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No. 65267-2-1

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

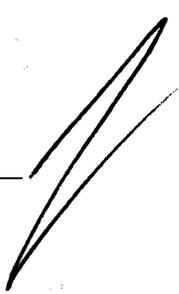
STATE OF WASHINGTON, Respondent,

v.

STEPHEN LEE HATCH, Appellant.

BRIEF OF RESPONDENT

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ER 410 passim

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether Dr. Coleman's testimony should have been precluded pursuant to ER 410 where Hatch unilaterally volunteered Dr. Coleman's evaluation to the prosecutor in hopes of reaching a negotiated plea agreement but where the prosecutor neither requested the information or otherwise engaged in plea negotiations with Hatch in exchange for the information.
2. Whether the trial court acted within its discretion to deny Hatch's motion for a new trial because the evidence presented at trial, even without Dr. Coleman's limited testimony, overwhelmingly supported the charges leveled against Hatch beyond a reasonable doubt.

C. FACTS

On February 4th 2008 Laurie Russell went to the Desert Sun tanning salon in Bellingham, Washington for a tanning session. RP 121. Laurie was put into room 11, a room with a newer style tanning bed. RP 122-124. Room 11's tanning bed did not close around the person tanning like a traditional clam style tanning bed but instead had a mattress bed that was open to the sides and more open on top. RP 122-124. As per her usual routine, Laurie entered her tanning room, locked the door, disrobed and climbed onto the tanning bed in the nude. RP 127. She then placed eye protection over her eyes and pressed a button to begin tanning. Id.

After the tanning bed lights switched off half way through her tanning session, Laurie swung her legs over the side of the tanning bed and began to flip over to complete her tanning session. Id. While flipping over, Laurie heard something “click” and looked up to see something small and black that was clicking on the top of a wall that divided her tanning room from another. RP 127-128. After Laurie realized the black object was a camera, she gasped and began to dress quickly to get out of her tanning room. RP 131. Laurie could hear bumping and shuffling in the adjoining tanning room while she was trying to dress. RP 131. Laurie quickly ran out of her room back to the front desk of the tanning salon visibly distraught and asked Amanda Simon, who was working at the front desk, to call 911. RP 129. Instead of calling 911, twenty-two year old Simon, who didn’t understand what was happening, tried to get Laurie to calm down. RP 66, 128. Upset and feeling desperate, Laurie ran out of the tanning salon to a computer business next door and had them call 911. RP 128.

Bellingham Police officer Chris Lease was dispatched in response to Russell’s 911 call. RP 106-7. Lease found Russell, who was still upset and appearing visibly shaken, at Compucare-a business located next door to the Desert Tanning salon. RP 107. After Russell explained what

happened, Officer Lease contacted a male, later identified as Stephen Hatch, who he observed exiting the tanning salon and walking across the parking lot. RP 109. After identifying himself to Hatch and explaining why Officer Lease was there, Hatch hung his head and admitted he had been stupid and had peeked over the wall at someone in the tanning salon. RP 109-110. The walls between the tanning rooms did not, for air circulation reasons, go all the way up to the ceiling but instead were partitioned off with 8-10 foot high walls. RP 118. Officer Lease asked Hatch if he had a camera and initially Hatch said no. But after Officer Lease informed Hatch he knew Hatch had a camera and that he had observed him walking funny-and adjusting his crotch area while Hatch was walking across the parking lot, Hatch reached down the front of his pants and retrieved a camera. RP 110. Hatch claimed that he had only taken a few pictures but that he had deleted them. RP 110. Officer Lease noticed the camera was a Nikon Coolpix 4500 and that it had a pen flashlight that was taped to the side of the camera. RP 113. The camera lens was pointed down when the camera was confiscated. RP 113. It was later determined a camera media card contained 117 pictures,-some of which had been designated deleted but were recoverable from the media card. RP 157. Forty-three of those images were taken at the Desert Sun

Tanning salon from a top down angle of two separate women -- Laurie Russell and Ludmilla Govor, on two separate dates while they were tanning in the nude. RP 161-162. Hatch sequentially took close up shots of various parts of their bodies including their breasts, genitalia and buttocks. RP 188, 177, see also, CP 129-131, Plaintiff's exhibits 1, 9-18, 20-52. The camera media card revealed Hatch took 33 pictures of Ludmilla Govor's body parts over 15 minutes. RP 178. Hatch had taken ten sequential pictures of Russell's naked body parts prior to being discovered. Id.

