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Court of Appeals
Division I
State of Washington

COA No. 74213-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTINAH BELLAH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George N. Bowden

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Christinah Bellah's trial for first degree trafficking in stolen jewelry, the trial court erred in denying the defendant's motion to continue the start date of trial to present an out-of-state witness.

2. The court erred in denying the defendant's alternative motion for funds to fly the witness to Washington for trial "tomorrow."

3. The court's rulings violated Ms. Bellah's right to present a defense under the Sixth Amendment to the U.S. Constitution.

4. In an abuse of discretion and in violation of the Fourteenth and Sixth Amendments to the U.S. Constitution, the trial court improperly restricted Ms. Bellah's lawyer from stating to the jury that he represented an innocent person.

5. In an abuse of discretion and in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, the trial court improperly restricted Ms. Bellah's lawyer from arguing to the jury that the role of the jury is to protect the individual from the state.

6. The trial court erred in excluding evidence that Jodie Spencer had been investigated and charged with theft of the jewelry and animal cruelty, and had pled guilty to animal cruelty, violating Ms. Bellah's right to present a defense.

7. Cumulative error requires reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Ms. Bellah's defense was that she sold the jewelry, to the same pawn shop where she had properly been selling items for years, because Jodie Spencer, her landlord, told her the jewelry was Spencer's and asked Christinah to sell it. Did the trial court abuse its discretion and violate Ms. Bellah's right to present a defense when it (a) denied a continuance; and (b) denied travel funds, for the defendant's elderly mother to travel from out of state and testify at trial that she heard Jodie Spencer actually tell Ms. Bellah the jewelry belonged to her?

2. The defendant has a right to present a defense and a right to counsel; were those rights violated when the court granted the prosecution's in limine motions to prevent defense counsel Gabriel Rothstein from introducing the jury to the defense's innocence theory of the case in *voir dire* and opening statement, and to prevent counsel from arguing that the role of the jury is to protect the individual from the state, where such argument would merely emphasize the high burden of proof beyond a reasonable doubt?

3. Did the trial court violate Ms. Bellah's right to present a defense when it excluded admissible evidence that would have established Ms. Bellah's defense of lack of knowledge the property was stolen, without a

showing by the State that the evidence was prejudicial and would disrupt the fact finding process at trial?

C. STATEMENT OF THE CASE

1. Charging. Christinah Bellah was one of several tenants who rented rooms in an Everett-area house owned by resident-landlord Jodie Spencer. On February 4, 2013, another tenant, Sandra Brown, had a serious altercation with Spencer about Spencer's child, who Brown had taken to a hospital appointment. CP 86-89. Medical staff decided that juvenile welfare laws required them to retain Spencer's child at the hospital. Brown informed Spencer of this on the telephone and Spencer, infuriated, yelled at Brown repeatedly. When Brown returned to the rental house, she found that her dog was missing and feared taken; her room had also been ransacked and jewelry had been stolen. CP 86-89; 3RP 166-76.

For some reason, Sandra Brown decided to implicate Ms. Bellah, who she disliked, as a person who might have taken her dog and stolen the jewelry. 3RP 182-83. However, when Detective Olivia Paxton investigated the case, she suspected that Ms. Spencer took the jewelry and the dog. Spencer was charged with theft and animal cruelty, and later entered a guilty plea to animal cruelty in Marysville Municipal Court. CP 60-62; Supp. CP ____, Sub # 40 (Exhibit 36). The trial court granted the

State's motion to exclude all evidence of the investigation and guilty plea of Ms. Spencer. 2RP 31-33.

The charge against Ms. Bellah was instituted in early 2015 after police learned that she sold jewelry (identified as owned by Sandra Brown) to a pawn shop. CP 86-87. Christinah denied knowing the property was stolen; rather, she had been given it by Jodie Spencer, who had walked into a common room at the rental house, said that the jewelry was hers, and had asked Ms. Bellah to pawn it. Spencer told Ms. Bellah that she needed to get money to make her payment on a bar establishment she also ran. CP 60-62.

2. Pre-trial and trial. On the Monday start date of trial testimony, the court denied the defense motion for a continuance, or for air travel funds, in order to fly the defendant's mother Judy Brown¹, from Arizona to Washington. The defense had learned of Judy Bellah the previous Friday. The court denied both requests, holding that the mother's proposed testimony regarding Spencer saying the jewelry was hers would be hearsay, and also ruling that it would be cumulative to expected trial testimony of Ms. Bellah's niece, Letisha Ferguson. 2RP 13-17.

