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Court of Appeals
Division II
State of Washington
3/21/2019 4:53 PM

COURT OF APPEALS NO. 51389-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION TWO

TANNER BIRDSALL,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

1. The State fails to address key issues in appellant's opening brief relating to the motion for a new trial.

In denying the motion for a new trial, the trial court criticized defense counsel for not submitting juror affidavits as to the impact of the improper evidence. The court told counsel, that his motion "would have been much stronger" if he could have gotten "one of those jurors to say this issue came up in our short deliberations and it affected us in some way." RP 1023-24. The court said that without those juror statements, "you're just asking me to speculate that they even talked about it." RP 1024. In the opening brief, appellant pointed out that this was a misapplication of the law and constitutes an abuse of discretion.

The State did not address these arguments in its response brief. The State's silence is understandable, as case law is unequivocal in this area. "The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." *State v. Ng*, 110 Wash.2d 32, 43, 750 P.2d 632 (1988). As such, "a juror's postverdict statements regarding the way in which the jury reached its verdict cannot be used to support a motion for a new trial." *Id.*

When ruling upon a motion for a new trial, a court abuses its discretion when it relies upon postverdict juror statements. The Supreme

Court's decision in *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 75 P.3d 944 (2003) illustrates this point. In *Breckenridge*, the trial court was called upon to decide whether outside information from one of the jurors required a new trial. The court considered declarations from jurors describing the impact of the outside evidence. Based in part upon those declarations, the trial court granted a mistrial. The Supreme Court reversed the order granting a new trial. The Court explained: "Because a trial court may not consider postverdict juror statements that inhere in the verdict when ruling on a new trial motion, the trial court abused its discretion by granting a new trial." *Id. at 204.*

The obvious corollary of this holding is that a trial court abuses its discretion when the court considers the absence of postverdict jury statements when denying a new trial. Significantly, the trial court's concern about the lack of statements from the jury was not just a single passing reference, but rather an issue upon which the trial court specifically questioned defense counsel. RP 1022-1025, 1034. It was significant to the court. Because the court misapplied the law, it abused its discretion and reversal is required.

Although more subtle, the court similarly abused its discretion when it denied the motion for a mistrial. The court indicated that it was concerned by the State's questions, but wanted to see what the jury did with the case

before ruling. RP 907-08. This is an abuse of discretion because it is a misunderstanding of the law. Either the misconduct merited a mistrial or it did not. The court's actions need to be distinguished from a judge who defers ruling so as to hear the rest of the evidence in this case. Deferring a ruling can arguably allow a court to put the improper evidence into better context with the rest of the evidence. But that is not what the court did here. Waiting to see the jury verdict to the misconduct is an untenable basis for denying the motion.

Under the reasoning of *Breckenridge, supra,* the court abused its discretion in denying the initial motion for a mistrial to see what the jury would do and relied upon the lack of postverdict statements to deny the motion for a new trial. In addition to those errors, however, the court also abused its discretion when it misconstrued the evidence and the applicable law. The State's argument to the contrary is not persuasive.

In the opening brief, appellant pointed out that the prosecutor attempted to elicit similar testimony in the prior two trials, and that each time the court sustained the objection. In response, the State protests that this recitation is "not at all true rendition of the State's actions in the prior two trials." BOR at 30. But saying it is not true does not make it so. Appellant cited to the specific pages in the transcript where the court sustained the objections. See AOB at 18-19.

The State argues that even if it did attempt to introduce drug evidence in the prior trials, those earlier cases have no bearing on the third trial. BOR at 30. Appellant respectfully disagrees. The fact that the prosecutor would repeatedly attempt to introduce this inadmissible evidence establishes that the prosecutor was aware of the power this would have on the jury. "Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). The prosecutor knew this was a close case. In fact, there had been two hung juries before the State tried Tanner a third time. The prosecutor's repeated attempts to introduce this impermissible drug evidence reveals the importance of this evidence to the State's case.

