

8/230-6

NO. 24820-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN DUNCAN,

Appellant.

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

The Honorable Craig J. Matheson

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE THAT DUNCAN WOULD NOT SUBMIT TO ANOTHER EXAMINATION BY THE STATE'S PSYCHOLOGIST DURING PRETRIAL DISCOVERY.

The State asserts that Duncan waived his argument that he was unfairly prejudiced by the court's admission of testimony that he refused to submit to a second examination by the State's expert because such argument cannot be raised for the first time on appeal. Brief of Respondent (BOR) at 6. The State relies on State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984), State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986), and King County v. Washington State Boundary Review Bd., 122 Wn.2d 648, 660, 860 P.2d 1024 (1993), but these cases have no application to this issue. In Jackson at 695, the Court ruled that irrelevant prior bad acts are inadmissible under ER 404. In Smith at 780, the Court ruled that evidentiary error under ER 404 is not grounds for reversal unless it is are prejudicial. In King County v. Boundary Review Bd. at 660, the Court ruled that where parties brief and argue an issue in a lower court, and the court rules upon it, that issue is properly raised for appellate review even if not formally within the pleadings before the lower court.

The State's failure to cite controlling authority, notwithstanding, the State's argument fails because the record substantiates that defense counsel clearly argued that such testimony would be irrelevant and prejudicial:

THE COURT: Well, I might be willing to give an instruction the way that this has come out saying that they only have a chance to do one interview, but they shouldn't hold it against the state for not doing an updated interview.

MS. SAPPINGTON: And they shouldn't hold it against Mr. Duncan or whatever.

MR. THOMPSON: What's the jury to infer from not holding it against this person or that person? It's not relevant. All it does is open up a situation where: Gosh, what's he hiding? That casts a pall on my client. The current case law in our state does not require him to do that. How do you cure that?

.....

The fact that he didn't choose to meet with him is the part that's troubling. But that's what the record is. I mean why are you going to say what everybody knows? What does that add to anything? Had an opportunity to talk. He hasn't had an opportunity to talk to him since. That's the facts. You don't lay it at the feet of anybody, 'cause it's not relevant to the discussion, because the state candidly is not entitled to that under the law. How you can -- you know, somebody exercises their rights not to be evaluated, and suddenly that is somehow turned against them in a court of law that he somehow was obligated or should have or that there was even a discussion about it isn't relevant to anything.

26RP 1331, 27RP 1338.

The State argues further that the court properly allowed the State to respond “where Mr. Duncan intentionally attacked the State’s expert’s credibility based on that expert’s failure to conduct a supplemental interview.” BOR at 7. The State cites RP 1256-7, claiming that defense counsel attempted to “attack Dr. Rawlings’ analysis and his report.” BOR at 8-9. Contrary to the State’s overstatement of the record, defense counsel merely pointed out that Dr. Rawlings considered reports written by others in concluding that Duncan continues to have sexual fantasies about children. Defense counsel never “attacked” Dr. Rawlings for not evaluating Duncan since 1996.

Clearly, defense counsel’s cross-examination provided no basis for the court to admit irrelevant and prejudicial evidence and the court abused its discretion in admitting the evidence. Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 617, 20 P.3d 496 (2001). Furthermore, the court’s error was not harmless in light of the accumulation of errors in this case. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S 849 (1994).

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE THAT IF RELEASED, DUNCAN PLANNED TO MOVE IN WITH A CHILD MOLESTER AND THEN PRECLUDING THE DEFENSE FROM ADMITTING EVIDENCE IN REBUTTAL.

The State asserts that Duncan waived his argument that the court erred in admitting unfairly prejudicial evidence that if released, he planned to move in with a child molester, Dion Walls, because such argument cannot be raised for the first time on appeal. BOR at 13. However, the record reflects that defense counsel argued that such evidence was prejudicial and if the State presented such evidence, he should be allowed to present evidence in rebuttal. 30RP 1811-15. Contrary to the State's assertion, Duncan's argument is properly before this Court.

The State then argues that any possibility of prejudice is outweighed by the probative value of the evidence because it "tended to prove Mr. Duncan's likelihood of reoffense by showing that if released, Mr. Duncan planned to associate closely with an individual who had committed like offenses." BOR at 13-14. The State's argument defies logic because Walls had not reoffended and was succeeding in the community since his release. Consequently, the evidence had no probative value. Furthermore, the State overlooks the critical fact that the

court precluded defense counsel from presenting rebuttal evidence, compounding the court's error. See Brief of Appellant at 15-17.

