

FILED

MAR 29 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 35296-0

**COURT OF APPEALS,
DIVISION III,
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY J. POOL,

Appellant,

REPLY BRIEF OF APPELLANT

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II. ARGUMENT IN REPLY

1. THE DEFENSE RAISED THE ISSUE OF THE PRIOR CONVICTIONS DURING MOTIONS IN LIMINE AND THEREFORE DID NOT WAIVE THE RIGHT TO APPEAL UNDER RAP 2.5 AND IS NOT RAISING A NEW ISSUE NOW.

The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal, unless the party can show the presence of an exception to that rule, such as a manifest error affecting a constitutional right. RAP 2.5(a); ER 103; *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011); *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Counsel must make timely objections to preserve errors for appeal or they are deemed waived. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). Additionally, "[a] party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

During pretrial motions, the Defense argued for the use of the prior convictions during the trial. Defense argued that the suspects' DNA had never been compared to the evidence including the DNA on the mask—setting a clear basis for the legal theory that there were alternative suspects. RP 14. Defense's argument that these individuals should be included, including their prior convictions, was addressed by the court and

cited by the State in their Brief. The Court clearly ruled that the Defense was prohibited from bringing these prior acts in. RP 19. The Defenses therefore has preserved both its right to appeal, and its intent to “name” these prior convictions during trial, as stated in Appellant’s Brief.

2. THE PROSECUTOR’S USE OF THE “COIN FLIP ANALOGY” WAS THE IMPROPER USE OF A FACT NOT IN EVIDENCE OR ANALOGY WHICH PREJUDICED THE DEFENDANT.

Testimony during trial established that the DNA profile was “140 times more likely that the data represented was a mixture of Jeffery Pool and an unknown than... two unrelated individuals.” RP 667. Ms. Walker and Ms. Cross testified regarding how the probability ratios worked and what the likelihood ratio meant. It is plainly clear, from the testimony and the State’s explanation of a likelihood ratio contained in the Respondent’s Brief, that a likelihood ratio is not an everyday concept. A likelihood ratio is a complicated probability which requires explanation to the jury. Neither witness testified about how likelihood ratios compared with other probability models, such as a coin flip. The transcript is clear that there was no witness or expert testimony to explain or compare how a coin flip probability would compare to a likelihood ratio. The State has produced no explanation of how the coin flip could be included as a fact in evidence.

Using the coin flip as an analogy is improper as it mischaracterizes the likelihood ratio as outlined in Defense's Appellant Brief. The State implied with this analogy that the coin would flip at a rate of 100% for a single outcome for 140 flips which is an improper characterization of a coin flip probability. As there is no testimony to explain how this comparison would work, the jury would have no basis for understanding. Therefore, the jury was forced to rely on the basic understanding a coin flip is supposed to be an equal probability of 50/50, and that the use likelihood ratio means it will be one side 140 times in a row. The coin flip analogy is a false explanation of how a DNA likelihood ratio would work. Therefore, statement is clearly prejudicial and misleading as it leads the jury to a misunderstanding of the DNA likelihood ratio and implies a certainty which is not the proper characterization of the ratio.

II. CONCLUSION

The State's argument is full of mischaracterizations. The State has mischaracterized the Defense's argument in support of the alternative suspect theory and "naming" the prior convictions, despite their inclusion at trial. The Defense preserved this entire issue and it is proper for appeal.

The State further mischaracterized the coin flip analogy; at trial and in its briefing, the State misuses and mischaracterizes the coin flip as a confusing, misleading, and false comparison to the likelihood ratio. The

State has no testimony or logical support for this analogy, and therefore it was prejudicial as it improperly stated or implied the wrong probability of the likelihood ratio. Therefore, the conviction should be reversed.

DATED this 29 day of March, 2018.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'JG Johnson', is written over a horizontal line.

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