72263-8

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Court of Appeals
Division I
State of Washington

No. 72263-8-I

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

STATE OF WASHINGTON,

Appellant,

v.

SAYIDIN H. MOHAMED,

Respondent.

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

RESPONDENT MOHAMED'S BRIEF

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A. ISSUES

1. When an out-of-court statement is admitted into evidence, ER 806 permits the opposing party to impeach the declarant only if the statement is admitted as substantive evidence. If a medical expert reasonably relies upon a defendant's out-of-court statements to form the basis of his expert opinion, the defendant's statements are not admissible as substantive evidence but only to explain the basis for the expert's opinion. Here, at trial, the defense medical expert related Sayidin Mohamed's out-of-court statements and testified he reasonably relied upon those statements to form the basis for his opinion. Did the trial court correctly conclude that Mr. Mohamed's statements made to the medical expert were not admissible as substantive evidence, and that therefore evidence of Mr. Mohamed's prior convictions was not admissible under ER 806 to impeach the statements?

2. In State v. Lucas, 167 Wn. App. 100, 271 P.3d 394 (2012), the Court held that a psychiatric expert's testimony, in which he related out-of-court statements made by the defendant that he relied upon to form his opinion, did not allow admission of the defendant's prior convictions as impeachment evidence. Did the trial court correctly conclude that Mr. Mohamed's case is indistinguishable from Lucas?

B. STATEMENT OF THE CASE

On the evening of April 4, 2014, Everett Police Officers Jeff Klages and Michael Keith were dispatched to the home of Sayidin Mohamed in Everett. 6/30/14RP 75, 103. Mr. Mohamed had made a number of calls to 911 but the 911 operator could not determine what he wanted. 6/30/14RP 75. The officers went to his home to find out whether he needed assistance. 6/30/14RP 75.

The officers spoke to Mr. Mohamed outside the home. 6/30/14RP 76-78. They observed that Mr. Mohamed was "extremely intoxicated." 6/30/14RP 77, 98, 104, 114. He smelled of alcohol, his eyes were watery and bloodshot, and his speech was slurred. 6/30/14RP 77, 104. He seemed upset and did not want to talk to the officers, but he was not aggressive or threatening. 6/30/14RP 76, 104-05. The officers placed him in handcuffs while they questioned him about the 911 calls. 6/30/14RP 77, 104-05.

After talking with Mr. Mohamed, the officers determined there was no emergency or criminal activity to investigate. 6/30/14RP 78, 105. They released Mr. Mohamed and he went back inside. 6/30/14RP 78, 105.

A short time later, before leaving the area, the officers learned from dispatch that Mr. Mohamed had an outstanding warrant for his arrest. 6/30/14RP 79, 106. They approached the house again, had Mr. Mohamed come back outside, and told him about the warrant and that he was under arrest. 7/30/14RP 79-80, 106. They placed him again in handcuffs. 6/30/14RP 80, 106-07.

As soon as Mr. Mohamed was placed in handcuffs for the second time, he became hostile and belligerent. 6/30/14RP 80. He yelled, made threats, and used profanity. 6/30/14RP 80, 106-07. He would not comply with the officers' commands. 6/30/14RP 81-82, 107. He struggled and would not allow the officers to search him. 6/30/14RP 81, 107. The officers took ahold of him and forcibly moved him to a grassy area nearby where they could secure him on the ground. 6/30/14RP 84, 108.

While the officers were struggling with Mr. Mohamed, he looked at Officer Klages and spit at him in the face. 6/30/14RP 85-86, 108. He then turned to Officer Keith and spit at him in the face. 6/30/14RP 109.

Soon additional officers arrived in response to Officer Klages' radio for assistance. 6/30/14RP 87. Like Officers Klages and Keith,

Officer Luke Dacy noted that Mr. Mohamed smelled strongly of alcohol. 7/01/14RP 14. Mr. Mohamed told one of the officers that he had been drinking since early afternoon. 7/01/14RP 18.

