

NO. 72702-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON B. JACOBS,

Appellant.

FILED
Feb 12, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SAMUEL CHUNG

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

IAN ITH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
a. Facts Of The Crime.....	2
b. Facts Of The Trial	4
C. <u>ARGUMENT</u>	7
1. JACOBS' PURPORTED LACK OF CRIMINAL HISTORY WAS PROPERLY EXCLUDED.....	7
a. Jacobs' Purported Lack Of Criminal History Was Inadmissible Under ER 405	8
b. The Trial Court Exercised Sound Discretion In Refusing To Admit Jacobs' Purported Lack Of Criminal History Under ER 705.....	13
c. Any Error Was Harmless.....	17
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Gov't of Virgin Islands v. Grant, 775 F.2d 508
 (3rd Cir. 1985) 11, 18

United States v. Angelini, 678 F.2d 380
 (1st Cir. 1982)..... 13

United States v. Blackwell, 853 F.2d 86
 (2nd Cir. 1988)..... 11

United States v. Darland, 626 F.2d 1235
 (5th Cir. 1980) 13

United States v. Hewitt, 634 F.2d 277
 (5th Cir. 1981) 13

Washington State:

City of Kennewick v. Day, 142 Wn.2d 1,
 11 P.3d 304 (2000)..... 8, 12

Group Health Coop. of Puget Sound, Inc. v.
 Department of Rev., 106 Wn.2d 391,
 722 P.2d 787 (1986)..... 14

In re Marriage of Littlefield, 133 Wn.2d 39,
 940 P.2d 1362 (1997)..... 17

State v. Aguirre, 168 Wn.2d 350,
 229 P.3d 669 (2010)..... 8

State v. Brush, 32 Wn. App. 445,
 648 P.2d 897 (1982)..... 11, 12

State v. Eakins, 127 Wn.2d 490,
 902 P.2d 1236 (1995)..... 12

<u>State v. Kelly</u> , 102 Wn.2d 188, 685 P.2d 564 (1984).....	9
<u>State v. Kinneman</u> , 155 Wn.2d 272, 119 P.3d 350 (2005).....	15
<u>State v. Martinez</u> , 78 Wn. App. 870, 899 P.2d 1302 (1995).....	14, 15
<u>State v. Mercer-Drummer</u> , 128 Wn. App. 625, 116 P.3d 454 (2005), <u>rev. denied</u> , 156 Wn.2d 1038 (2006).....	8, 9, 11
<u>State v. Nation</u> , 110 Wn. App. 651, 41 P.3d 1204 (2002).....	14
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001), <u>as amended</u> (July 19, 2002).....	17
<u>State v. O'Neill</u> , 58 Wn. App. 367, 793 P.2d 977 (1990).....	9, 10, 11
<u>State v. Renneberg</u> , 83 Wn.2d 735, 522 P.2d 835 (1974).....	11, 12
<u>State v. Rohrich</u> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	8, 17
<u>State v. Stacy</u> , 181 Wn. App. 553, 326 P.3d 136 (2014).....	10
<u>State v. Thach</u> , 126 Wn. App. 297, 106 P.3d 782 (2005), <u>rev. denied</u> , 155 Wn.2d 1005 (2005).....	9

Other Jurisdictions:

State v. Hortman, 207 Neb. 393,
299 N.W.2d 187 (1980) 13

State v. Kramp, 200 Mont. 383,
651 P.2d 614 (Mont. 1982)..... 12

Rules and Regulations

Washington State:

