No. 44135-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Crystal Luttrell,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-01134-5

The Honorable Judge Stephen M. Warning

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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I. THE COURT'S SELF-DEFENSE INSTRUCTIONS DID NOT MAKE THE LEGAL STANDARD MANIFESTLY APPARENT TO THE AVERAGE JUROR.

Jury instructions on self-defense "must make the relevant legal standard manifestly apparent to the average juror." *State v. McCreven* 170 Wn. App. 444, 462, 284 P.3d 793 (2012), *review denied* 176 Wn.2d 1015, 297 P.3d 708 (2013) (internal citations omitted). All facts and circumstances known to the accused are relevant to the subjective prong of the self-defense standard. *Id.*

In this case, Ms. Luttrell's self-defense theory turned on the fact that Baldwin had assaulted her in the past. RP 124, 136-37, 169, 171, 173-74. The jury was not instructed, however, that the prior assault was relevant to Ms. Luttrell's self-defense claim.

The court instructed the jury, using the language of WPIC 17.02, that the subjective prong for self-defense relied on "all of the facts and circumstances" known to Ms. Luttrell "at the time of the incident." The court did not include the language of the pattern instruction indicating that facts and circumstances arising *prior to* the incident were, likewise, legally relevant. CP 53.

Respondent provides that the court's instructions 18, 19, and 20 adequately conveyed the self-defense standard. Brief of Respondent, 7-10. None of those instructions, however, mentioned the relevance of circumstances occurring prior to the alleged assault. CP 54-56. The court's other self-defense instructions did not remedy the error of omitting the legal standard regarding circumstances known to Ms. Luttrell prior to the incident.

Respondent asserts that including the section of the pattern jury instruction regarding circumstances prior to the incident would have constituted an improper judicial comment on the evidence. Brief of Respondent, 10-11. Without citation to authority, the state claims that a jury instruction directing the jury's attention to specific evidence would be a comment on the evidence. Brief of Respondent, 10.

A statement by the court does not constitute an impermissible comment on the evidence if it does not create an inference of the court's attitude toward the merits of the case or evaluation of disputed issues. *State v. Johnson*, 152 Wn. App. 924, 935, 219 P.3d 958 (2009). A jury instruction which evidence supports and which accurately states the law is not a comment on the evidence. *Id.*

Ms. Luttrell presented sufficient evidence to warrant instructing the jury on the law of self defense. CP 53. The portion of WPIC 17.02

regarding circumstances known to the accused prior to the incident is an accurate statement of the law. *State v. George*, 161 Wn. App. 86, 97, 249 P.3d 202 (2011). The portion of the pattern instruction omitted in Ms. Luttrell's case would not have constituted a judicial comment on the evidence.

Under the court's instructions, the legal standard for self-defense was not "manifestly apparent to the average juror." *McCreven*, 170 Wn. App. at 462. Ms. Luttrell's conviction must be reversed. *Id.* at 467.

II. THE COURT DEPRIVED MS. LUTTRELL OF HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY REFUSING TO HOLD A HEARING AFTER A JUROR OVERHEARD OUTSIDE INFORMATION ABOUT THE CASE.

Due process is met when an impartial jury free of outside influences renders their verdict. U.S. Const. Amend XIV;[1] *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). The trial court's obligation to excuse unfit jurors is continuous. *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). Here, a juror overheard the conversation of Ms. Luttrell during trial about the conduct of the trial and her past work as a stripper. RP 7-8. The state argues that the court's refusal to inquire into the matter was not an abuse of discretion. Brief of Respondent, 12-13.

[1] Wash. Const. art. I, § 3.

Respondent relies primarily on *U.S. v. Schoppert*, 362 F.3d 451 (8th Cir. 2004). The facts of *Schoppert*, however, distinguish it from Ms. Luttrell's case. In *Schoppert,* defense counsel suspected that jurors had overheard discussions at sidebar, despite the fact that the courtroom was equipped with a system to direct white noise toward the jury in order to prevent exactly this. 362 F.3d at 458-59. Schoppert never requested that the trial court conduct an inquiry into possible jury taint. *Id.* Based on this, and the trial court's statement that the white noise system was "pretty well proven," the appellate court found that defense counsel's "bald assertion" of jury taint did not require a hearing. *Id.*

Here, by contrast, a juror came forward and informed the court that she had overheard an extraneous conversation involving Ms. Luttrell. RP 7-8. Upon learning of this information, Ms. Luttrell requested that the court conduct an inquiry into whether the extrinsic information would prejudice the juror. RP 9. In response, the court refused to hold a hearing and stated that Ms. Luttrell had brought the problem upon herself and was "going to have to live with it." *Id.* Unlike in *Schoppert*, the court here knew that at least one juror had been exposed to extrinsic evidence. The court erred in refusing to hold a hearing to determine possible prejudice and the extent of the jury taint.

