

COA No. 33950-1

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

RECEIVED
COURT OF APPEALS
DIVISION TWO
SEP 11 11:11:57

STATE OF WASHINGTON,

Respondent,

v.

TONY RAY PIERCE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Katherine M. Stolz

BY _____
COURT CLERK
STATE OF WASHINGTON
DO NOTED 09/11/13 3:32

FILED
COURT OF APPEALS

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

 1. Procedural history. 2

 2. Trial testimony. 3

D. ARGUMENT 8

 1. THE TRIAL COURT VIOLATED MR. PIERCE’S RIGHT TO PRESENT A DEFENSE, AND IN THE PROCESS COMMENTED ON THE EVIDENCE. 8

 a. Mr. Pierce sought to introduce evidence supporting his defense that Ms. Rincon gave him the jewelry in exchange for drugs8

 b. The trial court excluded all evidence having anything to do with drugs. 9

 c. During Mr. Pierce’s testimony, the trial court struck his statements that he had received the jewelry in question from Ms. Rincon in exchange for drugs, and ordered any further such evidence excluded. 10

 d. The trial court excluded relevant, admissible evidence and violated Mr. Pierce’s right to present a defense. 12

 e. The trial court also commented on the evidence when it erroneously told the jury that there had been no evidence of use of drugs by anyone in the case. 21

 2. MR. PIERCE’S TRAFFICKING CONVICTIONS SHOULD BE REVERSED UNDER THE CUMULATIVE ERROR DOCTRINE. 26

E. CONCLUSION 28

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992).	26,27
<u>State v. Atsbeha</u> , 96 Wn. App. 654, 981 P.2d 883 (1999)	17,19
<u>State v. Bebb</u> , 44 Wn. App. 803, 723 P.2d 512 (1986)	14
<u>State v. Bogner</u> , 62 Wn.2d 247, 382 P.2d 254 (1963).	25
<u>State v. Bradbury</u> , 38 Wn. App. 367, 685 P.2d 623 (1984)	27
<u>State v. Castellanos</u> , 132 Wn.2d 94, 935 P.2d 1353 (1997)	14
<u>State v. Cheatham</u> , 150 Wn.2d 626; 81 P.3d 830 (2003).	14,15
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001)	10
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	27
<u>State v. Crotts</u> , 22 Wash. 245, 60 P. 403 (1900).	24
<u>State v. Curry</u> , 62 Wn. App. 676, 814 P.2d 1252 (1991)	27
<u>State v. Dietrich</u> , 75 Wn.2d 676, 453 P.2d 654 (1969)	18
<u>State v. Ellis</u> , 136 Wn.2d 498, 963 P.2d 843 (1998).	14
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).	13
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	21
<u>State v. Hansen</u> , 46 Wn. App. 292, 730 P.2d 706 (1986)	22
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).	15,19
<u>State v. Jackman</u> , 2006 Wash. LEXIS 346 (April 13, 2006) . .	21,26
<u>State v. Jones</u> , 126 Wn. App. 136, 107 P.3d 755 (2005)	13
<u>State v. Lane</u> , 125 Wn.2d 825;	

889 P.2d 929 (1995)	21,22,23,24,25,26
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996)	17,19
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).	22
<u>State v. Noel</u> , 51 Wn. App. 436, 753 P.2d 1017, <u>review denied</u> , 111 Wn.2d 1003 (1988).	27
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992)	18
<u>State v. R.H.S.</u> , 94 Wn. App. 844, 974 P.2d 1253 (1999)	18,19,20
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995)	26,27
<u>State v. Stephens</u> , 7 Wn. App. 569, 500 P.2d 1262 (1972), <u>aff'd in part, rev'd in part</u> , 83 Wn.2d 485, 519 P.2d 249 (1974).	25
<u>State v. Trickel</u> , 16 Wn. App. 18, 553 P.2d 139 (1976), <u>review denied</u> , 88 Wn.2d 1004 (1977)	23

UNITED STATES SUPREME COURT CASES

<u>United States v. Agurs</u> , 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).	20
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)	17
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).	16
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	13
<u>Miranda v. Arizona</u> , 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966)	4
<u>Pennsylvania v. Ritchie</u> , 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)	17
<u>United Smith v. Phillips</u> , 455 U.S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982)	16