¹ The defendant Christina Bellah's mother's last name was Brown, but there is no relationship to alleged victim Sandra Brown; for clarity, the brief will refer to Ms. Bellah's mother as "Judy."

The court also granted the State's motions in limine to prevent defense counsel from introducing himself to the jury as representing an innocent person, or from arguing that the jury's role is to protect individuals from the state. CP 80-81; 2RP 25-29. The court deemed the first matter to be inadmissible personal opinion on guilt, and the latter to be an improper argument for jury nullification. 2RP 25-29.

3. Sentencing. Following the evidence phase, the jury convicted Ms. Bellah of trafficking. CP 32. The court sentenced Ms. Bellah to a standard range sentence. CP 18-28. She timely appeals. CP 2.

D. ARGUMENT

1. The trial court abused its discretion and violated Christinah Bellah's right to present a defense by denying the motion to continue trial for witness Judy Brown to travel from Arizona, or to obtain funds for immediate witness travel.

Trial call in Superior Court for the present case was on Friday, August 28. Defense counsel filed a motion and declaration, and orally moved on the morning of Monday August 31st for a continuance of trial, to allow for the travel of an important out-of-state witness, the defendant's mother Judy. Defense counsel had learned of Judy Brown on Friday several hours after trial call, and that afternoon he notified the State of his intention to seek a continuance on Monday. Supp. CP ____, Sub # 22 (minutes-minutes of August 28, 2015); 2RP 13-24.

Counsel explained that Judy Brown was somewhat elderly, and simply had been unable to travel on short notice over the weekend, and also could not travel unless witness funds were provided. 2RP 14. Counsel told the court that he wished he had learned of the witness earlier, but he urged that this should not be held against Ms. Bellah, because the matter concerned her right to present a defense. 2RP 17.

The court denied the motion to continue trial, ruling that the evidence of what Jodie Spencer said to the defendant was hearsay, and the court did not know of a hearsay exception that would apply. 2RP 18. The court also deemed the evidence cumulative, because it appeared that another new witness, the defendant's niece Letisha Ferguson, would testify similarly. For the same reasons, the trial court also denied counsel's alternative request that funds be authorized so that Judy Brown could fly to Seattle and be present at trial "tomorrow." 2RP 19-20.

a. The court abused its discretion. In criminal cases, "the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (citing State v. Miles, 77 Wn.2d 593, 597, 464 P.2d 723 (1970)). The court's reasoning in denying the continuance (and travel funds) was legally erroneous. The mother's testimony would not have

been hearsay. Spencer's statements would have been offered, not to prove the truth of the matter asserted, i.e., that the jewelry was Spencer's (it wasn't), but to show that Ms. Bellah was made to believe the jewelry was Spencer's. This would show that Ms. Bellah lacked the knowledge that is the essential *mens rea* element of first degree trafficking. RCW 9A.82.050; State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012) (knowledge is the mental element of RCW 9A.82.050); ER 801(c); State v. Fitzgerald, 39 Wn. App. 652, 660, 694 P.2d 1117 (1985) (evidence is not hearsay unless offered for the truth of the assertion). Additionally, the testimony of Judy Brown would not have been merely cumulative. Letisha testified at trial that she heard what Jodie stated, but Ferguson was a teenager whereas Judy Brown was an older adult woman and more reliable. Further, the defense was entitled to provide the strongest case possible, in this trial where the defense theory was to affirmatively persuade the jury of not just how, but why Ms. Bellah had no knowledge.

The court's denial of a continuance, and its denial of the alternative request for funds for witness travel, also violated Christinah Bellah's right to present a defense.

b. The right to present a defense was violated. The Due Process right to present a defense is the right to present witnesses who bear

material and relevant testimony. U.S. Const., amends. 6, 14; Wash. Const., article I, section 22; Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). It includes the right to overcome procedural obstacles in order to present witnesses for which the defense has a “colorable need.” State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

This Court of Appeals recently summarized the law applicable to the question whether denial of a continuance violated the right to present a defense. The Court emphasized that whether a ruling violated Due Process, inhibited a defense, or “conceivably projects a different result,” must be assessed by the total circumstances of each case, including the prejudice to the defense. State v. Eller, 84 Wn.2d 90, 95–96, 524 P.2d 242 (1974)).