Respondent cites to *Elmore*[2] and *Jorden* to claim that Washington courts apply the abuse of discretion standard when reviewing issues of jury taint. Brief of Respondent, 12. Both *Elmore* and *Jorden*, however, involved review of a court's decision regarding whether to dismiss a juror after holding a hearing to elicit the relevant facts. *Elmore*, 155 Wn.2d at 763-64; *Jorden*, 103 Wn. App. at 225-26. The issue here – whether the court erred by failing to hold a hearing at all – is a legal issue, which should be reviewed *de novo*. *State v. Guevara*, 172 Wn. App. 184, 187, 288 P.3d 1167 (2012).[3]

When jurors hear outside information on a defendant's character, prejudice is presumed. *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996). Respondent argues that any error was harmless because evidence regarding Baldwin's prior assault of Ms. Luttrell was elicited at trial. Brief of Respondent, 13. But the extrinsic evidence did not address the prior assault; it instead addressed Ms. Luttrell's prior status as a stripper. The state first brought out information regarding Ms. Luttrell's former job, not the defense. RP 30. The witnesses could have testified regarding the

[2] *State v. Elmore,* 155 Wn.2d 758, 123 P.3d 72 (2005).

[3] If the issue is a mixed question of law and fact, it should still be reviewed *de novo*. *Guevar*a, 172 Wn. App. at 187.

prior assault without reference to their work as strippers. The status of the women as strippers was prejudicial and irrelevant to the case.

In Ms. Luttrell's case, no hearing was held despite a juror coming forward to state that she had been exposed to extrinsic evidence. The state cannot overcome the presumption of prejudice. *Hall*, 85 F.3d at 371. Ms. Luttrell's conviction must be reversed and the case remanded for a new trial. *Id.*

III. MS. LUTTRELL WAS DENIED HER SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO A JURY TRIAL BY THE ADMISSION OF OPINION TESTIMONY, WHICH INVADED THE EXCLUSIVE PROVINCE OF THE JURY.

A. Mudge, the bouncer, provided a medical opinion despite not being a qualified expert.

Under ER 702, an expert may give an opinion if (1) the witness is a qualified expert, (2) the opinion is based on a theory generally accepted by the scientific community, and (3) the testimony is helpful to the trier of fact. *State v. Black,* 109 Wn.2d 336, 341, 745 P.2d 12 (1987). Here, the bouncer at the bar testified, based on his training and experience, that Baldwin was dizzy as a result of being hit. RP 83.

Respondent appears to concede that Mudge is not a medical expert qualified to testify about the effects of an alleged head injury. Brief of Respondent, 17-19; *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913

(2009) (the absence of argument on a point may be treated as a concession). While repeating that Mudge's testimony was "based on his training and experience," Respondent fails to articulate what training or experience a bouncer would receive on the source of another person's dizziness. Likewise, Respondent does not point to a theory generally accepted in the scientific community which could form a basis for Mudge's opinion.

Respondent argues instead that Mudge's opinion regarding the source of Baldwin's dizziness was admissible as lay opinion under ER 701. Brief of Respondent, 18. ER 701, however, provides that lay opinion testimony must be "not based on scientific, technical, or other specialized knowledge within the scope of rule 702." ER 701(c). Mudge's testimony regarding the effects of a blow to the head required specialized knowledge within the scope of rule 702. Only a qualified expert could properly have provided an opinion on the source of Baldwin's dizziness. ER 702. Furthermore, lay opinion testimony must be based on personal knowledge. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Here, the state laid no foundation demonstrating that Mudge had personal knowledge to provide the basis for this testimony. The court erred in permitting Mudge to so testify over Ms. Luttrell's objection. *Black,* 109 Wn.2d at 341.