The investigation revealed Hatch had specifically requested to tan in room 7 on February 4th -- a tanning room that shared a partition wall with tanning room 11 where Laurie Russell was tanning. RP 117. Officer's determined that it was possible for a person to see into tanning room 11 from tanning room 7 because the partition walls did not reach the ceiling and there was a cabinet against the wall that separated the two tanning rooms that enabled someone standing on it to peer into the adjoining tanning room. RP 117-118.

While his case was pending, Hatch sought an evaluation from Dr. Coleman, a sexual deviancy treatment provider, in hopes, according to Hatch's attorney, of using this evaluation to obtain a negotiated plea

agreement with the state. CP 37-38. The state did not request this evaluation. Hatch sought several continuances of his trial for this purpose. RP 1 (6/18/08), RP 3 (8/20/08), RP 5 (19/8/08). After obtaining an evaluation, Hatch provided Dr. Coleman's report to the state and continued to seek continuances stating on one occasion "Mr. Sawyer is the prosecutor. I gave him paper work to review. I'm asking that this be set over for a resolution, a plea hearing in two weeks" RP 4 (2/11/09). The deputy prosecutor then asked "Counsel wants a plea on the 26th?" And Hatch's counsel thereafter confirmed that Hatch would be pleading guilty. Id. The prosecutor then suggested setting the matter for trial on March 9th in case "the plea doesn't go through." Id. Hatch ultimately did not plead guilty and instead, the case proceeded to jury trial.

Prior to trial, Hatch sought to exclude Dr. Coleman from testifying on behalf of the state to admissions Hatch made to him during the evaluation process. RP 38. Hatch claimed the doctor's report was provided to the prosecutor in hopes of working out a negotiated plea agreement and therefore Dr. Coleman's testimony was inadmissible pursuant to ER 410. RP 38 (1/11/10). After hearing argument and learning that Hatch had unilaterally provided Dr. Coleman's evaluation to the prosecutor however and, that the state had not engaged in plea negotiations

with Hatch, the trial court determined some of Hatch's statements to Dr. Coleman -- that he had taken photographs of two women in the tanning salon and that he sexually fantasized about his wife and the women he photographed at the tanning salon, were not precluded by ER 410. RP 40, 42, 104-5.

Hatch was found guilty by jury of two counts of voyeurism. CP 7-19. Hatch filed a motion for new trial claiming again, that the trial court erred in permitting Dr. Coleman to testify. CP 44-96. The trial court denied Hatch's motion, determining that any error in admitting Dr. Coleman's limited testimony was harmless beyond a reasonable doubt because any reasonable trier of fact, notwithstanding Coleman's testimony, would find, based on the method and manner, that Hatch took the photos and the pictures themselves, and that Hatch took these photos for sexual gratification. RP 25 (4/10/10). Hatch timely appeals. CP 5-6.

D. ARGUMENT

- 1. Hatch's statements to Dr. Coleman were not made pursuant to plea negotiations as required by ER 410 and therefore Hatch's admissions to Dr. Coleman were properly admitted by the trial court.**

ER 410 provides in relevant part:

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.

ER 410.

ER 410 excludes statements made by the defendant when the prosecutor and the defendant are engaged in plea negotiations—negotiations in which the defendant and the state are seeking concessions quid pro quo. State v. Robertson, 582 F.2d 1356 (5th Cir. 1978). ER 410 has traditionally been limited to plea negotiations with prosecutors or their agents “who possess express authority to plea bargain and defense counsel or the defendant.” State v. Pizzuto, 55 Wn.App. 421, 434, 778 P.2d 42 (1989).

The purpose of ER 410 is to encourage the disposition of criminal cases through plea bargaining by allowing an accused to participate candidly in plea discussions, without fear his plea related statements will be used against him. State v. Jollo, 38 Wn.App. 469, 472, 685 P.2d 669 (1984). Best practice is for a defendant to make manifest his intention to seek a plea bargain before making incriminating statements. See United States v. Levy, 578 F.2d 896, 901 (2nd Cir.1978) (A silent hope, if

uncommunicated, gives the officer or prosecutor no chance to reject a confession he did not seek).