One of the responding officers brought a "spit mask,"[1] which was placed over Mr. Mohamed's head. 6/30/14RP 89, 92, 110. Mr. Mohamed continued to spit while wearing the mask. 6/30/14RP 95.

A neighbor who was outside observing the struggle said Mr. Mohamed was cussing, screaming, and yelling "really weird stuff." 6/30/14RP 67. He seemed to be "either crazy or on drugs." 6/30/14RP 71-72.

The officers finally managed to pick up Mr. Mohamed and secure him inside one of the police cars. 6/30/14RP 93. Once inside the car, he banged his head several times against the Plexiglass divider. 6/30/14RP 72, 111. He continued to spit. 6/30/14RP 100, 112. He was taken to jail. 6/30/14RP 96.

The State charged Mr. Mohamed with two counts of third degree assault for spitting on Officer Klages and Officer Keith. CP 111.

[1] A "spit mask" is a hood made of a lightweight mesh material that is placed over a person's head to prevent the person from spitting on others. 6/30/14RP 89.

Before trial, Robert Julien, a retired anesthesiologist and expert in pharmacology, evaluated Mr. Mohamed on behalf of the defense. 7/01/14RP 41-44, 50-51. Dr. Julien reviewed the police officers' descriptions of Mr. Mohamed's behavior contained in the police reports and interviewed Mr. Mohamed on the telephone from jail. 7/01/14RP 50-51. No testing had been done of Mr. Mohamed's blood-alcohol level at the time of his arrest, so Dr. Julien had no toxicology data to rely upon. 7/01/14RP 50. Mr. Mohamed told Dr. Julien that, in the afternoon on the day of the incident, he had drunk five 24-ounce cans of "211 Steel Reserve" beer, which is 8.1 percent alcohol. 7/01/14RP 53. He had mixed the beer with vodka, which is 40 percent alcohol, drinking a total of about one pint of vodka. 7/01/14RP 53. Mr. Mohamed said he had no memory of the incident; his next memory was waking up in jail. 7/01/14RP 56.

Dr. Julien concluded that, based on the amount of alcohol Mr. Mohamed reportedly drank, his blood-alcohol level was about .4 at the time of his arrest. 7/01/14RP 55. That is high enough to guarantee a person will black out as a result of alcohol intoxication. 7/01/14RP 55. A person in an alcohol-induced blackout is not necessarily unconscious but is unable to form new memories. 7/01/14RP 46, 49, 55. He or she

may be able to converse with others, follow directions, and appear otherwise normal. 7/01/14RP 49, 74-75. An alcohol-induced blackout is akin to organic dementia which is commonly seen in Alzheimer's patients. 7/01/14RP 46. The person is not only unable to form new memories, but is also unable to exercise executive cognitive functions such as using judgment, making informed decisions, or forming an intent to commit a crime. 7/01/14RP 48-50. Memory loss is the only way to assess a person's brain function while in an alcohol-induced blackout. 7/01/14RP 75. It is well-established that the loss of an ability to form new memories is associated with the depression of the frontal cortex, the area of the brain governing the ability to make decisions and exercise judgment. 7/01/14RP 88. Thus, Dr. Julien concluded that at the time of the incident, Mr. Mohamed was not able to form the requisite intent to commit an assault as a result of his alcohol intoxication. 7/01/14RP 58.

Dr. Julien thought Mr. Mohamed's report of his memory loss was consistent with the police officers' descriptions of him as being extremely intoxicated. 7/01/14RP 57.

At trial, after the State rested its case but before Dr. Julien testified, the prosecutor informed the court that if Dr. Julien testified

about the statements Mr. Mohamed had made to him during his interview, the State would introduce evidence of Mr. Mohamed's prior convictions for "crimes of dishonesty" pursuant to ER 806.[2] 7/01/14RP 21-22. The prosecutor asserted that "Dr. Julien basically stands in the place of the defendant when he's testifying," and that Dr. Julien could be impeached with any matter that would be admissible to impeach the defendant if he were to testify, including Mr. Mohamed's prior convictions for crimes of dishonesty. 7/01/14RP 21-22.

