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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.

APPELLANT'S BRIEF

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INTRODUCTION

This appeal concerns the admission of the testimony of Dr. William Coleman, a psychologist who had evaluated Mr. Hatch for purposes of amenability to treatment under the Special Sexual Offender Sentencing Alternative (SSOSA). RCW 9.94A.670. Mr. Hatch's attorney, David Nelson, provided Dr. Coleman's report to the deputy prosecuting attorney assigned to the case, Jeffrey Sawyer, in the hopes of obtaining Mr. Sawyer's agreement that Mr. Hatch should be sentenced under SSOSA. Those negotiations were unsuccessful and the matter went to trial. Over repeated objections, the trial court allowed the state to adduce evidence from Dr. Coleman, in proof of the element of sexual gratification under the voyeurism statute, RCW 9A.44.115(2), that Mr. Hatch had sexual fantasies about the women in the tanning salons.

In support of his motion for a new trial, Mr. Hatch submitted the Declaration of David Nelson and the declarations of three criminal defense attorneys from Whatcom County. Mr. Sawyer, the deputy prosecuting attorney who handled the case, did not submit a declaration. Rather, the state submitted the Affidavit of Mac Setter, Chief Criminal Deputy Prosecuting Attorney for Whatcom County.

The trial court denied the motion for a new trial, opining that even had Dr. Coleman's testimony been excluded, the result would not have been different.

ASSIGNMENTS OF ERROR

- 1] The trial court erred in admitting Dr. Coleman's testimony
- 2] The trial court erred in not granting Mr. Hatch's motion for a new trial.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- 1] Are the protections of Evidence Rule 410 activated by defense counsel's unilateral provision of statements of the defendant in connection with an offer to plead guilty?
- 2] Is a mutual agreement to negotiate a plea required before the protections of ER 410 become active?
- 3] Did the admission of Dr. Coleman's testimony violate Evidence Rule 410?
- 4] Was the admission of Dr. Coleman's testimony harmless error?

STATEMENT OF THE CASE

Prior to trial, Appellant Stephen Hatch objected to the admission of statements made by Mr. Hatch to a Dr. William Coleman. VRP - 1/11/10, p.38. Mr. Hatch had been evaluated by Dr. Coleman in order to support his offer to plead guilty in return for an agreed recommendation that he be sentenced under the Special Sex Offender Sentencing Alternative (SSOSA). Declaration of David Nelson, CP 37-38. On several occasions, resolution of the case had been continued so that Mr. Hatch could obtain the evaluation from Dr. Coleman.

On June 18, 2008, Mr. Hatch's attorney, David Nelson, in asking to continue the case indicated that Mr. Hatch was in the evaluation process and that he had been told that "...probably 60 days out is when the evaluation process will conclude." VRP – 6/18/08.

On August 20, 2008, Mr. Hatch's attorney noted that his client was in "the evaluation process". VRP – 8/20/08, p.3.

On October 8, 2008, Mr. Hatch's attorney informed the court that his client was "going through the evaluation process" with Dr. Coleman. VRP – 10/8/08, p.5. In response, Mr. Sawyer, the prosecutor, noted that the case had been continued for "short, short periods", and suggested that a trial date be picked for approximately a month out, "... and assuming we

get all the information we need, we can set that **for a plea** earlier. Id (emphasis supplied).

On December 3, 2008, with Mr. Hatch's attorney apparently not present, the prosecutor indicated "I think we are close to a resolution on this, Your Honor. At least that's my understanding from my last discussion with Mr. Nelson." VRP – 12/3/08.

On December 15, 2008, Mr. Hatch's attorney informed the court that "I've been trying to negotiate with Mr. Sawyer on this. We've been very close, and there is a resolution, I think, in the wind..." VRP – 12/15/08, p.6.

On January 7, 2009, Mr. Hatch's attorney told the court "Mr. Hatch is present. This is agreed. Mr. Hatch has completed the evaluation process; we are at the phase now where we are trying to work out the fine points of settling the case, if possible, and we just need this additional time to do that." VRP – 1/7/09.

