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COA No. 63423-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

BEVERLY MARLEY,

Appellant.

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

The Honorable Chris Washington

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the prosecutor, over objection, to invoke irrelevant, prejudicial sympathy for a significant State's witness, Danielle Jackson, and for the complaining witness, a person with disabilities, by questioning Jackson about the burdens of caring for her own disabled child, and about her concern for people with disabilities such as the complainant being taken advantage of, in violation of ER 401, ER 402, and ER 403.

2. The prosecutor, by purposefully eliciting Danielle Jackson's pronouncement that she was telling the truth since she was motivated by her concern for people with disabilities, over the defendant's unsuccessful bolstering objection, violated Ms. Marley's Sixth Amendment right to have the jury determine the credibility of witnesses based on competent evidence.

3. The above trial court errors require reversal of Ms. Marley's convictions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Beverly Marley was on trial for multiple counts of theft of DSHS¹ and SSA² disability funds, in connection with payments she

¹The Department of Social and Health Services.

²The Social Security Administration.

received for caring for her developmentally disabled niece Paula Smith. The case hinged on the credibility of fact witnesses who testified on the central disputed issue of whether Ms. Smith still lived with the defendant during the 6-month period in which Marley received payments but allegedly did not care for Smith, since Smith, or so she and others claimed, had moved out of Marley's home.

Did the trial court abuse its discretion in allowing the prosecutor, over objection, to invoke irrelevant, prejudicial matters engendering sympathy for a significant State's witness on this issue, Danielle Jackson, and engendering sympathy for Paula Smith, a person with disabilities, by questioning Jackson about the burdens of caring for her disabled child and her concern for people with disabilities being taken advantage of, thus committing evidentiary error in violation of ER 401, ER 402, and ER 403?

2. Did the prosecutor's elicitation, over objection, of Jackson's pronouncement that it was wrong for people to take advantage of persons with disabilities, such as her child and the complainant, and that this was why she was attesting truthfully now and in a prior statement, improperly bolster the witness's credibility

and invade the province of the jury, in violation of the defendant's Sixth Amendment rights?

3. Is reversal required for the above evidentiary and constitutional errors, including under the constitutional error standard requiring harmlessness beyond a reasonable doubt, in this case where the pivotal issue of where Ms. Smith lived during the time period in question was hotly disputed, and where the prosecutor sought to use the improper matters to sway the jury by emotion and sympathy?

C. STATEMENT OF THE CASE

1. **Procedural history.** Beverly Marley was charged and later convicted, following a sharply contested jury trial, on multiple counts of theft of state and federal funds, and making false statements in regard to Medicaid payments. CP 1, 10, 56.

The charging documents alleged that Ms. Marley, who received payments from DSHS for her care of her developmentally disabled niece, Paula Smith, including from June 2005 through early 2006, had not provided that care, because Smith had moved from Marley's home. CP 56-60. In addition, it was alleged that Ms. Marley, who was a protective payee for Ms. Smith's social security payments, used those funds for purposes of her own needs, not as

permitted by the Social Security Administration. CP 56-60. The State's charges were, specifically, as follows:

Count I - Theft of State Funds pursuant to RCW

9A.56.020(1)(a) and RCW 9A.56.030(1)(a). Count I charged Ms. Marley with theft under these statutes by allegedly wrongfully obtaining or exerting unauthorized control over \$8,756.32 of Washington State funds with the intent to deprive the State of the money. The information alleged that Ms. Marley cashed seven state warrants (checks) that were payment for in-home care services she contracted with the State to provide for her developmentally disabled niece, Paula Smith, cashing the checks despite the fact that, allegedly, she had not performed the in-home care services necessary to earn the money. Ms. Marley cashed the multiple checks on July 8, 2005, through January 5, 2006. CP 56-60.

Count IX - Theft of Federal Funds pursuant to RCW

9A.56.020(1)(a) and RCW 9A.56.030(1)(a). This count charged Ms. Marley with theft by allegedly wrongfully obtaining or exerting unauthorized control over \$3,566.00 of federal social security money, earmarked for Paula Smith, with the intent to deprive the federal government and Paula Smith of the money. Ms. Marley

allegedly committed this theft when she received eleven social security checks as the protective payee for Paula Smith and cashed those checks for her own personal use rather than using the funds for Ms. Smith's personal needs. Ms. Marley cashed the checks from July 1, 2005, through April 5, 2006. CP 56-60.

