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No. 62774-1-I

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION ONE

King County No. 06-1-06165-5 SEA

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS DELANTY,

Appellant.

2010 MAY 25 PM 03:09  
COURT OF APPEALS  
CLERK OF COURT

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APPELLANT'S REPLY BRIEF

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I. **REPLY TO STATE’S ARGUMENTS IN RESPONSE TO APPELLANT’S OPENING BRIEF**

The following are the State’s arguments and the Defendant’s Reply to each in turn.

- A. **The State Argues that the Trial Court Did Not Abuse Its Discretion in Refusing Defense Exhibit 355, Consisting of Invoices the Defense Offered to Prove That the Defendant Properly and Openly Billed for Work He Performed, to Prove that the Payments He Received Were Therefore Not Theft.** Brief of Respondent 17-19.

During the State’s case, prosecution witnesses testified about numerous checks written to the defendant before the charging period, and the State put them into evidence as exhibits, allegedly to show a pattern of previous thefts. Accordingly, the defense attempted to rebut this evidence with its own expert and Exhibit 355, which consisted of invoices for these checks to prove that he documented his work and openly charged for it.

However, the judge rejected the exhibit and cut the witness short, stating in front of the jury “we have to finish today” and “my decision is to try to keep the paperwork for the jury at a minimum.” RP (11/12/08) at 40. During jury deliberations, the foreman sent out a note specifically requesting copies of these invoices but the judge refused to provide them. *See infra* at 13-14.

During the hearing on Defendant's Motion for a New Trial the judge claimed that the jury's request for this exhibit was properly refused "because there were just too many of them and there was no direction for the jury as to what was to be done with them." RP (12/11/08) at 9-10. However, this Exhibit 355 is only 17 pages long and the defense accountant was attempting to explain it to the jury when the judge cut her off.

As argued by defense counsel, Exhibit 355

goes to the heart of the defense. It is the documentation that shows he billed her for the time and work he performed. The time period that the jury is asking about is the charging period, 2004 to 2005. There is nothing more relevant or germane than these invoices. Any person of average intelligence could look at these invoices and see that Tom Delanty was billing for work that he performed, that he is charged with not having performed and having billed her for.

*Id.* at 10. The judge responded:

I don't think that everything that is testified to during a trial, particularly documentation, necessarily then becomes an exhibit for the jury to examine during its deliberations. I think in many cases it would become overly burdensome to have that many pieces of paper and documents for the jury.

*Id.* at 10-11. Defense counsel responded:

Your Honor, if forty sheets of pages is overly burdensome, then why did the Court permit the State to produce binders of telephone records that are hundreds of pages long?

*Id.* at 11.

B. The State Claims that the Trial Court Did Not Err in Excluding Exhibit 376A, B and C, Which Formed the Center Piece of the Defense, Arguing that this Detailed Chronology of Documents Proving the Work the Defendant Performed Contained a Few Emails that Were Inadmissible Under ER 403, or Because Some of These Contained “hearsay” (Brief of Respondent at 20-21), and Because these documents “did not logically prove that Delanty did any work for Nancy Huegli that entitled him to compensation.” Brief of Respondent at 21-22.

1. The statements were not hearsay

The prosecutor objected to this critical defense exhibit because it contained “hearsay” in the form of emails between the defendant and the victim’s family describing the work he was doing and the amount of time it was taking. RP (11/10/08) at 2. However, the trial judge overruled this objection and even recognized that this exhibit was critical to the defense:

THE COURT: And aren’t they further evidence that he did it, especially in a case where it’s not disputed that these emails were received. It seems to me to in some way to enhance or verify the fact that this actually occurred, particularly since one of the disputes in this case is whether or not Mr. Delanty is to be believed. This substantiates that he is saying he did by some effort being made to convey that to the other side which exists and which is not disputed. . . . My sense is this is important for a person who is charged with a crime to be able to say I’m telling you that I did it and here are some examples of me having taken this position two years ago and not just on the stand to try to defend myself.

*Id.* at 14-15. The Court also recognized that the exhibit would “show Mr. Delanty’s state of mind that he believed that he had an understanding that

he was being paid for or was going to be compensated for his services.”