On February 11, 2009, Mr. Hatch's attorney indicated to the court "Mr. Sawyer is the prosecutor. I gave him some paperwork to review. I'm asking that this be set over for a resolution, a plea hearing in two weeks, because I'm in trial next week in Skagit, I think, and the 26th is the date I'm looking at." Mr Sawyer, the prosecutor, later noted, "**We can do a**

plea on the 26th. We can set a trial date for March 9th in case the plea doesn't go through." VRP – 2/11/09, p.4 (emphasis supplied).

On February 25, 2009, Mr. Hatch's attorney indicated in part "It will not be a trial, it's just depending how it will resolve itself." VRP – 2/25/09.

On April 8, 2009, Mr. Hatch's attorney indicated in part, "Your Honor, Mr. Sawyer and I have been negotiating this case for a long time, and part of the delay in getting this case to court was Mr. Hatch went and got an evaluation, and – a SSOSA evaluation which has been completed."

On April 29, 2009, the following occurred before the court:

Mr. Nelson : Mr. Hatch is present, and we ask that this be set over to May 14th for resolution.

The Court: **Plea on the 14th? Everybody is in agreement with that date for a plea?**

Mr. Sawyer: I'm fine with that.

Mr. Nelson: Yep. We have one or two things left to do to talk to the Prosecutor about.

(emphasis supplied)

Pre trial, Mr. Hatch objected to the admission of any statements made to Dr. Coleman on the grounds that the evaluation and the statements contained therein were provided to the state in connection with plea negotiations. VRP – 1/11-12/10, p.38. The following occurred:

Mr. Nelson: There's one additional matter, Your Honor. In the process, this case is very old for a number of reasons, it was bumped a number of times. The State asked for continuances early

on and defense asked for continuances. One of the reasons was we were exploring different avenues and negotiation heavily with the State.

One of the avenues we did do was an evaluation process with Dr. Coleman in an attempt to do a SSOSA. He completed the report and through negotiation it was presented to the State.

.....

Mr. Nelson: I'm also objecting to the evaluation which was done in pursuit of a legitimate negotiated plea offer and the contents of that, Dr. Coleman may be called, I'm told, and I'm objecting to that in that it was under ER 410, and that it's prejudicial, 403. And this was purely used as a negotiation to settle the case and it's inappropriate to be presented in this trial. VRP – 1/11-12/10, p.38.

The State responded:

Mr. Sawyer: [I] do believe that the defendant's own statements when he went to Dr. Coleman, not at my request, not at the court's request, but of his own volition sought an evaluation for medical purposes and made statements and then presented those to the court and that State, those statements are admissible against him. VRP – 1/11-12/10, p.39.

The court overruled the pretrial objection, holding that a unilateral provision to the State of the material, in the absence of a prior agreement to negotiate did not bring the material under the ambit of ER 410:

Mr. Nelson: My argument is [admission of statements made to Dr. Coleman] would be in violation of the [ER 410] in that [provision of the evaluation report to the State] was in pursuit of a plea or settlement of the case.

The Court: It was unilateral. It wasn't plea negotiation. If the State had said I will consider a SSOSA, you send him to Dr. Coleman and then give me a report and I will take a look at that, then maybe certainly the discussions between you and the State would be plea

negotiations and that would not come into evidence.” VRP – 1/11-12/10, p. 40.

Following voir dire examination of Dr. Coleman, the court permitted the state to elicit testimony from Dr. Coleman that:

- 1] He was a licensed doctor in the state of Washington;
- 2] That Mr. Hatch spoke with him and said that most of his fantasies were about his wife and the women at the tanning salon;
- 3] That Mr. Hatch told him he took photographs at the salon;

VRP – 1/11-12/10, pp. 101-2.

Dr. Coleman testified, answering primarily leading questions by the prosecutor:

- 1] that he was a licensed psychologist in the state of Washington;
- 2] that he knew Mr. Hatch;
- 3] that he had conversations with Mr. Hatch about incidents that took place at a tanning salon;
- 4] that Mr. Hatch took a digital camera to the salon and got caught;
- 5] that Mr. Hatch had told him that he had gone to the tanning salon eight to ten occasions;
- 6] that he had previously considered taking photos of women in the adjacent tanning booths and that he brought his camera to the salon on three occasions;

7] that he successfully procured photos of females in the adjacent booths on two occasions;

8] that he had obtained 8 to 10 photos of the first female, 90 on the second occasion he got caught; and

9] that Mr. Hatch told Dr. Coleman about his sexual fantasies and that most of them were about his wife and the women at the tanning salon.