Counts II through VIII - Medicaid False Statement pursuant to RCW 74.09.230(1). Finally, Ms. Marley was charged with seven counts of Medicaid False Statement for submitting invoices in which she claimed to have provided the maximum authorized hours of in home care to Paula Smith, when she had allegedly not provided any of the service hours. The invoices were submitted to the Medicaid program from June 28, 2005, through December 23, 2005. CP 56-60.

Following a jury trial held March 3 to 12, 2009, before the Honorable Chris Washington, Ms. Marley was convicted as charged. CP 73-74. Ms. Marley did not dispute obtaining payment from DSHS and receiving the SSA checks; instead, the State's witnesses claimed that Ms. Smith lived with them during the relevant period, and the witnesses on behalf of Ms. Marley testified that Ms. Smith never moved out of Marley's home. One defense

witness testified that Ms. Smith admitted to her that her claims against her Aunt Beverly were fabricated. See Part D.5, infra.

At sentencing, Ms. Marley was granted a first-time offender sentencing waiver pursuant to RCW 9.94A.650 and ordered to serve 90 days in custody. CP 121-31. She was ordered to pay \$12,322.32 in restitution. CP 120, 125.

Ms. Marley timely filed a notice of appeal. CP 132.

2. Relevant facts. Paula Smith is the defendant's niece, and has various developmental disabilities. 3/9/09RP at 310. Ms. Smith came to live with her Aunt Beverly at the age of eighteen, and Ms. Marley became Paula Smith's representative payee for Smith's SSA benefits. Ms. Marley signed an application which required her to report any change in Paula's living arrangements and to use all funds for Paula's exclusive benefit. 3/9/09RP at 310-14.

In addition, Paula Smith qualified for State assistance to include in-home personal care offered through the Medicaid program, administered by the Department of Social and Health Services (DSHS). The defendant signed a contract with DSHS to provide these services. Under this contract, Ms. Marley was required to perform various duties for Ms. Smith (cooking, cleaning,

assistance with personal hygiene, etc.) and to report any change in Ms. Smith's circumstances to DSHS. 3/9/09RP at 462-66.

Witnesses from various agencies testified regarding the process by which a person like Ms. Marley is provided funds to be used for the care of a person with a disability, and described how Ms. Marley had used the regular telephonic procedure by which she reported her hours of care in order to receive payments during the second half of 2005 and in early 2006. 3/9/09RP at 310-14 (DSHS case resource manager Lisa Welch); 3/9/09RP at 373-87 (Bank of America legal order processor Karen Doran); 3/9/09RP at 424, 435-38 (Social Security Administration investigator Robert Rodriguez); 3/9/09RP at 462-66 (DSHS investigator Michelle Wright).

Under the payment terms and conditions of Marley's DSHS contract, she was required to bill DSHS according to the Department's guidelines. 3/9/09RP at 310-12. In particular, Ms. Marley was required to submit invoices that accurately reflected the actual number of hours that she provided care to Ms. Smith and to notify the Department of any change in circumstances that would affect payment, e.g., the client Ms. Smith, moving. 3/9/09RP at 312-14.

The complainant, Paula Smith, testified that she moved out of Beverly Marley's house in June of 2005. 3/5/09RP at 169, 178, 181. She claimed that during the time afterwards, Ms. Marley did not provide her with any care, and used "my funds for her own personal practice." 3/5/09RP at 207.

Danielle Jackson, a friend of Paula Smith, testified that Smith began staying overnight and for longer periods with her at Ms. Jackson's home in June of 2005, for one or two weeks at a time, around the disputed time period. 3/10/09RP at 522-23. Jackson also claimed that Ms. Smith was also staying at their mutual friends Sarah's, and Windy's, homes. 3/10/09RP at 522.

Sarah Carr, another friend of Paula Smith, testified that in 2005, Ms. Smith came to her home in Renton "pretty often," a phrase she could only say meant that Smith was there on some weekends and after work. 3/9/09RP at 336. Windy Farrington testified that Paula Smith lived with her on and off, staying at her house for a few days a week or more during the disputed period. 3/9/09RP at 354-56.