*Id.* at 17.<sup>1</sup>

In *State v. Crowder*, 103 Wn.App. 220, 11 P.3d 828 (2000), an embezzlement case, the court upheld similar “out-of-court statements, which related primarily to her management of his [the victim’s] financial affairs,” reasoning that

Whether a statement is hearsay depends upon the purpose for which the statement is offered. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay.

*Id.* at 22, citing *State v. Collins*, 76 Wn.App. 496, 498-99, 886 P.2d 243 (1995).

As in this case, the statements were admissible as circumstantial evidence of the victim’s state of mind by showing “his reliance on Crowder’s supervision of his affairs. The statement is not hearsay under ER 803(a)(3).” *Id.* at 26. Other hearsay statements in the *Crowder* case were deemed admissible “as evidence of the existing mental or emotional condition, showing the intent of the declarant at the time spoken,” pursuant to ER 803(a)(3), or “as circumstantial evidence of Crowder’s influence.” *Id.* at 26-27. The same is true of the emails between Delanty and the Huegli family discussing the amount of work Delanty was doing and the escalating costs.

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<sup>1</sup> The State similarly offered numerous emails and letters in evidence. *See, e.g.*, Exhibits 5-9, 11 (emails) and 14-16, 22, (letters).

Moreover, it is simply unfair for the State to selectively introduce select portions of an ongoing email dialogue about the same subject matter without allowing the defense to put them in context with related statements pursuant to ER 106. That rule provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

As noted in *State v. West*, 70 Wn.2d 751, 424 P.2d 1014 (1967):

Where one party has introduced part of a conversation, the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved. *This is true though the evidence might not have been admissible in the first place.*

70 Wn.App. at 754-55 (emphasis added).

2. **The exhibit was highly relevant and critical to the defense**

Exhibit 376(A), (B) and (C) consisted of three notebooks that contained

a summary of documents that includes all the documentary evidence of the activity that Tom Delanty did on behalf of Betty Huegli such as phone records, check paying, correspondence. It also includes his email exchanges with Ralph and Sue Boyer, Jim Huegli both to and from him.

RP (11/10/08) at 1. This exhibit was offered to establish “the various activities he did to validate his bills and the amount of money he was paid, which, of course, goes to the heart of the case.” *Id.* Defense counsel strenuously argued that the Defendant

had a due process right to present evidence of my client’s innocence and having a document is the best way to do that. The State is going to claim that my client is a liar. I have the right to document the truth of what he is saying with the fact that an email was in fact sent to Jim Huegli. In fact, there were numerous emails sent to Jim Huegli a year before this problem developed. . . . What we have here are documents to document, corroborate and show my client’s state of mind and prove that he is telling the truth when he says ‘I told them over and over and over again a year before this that Betty is totally disabled. She cannot manage her affairs. I am spending huge amounts of time and money on this.’ That’s exactly what these emails say. It’s to corroborate his testimony like any document does, like a check does, like these billing statements and invoices do.

*Id.* at 8.

3. **The exhibit was necessary to rebut similar documents and testimony from prosecution witnesses**

The State presented testimony from Jim Huegli that he “spent hundreds of hours trying to find out anything that he did to justify that bill at any time and I have been unable to determine or locate a single solitary piece of paper or record that supports anything on that bill.” RP

(10/30/08) at 162.<sup>2</sup> The State also elicited detailed testimony from two civil attorneys hired by the Hueglis about the importance of “any backup documentation” for Delanty’s invoices. RP (11/4/08) at 88-90. Attorney Renea Saade explained: “We needed to get Mrs. Huegli’s phone records so there could be some cross-reference being done to determine whether or not she was calling Mr. Delanty and, if so, how often or how long did they speak so that we could do our own accounting.” *Id.* at 100. She was the civil attorney for Betty Huegli, and Ms. Saade testified that she had sought

all invoices, bills, statements of work or other communication or documents from the Defendant . . . generated at any time between the years 1999 and 2005 in which the Defendant, Mr. Delanty, requests payment for services allegedly rendered and where it advises the plaintiffs what fees that the Defendant would or may charge for said services.

*Id.* at 109-110. Exhibit 376 consisted of precisely this “backup documentation.”