VRP – 1/11-12/10, pp. 103-105.

In closing, counsel for both parties framed the issue as whether Mr. Hatch took the photographs in question for purposes of sexual gratification, and Dr. Coleman’s testimony played the leading role in that argument.

The prosecutor stated in his first closing “[W]e know that [Mr. Hatch] had sexual fantasies about women at the tanning salon.” VRP – 1/11-12/10, p. 197.

Mr. Hatch’s counsel took the tack of conceding certain elements, but arguing that there was not evidence beyond a reasonable doubt that the photographs were taken for purposes of sexual gratification:

I believe the government has proven certain elements beyond a reasonable doubt. I don’t think there’s any issue as to dates or geographic location. However, there is one area that is required that the government must prove that requires. I submit, speculation on your part. Because there’s been little if any evidence. And that

is on your instruction the law requires that the viewing or photographing or filming was for the purpose for arousing or gratifying the sexual desire of any person. The only evidence that's been presented to you regarding that issue was Dr. Coleman who got up on the stand and said that the defendant told him that he fantasized about his wife and other women including women at the tanning salon. I would suggest to you that that's normal for any heterosexual male. Is that enough to meet the high burden, not the civil burden between two people that might have a lawsuit against each other, but a criminal burden beyond a reasonable doubt?

Now, the prosecutor will ask you to look at the entire spectrum of facts that have been presented to you and come to a conclusion that that was there, that element was there. He is asking you to speculate. He is asking you to speculate. Were these photographs taken for sexual gratification? The prosecutor in his closing argument says to you. Well, we all know why he was doing this. And I submit to you he is asking you to speculate. That is not enough. That is not enough under the law to say, well, we all know what he was doing. That is insufficient to convict. I implore you to look at the law, look at the facts, look at the jury instructions just read to you, look at the standard you have to apply. I implore you to use, without emotion, without bias, without prejudice, the pragmatic, intellectually honest view of this case and determine whether or not the State has proven sexual gratification beyond a reasonable doubt. That is the issue in this case.

VRP – 1/11-12/10, pp. 204-6.

The prosecutor responded in his rebuttal argument:

And Mr. Nelson essentially conceded the dates and the location. And he didn't argue any of the other elements of the offenses. Except for Element Number 2, I think it was, let me look at me Instruction 10 and 11, that the viewing or photographing or filming was for the purpose of arousing or gratifying the sexual desires of any person.

What's important to realize here is it doesn't mean that the arousal or gratification has to actually have occurred or ever did actually occur. And further the gratification part doesn't mean that any kind of satisfying act was accomplished or ultimate act was accomplished. What it means is that he went into this taking those photographs of these unsuspecting women without their consent or

knowledge and photographing their private parts for the purpose of arousing or gratifying a sexual desire to any person; in this case I will allege to you that it was him that intended to arouse and gratify. That could be something titillating, exciting, something that puts a smile on his face as he is sneaking over the wall and taking those photographs. And when you look again and consider the testimony of what he was photographing, the places on the bodies of these two women that he was photographing, that tells you or ought to tell you that it was for the purpose of putting a smile on his face exciting him, arousing him and gratifying him at the expense of these women.

Now, Mr. Nelson tells you that the only evidence you have here, I wrote it down, the only evidence of this is from Dr. Coleman and that's not enough because , well, heck, guys have fantasies. But it's a little more than that. First off, Dr. Coleman told you that Mr. Hatch told him in relation to a discussion about these incidences at the tanning salon that he had fantasies about his wife, mostly about his wife and the women at the tanning salon. Combine that with the photographs and other evidence in this case, both direct evidence and circumstantial evidence, I argue the conclusion is inescapable. His purpose was to arouse and gratify his sexual purposes.