Whether or not Hatch's admissions to Dr. Coleman are barred by ER 410 is evaluated by determining on appeal whether Hatch believed he was engaged in plea negotiations and whether Hatch's belief was objectively reasonable. State v. Nowinski, 124 Wn.App. 617, 102 P.3d 840 (2004). Review of the trial court's determination of whether Dr. Coleman's testimony was precluded by ER 410 is de novo. *Id.*

Hatch contends he voluntarily sought an evaluation from Dr. Coleman and then provided that information to the state in hopes of receiving an agreed plea bargain. The issue in this case is whether Hatch's unilateral intention to pleas bargain constitutes plea bargaining as contemplated by ER 410 -- whether Hatch's subjective intent was objectively reasonable under the facts of this case.

Hatch argues that it his unilateral intention to pleas bargain was objectively reasonable based on local custom and practice of defendants obtaining sexual deviancy evaluations "as an assurance to the state that if it would agree to recommend a SSOSA disposition, its recommendation would be in line with the evaluator." *Br. of App.* at 20. The relevant inquiry however, is not what the local practice was or was not pertaining

to sexual deviancy evaluations but what the record reflects the prosecutor and Hatch conveyed and did in this case and whether their actions from the perspective of an ordinary person, reflect they were or were not engaged in plea negotiations quid pro quo when Hatch provided the state with a copy of Dr. Coleman's evaluation and report-the basis for his testimony. *See, State v. Nowinski*, 124 Wn.App. 625.

State v. Nowinski, 124 Wn.App. 617 and *State v. Pizzutto* 55 Wn.App. 421, are instructive. In *Nowinski*, the defendant made incriminating statements during a police interrogation where the prosecutor was present that the prosecutor sought to later introduce at trial. The trial court determined below that although *Nowinski* subjectively believed he was engaged in plea negotiations when he made these statements, his belief was objectively unreasonable because the prosecutor clarified prior to the interrogation that he was not making any deals that night. On appeal however, the court determined *Nowinski*'s confession fell within the scope of ER 410 because the prosecutor's presence during the interrogation signaled objectively, from the perspective of an ordinary person, that plea negotiations were being contemplated despite that prosecutor's statement to the contrary.

Unlike Nowinski, the record in this case does not objectively reflect that the state was engaged in plea negotiations with Hatch. The state did not request Hatch to submit to an evaluation as in State v. Jollo, 38 Wn.App. 469, 685 P.2d 669 (1984)¹ and Dr. Coleman was not acting as an agent of the state when Hatch made his admissions. Nor does the record reflect the state requested a copy of Dr. Coleman's report or that the state had made a plea offer in exchange for obtaining Dr. Coleman's report. Instead, the record simply reflects Hatch unilaterally sought an evaluation and provided the evaluation to the state without consideration, concession or any type of agreement. The record suggests Hatch simply intended to plead guilty and was planning on seeking a sentencing alternative or alternatively had hoped that by obtaining an evaluation and being amenable to treatment the prosecutor *thereafter* would agree to a negotiated plea to a misdemeanor. See, CP 37-38. Hatch's unilateral intent to engage in plea bargaining, standing alone however, does not and should not implicate ER 410. If that were the standard many confessions would fall within the scope of ER 410.

¹ In Jollo, the appellate court determined that incriminating statements made during a *state* requested treatment evaluation were made in furtherance of plea negotiations. ER 410 therefore precluded Jollo's admissions.

In State v. Pizzuto, 55 Wn.App. 421, 778 P.2d 42 (1989), for example, the court determined that voluntarily making incriminating statements to a detective in hopes of receiving a benefit was not enough to implicate ER 410. Pizzuto was arrested in Washington on an outstanding Idaho warrant and then made incriminating admissions to a Seattle detective in hopes of avoiding the death penalty. Pizzuto was aware that the detective had no authority to plea bargain with him. The court held that the mere fact Pizzuto hoped to receive a benefit by voluntarily making admissions did not establish any plea bargaining process was at play and therefore ER 410 did not apply.

