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Court of Appeals
Division III
State of Washington
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No. 36397-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRUCE LANG,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Bruce Lang was charged with assault in the first degree and robbery in the first degree, stemming from one incident. At trial, the court permitted a forensic psychiatrist to testify that Mr. Lang had personality traits which included law breaking, lying, and faking the symptoms of mental illness. The doctor further testified Mr. Lang had behaved consistently with those traits during the trial, including during Mr. Lang's testimony.

Mr. Lang was convicted of first degree robbery and second degree assault based on the same conduct. Although the parties agreed the two convictions merged for purposes of entering a conviction and sentencing, the court entered and sentenced Mr. Lang on both convictions.

Because the trial court admitted improper opinion testimony regarding Mr. Lang's credibility, reversal and remand for a new trial is required. At a minimum, this Court should vacate the conviction for assault in the second degree and remand for resentencing because Mr. Lang's convictions for both offenses violate double jeopardy.

B. ASSIGNMENTS OF ERROR

1. In violation of due process and the right to a fair trial by jury, the trial court admitted improper opinion testimony regarding Mr. Lang's credibility.

2. The trial court violated double jeopardy when it entered convictions and sentenced Mr. Lang for both assault in the second degree and robbery in the first degree when the two offenses merged and constituted the same criminal conduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. No witness may offer testimony in the form of an opinion regarding the credibility of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the province of the jury. Here, the court admitted expert testimony through a forensic psychiatrist that Mr. Lang's personality is that of a liar and a law breaker, and that he had acted in conformity with those traits during the trial, including during his testimony. Did the court admit improper opinion testimony regarding Mr. Lang's credibility, depriving him of a fair trial by jury?

2. When a defendant is convicted of both assault in the second degree and robbery in the first degree, and where the assaultive conduct

formed the basis for raising the robbery to first degree, the offenses merge and constitute the same criminal conduct. Double jeopardy is offended if the court enters convictions and sentences a defendant for both offenses. Here, Mr. Lang was convicted of second degree assault and first degree robbery. Although the parties agreed the offenses merged and constituted the same criminal conduct, the court nevertheless entered convictions and sentenced Mr. Lang for both offenses. Is vacation of the second degree assault and remand for resentencing required?

D. STATEMENT OF THE CASE

Bruce Lang was charged with assault in the first degree and robbery in the first degree. CP 1. The charges stemmed from a single incident involving the complainant, Torry Delong. According to Mr. Delong, Mr. Lang approached him, stabbed him, and walked away with Mr. Delong's suitcase and bicycle. 9/5/18 VRP at 245-46. Mr. Delong sustained a one-inch deep stab wound which the treating physician described as non-life-threatening. 9/5/18 VRP at 281. By the time Mr. Delong received medical treatment, his injury was no longer bleeding and there was no indication his injuries were serious. 9/5/18 VRP at

273-74, 277. The wound was cleaned and stitched, and Mr. Delong was released from the hospital. 9/5/18 VRP at 277, 281.

This singular incident formed the basis for the assault charge and elevated the robbery charge to first degree. CP 1. At trial, the State sought to admit testimony from Dr. William Grant, a forensic psychiatrist who had previously evaluated Mr. Lang. 9/6/18 VRP at 413-14. The State offered the testimony specifically to attack Mr. Lang's credibility. It informed the court, "It's about his credibility. And the State has the right to attack his credibility." 9/6/18 VRP at 413. The State further stated it offered Dr. Grant's testimony "to challenge [Mr. Lang's] credibility in terms of saying these things that he's not credible – those are not credible statements and he's doing it to manipulate, not just the system, but the jury." 9/6/18 VRP at 416-17. Over defense objection, the trial court ultimately admitted Dr. Grant's testimony. 9/6/18 VRP at 417.

In his testimony, Dr. Grant told the jury Mr. Lang had been diagnosed with antisocial personality disorder, malingering, and borderline personality disorder. 9/6/18 VRP at 420-21. He informed the jury these were personality disorders, stating, "Your personality is what makes you who you are, what makes you you." 9/6/18 VRP at 421. He

described antisocial personality disorder as including “Law breaking, lying, recklessness, irritability, irresponsibility.” *Id.* He described malingering as “Faking. . . faking illness.” 9/6/18 VRP at 421-22.

Dr. Grant also testified he had observed Mr. Lang throughout the trial, including during Mr. Lang’s testimony, and opined that Mr. Lang had behaved consistently with malingering and antisocial personality disorder. 9/6/18 VRP at 422.

At the end of the trial, the jury convicted Mr. Lang of robbery in the first degree as charged, and the lesser included assault in the second degree. CP 70-72. Although the parties agreed the two offenses merged and constituted the same criminal conduct, the trial court entered convictions and sentenced Mr. Lang for both offenses. 9/20/18 VRP at 490; CP 77-90.

E. ARGUMENT

1. The trial court violated double jeopardy when it entered convictions for both assault in the second degree and robbery in the first degree.