ER 404 8, 9, 12

ER 405 7, 8, 9, 10, 12

ER 703 13, 15

ER 705 7, 13, 14, 15, 16

Other Authorities

3 D. Louisell & C. Mueller, Federal Evidence § 389 14

5D Wash. Prac., Handbook Wash. Evid. ER 705 (2015-16 ed.) ... 15

A. ISSUES PRESENTED

1. Pertinent character evidence must be proven by reputation testimony only, not by specific instances of conduct except in rare cases; a lack of criminal history is not admissible character evidence. Further, trial courts have broad discretion to refuse to allow an expert witness to present otherwise inadmissible evidence as a basis for an opinion. In Jacobs' trial for residential burglary, he sought to introduce testimony from a psychologist that Jacobs reportedly lacked criminal-conviction history. Did the trial court properly exercise its discretion in excluding the testimony as improper character evidence and declining to allow its admission as a basis for the expert's opinion? Was any error harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Jason Jacobs was charged by Information with residential burglary, alleging that on or about October 20, 2013, he entered and remained unlawfully in the dwelling of Marisa Gallo, located at 711 Bellevue Avenue East in Seattle, King County, Washington, with intent to commit a crime therein. CP 1. The State further alleged the aggravating circumstance of committing the offense

while the victim of the burglary was present in the building or residence during the crime. Id.

A jury convicted Jacobs as charged. CP 79-80. The trial court granted Jacobs a first-time-offender waiver and imposed 45 days in jail with credit for time served, 240 hours of community service, and 12 months of community custody including mental-health and chemical-dependency treatment. CP 81-88. Jacobs timely appealed. CP 89.

2. SUBSTANTIVE FACTS

a. Facts Of The Crime.

Marisa Gallo awoke to the sound of an unfamiliar man's voice. 2RP 304-05.¹ It was about 2:30 in the morning, and Gallo, a scientist, lived alone in a one-bedroom apartment in Seattle's Capitol Hill neighborhood. 2RP 281-82, 303, 310. Gallo was always careful to lock her doors before bed, so at first she thought the voice was coming from a common courtyard outside. 2RP 303, 305. But this voice was closer — like someone was inside her apartment. 2RP 305. Gallo got up to investigate. Id.

¹ The verbatim report of proceedings is divided into four consecutively numbered volumes, referred to here as 1RP (September 18, 2014); 2RP (September 9, 2014); 3RP (September 10, 2014); 4RP (September 11 and 16, 2014; November 2, 2014).

In the living room, Jason Jacobs, a total stranger, had Gallo's heavy flat-screen television in his hands, fiddling with the cables. 2RP 297, 305-06. "What are you doing?" Gallo asked. 2RP 306. Jacobs looked at her with surprise and gestured to the TV. 2RP 307. "I'm just doing this," he said. Id. That "didn't really make much sense to me," Gallo later testified. Id. "I thought maybe it meant he was trying to steal the TV." Id.

Gallo engaged Jacobs in an incoherent conversation for a minute or two, as Jacobs claimed that someone had called him to her apartment to repair something. 2RP 308. Gallo tried to encourage Jacobs to leave without provoking him. 2RP 309. She was shocked and frightened. 2RP 312. Finally, Gallo opened her front door and ordered Jacobs out. 2RP 309. He left, but lingered outside. 2RP 309-11.

Gallo called the police, who arrived quickly and arrested Jacobs. 2RP 310-11. An officer noticed that Jacobs seemed intoxicated rather than suffering from a mental-health issue. 3RP 390-93, 402. When the police asked Gallo whether anything was missing from her home, she noticed her wallet had been removed from her purse and opened, but nothing was gone. 2RP 313.

A short time earlier, one of Gallo's neighbors had encountered Jacobs climbing over a security gate into the courtyard of the apartment building. 3RP 428-30. "Sorry, man, I'm drunk," Jacobs had said. 3RP 429. The neighbor had taken Jacobs for a tenant who had forgotten his keys. 3RP 433.

From jail, Jacobs called someone and professed no memory of the incident. 4RP 657-58. He said that he had been to several parties and drank "quite a bit," including several tequila shots, up until the bar closing at 1:50 in the morning. 4RP 658-59.

b. Facts Of The Trial.

At trial, Jacobs claimed affirmative defenses of diminished capacity and voluntary intoxication. 4RP 686-99; CP 66-67. Jacobs presented a psychologist, Tyler Bailey, who testified that past trauma may have caused Jacobs to have a "dissociative episode," but he could not say for sure. 3RP 458-73.