D. ARGUMENT

THE PROSECUTOR'S IMPROPER APPEALS TO SYMPATHY FOR THE DISABLED AND THEIR CARETAKERS, INVOKED TO SWAY THE JURY'S ASSESSMENT OF THE CREDIBILITY OF WITNESS DANIELLE JACKSON, AND TO ENGENDER EMOTIONAL SYMPATHY FOR THE COMPLAINANT, REQUIRE REVERSAL IN THIS SHARPLY CONTESTED FACTUAL CASE.

1. The defendant objected on several bases during the improper questioning and testimony of State's witness Danielle Jackson, and may appeal. Ms. Jackson, a friend of Ms. Smith, testified that Paula Smith began staying overnight, and then for longer periods, with her at Ms. Jackson's home in June of 2005. 3/10/09RP at 521. Jackson claimed that Paula began staying with her for periods of three or four days to a full weekend, to one or two weeks at a time, beginning around that period. 3/10/09RP at 522-23. She seemed to also be staying at her friends Windy's and Sarah's homes, and was receiving care, Jackson alleged, from her and them, and not Ms. Marley. 3/10/09RP at 522.

Ms. Marley objected on grounds of relevance, and later on grounds of improper bolstering, that the deputy prosecutor was bolstering Ms. Jackson's testimony by eliciting that she had a "heightened level of sensitivity" to issues involving the care of

persons with disabilities, because she herself had a daughter with special needs. 3/10/09RP at 539.

First, Ms. Jackson was allowed to testify over defense relevance objection as follows:

Being that my daughter is disabled, I feel it's wrong for people to take advantage of people who are disabled.

3/10/09RP at 539. Then, Ms. Jackson was allowed to testify about how frustrating and tiring it was for her to take care of her special needs child. 3/10/09RP at 546. The trial court simply did not rule on, and effectively denied, the defense objection to this testimony, which was that “[t]he State is attempting to bolster [Jackson’s] credibility by saying she’s got a developmentally disabled daughter.” 3/10/09RP at 546.

Ms. Marley’s objections on grounds of relevance and bolstering preserved the evidentiary errors. To assign error to a ruling admitting evidence, a party must raise “a timely objection on specific grounds,” and Ms. Marley did so here. State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006); see RAP 2.5.

In addition, it was clear from the context of the State’s questioning, the witness’s answers, and Ms. Marley’s objection that she was also challenging admission of the testimony on grounds of

unfair prejudice under ER 403, which prohibits evidence that encourages an emotional, rather than a rational decision by the jury. See State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (noting that ER 103(a)(1) allows appellate review when grounds for objection, though not specifically lodged at trial, are readily apparent from circumstances); 5 Karl B. Tegland, Washington Practice: Evidence Law And Practice § 103.11, at pp. 58-59 (5th ed. 2007) (stating that even if no specific objection was made, under ER 103(a) an evidentiary issue will be examined on appeal if the basis for the objection was “apparent from the context.” (Quoting ER 103(a)(1)). See also ER 403; State v. Ortega, 134 Wn. App. 617, 624, 142 P.3d 175 (2006) (evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial under ER 403), infra. Cases in the specific ER 403 area of Washington evidentiary law are therefore pertinent to both the fact of error in the present case, and the prejudice caused thereby.

Additionally, the prosecutor specifically and expressly proffered Ms. Jackson’s concerns for disabled persons as demonstrative of the credibility of her trial testimony and her prior statements to State agency investigators. 3/10/09RP at 538-39. In

the present appeal, case law authority prohibiting prosecutors from attempting to sway the jury in a criminal case by appeals to sympathy is pertinent to error and prejudice, as is the Washington courts' constitutional prohibition on improper bolstering of a witness's credibility.

2. The evidence was irrelevant under ER 401. To be admissible, evidence must be relevant. ER 402. ER 401 states that "relevant evidence" means

evidence having any tendency 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. Admittedly, the "threshold to admit relevant evidence is very low" and "[e]ven minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (citing State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).³

However, the issues at trial in this case were whether Ms. Smith moved out of Ms. Marley's home and out of her care so as to disentitle the defendant to the payments she received. In particular

³Each of the trial court's evidentiary rulings raised on appeal by Ms. Marley is governed by the abuse of discretion standard on appellate review, under which a court abuses its discretion when its decision in an evidentiary matter is manifestly unreasonable, e.g., by taking a view that no reasonable court would take, applying the wrong legal standard, or basing its ruling on an erroneous view of the law. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

with regard to witness Danielle Jackson, her testimony bore on this central disputed question of where Ms. Smith lived during the pertinent time. See 3/10/09RP at 521-23.