There is an instruction, it's actually kind of a lengthy instruction, it's Instruction 12, and that instruction talks about the different types of evidence, and it tells you that direct evidence and indirect evidence or circumstantial evidence are the same. They're not the same thing, they are different, but one is not worth more than the other.

You've got the direct evidence from Dr. Coleman saying he says he's got sexual fantasies about women. You have the direct evidence from all the other people that testified about what he is actually doing, and then you've got circumstantial do you believe this is a logical probability that he is doing it for sexual purposes, sexual arousal and gratification.

VRP – 1/11-12/10, pp. 207-210.

Following his conviction on both counts of the information, Mr. Hatch brought a motion for a new trial. In support of that motion, he

submitted the declaration of his trial counsel, 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). In opposition to the motion, the State submitted the Affidavit of Mac Setter, CP 26-28. The court denied the motion for a new trial stating:

The court is going to abide by its earlier decision in this case. If the court did err, if the Court of Appeals determines that negotiation can be unilateral, and that's an open question, I do not believe that the motion contains what is necessary for the court to address the prongs required on whether this was a 410 violation. If it was not a 410; if it was a 410 violation, or if it was not and there was ineffective assistance, I think it's harmless error under the facts of this case, Mr. Hyldahl, I really do. If I though there was a reasonable possibility this could come out differently with that evidence I wouldn't say that. But just with the facts there's nothing in these facts that could cause a reasonable trier of fact to determine that it was anything but sexual gratification involved under all the facts that were presented at the time of trial.

Like I say, if error was committed I think it's harmless. So I will deny the motion for a new trial.

VRP – 4/12/10, pp. 28-29

ARGUMENT

1. Standard of Review

The standard of review regarding the admission of Dr. Coleman's statements over Mr. Hatch's ER 410 objection is *de novo* on the undisputed facts:

Ordinarily, as the State points out, evidentiary rulings are reviewed for a manifest abuse of discretion. *State v. Smith*, 115 Wash.2d 434, 444, 798 P.2d 1146 (1990). However, no authority has been cited, and our research has disclosed none, for applying this standard of review to a conclusion regarding the applicability of ER 410. Such a ruling is not analogous to a discretionary ruling such as might be made under ER 403 or ER 404(b). The ruling at issue here denied a motion to suppress brought under CrR 3.5, the procedure for admitting confessions, and the court entered findings of fact and conclusions of law. In concluding that plea negotiations were not occurring, the court decided a mixed question of law and fact. This conclusion in turn compelled the court's ultimate ruling that Nowinski's statement was "not controlled" by ER 410. Our review will determine, *de novo*, whether the trial court derived the proper conclusion from the undisputed findings of fact about what was said during the course of the evening.

State v. Nowinski, 124 Wash.App. 617, 621, 102 P.3d 840, 842 - 843 (2004)

Because of the nature and extent of the facts submitted to the court by the parties in connection with Mr. Hatch's motion for a new trial, it is submitted that in this case the proper standard of review for the question of whether ER 410 applied to Dr. Coleman's testimony is *de novo*.

The longstanding standard of review of a trial court's grant or denial of a new trial is that the trial court's decision will not be disturbed unless it constitutes a manifest abuse of discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996); *State v. Williams*, 96 Wn.2d 215,

221-22, 634 P.2d 868 (1981); see also, *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989); *State v. Robinson*, 79 Wn.App. 386, 396, 902 P.2d 652 (1995). It has been held that a far stronger showing of abuse of discretion is required to set aside an order granting a new trial than one denying a new trial. *State v. Slanaker*, 58 Wn.App. 161, 163, 791 P.2d 575 (1990) (citing *State v. Brent*, 30 Wn.2d 286, 290, 191 P.2d 682 (1948)).

Mr. Hatch submits that the standard of review regarding the trial court's denial of his motion for a new trial should be *de novo* as to whether ER 410 was violated. See *Nowinski*, supra. The standard of review for whether the error was harmless is set forth below, i.e., whether within reasonable probabilities, the outcome of the trial would have been different if the error had not occurred.