Defense counsel objected, arguing that Dr. Julien did not rely upon Mr. Mohamed's prior convictions in forming his opinion. 7/01/14RP 23. Also, Mr. Mohamed's statements were not being offered for the truth of the matter asserted but rather to show the basis for Dr. Julien's opinion and therefore they were not subject to impeachment. 7/01/14RP 23. Counsel pointed out that, on cross-examination of Dr. Julien, the prosecutor could question the reliability of his opinion by highlighting that the doctor did not know whether Mr. Mohamed's statements to him were actually true. 7/01/14RP 23-24.

[2] ER 806 provides that "when a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."

The court acknowledged that Mr. Mohamed's out-of-court statements made to Dr. Julien were not being offered as substantive evidence or under any exception to the hearsay rule. 7/01/14RP 26-27. But the court nonetheless overruled the objection. 7/01/14RP 27-28. The court ruled that Dr. Julien could be cross-examined with evidence of Mr. Mohamed's prior convictions for felony and misdemeanor theft. 7/01/14RP 28-29

At the same time, the court proposed providing the jury with a limiting instruction which would say:

> Statements by the defendant to Dr. Julien are being offered only for the limited purpose of seeking to help explain Dr. Julien's opinions and are to be considered by you only for that limited purpose. Any information regarding prior convictions of the defendant is being offered only for the limited purpose of seeking to help challenge the defendant's credibility and Dr. Julien's opinions and are to be considered by you only for that limited purpose.

7/01/14RP 29-30.

The prosecutor approved of the instruction but defense counsel opposed it. 7/01/14RP 31. The prosecutor then stated that if defense counsel did not want the instruction, the court should not provide it. 7/01/14RP 31. The court said it would provide a limiting instruction only if *either one* of the parties requested it. 7/01/14RP 31.

Dr. Julien proceeded to testify about his opinion regarding Mr. Mohamed's mental state at the time of the offense. He testified that people in his field reasonably rely upon self-reports and police reports in forming their opinions. 7/01/14RP 52. A medical expert must necessarily rely upon a subject's self-report. 7/01/14RP 95. He acknowledged that if Mr. Mohamed's self-report were wrong or inaccurate, the doctor's final conclusions could also be wrong. 7/01/14RP 56. But he had no reason to question the truthfulness of Mr. Mohamed's self-report because it was consistent with the officers' descriptions of his behavior. 7/01/14RP 69-70.

On cross-examination, the prosecutor asked Dr. Julien if he was aware that Mr. Mohamed "had been convicted of multiple crimes of dishonesty, like, two felony theft convictions and multiple misdemeanor theft convictions, and that he had been dishonest in the past." 7/01/14RP 69. Dr. Julien responded that he was not aware of those prior convictions but if he had been, his opinion would not have changed. 7/01/14RP 69-70.

In closing argument, the prosecutor argued that Mr. Mohamed was not in an alcohol-induced blackout at the time of the offense and did in fact act with an intent to assault the officers. 7/01/14RP 116,

120, 126. Counsel argued that Dr. Julien "cannot dispute the fact that his report is solely for the most part based on self-reporting of which the defendant, as I stated to him, has crimes of dishonesty. Was he being dishonest at that time? Did he have an incentive to be dishonest? You bet he did." 7/01/14RP 127-28.

The jury was instructed on Mr. Mohamed's defense of voluntary intoxication.[3] CP 100. The following instruction was provided to the jury regarding the prior conviction evidence: "You may consider information that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's statements, and for no other purpose." 7/01/14RP 105-08; CP 94.