In its case in chief, the State also presented extensive financial analysis by its accounting expert, James Hardtke, who introduced numerous thick binders of phone records (Ex. 26 & 27), a thick binder of documents found on computers seized from Delanty’s house (Ex. 31), a

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<sup>2</sup> Jim Huegli’s analysis of phone records was based solely on long distance calls between Betty’s house in Bellevue and Tom Delanty’s house in Everett. RP (10/30/08) at 28.

summary of telephone records (Ex. 33), a bar chart of telephone calls (Ex. 34), and a binder containing numerous checks that were at issue in the case (Ex. 2).

Wes Edmunds, another attorney hired by the Hueglis, testified for the State that:

I wanted all the backup, the detailed billing that would justify the billing that he created, the \$73,000 and the \$23,000 that had been paid. I wanted all the documents. I wanted everything.

RP (11/4/08) at 9. According to his testimony, the relevant records included “phone records, daily logs of time and the like. . . . I wanted to look at those phone records to see what had been accomplished. . . . And then there seemed to be a high number of home visits also. I needed to learn more about that. . . . So I wanted backup.” *Id.* at 11.

Edmunds testified “I couldn’t analyze the billing and whether or not he was owed money and how much without first seeing the backup and also getting the materials.” *Id.* at 44. He needed “to get records to show whether he did those things.” *Id.* at 59. Defense Exhibits 375 and 355, and related testimony which the court excluded, did precisely this.

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Thus, his analysis did not include any of the lengthy and numerous calls Betty made to Delanty’s cell phone. *Id.* at 30-31.

4. **The defense made a detailed offer of proof for this exhibit**

The State erroneously claims in its Response that the defense “made no offer of proof of the relevance or admissibility of the exhibit or any of the invoices contained in it.” Response at 19. Quite to the contrary, the defense advised the trial judge “I need Mr. Ring to lay the foundation” for the exhibit. RP (11/10/08) at 1. The defense expert, Dan Ring, then laid a detailed foundation for Exhibit 376(A), (B) and (C), describing how all of those documents “cover the same time period as Exhibit 10, the invoice that Mr. Delanty submitted.” *Id.* at 25-26. Those documents consisted of

redacted phone records of Mr. Delanty, phone information from Mrs. Huegli’s phones, bank statements, copies of cancelled checks, emails and other material that were provided to me either by the State in discovery or retrieved by subpoena. . . . They all relate to the work that Tom Delanty performed for Betty Huegli.

*Id.* at 26. The entire exhibit was organized chronologically with weekly summaries backed up by documentary evidence to prove that Mr. Delanty performed the work for which he was paid. *Id.* at 32. Nearly all the underlying records were either received from the prosecution or by subpoena to banks, Charles Schwab and other similar institutions. *Id.* at 45-46.

C. **The State Argues that it was Proper for the Trial Court to Cut the Defense Case Short by Repeatedly and Frequently Cutting Off Witnesses and Urging the Defense to Quit Asking Questions and Hurry in the Presence of the Jury.** Brief of Respondent at 23-24.

On Thursday, November 6, after seven days of testimony from prosecution witnesses, the defense called its first witness and the prosecutor immediately expressed concern, stating “I’m just looking at the clock and I am concerned we are going to finish this.” RP (11/6/08) at 19. There was no court on Friday, November 7 or the following Tuesday, November 11, which was a court holiday. This left the defense only Monday, Wednesday and Thursday to present its entire case.

When the Defendant took the witness stand on Wednesday, November 12, the trial judge began interrupting his testimony, directing him to “give a number if you know a number. If you don’t know a number say you don’t know” and telling the Defendant to “leave it to your attorney to decide whether or not he wishes to follow up with these questions.” RP (11/12/08) at 196. A few pages later, the Court instructed counsel: “Last question. We need to break.” *Id.* at 208. The judge then told the jury: “Ladies and gentlemen, we do intend to conclude testimony tomorrow. . . . I say that to remind counsel --.” *Id.* at 209. Juror No. 3 asked “Do we come Friday or do we come Monday?” And the judge

answered “Don’t make me go there, only if I have to.” The juror then complained “I have a lot of stuff on my calendar Friday.” *Id.* at 209.

At this point in Delanty’s testimony, the Court interjected “How much longer do you have?” RP (11/12/08) at 160. The prosecutor cut him off, stating “We are short on time, Your Honor,” to which the Court responded “I know.” RP (11/12/08) at 187. When defense counsel asked for a sidebar the prosecutor again complained in front of the jury: “We have wasted so much time” and the judge directed counsel to “go on to the next subject or some subjects.” *Id.* at 195.

