

COA NO. 34078-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY ROY,

Appellant.

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

The Honorable Tina Kernan, Judge

REPLY BRIEF OF APPELLANT (AMENDED)

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO HEARSAY EVIDENCE, WHICH THE COURT RELIED ON TO CONVICT	1
2. THE COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER ROY'S REQUEST FOR A SUSPENDED SENTENCE	5
B. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Carraway v. Johnson</u> , 63 Wn.2d 212, 386 P.2d 420 (1963).....	3
<u>Matter of Guardianship of Marshall</u> , 46 Wn. App. 339, 731 P.2d 5 (1986).....	3
<u>State v. Bunker</u> , 144 Wn. App. 407, 183 P.3d 1086 (2008), <u>aff'd</u> , 169 Wn.2d 571, 238 P.3d 487 (2010).....	8
<u>State v. Clinkenbeard</u> , 130 Wn. App. 552, 123 P.3d 872 (2005).....	2
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	1
<u>State v. Edwards</u> , 131 Wn. App. 611, 128 P.3d 631 (2006).....	1, 4, 5
<u>State v. Gower</u> , 179 Wn.2d 851, 321 P.3d 1178 (2014).....	4
<u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	8
<u>State v. Hudlow</u> , 182 Wn. App. 266, 331 P.3d 90 (2014).....	5
<u>State v. Jessup</u> , 31 Wn. App. 304, 641 P.2d 1185 (1982).....	2
<u>State v. Miles</u> , 77 Wn.2d 593, 464 P.2d 723 (1970).....	4
<u>State v. Mohamed</u> , 187 Wn. App. 630, 350 P.3d 671 (2015).....	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Myers,
133 Wn.2d 26, 941 P.2d 1102 (1997)..... 2

State v. O'Dell,
183 Wn.2d 680, 358 P.3d 359 (2015)..... 8

State v. Rochelle,
11 Wn. App. 887, 527 P.2d 87 (1974)..... 2

OTHER AUTHORITIES

5A K. Tegland, Wash.Prac., Evidence § 358 (2d ed. 1982) 3

RCW 9.94A.655 7

RCW 9.94A.660 7

RCW 13.40.0357, Option B..... 5

RCW 13.40.0357, Option B, (3)(iii)..... 6

A. ARGUMENT IN REPLY

1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO HEARSAY EVIDENCE, WHICH THE COURT RELIED ON TO CONVICT.

The State claims Roy's attorney was not ineffective in failing to object to Ms. Roy's testimony on hearsay grounds. Brief of Respondent (BOR) at 7-8; see 1RP 24 ("my mother had said he'd been going around the outside of the house, to figure out how he would have got in. And, that's when I found that the window looked locked but it wasn't."). The State's theory is that Ms. Roy's testimony — "my mother had said he'd been going around the outside of the house, to figure out how he would have got in" — was not hearsay because it was only offered to "show the effect on the listener, without regard to the truth of the statement." BOR at 8 (quoting State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006)).

This theory fails. At the trial level, the State never argued this out-of-court statement was being offered to show the effect of the statement on the hearer, Ms. Roy. It never mentioned in closing argument or elsewhere that this statement was offered only for a limited purpose. It made no request for the trial court to treat it as such. No limiting instruction was proposed, which means there is nothing to show the court understood the statement as being admitted for only a limited purpose. See State v.

DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003) ("The trial court discussed a limiting instruction, despite the fact that it was a bench trial, reflecting the court's understanding of the limited purpose for which it would use V.C.'s testimony."). Without a limiting instruction, evidence is deemed relevant for all purposes. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

State v. Jessup, 31 Wn. App. 304, 641 P.2d 1185 (1982) illustrates what is missing in Roy's case. In Jessup, the court expressly admitted out-of-court statements under the state of mind exception to the hearsay rule. Jessup, 31 Wn. App. at 314-15. The record in Jessup thus showed the court admitted the statements for a limited purpose, other than for the truth of the matter asserted. No comparable ruling limiting the purpose for admitting the statement in Roy's case was made. There is no basis to construe the statement as being offered and used for a limited purpose when no effort was made to so limit it at the trial level.