Mudge's testimony was also an impermissible opinion of Ms. Luttrell's guilt and of Baldwin's credibility. *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009). As argued in the Opening Brief, all five factors indicate that the evidence should not have been admitted. Opening Brief, 15. Respondent argues that Mudge's testimony did not approach the ultimate issue of Ms. Luttrell's guilt. Brief of Respondent, 17-18.

The state also claims that under ER 704, opinion testimony that is otherwise admissible is not rendered inadmissible just because it touches on an ultimate issue to be decided by the jury. Brief of Respondent, 18.

But these conclusions are not warranted. The "inviolate" constitutional right to a trial by jury renders an opinion on the ultimate issue of guilt improper despite ER 704 because it invades the exclusive province of the jury. *Hudson*, 150 Wn. App. at 652. No witness may offer an opinion of the guilt of the accused either by direct statement or by inference. *Id.* Mudge's testimony that Baldwin was dizzy from a blow to the head created an inference of Ms. Luttrell's guilt and invaded the province of the jury. *Id.*

Mudge was not qualified as an expert and his opinion testimony on Ms. Luttrell's guilt and Baldwin's credibility invaded the exclusive

province of the jury. This violated Ms. Luttrell's right to a fair trial. *Hudson*, 150 Wn. App. at 653.

B. Detective Webb improperly opined that Baldwin appeared to have been attacked and that Ms. Luttrell did not.

Neither a lay nor an expert witness may testify either by direct statement or by inference regarding the guilt of the accused. *Hudson*, 150 Wn. App. at 652. A law enforcement officer's improper opinion testimony can be particularly prejudicial because it "carries a special aura of reliability." *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). At trial, Detective Webb testified that Baldwin appeared to have been attacked and that Ms. Luttrell did not. RP 115-116. Respondent states that Webb testified only about his observations of the Baldwin's injuries. Brief of Respondent, 20-21. But Webb also testified as follows:

> PROSECUTOR: All right. When you were speaking with the Defendant, did she look as if she had been attacked?
> WEBB: She did.
> PROSECUTOR: The Defendant looked as if she had been attacked?
> WEBB: I'm sorry. No. Defendant. I misunderstood you. No. The Defendant --
> PROSECUTOR: I apologize.
> WEBB: -- no, no.
> PROSECUTOR: We're switching up individuals.
> WEBB: Right. Gotcha.
> PROSECUTOR: Did the Defendant look as if she had been attacked?
> WEBB: She did not.
> RP 115.

In a case raising self-defense, the question of whether the accused was attacked is the ultimate question of guilt. Webb's statement that Baldwin looked as if she had been attacked and Ms. Luttrell did not provided an opinion of Ms. Luttrell's guilt and credibility. *Hudson*, 150 Wn. App. at 652.

Respondent cites to *State v. Wilber*, 55 Wn. App. 294, 298, 777 P.2d 36 (1989), to contend that testimony providing the inference of an improper opinion of guilt does not require reversal. Brief of Respondent, 21. *Wilber* involved law enforcement testimony providing an improper opinion of the credibility of a witness. *Wilber*, 55 Wn. App. at 298. The court found that the testimony was not an improper opinion of guilt because it did not directly relate to the actions or credibility of the accused. *Id.* Even so, the *Wilber* court found that the evidence was inadmissible because it was not based on a reliable scientific method. *Id.* at 299. Respondent's reliance on *Wilber* is misplaced.

Under the *Hudson* factors, testimony from Detective Webb that Baldwin had been attacked (and that Ms. Luttrell had not been attacked) constituted an impermissible opinion of guilt. See Opening Brief, 19-20. The testimony invaded the province of the jury and violated Ms. Luttrell's right to a fair trial. *Hudson*, 150 Wn. App. at 653. Ms. Luttrell's conviction must be reversed. *Id.*

C. Prosecution witnesses improperly opined that Baldwin was "the victim" in the altercation.

Respondent appears to concede that Maini and Webb's repeated references to Baldwin as "the victim" constituted error. Brief of Respondent; *Pullman*, 167 Wn.2d at 212 n.4. The references to Baldwin as "the victim" violated Ms. Luttrell's rights to due process and to trial by jury. *Hudson*, 150 Wn. App. at 653. Ms. Luttrell's conviction must be reversed. *Id.*

IV. PROSECUTORIAL MISCONDUCT DENIED MS. LUTTRELL A FAIR TRIAL.

A. The prosecutor committed misconduct when he asked Ms. Luttrell to comment on another witness's credibility.

A prosecutor commits prejudicial misconduct when she asks the accused to comment on the credibility of another witness in a credibility case. *State v. Ramos*, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011); *State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 899 (2005).