Pretrial, the State had objected to the psychologist testifying that Jacobs reportedly had no criminal convictions, or at least no convictions for crimes of dishonesty. 1RP 48-53; CP 103-04. The trial court ruled that a lack of conviction history was inadmissible because it was not character evidence in the form of testimony as to reputation. 1RP 112.

The record here is not entirely clear about Jacobs' actual criminal history. The State's charging documents reported no existing convictions, but Jacobs did have a 2012 completed deferred prosecution for Criminal Trespass and Resisting Arrest, and a 2011 arrest for misdemeanor assault. CP 4. The State also reported a misdemeanor arrest history in Colorado, including driving under the influence (DUI), failure to appear, domestic assault/battery, shoplifting and trespassing. Id. Jacobs' own Trial Brief stated that he had been convicted of DUI in Colorado and confirmed the trespass and resisting-arrest charges in Seattle (all of which Jacobs moved to suppress as irrelevant and unfairly prejudicial). CP 17-18. At sentencing, the State reported no known convictions affecting the offender score. CP 119-20.

At trial, the psychologist testified that he had based his opinion on a review of Jacobs' past "as reported by him," including traumatic episodes where he was the victim of violent crimes, which the psychologist detailed for the jury.² 3RP 458-62. The expert also considered medical records, some police reports, some

² Jacobs was apparently carjacked and assaulted in 2007, landing him in the hospital with a broken wrist, and in 2012 he was assaulted while promoting a statewide referendum to legalize same-sex marriage. He also reportedly was attacked in a parking lot in 2013, hospitalizing him with broken ribs and facial injuries.

recorded jail phone calls, and a letter from Jacob's mother. 3RP 463-67. Under cross-examination, Bailey acknowledged that a "dissociative episode" was only one possibility, while Jacobs' behavior also could have been caused by drinking too much. 3RP 512. Bailey conceded that he was not board-certified in forensic psychology, and had never testified as an expert before. 3RP 482-83. Bailey admitted that he did not interview Gallo, or the neighbor, or any of the officers, and was not aware that the defense had recorded a lengthy interview with Gallo. 3RP 486-87.

Bailey agreed he had initially arrived at his opinion without considering that Jacobs had been holding Gallo's TV and had gone through her purse. 3RP 492. Bailey also did not consider that a number of Jacobs' prescribed medications, such as the hyper-sedative Ambien, should not be mixed with alcohol. 3RP 495-96. And Bailey had taken Jacobs at his word that he drank only two drinks that night, even though he told Gallo's neighbor he was drunk, and in a jail phone call played for the jury, Jacobs had admitted to drinking considerably more during a night of party-hopping. 3RP 497; 4RP 658-59.

C. **ARGUMENT**

1. **JACOBS' PURPORTED LACK OF CRIMINAL HISTORY WAS PROPERLY EXCLUDED.**

Jacobs erroneously contends that the trial court abused its discretion by not allowing his expert witness to testify that Jacobs reportedly had no criminal history. First, Jacobs claims it was mere "background information" unaffected by the rules of character evidence, or if not, it was nonetheless pertinent to the burglary charge and his affirmative defenses. But the court of appeals has repeatedly rejected such arguments in holding that a lack of a criminal record, regardless of its possible pertinence, is barred by ER 405 because it is character evidence that is not proved by reputation testimony. Second, Jacobs incorrectly proffers that ER 705 *required* the trial court to allow his expert witness to discuss this otherwise inadmissible evidence as a basis for his opinion. But the trial court had broad discretion to refuse to allow such testimony, and here it acted judiciously in prohibiting Jacobs from using ER 705 as a way to avoid the prohibitions on character evidence. His arguments fail. Any error was harmless.

a. Jacobs' Purported Lack Of Criminal History Was Inadmissible Under ER 405.

This Court reviews a trial court's decision to admit or to exclude evidence for abuse of discretion. State v. Mercer-Drummer, 128 Wn. App. 625, 629-30, 116 P.3d 454 (2005), rev. denied, 156 Wn.2d 1038 (2006). An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable. Id. A decision is "manifestly unreasonable" if the court adopts a view that no reasonable person would take. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The right to present a defense does not extend to inadmissible evidence. State v. Aguirre, 168 Wn.2d 350, 363, 229 P.3d 669 (2010).