The trial court violated double jeopardy when it entered convictions for Mr. Lang for both assault in the second degree and first degree robbery. A court entering multiple convictions for the same conduct violates double jeopardy. *In re Personal Restraint of Francis*,

170 Wn.2d 517, 523, 242 P.3d 866 (2010); *State v. Freeman*, 153 Wn.2d 765, 770–71, 108 P.3d 753 (2005). It is well settled that under the merger doctrine, where “the degree of one offense is raised by conduct separately criminalized by the legislature, [the courts] presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Freeman*, 153 Wn.2d at 772–73. When the sole purpose of a second degree assault is to facilitate a first degree robbery, the assault is merely incidental to the robbery. *Francis*, 170 Wn.2d at 525. Under these circumstances, the assault constitutes the same criminal conduct as the first degree robbery and merges. *Id.* Thus, entering convictions on both offenses violates double jeopardy. *Id.*

Here, Mr. Lang was convicted of second degree assault and first degree robbery. The State charged the assaultive conduct as an element of the first degree robbery charge. The State alleged in count one that Mr. Lang committed first degree robbery by “inflict[ing] bodily injury upon TORRY K. DELONG.” CP 1. The assaultive behavior (the stab) formed the basis for raising the robbery charge to first degree.

As in *Freeman* and *Francis*, the two convictions here should have merged for purposes of entering a conviction and imposing a sentence. At sentencing, the State agreed the convictions formed the

same criminal conduct and merged. 9/20/18 VRP at 490. The trial court acknowledged the two offenses encompassed the same criminal conduct for purposes of offender scoring, but nevertheless entered convictions and sentenced Mr. Lang for both offenses. CP at 77-90.

Because Mr. Lang's second degree assault conviction merges into his conviction for first degree robbery, the trial court violated double jeopardy when it entered both convictions and sentenced Mr. Lang pursuant to both offenses. Thus, this court should vacate the conviction for the lesser offense of second degree assault and remand to the trial court for resentencing. *Francis*, 170 Wn.2d at 531.

2. The trial court when it admitted improper expert testimony regarding Mr. Lang's credibility.

The trial court erred when it admitted expert testimony through Dr. Grant regarding Mr. Lang's credibility. "Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant." *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). This is because such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. *Id.*; *Demery*, 144 Wn.2d at 759. A trial court's decision to admit expert

testimony is reviewed for abuse of discretion. *State v. Ciskie*, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988).

In determining whether a witness's testimony is impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *State v. Quaale*, 182 Wn.2d 191, 199-200, 340 P.3d 213 (2014) (citing *Kirkman*, 159 Wn.2d at 928). "Some areas, however, are clearly inappropriate for opinion testimony in criminal trials, including personal opinions, particularly expressions of personal belief, as to the defendant's guilt, the intent of the accused, or the veracity of witnesses." *Id.*

Here, the court permitted Dr. Grant to testify in the State's case in rebuttal that Mr. Lang had been diagnosed with antisocial personality disorder, malingering, and borderline personality disorder. 9/6/18 VRP at 420. He further testified that personality "is what makes you what you are, what makes you you." 9/6/18 VRP at 421. He described antisocial personality disorder as "Law breaking, lying, recklessness, irritability, irresponsibility." *Id.* He further described malingering as

“faking. . . faking illness.” 9/6/18 VRP at 422. Based upon Dr. Grant’s observations of Mr. Lang in court, the doctor testified Mr. Lang’s behavior in court was consistent with antisocial personality disorder and malingering. *Id.*

This testimony was a clear comment on Mr. Lang’s credibility. Indeed, the State admitted this was the sole purpose for which it offered Dr. Grant’s testimony in rebuttal. The State told the court, “It’s about his credibility. And the State has the right to attack his credibility.” 9/6/18 VRP at 414. The State had no other legitimate purpose for which it could have offered such testimony, particularly where Mr. Lang did not raise any defense related to his mental health. Counsel was clear that it did not intend to raise any mental health defense and intentionally avoided broaching the topic at any stage of the trial. 9/6/18 VRP at 411-12. Nevertheless, Dr. Grant literally told the jury Mr. Lang is a law breaker and a liar by nature, and that he had in fact lied on the stand and had faked his behavior to mimic symptoms of mental illness. Such testimony is improper. *Quaale*, 182 Wn.2d at 200.

Dr. Grant’s improper opinion testimony regarding Mr. Lang’s credibility invaded the province of the jury. In permitting such

testimony, the court deprived Mr. Lang of a fair trial by jury. This Court should reverse.

F. CONCLUSION

For the reasons stated above, Mr. Lang asks this court to reverse and remand for a new trial. At a minimum, this Court should vacate the conviction for assault in the second degree and remand for a new sentencing hearing.

DATED this 7th day of June 2019.

Respectfully submitted,

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APPELLANT.)	

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