

64335-5

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No. 64335-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED MOHAMED,

Appellant.

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

The Honorable Jay V. White

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
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WASHINGTON APPELLATE PROJECT
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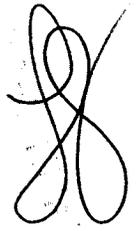


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A. ARGUMENT

THE COURT'S RULING BARRING MR. MOHAMED
FROM ADMITTING EVIDENCE OF MS. TRULSON'S
PRIOR DRUG USE VIOLATED HIS
CONSTITUTIONALLY PROTECTED RIGHT TO
PRESENT A DEFENSE

The State's Response Brief characterizes the standard of review of this error as an abuse of discretion. This analysis is incorrect. As argued in the Brief of Appellant, the refusal to allow Mr. Mohamed to present evidence of Ms. Trulson's prior drug use went to the heart of his defense, thus violating his right to present a defense under the Sixth Amendment to the United States Constitution and article I, section 22. The evidence that Ms. Trulson was a drug user and utilized Mr. Mohamed to feed her habit was not merely relevant evidence, as stated in *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010), it was Mr. Mohamed's "entire defense." As in *Jones*, if Mr. Mohamed's evidence was believed, it would have shown a lack of forcible compulsion which would have allowed the jury to acquit him. Without this evidence, Mr. Mohamed had no defense which had any credibility before the jury. Thus, Mr. Mohamed was prevented from presenting a meaningful defense.

To the extent the evidence may have violated a rule of evidence as argued by the State; Mr. Mohamed's right to present a

defense must prevail. See *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (where the right to present a defense is abridged by evidence rules that “infring[e] upon a weighty interest of the accused” and are “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’”), quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).

In *Jones*, the Supreme Court ruled that even if the rape shield statute had applied to theoretically bar the evidence proffered by Mr. Jones, “it cannot be used to bar evidence of extremely high probative value per the Sixth Amendment.” *Jones*, 168 Wn.2d at 723.

[N]o state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.

Id. Thus, even to the extent ER 404(b) may have barred Mr. Mohamed’s proffered evidence as argued by the State; his evidence could not be barred where the rule of evidence excluding this evidence directly conflicted with Mr. Mohamed’s right to present a defense.

Further, contrary to the State’s attempt to distinguish it, *State v. Jones* has enormous applicability to Mr. Mohamed’s matter. In

Jones, supra, the trial court excluded evidence that the victim and another woman engaged in an all night drug and sex party where the victim engaged in consensual intercourse with several men, including the defendant, who was subsequently charged with second degree rape. The trial court barred the evidence, finding it was being used by the defendant to challenge the veracity of the victim and, as a result, the evidence was barred by the rape shield statute. *Id.* The Supreme Court disagreed, ruling the evidence was not merely

of extremely high probative value; it is Jones's entire defense. Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence.

After the court effectively barred Jones from presenting his defense and after all witnesses had already testified, the trial court attempted to say that Jones had not been precluded from testifying to the issue of consent alone. The trial court's formulation would have allowed testimony of consent, but devoid of any context about how the consent happened or the actual events. These were essential facts of high probative value whose exclusion effectively barred Jones from presenting his defense. The trial court prevented him from presenting a meaningful defense. This violates the Sixth Amendment.

Jones, 168 Wn.2d at 721.

Here, Mr. Mohamed's proffered evidence was not merely extremely relevant defense evidence; it was Mr. Mohamed's "entire defense." *Jones*, 168 Wn.2d at 721.

Finally, contrary to the State's argument, the error in excluding the evidence of Ms. Trulson's prior drug use was not a harmless error. A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Again the State's Response Brief ignores the import of *Jones* to Mr. Mohamed's argument. In finding the error in *Jones* not harmless, the Supreme Court noted:

Admittedly, Jones's version of the events is not airtight. He did not call any of the other members of the alleged sex party as witnesses, K.D.'s testimony directly contradicted Jones's account, and only Jones's semen was found on K.D. Nevertheless, a reasonable jury that heard of a consensual sex party may have been inclined to see the encounter in a different light. The jury would have heard a completely different account of the events of that night, so it is possible that a reasonable jury may have reached a different result. The trial court's error prevented Jones from presenting his version of the events.

Jones, 168 Wn.2d at 724.

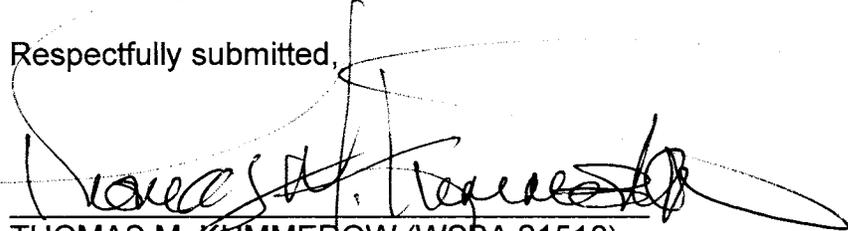
The same analysis is true here. Mr. Mohamed was barred from presenting to the jury any evidence of the drug transaction that allegedly occurred. This evidence would have directly contradicted Ms. Trulson's version of the events in which she claimed she never sought to trade drugs for sex. A reasonable jury hearing this evidence of Ms. Trulson's prior drug use and evidence of a drug deal gone bad "may have been inclined to see the [] encounter in a different light, and may have reached a different result. *Id.* As a result, as in *Jones*, the trial court's error in excluding this evidence was not harmless and Mr. Mohamed is entitled to reversal of his convictions and remand for a new trial. *Id.*

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant as well as the instant reply brief, Mr. Mohamed submits this Court must reverse his convictions and remand for a new trial.

DATED this 3rd day of August 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64335-5-I
v.)	
)	
MOHAMED MOHAMED,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANN MARIE SUMMERS, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF AUGUST, 2010.

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