Under ER 404(a), character evidence is generally inadmissible to prove conformity therewith on a particular occasion. An exception to this rule provides that "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same" is admissible. ER 404(a)(1). Character evidence may be pertinent when offered to support the existence of an affirmative defense. City of Kennewick v. Day, 142 Wn.2d 1, 10, 11 P.3d 304 (2000).

However, under ER 405, evidence admissible under ER 404(a) must be proved either by reputation testimony, or “[i]n cases in which character or a trait of character ... is an essential element of a charge,” by specific instances of conduct. Character is rarely an essential element of an offense and will be considered such only if character itself determines the rights and liabilities of the parties. State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984). In order to offer reputation evidence, a proper foundation must be laid that the witness and defendant are both part of a neutral and generalized community, and that the reputation is based on perceptions in the community and not just the opinion of the witness. State v. Thach, 126 Wn. App. 297, 315, 106 P.3d 782 (2005), rev. denied, 155 Wn.2d 1005 (2005).

Thus, a defendant may not attempt to prove his law-abiding character by testifying to the absence of an arrest record because it does not conform to ER 405. State v. O'Neill, 58 Wn. App. 367, 370, 793 P.2d 977 (1990). In O'Neill, whether an absence of an arrest or conviction record was pertinent to the charge (DUI) was irrelevant to the fact that such evidence was not testimony from a witness that O'Neill was a law-abiding citizen. Id. Similarly, in Mercer-Drummer, the court held that a character trait of being a

law-abiding citizen was not pertinent to the charge of assault, and the defendant's own testimony that she had no arrest record was not admissible under ER 405. 128 Wn. App. at 632. And in State v. Stacy, the court held that a lack of being in fights was not admissible under ER 405 because it was proof of character by specific instances of conduct. 181 Wn. App. 553, 565-66, 326 P.3d 136 (2014).

Jacobs' case is no different than these others, except that instead of Jacobs himself testifying to a lack of a criminal record, a psychologist would testify that he was told that Jacobs had no record. Adding a layer or two of hearsay would not turn this into admissible reputation testimony. The psychologist had no independent knowledge of Jacobs' record or of his reputation in any community. And character is not an essential element of burglary or any of Jacobs' affirmative defenses.

Jacobs never mentions ER 405, at all. Instead, he contends that evidence of a lack of criminal history is merely part of "background information" that should be admitted routinely. He urges this Court to adopt this theory into law by following the dissent in O'Neill, which relied largely on a single paragraph of *dicta*

in a Third Circuit ruling from the 1980's.³ To do so, this Court would have to ignore both O'Neill and Mercer-Drummer, which specifically rejected the "background information" theory that Jacobs now urges.

And O'Neill and Mercer-Drummer make Jacobs' other, older cases irrelevant to the issue at hand. United States v. Blackwell is a rarely cited case from the Second Circuit that has no binding authority here and is directly contradicted by O'Neill and Mercer-Drummer. 853 F.2d 86, 88 (2nd Cir. 1988) (lack of arrests is not character evidence, but failure to admit was harmless). State v. Brush is not precedent because it did not address the method of admitting Brush's character evidence (though he did so partly with a character witness) but rather whether it opened the door to the State to introduce a prior burglary conviction in rebuttal. 32 Wn. App. 445, 448-52, 648 P.2d 897 (1982). Similarly, the issue in State v. Renneberg was not the method of introducing the co-defendants' character evidence but whether "the state was

³ Gov't of Virgin Islands v. Grant, 775 F.2d 508 (3rd Cir. 1985). It is important to note that while Grant ruminated that "admitting evidence as to lack of prior arrest as background evidence ... makes some sense," the court said it could not disturb the "wide discretion" of the trial court in refusing such evidence, especially given the "relatively low probative value of such evidence, particularly when coming from the defendant." Id. at 513. It thus affirmed the trial court's suppression of the lack of an arrest record.

entitled to complete the tapestry” with evidence of their drug addiction. 83 Wn.2d 735, 736-38, 522 P.2d 835 (1974). And Renneberg predated the adoption of the Rules of Evidence, so it is meaningless here. See Brush, 32 Wn. App. at 448 n.2 (Rules of Evidence adopted April 2, 1979).