Ms. Jackson's "sensitivity" to issues regarding persons with disabilities was irrelevant to this question. Of course, the evidence elicited by the prosecutor went well beyond a passing comment that Ms. Jackson was sensitive to these issues. Even "more" irrelevant to the trial issues was the State's extended elicitation of the burdens borne by this witness in caring for her special needs child, and the tiring nature of doing so. 3/10/09RP at 546. The evidence was inadmissible under ER 401 and ER 402.

3. Evidence Rule 403. Relatedly, this evidence was also unduly prejudicial under ER 403. The rule prohibits the introduction of evidence where "its probative value is substantially outweighed by the danger of unfair prejudice." ER 403; State v. Rice, 48 Wn. App. 7, 11, 737 P.2d 726 (1987).

The gravamen of the prosecutor's elicitation of this evidence in violation of these rules was the appeal to sympathy that was, here, expressly made to the jury. See Carson v. Fine, 123 Wn.2d 206, 223-24, 867 P.2d 610 (1994) (evidence is unfairly prejudicial under ER 403 if it appeals to the jury's sympathies).

In general, seeking to influence the jury on the basis of emotion is improper. State v. Ortega, 134 Wn. App. at 624, supra; State v. Stackhouse, 90 Wn. App. 344, 356, 957 P.2d 218, review denied, 136 Wn.2d 1002 (1998). Evidence likely to provoke an emotional response by the jury rather than a rational decision is unfairly “prejudicial” within the meaning of ER 403. State v. Rice, 48 Wn. App. at 13 (citing 5 Karl B. Tegland, Washington Practice, Evidence Law and Practice § 106, at 250 (2d ed.1982)). A prosecutor may not resort to naked attempts to elicit an emotional response from the jury. State v. Russell, 125 Wn .2d 24, 87, 882 P.2d 747 (1994); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Specifically impermissible are appeals by the prosecutor to the sympathy of the jury. State v. Claflin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

These prohibitions fully apply to the improper elicitation of evidence carrying appeals based on sympathy, in the testimony phase of a trial. See State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006) (appellant asserted that introduction of challenged testimony improperly appealed to the jury's sympathy in

violation of Belgarde and Claflin, supra) (and citing same cases with approval).

The State's introduction of evidence about the genuine, but utterly immaterial burdens on Ms. Jackson from caring for a special needs child, were interjected into a heated trial that consisted of credibility skirmishes over every fact witness testifying on the question of Smith's living location during the time in question. Although zeal in the prosecutorial effort in a closely contested case is understandable, in this case, the State's delving into this extended invocation of sympathy for a significant witness, and for the complainant herself, was dangerously prejudicial. For example, in State v. Claflin, supra, the Court of Appeals condemned an argument where the prosecutor read a poem that poignantly reflected how the rape victim in the case "probably felt" during the alleged crime. State v. Claflin, 38 Wn. App. at 849-50. In this case the State engaged in a similar effort to urge the jury to decide the case based on sympathy.

The evidence elicited from Ms. Jackson by the prosecutor cut the same way, twice. It engendered sympathy for the particular witness, Ms. Jackson, and proffered her up to the jury as a

caretaker of a disabled person who surely would not lie in a case involving the welfare of the disabled.

Secondly, the witness's testimony engendered sympathy for the very complainant, Ms. Smith, a person with a disability. But this emotional discussion of Ms. Jackson's circumstances, and the complainant's disability, carried a tremendous danger of unfair prejudice – and the lack of relevance of the evidence demonstrates the purpose of generating an emotional decision in the case from the jury. The likelihood that the unfair prejudice carried by certain evidence will substantially outweigh its probative force is strong, where the evidence in question is, as here, completely inadequate under the probity and materiality components of relevance, to any possible issue in the case. See Carson v. Fine, 123 Wn.2d at 223-24 (highly probative evidence unlikely to be inadmissible under prejudice analysis of ER 403) (citing United States v. 0.161 Acres of Land, 837 F.2d 1036, 1041 (11th Cir.1988)); State v. Kendrick, 47 Wn. App. 620, 628, 47 Wn. App. 620, 736 P.2d 1079 (1987). Danielle Jackson's testimony was inadmissible.

