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Division II  
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NO. 51249-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

NATASHA BRITT,

Appellant.

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

The Honorable Grant Blinn, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT BEARS THE OBLIGATION TO ENSURE THAT ALL JURORS ARE FIT TO SERVE, REGARDLESS OF DEFENSE COUNSEL'S ACTIONS OR INACTIONS

The State attempts to place the burden on defense counsel to decide that Juror 26 was fit to serve, asserting that the trial court should defer to defense counsel's judgment on whether to challenge a juror. Br. of Resp't at 19-20. However, RCW 2.36.110 puts the obligation squarely on the trial court to excuse jurors who manifest unfitness based on "inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." Juror 26 was repetitive and unequivocal that she could not remember the evidence from a two- to three-week trial, even if permitted to take notes and deliberate with other jurors. RP 734. Under these circumstances, the trial court had an obligation to protect Britt's jury-trial right "regardless of inaction by counsel or the defendant." State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015); accord State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000) ("RCW 2.36.110 . . . place[s] a continuous obligation of the trial court to excuse any juror who is unfit and unable to perform the duties of a juror."). Given that Juror 26 manifested unfitness due her admitted inattention or mental defect,

which was never neutralized or mitigated in any manner, the trial court had the obligation to excuse Juror 26.

The State also points out that Juror 26 understood the “telephone game” questions defense counsel asked and that Juror 26 indicated she could be impartial. Br. of Resp’t at 18. The State also notes that Juror 26 indicated in her questionnaire that she did not have a physical or mental condition that she believed justified her excusal and that she has . Br. of Resp’t at 18. The issue raised by Britt does not pertain to bias, prejudice, or indifference, but to Juror 26’s clear statements regarding her inability to remember the evidence presented to her in the course of the trial. And, although the State claims Britt fails to show “Juror 26 had a[ ‘mental] defect’ that disqualified her from serving,” Juror 26’s words that she could not remember the evidence presented in trial—regardless of notetaking or later deliberation with other jurors—demonstrated that Juror 26 lacked the mental capacity or attentiveness to adequately serve.

The State also tries to downplay Juror 26’s statements, claiming she was just giving “an honest and perfectly normal response to the question. It is not surprising that a juror might express some doubt about their ability to recall specific testimony several weeks after the fact . . . .” Br. of Resp’t at 17. The State misrepresents Juror 26’s words. She did not merely express doubt about her ability to recall testimony after a two- to three-week trial;

she stated unequivocally she did not think she had the ability recall such evidence, even if she took notes and even if she discussed the testimony with other jurors during deliberations.

Britt was tried by a jury composed of at least one person who manifested unfitness to serve based on her poor memory. This error requires reversal of her convictions and a new trial.

2. DEMONSTRATING THAT THE STATE'S WITNESSES ARE LYING IS ALWAYS RELEVANT TO CREDIBILITY AND BIAS, AND THIS LINE OF DEFENSE WAS UNFAIRLY CURTAILED IN BRITT'S TRIAL

As Britt argued in her opening brief, the trial court unfairly restricted her cross examination of several state witnesses to elicit information showing that the witnesses were lying about Regina Golden's whereabouts. Br. of Appellant at 19-32. According to the State, defense counsel did not explain their theory of bias and credibility well enough for the trial court to understand or defense counsel simply withdrew their questions of witnesses or abandoned the arguments. Br. of Resp't at 22-30.

As the State admits, however, the defense theory became clear when Britt attempted to question Christine Kilpatrick regarding the parentage of A., Regina Golden's daughter. Br. of Resp't at 23-24 (acknowledging the defense theory that "Ms. Golden had a daughter and it would be unlikely that she would have left this daughter in someone else's care for three months,

which arguably supports a conclusion that Ms. Golden was not actually out of state for three months . . . .”). The trial court also understood the relevance of the testimony at this point, expressly articulating the evidence’s relevancy, at least partially. RP 1389. Yet the trial court excluded such evidence a “a bit far removed.” RP 1389. This was error. When evidence is relevant—as here, which the State and trial court acknowledged—“no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.” State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

From the moment Britt attempted to question Christine Kilpatrick, the cards were on the table and Britt’s strategy of discrediting the State’s witnesses regarding the whereabouts of Regina Golden were crystal clear. If the witnesses were willing to lie about Golden on the stand, then they were not credible witnesses in any respect and therefore were fabricating their allegations.

Nonetheless, the trial court persisted in excluding such evidence, repeatedly stating that it was not clear how the evidence showed bias. RP 1471-72, 1645-46. The State makes the same claim on appeal. Br. of Resp’t at 25, 30. It should go without saying that eliciting evidence showing witnesses are not being truthful about one subject suggests that the witnesses lack credibility overall, and that their willingness to lie to the factfinder

shows their bias against the accused. See Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 105, 39 L. Ed. 2d 347 (1974) (associating impeaching a witness's credibility with discrediting the witness based on witness's partiality). The trial court's failure to apprehend this basic point and place continual obstacles in front of Britt's efforts to discredit the State's witnesses denied Britt her fundamental due process right to present evidence and confront adverse witnesses. The trial court's multiple errors on this score require reversal.