<u>Taylor v. Illinois</u> , 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)	17
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)	16,17
<u>UNITED STATES COURT OF APPEALS CASES</u>	
<u>Jones v. Stinson</u> , 229 F.3d 112 (2d Cir. 2000).	20
<u>CASES FROM OTHER STATE JURISDICTIONS</u>	
<u>State v. Blanco</u> , 896 So. 2d 900 (Fla. App. 2005)	10
<u>STATUTES AND COURT RULES</u>	
RCW 9A.82.050(2)	2
RCW 9A.56.140(1)	2
RCW 9A.56.160(1)(a).	2
RCW 9A.82.010(19)	13,24
ER 401	14
ER 402	15
ER 403	15
RAP 2.5(a).	21
<u>CONSTITUTIONAL PROVISIONS</u>	
Sixth Amendment to the United States Constitution	13
Fourteenth Amendment to the United States Constitution	13
Washington Constitution, Article IV, § 16	21,24
Washington Const. art. 1, § 22	19

A. ASSIGNMENTS OF ERROR

1. In Mr. Pierce's trial on charges of trafficking in stolen jewelry, the trial court excluded relevant, admissible evidence and violated Mr. Pierce's right to present a defense, requiring reversal.

2. The trial court commented on the evidence, requiring reversal.

3. Cumulative error denied Mr. Pierce a fair trial, requiring reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in excluding relevant, admissible evidence regarding Mr. Pierce's relationship with Ms. Rincon, with whom he used drugs and from whom he had received the allegedly stolen jewelry in exchange for drugs.

2. Whether the trial court's evidentiary ruling violated Mr. Pierce's right to present a defense where the proffered evidence, if believed, would have defeated the State's proof that the jewelry was stolen.

3. Whether the trial court commented on the evidence when it erroneously told the jury that there had been no evidence of drugs in the case.

4. Whether the above constitutional errors warrant reversal individually or under the cumulative error standard.

C. STATEMENT OF THE CASE

1. Procedural history. Tony Pierce was charged with two counts of trafficking in stolen property in the first degree based on allegations that he knowingly trafficked in jewelry stolen from Rowena Rincon on January 28 and January 29, 2005, and one count possession of stolen property in the second degree, based on allegations that he possessed jewelry of a value in excess of \$250 that had been stolen from Rowena Rincon. CP 1-2, see RCW 9A.82.050(2); RCW 9A.56.140(1); RCW 9A.56.160(1)(a).

According to the affidavit of probable cause, Ms. Rincon alleged that her home was burglarized on January 27, 2005, and she suspected an "old acquaintance, Pierce." CP 3. Rincon also stated that she had not actually seen Mr. Pierce in years. A review of local pawn shop records showed that Mr. Pierce had pawned jewelry on January 28 and 29. When interrogated, Pierce admitted he had pawned jewelry, but he stated that it was his, and that he had possessed it for a long time. Some earrings were also found on Mr. Pierce's person, which he also stated had been his for a long time. Ms. Rincon identified the jewelry and claimed it was hers. CP 3.

During his jury trial, Mr. Pierce sought to question prosecution witness Rincon about her prior relationship with Mr. Pierce. Mr. Pierce stated that he and Ms. Rincon had an ongoing relationship in which Ms. Rincon would occasionally give Mr. Pierce jewelry in exchange for drugs, and that this was how he obtained her jewelry, which he then pawned. However, the trial court precluded the defense from inquiring into the topic of drugs during trial, reasoning that to raise this matter would be to smear the “victim,” Ms. Rincon, who the prosecutor had described as having been free of drugs for several years. 1RP at 4-6, 11, 30-33, 51-54¹; see Part D., infra.

The jury found Mr. Pierce guilty of the trafficking counts and not guilty on the possession count. CP 33-35. He was given standard range sentences of 20 months on the trafficking counts, run concurrently. CP 56-67. He appeals. CP 55.

2. Trial testimony. The manager of Topkick Jewelry and Loan, a pawn shop in Tacoma, Washington, testified that Mr. Pierce pawned items of jewelry at the shop on January 28 and January 29, 2005. Mr. Pierce produced his identification for purposes of the sale

¹The verbatim report of proceedings is contained in two volumes of transcript identified as “1RP” and “2RP,” followed by the appropriate page reference(s).

and indicated that he owned the jewelry. 1RP at 63-78; State's exhibits 1-4.