2. ER 410 Barred Dr. Coleman's Testimony at Trial. The Trial Court Should Not Have Admitted it at Trial, and, Having Done So in Error, Should Have Granted Mr. Hatch's Motion for a New Trial

Stephen Hatch was charged with Voyeurism. Represented by Attorney David Nelson, Mr. Hatch originally considered pleading guilty and asking the court for a Special Sex Offender Sentencing Alternative (SSOSA) under RCW 9.94A.670. Declaration of David Nelson, CP 37-38. In order to qualify for SSOSA, an offender must have been examined by a certified sex offender treatment provided and have been found

amenable to treatment. RCW 9.94A.670. The Washington courts recognize that SSOSA evaluations are sometimes prepared pre-guilty plea and have held that CrR 3.1 requires that indigent defendants be provided with such examinations at public expense for purposes of plea bargaining. *State v. Hermanson*, 65 Wash.App. 450, 455, 829 P.2d 193, 195 (1992). Trial in this case was continued a number of times in order for Mr. Hatch to obtain a SSOSA evaluation. Counsel for the state did not object to the continuances. During the hearings at which the case was continued, the fact that Mr. Hatch was obtaining an evaluation, and that the parties were seeking to resolve the case via plea was discussed. See Statement of Facts above.

Evidence Rule 410 provides:

Rule 410. Inadmissibility of Pleas, Offers of Pleas, and Related Statements

(a) General

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of **an offer to plead guilty** or nolo contendere to the crime charged or any other crime, or **of statements made in connection with, and relevant to, any of the foregoing pleas or offers**, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the

defendant under oath and in the presence of counsel. This rule does not govern the admissibility of evidence of a deferred sentence imposed under RCW 3.66.067 or RCW 9.95.200 to .240.

(b) Statutory Offers of Compromise

Evidence of payment or an offer or agreement to pay (i) to compromise a misdemeanor pursuant to RCW Chapter 10.22, or (ii) for a liability described in RCW 4.24.230, shall not be admissible in any civil or criminal proceeding.

(emphasis supplied)

ER 410 encourages the compromise of criminal matters by allowing criminal defendants to participate in plea negotiations without fear that evidence of the plea or related statement will be used against him if he later proceeds to trial. *State v. Korum*, 157 Wash.2d 614, 645, 141 P.3d 13, 30 (2006) citing *State v. Nowinski*, 124 Wash.App. 617, 628, 102 P.3d 840 (2004) and *State v. Nelson*, 108 Wash.App. 918, 925, 33 P.3d 419 (2001).

The question of whether the defendant and the government are engaged in plea negotiations is determined by the defendant's state of mind, but the test has both subjective and objective elements. Statements by the defendant are barred by Rule 410 if (1) the defendant subjectively believed he or she was engaged in plea negotiations, and (2) the defendant's belief was reasonable from an objective point of view, given the totality of the circumstances. *State v. Nowinski*, 124 Wn.App. 617, 102

P.3d 840 (2004) (on facts and circumstances of case, defendant believed he was engaged in plea negotiations, and his belief was objectively reasonable; confession during plea negotiations suppressed).

In, *U.S. v. Robertson*, 582 F.2d 1356, 1366 (1978), the Fifth Circuit articulated the policy behind ER 410:

However, the policy underlying Fed.R.Crim.P. 11(e)(6) and Fed.R.Evid. 410 provides the basic orientation toward this characterization. In essence, the rule of inadmissibility is designed to serve both as an incentive and as a prophylactic; the rule both encourages and protects a free plea dialogue between the accused and the government. Given this essential purpose, the trial court's initial inquiry must be focused on the accused's perceptions of the discussion, in context.

The court acknowledged “the accused's assertions concerning his state of mind are critical” in determining whether a discussion should be characterized as a plea negotiation. *Robertson*, 582 F.2d at 1366. An objective assessment is also critical because the defendant's subjective perceptions were the only consideration, every confession would be vulnerable to an ER 410 challenge:

The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

See also *State v. Nowinski* 124 Wash.App. 617, 622, 102 P.3d 840, 843 (Wash.App. Div. 1,2004)

In his Courtroom Handbook on Washington Evidence, (2009-2010 edition) at p. 272, Karl B.Tegland makes the following comment:

State v. Nowinski, decided by Division 1, was a close case, and given the facts and circumstances surrounding the defendant's confession, reasonable minds could differ as to whether the defendant's belief was reasonable. The defendant confessed during interrogation by police, though a prosecuting attorney was also present. The court emphasized its belief that a prosecuting attorney would be present only if plea negotiations were contemplated, even though the prosecuting attorney expressly stated during the interrogation that the State was not prepared to "deal" at that time. As a result, *Nowinski* should be a particularly important precedent for those seeking to invoke ER 410 to suppress statements in arguable, borderline situations.