3. UNDER RECENT PRECEDENT, THE STATE BEARS THE BURDEN OF PROVING THAT BRITT'S DNA HAS NOT BEEN COLLECTED, WHICH IT FAILED TO DO

The State cites State v. Thibodeaux, 6 Wn. App. 2d 223, 430 P.3d 700 (2018), for the proposition that Britt "has not demonstrated that it was impermissible to impose the collection fee." Br. of Resp't at 46. The State made a similar argument in State v. Houck, \_\_\_ Wn. App. 2d \_\_\_, \_\_\_ P.3d \_\_\_, 2019 WL 3562018, at \*6 (Aug. 6, 2019), which this court rejected. It is the State's burden to demonstrate that the DNA was not collected, not Britt's burden to demonstrate it was.

The State concedes that Britt has a potentially qualifying offense that requires collection of her DNA. Br. of Resp't at 45-46. As in Houck, however, "the record on appeal is silent as to whether the State previously collected [her] DNA." Houck, 2019 WL 3562018, at \*6. "If such collection

occurred, the trial court’s imposition of the DNA collection fee was improper.” Id. The according remedy is remand where the trial court “shall strike the DNA collection fee unless the State demonstrates that [Britt]’s DNA has not been collected.” Id.

4. THE STATE’S ATTEMPTS TO DISTINGUISH GOSSETT FAIL

Under this court’s recent decision in In re Personal Restraint of Gossett, 7 Wn. App. 2d 610, 624-25, 435 P.3d 314 (2019), the Department of Corrections (DOC) need not abide by a trial court’s order amending a judgment and sentence to address parental visitation issues where the trial court does not exercise personal jurisdiction over DOC. In Gossett, the trial court amended the judgment and sentence to allow visitation between its inmate, Gossett, and his minor children. Id. at 614. DOC refused to facilitate the visitation because it had not received notice of the hearing and asserted that the trial court lacked personal jurisdiction over it. Id. at 618-20. This court agreed with DOC. Id. at 624-25. This court explained, “Gossett had already been remanded to the custody of DOC, and the order amending and clarifying his sentence pertained to the routine management of one of its prisoners.” Id. at 625.

Without analysis, the State claims that Gossett “clearly involved a unique set of facts and has no bearing on this case, as the order in the present

case does not mandate or direct how the Department is to operate its facilities.” Br. of Resp’t at 47. True, in Gossett, the trial court’s order amending the judgment and sentence required DOC personnel to supervise visitation, a requirement that is absent from the trial court’s order in Britt’s case. Compare Gossett, 7 Wn. App. 2d at 615, 619-21 with CP 259-61. However, DOC refused to allow Gossett any contact with his children whatsoever, despite the trial court’s order amending the judgment and sentence to allow visitation. Gossett, 7 Wn. App. 2d at 615, 619-21.

Just as in Gossett, the trial court entered an order amending the judgment and sentence to permit Britt to have contact with her children. CP 258-62. The State does not dispute that DOC did not participate in or approve of such contact at the hearing at which the judgment and sentence was amended. Just as in Gossett, DOC may now unilaterally refuse to permit the contact ordered by the trial court if it disagrees with such contact based on its own policies. Cf. Gossett, 7 Wn. App. 2d at 618-21. Because DOC did not participate in amending the judgment and sentence, under Gossett, DOC need not comply with the order amending the judgment and sentence and need not permit Britt to have the contact with her children that the order authorizes. Cf. id. at 624-25. Just as Gossett was, Britt “had already been remanded to the custody of DOC [when the order in question was issued], and the order amending and clarifying [her] sentence pertained

to the routine management of one of its prisoners.” Id. at 625. The only ability Britt has to require DOC to allow contact between her and her children is to request remand where the trial court directly orders DOC to allow such contact.

As for Britt’s claim that the trial court violated RAP 7.2(a), the State agrees. Br. of Resp’t at 47. Yet the State claims that it would waste “judicial resources to nullify the agreed order (which gave the Defendant the relief she requested) and remand this case for entry of an identical order.” Br. of Resp’t at 47-48. Britt has three responses.

First, under Gossett, the amended order did not give Britt the relief she requested; though it purported to do so, DOC need not allow Britt to have contact with her children, so the “relief” given is illusory.

Second, Britt does not request remand for an identical order; she requests remand so that the trial court can exercise jurisdiction over DOC to force its duty to comply with a duly issued court order allowing Britt contact with her children. In short, the order would not be identical because it would specifically reach DOC.

Third, it would more greatly waste judicial resources not to grant Britt the requested relief. Assuming that DOC refuses to honor the order amending the judgment and sentence and continues to disallow contact, Britt would need to engage in further legal proceedings, either by making

additional motions in the trial court or by filing a personal restraint petition in the Court of Appeals. In other words, the appellate court could easily resolve the issue by ordering remand now. If it does not, Britt has no recourse but to pursue further litigation outside of this appeal, which may necessitate multiple motions and petitions, which may in turn stem additional appellate litigation. Judicial economy is best served by remanding this matter so that the trial court may enter an order that is actually binding on DOC regarding Britt's contact with her children and striking the psychosexual evaluation requirement.

D. CONCLUSION

For the reasons stated here and in her opening brief, Britt asks that this court reverse her convictions and remand for a new and fair trial.

DATED this 14th day of August, 2019.

Respectfully submitted,

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

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