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Court of Appeals
Division I
State of Washington

NO. 74213-2-1

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

STATE OF WASHINGTON

Respondent

v.

CHRISTINA E. BELLAH,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Was a motion to continue the trial to obtain the presence of a witness properly denied where the motion was untimely and the witnesses' testimony was cumulative of other evidence?

2. The trial court granted a motion to prohibit defense counsel from introducing his client as an innocent woman or from arguing to the jury that its job was to protect the defendant from the State. Defense counsel was permitted to state his client was presumed innocent.

a. Did the court properly restrict counsel's comments to the evidence presented and the law as provided by the court?

b. If these restrictions were error, was the error harmless?

3. The defendant was charged with trafficking in stolen property involving the victim's jewelry. The court excluded evidence the victim's landlord was convicted of animal cruelty in connection with a theft of the victim's dog.

a. Has the issue of whether this ruling deprived the defendant of a right to present a defense been preserved for review?

b. Was the evidence properly excluded when it was not relevant to an issue at trial?

- c. If it was error to exclude the evidence, was it harmless?
4. Is the defendant entitled to a new trial under the cumulative error doctrine?
5. If the State substantially prevails on appeal should the court award appellate costs?

II. STATEMENT OF THE CASE

A. FACTS RELATED TO TRAFFICKING IN STOLEN PROPERTY.

In August 2012 Sandra Brown rented a room in a house in Marysville that was owned by Jodie Spencer. The defendant, Christina Bellah, also lived in the house. Ms. Spencer and the defendant had known each other for many years. The defendant was employed by Ms. Spencer and the two women were friends. Ms. Brown did not know anyone at the house before she rented the room. 8/31/15 RP 98-101, 122-123.

On August 27 Ms. Brown took Ms. Spencer's daughter to the emergency room at Ms. Spencer's request. The hospital visit was prolonged when the daughter made statements resulting in her admission to the mental ward. Ms. Brown did not contact Ms. Spencer because she was told she could not do so by hospital personnel. When Ms. Spencer finally got in contact with Ms. Brown she was very angry with Ms. Brown. 8/31/15 RP 91, 99-105.

When Ms. Spencer arrived at the hospital Ms. Brown left for home. She called the police before she left because she was afraid of Ms. Spencer. When she arrived home the police, Ms. Spencer, and the defendant were present. The defendant accompanied Ms. Brown to her room. Before she left Ms. Brown had locked her door but when she got home her room had been broken into. Her jewelry, some of her clothing, and her dog had been taken. Ms. Brown noticed that a couple of the defendant's children were wearing some of Ms. Brown's jewelry. The children taunted Ms. Brown about wearing her jewelry. 8/31/15 RP 105-112.

Ms. Brown was upset and immediately left to look for her dog. With the assistance of her daughters Ms. Brown located her dog the next day. 8/31/15 RP 108, 113.

After Ms. Spencer found out what happened with her daughter she asked her friend Michelle White to come to her house. Ms. Brown's room was next to Ms. Spencer's room where the two women were talking. While Ms. White was there the defendant came in with a jewelry box. The defendant suggested that they could sell the contents of the box. Ms. Spencer told her no and to put the box back. The defendant left for a few seconds and then came back. Ms. White later identified a necklace she had

seen the defendant wearing after that day. That necklace was one of the pieces of jewelry that had been taken from Ms. Brown. 8/31/15 RP 126; 9/2/15 RP 273-276, 278-283.

On August 28 Ms. Brown returned to the house to collect her things and move out. The defendant was at the house, and talked to Ms. Brown. The defendant suggested to Ms. Brown that she might be able to get Ms. Brown's jewelry back if Ms. Brown would agree not to report the defendant for the theft. 8/31/15 RP 114-115.

On September 3 the defendant went to Pacific Pawn and Loan. She had been a customer there for about 10 years at that time. She pawned Ms. Brown's jewelry using the name Christina Ginyard. 8/31/15 RP 54-56, 77, 126-131; 9/1/15 RP 151, 207-210.

Detective Paxton was assigned to investigate the theft of Ms. Brown's jewelry. When she spoke to the defendant on October 2 the defendant stated that she did not know what happened to Ms. Brown's stolen jewelry. The defendant claimed that she looked for the jewelry box but couldn't find it. Detective Paxton spoke with the defendant again on October 8 after the jewelry had been located. At that time the defendant suggested that Ms. Spencer or her boyfriend took the jewelry and traded it for drugs. She claimed that

neither Ms. Spencer nor her boyfriend would have pawned the jewelry because "they're smart, and they know if you pawn it, it can be traced." The defendant denied pawning any items under the name of Ginyard, but acknowledged that was another name that she was known by. She admitted pawning the jewelry but claimed that Ms. Spencer told her that the jewelry belonged to Ms. Spencer. 9/1/15 RP 211-213, 220-226.