4. Bolstering. It must be again pointed out that the prosecutor elicited Ms. Jackson's lamentations regarding caring for

the disabled as an express effort to convince the jury she was telling the truth about where Ms. Smith lived because she did not want people who are disabled to be “taken advantage of.” 3/10/09RP at 538-39. The State specifically elicited from Ms. Jackson that her sensitivity to the concerns of disabled persons “impact[ed] the information” she provided in her written statement to DSHS investigators, which she therefore now also stood by. 3/10/09RP at 538-39.

This link between the witness’ sensitivity to persons with disabilities (because of her own special needs child), and the truth of her testimony, was in fact made twice by the State. 3/10/09RP at 540-41. Whether termed bolstering, or vouching, the prosecutor here interjected an improper matter designed to heighten the credibility of the witness in question, by invoking sympathy for her, and by asking the jury to decide the case emotionally under a reactionary distaste for people allegedly taking any “advantage” of the disabled – such as the complainant herself.

This was impermissible. A public prosecutor is a quasi-judicial officer charged with the duty to seek a verdict based upon rational reasoning as to the facts and the law. State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995) (citing

State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978)).

Thus prosecutors may not improperly bolster the credibility of witnesses. It is not error for a prosecutor to point out why the jury would want to believe one witness over another. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). However, it is improper to seek to have the jury assess a witness's credibility based on irrelevant matters outside the record. See State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

On a constitutional level, the admission of testimony bolstering the credibility of a criminal defendant's accusers, whether the complaining witness or other witnesses for the State, unconstitutionally invades the province of the fact-finder in a jury trial. The credibility of witnesses is a matter for the jury to decide, upon competent evidence. State v. Froehlich, 96 Wn.2d 301, 307, 635 P.2d 127 (1981); Dubria v. Smith, 224 F.3d 995, 1001-02 (9th Cir. 2000), cert. denied, 531 U.S. 1148 (2001). Bolstering or vouching, as occurred here, is an improper invasion of the jury's province to decide witness credibility. The Sixth Amendment right to jury trial is violated in such circumstances. U.S. Const. amend. 6. When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial.

United States v. Edwards, 154 F.3d 915, 921 (9th Cir.1998).

The prosecutor's extended "play" for the jury's sympathy in this close case requires reversal.

5. The above evidentiary errors were harmful to the outcome, given the sharply contested factual issues the jury was required to decide. Ms. Marley contends that in this close case, reversal is required because of the error of the State's appeal to the sympathy of the jury – including the prosecutor's effort to secure a verdict by bolstering the credibility of an important witness, expressly equating her challenging personal circumstances in caring for a person with similar disabilities as the complaining witness, with the jury question of whether she was telling the truth. The improper appeal similarly invoked sympathy for the complainant, a person with disabilities.

Without question this was a close case on the facts and this improper appeal to sympathy, and bolstering or vouching of witness Jackson's credibility, surely mattered to the outcome. The State's flagrant appeal to passion and sympathy was an error that requires a new trial. In this case, the witness in question was testifying on the key, central issue of Ms. Paula Smith's living location. Yet the

jury was regaled about how Jackson had a disabled child and how hard it was to care for her, which account was entirely inadmissible.

In the circumstances of this case, the error cannot be deemed harmless. Absent the appeal to sympathy by the prosecutor, the jury would likely not have convicted Ms. Marley in this highly contested factual case, in which, for example, Shameaeann Garrett, the defendant's daughter, confirmed that she had been at her mother's home when Paula Smith and her friends moved her possessions out of the home in February of 2006. 3/10/09RP at 556, 561-62. Ms. Garrett had been visiting her mother regularly, and Paula Smith did not move out until that month and year. 3/10/09RP at 561.

More significantly, Dorothy Moore, the defendant's sister, revealed that she had a conversation in Walgreens drugstore with Paula Smith, who admitted to Moore that she had lied about the allegations against Ms. Marley. Smith confided that she wanted to admit something she had done, and then according to Moore's testimony, she said:

"I put her [Marley] through a lot. I want to tell the truth about me lying on my auntie [the defendant], but if I tell the truth now" – she said a . . . "that's investigating me, that talked to me and told me if I tell the truth now I'll go to jail."