Out-of-court statements, not offered for the truth of the matter asserted, are not substantive evidence of guilt. State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005). But hearsay admitted without objection is considered competent evidence that may be relied on as substantive evidence. State v. Rochelle, 11 Wn. App. 887, 889, 527 P.2d 87 (1974) (citing Carraway v. Johnson, 63 Wn.2d 212, 214, 386 P.2d 420

(1963)); see also Matter of Guardianship of Marshall, 46 Wn. App. 339, 343, 731 P.2d 5 (1986) ("Hearsay evidence admitted without objection may be considered by the trier of the fact or the appellate court for its probative value.", quoting 5A K. Tegland, Wash.Prac., Evidence § 358 at 195 (2d ed. 1982)). This is precisely why Roy's attorney should have objected. A hearsay objection would have kept the trial court from relying on the hearsay statement as evidence of guilt.

And there can be no doubt the trial court did so. In its oral findings, the court tallied up the evidence it relied on to find guilt. 1RP 68-69. One of those findings was that "Your great grandmother saw some -- saw you outside that day. She didn't testify today but there was evidence presented that she had seen that." 1RP 68-69. From this, it is obvious the court relied on the hearsay statement as substantive evidence of guilt. The court at no time so much as suggested it considered this testimony for a limited purpose, rather than as for the truth of the matter asserted.

The trial court's written findings show the same thing. As a factual finding supporting its conclusion that the State proved its case, the court found "Teresa Roy's mother, Respondent's great grandmother, observed Respondent running around the outside of the residence near the office window prior to Respondent going to school." CP 11 (FF 8). The finding is unqualified.

The presumption that a judge in a bench trial will disregard inadmissible evidence when making findings is inapplicable when the judge actually "consider[ed] matters which are inadmissible when making his [or her] findings." State v. Gower, 179 Wn.2d 851, 856, 321 P.3d 1178 (2014) (quoting State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970)). Such is the case here. 1RP 68-69; CP 11 (FF 8).

The State cites Edwards but does not apply its lesson. In that case, a detective testified that he initiated his investigation of the defendant based on the statements of a confidential informant. Edwards, 131 Wn. App. at 614. The State argued this testimony was not offered to prove the truth of the confidential informant's statement to the detective, but only to explain why the detective began to investigate that particular person. Id. This Court held the detective's state of mind "was not an issue in controversy" and therefore irrelevant to whether the defendant committed the charged crimes. Id. The statement was inadmissible hearsay because it was only relevant if offered for its truth. Id. at 615.

The same is true in Roy's case. Ms. Roy's state of mind was irrelevant. What prompted her to discover that the window was unlocked was not an issue in controversy. The grandmother's out-of-court statement relayed by Ms. Roy — "my mother had said he'd been going around the outside of the house, to figure out how he would have got in" — is

relevant only if offered for its truth. For that reason, it constitutes inadmissible hearsay. Edwards, 131 Wn. App. at 613-14; accord State v. Hudlow, 182 Wn. App. 266, 278-80, 331 P.3d 90 (2014). The court found the statement relevant or it would not have included the evidence in its findings. And the statement is only relevant if it is considered for its truth. The court relied on hearsay as evidence of guilt because Roy's attorney did not object to it. The failure to object was ineffective assistance.

2. THE COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER ROY'S REQUEST FOR A SUSPENDED SENTENCE.

The State appropriately concedes the court abused its discretion in failing to consider Roy's request for a suspended sentence under Option B of RCW 13.40.0357. BOR at 12. Its position that the error is harmless and no remand is required for the court to exercise its discretion is not well taken.