B. FACTS RELATED TO PRETRIAL RULINGS.

Defense counsel filed his notice of appearance on January 6, 2015. CP __ (sub. 9). Trial was originally set for March 20, 2015. Trial was continued to May 29, 2015 and again to August 14, 2015. On August 13, 2013 the State moved for a continuance to September 4 due to the unavailability of two material witnesses. CP __ (sub. 19); 8/13/15 RP 4-5. Defense counsel objected stating that the defense was ready for trial. "We want no more continuances." 8/13/15 RP 5. Alternatively counsel argued that he was not available on September 4, but could be available to start trial on September 1. 8/13/15 RP 6. The court found good cause to continue due to the unavailability of necessary witnesses. It considered defense counsel's availability and set trial call for August 28 with trial to commence on August 31. 8/13/15 RP 7-8.

On August 31 defense counsel filed a motion to continue the trial date. He asserted that on the preceding Friday, August 28 he heard about two witnesses who could corroborate the defendant's account of events as it related to the knowledge element of the crime. The two witnesses were the defendant's mother, Judy Brown¹, and her niece Latisha Ferguson. Judy Brown lived in Arizona, and therefore was not available for trial that week. Ms. Ferguson lived locally and was available to testify. The State objected to the continuance, noting defense had represented they were ready for trial at trial call. The State argued that the information had been known to the defense since 2012 when the offense was alleged to have been committed. The State had a witness who was coming from California to testify that week. 8/31/15 RP 13-18.

The court questioned whether Judy Brown really was unavailable for trial that week, suggesting that she could have flown up from Arizona with a few days' notice. Counsel argued that he did not immediately seek court authorized funds to do so because

¹ Because the victim and the defense witness have the same surname the victim is referred to as Ms. Brown and the defense witness is referred to by her full name.

he was unsure whether the court would find Judy Brown's testimony admissible. 8/31/15 RP 19-20.

The court also questioned whether Judy Brown's testimony was cumulative of other evidence. Counsel argued that two witnesses were more credible than one, particularly since both witnesses were related to the defendant. Further, Judy Brown was attempting to locate a receipt because she believed that she also purchased some item on the date of the offense. 8/31/15 RP 19-20.

The court ruled that Judy Brown's testimony was cumulative of Ms. Ferguson's testimony. Because it was cumulative the court would not have allowed it into evidence. It also found that it was speculative whether evidence of some purchase made by Judy Brown was material. Further the evidence had been available and she could have searched for it beforehand. The court therefore denied the continuance motion. 8/31/15 RP 21-23

III. ARGUMENT

A. AN UNTIMELY MOTION TO CONTINUE THE TRIAL WAS PROPERLY DENIED.

The defendant argues that the trial court erred when it denied her motion for a continuance to obtain Judy Brown's testimony at trial. She also argues that the court erred when it

denied her motion for expenditure of public funds for airfare for that witness.

Whether to grant or deny a motion to continue rests within the discretion of the trial court. It will not be overturned unless the appellant makes a clear showing that the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). When considering a motion to continue in order to secure the attendance of a witness a number of factors are relevant including the diligence of the party seeking a continuance, the materiality of the proposed evidence, the redundancy of the evidence, due process, and the maintenance of orderly procedure. Id. at 273. A decision to deny a continuance in order to secure the presence of a witness will be overturned only upon showing that the defendant was prejudiced or the results of the trial would have likely been different had the motion been granted. State v. Kelly, 32 Wn. App. 112, 114, 645 P.2d 1146, review denied, 97 Wn.2d 1037 (1982). The reviewing court will look at the totality of the circumstances, and particularly the reasons given to the trial court at the time the motion was made, when deciding whether a trial court erred in deny a continuance motion. Id. at 114-115.

The defendant first argues that the trial court abused its discretion because its decision was based on a misapplication of the law. Specifically he argues the court denied the continuance on the basis that Judy Brown's proffered testimony regarding what Ms. Spencer said was hearsay. A trial court abuses its discretion when its ruling is based on an erroneous view of the law or it involves an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

The trial court did not decide that Judy Brown's proposed testimony would be hearsay. Rather it assumed that the evidence would be allowed as an exception to the hearsay rule, but found it was cumulative to the evidence the defense sought to introduce through Ms. Ferguson.² 8/31/15 RP 18-19. Thus the court did not abuse its discretion by erroneously applying the hearsay rule to the proffered evidence.

A trial court does not abuse its discretion by denying a motion to continue the trial for the purpose of securing a witnesses' presence where the proposed testimony had been admitted through other witnesses. State v. Eller, 84 Wn.2d 90, 96-98, 524

² During Ms. Ferguson's testimony the court gave a limiting instruction directing jurors not to consider Ms. Spencer's statements for the truth of the matter asserted, but only as they may relate to the defendant's state of mind. 9/2/15 RP 304.

