlstedt's version of events was clear from his testimony. 6RP 146, 163. If the State believed a re-enactment would effectively rebut the defense, it was free to present such evidence as rebuttal testimony or during its initial closing argument. Instead, it waited until rebuttal argument, when the defense had no further opportunity to explain or question.

Here, the State responded to a verbal hypothetical by defense counsel with a visual, physical re-enactment that may or may not have anything to do with what actually happened. The argument was improper because it went beyond the evidence and beyond what was necessary to respond to defense counsel's argument. Francisco, 148 Wn. App. at 178.

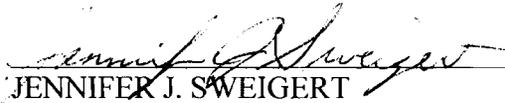
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Ahlstedt requests this Court reverse his convictions.

DATED this 15th day of August, 2011.

Respectfully submitted,

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 v.)
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 Appellant.)

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BY: *ka*
DATE: 8/15/2011
COURT REPORTER: *ka*

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 15TH DAY OF AUGUST, 2011, 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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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF AUGUST, 2011.

x *Patrick Mayovsky*