

FILED
Court of Appeals
Division III
State of Washington
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NO. 37159-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

T.P.,

Appellant.

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

The Honorable Brian Huber, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. Defense counsel's supposed violation of the evidence rules does not transform the inadmissible reputation testimony into admissible evidence.

The prosecution concedes the reputation testimony by A.S.'s parents "admittedly lacked foundation." Br. of Resp't, 19; see also Br. of Resp't, 17 (acknowledging "as to either parent witness, the specifics of what the 'community' encompassed was never defined").

But the prosecution contends the reputation testimony was nevertheless admissible because the prosecution was allowed to anticipate defense counsel's attempt to undermine A.S.'s credibility. Br. of Resp't, 16. The prosecution asserts it "sought to 'pull the sting' ahead of time as allowed by controlling law." Br. of Resp't, 16. In so arguing, the prosecution emphasizes defense counsel's "credibility attack" violated the rape shield statute and ER 404(b). Br. of Resp't, 14-15.

The prosecution essentially argues for "curative admissibility." In other words, even though the reputation evidence lacked foundation, it became admissible after defense counsel violated the rules of evidence. But this Court soundly

rejected the curative admissibility doctrine recently in State v. Rushworth, __Wn. App. 2d__, 458 P.3d 1192 (2020), and State v. Lang, __Wn. App. 2d__, 458 P.3d 791 (2020).

In Rushworth, this Court explained the curative admissibility doctrine is “aptly known as ‘fighting fire with fire,’” and “permits the introduction of evidence that is inadmissible for reasons other than relevance.” 458 P.3d at 1197. This is distinct from the open door doctrine, which “is nothing more than a theory of expanded relevance.” Lang, 458 P.3d at 794.

This Court in Rushworth emphasized, “[o]ur Supreme Court has never recognized the validity of the curative admissibility doctrine,” and, “[a]t least in criminal cases, allowing the State to introduce evidence under the doctrine is inappropriate.” 458 P.3d at 1198. Put another way, “[t]he rules of evidence do not envision a tacit quid pro quo when it comes to inadmissible evidence.” Id. at 1199.

Lang, in particular, is on point. There, Lang placed his credibility in question by testifying. Lang, 458 P.3d at 794. “But the same is true of any witness,” this Court emphasized. Id. Once Lang’s credibility was at issue, the prosecution was entitled to

deploy tools of impeachment. Id. “Such tools must, however, be permissible under the rules of evidence and the federal and state constitutions.” Id. In Lang, several evidentiary rules barred the prosecution from impeaching Lang’s testimony as it did. Id.

The same is true here. Whether defense counsel violated the rules of evidence or not, the reputation testimony was still inadmissible because it lacked foundation. Defense counsel’s attack on A.S.’s credibility did not transform the inadmissible reputation evidence into admissible evidence. The prosecution was not permitted to fight fire with fire. Without foundation, the reputation testimony remained inadmissible.

The prosecution’s alternative argument is that reversal is not warranted because “the trial judge had substantial evidence of the fact of T.P.’s guilt.” Br. of Resp’t, 20. However, whether evidentiary error necessitates reversal “does not turn on whether there is sufficient evidence to convict without the inadmissible evidence.” State v. Grower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

It is hard to tell from the record how much the trial court relied on the inadmissible reputation testimony. The court’s

written findings of fact and conclusions of law were brief, basically just reciting the prosecution's evidence the aligned with the elements of the offense. CP 41-42. The court did not make any express findings of credibility or explicitly summarize the evidence it relied on, just noting "the testimony of the witnesses" and "the exhibits admitted into evidence." CP 41.

But the record does clearly demonstrate the trial court overruled defense counsel's repeated objections to the reputation testimony. RP 48-50, 56-57. This rebuts the presumption that a judge sitting as the trier of fact does not consider inadmissible evidence. Grower, 179 Wn.2d at 856 (recognizing presumption is rebutted where "the trial court affirmatively recognize[s] the legal admissibility of the evidence in question").

Furthermore, taking the evidence as a whole, the reputation testimony was a significant component of the prosecution's case. The prosecution presented only four witnesses in a single-day trial: Detective Ramon Bravo, A.S., and A.S.'s mother and father. Thus, *half* of all the prosecution's witnesses offered improper reputation testimony. The prosecution further highlighted the improper testimony by eliciting it at the end of

direct-examination of both A.S.'s mother and father. RP 45-46 (mother), 56-57 (father).

The prosecution further acknowledges this was “[a]rguably a ‘he said/she said’ kind of case.” Br. of Resp’t, 13. A.S.’s credibility was therefore a critical component of the prosecution’s case. Yet, contrary to the rules of evidence, two of the prosecution’s key witnesses opined that A.S. had a reputation for truthfulness.

Under the circumstances, it cannot be said that the repeated error was harmless. Reversal is necessary.

2. T.P. was denied effective assistance of counsel where his attorney pursued an unreasonable defense, inconsistent with the law and T.P.’s statement to police.

T.P. rests largely on his opening brief, but makes a point of factual correction here. The prosecution contends defense counsel’s theory of the case was not inconsistent with T.P.’s statement because “defense counsel pointed out that the definition of ‘made out’ was never specified.” Br. of Resp’t, 28. The prosecution points out “[d]efense counsel raised the idea that the phrase may encompass sexual activity.” Br. of Resp’t, 28, 30

(again emphasizing the same argument by defense counsel). In other words, T.P. may have admitted to the digital penetration by admitting he and A.S. made out.

This argument highlights the unreasonableness of defense counsel's theory. In his interview with T.P., Detective Ramon asked T.P. directly, "Did you ever do it?" meaning, did he ever finger A.S. RP 34. T.P. responded, unequivocally, "No." RP 34. T.P. explained he and A.S. kissed, but he never put his hand down her pants. RP 32. He reiterated he wanted to finger A.S., "but I didn't." RP 33. There was no confusion about what T.P. meant in his statement—he and A.S. kissed, but he did not finger her. Defense counsel's suggestion that "making out" might have included a consensual version of the sexual activity A.S. alleged was both incorrect and undermined his own client's credibility.

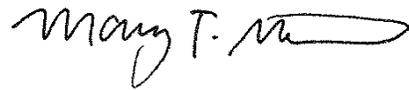
B. CONCLUSION

For the reasons discussed here and in the opening brief, this Court should reverse T.P.'s conviction and remand for a new trial. Alternatively, this Court should accept the prosecution's concession, reverse T.P.'s sentence, and remand for reduction of his community supervision term from 24 to 12 months.

DATED this 14th day of May, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift". The signature is written in a cursive style with a large, sweeping flourish at the end.

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