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DECEMBER 13, 2011  
Court of Appeals  
Division III  
State of Washington

NO. 30122-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**JOSE LUIS ZAPIEN,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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Dennis W. Morgan    WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
(509) 659-0600

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## **ASSIGNMENTS OF ERROR**

1. The trial court erroneously overruled Jose Luis Zapien's objection to a legal conclusion included in a deputy's expert opinion.
2. Mr. Zapien's admissions were subject to a *corpus delicti* challenge and defense counsel's failure to raise the issue constitutes ineffective assistance of counsel.
3. The evidence was insufficient to prove, beyond a reasonable doubt, that Mr. Zapien was raising roosters to engage in cockfighting.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Was a police officer's opinion a legal conclusion invading the province of the jury?
2. Did defense counsel fail to provide effective assistance in accord with the Sixth Amendment to the United States Constitution and Const. art. I, § 22 when no *corpus delicti* challenge was made concerning Mr. Zapien's admissions?
3. In the absence of the legal conclusion and the admissions, did the State present sufficient evidence of animal fighting?

## **STATEMENT OF CASE**

On May 5, 2011 Deputies Reining and Campos of the Benton County Sheriff's Office responded to a complaint of cockfighting at

168102 West 215 PR SW. (RP 59, ll. 12-13; RP 60, ll. 3-12; RP 74, ll. 21-23).

The deputies made contact with Maria Zapien, her son Hugo Zapien, and Mr. Zapien, who is Hugo's uncle. Mrs. Zapien consented to a search of the property. (RP 41, ll. 15-18; RP 42, ll. 1-3; RP 43, ll. 2-5; RP 50, ll. 12-16).

There were a total of thirty-five (35) roosters and six (6) hens on the property. Mr. Zapien admitted ownership of six (6) roosters located in individual cages. Mrs. Zapien advised that she had been raising chickens since 1997 for eggs and to eat. (RP 44, l. 2 to RP 45, l. 5; RP 51, ll. 4-10; RP 52, ll. 18-20; RP 53, ll. 9-17; RP 62, ll. 7-10; RP 64, ll. 14-20; RP 81, ll. 8-15).

Neither Hugo Zapien, Maria Zapien, nor Sergio Zapien (another of the defendant's nephews) ever saw any cockfighting at the residence. (RP 47, ll. 9-24; RP 52, ll. 18-20; RP 65, ll. 22-24; RP 114, ll. 9-10; RP 115, ll. 14-21).

Mr. Zapien admitted that he used the roosters for cockfighting in Benton and Yakima Counties. The cockfights occurred approximately once per month. (RP 65, ll. 2-17).

Deputy Reining took pictures of the six (6) roosters. Neither she nor Deputy Campos examined the roosters to see if they had been involved in any fights. No follow-up investigation was conducted. (RP 69, ll. 20-23; RP 70, ll. 6-11; RP 94, ll. 6-15; RP 109, ll. 18-24).

Two of the photos showed roosters with either shaved or no spurs. The rooster with no spurs also had a shaved comb. The other photos did not provide any indication of roosters used in cockfighting. (RP 98, ll. 10-12; RP 100, ll. 4-9; RP 101, ll. 6-25; ll. 7-11; Exhibits 13 and 17).

Hugo Zapien testified that roosters have their talons (spurs) removed as a means of protection. Roosters do not get along with one another and may attack humans. (RP 45, ll. 9-23).

Deputies Campos and Reining concurred with Hugo Zapien's analysis. Deputy Reining also indicated that a rooster has its spurs removed in order for a boot to be placed over the leg. The boot normally has razor blades. It is used by the rooster during a cockfight. (RP 66, ll. 10-15; RP 79, ll. 20-25; RP 97, ll. 16-21; RP 98, ll. 2-4).

Deputy Reining, who has received training with regard to cockfighting, provided an opinion at trial concerning what she had observed at the residence. It was her opinion that the presence of multiple roosters, various types of grains, vitamin supplements, gravel powders; and the presence of a wooden bench near Mr. Zapien's trailer, with blood, feathers, a needle and thread, scissors and tie-downs, was indicative of preparing roosters for fights. Her opinion was admitted over defense counsel's objection that it constituted a legal conclusion. (RP 79, ll. 6-9; RP 84, ll. 12-17; RP 86, ll. 11-21; RP 92, l. 21 to RP 93, l. 2).

The deputies also located a wooden box in a shed with blood and feathers in it. Deputy Reining testified that the box was indicative of hav-

ing held a rooster who had been involved in a fight. No objection was made by defense counsel. (RP 87, ll. 14-25).

