

No. 49332-2-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH LEROY FUGLE

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 14-1-04016-6

REPLY BRIEF OF APPELLANT

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Table of Contents

TABLE OF AUTHORITIES..... ii

I. STATEMENT OF THE CASE 1

II. ARGUMENT 1

III. CONCLUSION 5

TABLE OF AUTHORITIES

Cases

<i>State v. Barry</i> , 183 Wn.2d 297, 302-03, 352 P.3d 161 (2015).....	4
<i>State v. Clark</i> , 187 Wn.2d 641, 389 P.3d 462 (2017).....	2
<i>State v. Graham</i> , 59 Wn.App. 418, 796 P.2d 314 (1990)	2
<i>State v. Grant</i> , 83 Wn.App. 98, 109, 920 P.2d 609 (1996).....	2
<i>State v. Greene</i> , 139 Wn.2d 64, 73, 984 P.2d 1024 (1999)	2
<i>State v. Lee</i> , No. 92475-9 (June 15, 2017)	3
<i>State v. Rafay</i> , 168 Wn.App. 734, 784, 285 P.3d 83 (2012)	2

Rules

ER 702.....	1
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I. STATEMENT OF THE CASE

Appellant adopts the statement of facts as set forth in his opening brief.

II. ARGUMENT

A. The Testimony on Delayed Disclosure Was Not Relevant to Any Issue in the Case.

The state's only response to the alleged error in this case is based on its position that the defense placed the victim's credibility in issue and, therefore, the state was entitled to present evidence that delayed disclosure was pertinent to the jury's consideration. State's brief at 36-44. However, at no time did the defense, during cross-examination or during closing argument, ever suggest that the victim was not credible based on the late disclosure. RP 938-52.

The state's argument that the defense did in fact attack the credibility of the alleged victim in issue is based entirely on a misunderstanding of the case. The issue for the defense, as was placed into evidence through Dr. Reisberg, was that the so-called "memory" was not credible because the science did not support this type of recollection. In essence, it was based on a fictional event. It had absolutely nothing to do with the delayed reporting, which the accused acknowledged was a result of his amnesia.

The defense does not dispute that expert testimony is sometimes relevant in a given situation. ER 702 provides that "[i]f 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...may testify..." It

should only be admitted, however, in circumstances that do not exist here—where the expert’s testimony is helpful to the trier of fact. *State v. Rafay*, 168 Wn.App. 734, 784, 285 P.3d 83 (2012).

As such, the courts have allowed expert testimony in circumstances where the defense suggests that due to the delayed reporting, the victim was not credible. *State v. Graham*, 59 Wn.App. 418, 796 P.2d 314 (1990)(thrust of defense argument was that the delay in reporting was due to the victim no in fact being abused); *State v. Grant*, 83 Wn.App. 98, 109, 920 P.2d 609 (1996)(expert testimony relevant to explain a DV victim’s inconsistent conduct).

Importantly, however, not all expert testimony is relevant. It only becomes relevant if it addresses an issue at trial. If a defense is not pleaded, or in this case, argued, then expert testimony is not relevant. See *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017)(defense proffered expert testimony not relevant to issues at trial). As stated in *State v. Greene*, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999):

...proffered scientific evidence is inadmissible under ER702 unless it is helpful to the trier of fact under the particular facts of the specific case in which the evidence is sought to be admitted.

...

Under ER 702, expert testimony will be deemed helpful to the trier of fact only if its relevance can be established. Scientific evidence that does not help the trier of fact resolve any issue of fact is irrelevant and does not meet the requirements of ER 702.

(citations omitted).

Here, the proffered evidence did not address any issue of fact and was, therefore, inadmissible. The only reason to have the evidence admitted was to

give general support to the credibility of the alleged victim, a reason that has been deemed to be prejudicial. As stated in appellant's opening brief, the erroneous admission of the evidence materially affected the outcome within reasonable probabilities. Thus, the Court should reverse the convictions and remand for a new trial.

B. The Defense was Prejudiced by its Inability to Effectively Cross Examine the Alleged Victim.

The Washington Supreme Court recently addressed the importance of the right to cross examine adverse witnesses in a criminal case. As the court stated:

Both the federal and state constitutions protect a defendant's right to confront an adverse witness. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). "Confrontation" includes more than mere physical confrontation. *Davis*, 415 U.S. at 315. "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Id.* at 315-16 (internal quotation marks omitted) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)). Cross-examination allows the defendant to "test the perception, memory, and credibility of witnesses." *Darden*, 145 Wn.2d at 620. Confrontation therefore assures the accuracy of the fact-finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded." *Darden*, 145 Wn.2d at 620 (citation omitted).

State v. Lee, No. 92475-9 (June 15, 2017).

Here, the trial court impeded the defense from its full opportunity to cross-examine the accuser. The importance of the evidence was to demonstrate, through the accuser and the investigating officer, that there was nothing to corroborate the

statements that the accuser now indicated that he remembered as being fact.

Given that the entire testimony was based on recent “memories”, it was important to demonstrate that those memories were not real at all, which was the heart of the defense to the charges. The only issue should be whether the exclusion of the evidence was prejudicial or harmless.

Reversal is not required when it is clear that the error was harmless beyond a reasonable doubt. *State v. Barry*, 183 Wn.2d 297, 302-03, 352 P.3d 161 (2015)(quoting *Chapman v. California*, 386 U.S. 16, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The State bears the burden of demonstrating harmless error and is typically met where other, overwhelming evidence of the defendant's guilt is present. *Id.* at 303 (citations omitted). That is not the case here.

As has been presented, this case was extremely close, based not only on the jury's initial indication that it was unable to reach a verdict, but the paucity of evidence related to the veracity of the accused's memory. Under these circumstances, the state cannot demonstrate that the error was harmless beyond a reasonable doubt. Thus, this Court should reverse.

III. CONCLUSION

Based on the foregoing and the points and authorities in the opening brief, the appellant requests that the Court reverse his convictions and remand for a new trial.

RESPECTFULLY SUBMITTED this 12th day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

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