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

STATE OF WASHINGTON, Respondent, v. BRUCE N. LANG, Appellant.	)	No. 36397-0-III PUBLISHED OPINION

PENNELL, A.C.J. — It is well established that a prosecutor cannot comment on a witness's veracity or elicit testimony to the same effect. Yet the prosecutor at Bruce Lang's trial did just that. After Mr. Lang took the stand, recanted his prior confession, and accused the State of threatening and poisoning him, the prosecutor elicited testimony from a psychologist that Mr. Lang was a diagnosed malingerer (i.e. a liar) and that he engaged in malingering on the stand. This was a flagrant error of constitutional proportions. Regardless of whether Mr. Lang's testimony was outrageous or even perjurious, the prosecutor was not entitled to flout the rules restricting opinion testimony.

The improper testimony elicited by the prosecutor needlessly jeopardized the validity of the case against Mr. Lang. Had Mr. Lang's testimony been plausible or even relevant to his stated defense, we would readily reverse. But given the unique circumstances of this case, we will not do so. Simply put, there was no prejudice.

The State is cautioned that the mistake committed here should not be repeated in future cases.

FACTS

Mr. Lang victimized an individual named Torry Delong. Mr. Delong was walking down an alley with his bicycle and a rolling suitcase when he saw a man and woman, later identified as Mr. Lang and his girlfriend. Mr. Lang was motioning for Mr. Delong to come toward him.

Mr. Delong approached Mr. Lang. Mr. Lang then grabbed Mr. Delong and put Mr. Delong's "right arm behind [his] back, [and] spun [him] around." 1 Report of Proceedings (RP) (Sept. 5, 2018) at 245. Mr. Lang stabbed Mr. Delong in the back and pushed him to the ground before making off with Mr. Delong's bicycle and suitcase. The stabbing occurred "very fast." *Id*. at 232. Mr. Delong ran to a bystander and pulled his shirt up to reveal "a bad wound with blood everywhere." *Id*. at 233-34. The bystander helped Mr. Delong obtain medical attention.

Mr. Lang was not initially identified as Mr. Delong's assailant. The case went unsolved for approximately one year. The police finally contacted Mr. Lang after receiving a tip. Once contacted, Mr. Lang agreed to a recorded interview and admitted attacking and robbing Mr. Delong.

The State charged Mr. Lang with one count of first degree robbery and one count of first degree assault. During the pretrial phase of the case, Mr. Lang underwent a competency evaluation and was deemed competent to stand trial.

At trial, a tape recording of Mr. Lang's confession was admitted into evidence. The State also presented testimony from both Mr. Delong and Mr. Lang's girlfriend. Each identified Mr. Lang as the perpetrator of the stabbing and robbery. Mr. Lang's attorney did not challenge the identification of Mr. Lang as the assailant. Instead, the defense position was that Mr. Lang's conduct was not sufficiently egregious to constitute robbery or first degree assault.

Mr. Lang took the stand and testified in his defense. He provided a somewhat rambling statement, denying any involvement in the attack.[1] Mr. Lang's attorney did not ask any questions about mental health and Mr. Lang did not provide any such information sua sponte.

The prosecutor engaged Mr. Lang in a lengthy cross-examination. During this portion of his testimony, Mr. Lang admitted to his prior confession, but complained he was poisoned. Mr. Lang also quarreled with the prosecuting attorney and accused her of making threats. Over a defense objection, the prosecutor asked Mr. Lang about his mental

[1] Mr. Lang's direct testimony spans less than five pages of the trial transcript.

health history and tried to get Mr. Lang to concede he was diagnosed as malingering.[2] Mr. Lang denied the diagnosis. Mr. Lang's attorney did not conduct any redirect examination. The defense rested after Mr. Lang's testimony.

During rebuttal, the State sought to call one of the psychologists who examined Mr. Lang during the competency process. The psychologist was in the courtroom during Mr. Lang's testimony. The State proffered the psychologist would testify Mr. Lang had been diagnosed as a malingerer. According to the State, this testimony was relevant to Mr. Lang's credibility and his claims that he was poisoned and threatened. The defense objected and was overruled.

The psychologist testified Mr. Lang did not suffer from a mental disease or defect, such as schizophrenia or bipolar disorder. Instead, Mr. Lang was diagnosed with "[m]alingering, antisocial personality, and borderline personality disorder." 2 RP (Sept. 6, 2018) at 420-21. The psychologist explained the traits of antisocial disorder include "[l]aw breaking, lying, recklessness, irritability, [and] irresponsibility." *Id*. at 421.

[2] "The essential feature of malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 726 (5th ed. 2013).

He described malingering as "faking." *Id.* at 422. The psychologist testified he observed Mr. Lang's behavior on the witness stand and opined this behavior was consistent with the traits of antisocial personality disorder and malingering.

The jury convicted Mr. Lang of first degree robbery and the lesser included charge of second degree assault.[3] At sentencing, the parties agreed Mr. Lang's second degree assault conviction merged into the first degree robbery conviction. The court sentenced Mr. Lang to the maximum term of confinement within the standard range for first degree robbery. It entered convictions on both counts. Mr. Lang brings this timely appeal from that judgment and sentence.

ANALYSIS

The only contested issue on appeal is the propriety of the expert testimony regarding Mr. Lang's credibility. We review the trial court's decision to allow this rebuttal testimony for abuse of discretion. *State v. Horn*, 3 Wn. App. 2d 302, 310, 415 P.3d 1225 (2018).