P.2d 242 (1974). The defense to the charge was that the defendant did not know that the jewelry she pawned had been stolen. In support of that defense the defendant proposed calling Judy Brown and Latisha Ferguson to testify that Ms. Spencer said that the jewelry belonged to her. Both witnesses accompanied the defendant to the pawn shop and were present during the transaction. 1 CP 69. The evidence from each witness was identical. Ms. Ferguson was present and did testify to those facts. 9/2/15 RP 302-307. The court did not err when it denied the continuance in order to produce redundant evidence.

The only other potential evidence that Judy Brown could offer in addition to that which Ms. Ferguson could offer was documentation showing that she too had made a transaction at the pawn shop on that same date. 8/31/15 RP 21. Counsel could not say when or if Judy Brown could find that documentation, or what it would specifically show if she did find it. The court found it was speculative whether this evidence was even material. 8/31/15 RP 21-22.

In similar circumstances the court held it was not an abuse of discretion to deny a continuance to secure a witnesses' presence when the defense had not been able to subpoena the witness and it

was speculative whether it would ever be able to do so. Eller, 84 Wn.2d at 98. Like the reluctant witness in Eller, the defense only provided the court speculation whether the proposed documents could be found or that they were material. The court did not err in denying a continuance to obtain that potential piece of evidence.

The defendant argues Judy Brown's testimony was not merely cumulative because her mother's testimony would be more credible as it came from an older woman. This argument suggests that the court was required to make a credibility determination before deciding the continuance motion. The defendant has cited no authority to support that argument. This court should reject that suggestion.

The court may exclude relevant evidence if its probative value is substantially outweighed by the needless presentation of cumulative evidence. ER 403. "Cumulative" means to increase or grow by accumulation or successive additions.³ Thus the rule allows the court to exclude relevant evidence on the basis of redundancy. For good reason the rule does not require the court to consider the quality of the redundant evidence when analyzing whether evidence is needlessly cumulative.

³<http://www.dictionary.com/browse/cumulative?s=t>

It would be impossible for the court to judge how a jury would evaluate the credibility of one witness over another. Any attempt to do so would be based on pure speculation. In this case the court could not know that a jury would find Judy Brown's testimony more reliable than Ms. Ferguson's as the defendant argues it was. The witnesses' relative age would not necessarily factor into a jury's analysis. Both women were related to the defendant, and may have had a similar motive to testify in a manner that supported the defense. Jurors are instructed that they may consider a witnesses' potential bias and method and manner while testifying. 1 CP 35. The court would have no way to know how the jury would evaluate these factors when considering any witnesses' testimony. Thus, it was not error to not factor in the witnesses' relative credibility when ruling on the continuance motion.

Nor did the trial court err in excluding Judy Brown's testimony because of the manner in which the prosecutor cross examined Ms. Ferguson or argued the reasons her testimony lacked credibility. The purpose of cross examination is to test the perception, memory, and credibility of a witness. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Also, a prosecutor may

freely comment on witness credibility based on the evidence. State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). The prosecutor properly cross-examined Ms. Ferguson by pointing out her close relationship with the defendant, her lack of knowledge of certain events that transpired on August 27, and her impaired memory of other events. 9/2/15 RP 307-309. Contrary to the defendant's assertion the prosecutor did not specifically reference Ms. Ferguson's testimony in closing.⁴

The defendant argues that her Due Process right also was violated when the court denied her funds for airfare in order to secure Judy Brown's presence at trial the next day. Defense counsel made the motion to expend public funds for that purpose only after the court had ruled that Judy Brown's testimony was cumulative, and therefore not material. 8/31/15 RP 23. Because her testimony would have been cumulative and the court had discretion to exclude it on that basis, it did not err when it denied the motion to expend public funds.

⁴ The defendant cited to the record to support her claim that the prosecutor implied in closing argument that Ms. Ferguson was making up the testimony because of some unstated self-interest. BOA at 11. While that would have been a proper argument, and would not have rendered the court's ultimate decision to exclude Judy Brown's testimony or to deny the continuance motion improper, the prosecutor made no such argument. Further the defendant's citation to the record at 3 RP 34-35 is inaccurate. Volume 3 of the transcripts covers pages 134-263.

In addition, the court did not err because the defense had not exercised diligence in seeking those funds. The defendant had been represented by the same attorney for eight months by the time of trial. 2 CP __ (Sub 9, Notice of Appearance). That was the fourth scheduled trial date. 8/13/15 RP 5. Counsel learned about the witnesses only after trial call on the preceding Friday afternoon. 8/31/15 RP 13-15. The defendant had substantial opportunity to provide counsel with the names of witnesses she undoubtedly was aware of before that time. Even when counsel became aware of the witness and her whereabouts, he made a strategic decision not to seek public funds before he was sure the court would admit her testimony. As counsel acknowledged it would be a waste of public funds to fly Judy Brown to Washington only to have her testimony excluded by the court. 8/31/15 RP 19-20. Since the court had already found her testimony cumulative and therefore not material, the court did not abuse its discretion by deny a motion to expend funds that would ultimately be wasted.

B. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT LIMITED THE SCOPE OF DEFENSE COUNSEL'S ARGUMENT.

1. It Was Proper To Limit Arguments That Were Not Based On The Facts Presented Or The Law As Provided In The Court's Instructions To The Jury.

Pre-trial the court granted the State's motion to prohibit the defense attorney from arguing to the jury that its role was to protect individuals from the State. The court also granted a motion to restrict counsel from introducing her as an "innocent woman." The court found that language constituted improper vouching and was a statement of fact beyond counsel's personal knowledge. The court permitted counsel to introduce his client by stating that she was presumed innocent. 1 CP 80-81; 8/31/15 RP 25-29. The defendant argues these two rulings unduly restricted her right to argue her theory of the case, and violated her right to counsel. Because the restrictions on counsel's comments were within the discretion of the trial judge the court should reject those arguments.

A trial court has broad discretion to control the scope of counsel's closing argument. State v. Frost, 160 Wn.2d 765, 772, 161 P.3d 361 (2007), cert denied, 552 U.S. 1145 (2008). A trial court should restrict defense counsel's arguments by limiting those arguments to the facts in evidence and the law as set forth by the

court's instructions to the jury. State v. Perez-Cervantes, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). However, a defendant's due process right and Sixth Amendment right to counsel may be impaired if a trial court improperly limits the scope of defense counsel's closing arguments. State v. Osman, 192 Wn. App. 355, 368-369, 366 P.3d 956 (2016). A trial court's order restricting arguments of counsel is reviewed for an abuse of discretion. Perez-Cervantes, 141 Wn.2d at 475. An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. Id.

These authorities address the scope of the court's authority over defense counsel's closing argument. The court's orders in this case were directed at defense counsel's preliminary remarks to the jury. Although not technically argument, there is no reason that these authorities should not equally apply to those preliminary remarks.

The court did not err when it placed restrictions on the manner in which he introduced his client. Introducing the defendant as "an innocent woman" would be contrary to the court's instruction that the "defendant was presumed innocent." The presumption of innocence is not a statement that a defendant is in fact innocent

because that presumption may be overcome by the evidence presented beyond a reasonable doubt. 1 CP 38. If the defendant were in fact innocent, no evidence would establish that she was guilty of the charge. Thus the court properly restricted counsel's comments to the law as given to the jury.

The defendant argues that the restriction on introducing her as an innocent woman precluded counsel from arguing her theory of the case, i.e. that she was innocent of the charge. Nothing in the court's restrictions however precluded counsel from arguing that the credible evidence did not establish beyond a reasonable doubt that she knowingly trafficked in stolen property. Counsel was permitted to argue from the evidence his theory of the case that the State's witnesses were not credible, and that the more reasonable interpretation of the evidence was that the defendant did not know that the jewelry she pawned had been stolen from Ms. Brown. 9/2/15 RP 399-413. These arguments were properly limited to the evidence produced and the court's instructions to the jury. The restriction on referring to the defendant as an "innocent woman" did not violate her right to due process or right to counsel.

The defendant also argues that counsel should not have been limited in the manner in which he introduced her because

characterizing her as “an innocent woman” did not constitute improper vouching. To support the motion in limine the State cited State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). The defendant argues that case does not support the court’s ruling because that dealt with a prosecutor’s improper personal opinion of the defendant’s guilt. Reed cited the former Code of Professional Responsibility in part as authority for its condemnation of the prosecutor’s argument. Former CPR DR 7-106(C)(4) stated “unequivocally that an attorney shall not [a]ssert his personal opinion as to the justness of a cause,or as to the guilt or innocence of an accused...” Id. at 145. The rule was not limited to prosecutors, but applied equally to defense attorneys as well.

The current Rules of Professional Conduct similarly prohibit all attorneys from asserting their personal knowledge of a fact in issue (except while testifying) or stating an opinion as to the justness of a cause, or the guilt or innocence of an accused. RPC 3.4(e). Criminal defense attorneys are not exempt from that rule. A claim that defense counsel “has the privilege of representing an innocent man/woman” is a personal opinion that the defendant is in fact innocent. It is an expression that defense counsel personally knows something that jurors do not, i.e. that the defendant did not

do the acts she was accused of. To the extent that the court relied on Reed and RPC 3.4(e) to preclude the defense from asserting his personal opinion that the defendant was innocent, no error occurred.