Topkick Jewelry and Loan had provided a routine report of pawned items to the Pierce County Sheriff's Office, and following its receipt, Deputy Stephens met Ms. Rincon at the pawn shop, where she identified the jewelry pawned by Mr. Pierce as the jewelry she alleged had been taken from her home. 1RP at 79-82.

Based on Ms. Rincon's claim that Mr. Pierce had taken the jewelry, Deputy Stephens contacted Mr. Pierce at his residence. As the deputy approached Mr. Pierce in his yard, Mr. Pierce said, "You looking for me? I didn't steal anything." 1RP at 82. When questioned following Miranda,² Mr. Pierce denied that he had pawned any items. The deputy arrested Mr. Pierce for possession of stolen property, following which he admitted that he had pawned some items of jewelry he owned, a couple of days previously. 1RP at 82-83. In a search incident to arrest, a pair of earrings were found on Mr. Pierce's person, which he stated had been in his possession for a long time. 1RP at 83; State's exhibit 5.

Rowena Rincon testified that Mr. Pierce came to her house and knocked on the door on the 25th or 26th of January. She stated

²Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966); see 1RP 16-17, 25 (CrR 3.5 hearing).

she did not answer the door because Mr. Pierce “didn’t have any business being there.” 1RP at 89-91. He allegedly returned later that day and knocked again. 1RP at 91-92. The next day, Ms. Rincon returned from work at around one or two p.m. in the afternoon, and found that her front door had been kicked in.³ 1RP at 92.

Ms. Rincon claimed that she discovered some jewelry missing from jewelry boxes in her bedroom. 1RP at 92. She later identified the jewelry from the Topkick shop and the earrings found on Mr. Pierce’s person as the jewelry she said had been stolen. 1RP at 93-98, 100.

In cross-examination, Ms. Rincon indicated that Mr. Pierce had lived in her neighborhood for some years. 1RP at 104. She stated that Mr. Pierce had also come to her house the “the same day or the day before,” but that she was not at home; and she asserted that her fiancé, Kevin Johnson, would not have let Mr. Pierce into the house. 1RP at 105. Ms. Rincon testified that in the 10 years that Mr. Pierce and she had lived in the area, she had seen him socially only at a neighbor’s house. 1RP at 105. She said she could not

³Sean Gumm, Ms. Rincon’s son, stated that some time earlier in 2005, he was at home when he heard the house door swing open loudly and hit the wall. He believed at the time that it was his mother coming home. 1RP at 115-17.

recall the last time she had ever had a conversation with Mr. Pierce. 1RP at 106.⁴

State's witness Kevin Johnson stated that Mr. Pierce had come by the house where Johnson lived with Ms. Rincon, on a date "earlier his year." 1RP at 127-28. Mr. Pierce needed to search the house for some gloves he had left there, in the garage or the front room. Mr. Johnson let Mr. Pierce look in the garage, but the gloves were not there. 1RP at 128. He did not allow Mr. Pierce to enter any other part of the house. 1RP at 136. Mr. Pierce returned to the house about a half hour later, and let Mr. Johnson know he had found the gloves at another house. 1RP at 128-29. Some time, or day, thereafter (the witness was unclear), Ms. Rincon told Mr. Johnson that she was upset because, she said, jewelry had been taken from her bedroom. 1RP at 138-39.

Defense witness Cary Bermudez testified regarding Ms. Rincon's interaction with Mr. Pierce. Mr. Bermudez rented a room of his house to one Doris Slaughter, and Rincon and Pierce were apparently mutual friends of Slaughter's. 2RP at 143-46. Mr. Bermudez stated that both Rincon and the defendant visited Slaughter at the same time and had done so recently. The witness

⁴The defense reserved the right to recall Ms. Rincon as a witness. 1RP at 111.

specifically recalled them visiting in June, July and September of the current year, and he believed they had visited Ms. Slaughter at least four times. Following one visit, Ms. Rincon gave Mr. Pierce a ride somewhere in her car. 2RP at 144-46, 150. During these visits Rincon and Pierce each stayed from a half hour to an hour, and the visits usually occurred in the evening. 2RP at 150-51.

Ron Moores, the owner of CJ Bail Bonds in Tacoma, stated that he encountered Mr. Pierce, an acquaintance of his, on the morning of January 27, 2005, outside the Arches Restaurant in Tacoma. 2RP at 152-54. Mr. Moore gave Mr. Pierce a ride into downtown, arriving at the bail bonds office at about 9 a.m. Mr. Pierce made a long distance call to Olympia at exactly 9:56 a.m. 2RP at 154-56; Defense exhibit 10.