As in Pizzuto, the facts of this case do not establish any plea bargain was reasonably objectively engaged in when Hatch made incriminating statements to Dr. Coleman or when Hatch provided Dr. Coleman's report to the state. While the prosecutor had authority to bargain with Hatch, nothing in the record reflects an intent to do so in exchange for Dr. Coleman's report. Instead, the record reflects at most that Hatch contemplated pleading guilty and seeking treatment. While he hope to negotiate a plea bargain, nothing in the record reflects the state engaged in that process. Therefore, based on the facts of this case, the trial court did not err by admitting Dr. Coleman's testimony.

2. **Any error in admitting Dr. Coleman's testimony was harmless because the manner in which Hatch peered over and took private photographs of naked women while they tanned combined with the nature of the photos themselves demonstrate beyond a reasonable doubt Hatch took these photos for purposes of sexual gratification.**

Even if ER 410 precluded Dr. Coleman's testimony, any error in admitting his testimony was harmless beyond a reasonable doubt, given the overwhelming evidence presented in this case.

Following the jury verdict, Hatch filed a motion for a new trial. The trial court, after reconsidering the legal issues pertaining to Dr. Coleman's testimony and the facts of this case determined ER 410 did not preclude the admissions Hatch made to Dr. Coleman but that even if it did, the admission of Dr. Coleman's testimony was harmless beyond a reasonable doubt and therefore did not warrant a new trial. RP 25 (4/10/10).

A motion for new trial is reviewed on appeal for manifest abuse of discretion. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Moreover, the improper admission of evidence is reversible error on appeal only if it results in prejudice. An evidentiary error is prejudicial if a reasonable probability exists that the error materially affected the outcome of the trial. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Notwithstanding Dr. Coleman's testimony, the remaining evidence against Hatch was compelling and could only lead to one conclusion-that Hatch was guilty of guilty of two counts of voyeurism. Hatch was essentially caught in the act- of secretly taking sequential photos of strangers over a partition wall while they lay on a tanning bed in the nude. Records demonstrated Hatch intentionally requested tanning room 7 when he made his tanning appointments and Hatch's later admissions to officer Lease confirm Hatch likely sought tanning room 7 in order to gain visual access to tanning room 11.

Hatch admitted to Officer Lease not only that he had peeked over the wall at Laurie Russell while she was tanning, but that he had also taken photographs. The photographs recovered from the media card in Hatch's camera-that Hatch had shoved down his pants before trying to leave the tanning salon revealed Hatch's actions were for sexual gratification. Hatch took 43 pictures on two occasions of various body parts of his two victims. Hatch took close-up photos of their breasts, genitalia and buttocks. Hatch's assertion that without Dr. Coleman's testimony, the jury would have acquitted for lack of evidence of sexual gratification, is without merit. The nature of the photos themselves combined with the manner in which Hatch obtained the photos infer beyond a reasonable

doubt Hatch peeked at his victims and took the photos for purposes of sexual gratification.

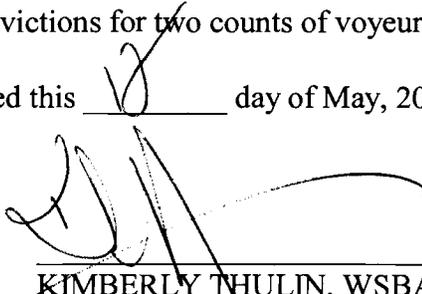
After denying Hatch's motion for new trial, the trial court observed, "If I thought there was a reasonable probability this would come out differently with the evidence I wouldn't say that. But just with the facts there's nothing in these facts that could cause a reasonable trier of fact to determine that it was anything but sexual gratification involved under all of the facts that were presented at trial." RP 29 (4/10/11).

Under these circumstances the trial court did not abuse its discretion in denying Hatch's motion for a new trial.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm Hatch's convictions for two counts of voyeurism.

Respectfully submitted this 18 day of May, 2011.

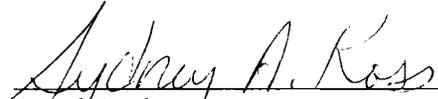


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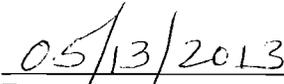
CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Date