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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 33722-3-II

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RICKIE R. RILEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 04-1-03219-1

REPLY BRIEF

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STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

- A. THE COURT ERRED WHEN IT ALLOWED EVIDENCE OF DEFENDANT'S USE OF PRESCRIPTION MEDICATIONS.

That Mr. Riley took a prescription medication prior to the collision was not relevant to any element of vehicular assault. Here, the court allowed into evidence the testimony of Deputy Fleig regarding statements Mr. Riley made regarding ingesting prescription medication in the early morning hours of March 1, 2005. RP 91:7-92:8; 153:19-154:3.

Asa Louis, the State Toxicologist, testified that no narcotics were present in Mr. Riley's blood. Mr. Louis further acknowledged he was not able to relate what effect, if any, said medications might have had on Mr. Riley's ability to drive, RP 91:7-92:8, and the State acknowledged that neither Vicodin nor muscle relaxers were detected in Mr. Riley's blood. State's Brief, p. 11. As such, the trial court erred by admitting this evidence.

As set forth previously, ER 401 and ER 403 govern the admissibility of evidence. Initially, the evidence must be relevant. Here, Mr. Riley's medication use earlier in the day was not relevant as it had no tendency to make the existence of a fact, i.e., whether Mr. Riley was under the influence of marijuana at the time of his driving, "more probable or less probable than it would be without the evidence." ER 401.

Secondly, even if this court determines this evidence relevant, its probative value, which is minimal, is substantially outweighed by its prejudicial effect, which is great, particularly when the State's expert could not state what, if any, effect these drugs had on Mr. Riley's ability to drive.

Finally, the State's evidence did not establish that Mr. Riley had these substances in his system at the time of the charged offense. Admitting evidence of Mr. Riley's use of prescription medication allowed the jury to speculate as to how this affected his driving. Reviewing the respondent's argument in support of this evidence, jury speculation is exactly what

the State suggested. See State's Brief at p. 11-12.

Respectfully, given the nominal amount of THC in Mr. Riley's blood after the accident, the trial court abused its discretion by allowing the aforementioned evidence into trial as its prejudicial effect substantially outweighed any probative value.

B. THE COURT ERRED IN EXCLUDING THE EXCULPATORY STATEMENTS OF WILLIAM COLLISON.

Mr. Riley relies upon the arguments set forth in his opening brief regarding the admissibility of William Collison's statements.

C. THE TRIAL COURT ERRED WHEN IT ADMITTED THE TESTIMONY OF ASA LOUIS, THE FORENSIC TOXICOLOGIST.

Contrary to the State's argument, Mr. Riley moved, pre-trial, to exclude Asa Louis' testimony on a variety of bases, one of which was relevance. CP 20-27. The Court denied the motion. RP 91:7-92:8. Respectfully, and based upon the arguments set forth in appellant's opening brief, the trial court abused its discretion by allowing Asa Louis to testify.

D. INSUFFICIENT EVIDENCE EXISTED TO SUSTAIN THE JURY'S GUILTY VERDICT.

Mr. Riley relies upon the arguments set forth in his opening brief addressing this issue. The thrust of the arguments is that consistent testimony from the State and defense experts established that no connection existed between the nominal level of THC found in Mr. Riley's blood and impairment. This failure of proof for the element of being under the influence for vehicular assault is critical, and without any evidence to support such finding, the jury's verdict cannot stand.

When reasonable minds cannot differ when the evidence does not support proof of a necessary element, insufficient evidence exists to uphold the conviction. As such, this court should reverse the jury's verdict.

E. THE PROSECUTORS IMPROPER COMMENTS DENIED MR. RILEY A FAIR TRIAL.

Mr. Riley relies upon the arguments set forth in his opening brief regarding the prosecutor's improper comments.

Additionally, this court should also consider the recent case of State v. Boehning, 127 Wn.App. 511, 111 P.3d 899 (2005).

In Boehning, a sex offense case, the defendant was charged with three counts of first degree rape of a child, or, alternatively, three counts of first degree child molestation. H.R., who was eleven years old when she testified at trial, had resided with Boehning in foster care for about six months. When H.R. was later moved to a different foster home, she told her new foster parent Boehning had abused her. H.R. later told a caseworker and a detective that she had been abused. Boehning 127 W.App. at 514.