Similarly, with regard to the court’s denial of travel funds for witness Judy Brown, Criminal Rule 3.1(f) “incorporates constitutional requirements by recognizing that funds must be provided where necessary to an adequate defense.” State v. Kelly, 102 Wn.2d 188, 200, 685 P.2d 564 (1984).²

² The issue of funds for witness travel is governed by CrR 3.1. The matter implicates the right to present a defense. See State v. Maupin, 128 Wn.2d

The circumstances of the present case require reversal. As the Supreme Court has noted, “there are no mechanical tests for deciding when the denial of a continuance violates due process.” State v. Eller, 84 Wn.2d at 96 (citing State v. Cadena, 74 Wn.2d 185, 443 P.2d 826 (1968)). “In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.” State v. Downing, 151 Wn.2d at 273 (citing Eller, 84 Wn.2d at 95; RCW 10.46.080; CrR 3.3(f)).

Here, there was minimal surprise if any, because the basic defense claim of innocence was known and the prosecution would be able to interview the witness. There would be no prejudicial delay to the State.³ Most crucially, Mrs. Judy Brown would confirm her daughter Ms. Bellah's explanation to the police – and the jury -- that the landlord, Jodie Spencer, had asked Ms. Bellah to pawn the jewelry. She would testify that Spencer stated it was hers. In addition, Judy Brown also accompanied Ms. Bellah

918, 924–925, 913 P.2d 808 (1996); State v. Kelly, 102 Wn. 2d at 190. CrR 3.1(f) provides for authorization of funds for services “[u]pon finding [by the court that] the services are necessary[.]”

³ The State’s own previous request for a several-week continuance, sought the previous month because a detective was going to be on vacation during the time of trial, had been granted. 1RP 22.

to the Pawn Shop, where she observed her sell the jewelry, as she had properly sold items there in the past.

Defense counsel's good faith in Ms. Bellah's case is an essential component of the error of denying the continuance. State v. Edwards, 68 Wn.2d 246, 258, 412 P.2d 747 (1966). "If it is manifest that the request for recess or continuance is designed to delay, harry, or obstruct the orderly process of the trial, or to take the prosecution by surprise, then the court can justifiably in the exercise of its discretion deny it." Edwards, 68 Wn.2d at 258.

No such delay was desired here; the opposite is true. Counsel conceded that he wished he had learned earlier of Judy Bellah, who was elderly and had been unable to travel on short notice. But counsel attempted to expedite her ability to attend a trial by asking for a continuance of the week's trial, and then he was able to offer an even more expedited basis by indicating that travel funds could allow Judy Bellah to travel the next court day, i.e., "tomorrow." 2RP 19-23.

Unfortunately, the denial of the continuance, and witness travel funds, meant that Ms. Bellah was not permitted to present this important evidence. As a result, at trial, the prosecution was able to cross-examine young Letisha Ferguson with criticism that the presence of Judy Brown would have refuted. The State chided the niece's testimony at length, as

forgetful, newly imagined, and *uncorroborated*. 3RP 307-12. The State also implied that Letisha was making up the testimony because of some self-interest (which was undefined). 3RP 34-35.

These circumstances, including that of prejudice, are a key aspect of the question whether, in all the circumstances, Due Process was ultimately violated. The importance of the witness in question here contrasted with any *de minimis* procedural delay – if any -- and should have prevailed.

2. The trial court violated Ms. Bellah's right to counsel and right to defend against the charge when it prohibited her counsel from stating that he represented an innocent person, and from arguing that the role of the jury is to protect individuals from the State.

The trial court, in granting several *in limine* motions brought by the prosecution, erroneously restricted the way in which Ms. Bellah's lawyer could introduce the defense case to the jury, restricted what counsel could say in opening statement, and restricted the argument that counsel could make to the jury in closing. CP 80-81, 2RP 25-29. These rulings violated Ms. Bellah's right to counsel, and her right to defend against the charge, which are guaranteed by the Sixth and Fourteenth Amendments. U.S. Const. amends 6, 14.

It is true that trial courts have authority over the courtroom, and may employ procedures that control the order and manner of presentation

of evidence and argument, so that the case is tried fairly. See, e.g., Sanders v. State, 169 Wn. 2d 827, 851, 240 P.3d 120, 132 (2010) (citing ER 611(a) and State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969)); State v. Perez–Cervantes, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000).

