

FILED
10-30-15
Court of Appeals
Division I
State of Washington

NO. 72829-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES DELONG,

Appellant.

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

The Honorable John Chun, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUE IN REPLY

Fact, not expert, witnesses were crucial to the State's contention that the complainant was incapable of consenting to sexual activity. Was the appellant's ability to cross-examine such witnesses, and to present his defense that the complainant was, in fact, capable of consent, hamstrung by the trial court's improper exclusion of relevant evidence?

B. ARGUMENT

THE EXCLUDED EVIDENCE WAS RELEVANT AND ESSENTIAL TO THE APPELLANT'S DEFENSE.

In its brief, the State subtly attempts to steer this Court to the foregone conclusion that P.W. was incapable of consent by using the following pseudoscientific language:

- She was "biologically incapable" of consenting to sexual activity. Brief of Respondent (BOR) at 10.
- She suffers from "physiological defects." BOR at 13.
- The issue in the present case is whether she has the "fundamental, organic ability to consent." BOR at 17.
- The jury clearly found that "organic limitations" rendered her incapable of consent. BOR at 26.

But this begs the question. P.W. was not evaluated by an expert, and no expert opined to the specifics of her disability: not its cause or

origin, not its timing relative to various events in her life, and not its severity.¹ As the State points out, P.W. testified at trial. But the testimony of various fact witnesses, including police officers, who had spent time with P.W. was critical to the State's case and to the jury's evaluation of P.W.'s mental capacity. See 3RP 66-70; 4RP 22-25 (State's pretrial arguments that such witnesses should be permitted to offer their opinions as to P.W.'s mental capacity, comparing such lay opinions as similar to an opinion on intoxication).

In this context, evidence tending to suggest that P.W. was capable of implementing her own sexual preferences and choices, and therefore capable of understanding the nature and consequence of sex, was highly relevant to DeLong's defense. Brief of Appellant (BOA) at 25-26. DeLong should have been permitted to inquire about the nature of P.W.'s relationship with her boyfriend, including the exercise of choice in that relationship. See BOA at 19 (defense request for hearing and opportunity to ask P.W. about nature of relationship); see also State v. Frost, 141 N.H. 493, 501, 686 A.2d 1172 (1996) (while fact that the complainant engaged in prior sexual activity is not necessarily probative of capacity to consent,

¹ As DeLong acknowledged in his opening brief, Washington courts do not require expert testimony to establish incapacity. State v. Summers, 70 Wn. App. 424, 428, 853 P.2d 953 (1993).

evidence that complainant refrained from certain sexual activities is highly probative of the issue of her capacity to decide whether or not to consent).

DeLong also had a right to confront State's witnesses, including Detective Purcella and roommate Christina Stark,² with the fact that they did not appear to take issue with P.W.'s relationship with, or ability to consent to sex with, another person who was not DeLong.³ Cf. 4RP 13 (prosecutor's argument boyfriend evidence was irrelevant in part because "[w]e believe Mr. DeLong is a threat to her safety and [to] other people in the community"). The State deems "irrelevant" whether such individuals took action with respect to the relationship with the boyfriend. BOR at 22-23. But, again, the testimony of these same witnesses was used by the State used to establish P.W.'s incapacity. The State offered no expert witness.

² The State's brief contains an error regarding the amount of time Stark lived with DeLong and P.W. BOR at 5 (citing 11RP 107-08, 110). The brief asserts Stark lived with them for about a year. Rather, Stark testified she only met DeLong about a year *before trial*. 11RP 109-10. See also BOA at 5.

³ The State's brief also repeatedly refers to the boyfriend as developmentally disabled and even "similarly developmentally disabled." BOR at 10, 21. The relevance and accuracy of this contention are dubious. The State asserted below that the boyfriend was at a minimum "slow" mentally, a representation that DeLong questioned. 4RP 12-13. The State then acknowledged "[i]t's not evidence. It's not part of the case. We're not offering it," 4RP 13, a position at odds with the State's current position.

The trial court violated DeLong's constitutional rights by impeding him from presenting a complete defense and by undermining his ability to cross-examine and confront crucial prosecution witnesses. BOA at 26-27. The forgoing constitutional errors require a new trial as to the charges relating to P.W.

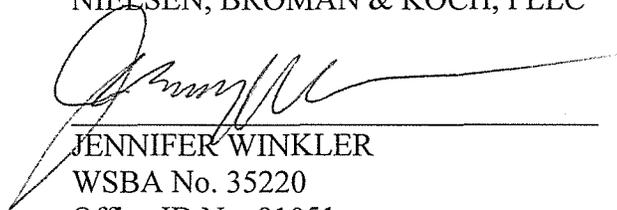
C. CONCLUSION

For the foregoing reasons, and the additional reasons set forth in DeLong's opening brief, this Court should grant the requested relief.

DATED this 30TH day of October, 2015.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 72829-6-1
)	
JAMES DELONG,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF OCOTBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES DELONG
DOC NO. 291510
MONROE CORRECTIONS CENTER
P.O. BOX 888
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCTOBER 2015.

X *Patrick Mayovsky*