In his testimony, Mr. Pierce testified that he had not gone to Ms. Rincon's home on January 27, much less to look for a pair of gloves, and he had never met Kevin Johnson. 1RP at 173. On that day, he actually spent the morning at the bail bonds office owned by Mr. Moores. 2RP at 174-75. Mr. Pierce's testimony is further discussed infra.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. PIERCE'S RIGHT TO PRESENT A DEFENSE, AND IN THE PROCESS COMMENTED ON THE EVIDENCE.

a. Mr. Pierce sought to introduce evidence supporting his defense theory that Ms. Rincon gave him the jewelry in exchange for drugs. Prior to trial, defense counsel made an offer of proof regarding Mr. Pierce's relationship with Ms. Rincon. Ms. Rincon had stated in her defense interview that she had a general relationship with Mr. Pierce five years previously, but that she had not had any contact with the defendant since then. 1RP at 4-5. However, counsel noted that Mr. Pierce and defense witnesses would testify that the relationship between Mr. Pierce and Ms. Rincon was in fact a continuing one. 1RP at 5. Counsel indicated he needed to lay a foundation for this evidence by questioning State's witness Rincon regarding the nature of relationship with Mr. Pierce. 1RP at 5-6. Critically, counsel indicated that it would be Mr. Pierce's testimony that Ms. Rincon had traded the jewelry in question to Mr. Pierce in exchange for drugs. 1RP at 11.

The prosecution argued that Ms. Rincon had a previous drug habit that she had moved away from, without ever being charged, and that she then went to community college. 1RP at 30. The

prosecution moved in limine to exclude any mention of Ms. Rincon's drug history. 1RP at 30.

In response, the defense noted that Ms. Rincon had admitted in the interview to using drugs with Mr. Pierce in the past on multiple occasions, and that she had indeed contended that she had given up drugs, but that Mr. Pierce's defense was that the relationship had continued, and that he had received the jewelry in question from Ms. Rincon in exchange for drugs. 1RP at 31. In addition, counsel argued that Ms. Rincon was alleging theft of the jewelry in order to gain return of the items that she had given to the defendant. 1RP at 32. Counsel argued that the jury was entitled to hear evidence regarding Ms. Rincon's relationship with Mr. Pierce, and its particular nature, in support of the defense theory. 1RP at 32.

The prosecution responded that Ms. Rincon had only admitted to being in a house with Mr. Pierce at some past time, where he was using drugs, and then asserted that Ms. Rincon "has no drug history." 1RP at 32-33.

b. The trial court excluded all evidence having anything to do with drugs. The trial court ruled that any inquiry into drugs would be "smearing the victim," and ordered defense counsel not to inquire about the topic at all. 1RP at 32-33. The trial court later

repeated its ruling precluding inquiry into drug use by either Mr. Rincon or Mr. Pierce, adding that such evidence would also be prejudicial to the defendant. Defense counsel confirmed with the court that he had made an adequate record of his objection to the court's ruling. 1RP 51-54. During questioning of Ms. Rincon, defense counsel obeyed the court's pre-trial order.

c. During Mr. Pierce's testimony, the trial court struck his statements that he had received the jewelry in question from Ms. Rincon in exchange for drugs, and ordered any further such evidence excluded. Tony Pierce testified in his defense. He noted that he had known Rowena Rincon for three or four years. Their relationship had become sexual about two years previously. 2RP at 161-63. The relationship also involved, among other things, drinking alcohol, and "partying together."⁵ 2RP at 161-62.

During the relationship, Ms. Rincon and Mr. Pierce would exchange jewelry for drugs. 2RP at 164. Ms. Rincon would give Mr. Pierce jewelry in exchange for "dope." 2RP at 164. Over time, Mr.

⁵In the parlance of the drug world, the term "party" is understood to mean the use of drugs. See State v. Clark, 143 Wn.2d 731, 740, 24 P.3d 1006 (2001) ("they returned to the . . . house next door and partied the rest of the night using alcohol and drugs"); State v. Blanco, 896 So. 2d 900, 901 (Fla. App. 2005) ("The [undercover] officer indicated that he liked to "party," and explained to the defendant that he meant the use of cocaine").