However, the restrictions imposed here were untenable and abused that discretion, and violated Ms. Bellah’s constitutional rights.⁴

a. The defense can certainly state its theory of the case. The court granted the State’s motion to specifically bar Ms. Bellah’s lawyer from introducing himself to the jurors in *voir dire* and/or in opening statement, by saying,

“I am Gabe Rothstein and I have the privilege of representing an innocent man/woman, . . .”

CP 81 (State’s motions in limine); 2RP 25-29. The prosecutor claimed that “[e]vidence shows that [this defense] counsel [Rothstein] violates this rule at the first opportunity.” CP 81. The prosecutor also contended that any such statement would violate the rule which bars attorney vouching, asserting a personal opinion as to the ultimate issue, or credibility. CP 81 (citing State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)).

But Ms. Bellah’s defense of innocence was the basic argument she was endeavouring to affirmatively show the jury, including by the fact that

⁴The Court of Appeals reviews alleged constitutional violations *de novo*. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

Jodie Spencer told her the jewelry was Spencer's, when she asked Ms. Bellah to sell it for her. CP 60-61 (defense in limine motion previewing expected trial evidence including defendant's testimony); CP 64-66 (defense in limine arguments regarding admissibility of evidence of lack of any knowledge); see also CP 55 (defense proposed instruction requiring that defendant must actually know the property is stolen property).

The court had no basis to bar Ms. Bellah's attorney from whatever rhetorical manner in which he wished to phrase his statement or introduction of the defense, even if it had been inartful, which it was not. The State's cited case of Reed was inapposite, as it involved a prosecutor who committed misconduct by asserting his personal opinion in closing argument – the prosecutor called the defendant a liar four times, said the case was so bad that it must be difficult for counsel to represent this client, and opined his belief that “[w]e ought to re-enact the death penalty just for this guy” because the defendant himself proved he committed the crime by committing it with so much evidentiary proof. State v. Reed, 102 Wn. 2d 140, 143-46, 684 P.2d 699 (1984).

The notion that the Reed case barred counsel in this case, from telling the jury that the evidence would make clear the accused's innocence is untenable. Further, the defense statement, even as worded by the prosecutor, was far from “vouching.” The gravamen of a prosecuting

attorney's assertion of a personal knowledge of the defendant's guilt or opinion on lack of credibility is that it implies that "there reposes in the state a wisdom or knowledge superior to and apart from that of its officers - a knowledge, both impersonal and damning, which sets in motion the inexorable process of prosecution where guilt is known." State v. Badda, 63 Wn. 2d 176, 180, 385 P.2d 859 (1963); see also State v. Thorgerson, 172 Wn.2d 438, 443-44, 258 P.3d 43 (2011).

In contrast, here, defense counsel did not seek to vouch for credibility or give a personal opinion on the ultimate issue, nor would he claim that this client, from among all others he had represented, was known to be not guilty. Rather, he merely sought to state the defense theory of the case. See also United States v. Younger, 398 F.3d 1179, 1191 (9th Cir.2005) (personal opinions are distinct from legitimate summary of the case).

The defendant has a right to counsel and a right to defend that includes counsel's ability to state and argue the entire defense theory. Certainly the defense theory can be innocence. Here, that was the argument advanced, i.e., that the accusation of knowing trafficking was simply false, and that the State would fail to prove the case to the jurors such that they could properly have "an abiding belief in the truth of the

charge[.]” (Emphasis added.) CP 38 (Instruction no. 3).⁵

The gravamen of the violation is that the defense was entitled to outline for the jury its basic theory of the defense, through counsel, including in opening statement and in argument, by stating that Ms. Bellah would be shown to be innocent. Implicit in the Sixth Amendment and Due Process is the criminal defendant's right to control her defense to the charge. U.S. Const. amends 6, 14; Wash. Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Lynch, 178 Wn.2d 487, 491, 309 P.3d 482 (2013) (trial court cannot dictate the type of defense mounted by the accused).

Defendants may pose any defense to the charge that is supported by the evidence or lack thereof. See Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); State v. Fernandez–Medina, 141 Wn.2d 448, 458–60, 6 P.3d 1150 (2000). This right was violated in Ms. Bellah’s trial.

b. The right to counsel was violated. Further, the Sixth Amendment right to counsel encompasses the delivery of argument in pursuit of the defense theory, unfettered. Herring v. New York, 422 U.S.