The issue of whether ER 410 barred Dr. Coleman's testimony under ER 410 was argued before the submission of evidence to the jury. VRP – 1/11-12/10, pp. 38-46. Trial counsel asserted that the SSOSA evaluation was obtained and provided to the prosecutor in pursuance of a negotiated guilty plea. VRP – 1/11-12/10, pp. 38-40. The prosecutor did not make contrary assertions. It should also be noted that the parties had long contemplated a plea following the state's review of the SSOSA evaluation and that this contemplation was evidenced by the remarks of counsel at the various scheduling hearings detailed in the Statement of the Case above. The trial court found that the intent to negotiate a plea was

unilateral, and therefore not negotiation and that ER 410 therefore did not apply. VRP – 1/11-12/10, p. 40.

In his motion for a new trial, Mr. Hatch made the same argument. On that occasion however, the trial court had the benefit of Declarations from trial counsel, David Nelson, as well as from three experienced criminal defense attorneys practicing in Whatcom County. Additionally, the state submitted the Affidavit of Mac Setter.

Subjectively, Defendant, through counsel, believed that he was opening negotiations for an agreed sentencing recommendation for Special Sex Offender Sentencing Alternative by providing Dr. Coleman's evaluation to the state. See Declaration of David Nelson, CP 37-38. He believed that the provision of the evaluation was the first step in arranging for a meeting of the minds. It was an **offer to plead guilty**, see ER 410(a), if the state would agree to join in a recommendation for the sentencing alternative. The state did not provide any evidence to the contrary.

Objectively, it was a reasonable belief by Defendant and his counsel that the information contained in the evaluation would come under the ambit of ER 410. That a guilty plea and SSOSA sentence had been considered by the parties is evidence from the comments regarding a plea made during the scheduling hearings in the case. The declarations of attorneys Jill Bernstein, Starck Follis and Thomas Fryer demonstrate that

the custom and practice of attorneys in the criminal courts of Whatcom County are to provide SSOSA evaluations prior to the entry of pleas in sex cases for the review of the prosecution and as an offer to plead guilty if the state will agree to recommend a SSOSA disposition. As Mr. Nelson notes, and as Ms. Bernstein, Mr. Follis and Mr. Fryer echo, there is absolutely no reason to provide a SSOSA evaluation to the state except in the context of an offer to plead guilty. A competent defense attorney does not provide inculpatory information to the state if he plans to go to trial. Rather, such information is provided, as it was in *State v. Jollo*, 38 Wn.App. 469, 685 P.2d 669 (1984), in order to obtain a favorable sentencing recommendation from the state.

The state will likely attempt to distinguish the *Jollo* case on the argument that there the state asked for an evaluation in the course of plea bargain negotiations. Such a request is even less of a concrete plea offer than was counsel's provision of the evaluation in this case. Although we cannot know precisely what was said between counsel in the *Jollo* case, it can safely be assumed that the state's offer would be conditional upon the evaluator's determination that Mr. Jollo was amenable to treatment. A possible difference between the *Jollo* case and the case at bar is that Mr. Nelson was acting from a belief founded in the past custom and practice of the criminal bar, both defense and prosecution, in the negotiation of sex

offenses in Whatcom County. Counsel for the state was either unaware of that custom and practice or was unwilling to acknowledge that custom and practice. Here, Mr. Nelson provided the evaluation showing that Mr. Hatch was amenable to treatment as an assurance to the state that if it agreed to recommend a SSOSA disposition, its recommendation would be in line with that of the evaluator.

