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Supreme Court No. 100142-8

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

MEHMET WHICKER,

Petitioner/Cross-Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

ANSWER TO CROSS-PETITION FOR REVIEW

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A. INTRODUCTION

The Court should deny the State's cross-petition for review because it does not meet any of the RAP 13.4(b) criteria. In reviewing Mehmet Whicker's right to present a defense claim, the Court of Appeals applied this Court's well-settled precedent and conducted the two-part analysis required by *State v. Arndt*, 194 Wn.2d 784, 453 P.3d 696 (2019). Slip op. at 4. It correctly determined the trial court abused its discretion in ruling the evidence was "simply not relevant" and properly recognized this crucial evidence was "material" to Mr. Whicker's self-defense assertion. Slip op. at 5-6. Therefore, the Court of Appeals rightly held the improper exclusion of evidence of Mr. Goncalves's extreme intoxication deprived Mr. Whicker of his right to present a defense. Slip op. at 5-6. The State's cross-petition fails to present an issue meriting this Court's review.

B. ARGUMENT

This Court should deny the State's cross-petition because the Court of Appeals's opinion finding the decedent's extreme intoxication was relevant to Mr. Whicker's self-defense assertion and its holding the exclusion of this crucial evidence violated Mr. Whicker's right to present a defense is not in conflict with opinions of this Court or the Court of Appeals.

The State seeks review of the Court of Appeals's holding that the trial court's exclusion of Mr. Goncalves's extreme intoxication violated the Rules of Evidence and deprived Mr. Whicker of his due process right to present a defense. Although the Court of Appeals recognized the egregious constitutional error in excluding this crucial evidence, it ruled the error was harmless. Slip op. at 6-7. Mr. Whicker raised the flawed harmless error analysis as an issue meriting review in his petition. Petition for Review at 1, 8-14. Unlike the analysis of the error in Mr. Whicker's petition, the legal principle contested by the prosecution does not merit review.

It is well established that a person's right to present evidence in support of their defense is essential to the due

process right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). An accused person has “the right to put before a jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). The State’s cross-petition argues the Court of Appeals erred in holding the exclusion of evidence violated Mr. Whicker’s right to present a defense because it claims the evidence did not meet the very low threshold of relevance. This Court should reject this argument.

Evidence is relevant if it tends “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The “threshold for relevance is extremely low under ER 401.” *City of Kennewick v. Day*, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). “Even minimally relevant

evidence is admissible.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Moreover, the right to present a defense prohibits limitations on the defendant’s elicitation of even minimally relevant evidence about the incident. *Jones*, 168 Wn.2d at 721.

Courts may bar relevant defense evidence only where the evidence undermines the fairness of the trial. *Darden*, 145 Wn.2d at 621-22; ER 403. The State bears the burden of showing that the evidence is “so prejudicial as to disrupt the fact-finding process at trial.” *Darden*, 145 Wn.2d at 622. For evidence of high probative value, “no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.” *State v. Bedada*, 13 Wn. App. 2d 185, 194, 463 P.3d 125 (2020) (quoting *Arndt*, 194 Wn.2d at 812)).

Here, the Court of Appeals applied this settled law to determine the excluded BAC evidence was relevant and material. Slip op. at 4-6. Mr. Whicker’s entire defense was that

he acted in self-defense when he stabbed Mr. Goncalves. He explained that Mr. Goncalves appeared high or drunk, that he was acting irrationally and aggressively, and that it contributed to Mr. Whicker's reasonable fear of him. RP 326, 26-27, 470, 473-74, 496-97, 506; Ex. 62. Evidence of Mr. Goncalves .24 BAC corroborated Mr. Whicker's perception of events and description of Mr. Goncalves's inexplicable aggression. It also offered independent evidence that Mr. Goncalves was extraordinarily intoxicated. Ex. 69. The Court of Appeals properly held this evidence corroborated Mr. Whicker's testimony and supported his self-defense assertion. Slip op. at 5.

The State attempts to craft a conflict with this firmly settled body of law by pointing to a *civil* case assessing the relevance of intoxication evidence under a proximate cause statute and a criminal case addressing the relevance of speculative *expert opinion* evidence. Cross-Petition at 12-17 (discussing *Gerlach v. Cove Apartments L.L.C.*, 196 Wn.2d

111, 471 P.3d 181 (2020), and *State v. Lewis*, 141 Wn. App. 367, 166 P.3d 786 (2007)). Both cases are distinguishable, do not demonstrate a conflict, and, in fact, support the Court of Appeals's holding that the BAC evidence was relevant and that the court denied Mr. Whicker his right to present a defense when it excluded the evidence. Therefore, this Court should deny the State's cross-petition.

In *Gerlach*, this Court considered the relevance of a person's BAC level to a landlord's statutory intoxication defense under RCW 5.40.060. That statute offers "a complete defense" to actions seeking damages for injury where the person injured was "under the influence of intoxicating liquor" at the time of the injury if their condition was a proximate cause of the injury and the jury finds the person "more than fifty percent at fault." RCW 5.40.060(1). The Court held the trial court properly excluded intoxication evidence and related expert opinion because its minimal relevance to determining the

proximate cause of the injury under the statute did not outweigh the unfair prejudice. *Gerlach*, 196 Wn.2d 121-24.