⁵ The courts have routinely upheld the constitutionality of this language in Instruction no. 3. See, e.g., State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). A defense attorney's arguments are proper when they are based on the court's instructions to the jury. Perez-Cervantes, 141 Wn.2d at 475 (citing State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972)).

853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). Ms. Bellah had the right to have her lawyer raise and argue the chosen defense as he or she crafts it, a right so central to the right to counsel that courts cannot even compel defense counsel to argue “logically.” City of Seattle v. Arensmeyer, 6 Wn. App. 116, 121, 491 P.2d 1305 (1971); U.S. Const, amend. 6.

Ms. Bellah pawned the jewelry at Spencer’s urging, at the pawnshop and with the same clerk where she had properly and completely legally been pawning items for *years*. As part of her defense, she would, could, and did testify affirmatively to those facts. See 4RP 317-24, 330-32, 350-51, 367-68.

But Ms. Bellah desired her lawyer to defend all the way through to the end of the case, including closing argument, on the basis that because she was innocent, the State *certainly* could not prove her guilty to the high Due Process standard required to convict. The trial court’s ruling not only violated the general Due Process right to defend, State v. Lynch, 178 Wn.2d at 491, but also specifically hobbled defense counsel's ability to argue the defense case, and violated his client’s Sixth Amendment right to counsel. State v. Frost, 160 Wn.2d 765, 772-73, 161 P.3d 361 (2007).

c. Further, counsel can certainly defend the case by arguing that the jury’s adherence to the Due Process standards for conviction of a crime serve to “protect the individual from the state.” The right to

defend, and the right to counsel, were also violated by the trial court's acceptance of the State's argument that any such argument by defense counsel would be a request for jury nullification.

Ms. Bellah's lawyer made clear that he was not seeking to argue for jury nullification. The trial court refused to entertain his explanation that, although he only sought to emphasize to the jury the protections of Due Process, the State's in limine briefing had misconstrued this as seeking nullification. 2RP 25-26; see CP 80.

The defense was correct. In a criminal case, the government bears the burden of proving every essential element of a criminal offense "beyond a reasonable doubt;" a judgment of guilty in the absence of that quantum of proof violates the individual's Due Process rights. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970); U.S. Const amend. 14. This of course is a far higher standard of proof than that applicable in civil litigation, such as *between individuals*. See In re Custody of C.C.M., 149 Wn. App. 184, 202-04, 202 P.3d 971 (2009) (citing Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)) (comparing various standards of proof in civil cases and other actions with criminal jury trial standard). The right to a jury trial is the "great bulwark" protecting an individual's liberty civil and political liberty. State v. Dyson, 189 Wn. App. 215, 224, 360 P.3d 25, 29

(2015) (citing Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2160, 2161, 186 L.Ed.2d 314 (2013)).

The jury must understand and apply the high criminal case standard. See, e.g., State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (prosecutor's arguments trivializing the reasonable doubt standard as having the same gravity as “everyday” decision making was error). Applied by the jury in a criminal case, it is the very essence of the Due Process protections of the individual as against the State. United States v. Gilliam, 994 F.2d 97, 101 (2d Cir. 1993) (The founding fathers’ efforts at installing protections against government tyranny take their practical form in the jury’s reasonable doubt standard); State v. Rinaldo, 98 Wn. 2d 419, 425, 655 P.2d 1141 (1982) (In our system of law, the drastic impairment of the liberty of an individual that results from government incarceration must be justified by proof beyond a reasonable doubt to a jury).

Thus our courts have characterized this standard in essentially the same, proper way that Ms. Bellah’s defense counsel sought to. See State v. Smith, 33 Wn. App. 791, 795, 658 P.2d 1250 (1983) (standard of jury proof beyond a reasonable doubt serves to protect the individual from unjust loss of liberty to the State) (citing Winship, 397 U.S. at 363); U.S.

Const. amend. 6. This theme is often a part of defense attorneys' closing arguments in criminal trials.

The prosecution's cited cases of Meggyesy and Bonissio establish the rule that a defendant cannot seek nullification – i.e., urge the jury essentially to acquit even if the applicable law shows guilt. State v. Meggyesy, 90 Wn. App. 693, 600, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn. 2d 156, 110 P.3d 188 (2005)); State v. Bonissio, 92 Wn. App. 783, 793-94, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999). But counsel never sought to urge the jury to do that; his riposte would be (a) that this would be improper, as he indeed conceded; and (b) that he would not need to seek nullification, given the defense of innocence. See also Sparf v. United States, 156 U.S. 51, 102, 15 S.Ct. 273, 39 L.Ed. 343 (1895) (nullification is acquittal despite the law in the instructions mandating conviction upon proper proof).