Nor did the court err when it granted the State's motion to prevent defense counsel from asserting that the jury's role was to protect individuals from the State. "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Consistent with this statement the court instructed jurors that their duty was to deliberate with an effort to reach a unanimous verdict, and to return a verdict of guilty or not guilty consistent with their determination whether or not the State had proved the elements of the offense beyond a reasonable doubt. 1 CP 37, 41, 49. The court further defined the jury's role by directing them to decide the facts in the case based on the evidence, and to accept the law from the court's instructions. 1 CP 34. Nowhere in the instructions did the court direct jurors that its role was to protect individuals from the State. An argument that juror's had a duty to protect individuals from the State suggests the jury had a duty other than that which was defined by the law and the courts instructions.

The court did not err when it prohibited counsel from making that argument.

The defendant attempts to avoid the obvious problem with the argument by arguing that it was consistent with an argument that the due process standard of proof beyond a reasonable doubt served to "protect individuals from the State." This argument should fail because the two arguments are not alike and are not interchangeable.

The standard of proof is different from the jury function. The standard of proof is designed to protect an accused from an unjust loss of liberty or stigmatization by conviction. State v. Smith, 33 Wn. App. 791, 795, 658 P.2d 1250, review denied, 99 Wn.2d 1013 (1983). The jury's function is to determine whether that standard has been met as applied to a given set of facts. Emery, 174 Wn.2d at 760. While the burden of proof is a measure of proof necessary to convict, the jury is the body that actively applies that measure. Nothing in the court's ruling prohibited counsel from discussing the standard of proof beyond a reasonable doubt, and its function of protecting persons from unjust convictions.

Despite counsel's argument to the contrary, an argument that the jury's role is to protect individuals from the State is an

argument for nullification. Jury nullification occurs when the evidence clearly proves the defendant's guilt beyond a reasonable doubt, but the jury, based on its own sense of justice or fairness, decides to acquit. State v. Meggyesy, 90 Wn. App. 693, 700 n. 8, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds, State v. Recuenco, 154 Wn.2d 156 (2005). A defendant is not entitled to an instruction that informs the jury that it may acquit the defendant in the face of evidence proving she is guilty. State v. Bonisisio, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999).

While an unjust loss of liberty may result from conviction based on evidence that does not meet the reasonable doubt standard, the same result does not occur where the evidence does meet that standard. The argument, however, ignores that distinction. Instead, by broadly stating juror's duty is to protect individuals from the State, the defense suggests that jurors should acquit regardless of that standard or the evidence presented.

The court also properly excluded the argument because it was inflammatory. An argument that individuals needed protection from the State suggests the State abused its power in filing charges against the individual, regardless of the evidence supporting that

charge. Thus the argument is contrary to the court's instruction to rely on the evidence presented, to refrain from allowing sympathy, prejudice or personal preference to play a role in the juror's deliberations, and to act impartially, "to assure that all parties receive a fair trial." 1 CP 34, 36. Because the argument suggests the court's instructions should be ignored in that regard the limitation on counsel's argument was proper.

2. If The Court Erred In Restricting Defense Counsel's Arguments It Was Harmless.

The defendant argues that by restricting counsel's arguments the court violated her due process rights and right to counsel. She argues the error is a structural one which justifies automatic reversal. This argument was rejected in Frost, 160 Wn.2d at 781-782. In Frost the trial court restricted defense counsel's argument by requiring an election; either counsel could argue that his client was innocent or counsel could argue the affirmative defense of duress. Id. at 770. The court held that was error, but held the error was not structural. Applying a harmless error analysis, the court affirmed the conviction. Id. at 781-783. That decision was affirmed by the United States Supreme Court.

Glebe v. Frost, 135 S.Ct. 429, 190 L.Ed.2d 317 (2014). If the court erred by restricting counsel arguments, it is harmless.

Constitutional error is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Frost, 160 Wn.2d at 782. Here as in Frost the court's actions did not taint the evidence. The court may look to all of the evidence introduced, including testimony that the defendant and her children were seen wearing the victim's jewelry, and it was the defendant and not Ms. Spencer who suggested selling that jewelry. Defense counsel was not prevented from arguing from the evidence introduced at trial, or the relative credibility of the witnesses. Nor was he precluded from arguing that under the reasonable doubt standard the State had not met its burden of proof. Under the circumstances if the court did err in restricting defense counsel's comments it was harmless.

C. THE LANDLORD'S ANIMAL CRUELTY CONVICTION WAS NOT RELEVANT TO ANY FACT IN ISSUE AND WAS THEREFORE PROPRLY EXCLUDED.

The State moved in limine to prohibit the defense from eliciting evidence that Jodie Spencer was responsible for taking Ms. Brown's dog and leaving it on the highway, and that Ms. Spencer later pled guilty to animal cruelty in connection with that act. 8/31/15 RP 30. The defense argued the evidence was relevant to refute Ms.