Pierce saved a bunch of jewelry that Ms. Rincon had given him, and on January 28th and 29th he had pawned some of that jewelry. 2RP at 164-65.

Mr. Pierce was asked by his counsel to identify the pawned jewelry that Ms. Rincon had traded to him. 2RP at 167. He began identifying a gold chain and a watch, which he stated, "She traded for dope." 2RP at 167-68. There was no objection by the prosecution. However, the trial court called for a side bar, following which the court instructed the jury as follows:

At this time the Court will give a verbal instruction to the jury. There is no use of drugs by anyone in this case.

2RP at 168. Mr. Pierce then continued to identify other pieces of jewelry that he had received from Ms. Rincon in "trading activity." 2RP at 169-70.

During a subsequent recess, the trial court addressed Mr. Pierce as follows:

THE COURT: Mr. Pierce, you have violated my instructions three times, sir. If you violate them again, this Court is going to entertain sanctions of contempt against you, and may declare a mistrial.

THE DEFENDANT: But it's true. Sorry.

2RP 171. Before the jury returned, the court again warned Mr. Pierce about raising his defense theory, and also stated that it would

later be giving the jury another instruction that it was to ignore any testimony regarding drug use. 2RP at 171.⁶

d. The trial court excluded relevant, admissible evidence and violated Mr. Pierce's right to present a defense. Mr. Pierce tried to introduce evidence that he and Ms. Rincon had an ongoing relationship with each other that involved drug use and the related trading of items, including jewelry, for drugs. This evidence, which in the course of the trial was precluded, excluded, and then denigrated by the trial court, was relevant and admissible to show that Mr. Pierce was in rightful possession of the jewelry he pawned. If believed, it would have defeated the State's allegation that Mr. Pierce knowingly trafficked in stolen property.

The trial court's exclusion of the evidence was an abuse of discretion in an evidentiary ruling, and a plain violation of Mr. Pierce's due process right to present a defense to the charges against him.

⁶Although no further instruction to the jury on this topic appears in the record, at sentencing, the court told Mr. Pierce that it was giving him the high end of the standard range for his offenses because he had violated the court's in limine rulings regarding the drug defense, and therefore his "remorse was a little too late." 1RP at 236; see Part D., infra.

In order to support a conviction for the offense of first degree trafficking in stolen property, the State must prove that the property was stolen. Pursuant to RCW 9A.82.010(19), "traffic" means

to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

(Emphasis added.) RCW 9A.82.010(19). The State must also prove that the defendant knew the property was stolen. Pursuant to RCW 9A.82.050, first degree trafficking is defined as follows:

A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

(Emphasis added.) RCW 9A.82.050(2). Both of these elements were required, consistent with the Sixth and Fourteenth Amendments to the United States Constitution, to be proved to Mr. Perce's jury beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Jones, 126 Wn. App. 136, 144, 148, 107 P.3d 755 (2005); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The evidence offered by Mr. Perce was relevant to these elements. It is true that the admissibility of evidence generally is

within the sound discretion of the trial court. State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). The reviewing court will not reverse a trial court's decision regarding the admissibility of evidence absent an abuse of discretion, which "occurs only when no reasonable person would take the view adopted by the trial court." State v. Ellis, 136 Wn.2d at 504 (quoting State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)).

Here, however, the trial court's exclusion of Mr. Pierce's evidence was an abuse of discretion. Evidence is relevant if it has "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." (Emphasis added.) ER 401; State v. Cheatham, 150 Wn.2d 626, 645; 81 P.3d 830 (2003). Only "minimal logical relevancy" is required for evidence to meet ER 401. State v. Bebb, 44 Wn. App. 803, 814, 723 P.2d 512 (1986). In the present case, if the jewelry in question was not stolen or Mr. Pierce did not know it to be stolen, he was not guilty of trafficking. RCW 9A.82.010(19); RCW 9A.82.050(2). Therefore his proffered evidence that Ms. Rincon had traded her jewelry to Mr. Pierce was relevant. ER 401.