Deputy Campos candidly admitted that his sole knowledge concerning Mr. Zapien's activities were based upon Mr. Zapien's own statements. (RP 72, ll. 7-14).

An Information was filed on May 10, 2011 charging Mr. Zapien with animal fighting under RCW 16.52.117(1)(a). (CP 1).

Mr. Zapien was found guilty on July 19, 2011. (CP 52).

Judgment and Sentence was entered on July 27, 2011. Mr. Zapien filed his Notice of Appeal the same date. (CP 55; CP 63).

### **SUMMARY OF ARGUMENT**

The trial court allowed a police officer to give an expert opinion that was a legal conclusion. The opinion invaded the province of the jury and violated Mr. Zapien's constitutional right to a fair trial.

Defense counsel's failure to raise a *corpus delecti* challenge to Mr. Zapien's admissions constitutes ineffective assistance of counsel.

Mr. Zapien is entitled to a new trial.

### **ARGUMENT**

RCW 16.52.117(1) provides, in part:

A person commits the crime of animal fighting if the person knowingly does any of the following:

- (a) Owns, possesses, keeps, breeds, trains, buys, sells, or advertises or offers for sale any animal with the intent that the animal shall be engaged in an exhibition of fighting with another animal... .

The State did not present any evidence that Mr. Zapien was breeding, training, buying, selling, advertizing, or offering for sale any of the roosters.

The to-convict instruction limited the jury's consideration to ownership, possession or keeping of the roosters. (CP 48).

Eliminating Mr. Zapien's admissions, the State presented the following evidence:

- 1). A wood bench with:
  - a). blood and feathers;
  - b). a needle, thread and scissors;
  - c ). tie-downs;
- 2). Roosters in individual cages;
- 3). Wood crates with one having blood and feathers in it;
- 4). Vitamin supplements;
- 5). Various types of feed;
- 6). Gravel powders;
- 7). Two roosters having spurs removed and/or shaved.

The State did not present any evidence of injuries to the roosters.

No blades or boots were located during the search. (RP 101, ll. 3-6).

No magazines relating to animal fighting or advertisements for cockfights were found.

There was no evidence that any cockfighting had occurred at the residence.

Mr. Zapien challenges both the sufficiency of the evidence and Deputy Reining's opinion. It is his position that in the absence of his admissions and the deputy's opinion, which constitutes a legal conclusion, the State did not present sufficient evidence to sustain his conviction.

#### **A. SUFFICIENCY OF EVIDENCE**

“...[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

*State v. Green*, 94 Wn. 2d 216, 221, 616 P. 2d 628 (1980).

When considering Mr. Zapien's challenge to the sufficiency of the evidence the Court needs to apply the overwhelming evidence test. “Under the overwhelming evidence test, the court examines whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt.” *State v. Barr*, 123 Wn. App. 373, 384, 98 P. 3d 518 (2004).

If Deputy Reining's opinion and Mr. Zapien's admissions are removed from the mix, then it becomes readily apparent that the evidence presented by the State is not overwhelming. In fact, it provides no indication of Mr. Zapien's intent.

## **B. LEGAL CONCLUSION**

Initially, Deputy Reining's opinion constitutes a legal conclusion. Legal conclusions are not subject to expert opinion.

In *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) the Court addressed FRE 702, and held:

...[W]itnesses should not tell the jury what result to reach and that opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions. **FED. R. EVID. 702** advisory committee notes (“[I]t seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference.”).

Under the facts and circumstances of Mr. Zapien's case, it was up to the jury to determine whether or not the evidence presented constituted evidence of intent to engage in animal fighting. The deputy's opinion told the jury that it should draw that conclusion.

The *Montgomery* Court held, *supra*:

...[T]his court has held that there are some areas that are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the de-

fendant, **the intent of the accused**, or the credibility of witnesses.

(Emphasis supplied).

The critical testimony is as follows:

**Q.** Were the observations you made at the property and the chickens consistent with chickens that were raised for cockfighting?

**MR. HOLT:** Objection, Your Honor, calls for legal conclusion. Takes the matter away from the jury.

**THE COURT:** I will overrule and allow it.

**A.** Yes, it was.

**Q.** Were the boxes that were found on the property consistent with boxes that would be used to transport roosters to fights?

**MR. HOLT:** Same objection, Your Honor.

**THE COURT:** I will overrule.

**A.** Yes, it was.

The foregoing testimony was directed toward Mr. Zapien's intent.