Brown's testimony that the defendant took responsibility for stealing the dog. 8/31/15 RP 30-33. The court found the evidence was not relevant to whether the defendant knowingly trafficked Ms. Brown's stolen jewelry. It granted the State's motion. It further ordered that the State could not introduce any evidence that the defendant claimed responsibility for stealing the dog. 8/31/15 RP 30-34.

The defendant argues the evidence was relevant and therefore should have been admitted into evidence. She argues that the evidence was admissible because if Ms. Spencer was convicted of animal cruelty in connection with the theft of the dog, Ms. Spencer likely could have taken the jewelry and given it to the defendant to sell. BOA at 23. This in turn would support her theory of the case that she did not know the jewelry had been stolen. She argues the erroneous exclusion of the evidence deprived her of a right to present a defense.

The defendant did not raise this ground for admission of the Spencer animal cruelty conviction at trial. Generally the court will not review a claim of error that had not been raised in the trial court. State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). The court may consider an issue raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). To

establish an alleged error is manifest, the defendant must show how the error actually affected her rights at trial and thereby prejudiced her. State v. Kirkman, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007). When the facts necessary to adjudicate the claimed error are not in the record on appeal the defendant cannot show actual prejudice, and the error is therefore not manifest. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Here the defendant proposed introducing evidence of a certified copy of a judgment and sentence from Marysville Municipal Court to prove that Ms. Spencer was convicted of animal cruelty. 8/31/15 RP 30-31. That document is not in the record. Nor is there any evidence in the record that the conviction related to Ms. Spencer taking Ms. Brown's dog and disposing of it on the highway as counsel alleged. 8/31/15 RP 31. The Marysville Municipal Code § 10.04.380 entitled cruelty to animals and mistreatment adopts a number of state statutes by reference.⁵ There is nothing in the record to establish the statutory basis on which Ms. Spencer was convicted. Because the record is devoid of any evidence the conviction was related to the theft of the dog or that Ms. Spencer

⁵ A copy of the code section is attached to this brief.

acted alone in stealing the dog the error is not manifest, and the court should refuse to consider the defendant's claim of error.

The court should refuse to consider the issue as well because the defendant did not object to the exclusion of the evidence on the basis she now argues. A defendant does have a constitutional right to present a defense. State v. Aguirre, 168 Wn.2d 350, 363, 229 P.3d 669 (2010). That right is not unfettered; the evidence must be relevant and otherwise admissible and the defendant must lay a proper foundation. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993). Generally, a party waives a challenge to an evidentiary ruling if the grounds for admission on appeal were not argued in the trial court. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986). Because the right to present a defense is limited, and constitutional errors may be waived when they are not raised in the trial court, this procedural requirement should likewise apply to errors that are claimed to violate a defendant's right to present a defense. The court should refuse to consider the defendant's argument on the bases she now asserts.

If the court does consider the defendant's challenge to the exclusion of the Spencer animal cruelty evidence, it should find no error occurred. First if the animal cruelty conviction showed Ms. Spencer stole the dog, that evidence would not be relevant. The motive for the thefts involved in the animal cruelty and the trafficking in stolen property charges were completely different. The motive for the dog theft was arguably revenge; Ms. Spencer was angry at Ms. Brown for failing to inform Ms. Spencer about her daughter's hospitalization. The motive for the trafficking was to obtain money. Thus, Ms. Spencer's animal cruelty conviction does not lead to the conclusion that she also stole the jewelry and falsely claimed it was hers when she asked the defendant to pawn it.

The proposed evidence was also not relevant because it was not accompanied by other facts tying the dog theft to the jewelry trafficking. In that regard this case is similar to State v. Donald, 178 Wn. App. 250, 269, 316 P.3d 1081 (2013), review denied, 180 Wn.2d 1010 (2014). In Donald the defendant sought to introduce evidence of a co-defendant's prior criminal history to show that he acted alone in committing an assault and burglary. This court held the evidence was not relevant because that history contained no information about the number of participants in those

crimes. Like the proffered evidence in Donald, evidence Ms. Spencer was convicted of animal cruelty in connection with the theft of Ms. Brown's dog does not tend to exculpate the defendant absent some additional evidence that the defendant was not a participant in the crime or that she knew nothing about that theft. Since the bare evidence of the dog theft and animal cruelty conviction does not tend to make it more or less likely that the defendant knew the jewelry was stolen when the defendant pawned it, it is not relevant.

Nor did the court err when it found the evidence was not relevant for the purpose the defendant sought to introduce it at trial. Assuming the conviction could be tied to the theft of the dog, it would be only minimally relevant to refute evidence the defendant admitted responsibility for taking the dog. The conviction did not necessarily exclude the defendant as a participant in the crime or as someone who knew about that crime or that Sandra Brown's jewelry had been stolen. Whatever minimal relevance it had was eliminated when the court excluded the anticipated testimony concerning the defendant's confession to Sandra Brown. 8/31/15
RP 33.