The State argues that the defense opened the door to this testimony by not objecting to the State's evidence. BOR 33-35. Both the trial court and the State cited to the confrontation call as an example of where Tanner raised the issues of drugs. Specifically, Tanner told S.C. that he had not drugged her:

> Whoa, whoa, whoa, whoa, you're—are you really saying, like, I'd spiked your drink or something? . . . Well, okay. Well, I'll tell you right now, like, I never put anything inside of your drink. Like, that's not who I am.

Exhibit 4 at 6. This statement was introduced by the State in the State's case in chief.

This "open the door" doctrine allows a party to admit otherwise inadmissible evidence *when the opposing party* has raised the issue. As our state supreme court explained, "it would be a curious rule of evidence which allowed a party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). In order for the doctrine to apply, it must be the opposing party who introduces the evidence that opens the door. Here it was the State's evidence, thus the open the door doctrine has no application.

Similarly, the State submitted a toxicology report that stated there were no drugs in S.C.'s system. RP 897, EX. 9. The State appears to suggest that this report—introduced by the State—permitted the State to asks questions about why there were no drugs found in S.C.'s system. For the same reason as with the confrontation call, the State cannot open its own door to allow in otherwise inadmissible evidence.

As an alternative argument, the prosecutor asserts "the State made zero reference to drugs in the presentation of its case." BOR 30. The prosecutor also argues that a jury would not have interpreted its question as referring to drugs because the prosecutor did not specifically ask about what

was "*in*" the bottles. BOR 32. As the following colloquia reveals, the questions leave little doubt as to how the jurors would have perceived the prosecutor's questions:

> MS RILEY: With the information you just provided, if the blood was taken 24 hours after, would this be the results that you would expect to see regardless of what a BAC level would be *or drugs in the system*?
>
> MR. CAMPBELL: Your Honor, first all, it's a compound question and . . .
>
> THE COURT: Sustained. Rephrase.
>
> MS. RILEY: Okay
>
> MR. CAMPBELL: And I think—as to BAC, it has been asked and answered. If there's other parts, I would like to be heard outside the jury.
>
> THE COURT: All right. Just . . .
>
> MS. RILEY: So were the results what you would have expected based on that time frame that was after 24 hours?
>
> MR. CAMPBELL: Again, I object. Asked and answered. She already testified to this.
>
> THE COURT: Sustained.
>
> MS. RILEY: Okay
>
> MS. RILEY: *And if bottles of alcohol were collected in this case, but they were empty, they were dry*
>
> WITNESS: Okay
>
> MS. RILEY: *Would there have been any ability for the lab to have tested those for any substance that might have been there or anything like that?*

ANSWER: *No. We cannot test empty anything*.

RP 897-98 (emphasis added). The prosecutor was not asking about DNA on the bottle. The prosecutor was asking about whether they could test for the presence of drugs. The only reason to ask these questions was to suggest that S.C. had been drugged.

By suggesting that drugs might be involved, the State was attempting to hedge its bet. The defense had introduced expert testimony that S.C. would not have been so intoxicated that she was incapable of consent. The defense expert had considerably more expertise and experience than the state's technician. But by suggesting that S.C. was drugged, as opposed to just intoxicated, the State escapes the battle of experts.

While trial courts enjoy considerable discretion when applying the facts to the law in a motion for a new trial, no deference is owed when the court has misapplied the law. Here, the court clearly misunderstood the law, believing that juror statements, or the lack of juror statements was a significant factor in deciding motions for a new trial. Reversal is required.

2. The State's proffered justifications for its misconduct are meritless.

In the history of the Me-Too movement, November of 2017 will be remembered as a particularly noteworthy time. Days before the State's closing argument, two highly placed media personalities were fired for

sexual harassment. The New York Times wrote about the growth of the Me-Too movement in an article about when the blinders come off. See BOA 31.

