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NO. 54158-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHANIE DUGGER,

Appellant.

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

The Honorable Kevin D. Hull, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to present a complete defense by excluding relevant, admissible evidence.

Issue pertaining to assignment of error

On cross-examination of appellant, the State suggested that she fabricated testimony crucial to her defense because she had not included that information in an earlier written statement. The defense offered testimony to rebut the State's implication, but the court excluded it based on a misunderstanding of the earlier testimony. Did the court's erroneous exclusion of crucial defense evidence violate appellant's right to present a complete defense?

B. STATEMENT OF THE CASE

Appellant Stephanie Dugger was charged with hit and run injury and second degree assault arising out of an incident on June 21, 2018, in which the Jeep she was driving collided with the motorcycle being driven by James Twogood. CP 9-11; RCW 46.52.020(4)(b); RCW 9A.36.021(1)(c). The case proceeded to a jury trial in Kitsap County Superior Court.

Dugger testified at trial that as she was driving home, a car in front of her stopped abruptly, and she had to brake suddenly. RP 332. There was

a motorcycle behind her and the driver, Twogood, looked upset and threw up his hands. RP 333. They proceeded to drive, and he tailgated her, continuing to throw up his hands. RP 334. She assumed he thought that she had brake-checked him, because his tailgating became more aggressive. He would back off a bit and then accelerate towards her. Between that, the head shaking, and the hand gestures, he appeared upset. RP 335-36.

Twogood testified that he believed Dugger had been brake-checking him. He was surprised, but he backed off, and then it happened again, so he passed the Jeep. RP 219. He testified that he was irritated with Dugger's driving although he said he did not remember making any gestures as he passed. RP 220. He admitted it was very possible he flipped her off, though. RP 278. Although Twogood testified on cross exam that he didn't think he had done anything that would have scared Dugger, he admitted at the scene that things had gotten heated as they were driving. RP 264, 272.

Dugger testified that she was scared, but she was close to home so she continued driving, signaling her right turn. RP 336. The motorcycle followed her up the hill. RP 337. At the top of the hill as the road flattened out, she lost sight of the motorcycle in her rearview mirror but then saw it

in her peripheral vision trying to pass her on the right. That scared her even more. RP 337.

Twogood admitted that after initially continuing straight when the Jeep turned right, he changed his mind and followed Dugger up the hill. RP 222. According to Twogood, Dugger was waiting for him after he crested the hill, with her Jeep pulled across the road. RP 224. When he passed her on the right, the Jeep pulled forward and collided with the left side of his motorcycle, pushing the bike out from under him and causing him to land on the road. RP 225-26. He got the wind knocked out of him, and he had some road rash, a sprained thumb, and some sore ribs. RP 229, 232. Twogood characterized the collision as intentional. RP 277.

Dugger testified that she felt and heard a thump as she continued driving, and she thought Twogood might have kicked her tire. RP 338-39. She continued around the 90 degree curve in the road and did not see the motorcycle any longer. She was unaware that an accident had occurred. RP 339.

Deputy Andrew Aman investigated the incident. RP 105. He spoke to someone at the scene who told him where he would find the Jeep. RP 212. When he went to Dugger's house, he saw the Jeep parked in front. He noticed some damage to the right front fender, saw that the right front hubcap was missing, and found the right front tire flat. RP 121, 126. He

felt the damage was consistent with evidence at the scene of the collision. RP 131.

There was no one at the house when Aman knocked on the door. RP 123. When he went back the next day, Dugger was not there, but her mother was. She gave Aman Dugger's phone number, and he attempted to call her over the next few days. He also went back to the house a couple of times, but he was unable to reach Dugger. RP 135-36. He left a business card with the case number in the door jamb. RP 178. Dugger's mother, Melody Yamanaka, testified that she called Dugger to tell her about the deputy's business card. RP 321.

Dugger's defense was that she did not know at the time that her Jeep had collided with Twogood, and she did not hit him intentionally. Dugger testified that she was freaked out by what she felt was an incident of road rage, and her panic guided her actions. RP 340. She has suffered panic attacks in the past and she has been diagnosed with a panic disorder. She has medication that she takes as needed for panic attacks, and she took some that day after the incident. RP 344-45.

Dugger testified that when she got home her heart was pounding, she was breathing fast, and she was very scared. RP 340. She rushed inside her house, afraid Twogood might be following her. RP 341. Not long after she got home she heard someone yelling outside her house and

assumed it had something to do with the incident. RP 341. She told the man to leave, and he did. RP 342. A contractor working at Dugger's house confirmed this encounter. RP 312-13.