At trial, H.R. testified that Boehning had pulled her into a bathroom and removed her pants and underwear. She claimed Boehning removed his pants, kissed her with an open mouth, laid her down on the floor, and then rubbed his "dick" in a circle on her vagina. She claimed Boehning told her not to tell anyone because it was a "naughty thing." H.R. testified this event happened more than twice. Id. at 515.

H.R.'s later foster parent, Tomlinson, testified at trial that H.R. told her she was scared and that "something bad" happened to her in foster care before and that her foster father made her do "nasty things." The caseworker testified that H.R. disclosed she had been sexually abused. A detective also testified and stated H.R. disclosed abuse during his interview with her. Id. at 515-16.

Boehning testified in his own defense and denied any of these acts occurred. During questioning, the prosecutor asked Boehning if H.R. would have reason to be upset with him, and Boehning could provide no reason. The prosecutor also asked Boehning if H.R. had made this all up. Boehning said it was possible. Id. at 516-17.

The court ultimately reversed the conviction based on the prosecutor's improper questioning and argument. Id. at 525. The court recognized, however, that when the improper comments were eliminated from consideration, the testimony of H.R., the foster parent, caseworker and detective were insufficient to establish proof beyond a reasonable doubt.

The court noted that the jury's verdict depended almost entirely upon H.R.'s credibility, who was eleven at the time of trial, and the defendant. There were no witnesses. There was no physical evidence to corroborate H.R.'s testimony. The foster parent, caseworker and detective testified only that H.R. had disclosed the fact of abuse. Further, Boehning could not provide any motive for H.R. to make up a story when he was directly asked by the prosecutor. The prosecutor argued, in closing, that H.R. had no motivation to fabricate the story. Upon considering all of the aforementioned, the court concluded as follows:

[T]he evidence arguably supported either party's version of events. We cannot conclude that a rational jury probably would have returned the same verdict without the prosecutor's improper remarks.

Boehning at 523.

If the evidence in Boehning was insufficient to establish proof beyond a reasonable doubt without the prosecutor's improper comments, then the evidence in Mr. Riley's case, which is significantly, cannot support a finding of proof beyond a reasonable doubt in any way.

Because it cannot be stated beyond a reasonable doubt that Mr. Riley's conviction would stand absent the prosecution's improper argument, reversal is required.

F. THE DEFENDANT IS ENTITLED TO RELIEF DUE TO THE CUMULATIVE ERROR.

The State's response to Mr. Riley's request for relief resulting from the cumulative error appears to be that Mr. Riley has failed to allege a sufficient number of significant errors. When reviewing the errors in the case, however, their significance, given the weakness of the State's evidence, denied Mr. Riley a fair trial.

As set forth in Mr. Riley's opening brief, reversal may be required due to the cumulative effect of trial court errors, even if each error standing alone would otherwise be considered harmless. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). Error may take one of two forms--constitutional and non-constitutional error. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985),

cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

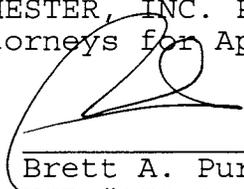
Here, all of the trial court errors unfairly prejudiced Mr. Riley's right to a fair trial. In addition to preventing Mr. Riley the opportunity to present alibi testimony, drug evidence was allowed into trial that was irrelevant, and state witnesses were allowed to testify on matters collateral to the sole issue in the case: whether Mr. Riley was under the influence of a drug, to-wit: marijuana, at the time of the offense charged. Absent the errors set forth above, Mr. Riley may have been acquitted. Accordingly, and based upon the aforementioned, the cumulative errors denied Mr. Riley a fair trial.

CONCLUSION

Based upon the above, Mr. Riley respectfully requests that this court reverse the jury's verdict with directions to the trial court to dismiss, or, in the alternative, order a new trial for Mr. Riley.

RESPECTFULLY SUBMITTED this 2nd day of August, 2006.

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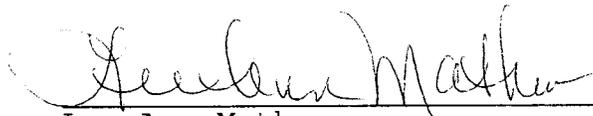
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 2nd day
of ~~July~~ ^{August}, 2006.



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