None of this *should* have had anything to do with Tanner's trial and whether S.C. was incapable of consent. But the prosecutor, tapping into these pent-up emotions, chose to make this case a referendum on gender equality. She told the jury in closing about the double standard, and women have to be so careful what they say or do. RP 973. The prosecutor continued, "Women should be allowed to dress how they want and act how they want. But that's not how society is, right, unfortunately." She further told the jury they must say no to blaming the victim. RP 973-974.

Although the State suggests that there was nothing improper about these comments, the danger of invoking these irrelevant considerations is obvious: "The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem." *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011).

In response, the State suggests that these comments had nothing to do with current events. The State's argument rings hallow, particularly

given that the prosecutor did not use this improper argument in the earlier two trials that resulted in hung juries.

The State also argues that there could be no prejudice because the prosecutor only talked about what was "common-knowledge." BOR 40. The argument is unpersuasive. It is common knowledge that if drug dealers at a mall continue to go unpunished, the drug dealing will continue. But it nonetheless was reversible error when the prosecutor made that argument in closing. *See State v. Ramos*, 164 Wn. App. at 338. Similarly, it is common knowledge that when juries don't believe children who allege child abuse, more children will end up being abused. Stating that common knowledge about children in closing argument, however, constitutes reversible error. *See e.g., State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991). The issue isn't whether the improper statements are common knowledge, but rather, whether they were an invitation to decide the case based on emotional appeals. *See In re Detention of Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998).

The State also appears to suggest that this was a strong case and that any error was harmless. Given that the State presented the same witness twice before and was unable to obtain a guilty verdict, any such argument should fall on deaf ears. One of the main distinctions between the first two trials and the third was the prosecutor's improper argument.

Remarkably, the prosecutor suggests that the third trial was different because there had been jury tampering in the first two trials. BOR 46. That is an extremely serious accusation for which the State cites to no actual findings by the court. To rely upon this as a distinction between the trials, without any judicial findings to that effect, is a transparent and desperate attempt to save an improperly obtained conviction.

As to the prosecutor's misstatement of the toxicology evidence in closing, the State denies that this occurred. The State asserts that the defense used .68 in its calculations, but none of the transcript pages cited to by the prosecutor state that. See BOR at 43, citing transcript pages 886, 889, 934-35, 952. To the contrary, Predmore stated that .68 applied to men and larger women or women who worked out. RP 935. He noted that even the number used by the State, which is .55, might account for heavier ladies. *Id.* He observed that S.C. did not sound like a heavy person. He further explained that in his many years of experience, he found that .55 (used by the State's toxicologist) was not very common. He did not use that number in this case, noting that it takes a little judgment depending upon the individual to come up with the right number. *Id.*

From all of this, the State extrapolates that Predmore must have used a heavier number for S.C. But again, in none of the pages cited by the State does Predmore or the State's toxicologist claim he used that number.

Instead, based on his statements, it appears that Predmore would have used a lower number as he specifically recognized the difference between men and women in his calculation. RP 933-935.

3. Tanner Birdsall was denied his Constitutional right to effective assistance of counsel when defense counsel failed to request a reasonable belief affirmative defense instruction.

The reasonable belief defense allows a juror to put themselves in the shoes of Tanner Birdsall on that evening and determine whether a reasonable person would have believed that S.C. was capable of consent. The affirmative defense allows the jury to bring a common sense perspective to how events would have occurred that evening.

Alcohol and sex are no strangers to each other. Hook-ups at parties and bars are common experiences for many in society. Appellant submits that the average person would not equate being somewhat drunk with an inability to consent. Most people who have more than a couple drinks have probably made decisions that they later regretted, whether it is an online purchase on Amazon, an angry word at the boss at the office party, or perhaps becoming sexually involved with someone who should have remained just a friend. In each instance, the person was capable of making decisions, they just made bad ones. These common experiences provide the

framework for a reasonable belief defense and a safety valve for the harshness of a strict liability offense.

