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NO. 49881-2-II

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

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IN RE THE DETENTION OF  
JOEL REIMER,  
Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Joel Reimer was entitled to a jury trial to determine whether the State could prove he continued to meet the criteria for indefinite civil commitment after 25 years at the Special Commitment Center (SCC). Mr. Reimer’s rights were denied by the unfair trial, however, because he was denied his right to testify during his case and because—contrary to a pretrial ruling and with the effect of bolstering the State’s expert’s opinion—the prosecutor elicited the opinions of nontestifying expert witnesses. The Court should reverse and remand for a new trial.

**1. Joel Reimer explicitly preserved his right to testify and was denied that right when he was not called to testify in his own defense despite his efforts to reach his attorneys.**

- a. The State ignores that Mr. Reimer explicitly preserved his right to testify in his own case.

The right to testify is “so crucial to the accused’s fate” that only he can decide whether to waive it. *State v. Humphries*, 181 Wn.2d 708, 725, 336 P.3d 1121 (2014) (internal quotation marks omitted). The decision whether to testify ultimately lies with the client. *State v. Robinson*, 138 Wn.2d 753, 763, 982 P.2d 590 (1999). The right is

explicitly protected under our state constitution. *Id.* at 758; Const. art. I, § 22.

The fundamental right to testify can only be waived if the waiver is made knowingly, intelligently and voluntarily. *State v. Thomas*, 128 Wn.2d 553, 558-59, 910 P.2d 475 (1996). An accused's constitutionally protected right to testify is violated if the final decision not to testify is made against his will. *Robinson*, 138 Wn.2d at 763.

Our courts indulge every reasonable presumption against waiver of the right to testify. *E.g.*, *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

Contrary to the State's contention, the prosecution bears the burden of establishing a valid waiver. *E.g.*, *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014) (courts indulge every reasonable presumption against waiver of fundamental rights and State bears burden to establish valid waiver); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (regarding guilty pleas, "The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation."). The State cites to *In re Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994) to argue Mr. Reimer bears the burden. Resp. Br. at 9.

But, *Lord* does not place the burden on the respondent to establish waiver of the right to testify. *See Lord*, 123 Wn. 2d at 317.

Moreover, the facts of *Lord* distinguish it from this case. In *Lord*, the defendant was present and affirmatively stated on the record, to the trial court, that he would not testify on the advice of counsel. *Id.* at 316. Essentially the opposite occurred here: Mr. Reimer explicitly refused to waive his right to testify. CP 1229. Moreover, as discussed below, unlike in *Lord* and *Thomas*, but as in *Robinson*, Mr. Reimer presents particularized facts supporting the assertion that he did not waive his right to testify.

Mr. Reimer explicitly preserved his right to testify in his own case. CP 1229. He did so even though he waived his right to be present for much of the trial. CP 1227-31; RP 41-49, 55-59. The waiver form he executed specifically omitted a waiver of the right to testify:

**Right To Testify**

I understand that I have a constitutional right to testify. I understand that if I choose to testify, the Petitioner has a right to cross-examination [sic] me.

I hereby waive my right to testify and be present to testify. Initial: \_\_\_\_\_. [**line left blank**]

CP 1229 (footnote omitted).

Mr. Reimer explicitly preserved his right to testify in his own case. And this preservation was separate and apart from his willingness to testify during the State's case. *Compare* CP 1228-29 (waiving right to be present during state's case-in-chief with exception if called by state to testify) *with* CP 1229 (preserving right to testify in respondent's own case-in-chief). Thus, his testimony during the State's case does not cure the violation of his right to testify during his own case-in-chief.

The court also made plain that Mr. Reimer could revisit his waivers at any point during trial by notifying his attorney. RP 78-79.

Mr. Reimer waived his right to be present for portions of the trial because he wanted to stay at the SCC rather than be held in jail. He could more reliably receive his medication at the SCC, and he had back and neck pain that made sleeping at the SCC more comfortable for him. CP 1227-31; RP 41-49, 55-59; *see* CP 1144-55.