Second the evidence was properly excluded for the reason that the defendant now argues on appeal because it would be improper character evidence. The defendant argues it is relevant as circumstantial evidence that Ms. Spencer stole the jewelry because that act was consistent with her prior conduct in stealing the dog. ER 404(b) excludes character evidence offered for this purpose. Donald, 178 Wn. App. at 257. A defendant's constitutional right to present a defense does not include the right to present propensity evidence that is barred by ER 404(b). Id. at 263-268. Thus, if the defendant had argued that the evidence was admissible to show that Ms. Spencer likely stole the jewelry the court would have properly excluded it under ER 404(b).

The defendant's argument that the evidence is similar to other suspect evidence should likewise be rejected. A defendant is permitted to introduce evidence that someone other than the defendant committed a charged offense when there is "such a proof of connection with the crime, such as a train of facts and circumstances as tend clearly to point out someone besides the accused as the guilty party." State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). The prored evidence must raise more than just suspicion that another person committed the crime. "Some

combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." State v. Franklin, 180 Wn.2d 371, 38-381, 325 P.3d 159 (2014). The foundation for other suspect evidence must show a clear nexus between the other person and the crime. State v. Strizheus, 163 Wn. App. 820, 830, 262 P.3d 100 (2011), review denied, 173 Wn.2d 1030 (2012). It must also show that the other person took a step indicating an intention to act on motive or opportunity to commit the crime. State v. Starbuck, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015), review denied, 185 Wn.2d 1008 (2016).

As the defendant acknowledges, the theft of the dog was completely different from trafficking the stolen jewelry. BOA at 23. Ms. Spencer's conviction allegedly in connection with the dog theft said nothing about the defendant's knowledge that the jewelry had been stolen. Pure speculation is the only link between the animal cruelty conviction and the defendant's knowledge that the jewelry was stolen. The evidence was not admissible under an "other suspects" theory.

Finally, the defendant argues that error in excluding the Spencer conviction was not harmless. The exclusion of evidence

that results in depriving a defendant of her right to present a defense is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). Assuming for the sake of argument that the trial court should have permitted the evidence, the error was harmless.

Error in excluding evidence was not harmless in a rape case where the court excluded all the evidence regarding the circumstances of the sexual intercourse which were offered to support the defendant's consent defense. Jones, 168 Wn.2d at 582. Unlike Jones the defendant here was permitted to introduce evidence that directly related to the circumstances of her defense. Both the defendant and her niece testified that Ms. Spencer gave the defendant Ms. Spencer's jewelry to pawn so Ms. Spencer could pay some bills and rent for her bar. When the defendant returned from pawing the jewelry she gave the money from the pawn to Ms. Spencer. 9/2/15 RP 304-306, 323. In contrast the State produced evidence that both the defendant and her children were seen wearing Ms. Brown's jewelry. When the defendant brought some jewelry into Ms. Spencer's room, Ms. Spencer did not agree to go along with the defendant's suggestion that they sell it to make

money. Instead Ms. Spencer told the defendant to put the jewelry back. 8/31/15 RP 112; 9/2/15 RP 271–282.

Thus the jury had a complete picture of each parties' evidence. Evidence of the Spencer conviction would have added little if anything to the defense. Since the jury had evidence supporting the defense, exclusion of the Spencer conviction, if error, was harmless.

D. THE CUMULATIVE ERROR DOCTRINE DOES NOT WARRANT REVERSAL.

The defendant next argues that she is entitled to a new trial under the cumulative error. The cumulative error doctrine applies when there have been several trial errors that standing alone may be insufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Where no error occurred, or where there are few errors that had little or no effect on the outcome of the trial, the doctrine does not justify a new trial. Id.

As discussed the court did not err by excluding cumulative and irrelevant evidence, and restricting the comments of counsel to the facts presented and the court instructions to the jury. She is not entitled to a new trial as a result of cumulative error.

E. THE COURT SHOULD GRANT APPELLATE COSTS.

The defendant has filed a motion to amend her opening brief to include a prayer to deny an award of appellate costs in the event that she does not substantially prevail on appeal. The State does not oppose that motion.

However, should the State substantially prevail on appeal the court should grant an award of costs. An award of costs is authorized by RCW 10.73.160. Such costs "shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." An award of costs becomes part of the judgment and sentence. RCW 10.73.160(3). Upon a showing of hardship the costs may be remitted by the trial court. RCW 10.73.160(4). Costs have not yet been calculated, but are anticipated to primarily cover the appellate defense costs, in addition to a small amount of costs incurred by the Snohomish County Prosecutor's Office.

In support of her request the defendant cites State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, review denied, 185 Wn.2d 1034(2016). This court held that it is appropriate for the court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an

appellant's brief. Id. at 390. While ability to pay is one factor the court considers it is not the only factor. Id. at 389.