While the jury was deliberating, defense counsel informed the court that she had just discovered a relevant case, State v. Lucas, 167 Wn. App. 100, 271 P.3d 394 (2012), which holds that a defendant's prior convictions are not admissible as impeachment when a psychiatrist relies in his trial testimony on the defendant's statements

[3] The voluntary intoxication instruction stated:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

CP 100.

made during a mental health examination to form the basis of his expert opinion. 7/02/14RP 6. When the jury returned a verdict of guilty, counsel moved for a new trial based on State v. Lucas. 7/02/14RP 14; CP 78-85.

A hearing was held. The trial court agreed that an error of law had occurred during trial when the court permitted the State to introduce evidence of Mr. Mohamed's prior convictions to impeach Dr. Julien's testimony. CP 2. The court concluded this case could not be distinguished from Lucas. 7/30/14RP 16; 8/07/14RP 5-6; CP 2. The court also concluded that admission of evidence of Mr. Mohamed's prior convictions was prejudicial because the prosecutor had referred to the prior convictions both during cross-examination of Dr. Julien and during closing argument. 7/30/14RP 16. Therefore, a new trial was warranted. 7/30/14RP 16; CP 2, 5.

The State now appeals the court's order granting a new trial.

C. ARGUMENT

1. The trial court properly granted a new trial because evidence of Mr. Mohamed's prior convictions was not admissible under ER 806 to impeach his out-of-court statements made to the medical expert

ER 806 permits a party to attack the credibility of a hearsay declarant as if the declarant had testified at trial:

> When a hearsay statement, or a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. . . .

The rule rests on the principle that "[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility is subject to impeachment and support just as if he had testified." Judicial Council Comment ER 806, quoted in 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 806.1, at 240 n.1 (5th ed. 2007).

But ER 806, by its express terms, applies only "[w]hen a *hearsay* statement . . . has been admitted in evidence."[4] ER 806

[4] ER 806 also applies when "a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence." A statement defined in rule 801(d)(2)(iii), (iv), or (v), is a statement

(emphasis added). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Thus, "ER 806 authorizes impeachment of a declarant only when the declarant's statement has been offered to prove the truth of the matter asserted. If the statement is offered for some other non-hearsay purpose, ER 806 does not apply." State v. Fish, 99 Wn. App. 86, 95, 992 P.2d 505 (1999); see also United States v. Price, 792 F.2d 994 (11th Cir. 1986) (defendant not entitled to impeach informant under FRE 806 because informant's statements not offered to prove truth of matters asserted, but merely to place defendant's own statements in context); 5C Tegland, Washington Practice, supra, § 806.2, at 242.

Mr. Mohamed's out-of-court statements to Dr. Julien were "self-serving" and thus were inadmissible to prove the truth of the matters asserted. State v. Fullen, 7 Wn. App. 369, 381, 499 P.2d 893

> offered against a party and is . . . (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Mr. Mohamed's statements were not offered against him and do not fall under ER 801(d)(2).

(1972). But they were admissible to explain the basis of Dr. Julien's opinion. Id. at 383-84.

In Washington, ER 703 expressly allows experts to base their opinion testimony on facts or data that are not admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 705 provides that an "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." Together, these rules permit a trial court to allow an expert to relate otherwise inadmissible out-of-court statements to the jury in order to explain the bases for his or her opinion. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice, §705.5, at 293-94 (5th ed. 2007).

Although otherwise inadmissible out-of-court statements are admissible to show the basis of an expert's opinion, "[t]he admission of these facts . . . is not proof of them." Group Health Co-op. of Puget Sound, Inc. v. State Through Dept. of Revenue, 106 Wn.2d 391, 399, 722 P.2d 787 (1986).

> "[I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially

> the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only."

Id. (quoting State v. Wineberg, 74 Wn.2d 372, 382, 444 P.2d 787 (1968) (internal citations omitted)); see also In re Det. of Marshall, 156 Wn.2d 150, 162-63, 125 P.3d 111 (2005) (expert could relate otherwise inadmissible material only for purpose of explaining basis for her expert opinion).