At sentencing, the State advanced an erroneous interpretation of the law. 2RP 8. The trial court accepted this erroneous interpretation and, after stating its belief that it lacked authority to grant a suspended sentence, imposed a standard range sentence. 2RP 9-11. The court stated: "Because the standard range on these offenses is pretty set in stone, I am going to impose 52 to 65 weeks on the Class B felony and 15 to 36 weeks on the Class C felony. I do find the Option B alternative does not apply to this

case because Mr. Roy was convicted of residential burglary, and specifically under the statute, 13.40.0357(c)(b)(iii) residential burglary would make him ineligible for the Option B alternative. *Thus*, I will impose the standard range upon Mr. Roy. I see no reason to go above or below. And that will be my order." 2RP 10-11 (emphasis added).

From this, it is crystal clear the trial court mistakenly believed Roy was statutorily ineligible for a suspended sentence and thus imposed a standard sentence. The court's reference to seeing no reason to go above or below the standard range refers to no basis for imposing a manifest injustice disposition above the standard range or below the standard range. The State had not recommended such a disposition. 2RP 5. Defense counsel wanted more time to consider whether to request a manifest injustice disposition, but then said "I don't believe a manifest is what Mr. Roy is going to be asking for today." 2RP 5-6. From this context flowed the court's remark that it saw no reason to go above or below the standard range. The remark cannot fairly be interpreted to mean that the court was saying it would not have imposed a suspended sentence even if Roy were eligible for a suspended sentence. The court clearly imposed a standard range because it mistakenly believed Roy was not eligible for a suspended sentence.

The State's attempt to show harmless error by conflating the suspended sentence alternative with an exceptional sentence is misplaced. In State v. Mohamed, the sentencing court mistakenly believed it had no authority to waive school zone enhancements if it chose to impose an alternative DOSA or PSA¹ sentence. State v. Mohamed, 187 Wn. App. 630, 646, 350 P.3d 671 (2015). The State argued the error was harmless because the trial court found an exceptional sentence was unwarranted. Mohamed, 187 Wn. App. at 647. The Court of Appeals rejected this argument because "an exceptional sentence is separate from the alternative sentencing provisions of a DOSA or PSA." Id. The same reasoning applies in Roy's case. The trial court's decision not to impose an exceptional sentence is a separate consideration from whether to impose a sentencing alternative such as a suspended sentence.

The State argues there are reasons available for why the court would not impose a suspended sentence due to Roy's offender score and the fact that he committed the present offenses while on local sanctions. BOR at 13-14. We don't know what the court would have done if it understood it had discretion to exercise. The State's argument fails in light of Grayson, which the State does not acknowledge in its brief. In Grayson,

¹The drug offender sentencing alternative (DOSA) under RCW 9.94A.660 and the parenting sentencing alternative (PSA) under RCW 9.94A.655.

the Supreme Court held the trial court erred when it failed to consider a DOSA sentence when the defendant requested it. State v. Grayson, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005). The Court noted "there were ample other grounds to find that Grayson was not a good candidate for DOSA." Grayson, 154 Wn.2d at 342. Despite these facts, the Court left it to the "able hands of the trial judge on remand to consider whether Grayson" was a suitable candidate for a DOSA sentence. Id. at 343. "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Id. at 342. The same rationale applies here. The error being established, the remedy must follow. Reversal and remand is required to enable the trial court to exercise its discretion. State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015); State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), aff'd, 169 Wn.2d 571, 238 P.3d 487 (2010).

B. CONCLUSION

For the reasons set forth above and in the opening brief, Roy requests reversal of the convictions or, in the event the convictions are not reversed, remand for resentencing.

DATED this 29th day of November 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON
JENNIFER M. WINKLER

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 - Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI
RANIA RAMPERSAD

State V. Zachary Roy

No. 34078-3-III

Certificate of Service

On November 29, 2016, I filed, mailed and/or e-served the amended reply brief of appellant directed to:

Zachary Roy
Naselle Youth Camp
11 Youth Camp Dr
Naselle, WA 98638

Benjamin Nichols
Asotin County Prosecutors Office
bnichols@co.asotin.wa.us
lwebber@co.asotin.wa.us

Re: Roy

Cause No. 34078-3-III in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch

11-29-2016

Date
Done in Seattle, Washington