However, it is clear Mr. Reimer was not returned to the SCC. Rather, he remained in jail during the trial. RP 904, 1050, 1395-1401, 1405-06. He had every right to appear at his trial and testify in his own case. Because Mr. Reimer was jailed, he had every reason to do exercise his right.

The record also shows Mr. Reimer tried to testify. At the post-trial hearing, Mr. Reimer attested he was supposed to be in court on October 19 and had a right to testify according to the waiver he signed. RP 1403-05. He called his attorneys to effectuate his rights. RP 1405-06. He also sent messages through the jail. *Id.* In fact, one message did reach the court, and it advised Mr. Reimer's attorneys that he was trying to contact them. RP 1050. But his attorneys apparently did not contact him, and they rested his case.

Attorneys "can prevent their clients from testifying, in violation of their constitutional right to testify, by refusing to call the defendant as a witness even though the attorney knows that the defendant wants to testify." *Robinson*, 138 Wn.2d at 762-63. Mr. Reimer did not waive his right to testify, yet his attorneys failed to call him to the stand. "If the decision to testify is made against the will of the defendant, it is axiomatic that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify." *Id.* at 763. Mr. Reimer was deprived of his constitutional right to testify.

- b. The Court should hold the violation of the right to testify is structural error. However, even under the constitutional harmless error standard, the constitutional violation prejudiced Mr. Reimer.

Because denial of the right to testify affects the entire framework in which the trial proceeded, the error is structural and requires reversal. *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The extent of the prejudice cannot be measured. Because Mr. Reimer was denied the right to testify in his own defense, the Court cannot precisely measure the effect of the unconstitutional omission. The matter should be remanded for a new trial. *See id.* at 309-10.

Notably, the State does not address why the error is not structural. However, even if the Court applies the constitutional harmless error test, reversal is compelled. *See Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

A constitutional error requires reversal unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. *Id.* The State fails to do so here. First, the State ignores that the jury was initially deadlocked. In fact, the presiding juror reported the discourse was deep and rich, but that votes had not changed for a

long time. RP 1390-92. The evidence was hardly as favorable to the State as it tries to portray. *See* Resp. Br. at 15-18.

Moreover, the fact that Mr. Reimer had the opportunity to testify in the State's case-in-chief does not demonstrate he presented the jury with all the evidence he wanted them to consider. Mr. Reimer had a right to testify in his own case, and this opportunity arises after the State's evidence was complete. As Mr. Reimer attests,

My proposed strategy was that I would testify first as called by the prosecutor and then after Dr. Richards or just before him I would testify to "Ancestral Influence"; "Early Childhood"; "Avoiding Organized Dogma"; "Introspection"; "Self-Realization"; "The Awakening," (first recognized in an evaluation by DCC Dr. Gollogly in 1998); "To Reform My Environment"; "Trust and Rapport"; and the facts in the overview of Evaluations 1983-2016. I presented Ancestry records and [trial counsel] promised we would go through each one when I testified on my own behalf.

CP 1330. These topics were not covered when Mr. Reimer was called during the State's case. *See* Resp. Br. at 16-18 (discussing cross-examination of Reimer). For example, Mr. Reimer was not asked to view Ancestry records. *Compare* CP 1330 *with* RP 865-99, 919.

These topics could have demonstrated to the jury that Mr. Reimer no longer suffers from a disorder that affects his volitional control.

Moreover, Mr. Reimer and his attorneys could have directed the topics

of his examination—unlike on cross-examination during the State’s case—and responded to the State’s presentation of evidence.

Further, the jury was confronted with disputed expert opinions. The State’s expert diagnosed Mr. Reimer with sexual sadism among other disorders. RP 556-59. But Mr. Reimer’s expert, the former head of the SCC, testified Mr. Reimer did not suffer from a condition that made him predisposed to committing sexually violent acts. RP 1095-96, 1114-15, 1192. The State cannot show beyond a reasonable doubt that Mr. Reimer’s testimony—if he had been allowed to offer it—would not have swayed the jury to find Mr. Reimer did not satisfy the criteria for commitment.