Where otherwise inadmissible out-of-court statements are admitted for the limited purpose of explaining the basis of an expert's opinion, a party is entitled to an appropriate instruction informing the jury of that purpose. State v. Lui, 153 Wn. App. 304, 321-22, 221 P.3d 928 (2009), aff'd, 179 Wn.2d 457, 315 P.3d 493 (2014). But contrary to the State's argument in this case, the absence of a limiting instruction does not change the character of the evidence as non-hearsay. Id. In Lui, although no limiting instruction was requested or given, this Court held the out-of-court statements recounted by the experts were admitted only "to explain the bases for their opinions." Id. at 322.

Here, the trial court admitted Mr. Mohamed's out-of-court statements recounted to the expert not as hearsay, or under any exception to the hearsay rule, but merely to explain the basis of the

expert's opinion. 7/01/14RP 26-27. The statements were admissible at trial under ER 703 and 705 because Dr. Julien reasonably relied upon them in forming his opinion. Indeed, Dr. Julien testified that experts in his field must necessarily rely upon a subject's self-report in forming an opinion about the person's mental state. 7/01/14RP 52, 95. As in Lui, although no limiting instruction was provided to the jury, the statements were admitted for a non-hearsay purpose and must be characterized as non-hearsay. Lui, 153 Wn. App. at 321-22. Because the statements were not hearsay, ER 806 did not apply.

Instead of allowing the State to present evidence of Mr. Mohamed's prior convictions to attack *Mr. Mohamed's* credibility, the court should have limited the State to cross-examination of the expert. In State v. Eaton, the defendant presented a diminished capacity defense, and the trial court required him to testify and subject himself to cross-examination—thereby permitting the jury to learn of his prior robbery conviction—so that the State could test the truth of his out-of-court statements to the psychiatrist expert. State v. Eaton, 30 Wn. App. 288, 292-93, 633 P.2d 921 (1981). The Court reversed, holding "the proper way to test the reliability of the [expert's] opinion was through cross examination of the psychiatrist, not by requiring the defendant to

testify." Id. at 292. The Court noted that, as discussed above, ER 703 permits an expert to base his opinion upon data not admissible in evidence so long as the data is of a kind reasonably relied upon by experts in the field. Id. at 293-94. Although the probative value of expert medical testimony may be lessened when it is based on subjective symptoms and narrative statements given by a defendant charged with a crime, the assumption underlying ER 703 is that opposing counsel will forcefully bring that point to the jury's attention during cross-examination of the expert. Id. at 294-95. Further, "Jurors are quite aware that a criminal defendant may be motivated to fabricate a defense and are unlikely to be influenced unduly by an expert opinion that is shown to rest on questionable sources of information." Id.

Here, as in Eaton, the State had other means of attacking the credibility of Dr. Julien's opinion. The State may attack the credibility of an expert's opinion by pointing out to the jury that the opinion is based on the subjective symptoms and narrative statements given by the defendant after he was charged with a crime, and that the defendant might have therefore been motivated to fabricate his statements. Id. at 293-95. But the court may not require the defendant to undergo cross-examination, or permit admission of the defendant's prior convictions,

as a way of making that point. Id. It is up to the expert, not the court—or the prosecutor—to determine what data the expert could reasonably rely upon. Id. at 294. If the expert is qualified to express an opinion, the court must defer to the expert's advice on that point. Id. The Rules of Evidence do not permit the State to present evidence of a defendant's prior convictions for the purpose of attacking an expert's opinion.

That conclusion is consistent with general principles of relevance and undue prejudice. When a defendant's out-of-court statements are admitted through the testimony of a medical expert, eliciting whether the expert knew of the defendant's prior convictions has little relevance in judging the credibility of the expert's opinion. Id. at 294-95. At the same time, admission of prior conviction evidence significantly bolsters the State's case but has little relevance to the truth-finding function of the trial. Id. at 297.