Still, Jacobs goes on to argue at great length that evidence of law-abiding character was pertinent — i.e., relevant — to the charge and his affirmative defenses, and thus admissible under ER 404. He misses the point. Regardless of whether it was pertinent that Jacobs had law-abiding character (though saying so would have been disingenuous in light of his actual offense history), ER 405 prohibited him from proving through hearsay testimony that he lacked criminal convictions.

Thus, Jacobs’ reliance on Day and State v. Eakins are misplaced because both cases involved reputation testimony. Day, 142 Wn.2d at 4 (boss asked about Day’s reputation for sobriety); Eakins, 127 Wn.2d 490, 494, 902 P.2d 1236 (1995) (15 lay character witnesses on peaceful nature). For the same reason, Jacobs’ old foreign cases do not help him either. See State v. Kramp, 200 Mont. 383, 389, 651 P.2d 614 (Mont. 1982) (acquaintance to say defendant was truthful and honest);

United States v. Angelini, 678 F.2d 380 (1st Cir. 1982) (three character witnesses to say defendant was law-abiding and truthful); United States v. Hewitt, 634 F.2d 277, 278 (5th Cir. 1981) (local sheriff's deputy, local businessman and minister all to say defendant had character for lawfulness); United States v. Darland, 626 F.2d 1235, 1236-37 (5th Cir. 1980) (elderly lady to say defendant had reputation for honesty and integrity). See also State v. Hortman, 207 Neb. 393, 299 N.W.2d 187 (1980) (testimony of reputation for "truth and veracity" not admissible).

Had Jacobs offered similar reputation testimony in his trial, the trial court may have admitted it. But Jacobs did not offer reputation testimony; he offered specific instances of conduct, of a type that has been specifically disallowed by our courts. The trial court here did not abuse its discretion in refusing to admit the evidence of Jacobs' supposedly clean record.

- b. The Trial Court Exercised Sound Discretion In Refusing To Admit Jacobs' Purported Lack Of Criminal History Under ER 705.

ER 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field

in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

In addition, ER 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

Thus, under ER 705, a court has the discretion to allow an expert to testify on facts upon which an opinion was based even if these facts or data are otherwise inadmissible, though it is not substantive evidence. Group Health Coop. of Puget Sound, Inc. v. Department of Rev., 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986).

However, ER 705 is not a mechanism for admitting otherwise inadmissible evidence as an explanation of an expert's opinion. State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002). While an expert may take into account inadmissible information, "it does not follow that such a witness may simply report such matters to the trier of fact: The rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence..." State v. Martinez, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995) (quoting 3 D. Louisell & C. Mueller, Federal Evidence § 389, at 663), abrogated on other grounds by

State v. Kinneman, 155 Wn.2d 272, 288, 119 P.3d 350 (2005).

“Rules 703 and 705 should not be construed so as to ‘bootstrap’ into evidence hearsay that is not necessary to help the jury understand the expert’s opinion.” Martinez, 78 Wn. App. at 880.

See also 5D Wash. Prac., Handbook Wash. Evid. ER 705 (2015-16 ed.) (trial court has “considerable discretion in determining what seems fair under the circumstances,” and “is not *required* to allow the expert to explain the basis for his or her opinion”).

In Martinez, the trial court properly forbade a defense expert from testifying to statements from other experts that he had considered in forming his opinion. 78 Wn. App. at 880-81. The court of appeals held that such hearsay was not necessary for explaining the basis of the opinion and “could have been misleading because the jury would have been likely to construe this as substantive evidence.” Id.

The situation here is no different: Saying that Jacobs reportedly had no criminal convictions was not necessary — if even relevant at all — to explain a theory of a possible “dissociative episode” to the jury. The psychologist’s opinion was based almost entirely on Jacobs’ own recounting of past traumatic events, which the expert was allowed to relay to the jury in detail. The fact that

Jacobs may never have been convicted of a crime did not make it any more or less likely that he had a “dissociative episode.” The expert was not hampered in presenting his opinion thoroughly to support Jacobs’ alleged defenses.