3/10/09RP at 618. This was in 2007. 3/10/09RP at 620. Smith specifically admitted to this witness that she had lied about when she moved out of Ms. Marley's home. 3/10/09RP at 618-19.

Evidentiary error is harmless where, within reasonable probabilities, the outcome of the trial was materially affected as a result of the error. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Additionally, since a great part of the error committed here was of constitutional magnitude, it is harmless only if it can be said beyond a reasonable doubt that it did not contribute to the verdict. State v. Farr-Lenzini, 93 Wn. App. 435, 465, 970 P.2d 313 (1999). Alternatively, the error is harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, the evidence rendering the case highly contested, rather than overwhelming, and thus subject to reversibility, only continued below. Ms. Marley's friend, Edna Banks, confirmed that she was a frequent visitor at Ms. Marley's home during the entire relevant period, and that she saw Paula Smith and talked to her there "all the time," until she moved her things out of the home in

February of 2006. 3/10/09RP at 574, 576. Banks testified how she was personally aware of all of this:

Because I was over there all the time. I remember that because she's there. She was there all 2005. She moved out in 2006.

3/10/09RP at 578. Ms. Banks's testimony, again in turn with that of other defense witnesses, attests to the sharply contested factual nature of the case, and thus demonstrates the precarious threads by which the jury's ability to fairly assess the case and decide it by reason and rationality hung, rendering the evidentiary errors plainly outcome-determinative.

Finally, for her part, Beverly Marley unequivocally testified that although Ms. Smith visited various friends for several days at a time during the questioned period, she lived with her (Ms. Marley) and no undeserved payments were ever accepted. Ms. Marley testified that Paula Smith only began to move out of her home in February of 2006, when several of Smith's friends began moving her possessions out of the house. 3/10/09RP at 587, 594.⁴

Ms. Marley was fully aware of her obligation to contact the agencies involved if Ms. Smith's care arrangements changed.

⁴Social worker Lisa Welch confirmed that Ms. Marley told her in February of 2006 that she "hadn't seen Ms. Smith for two weeks." 3/9/09RP at 324. Ms. Marley made the same attestation to Social Security Administration investigator Robert Rodriguez. 3/9/09RP at 446-47.

3/10/09RP at 604. But Ms. Smith did not move out of the home in June 2005. Ms. Marley testified that until 2006, Ms. Smith

never, never left my house. She never did. That's why I was taking her to work with me during all those times[.]

3/10/09RP at 594.

In this case, absent the significant evidentiary errors by the trial court, Ms. Marley's trial would have been a fair credibility contest. But the State's emotional appeal to sympathy for persons caring for disabled persons, and specifically for the disabled complainant herself, affected Ms. Marley's jury's decision. Prosecutorial questioning that results in repeated improper bolstering of witness credibility has an enduring prejudicial effect that is difficult to extinguish – even when the trial court rules correctly on objections to such questions. See State v. Reed, 102 Wn.2d 140, 143-47, 684 P.2d 699 (1984) (remanding for new trial because of prosecutorial misconduct in commenting on defendant's credibility, even though trial court sustained virtually every defense objection); see also Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 609, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) (noting that "[a]s anyone who has tried jury cases knows, jury

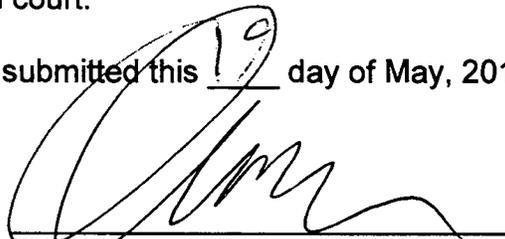
sympathy commonly overcomes a theoretical inability to recover [under the law of damages]" (Powell, J. dissenting)).

In the present case, the credibility of the complainant, the defendant, and the State's and defense lay witnesses was a crucial issue. The prosecutor's questioning of Ms. Jackson was designed to bolster and "enhance" her credibility and also to engender sympathy directly for Ms. Smith. It likely swayed the jury, and reversal is required.

E. CONCLUSION

Based on the foregoing, the appellant Beverly Marley respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 19 day of May, 2010.



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Washington Appellate Project - 91052

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 BEVERLY MARLEY,)
)
 Appellant.)

NO. 63423-2-I

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DIVISION ONE
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