Dugger testified that she was still panicked and wanted to get out of there as quickly as possible. RP 342. She asked the contractor for a ride to her friend's house, and he agreed. It didn't even cross her mind that there might be some damage to her Jeep, because the thump she had heard as she was driving did not seem significant. RP 342-43. Dugger testified that at that point she was so panicked that the only thing she could think about was that she was in fear of the person behind her and she wanted to be somewhere he did not know about. RP 343. After her friend's house Dugger went to a hotel, where she stayed for almost a week. RP 344, 348.

Dugger testified that once she was at the hotel, she finally felt like she could breathe, and she called her father to tell him what had happened. She asked him to go to her house to see if the motorcyclist had been there. RP 346. He called her the next day to tell her the house looked fine, but her car had a flat tire, so he had it changed. RP 346. Dugger still did not know there had been an accident, but over the course of the next day she learned from her parents about the dent in her car and that the deputy had left his card with her mother. RP 347-48.

Dugger testified that when she realized that something more had happened than she thought, she decided to talk to an attorney. RP 349. The attorney asked her to write out a statement about what happened and said he would contact the deputy. RP 349-50.

In her statement, Dugger described the motorcyclist's aggression as she was driving home on the day in question. She said she felt as though he had kicked her car when he attempted to pass her on the right. She was frightened and kept driving in fear, thinking he was chasing her down. She explained that she stayed in a hotel for the next week, afraid the assailant would come to her home. She learned from her mother that a deputy had left his card at the house, and she was hoping to resolve the matter. She stated that her vehicle may have been struck, but she took no action out of fear of the aggression from the motorcyclist coming after her. Exhibit 2A.

On cross exam, the prosecutor asked Dugger about her testimony that she was panicking as a result of the incident. She agreed that she did not feel the need to call the police about the road rage incident, even though she was terrified of the motorcyclist. RP 375. She agreed that she did not mention in her statement that she could not function that day because she had a history of panic attacks, explaining that she was asked to describe what happened, not how she was feeling. RP 386. The

prosecutor asked again whether she mentioned her panic in the statement, and she again explained that she was asked only to describe what happened with the motorcyclist. RP 386.

The prosecutor continued, “And do you feel now like the details you shared with us today about your history of panic attacks and your panic attack that day, did you feel that that was somehow not an important detail to share with the police?” *Id.* Again, Dugger answered that if she had been asked to include that information, she would have. *Id.* Dugger said she did not elaborate about her panic attack in the letter, but she mentioned that she was scared. The prosecutor responded, “But you shared it with us for the first time here today?” RP 387. Dugger answered that she testified about her panic because she was asked about it. *Id.*

After Dugger testified, defense counsel informed the court he planned to recall Dugger’s mother to testify about Dugger’s history of panic attacks. RP 397. Counsel explained that he planned to elicit testimony that Yamanaka is aware of Dugger’s diagnosis and that she takes medication for it. RP 399. The prosecutor objected that the proposed testimony would not rebut a claim of recent fabrication because he never asked Dugger about her diagnosis or medication, he only asked her about that day. RP 399. Defense counsel argued that there was a clear inference of recent fabrication in the prosecutor’s cross examination, suggesting

Dugger made up the history of panic attacks in her testimony on direct. RP 400.

The court said it did not recall Dugger testifying that she had a panic attack following the incident. RP 400. Defense counsel argued that Dugger had described her panic reaction to the incident, and the jury had the information it needed to conclude she experienced a panic attack. RP 402. The court did not believe there was testimony that Dugger experienced a panic attack as a result of the incident. It ruled that Yamanaka could not testify as proposed without that testimony from Dugger. RP 403-04.

The prosecutor argued in closing that Dugger's testimony that she did not know there was an accident was not reasonable and the jury should not believe it. RP 501-02. He argued that Twogood had been very specific, claiming that Dugger hit him intentionally, and that made her guilty of both charges. RP 504, 508, 510-11.

Defense counsel argued that the only element of hit and run being contested was that Dugger knew there was an accident. RP 522. The only element in dispute in the assault charge was whether Dugger acted intentionally. RP 524. The State's case as to both counts rested on Twogood's testimony that Dugger acted intentionally, but he was not credible. RP 522-25.

Counsel argued that while a normal person might have known the collision occurred, the jury needed to determine what was reasonable considering the stressors Dugger was under and the fact that she was terrified by Twogood's aggressive behavior at that point. RP 544. He argued that Dugger did not know there was an accident, she did not intentionally touch Twogood, and when she realized something was wrong she contacted the police through her lawyer. RP 546.

The jury returned guilty verdicts on both counts, and the court imposed a standard range sentence. CP 69, 71-72. Dugger filed this timely appeal. CP 81.

C. ARGUMENT

THE COURT'S REFUSAL TO ALLOW RELEVANT AND ADMISSIBLE TESTIMONY FROM DUGGER'S MOTHER VIOLATED DUGGER'S RIGHT TO PRESENT A COMPLETE DEFENSE.

Criminal defendants have the constitutional right to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983).

