

No. 49024-2-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

Pierce County Superior Court, No. 16-1-00466-2

STATE OF WASHINGTON
Respondent

vs.

SETH A. FULMER
Appellant

Reply Brief of Appellant

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A. REBUTTAL ARGUMENT

1. Mr. Fulmer’s first assignment of error is reviewable, as the substance of the proffered testimony is apparent from counsel’s questions and the context of the questioning.

The State argues that Mr. Fulmer failed to preserve any error on the part of the trial court in excluding his testimony. Brief of Respondent (“Resp.”) at 5. The cases that the State cites, however, apply to different types of rulings than evidentiary rulings excluding testimony that was actually offered at trial, and are inapposite.

With regard to the exclusion of testimony, the proponent of the evidence must establish an adequate record for review. However, a formal offer of proof is not necessary “if the substance of the excluded evidence is apparent from the record.” *State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991). Rather, “the substance of the evidence may be made apparent from the questions asked or from the context in which they were asked.” ER 103(a)(2); *In re Det. of McGary*, 175 Wn. App. 328, 337, 306 P.3d 1005 (2013) (*quoting Ray*, 116 Wn.2d at 539)).

Courts examine whether the potential significance of the evidence is evident in the record. *McGary*, 175 Wn. App. at 337. The rule “does not require that the details of the testimony be apparent.” *Ray*, 116 Wn.2d at 539. For example, in *State v. Benn*, the substance of the excluded evidence was “fairly apparent from Benn's questioning of the experts,” but its exclusion was not clearly prejudicial. *State v. Benn*, 161 Wn.2d 256, 268, 165 P.3d 1232 (2007).

In *State v. Roberts*, following Mr. Roberts’ testimony that he was afraid that “Sylvester” would vandalize his property, defense counsel “asked what if anything Sylvester had said to cause this fear” and the trial court sustained a hearsay objection. *Roberts*, 80 Wn. App. 342, 349, 908 P.2d 892 (1996). This exchange was sufficiently clear for the court to review whether it was “error for the trial court to preclude Roberts from testifying to the content of Sylvester's alleged threat” and hold that it was. *Id.* at 352; 353 n.8.

Similarly, the substance and potential significance of Mr. Fulmer’s testimony regarding his discussions with Mr. Brown was clear from the language and the context of

defense counsel's questioning. RP 168-69. Mr. Fulmer revealed the discussion with Brown in response to counsel's question as to how he remained at the residence in January without having paid rent. RP 168.

Counsel's comments also made clear that Mr. Fulmer's understanding, or state of mind, was at issue, as well as Brown's verbal action of giving the permission, as opposed to the truth of the matters asserted. RP 168-69. Moreover, the value of the excluded testimony was clear. Mr. Fulmer's testimony simply that he stayed at the premises did not establish that Brown knew that he still lived there, which rendered Mr. Fulmer unable to contradict Mr. Brown's testimony or challenge his credibility by proving that Brown had a motive to lie.

The substance and purpose of Mr. Fulmer's testimony regarding his discussions with other residents about Detective Shaviri's visit was also clear from counsel's question as to how Mr. Fulmer became aware that the detective was looking for him. RP 171. This testimony would have helped enforce Mr. Fulmer's defense that the missed encounters with the detective were due to

happenstance, as successful encounters between Mr. Fulmer and other residents happened around that same time period. Thus, the value of the testimony is apparent in the record.

As the State notes, even if Mr. Fulmer had not adequately preserved the issue, manifest constitutional error is also reviewable. RAP 2.5(a). Under the analysis of the right to testify in Appellant's opening brief, the trial court's manifestly erroneous exclusion of Mr. Fulmer's testimony was a violation of his constitutional rights. Brief of Appellant ("App") at 10-20.

2. Mr. Fulmer's use of a false name did not support an inference of consciousness of guilt for the crime charged.

The State argues that Mr. Fulmer's use of a false name during the traffic stop supported a particularized inference of "consciousness of guilt of the serious offense with which he was ultimately charged" even if, as the trial court explicitly found, Mr. Fulmer could not have known that he had a warrant for his arrest for the instant charge at the time of the traffic stop. Brief of Resp. at 14; RP 40;

State v. Freeburg, 105 Wn. App. 492, 500, 20 P.3d 984 (2001).

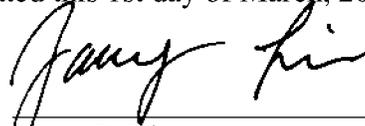
The State points out that Mr. Fulmer provided a different address for his alias Shelton than the address where he was registered. Brief of Resp. at 14. However, this fact carries the opposite inference, that Mr. Fulmer feared arrest on his unrelated warrants, not for failure to register, as giving a different address could only increase the odds of arrest for the more serious charge.

Despite the seemingly nonexistent nexus between Mr. Fulmer's use of a false name and the possibility of an arrest on a warrant that he could not yet have known about, the admission of this "powerful" evidence could easily have led the jury to conclude that Mr. Fulmer was a "bad" man with a propensity to lie, an inference that the State heavily exploited in its closing argument. *Id.* at 502; RP 205; 224-25. The trial court's failure to give a limiting instruction requires reversal. *Id.*

B. CONCLUSION

For the reasons explained above and in his opening brief, Mr. Fulmer respectfully requests this Court reverse his conviction and remand this case for a new trial.

Respectfully submitted this 1st day of March, 2017.

A handwritten signature in black ink, appearing to read "Jacey Liu", written over a horizontal line.

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COURT OF APPEALS, DIVISION TWO
STATE OF WASHINGTON

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Appellant.

Sup. Ct. No: 16-1-00466-2
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DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on March 1, 2017, I served by e-mail, with consent to electronic service, the Reply Brief of Appellant upon:

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I further certify that on March 1, 2017, I caused a copy of the Reply Brief of Appellant to be mailed to the following:

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Respectfully submitted this 1st day of March, 2017.

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