Here, the State had ample opportunity on cross-examination to point out to the jury any reason for questioning the reliability of Dr. Julien's opinion. Dr. Julien acknowledged his opinion was based in part on Mr. Mohamed's self-report and that he did not really know whether the self-report was truthful. 7/01/14RP 67-69. He also

acknowledged that Mr. Mohamed was aware that Dr. Julien was working for the defense and was interviewing him for the purpose of forming an opinion about the effect of his alcohol consumption on his mental state. 7/01/14RP 67-68. The jurors were undoubtedly aware that Mr. Mohamed may have been motivated to fabricate his statements to Dr. Julien. See Eaton, 30 Wn. App. at 295. In addition, the jurors were explicitly instructed that they were "not . . . required to accept [Dr. Julien's] opinion," and that in determining what weight or credibility to give to the opinion, they may "consider the reasons given for the opinion and the sources of [Dr. Julien's] information." CP 95. It was not necessary to refer to Mr. Mohamed's prior convictions in order to give the jurors the tools they needed to assess the reliability of Dr. Julien's opinion.

Instead of seeking to admit evidence of Mr. Mohamed's prior convictions, the State could have simply requested that the court limit Dr. Julien's testimony to his examination of Mr. Mohamed without relating the content of the out-of-court statements. Although a trial court may permit an expert to recount inadmissible evidence to the jury as the basis of his opinion, the trial court is not required to do so. "ER 705 gives the trial court *discretion* to permit an expert to relate hearsay

or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion." Lui, 153 Wn. App. at 321 (emphasis added). The State could have requested that the trial court require Dr. Julien to testify only "concerning his examination of the defendant without relating specifically those things which could bring in hearsay." Fullen, 7 Wn. App. at 381.

ER 705 was not intended to serve as a mechanism to avoid the ordinary rules for admissibility of evidence. State v. Anderson, 44 Wn. App. 644, 652-53, 723 P.2d 464 (1986). The admission or refusal of the facts underlying the expert's opinion lies largely within the sound discretion of the trial court. Id. Thus, the State could have requested that the trial court apply the ordinary rules of evidence and determine whether the risk of prejudice resulting from the jury's potential misuse of the out-of-court statements for substantive purposes outweighed the probative value of the information in assisting the jury to weigh the expert's opinion. That the State chose not to do so does not mean the door was therefore opened to admission of Mr. Mohamed's prior convictions under ER 806.

Moreover, to the extent the State was concerned that the jury might use Mr. Mohamed's out-of-court statements as substantive

evidence, the State could have requested a limiting instruction. The State complains that Mr. Mohamed did not request a limiting instruction but the burden was on *the State* as the opposing party to request such an instruction. As long as evidence is relevant and admissible for some purpose, any error for failure to provide a limiting instruction is waived by the party against whom the evidence is admitted. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 105.2 (5th ed. 2007); see also State v. Neslund, 50 Wn. App. 531, 540, 749 P.2d 725 (1988) ("Failure to request a limiting instruction waives any error that an instruction could have corrected."). Here, the evidence was admitted against the State and it was therefore the State's obligation to request an instruction informing the jury of its limited purpose.

If the State had requested a limiting instruction, the trial court would have provided it. The court proposed a limiting instruction that would have said: "Statements by the defendant to Dr. Julien are being offered only for the limited purpose of seeking to help explain Dr. Julien's opinions and are to be considered by you only for that limited purpose." 7/01/14RP 29-30. The court said it would provide the instruction if *either party* requested it. 7/01/14RP 31. If the State had

requested the instruction, it would have been legally entitled to it. See Lui, 153 Wn. App. at 321-22 (where otherwise inadmissible out-of-court statements are admitted for only limited purpose of explaining basis of expert's opinion, a party is entitled to appropriate instruction informing jury of that purpose). The State was not entitled to introduce highly prejudicial evidence of Mr. Mohamed's prior convictions simply because it chose not to request a limiting instruction.

