

No. 65267-2-I

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

STEPHEN LEE HATCH,

Petitioner / Appellant,

vs.

STATE OF WASHINGTON,

Respondent / Appellee.

2011 JUN 15 AM 10:25
FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON

APPELLANT'S REPLY BRIEF

ORIGINAL

Douglas R. Hyldahl, Esq.,
WSBA No. 13521
Lester & Hyldahl, PLLC
222 Grand Ave., Ste. F
Bellingham WA 98225

Telephone:(360) 733-5774
Fax: (360) 733-5785

Counsel for Appellant
Stephen Lee Hatch

TABLE OF CONTENTS

STATEMENTS OF FACT1

ARGUMENT 1

1. Applicability of ER 410 1

2. Harmless Error 3

TABLES OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Koenig v. Nowinski</i> , 124 Wn.App. 617, 102 P.3d 840 (2004).....	2
<i>Ex Parte Yarber</i> , 437 So.2d 1330, 1336 (Ala., 1983)	2
<i>State v. Pizzuto</i> , 55 Wn.App. 421, 434, 778 P.2d 42, 49 (1989).....	3
<i>State v. Jackson</i> , 102 Wash.2d 689, 695, 689 P.2d 76, 79-80 (1984).....	3
 <u>RULES</u>	
ER 410.....	1, 3

STATEMENTS OF FACT

In its brief, Respondent asserts that the trial court, having “[learned] that Hatch had unilaterally provided Dr. Coleman’s evaluation to the prosecutor... and, that the state had not engaged in plea negotiations with Hatch...”, went on to rule that the admission of Dr. Coleman’s did not violate ER 410. Respondent’s Brief pp. 5-6. This assertion is incorrect. A close review of the record shows that the trial prosecutor never claimed to the trial court that he did not engage in negotiations with Mr. Hatch’s attorney. Although the trial prosecutor asserted “...there was never any negotiation on the SSOSA”, VRP 1/12/10, p. 81, he also admitted that he had made an offer in the case. VRP 1/12/10, p. 88. Further, he admitted that there were negotiations regarding a SSOSA after the evaluation was provided. VRP 1/12/10, p. 92. In addition, it should be noted that Mr. Hatch’s trial counsel unsuccessfully negotiated to resolve the matter with misdemeanor pleas. Declaration of David Nelson, CP 37-38.

ARGUMENT

Applicability of ER 410

Respondent argues that local customs regarding plea bargaining have no place in the analysis of the issue here. Respondent’s Brief pp. 8-9.

It would frame the issue upon what “the record reflects”. Id. But this argument misses the point.

First, there are facts in the record as to local custom regarding the provision of SSOSA evaluations prior to plea. Declaration of David Nelson, CP 37-38, and those of Whatcom County attorneys, Jill Bernstein (CP 39-41), Starck Follis (CP 34-36) and Thomas Fryer (CP 42-43); Affidavit of Mac Setter, CP 26-28. All either indicate, or support the notion that a SSOSA evaluation would only be provided in a pretrial setting in connection with an offer to plead guilty.

Secondly, local custom is relevant to the question of whether the subjective intent to negotiate is objectively reasonable, a requirement for ER 410 applicability under *State v. Nowinski*, 124 Wn.App. 617, 102 P.3d 840 (2004)

Finally, although this author has found no authority in Washington applying local custom to matters of plea bargaining, such authority does exist in other jurisdictions. In *Ex parte Yarber*, 437 So.2d 1330, 1336 (Ala.,1983), the Supreme Court of Alabama noted:

In its opinion, the Court of Criminal Appeals notes the fact that defendant and the state did not enter into a written plea agreement. We are unaware of any requirement that the agreement be reduced to writing. Regarding negotiated pleas, two commentators have remarked, “[A] plea bargain is a matter of honor between opposing counsel. It is not reduced to writing.” Bailey and Rothblatt, *Handling Misdemeanor Cases*, § 39 (1976). The same is true in

our jurisdiction. Although a plea agreement may be reduced to writing, **the prevalent custom in Alabama is that such agreements are verbal understandings between the attorneys involved.** We point out this to dispel any suggestion that a plea agreement is unenforceable merely because it is unwritten.