**2. The rules of evidence and a pretrial ruling precluded the State’s from eliciting diagnoses by nontestifying experts, which bolstered the State’s trial expert. Because the State’s misconduct nonetheless put this evidence before the jury, the matter must be reversed and remanded for a fair trial.**

a. The State misrepresents the record.

The State selectively excerpts from the record regarding the State’s pretrial position and the trial court’s pretrial ruling. Resp. Br. at 8. First, the State ignores its own pretrial argument. *See id.* (declining to recite the prosecutor’s argument during motion in limine hearing).

The State argued the testifying experts should be allowed to testify to facts they relied on that were derived from prior evaluations of Mr. Reimer. RP 128-29 (“a large majority of information that the experts are relying on is coming from these evaluations”). However, the State avowed it would not seek to bolster its expert’s opinion by bootstrapping the opinions of nontestifying experts because it conceded that doing so would be improper. RP 129. Mr. Talebi stated pretrial,

So I’m not going to stand there and say, you know, well, Dr. Hoberman, you know, you found he was a sexual sadist, [INAUDIBLE] found he was a sexual sadist, this evaluator found -- you know, in that way to basically **bolster** his testimony, however, there are things because we’re talking about a period of 25 years that these evaluations are benchmarks.

*Id.* (emphasis added). The State assured the court (and Mr. Reimer) it would not use nontestifying expert opinions to bolster Dr. Hoberman’s diagnoses:

So I just think in terms of overall saying, you know, no, you can’t rely on the opinions that are in these evaluations from the experts, it’s both experts use quite a bit of information from these evaluations. So I don’t think there’s a way around that, but I can just tell the court **I’m in agreement. I’m not just going to bolster, you know, Dr. Hoberman’s and undercut Dr. Richards by saying, you know, 20 people agree with you and five people or two people only agree with you. I’m not going to do that, so.**

RP 129-30 (emphasis added).

Mr. Reimer agreed the experts could rely on facts from records other than their own, but they could not rely on or testify about nontestifying experts' opinions. RP 130-31. As counsel summarized, "We're really, as I think the court can see, very concerned about this bootstrapping of prior opinions." RP 131.

The trial court agreed with the parties that nontestifying expert opinions were inadmissible. RP 132. It ruled that the "starting point" would be "the experts can testify to facts other people have. The experts can't testify to opinions other people have." RP 132.

Contrary to the State's recitation to this Court, the trial court did not reserve ruling depending on the questions asked. Resp. Br. at 8 (erroneously citing RP 129, which contains counsel's argument). Rather, again, the trial court ruled "the experts can testify to facts other people have. The experts can't testify to opinions other people have." RP 131. That was the "starting point." *Id.* This ruling was conclusive.

In fact, the trial court later told the jury that "previously, there was a ruling that we were not going to discuss or consider prior evaluations of Mr. Reimer by people who were not brought in here as witnesses for a variety of reasons, including the fact that they're not

subject to cross-examination.” RP 1190-91. It is disingenuous for the State to now argue that the trial court had not so ruled.

The only matter the trial court left open was that a party could try to revisit the issue by addressing the matter outside the presence of the jury. RP 1191. The court continued, “depending on the questions that are asked . . . . If anybody thinks that it’s really opened up, my preference would be that we get the high sign and can talk about it outside the presence of the jury.” *Id.* The court reiterated it would only consider a departure from the pretrial ruling if a party moved to do so and the matter was heard outside the presence of the jury: “I’m okay with making this trial just a little bit longer as opposed to trying it another time. So that’s where the starting point is, and if somebody thinks we need to go beyond that, we’ll discuss it.” *Id.*

The State ignored the court’s directive. It did not ask the court to reconsider its pretrial ruling. Contrary to the pretrial ruling, during the State’s cross-examination of Dr. Richards, it did not ask the court to “go beyond” its pretrial ruling that the “experts can’t testify to opinions other people have.” RP 131. In fact, the State did quite the opposite. The prosecutor simply asked Dr. Richards about the opinions of nontestifying experts. RP 1179-80. And the court, unaware where the

prosecutor was heading, allowed the testimony. RP 1889 (the court explained, “When the question first started, I thought it was going elsewhere than it did.”).