Mr. Hatch and his counsel provided the evaluation to the state subjectively believing that they were offering to plead guilty should the prosecutor agree to recommend a SSOSA. As the declarations of Ms. Bernstein, Mr. Follis and Mr. Fryer demonstrate, that belief was objectively reasonable.

In response to the motion for a new trial, the state submitted the Affidavit of Mac Setter. Mr. Setter's statements highlight the fact that the provision of a SSOSA evaluation to the state is an integral part of the plea bargaining process.

First, Mr. Setter writes:

If the Defendant pursues an evaluation, he has made a decision to admit sexual misconduct. To the extent that the defendant admits more victims and more acts, of a similar nature, this office has always agreed to forgo additional charges. The Defendant's candor allows the State to extend resources and support to victims that we would otherwise not know.

Affidavit of Mac Setter, CP 27-28.

Making a decision to admit sexual misconduct is an important step in the decision to plead guilty, and providing an evaluation to the state which contains those admissions is the first step in the process of negotiating the parameters of that plea. Additionally, the state's decision to forgo charges relating to additional victims disclosed in the evaluation process is one side of the *quid pro quo* that characterizes all plea bargaining discussions. See also 5A WAPRAC Sec 410.5 cited by the State in its response to the motion for new trial. CP 29-33.

Secondly, Mr. Setter wrote:

Any settlement negotiations occur after [the Defendant's] decision and aren't finalized until the evaluation is available for review [by the State].

Affidavit of Mac Setter, CP 27-28.

This statement supports the Mr. Hatch's position that the state's review of the SSOSA evaluation is an important portion of the negotiation process. Thus, the provision of the evaluation to the state is done in connection with an offer to plead guilty. This is exactly the type of statement to which ER 410 applies.

Finally, Mr. Setter concluded by writing:

The Defendant's mere representation through counsel that he will be getting an evaluation or has gotten an evaluation cannot be said, by itself, to bring the evaluation under the purview of ER 410.

Affidavit of Mac Setter, CP 27-28.

This statement is accurate, but misses the mark. It is not Mr. Nelson's representation that Mr. Hatch was getting or had gotten an evaluation that was admitted over objection. Rather, it was statements made in connection with the evaluation itself that were admitted and that are the offending evidence. It is the provision of the evaluation to the State in connection with an offer to plead guilty that Mr. Hatch argues brings it within the protection of ER 410.

In the recent case of *Koenig v. Thurston County*, 155 Wn.App. 398, 229 P.3d 910 (2010), the issue was whether a SSOSA evaluation is exempted from disclosure pursuant to the Public Disclosure Act. Division 2 of the Court of Appeals held that it was not. In his partial dissent, Judge Armstrong quoted a prosecutor who had written an affidavit in support of exemption:

The deputy prosecutor in the *Lerud* case also wrote about the detrimental effect of public disclosure on law enforcement:

These reports are **generally provided to me in an effort to reach a settlement in the case**. Requiring disclosure of these reports, in my view, **would substantially hinder the plea negotiation process**. In fact, one would question if it would be malpractice for a defense attorney to provide a copy of the report to the state knowing that it is subject to public disclosure. Yet providing a copy of the report to the state is **the only way for the defendant to request a recommendation from the state for the SSOSA option**.

At the time, I considered the report to be very private and work product. Upon further review of the public disclosure law, it is obvious that such a report must remain confidential for the additional reason of effective law enforcement. **If a defendant understands that such a report could be handed over to anyone, there is a good chance the Prosecuting Attorney's Office would never be able to obtain the necessary SSOSA material.** SSOSA provides a means to rehabilitate sex offenders. Losing this tool has a negative impact on effective law enforcement.

Koenig v. Thurston County, 155 Wn.App. at 428, 229 P.3d at 925 (emphasis supplied).

And Judge Armstrong further noted :

Finally, the SSOSA evaluation is an important tool in plea negotiations.

Id at 430.

3. The Admission of Dr. Coleman's Testimony Did Not Constitute Harmless Error

Errors in the admission of evidence are usually non constitutional. In order to determine whether a non constitutional error is harmless, 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).