A reasonable person in Tanner's shoes would know that S.C. was intoxicated. But that is not the question. The question is whether that person knew that S.C. was *incapable* of consent—that her smiles, flirting and sexually forward behavior must all be ignored. Unfortunately, because defense counsel failed to request the reasonable belief affirmative defense, the jury was never called upon to make that determination.

The State argues that in order to present the defense, Tanner would have had to testify. ROR 58. This is incorrect. While the defendants in *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007) and *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009) both testified, that is not a requirement to obtain the instruction. As our supreme court explained in *State v. Fisher*, "a defendant may use any evidence presented at trial, regardless of the party that presented it, in order to satisfy her burden of production for an affirmative defense instruction." *State v. Fisher*, 185 Wn.2d 836, 851, 374 P.3d 1185 (2016). Similarly, in *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996), the defendant was entitled to a voluntary intoxication defense, even though he did not testify and did not call any witnesses. He was allowed to rely upon evidence produced by the State or elicited in cross examination. *Id.* In the present case, the defense

could have called Tanner or simply relied upon the affirmative evidence contained within the State's case.

Similar to the complaining witness in *Hubert*, there was evidence that S.C. was friendly and flirtatious. In fact, it was S.C. that had suggested the three of them engage in a game of strip ping pong. Ex. 8 at 2. In *Hubert*, the defendant knew that the complaining witness had not only drunk alcohol, but that she has smoked marijuana as well. Here, S.C. stated that she did not have that much to drink. Ex. 4 at 3 & 6. In *Hubert*, the complaining witness had fallen asleep when the defendant walked into the room and began cuddling with her on the bed. By contrast, Tanner did not have to wake S.C. up to have sex with her. Ex. 4 at 8.

Tanner stated that S.C. initiated the sexual contact with him. Ex 4 at 4, 12. It is common knowledge that people sometimes become sick from drinking, but that are still capable of carrying on conversations shortly afterwards. Here, after she had thrown up, S.C. told the Joel and Tanner that she was feeling fine. Ex. 8 at 2.

It was clear from Tanner's statements, read as a whole, that he did not equate being intoxicated with the inability to consent. He knew that everyone was drinking that evening, and that S.C. had even gotten sick, but based on all of their interactions, he believed she still consented. This was

a reasonable belief for someone standing in his shoes that night, and would have constituted a valid affirmative defense if raised.

Finally, prejudice is established when the defendant is deprived of a meritorious defense that could have otherwise presented to the jury. A jury listening to the evidence could easily find that Tanner believed there was consent, even if S.C. was incapable of consent. Without a reasonable belief instruction, however, the jury would still have to convict. As the court explained in *Powell*:

> Without the "reasonable belief" instruction, the jury had (1) no way to recognize and to weigh the legal significance of Powell's testimony and portions of defense counsel's closing argument that it appeared to Powell that PLM had consented; and (2) no way of acquitting Powell even if it believed he had reasonably believed PLM was not mentally incapacitated or physically helpless. Instead, it would have appeared to the jury that it had no option but to convict Powell if it found beyond a reasonable doubt that PLM had been mentally incapacitated or physically helpless, regardless of whether it also found that Powell reasonably believed PLM had consented. The absence of this instruction essentially nullified Powell's defense.

Powell, 150 Wn. App. at 156–57. The same result occurred here. The failure to present this affirmative defense was a deficient performance that deprived Tanner of an important defense. Reversal is required.

II. CONCLUSION

For the reasons set forth in the opening brief, and amplified in this reply brief, appellant respectfully requests this Court reverse his unjust conviction.

Dated this 21st day of March, 2019

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March 21, 2019 - 4:53 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51389-7
Appellate Court Case Title:	State of Washington, Respondent v Tanner Jamy Scott Birdsall, Appellant
Superior Court Case Number:	16-1-00111-7

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