The State's motion in limine, as framed pre-trial, was simply wrongly premised. It is a constitutional commonplace that the core protection standing between the executive and the citizen in a criminal prosecution is the jury, that must be persuaded beyond a reasonable doubt of the charge.

d. Reversal is required. Accordingly, Ms. Bellah was entitled to have defense counsel Rothstein state the defense theory, and argue that she should not be convicted except upon proof beyond a reasonable doubt.

Automatic reversal is required because these constitutional violations, in tandem, so affected the trial process that it was structural error. Structural error is a defect affecting the very framework within which the trial proceeds. See Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); see, e.g., United States v. Gonzalez-Lopez, 548 U.S. 140, 148–50 & n. 4, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (denial of Sixth Amendment right to counsel of choice not subject to harmless error analysis). Unduly restricting defense counsel’s ability to state the case or argue for acquittal in closing argument in violation of the Sixth Amendment and Due Process is this sort of error, and as such, it should not be not subject to harmless error affirmance. See generally Herring v. New York, supra, 422 U.S. at 863; Sullivan v. Louisiana, 508 U.S. at 277-78). Reversal is required.

Even if harmless error analysis applies, this Court must be convinced beyond a reasonable doubt that any reasonable jury would have reached the same trafficking verdict, even if Mr. Rothstein had been allowed to introduce and plead the defense case to the jury, in its full

expression, without his skills neutered and his lawful arguments of fundamental criminal jurisprudence forbidden. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). The evidence in Ms. Bellah's case was sharply disputed. It made little sense that after nearly a decade of legally pawning items at the same pawn shop, she would suddenly decide to knowingly pawn stolen property that she knew had been reported to the police. Of course, she herself testified – making clear that she did not know the jewelry was stolen, and in fact was affirmatively led to believe the jewelry was Ms. Spencer's property. If the defense had been permitted to argue the case unfettered, through counsel, by striking upon every legal theme to seek acquittal, the result would have been different.

3. The trial court erred in precluding the defense from showing that Jodie Spencer had pled guilty to animal cruelty involving Sandra Brown's dog "Tuffy," violating Ms. Bellah's right to present a defense.

a. The court excluded, relevant, admissible evidence. Pre-trial, the court ruled that the defense could not show, through cross-examination of Detective Paxton, and/or by a judgment document, that Jodie Spencer had been investigated for and charged with theft and animal cruelty regarding Sandra Brown's dog. In particular, Spencer had pled guilty to

animal cruelty in Marysville Municipal Court, related to the present incident. 2RP 30-34.

This was error. On appeal, the Court reviews an alleged denial of the right to present a defense *de novo*. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

A trial court abuses its discretion when its decision is legally untenable as an application of the rules of evidence. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In addition, the right to present evidence in one's defense is violated where a trial court erroneously excludes evidence that is material and probative, and for which the defense has a colorable need. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, 844 P.2d 1018, cert. denied, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); U.S. Const. amend. 14, supra. If a defendant offers relevant and admissible evidence, the burden shifts to the prosecution to demonstrate that "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002); US Const. amend. 14.

This evidence was squarely relevant. Relevant evidence means evidence having any tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. ER 401. Sandra Brown's jewelry, and Tuffy, both went missing after Brown and Spencer had heated telephone arguments, and Brown came home to the house to find her room and effects ransacked, and jewelry gone. The relevancy of the evidence was established by the circumstances of the case, and the relationship of the facts to the ultimate issue. 5 K. Tegland, Washington Practice, § 82, at 168 (2d ed. 1982). Evidence that Ms. Spencer was investigated for these incidents and was convicted of one of them had a tendency to prove a fact – that Ms. Spencer likely took the jewelry and thus could have given it to the defendant to sell, just as Ms. Bellah contended. ER 401; ER 402.

Notably, in the closely related context of “other suspect evidence,” a defendant may introduce evidence that tends to show, by a clear nexus of facts and circumstances, that the crime was committed by someone else. State v. Strizheus, 163 Wn. App. 820, 830, 262 P.3d 100 (2011).