The Court's opinion in *Gerlach* was narrowly attuned to that particular statutory defense and whether the BAC could prove the plaintiff's intoxication was a proximate cause of her injury. 196 Wn.2d at 123. The interpretation of this civil statutory defense is inapplicable to the stronger constitutional right of an accused to present a defense in a criminal trial.

In addition, contrary to the prosecution's argument, *Gerlach* recognized the BAC evidence was relevant but found its exclusion proper because it was unfairly prejudicial under ER 403, particularly given the plaintiff's admission she was intoxicated.¹ *Id.* at 120-27. The Court's analysis under ER 403 for purposes of this civil statute does not offer guidance under the heightened standard the State must meet to justify excluding

¹ Indeed, ER 403 identifies circumstances in which a court may exclude evidence "although relevant," and applies only where a court has first determined the evidence is relevant. ER 401; ER 402.

evidence relevant to an accused's defense in a criminal trial. *Darden*, 145 Wn.2d at 621-22; *Bedada*, 13 Wn. App. 2d at 194. *Gerlach*'s assessment of prejudice and the relevance of intoxication evidence to liability under the civil statute does not create a conflict with the Court of Appeals's opinion in Mr. Whicker's case.

Lewis, the other case on which the prosecution relies, is similarly unhelpful to the State's claim of a conflict. In *Lewis*, the trial court permitted the defense to introduce testimony from the medical examiner that the victim had a high level of methamphetamine in his body at the time of death. 141 Wn. App. at 378. However, the defense also sought to introduce a speculative expert opinion on what could have been the possible effect of methamphetamine on the victim. *Id.* at 379. The trial court excluded the defense's proffered expert opinion about the general effects of methamphetamine and whether it could cause a person to act aggressively. *Id.* The court

excluded the proposed opinion testimony as irrelevant and speculative, and the Court of Appeals affirmed. *Id.*

Unlike *Lewis*, Mr. Whicker here did not seek to introduce expert opinion evidence on how alcohol in general might affect different people. Mr. Whicker sought to introduce evidence of Mr. Goncalves's actual .24 BAC. CP 59-60; 1RP 50-52, 61-69; RP 357, 384-403, 545-51; Ex. 69. Mr. Whicker was not attempting to introduce the sort of speculative expert opinion testimony excluded in *Lewis*.

Expert testimony is unnecessary to understand the significance of a .24 BAC. It does not matter precisely how such a BAC affected Mr. Goncalves. The importance of the BAC is that it demonstrated Mr. Goncalves was actually impaired – and to a significant degree – and that this corroborated Mr. Whicker's testimony. The jury could not fairly resolve the fundamental question of whether Mr. Whicker acted in self-defense without having this key evidence. The proponent of evidence establishing intoxication is not required

to present expert testimony for such evidence to be relevant to a self-defense assertion.

Importantly, in *Lewis*, the defendant never testified the victim appeared intoxicated or impaired at the time of the encounter. 141 Wn. App. at 388. Therefore, evidence the decedent had methamphetamine in his system was not relevant to corroborating the defendant's self-defense claim that force was necessary. Conversely, here, Mr. Whicker always maintained Mr. Goncalves appeared either drunk or high. He said that to police on the night of the incident, he explained it to his examining doctor, and he testified to his impression of Mr. Goncalves's intoxication. RP 326, 26-27, 470, 473-74, 496-97, 506; Ex. 62. Evidence that corroborated Mr. Whicker's expressed impressions of Mr. Goncalves's extreme intoxication was clearly relevant to his claim about Mr. Goncalves's aggression and that force was necessary.

Here, Mr. Whicker did not seek to introduce speculative opinion testimony about the hypothetical effects of alcohol on

different people. Instead, he moved to introduce factual evidence proving Mr. Goncalves had a .24 BAC. Ex. 69. The BAC evidence corroborated Mr. Whicker's subjective and objective belief in the danger Mr. Goncalves posed, Mr. Whicker's perception and description of Mr. Goncalves's behavior, and Mr. Goncalves's extraordinary intoxication. The Court of Appeals properly held this evidence was relevant and material to support Mr. Whicker's self-defense claim.

The prosecution seeks to stretch a Court of Appeals opinion excluding baseless expert opinion and a civil case interpreting a specific statutory defense into a conflict where none exists. The Court of Appeals properly found the exclusion of this crucial evidence deprived Mr. Whicker of his right to present a defense. This Court should reject the State's request for review of the opinion's straightforward application of well-settled law based on this nonexistent conflict.

C. CONCLUSION

Based on the foregoing, Petitioner/Cross-Respondent Mehmet Whicker requests this Court deny the prosecution's cross-petition for review.

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 1,795 words.

DATED this 22nd day of September, 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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