In sum, evidence of Mr. Mohamed's prior convictions was not admissible under ER 806 to impeach his out-of-court statements because the statements were not admitted as hearsay. Thus, the trial court did not err in granting a new trial. This Court should affirm the trial court's order.

2. This case is indistinguishable from State v. Lucas

In State v. Lucas, 167 Wn. App. 100, 271 P.3d 394 (2012), Division Two of the Court of Appeals applied the above principles in a case with facts that are indistinguishable from the present case. The Lucas Court concluded that prior conviction evidence was not admissible under ER 806 to impeach Mr. Lucas's out-of-court statements made to a psychiatrist expert because the statements were not admitted to prove the truth of the matters asserted. Id. The

reasoning in Lucas is correct and this Court should not depart from it. The trial court correctly concluded that Lucas is indistinguishable from this case.

In Lucas, Lucas was charged with fourth degree assault and second degree assault after he punched a bystander on the street and then punched an off-duty sheriff's deputy who had witnessed the incident and tried to intervene. Id. at 102-04. According to witnesses, Lucas's behavior was "erratic"; he was "yelling" and "ranting." Id. at 102-03. He was obviously intoxicated. He had a strong odor of alcohol on his breath, his speech was slurred and when he vomited in the patrol car, the vomit smelled of alcohol. Id. at 104.

At trial, a psychiatrist testified as an expert in support of Lucas's diminished capacity defense. Id. at 105. Lucas had a history of paranoid schizophrenia and his symptoms would be exacerbated by alcohol consumption. Id. The expert interviewed Lucas, who told him that he had consumed a large amount of alcohol that morning and remembered little else other than vomiting and waking up in jail. Id. The expert opined that at the time of the incident, Lucas was incapable of forming the necessary intent to commit the crime due to his history of mental illness and alcohol consumption. Id.

The trial court allowed the State to cross-examine the expert with evidence of Lucas's prior first degree robbery conviction under ER 806, in order to impeach Lucas's credibility and truthfulness. Id. at 105-06. On cross-examination, the expert acknowledged that he was aware of the robbery conviction and that he could not verify Lucas's statements and instead took them at "face value." Id. at 106. The Court of Appeals reversed, holding that because Lucas's out-of-court statements were not offered to prove the truth of the matters asserted but only to explain the basis of the expert's opinion, ER 806 did not apply. Id. at 108-12.

The Lucas Court recognized the general principle, discussed above, that "ER 806 authorizes impeachment of a declarant only when the declarant's statement has been offered to prove the truth of the matter asserted." Id. at 108. The Court also recognized that although ER 703 and 705 allow expert witnesses to recount otherwise inadmissible evidence, such as hearsay statements, for the purpose of showing the basis of the expert's opinion, "'[t]he admission of these facts . . . is not proof of them.'" Id. at 108 (quoting Group Health Coop. of Puget Sound, 106 Wn.2d at 399-400). The court explained, "In other words, out-of-court statements on which experts based their

opinions are not hearsay under ER 801(c) because they are not offered as substantive proof, i.e., 'the truth of the matter asserted.' Rather, they are offered 'only for the limited purpose of explaining the expert's opinion.'" Id. at 109 (quoting 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence author's cmts. at 387, 400 (2011-2012 ed.)). Thus, because "out-of-court statements offered at trial as the basis of an expert's opinion are not hearsay," they "do not expose the declarant to impeachment under ER 806." Lucas, 167 Wn. App. at 109-10.