Although the evidence that Ms. Bellah proffered was not other suspect evidence as to the trafficking charge, Spencer's theft and the alleged trafficking are both offenses involving possession of stolen property and Ms. Spencer's plea of guilty showed that she likely was responsible for the

jewelry becoming stolen property – while MS. Bellah did not have knowledge. The proffered evidence made out much more than the “mere suspicion” which has been deemed inadequate for other suspect evidence. State v. Franklin, 180 Wn.2d 371, 380, 325 P.3d 159 (2014). The defendant has the burden of showing that evidence of this sort is admissible, Strizheus, 163 Wn. App. at 830, and Ms. Bellah met this burden. Evidence from Detective Paxton, and the Marysville judgment, fundamentally supported the defense factual arguments that Ms. Bellah was raising, or attempting to raise.

The defense also had more than a colorable need for this evidence. Ultimately, these were facts tending to establish a party's theory of the case, and such facts generally should be found to be relevant. State v. Rice, 48 Wn. App. at 11-12.

No reasonable court could rule that this evidence should not be admitted, and the court violated Ms. Bellah’s right to present a defense. The trial court’s analysis excluding the evidence was cursory at best and did not rely on any determination that the evidence was highly prejudicial to the degree allowing exclusion of defense evidence. Certainly, the prosecution offered no argument that this evidence was so prejudicial that it would disrupt the fairness of the trial process. 2RP 30-34; State v. Darden, 145 Wn.2d at 622.

b. The error was not harmless. Error of a constitutional magnitude is harmless only if the Court of Appeals is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Jones, 168 Wn.2d at 724. Here, the evidence regarding Spencer, from various sources including the detective and the Marysville judgment, would have been persuasive as both direct and circumstantial proof that Spencer gave the jewelry to Ms. Bellah and she represented it was hers, but that she knew at that time (and did not reveal) that she had stolen the jewelry from Brown. As the defense contended, Spencer took the jewelry and therefore the defense that she did hold it out as hers would be strongly corroborated; if the court had allowed this to be introduced, a different verdict would have been the result. Excluding the evidence cannot be shown to be harmless beyond a reasonable doubt.

4. Alternatively, the assigned errors also require reversal under the cumulative error doctrine.

The cumulative error doctrine allows this Court to reverse for multiple errors that together resulted in denial of the Due Process right of a fair trial, even if an individual error does not merit reversal. This rule protects a principle so important – that of a fair trial -- that it applies even in cases where some of the errors were inadequately preserved. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S.

1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992); U.S. Const. amend. 14, Wash. Const. art. 1, § 3. That notable rule affirms that the Court should look to the cumulative, total prejudice that occurred throughout this case on the same theme, whether disputed below as both evidentiary and constitutional error. The Court looks to the entire series of errors, and it may exercise its discretion under RAP 2.5(a)(3) to review all of them as part of a cumulative prejudice analysis to ensure that Ms. Bellah was not deprived of a fundamentally fair trial. State v. Alexander, 64 Wn. App. at 150-51. Of course, constitutional errors contribute significantly more to the total prejudice than do non-constitutional errors. Id.

Christinah Bellah argues that each error above requires reversal, but in the alternative, this Court should also consider the cumulative prejudice that was caused. Each error went to the issue of knowledge that the property is stolen, which is the critical *mens rea* element of the offense, and Ms. Bellah's defense was that her affirmative belief the jewelry was Spencer's established her outright innocence. RCW 9A.82.050; State v. Owens, 180 Wn. 2d 90, 92, 323 P.3d 1030, 1031 (2014); State v. Killingsworth, 166 Wn. App. at 287, supra. The errors that each went squarely to the element in dispute in this case carried more harm than the sum of their parts -- because the status of the jewelry as

stolen was not at issue, the importance of “knowledge” was the entire case against Ms. Bellah itself. See also Tegland § 83, at 171. Yet the trial court rulings specifically precluded the defendant from showing or corroborating her factual claims. Additional rulings violated Ms. Bellah’s right to clearly state her defense of innocence – her complete lack of knowledge – and prevented counsel from arguing to his ability on the concept of proof beyond a reasonable doubt. Considering the cumulative prejudice, Ms. Bellah was convicted in an unfair trial, and this Court should reverse.

E. CONCLUSION

Based on the foregoing, Christinah Bellah respectfully requests that this Court reverse her trafficking conviction.

DATED this *20th* day of June, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS

Washington State Bar Number 24560

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74213-2-I
)	
CHRISTINA BELLAH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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