Defense evidence need only be relevant to be admissible. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence.” ER 401. If the defense evidence is relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622.

This Court reviews the trial court’s ruling excluding evidence for abuse of discretion and considers *de novo* whether the ruling violated the defendant’s Sixth Amendment right to present a defense. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019).

The court below abused its discretion by excluding testimony from Dugger’s mother that Dugger was diagnosed with panic attacks and she takes medication for that condition. A court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015).

Dugger testified that she has been diagnosed with a panic disorder and she takes medication as needed for panic attacks. She took some medication after the incident with Twogood. RP 344-45. She specifically described the symptoms she had that day, saying she was freaked out, her

heart was pounding, she was breathing fast, and she was very scared. RP 340. She was still panicked after she got home and the only thing she could think about was that she wanted to be somewhere that the motorcyclist could not find her. RP 342-43. She finally felt like she could breathe again once she got to a hotel. RP 346.

In addition, on cross examination the prosecutor asked Dugger whether she had mentioned her history of panic attacks and her panic attack that day when she prepared her written statement. RP 386. Dugger explained that she was only asked to describe what happened with Twogood, but she would have included her panic attack if she had been asked. RP 386.

Following the State's cross-examination of Dugger, defense counsel informed the court that he planned to present testimony from Dugger's mother that Dugger had been diagnosed with panic attacks and took medication for that condition. RP 397, 399. The court ruled that the offered testimony would be relevant only if Dugger testified she had a panic attack on the day in question. Since it did not recall such testimony, it excluded the offered evidence. RP 401, 404.

The court's memory was faulty, and therefore the basis of its decision was untenable. In fact, Dugger specifically testified that she was panicked that day, and she needed to take her prescribed panic attack

medication as a result of the incident. RP 345. Moreover, the State cross-examined her extensively about her testimony that she has a history of panic attacks and had a panic attack that day. RP 386.

The issues in dispute at trial involved Dugger's knowledge and intent, and thus her state of mind and mental processes were relevant. Given her testimony that she was experiencing panic as a result of the incident, and the cross examination calling that testimony into question, the offered testimony was relevant, and the court abused its discretion in ruling otherwise.

Because the defense evidence was relevant, the State had the burden of showing it was so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622. It did not meet that burden.

When defense counsel brought up the possibility, prior to Dugger's testimony, of eliciting testimony from Yamanaka about Dugger's panic diagnosis and medication, the State argued that such testimony would be hearsay. RP 156. While testimony from Yamanaka that Dugger told her about her diagnosis might have been inadmissible under some circumstances, the prosecutor's cross-examination of Dugger made those statements both relevant and admissible.

When cross-examining Dugger, the prosecutor asked her repeatedly whether she had included in her written statement any reference to her history of panic attacks and her panic attack on the day of the incident. RP 386. He pointed out that the first time she shared about her panic attacks was in her testimony at trial. RP 387. This line of questioning suggested that she fabricated the explanation for her behavior after she made her written statement. Prior statements of a witness offered to rebut an express or implied charge of recent fabrication are not hearsay. ER 801(d)(1)(ii)¹. This rule allows admission of Dugger's out of court statements to her mother regarding her panic attack history to rebut the suggestion of recent fabrication.

Dugger's credibility was central to the defense, and the effect of the panic she was experiencing was crucial to the jury's determination of whether she intentionally struck Twogood or even knew there had been an accident. The prosecutor attacked Dugger's credibility, specifically on the issue of her history of panic attacks and her panic that day. Corroborating

¹ ER 801 provides in relevant part:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--
(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person;

testimony is admissible to rehabilitate her on this issue. The State offered no other reason for exclusion of the evidence, and it cannot carry its burden of showing that admission would disrupt the fairness of the fact-finding process.

The denial of the right to present a complete defense is constitutional error. *Crane*, 476 U.S. at 690. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt that any trier of fact would reach the same result absent the error and “the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The case came down to Dugger’s knowledge and intent. Her credibility was crucial to the defense. The State was allowed to attack her credibility by accusing her of fabricating relevant facts, while the defense was precluded from offering corroborating evidence which would directly contradict that accusation. If the jury had heard corroboration that Dugger does indeed have a history of panic attacks for which she has been prescribed medication, it might have found her testimony that she did not intentionally strike Twogood but was in fact so distracted by her panic that

she did not realize there had been an accident more credible. The State cannot show beyond a reasonable doubt that the jury would have reached the same result if it had heard the excluded evidence, and Dugger's convictions must be reversed.

D. CONCLUSION

The trial court violated Dugger's constitutional right to present a complete defense by excluding relevant, admissible evidence. Dugger's convictions must be reversed and the case remanded for a new trial.

DATED June 19, 2020.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



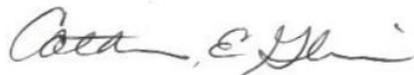
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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in
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I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
June 19, 2020

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