The Lucas Court recognized that it is not necessary to admit prior conviction evidence in order to provide the jury with the necessary tools to assess the credibility of an expert's opinion. Citing Eaton, which is discussed above, the Court explained,

> "[T]he probative value of expert medical testimony may be lessened when it is based on subjective symptoms and narrative statements given by a defendant after he has been charged with a crime. The assumption underlying ER 703, however, is that opposing counsel will forcefully bring that point to the jury's attention during cross-examination of the expert. Jurors are quite aware that a criminal defendant may be motivated to fabricate a defense and are unlikely to be influenced unduly by an expert opinion that is shown to rest on questionable sources of information."

Id. at 110 (quoting Eaton, 30 Wn. App. at 294-95).

In Lucas, the State had ample opportunity to test the reliability of the expert's opinion and did not need to rely upon the prior conviction evidence. The State had cross-examined the expert, including by casting doubt on the credibility of Lucas's statements by adducing the expert's testimony that he took such statements at "face value" with no means to verify them, "thus rendering any reference to Lucas's prior conviction unnecessary." Lucas, 167 Wn. App. at 110.

Finally, the Lucas Court recognized that the prior conviction evidence likely had a harmful and unfairly prejudicial impact on the jury, which required that the conviction be reversed. Again citing Eaton, the Court noted "'[t]here is a significant danger that jurors will consider prior conviction admitted for impeachment purposes as substantive evidence of guilt, regardless of instructions to the contrary.'" Id. at 111 (quoting Eaton, 30 Wn. App. at 291 n.4.). Generally, "cases finding that the erroneous admission of defendants' prior criminal convictions was harmless 'have turned on the fact that the defendant had other prior convictions that *were* properly admissible.'" Lucas, 167 Wn. App. at 112 (quoting State v. Calegar, 133 Wn.2d 718, 728, 947 P.2d 235 (1997)). That factor was not present in Lucas's case. Further, because "[t]he jury's possibly

negative assessment of Lucas's credibility—arising from the erroneous admission of his prior conviction—conceivably and negatively influenced the weight they gave to [the expert's] testimony," and because the expert was the key witness for Mr. Lucas's only viable defense of diminished capacity, the error was not harmless and the conviction must be reversed. Lucas, 167 Wn. App. at 112.

Lucas cannot be distinguished from this case. As in Lucas, Mr. Mohamed's out-of-court statements made to the expert were not admitted at trial for the truth of the matters asserted but rather to explain the basis of the expert's opinion. Thus, the statements were not subject to impeachment under ER 806 with evidence of Mr. Mohamed's prior convictions. Id. at 108-10.

Further, as the trial court concluded in its oral ruling, see 7/30/14RP 16, the erroneous admission of the prior conviction evidence was not harmless. The State referred to the prior conviction evidence in its cross-examination of Dr. Julien and in closing argument. 7/01/14RP 69-70, 127-28; 7/30/14RP 16. As the Lucas Court recognized, the erroneous admission of a defendant's prior criminal convictions is generally harmless only where the defendant had other prior convictions that *were* properly admissible. See Lucas, 167 Wn.

App. at 112. That factor is not present in this case. Moreover, as in Lucas, "[t]he jury's possibly negative assessment of [Mr. Mohamed's] credibility—arising from the erroneous admission of his prior conviction—conceivably and negatively influenced the weight they gave to [Dr. Julien's] testimony." Id. Because Dr. Julien was the key witness for Mr. Mohamed's only viable defense of voluntary intoxication, the trial court correctly ruled that the erroneous admission of the prior conviction evidence was not harmless. Under these circumstances, the trial court properly granted a new trial. This Court should affirm the trial court's decision.

D. CONCLUSION

The trial court did not err in concluding that evidence of Mr. Mohamed's prior convictions was erroneously admitted and that admission of the prior conviction evidence prejudiced the verdict. This Court should affirm the court's order granting a new trial.

Respectfully submitted this 23rd day of March, 2015.

s/ MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	
	)	NO. 72263-8-I
v.	)	
	)	
SAYIDIN MOHAMED,	)	
	)	
Respondent.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** 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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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF MARCH, 2015.

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