But hearsay evidence that Jacobs had no criminal convictions would have been misleading to the jury and prejudicial to the State because the jury would take it as substantive and true evidence — after all, it was relied upon by a professional psychologist. And, not least, it would have been misleading because Jacobs’ real criminal history apparently was not as peerless as Jacobs was trying to portray. In fact, it was not even reasonable for the psychologist to rely on a disingenuous assertion that Jacobs had never run afoul of the law.

Moreover, at the heart of the matter, Jacobs’ argument is fundamentally flawed because he incorrectly portrays ER 705 as mandatory instead of permissive. ER 705 is not an entitlement for an expert to testify to practically anything — repugnant as it may be to the other evidence rules — so long as he relied on it in forming an opinion. Jacobs ignores the broad discretion afforded the trial court to *refuse* to allow inadmissible facts and data to be presented to the jury despite their potential admissibility under ER 705.

Instead, Jacobs argues the opposite — that if facts and data are admissible under the rule, then the trial court necessarily abuses its discretion by refusing to admit them. This Court should reject such a backward reading.

Jacobs cannot show that the trial court's decision here was outside the range of acceptable choices, given the applicable legal standard. See In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362, 1366 (1997) (defining "manifestly unreasonable").

Jacobs cannot show that the trial court took a view that no reasonable person would take. See Rohrich, 149 Wn.2d at 654. The trial court did not abuse its discretion, and Jacobs' argument fails.

c. Any Error Was Harmless.

Evidentiary error provides grounds for reversal only where it resulted in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255, 1261 (2001), as amended (July 19, 2002). An error is prejudicial if it materially affects the outcome of a trial. Id. Evidentiary error is harmless "if the evidence is of minor significance in reference to the evidence as a whole." Id.

By Jacobs' own preferred case law, evidence of a lack of prior convictions has such "low probative value ... particularly when coming from the defendant" that "refusal to admit such evidence, even if error, would be harmless." Gov't of Virgin Islands v. Grant, 775 F.2d 508, 513 (3rd Cir. 1985). "Indeed, testimony that one has never been arrested is especially weak character evidence; a clever criminal, after all, may never be caught." Id. And admitting evidence of law-abiding character "presumably would be sufficient to open the door to rebuttal evidence by the prosecutor." Id.

Here, the trial court's adherence to controlling authority, in denying Jacobs his hearsay evidence of a conviction-free record, had zero effect on the outcome of his case. The State presented overwhelming evidence that Jacobs entered Gallo's apartment nefariously and was trying to make off with her television after going through her purse. He made false excuses when caught, demonstrating knowledge and understanding of the nature of his actions.

Meantime, Jacobs was able to present a thorough defense, with the expert psychologist's unfettered opinion that Jacobs

possibly had a mental-health break based on past trauma. On the other hand, the State strongly countered the expert's opinion by pointing out multiple deficiencies and biases in his theory, along with facts that the psychologist overlooked or outright ignored. The State also highlighted evidence showing that, in actuality, Jacobs just had been very drunk.

Allowing Jacobs' expert witness to tell the jury that Jacobs claimed to have no criminal history would not have patched the obvious holes that the State drilled into the psychologist's opinion. On the contrary, it likely would have opened the door to the State to elaborate on Jacobs' actual criminal history, further eroding his portrayal as a law-abiding, traumatized victim who haplessly lost his way in a dissociative trance. This Court should have no doubt that the jury's rejection of Jacobs' defense had everything to do with the basic incredibility of the defense, and nothing to do with the jury's ignorance of Jacobs' not-so-clean criminal record. Any error in failing to admit his supposed lack of criminal history was harmless.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Jacobs' judgment and sentence.

DATED this 12TH day of February, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

IAN ITH, WSBA #45250
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. Jason Blair Jacobs, Cause No. 72702-8, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 12 day of February, 2016.


Name:
Done in Seattle, Washington