Q. [By Mr. Talebi] And so, Dr. Richards, while you were there for several years there was several evaluations at that time on Mr. Reimer, and, in fact, each of those evaluations diagnosed him with several paraphilias --

MR. GAER: Objection --

Q. -- antisocial --

MR. GAER: -- pretrial motions.

THE COURT: I’ll allow it.

MR. GAER: Your Honor --

THE COURT: I’ll allow it.

Q. He was diagnosed with multiple paraphilias, including sexual sadism. He was diagnosed with antisocial personality and high psychopathy by all of them. [The same diagnoses the State’s expert made at trial. RP 556-59.] So you never wrote a letter to them in regards to Mr. Reimer in terms of those cases; is that right?

A. That’s correct.

RP 1179-80.

The trial court did not “reverse[] its decision”—as the State now argues. Resp. Br. at 9. The trial court initially ruled pretrial that the opinions of nontestifying experts were inadmissible, RP 130-31, and it

ultimately reached the same conclusion albeit after it first overruled Mr. Reimer's objection, RP 1189-90. By ultimately concluding that the opinions of nontestifying experts were inadmissible, the trial court ruled consistently with its pretrial ruling. Furthermore, the trial court found the State's conduct violated the court's pretrial ruling. RP 1188 (asking prosecutor why he asked the question knowing "you're going to run dead into that prior ruling on the motions in limine" without raising the issue "outside the presence of the jury"), 1189 ("It certainly runs squarely into the prior ruling about evaluations from people who aren't present here."). However, because of the State's failure to comply with the pretrial ruling (and the trial court's failure to realize where the questioning was leading), the jury learned of the opinions in "several evaluations" by nontestifying experts over "several years." RP 1179-80, 1185-90 (court did not realize where questioning would lead when it overruled objection).

- b. The admission of years of diagnoses mirroring the State's expert's diagnoses was evidentiary error and prosecutorial misconduct that requires reversal and remand for a fair trial.

The State tries to skirt the trial court's ruling by arguing the evidence was admissible as impeachment. Resp. Br. at 19-20, 26, 27-

30. But the evidence only impeaches Dr. Richards if it is true; therefore, it is not a nonhearsay purpose.

A statement of another that is offered to impeach a witness necessarily is also offered to prove the truth of the matter asserted.

*State v. Williams*, 79 Wn. App. 21, 26-27, 902 P.2d 1258 (1995).

A trial witness' own prior inconsistent statement is not offered to prove the truth of the matter asserted to the extent it is offered to cast doubt on the witness' credibility. To say that a witness' prior statement is "inconsistent" is to say it has been compared with, and found different from, the witness' trial testimony. This comparison, without regard to the truth of either statement, tends to cast doubt on the witness' credibility, for a person who speaks inconsistently is thought to be less credible than a person who does not. McCormick on Evidence § 34, at 114 (4th ed.1992).<sup>14</sup> Thus, to the extent that a witness' own prior inconsistent statement is offered to cast doubt on his or her credibility, it is not offered to prove the truth of the matter asserted, it is nonhearsay, and it may be admissible "to impeach". *Webb v. Seattle*, 22 Wn.2d 596, 610, 157 P.2d 312 (1945).

**This reasoning does not extend to situations in which the prior inconsistent statement was made by someone other than the trial witness.** If A's prior out-of-court statement is inconsistent with B's trial testimony, **A's statement casts doubt on B's credibility if A's statement is true; but A's statement does not cast doubt on B's credibility if A's statement is not true.** In this situation, A's statement is offered to prove the truth of the matter asserted, even though it also is offered "to impeach" B.

*Id.* (footnote omitted; emphasis added).

As this Court explained in *Hamilton*, impeachment evidence used in an effort to show the testifying witness should have relied on the opinion is elicited for its truth and therefore inadmissible hearsay under ER 801(c). *State v. Hamilton*, 196 Wn. App. 461, 464, 383 P.3d 1062 (2016). “Cross-examination that attempts to impeach by slipping in unrelayed on opinions and conclusions without calling the experts to testify is improper.” *Id.* (quoting Robert H. Aronson & Maureen Howard, *The Law of Evidence in Washington* § 8.03[8][b], at 8-67 (5th ed. 2016)).