The next day, Thursday, when the judge was determined to finish the trial, the judge repeatedly interrupted the defendant’s testimony, telling Delanty: “You should answer yes or no” to the questions. RP (11/13/08) at 34. “The question is did you draft that document on a home computer,” (*id.* at 36); “Mr. Delanty, we are going to get through this a lot faster if you just answer the question. You don’t need to explain yourself,” (*id.* at 37); “Mr. Delanty, just limit yourself to responding, actually answering the question” (*id.* at 39-40); and the court then inquired “Is there going to be a lot more questions about this?” *Id.* at 44.

The defense cut its questioning short and called an expert witness, Margy Brouns-Eaton, an accountant to testify about her analysis. But only eight pages into her testimony the judge asked: “How much longer do you

think you'll be?" *Id.* at 58-59. A few pages later, defense counsel responded "I'll get through this very quickly, but it's my discretion what I ask my own witness," and the judge responded, in front of the jury, "We do have to be mindful of the time," to which defense counsel responded "I will, I promise." *Id.* at 62.

The prosecutor then complained that the witness "can testify without having another piece of paper in evidence. We are trying to go faster," to which defense counsel responded that it was only a one page document, Exhibit 312, a "Table of Errors and Omissions" of Mr. Delanty's accounting for his time that formed the basis of his billing. *Id.* at 68. The court responded by interjecting "What's the relevance of this witness' correction of what has happened?" To which the defense responded

Your Honor, she's also verifying the accuracy of the most critical exhibit in the case. . . . She's verifying that the final invoice accurately reflects almost entirely the previous invoices, gives credit for all the payments including the cash payments and shows that more money is owed at the bottom.

The judge conceded that the testimony was "relevant" but nevertheless kept pressuring the defense and defense counsel responded "I will try to move quickly. I promise." *Id.* at 69. The prosecutor then stated "Let me finish up since I'm the one who's in a big hurry." RP 87.

When the defense called the Defendant's wife, Vida Delanty, to testify about her personal observations of the amount of work Tom was performing for Betty Huegli, the court interrupted the direct examination only thirteen pages into her testimony, stating:

Mr. Hansen, how many more questions? . . . I am committed as long as it works out to actually finish this case, the testimony, the instructions and argument today. . . . **So we have to finish today**, over the lunch hour if need be.

*Id.* at 111 (emphasis added).

When the defense asked questions that would corroborate the Defendant's testimony about the length of conversations he had with Jim Huegli the court again interrupted, stating "Is it any different from what the jury has heard?" from the Defendant himself, and defense counsel answered "No, Your Honor," and the judge responded: "Let's go on then" and cut the witness short. *Id.* at 120. The defense immediately rested. *Id.* at 122.

This is not proper trial management, especially since the State created the problem by taking nearly the whole time allotted for trial to present its numerous witnesses and literally thousands of pages of documents and analysis of these records by Jim Heugli, Detective James Hardtke, and attorneys Renea Saade and Wes Edmunds. This is an egregious violation of Delanty's due process right to a fair trial and to

present a defense. *See State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (holding it is an abuse of discretion to exclude evidence that is “crucial to the central contention of a valid defense.”) and numerous other cases to the same effect in Appellant’s Opening Brief at 30-33.

D. **The State Argues that All of These Errors Were Harmless, Even Though the Jury Repeatedly Asked for the Excluded Exhibits During Deliberations, and Even Though the Defendant was Acquitted on Some Counts.**  
Brief of Respondent at 23.

The exclusion of these exhibits was highly prejudicial error as evidenced by two written inquiries from the jury during deliberations seeking the very documents from Exhibits 355 and 376(A)-(C) that the Court refused to admit into evidence.

The first inquiry, just one hour after deliberations began on Friday, November 14, 2008, asked:

Can we please have copies of checks Mr. Delanty filled out for Mrs. Huegli’s household expenses (utilities) 2004-2005.

CP 181 and Appendix 1 to Appellant’s Opening Brief (copy of jury inquiries and responses). The Court responded “you will need to rely on the evidence that was admitted into evidence and which you have at this time.” *Id.*

An hour after the judge refused this request, the jury sent out a second inquiry asking for the Ex. 355, the invoices and checks which the

Court had also refused to admit during trial. CP 182 (also included in Appendix 1 to Appellant's Opening Brief). Again, the Court responded that the jury would "need to rely on your examination of the exhibits admitted at trial and the testimony admitted at trial." *Id.* At this point, defense counsel advised the Court verbally and by email "that the jury should be given additional evidence." However, the Court refused to admit these exhibits.