The State claims the psychologist's testimony was permissible under the "invited error doctrine;" according to the State, Mr. Lang invited testimony from the psychologist

[3] The State charged Mr. Lang with first degree assault. However, the court included an instruction for both first and second degree assault at defense counsel's request.

by testifying in a bizarre and outrageous manner. This analysis is inapt. The invited error doctrine is a theory of appellate relief. *State v. Rushworth*, No. 36077-6-III, slip op. at 12-13 (Wash. Ct. App. Feb. 20, 2020), https://www.courts.wa.gov/opinions/pdf/360776_pub.pdf. It prohibits a party from relief on appeal after inducing the commission of error at trial. *See In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). Invited error is not a substantive rule of evidence applicable to trial courts. It is therefore irrelevant to the propriety of the evidence proffered at trial.

The State also contends the "open door doctrine" justified the psychologist's testimony. Unlike invited error, the open door doctrine is a substantive evidentiary principle. However, its scope is limited. The open door doctrine is nothing more than a theory of expanded relevance. *Rushworth*, No. 36077-6-III, slip op. at 8. It applies when a defendant waives the benefit of an evidentiary or constitutional protection by broaching a topic that would ordinarily be off limits. *Id.* Once a defendant opens the door to an otherwise prohibited topic, the State can introduce relevant responsive evidence. Although the open door doctrine provides the State with a broader landscape of relevant evidence, it does not provide license to disregard constitutional and evidentiary limitations on the admission of evidence. *See State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008).

Mr. Lang's trial did not implicate the open door doctrine. By testifying, Mr. Lang placed his credibility in question. *See* ER 607. But the same is true of any witness. *Id*. Once Mr. Lang's credibility was at issue, the State was entitled to deploy tools of impeachment. Such tools must, however, be permissible under the rules of evidence and the federal and state constitutions.

Several evidentiary rules barred the State from impeaching Mr. Lang with the psychologist's testimony. Under ER 608(a), a witness's character for untruthfulness may be elicited only through reputation testimony. Opinion testimony is prohibited. *See State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion) (citing now deleted comment to ER 608)). While the rules of evidence allow expert testimony on technical or scientific matters in order to help jurors understand the evidence, ER 702, witness credibility is not a scientific or technical concept. It is a subject at the very heart of juror expertise. *See State v. Whelchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). An expert may sometimes appropriately provide jurors with tools for assessing witness credibility. *See, e.g.*, *State v. Kirkman*, 159 Wn.2d 918, 929-30, 932-33, 155 P.3d 125 (2007) (concluding expert permissibly testified that child's account of sexual touching was consistent with abuse); *State v. Froehlich*, 96 Wn.2d 301, 306-07, 635 P.2d 127 (1981) (holding expert testimony

explaining mental condition permissible to impeach witness whose "mental disability . . . is clearly apparent and [their] competency is a central issue in the case").[4] But an explicit statement about a witness's believability is prohibited. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); *see also Kirkman*, 159 Wn.2d at 938.

The psychologist's testimony here also threatened Mr. Lang's constitutional right to an independent jury determination of guilt. *Kirkman*, 159 Wn.2d at 927; *State v. Dunn*, 125 Wn. App. 582, 592-93, 105 P.3d 1022 (2005). Opinion testimony on a core issue of guilt or witness veracity is a form of vouching. *See State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Vouching is always inappropriate and "'unfairly prejudicial to [a] defendant.'" *State v. Hager*, 171 Wn.2d 151, 158-59, 248 P.3d 512 (2011) (quoting *Kirkman*, 159 Wn.2d at 927). And it is especially dangerous when such testimony comes from a witness with a heightened aura of authority, such as a police officer or an expert. *See Kirkman*, 159 Wn.2d at 928. When the State elicits vouching testimony it suggests its witness holds superior ability to assess guilt or innocence, inviting the jury to defer to this expertise instead of engaging in an independent assessment of the evidence. Because

[4] For example, had the psychologist merely testified that Mr. Lang did not suffer from a mental disease or defect, ER 608(a) would not have been implicated. Assuming the prosecutor could establish such testimony was not merely collateral, it might have been a proper tool to help the jury evaluate Mr. Lang's testimony.

vouching testimony invades the province of the jury and jeopardizes the right to a fair trial, it is constitutionally prohibited. *See City of Vancouver v. Kaufman*, 10 Wn. App. 2d 747, 765-66, 450 P.3d 196 (2019); *Dunn*, 125 Wn. App. at 592-93; *State v. Barr*, 123 Wn. App. 373, 380-81, 98 P.3d 518 (2004); *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

When, as here, an adverse evidentiary ruling implicates a defendant's constitutional rights, we must engage in an exacting assessment of prejudice. Under the applicable standard, reversal is required unless the State demonstrates by clear and convincing evidence that the error was harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

A careful review of the record reveals there was no risk of prejudice from the improper expert testimony. Mr. Lang's trial testimony was patently not credible; it was inconsistent with his prior statements and the statements of all the other witnesses, including Mr. Lang's girlfriend. Mr. Lang's testimony was also inconsistent with his attorney's theory of defense, which was that Mr. Lang confronted Mr. Delong, but the interaction did not amount to robbery and first degree assault. Though the State's approach to impeachment was completely inappropriate, we perceive no risk that the testimony impacted the jury's guilty verdicts.

While we sustain the jury's verdicts, Mr. Lang's judgment of conviction must be revised. Mr. Lang was convicted of first degree robbery and second degree assault based on the same underlying conduct. Double jeopardy[5] prohibits this outcome. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 524-25, 242 P.3d 866 (2010); *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005). Imposition of concurrent sentences is not sufficient to address double jeopardy concerns. Instead, the court must completely dismiss the lesser charge. *State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 8, 304 P.3d 906 (2013).

CONCLUSION

The jury's verdict is affirmed. This matter is remanded with instructions to dismiss Mr. Lang's conviction for second degree assault.

Pennell, A.C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

[5] U.S. CONST. amend. V; WASH. CONST. art. I, § 9.