Mr. Zapien's intent was the core element involved in the case. It was also the only disputed element.

...Police officers testimony carries an "aura of reliability." *Demery, [State v. Demery, 144 Wn. 2d 753, 30 P. 3d 1278 (2001)]* at 765. But police officers opinions on guilt have low probative value because their area

of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt.

*State v. Montgomery, supra*, 595.

Deputy Reining's observations are obviously admissible evidence. However, it is up to the jury to draw its own conclusions from those observations.

"The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof, though they are not favored in criminal law." *State v. Cantu*, 156 Wn. 2d 819, 826, 132 P. 3d 715 (2006).

Deputy Reining's observations were sufficient to allow the State to argue certain inferences from what she had seen at the residence. There was no need for an expert opinion that the items seen were used to prepare roosters for cockfighting.

Defense counsel's objection should have been sustained.

"In most cases where testimony on the ultimate issue has been excluded, either the expert had testified in terms of legal standards beyond his or her expertise, or else the subject was not beyond the jury's capability to decide." **ROBERT A. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON § 704.04, at 704-10 (4<sup>TH</sup> ed. 2008).**

*State v. Nelson*, 152 Wn. App. 755, 767, 219 P. 3d 100 (2009).

The *Nelson* case involved animal fighting between dogs. The *Nelson* Court recognized that the State had offered a variety of physical and testimonial evidence (*i.e.*, pit bull magazines, notebooks, training records, dietary records, a treadmill and other paraphernalia used in dogfights) which is missing in Mr. Zapien's case. *See: State v. Clausing*, 147 Wn. 2d 620, 56 P. 3d. 550 (2002), *see also State Hudson*, 150 Wn. App. 646, 656, 208 P. 3d 1236 (2009) (improper opinions on guilt invade the jury's province and violate a defendant's constitutional right to a fair trial).

### C. ADMISSIONS

The only direct evidence of Mr. Zapien's intent are his admissions to Deputy Campos. Defense counsel did not raise a *corpus delicti* objection at trial. Mr. Zapien's recognizes that a failure to object precludes review of evidentiary issues such as the *corpus delicti* rule. *See: State v. Dodgen*, 81 Wn. App. 487, 492, 915 P. 2d 531 (1996).

Nevertheless, Mr. Zapien asserts that without his admissions the State's case is essentially gutted. Defense counsel should have raised an evidentiary challenge at trial. Failure to do so adversely impacts Mr. Zapien's constitutional challenge to the sufficiency of the evidence.

Defense counsel did raise a challenge to Mr. Zapien's admissions and a CrR 3.5 hearing was held. (7/18/11 RP; CP 6).

Defense counsel dropped the ball in not following through with a *corpus delicti* challenge at trial.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn. 2d 322, 334-35, 899 P. 2d 1251 (1995).

Mr. Zapien asserts that he has established the prejudice prong of the ineffective assistance of counsel test. In the absence of his admissions and Deputy Reining's testimony there is no evidence of his intent. In the absence of intent evidence there is no crime.

The trial court may or may not have granted a challenge based upon the *corpus delicti* rule. However, whether or not it would have been granted is not the issue. The issue is that defense counsel should have raised the objection.

## CONCLUSION

Deputy Reining's opinion constitutes a legal conclusion. Defense counsel's objection should have been sustained and the opinion excluded.

Defense counsel was ineffective in not raising a *corpus delicti* challenge to Mr. Zapien's admissions. In the absence of those admissions there was little or no evidence of Mr. Zapien's intent.

The State's evidence was not overwhelming. The evidence was insufficient to sustain the State's burden of proof without the legal conclusion and admissions.

Mr. Zapien is entitled to have his conviction reversed and the case dismissed.

DATED this 12th day of December, 2011.

Respectfully submitted,

s/ Dennis W. Morgan  
DENNIS W. MORGAN WSBA #5286  
Attorney for Defendant/Appellant.  
120 West Main  
Ritzville, Washington 99169  
(509) 659-0600  
Fax: (509) 659-0601  
nodblspk@rcabletv.com



JOSE LUIS ZAPIEN  
168102 215 PR SW  
Prosser, Washington 99350

U.S. MAIL

S/ Connie Hille

Connie Hille, Administrative Assistant  
DENNIS W. MORGAN LAW OFFICE  
120 W. Main Street  
Ritzville, WA 99169  
(509) 659-0600  
(509) 659-0601  
c\_hille@centurytel.net