The State concedes the same, “It is improper to impeach an expert witness’ testimony by contrasting it with ‘unrelayed on opinions’ of other non-testifying experts. *Hamilton*, 196 Wn. App. 461, 464, 383 P.3d 1062 (2016).” Resp. Br. at 19.

Unless the nontestifying experts actually opined on the same diagnoses as Dr. Hoberman (sexual sadism) or to the opposite conclusion as Dr. Richards at trial, their opinions carry no impeachment value. Thus, the truth of the opinions was central to the State’s questioning of Dr. Richards.

The trial court’s pretrial ruling squarely precluded this questioning. RP 131. The State did not follow the court’s directive

that, if it sought to alter the pretrial ruling that nontestifying expert opinion evidence was inadmissible, it must raise the issue in advance, outside the presence of the jury. *See id.* Rather, the State simply asked Dr. Richards about the other opinions and put the evidence before the jury. This was misconduct. It also violated the rules of evidence. ER 401, 402, 703, 705, 801(c); *Hamilton*, 196 Wn. App. at 464.

As in *Hamilton*, the inadmissible evidence concerned the central issue in the case—whether Mr. Reimer suffers from a mental disorder that makes him more likely to engage in sexually violent behavior. *See* 196 Wn. App. at 485. The prosecutor’s elicitation of this inadmissible evidence requires reversal, as it did in *Hamilton*. *See id.*

Here, unlike in *Hamilton*, two additional bases compound the error and compel reversal. First, the elicitation of the inadmissible evidence was misconduct because it violated the court’s pretrial ruling. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutor commits misconduct that is flagrant and ill-intentioned if it violates the rules established to govern the parties’ conduct at trial); RP 131 (pretrial ruling). Despite the pretrial prohibition on the opinions of nontestifying expert’s, the State deliberately questioned Dr. Richards, as it had done at his deposition, about the diagnoses of prior evaluators.

RP 1179-80, 1186-87. The trial court disapproved of the State's conduct on this basis:

THE COURT: Well, Counsel, let me ask, in light of the prior ruling -- and you've got this in a deposition, you know you're going to use it, why on earth did it not come up outside the presence of the jury?

MR. TALEBI: What?

THE COURT: The fact that you're going to run dead into that prior ruling on the motions in limine.

RP 1188.

Second, the violation of the pretrial ruling was flagrant and ill-intentioned misconduct that vouched for the State's expert, as Dr. Hoberman diagnosed Mr. Reimer with sexual sadism, antisocial personality disorder and high psychopathy—the same opinions the State “offered” on cross-examination through the nontestifying experts. Beyond the admission of inadmissible evidence on a central issue, here the evidence of years of opinions of nontestifying experts vouched for the State's own expert's testimony. Thus, the prejudice here extends beyond that at stake in *Hamilton*.

The admission of this testimony jeopardized Mr. Reimer's right to a fair trial and requires reversal. *See Hamilton*, 196 Wn. App. at 485.

B. CONCLUSION

As set forth here and in the opening brief, the commitment order should be reversed and the matter remanded for a new trial on three independent grounds: (1) Mr. Reimer was denied his right to testify; (2) the prosecutor elicited inadmissible opinion evidence that prejudiced Mr. Reimer's right to a fair trial, and (3) application of an unconstitutionally low standard of proof denied Mr. Reimer due process.

DATED this 12th day of December, 2017.

Respectfully submitted,

s/ Marla L. Zink

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

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IN RE THE DETENTION OF	)	
	)	
JOEL REIMER,	)	NO. 49881-2-II
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

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[X] JOEL REIMER SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X) U.S. MAIL ( ) HAND DELIVERY ( ) _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 12<sup>TH</sup> DAY OF DECEMBER, 2017.

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# WASHINGTON APPELLATE PROJECT

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## Transmittal Information

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