Here, other than the statements of Mr. Hatch, recounted in Dr. Coleman's testimony that he fantasized about the women in the tanning salon, there was no evidence that he took the photographs for the sexual

gratification of any person, an element of the charge. RCW 9A.44.115(2). The only statement by Mr. Hatch that was introduced into evidence was that “he had been peeking over the wall and that he was just being stupid.” VRP – 1/11-12/10, p.110. Nor did Mr. Hatch testify. The photographs themselves consist of various shots of two women. There was no evidence of Mr. Hatch’s sexual arousal from the photographs, nor was there any indication that he was intending to publish them. Testimony was introduced that Mr. Hatch had visited the tanning salon nine times and that on five of those times he was placed in the room from where the photographs were taken. VRP – 1/11-12/10, p.65. Further, there was evidence admitted that indicated that photos were taken only two dates: February 1 and February 4, 2008. VRP – 1/11-12/10, pp. 162-171. There is a reasonable probability that had Dr. Coleman’s testimony not been admitted that the jury would have acquitted for lack of evidence of sexual gratification.

In the only two cases passing on the sufficiency of the evidence as to the element of sexual gratification, Washington courts have noted elements other than the mere taking of photographs. In *State v. Glas*, 106 Wash.App. 895, 904, 27 P.3d 216, 220 (2001) reversed on other grounds 147 Wash.2d 410, 414, 54 P.3d 147, 149 (2002), the court noted in response to a sufficiency challenge:

The statute requires only that the purpose of the behavior be to arouse or gratify in some manner some sexual desire of any person. That commonsense reference followed from the evidence here, including Mr. Glas's statement that the photographs were ultimately destined for a pornographic internet web site.

And in *State v. Diaz-Flores*, 148 Wash.App. 911, 918-919, 201 P.3d 1073, 1077 (2009), in response to a defense contention that the State failed to present evidence that the defendant was aroused or had gratified his sexual desires in viewing *both* the naked male and the naked female, the court found:

Officer Sanabria testified that Diaz-Flores's face was pressed right up against the window, that his hands were in his "crotch area", and that he put his hands in his pockets when he heard the officers approaching. Both officers testified that Diaz-Flores's zipper was down and it appeared that he had an erection. There was no evidence to suggest another purpose than sexual gratification.

Contrarily, in this case there was no evidence that the purpose behind Mr. Hatch's taking of the photographs was for the purpose of sexual gratification. Although what was testified to by the complainants clearly showed an invasion of privacy, such is not a crime in Washington absent the purpose of sexual gratification. Had Dr. Coleman not testified to Mr. Hatch's fantasies, there is a reasonable probability that the result would have been different.

CONCLUSION

It is clear that when a SSOSA evaluation is turned over to the prosecutor by the defense, that it is intended to open the subject of a guilty plea to some charge in return for an agreed recommendation for a SSOSA disposition. The declarations and affidavits of all counsel submitted to the trial court in connection with the motion for a new trial, both by Mr. Hatch and by the state, show that the provision of the evaluation, and the candor the defendant is required to show in submitting to it, trigger a *quid pro quo* of not filing other charges when the defendant pleads guilty. There is absolutely no reason for a defendant in a sex case, or his counsel, to turn over the damning evidence contained in the evaluation regarding the offense charged, unless the defendant is going to plead guilty.

Like commercial contracts, which are written not to govern conduct when the relationship between the parties is going well but rather to govern it when there is a dispute, ER 410 is written to govern admissibility when the plea bargaining relationship has broken down and the matter is at trial. In this case, the search for an agreed resolution failed. The information provided to the state in connection with that search was barred from evidence by ER 410.

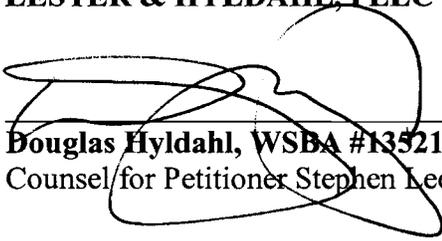
Further, the admission of this evidence was not harmless error. In the absence of any evidence other than Dr. Coleman's testimony, there is a

reasonable probability that at least one juror would have harbored reasonable doubt as to whether the photographs were taken for the purpose of sexual gratification.

This case should be remanded for a new trial.

DATED this 10 day of January, 2011.

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