(emphasis supplied)

Respondent additionally argues that the unilateral provision of Dr. Coleman's evaluation with the intent to engage in plea bargaining does not implicate the protections of ER 410. Respondent's Brief p. 10. It equates such provision with an uncounseled, pre charging confession of the sort found in *State v. Pizzuto*, 55 Wash.App. 421, 434, 778 P.2d 42, 49 (1989). But, such were not the facts here. Mr. Hatch's counsel provided the evaluation with the intent to initiate plea bargaining for an agreed SSOSA disposition. That such intent was objectively reasonable is shown in the record. Indeed, this court reversed a conviction in *Nowinski*, supra, where the negotiations were much less formal than those here.

Harmless Error

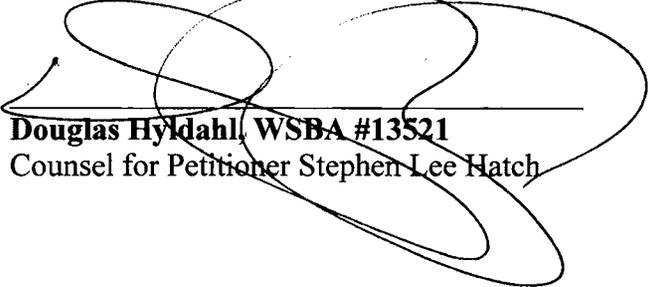
Respondent asserts, as the trial court opined, that the admission of Dr. Coleman's testimony was harmless error. In this context, this court must determine, within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred. *State v. Jackson*, 102 Wash.2d 689, 695, 689 P.2d 76, 79 - 80 (1984).

The issue to which the offending testimony went was whether Mr. Hatch took the photos for the purpose of sexual gratification. The record establishes that the photos were taken surreptitiously. Other than that, and the nature of the photos themselves, there is no evidence that the photos were taken for purposes of sexual gratification. There were many times that Mr. Hatch went to the tanning salon and did not take pictures.

Further, Mr. Hatch refers the court to the argument found at pp. 23 to 25 of his Opening Brief.

DATED this 14 day of June, 2011.

LESTER & HYLDAHL, PLLC



Douglas Hyl Dahl, WSBA #13521
Counsel for Petitioner Stephen Lee Hatch

No. 65267-2-I

IN THE COURT OF APPEALS, DIVISION I,
STATE OF WASHINGTON

STEPHEN LEE HATCH)
)
) Petitioner/Appellant.)
)
) -vs.-)
)
) **STATE OF WASHINGTON,**)
)
) Respondent/Appellee,)
)

**DECLARATION
OF SERVICE**

This declaration is made by:

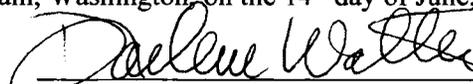
Name: Darlene Walters
Address: 222 Grand Ave., Ste. F, Bellingham, WA
Telephone: (360) 733-5774
Occupation: Legal Assistant
Relationship to parties: I am the Legal Assistant to the attorney for the above-named Petitioner.

I DECLARE THAT

1. On June 14, 2011, I delivered or caused to be delivered via Federal Express, postage prepaid, the original and one copy of *Appellant's Reply Brief*, for filing to the Court of Appeals, One Union Square, 600 University Street, Seattle, WA 98101-4170, a true and correct copy of the *Appellant's Reply Brief*, upon the Whatcom County Prosecuting Attorney's Office delivered by 4th Corner Network, and copy to Stephen Lee Hatch, Appellant, by U.S. Mail, postage prepaid.

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Bellingham, Washington, on the 14th day of June, 2011.


Darlene Walters