The state asked Ms. Luttrell to comment on inconsistencies between her testimony and that of Mudge:

> Q: You heard the testimony of Mr. Mudge yesterday; did you not?
> A: I heard it.
> Q: And he described the situation incredibly different than what you just described.
> ....

> Q: Mr. Mudge described in Exhibit 6 that you were positioned on the outside of Ms. Baldwin; correct?
> A: I wasn't.
> Q: You weren't. But Mr. Mudge did say that; didn't he?
> ....
> Q: Summer Baldwin was sitting in the corner.
> A: No, she wasn't.
> RP 141-42.

The clear import of the prosecutor's questions to which defense counsel did not object was to elicit testimony from Ms. Luttrell regarding Mudge's credibility.[4] Respondent argues that defense counsel's sustained objections prevented the state from inquiring about the inconsistencies between Ms. Luttrell and Mudge's testimony. Brief of Respondent, 24. By the end of the exchange, the prosecutor had accomplished the goal of making it apparent to the jury that Ms. Luttrell did not agree with Mudge's version of events.

The prosecutor's repeated improper questions and evasion of the court's ruling constituted flagrant and ill-intentioned misconduct. Ms. Luttrell's conviction must be reversed and the case remanded for a new trial. *Id.*

[4] The court did not strike the prosecutor's improper questions after sustaining defense counsel's objections. RP 141-42.

B. The prosecutor committed misconduct by "testifying" during closing argument.

The state claimed that Ms. Luttrell was "stabbing" with a beer bottle when Mudge intervened, without any supporting evidence for the claim. RP 159. The defense objected, and the court did not rule. RP 159. Respondent admits that the prosecutor's statement, taken alone, "might suggest that the State is implying that the defendant stabbed the victim." Brief of Respondent, 26. In its full context, Respondent claims, "the State's argument described the intentional acts of swinging, punching, and stabbing with the bottle." *Id.*

Even setting aside that the state more than "implied" stabbing by claiming it, the rest of Respondent's argument also misses the point. There was no testimony at trial that Ms. Luttrell made a stabbing motion with the bottle. RP 10-174. No expert testified that the nature of the cut on Mudge's arm indicated that he was stabbed. *Id.* The prosecutor's comment constituted "testimony" to a "fact" that had not been admitted into evidence. *In re Glasmann,* 175 Wn.2d 696, 286 P.3d 673 (2012).

The new allegation that Ms. Luttrell had been "stabbing" with a beer bottle made her appear more violent; the court's failure to rule on the objection enhanced the prejudice by making it appear to the jury that the prosecutor's statements were permissible. The prosecutor's improper

argument prejudiced Ms. Luttrell, and requires reversal. *Glasmann*, 175 Wn.2d at 708.

C. The prosecutor committed misconduct by repeatedly misstating the law of self-defense in closing.

The state's repeated arguments during closing that Ms. Luttrell should have left the situation rather than defending herself misstated the law and denied Ms. Luttrell a fair trial. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 164 Wn.2d 724, 295 P.3d 728 (2012); *Glasmann*, 175 Wn.2d at 713; *State v. Jordan*, 158 Wn. App. 297, 301 n. 6, 241 P.3d 464 (2010). Respondent argues, without citing to any authority, that despite the doctrine imposing no duty to retreat, "the state is permitted to suggest that leaving the situation was a reasonable alternative." Brief of Respondent, 28. Respondent's argument misapprehends the law of self-defense. *Jordan*, 158 Wn. App. at 301 n. 6.

The prosecutor also argued that Ms. Luttrell "only gets to *claim* self-defense if the force is not more than is necessary." RP 184 (emphasis added). This argument mischaracterized the law of self-defense and shifted the burden of proof. Respondent appears to concede that this statement was improper. Brief of Respondent, 27-29; *Pullman*, 167 Wn.2d at 212 n.4.