The defendant completed her sentence in February 2016. 2 CP __ (sub. 62 Return of Commitment). She is 42 years old, a relatively young woman. 1 CP 27. Although defense counsel represented that the defendant was disabled, receiving social security disability income, there is no indication that she had a total disability which prevented her from earning some kind of income. The trial court was persuaded that the defendant had sufficient income to make a minimum of \$50 per month payment toward legal financial obligations commencing 60 days after her release from confinement. 10/22/15 RP 5, 10.

The defendant did not choose to be charged with a crime, and thus did not choose to incur the costs associated with trial. In contrast she did choose to appeal the conviction and incur the costs associated with an appeal. The legislature recognized that distinction when it required the trial court to consider the offender's ability to pay before imposing trial costs, but did not impose that requirement before the court exercised its discretion to impose appellate costs. RCW 10.01.160(3), RCW 10.73.160.

While a party may qualify for indigence status pursuant to statute that does not mean that they are constitutionally indigent and unable to contribute at all to the costs of an appeal. State v. Johnson, 179 Wn.2d 534, 315 P.3d 1090, cert denied, 135 S.Ct. 139 (2014). A party may not be able to afford the up-front costs of an appeal, but may be able to make payments at a later point to defray the costs of that appeal. If the party truly is constitutionally indigent, and demonstrates that payment of even a small monthly amount towards those costs causes her a significant hardship, those costs can ultimately be remitted. RCW 10.73.140(4). Until a defendant who qualifies for appointed counsel demonstrates constitutional indigence she should not be treated differently from a defendant who does not qualify for appointed counsel, and who must pay those costs associated with her appeal.

For policy reasons the court should also impose those costs unless constitutional indigence is demonstrated. Defendants who never face the possibility that they will have to pay for their appeal have no incentive to refrain from appealing a conviction where the only issues that could be raised are frivolous.

The defendant here did qualify under RCW 10.101.010 for appointment of counsel. She is relatively young and there is no

evidence in the record that she is so disabled that she could not find some kind of employment to earn funds to pay toward her appellate costs. At this point, should the State substantially prevail on appeal, the court should award appellate costs.

IV. CONCLUSION

For the foregoing reasons the State asks the court to affirm the conviction and impose appellate costs.

Respectfully submitted on August 18, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

must be kept in tightly covered fly-proof receptacles and disposed of at least once each week in a manner approved by the animal control officer. (Ord. 2404 § 1, 2002; Ord. 2013 § 34, 1995).

10.04.350 Pigsty.

No pigsty, piggery or other place where swine are kept shall be built or maintained on marshy ground or land subject to overflow, nor within 200 feet of any stream or other source of water supply, nor within 300 feet of any inhabited house or public meeting house on adjoining property. (Ord. 2404 § 1, 2002; Ord. 2013 § 35, 1995).

10.04.360 Swine – Garbage feeding.

When garbage is fed to pigs all unconsumed garbage shall be removed daily and disposed of by burial or incineration. No organic material furnishing feed for flies shall be allowed to accumulate on the premises. All garbage shall be handled and fed upon platforms of concrete or other impervious material. Unslaked lime, hypochlorite of lime, borax or mineral oil shall be used daily in sufficient quantities to prevent offensive odors and the breeding of flies. All garbage, offal and flesh fed to swine must be sterilized by cooking before feeding. (Ord. 2404 § 1, 2002; Ord. 2013 § 36, 1995).

10.04.370 Rat- and mice-free premises.

All premises where any of the livestock or fowl mentioned in this chapter are kept shall be kept free from rats and rat and mice harborages. (Ord. 2404 § 1, 2002; Ord. 2013 § 37, 1995).

10.04.380 Cruelty to animals and mistreatment – Statutes adopted by reference.

The following statutes, as now enacted or hereinafter amended, are adopted by reference as if fully set forth herein, including penalties; except that conduct constituting a felony, as determined by the prosecutor, is excluded:

RCW

Chapter 16.52 Prevention of Cruelty to Animals

Chapter 9.08 Animals, Crimes Relating to

46.61.660 Carrying Animals on Outside of Vehicle

9.91.170 Interfering with Dog Guide or Service Animal

9.91.175 Interfering with Search and Rescue Dog

(Ord. 3017 § 1 (Exh. A), 2016; Ord. 2404 § 1, 2002; Ord. 2013 § 38, 1995).

10.04.390 Dangerous dogs.

The following statutes regarding dangerous dogs are incorporated by reference:

RCW

16.08.070 Definitions

16.08.080 Registration

16.08.090 Restraint

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

THE STATE OF WASHINGTON,

Respondent,

v.

CHRISTINA E. BELLAH,

Appellant.

No. 74213-2-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 19th day of August, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Oliver Davis, Washington Appellate Project, oliver@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of August, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office