The court erred in admitting unfairly prejudicial evidence "dragged in" for the "sake of prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223-24, 867 P.2d 610 (1994).

3. THE TRIAL COURT VIOLATED DUNCAN'S DUE PROCESS RIGHT TO MEANINGFULLY CROSS-EXAMINE THE STATE'S EXPERT WITNESS.

The State argues that "the risk of erroneous deprivation of Mr. Duncan's liberty interest due to the limitation on cross-examination of Dr. Spizman was negligible" in light of the fact that Duncan advanced his defense that he discontinued treatment because it was not meaningful through other testimony. BOR at 15-16. The State's argument is without merit because Duncan had a due process right to cross-examine Spizman regardless of what other evidence Duncan presented in his defense. The State fails to provide any authority to the contrary.

The State also attempts to minimize the effect of Spizman's testimony. BOR at 16. The records reflects, however, that Spizman essentially testified that Duncan remains a risk because he has refused sex offender treatment at the Special Commitment Center (SCC). 27RP 1407, 1415. Consequently, Duncan had a right to cross-examine Spizman further about how the treatment program benefits sex offenders.

The trial court violated Duncan's due process right to meaningful cross-examination, excluding evidence relevant to his defense. In re Detention of Brock, 126 Wn. App. 957, 963, 110 P. 3d 791 (2005).

4. THE TRIAL COURT VIOLATED DUNCAN'S DUE PROCESS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE BY EXCLUDING EXPERT TESTIMONY ON WHETHER THE TREATMENT PROGRAM AT SCC BENEFITED DUNCAN.

The State argues that the court properly excluded Dr. Halon's testimony because there was little evidence presented that "suggests Dr. Halon was qualified to opine as to whether the special needs treatment program at the SCC was likely to be successful." BOR at 18. However, at trial, the State never disputed Dr. Halon's qualifications as an expert but instead moved to exclude the testimony based on relevance:

[DEFENSE COUNSEL, MR. THOMPSON]: Doctor, do you have some experience reviewing the treatment program as outlined in the levels program and also the special needs pamphlet at SCC?

[DR. HALON]: Well, I have, yeah. I've reviewed the -- I guess they call it a protocol or something. The phases are all in there, what they do, how they do it, and I've read a deposition by Lawrence Thompson.

MS. SAPPINGTON: Your Honor, may we have a side bar?

(Heard at side bar:)

MS. SAPPINGTON: Now I'm not absolutely sure of this, but I'm assuming that he's going to be -- he's now putting his expert up there to assess the quality of the treatment at

the Special Commitment Center, which I think has been covered in motion in limine, A, and B, is not relevant to the question of whether or not Bryan Duncan is a sex offender.

MR. THOMPSON: I would not have thought so until Dr. Spizman talked about the Special Needs Center and whether or not treatment is available, and I want the doctor to give his opinion on whether the treatment which is available, given his understanding of it, has any applicability for Bryan Duncan.

31RP 2003-40.

Dr. Halon's testimony was relevant and in direct response to testimony by Dr. Spizman that Duncan has not "fully invested himself for any significant period of time in the treatment program" and Dr. Rawlings' testimony that it is a concern that Duncan has not participated in treatment because "he hasn't learned or internalized the kinds of skills that potentially could help him to control his behavior. 27RP 1407, 25RP 1127.

Dr. Halon's expert testimony was essential to Duncan's defense that he discontinued treatment at SCC because it was not helpful nor meaningful. By excluding his testimony, the court violated Duncan's due process right to present evidence in his defense. In re Detention of Skinner, 122 Wn. App. 620, 630, 94 P.3d 981 (2004), rev. denied, 153 Wn.2d 1026, 110 P.3d 213 (2005).

5. CUMULATIVE ERROR DENIED DUNCAN HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Contrary to the State's claim that Duncan has not established any prejudicial errors, an accumulation of errors affected the outcome of his commitment trial: 1) the court admitted irrelevant and unfairly prejudicial evidence that Duncan would not undergo another examination by the State's psychologist; 2) the court admitted unfairly prejudicial evidence that the person Duncan planned to move in with, if released, is a child molester, and precluded evidence that the person has not reoffended and has succeeded in the community since his release; 3) the court violated Duncan's due process right to meaningful cross-examination of the State's expert witness; and 4) the court violated Duncan's due process right to present evidence in his defense by excluding expert testimony.

Reversal is required because cumulative error denied Duncan his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

B. CONCLUSION

For the reasons stated here and in the opening brief, and as justice requires, this Court should reverse the trial court's commitment order and remand for a new trial.

DATED this 12th day of February, 2007.

Respectfully submitted,


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