The prosecutor committed flagrant and ill-intentioned misconduct by misstating the law of self-defense in closing. *Glasmann*, 175 Wn.2d at 713; *Jordan*, 158 Wn. App. at 301 n. 6. Ms. Luttrell's conviction must be reversed. *Glasmann*, 175 Wn.2d at 713.

D. The cumulative effect of the prosecutor's misconduct requires reversal.

The Appellant relies on the argument contained in the Opening Brief.

V. MS. LUTTRELL WAS DENIED HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Defense counsel provided ineffective assistance by failing to object to improper opinion testimony and prosecutorial misconduct.

Failure to object to inadmissible evidence constitutes deficient performance absent a valid tactical reason. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). Defense counsel obtained a ruling before the trial began that Baldwin would not be referred to as a "victim", but failed to object when it was violated. RP 13, 24, 111, 112, 113. Respondent appears to concede that the references to Baldwin as "the victim" were improper and that counsel's failure to object constituted ineffective assistance. Brief of Respondent; *Pullman*, 167 Wn.2d at 212 n.4.

Counsel likewise failed to object to Detective Webb's improper opinion that Baldwin appeared to have been attacked and Ms. Luttrell did not. RP 115-116. Respondent argues only that counsel's failure to object did not constitute ineffective assistance because the testimony was admissible. Brief of Respondent, 30-31. As outlined above, Webb's testimony constituted an improper opinion of Ms. Luttrell's guilt and credibility. Defense counsel recognized the prejudicial nature of the improperly admitted testimony. This can be seen from the motion *in limine,* the successful objection to testimony characterizing Baldwin as "the victim," and the successful objection (at sidebar) to Mudge's opinion that Baldwin had been attacked. CP 31-32; RP 24, 74, 97.

Respondent appears to concede that counsel's failure to object to the prosecutor's mischaracterization of the law of self-defense constituted ineffective assistance. Brief of Respondent; *Pullman*, 167 Wn.2d at 212 n.4

Each of counsel's failures to object allowed the prosecutor to present improper evidence and argument that directly undermined the defense. Ms. Luttrell was prejudiced by defense counsel's deficient performance. Accordingly, her conviction must be reversed and the case remanded for a new trial. *Hendrickson*, 138 Wn. App. at 833.

B. Defense counsel provided ineffective assistance by failing to propose proper instructions on self-defense, and by failing to object to the omission of language from the court's self-defense instructions.

Without objection, the trial court omitted the standard language informing the jury that they could consider all circumstances known to the accused prior to the incident from the jury instructions. WPIC 17.02; CP 53. This constituted prejudicial deficient performance. *State v. Kyllo*, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). Respondent argues that the omitted portion of the pattern instruction on self-defense would have constituted an improper judicial comment on the evidence. Brief of Respondent, 31-32. But as detailed above, a jury instruction that is supported by sufficient evidence and properly states the law is not a comment on the evidence. *Johnson*, 152 Wn. App. at 935.

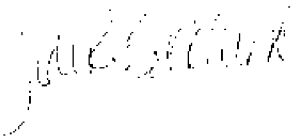
Ms. Luttrell received ineffective assistance of counsel through several failures to object to improper opinion evidence, to object to prosecutorial misconduct, and to present appropriate instructions critical to the defense theory of the case. Because Ms. Luttrell was prejudiced by her attorney's deficient performance, her conviction must be reversed and her case remanded for a new trial. *Kyllo*, 166 Wn.2d at 871.

CONCLUSION

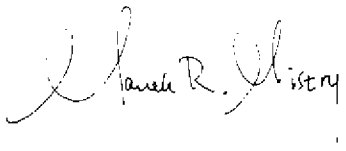
Ms. Luttrell was denied a fair trial when the court failed to adequately instruct the jury on the law of self-defense, the court refused to hold a hearing regarding a juror's possible exposure to extrinsic, witnesses provided impermissible opinions of guilt and witness credibility, the prosecutor committed misconduct, and defense counsel provided ineffective assistance. Ms. Luttrell's conviction must be reversed.

Respectfully submitted on August 27, 2013,

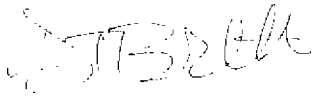
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Crystal Luttrell
2107 36th Ave
Longview, WA 98632

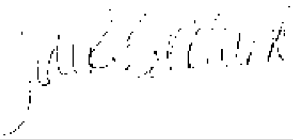
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 27, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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