

No. 34031-7-III

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

FILED  
FEB 15, 2017  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA WADE BRINK,

Appellant.

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

The Honorable Judge Annette S. Plese

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APPELLANT'S REPLY BRIEF

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**TABLE OF CONTENTS**

A. INTRODUCTION.....3

B. SUPPLEMENTAL STATEMENT OF THE CASE.....3

C. ARGUMENT IN REPLY.....3

    1. Defense counsel did not open the door to allow Ms. Brown  
    to opine on the defendant’s guilt. ....3

    2. Facts in the record are supportive of Mr. Brink’s version of  
    the events, as well.....5

D. CONCLUSION.....5

**TABLE OF AUTHORITIES**

Washington Supreme Court

*State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969).....4

## **A. INTRODUCTION**

Joshua Wade Brink accepts this opportunity to reply to the State's response brief. For issues not addressed herein, Appellant respectfully requests that the Court refer to his opening brief.

## **B. SUPPLEMENTAL STATEMENT OF THE CASE**

Mr. Brink testified he called Ashley Brown around 6:30 p.m. on the evening K.S.D. was burned. (RP 207). He denied waiting to call her until 9 p.m. that evening. (RP 207).

## **C. ARGUMENT IN REPLY**

### **1. Defense counsel did not open the door to allow Ms. Brown to opine on the defendant's guilt.**

The State claims Mr. Brink's defense counsel opened the door to evidence otherwise inadmissible by asking Ms. Brown about Mr. Brink's relationship with K.S.D. prior to the incident in this case. *See* State's Brief at 27-30. Specifically, the State claims defense counsel opened the door to Ms. Brown's personal opinion on Mr. Brink's guilt when defense counsel asked about Mr. Brink's relationship with K.S.D. *Id.* at 28-30. For this reason, the State argues an objection by defense counsel as to Ms. Brown's opinion on the defendant's guilt would have been sustained, and therefore it was not ineffective assistance of counsel for failure to object to Ms. Brown's expressed opinion. *Id.* at 27.

However, Ms. Brown’s testimony went beyond the “open the door” rule. The “open the door” rule does not mean to “open the floodgates.” *See State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). When a party seeks to explore an area of testimony previously forbidden until the door is opened, the scope of that examination is still limited to “the subject matter that was first introduced.” *Id.* at 455.

Here, Ms. Brown said the relationship between Mr. Brink and her son was great before the incident occurred. (RP 167). But the response Ms. Brown gave to the State’s question as to whether her understanding had changed was not within the scope of the original line of questioning. The State could not use Ms. Brown to opine on the defendant’s guilt—if anything, her testimony should have been limited to what the relationship between Mr. Brink and K.S.D. was like. Moreover, Ms. Brown did not base her opinion upon Mr. Brink’s relationship with K.S.D. (RP 167-168). Instead, Ms. Brown based her opinion of Mr. Brink’s guilt on the experts and reports she had seen and listened to. (RP 168).

Ms. Brown’s testimony was well beyond anything that would have been permissible under the “open the door” rule. *See Gefeller*, 76 Wn.2d at 455. Defense counsel should have objected and was ineffective for failure to do so, as set forth in Mr. Brink’s opening brief. *See Appellant’s Opening Brief* at 27-30.

**2. Facts in the record are supportive of Mr. Brink's version of the events, as well.**

The State makes much of the argument in its brief that Mr. Brink did not call Ms. Brown until 9:00 p.m. on the evening of the incident, arguing this was evidence of guilt. *See* State's Brief at 4, 35-36. However, Mr. Brink testified at trial that he called Ms. Brown around 6:30 p.m. that evening. (RP 207). This fact was a point of dispute at trial and it cannot unilaterally be presumed to be evidence of guilt.

**D. CONCLUSION**

Based upon the arguments set forth above and those set forth in Mr. Brink's opening brief, his conviction should be reversed and remanded for a new trial. At a minimum, the case should be remanded for resentencing so the combined terms of incarceration and community custody do not exceed 120 months. Mr. Brink also objects to any appellate costs should the State prevail on appeal.

Respectfully submitted this 15th day of February, 2017.

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 34031-7-III  
vs. )  
 )  
JOSHUA WADE BRINK ) PROOF OF SERVICE  
 )  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Jill S. Reuter, of Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 15, 2017, I deposited for mail by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Joshua Wade Brink, DOC #374088  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

Having obtained prior permission, I also served Respondent at SCPAappeals@SpokaneCounty.org by e-mail using the electronic service feature while e-filing.

Dated this 15th day of February, 2017.

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