Even though the trial court excluded the most critical evidence for the defense, rushed the trial and cut witnesses off in front of the jury, expressing disdain for the defense and insisting on completing the trial by the end of Thursday, the jury still acquitted the Defendant on two charges.

Obviously, these egregious errors were not harmless beyond a reasonable doubt as required by *Chapman v. California*, 386 U.S. 18, 24, *reh'g denied*, 386 U.S. 987 (1967); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986) (the Washington Supreme Court has adopted the "overwhelming untainted evidence" standard in harmless error analysis).

## **II. RESPONSE TO STATE'S CROSS APPEAL**

The only issue raised by the State's Cross Appeal is its claim that Judge Lum erred when he ordered depositions the two critical witnesses, Susan and Ralph Boyer, the daughter and son-in-law of the alleged victim.

Both were called as State's witnesses at trial and offered critical, and hotly disputed testimony about the amount of work Tom Delanty performed for Betty Huegli.

The State acknowledges that the defense filed a motion to take their depositions, pursuant to CrR 4.6, "because they first refused to submit to pretrial interviews with the defense and then refused to be recorded during their interviews." State's Response at 25. The State argues that CrR 4.6 should never apply where the witness has talked to the police but refused to speak with the defense, so long as the prosecution "has provided a recorded statement or the substance of the witness's statement to the opposing party as required by CrR 4.7," the criminal discovery rule. State's Response at 26. In other words, the State claims that only the police have the right to interview critical witnesses.

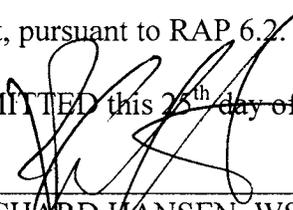
This is clearly *not* the law in Washington. CrR 4.6 provides for depositions in criminal cases "if a witness refuses to discuss the case *with either counsel* and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice." CrR 4.6(a) (emphasis added). At a pretrial hearing, defense submitted an affidavit from the defense investigator establishing the fact that these witnesses refused to speak with him, and the Court then ordered depositions of both of these witnesses. Without citation to the record, the State quotes the

judge making a finding that the witnesses kept “vacillating” and that the defense should not be “required to be jerked out 20 days from Sunday.” State’s Response at 28. Assuming the accuracy of this quote, it is clearly a sufficient finding to satisfy the requirements of CrR 4.6.

The Boyers were allowed to have Sue Boyer’s brother, Jim Huegli, present for the depositions and the prosecutor was present as well. As the prosecutor well knows, the undersigned conducted those depositions in a highly professional manner, so there is certainly no need for this court to provide an “incentive to be professional and respectful toward the witness.” State’s Response at page 28.

In any event, this issue is moot because the depositions were taken and cannot be rescinded. Judge Lum’s rulings were based on the particular facts of this case, so this hardly “involves matters of continuing and substantial public interest,” or issues “of public interest that are capable of repetition yet easily evade review,” as argued by the State. States Response at 29 (citations omitted). The proper procedure to seek review of this pretrial decision would have been for the State to seek discretionary review in this Court, pursuant to RAP 6.2.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of May, 2010.

  
\_\_\_\_\_  
RICHARD HANSEN, WSBA #5650  
Attorney for Appellant

**PROOF OF SERVICE**

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

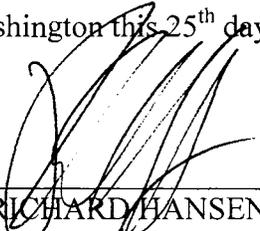
On the 25<sup>th</sup> day of May, 2010, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Reply Brief directed to attorney for Respondent:

Economic Crimes Unit  
King County Prosecutor's Office  
516 Third Ave., W554  
Seattle, WA 98104

And mailed to Appellant:

Thomas Delanty, #326288  
Airway Heights Corrections Center  
P.O. Box 2049  
Airway Heights, WA 99001

DATED at Seattle, Washington this 25<sup>th</sup> day of May, 2010.



\_\_\_\_\_  
RICHARD HANSEN, WSBA #5650  
Attorney for Appellant