The fact that the jewelry was exchanged for drugs is evidence that, in conjunction with the defendant's proffered testimony regarding his ongoing relationship with Ms. Rincon involving drug use, tends to make it more probable that his claim of ownership was truthful, compared to a bare, unsupported claim by Mr. Pierce that he had been given the jewelry. All of this evidence was relevant to prove that the jewelry was not stolen. With some exceptions,⁷ none of which here apply, "all relevant evidence is admissible." ER 402; Cheatham, 150 Wn.2d at 644-45. Thus the trial court's error consisted of both preventing defense counsel from asking Ms. Rincon about the true nature of her relationship with Mr. Pierce, and in preventing Mr. Pierce from testifying about that relationship and the manner in which he was given the jewelry in question. 1RP 32-33, 51-54, 2RP 168-71.

The trial court erred because exclusion of relevant evidence that is not otherwise inadmissible is error. The trial court has no discretion to disallow evidence that is relevant and admissible. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

⁷See ER 402 (relevant evidence excluded if prohibited by rule, statute, constitution, etc.); ER 403 (relevant evidence excluded if its probative value is substantially outweighed by unfair prejudice, etc.).

Furthermore, because the trial court's erroneous exclusion of admissible evidence regarding Ms. Rincon's relationship with Mr. Pierce, and the manner in which Mr. Pierce received the jewelry in question from her, was critical to his effort to defeat an element or elements of the charges, the court violated Mr. Pierce's due process right to present a defense. As a general matter, due process was violated because the trial court's ruling precluding Mr. Pierce from defending against the charges rendered his trial fundamentally unfair, and the "touchstone of due process . . . is the fairness" of the proceeding. United Smith v. Phillips, 455 U.S. 209, 219, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982)).

First, specifically, as the criminal defendant, Mr. Pierce had a constitutional right to cross-examine prosecution witnesses, including Ms. Rincon. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). This right guaranteed his ability to question Ms. Rincon and elicit relevant admissible evidence to support his defense theory, which the trial court specifically precluded. 1RP 32-33, 51-54.

Second, Mr. Pierce had a right to present his own evidence to support his defense. A defendant has an absolute right to present admissible evidence in his defense. Washington v. Texas, 388 U.S.

14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); see also Taylor v. Illinois, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The Washington Supreme Court follows this rule. See State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). As the Court observed in Maupin, "[t]he right to offer the testimony of witnesses . . . is in plain terms the right to present a defense This right is a fundamental element of due process of law." Maupin, 128 Wn.2d at 924 (quoting Washington v. Texas, 388 U.S. at 19). The trial court struck Mr. Pierce's efforts to testify in his defense, ordered him to refrain from further attempting to offer his evidence, and, remarkably, even instructed the jury that what evidence he had offered on the topic simply did not exist. 2RP 168-71.

For purposes of the right to present a defense, if evidence that is admissible is wrongfully excluded, the constitutional question is whether the proffered testimony was material and relevant to the outcome of the case. State v. Atsbeha, 96 Wn. App. 654, 660, 981 P.2d 883 (1999). The criminal defendant has "the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("the right of an accused in a criminal

trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations").

Importantly, the question whether the reviewing court finds the evidence credible is not an issue, because it is the function and province of the jury to weigh the evidence, determine the credibility of the witnesses and decide disputed questions of fact. State v. Dietrich, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969). A defendant in a criminal case has a constitutional right to present relevant evidence establishing his version of the facts so that the trier of fact can decide where the truth lies. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

For example, in State v. R.H.S., 94 Wn. App. 844, 974 P.2d 1253 (1999), the defendant argued that his conviction for second-degree assault should be reversed because the trial court erroneously excluded his testimony asserting his absence of the knowledge required for a finding of recklessness. The reviewing court agreed and overturned his conviction because the defendant's testimony that he had no knowledge that punching a person in the face could inflict substantial bodily harm, however self-serving, was material to the question of recklessness. State v. R.H.S., 94 Wn. App. at 849. As the Court stated,

While it is possible that RHS's testimony is "so incredible that its exclusion is harmless error," we are not the arbiters of credibility. We must take the testimony to be true and evaluate its likely effect on the outcome of the trial. Because the testimony, if believed, would establish a defense to second degree assault, we are unable to declare that the error is harmless beyond a reasonable doubt.

(Footnotes omitted.) R.H.S., 94 Wn. App. at 848-49 (citing State v. Maupin, 128 Wn.2d at 929-30). Because the excluded evidence in this case would, if believed, defeat the State's charges of trafficking, it was material and indeed highly probative as to a necessary element of the State's proof, and its exclusion was error. See also State v. Atsbeha, 142 Wn.2d at 926 (excluding evidence of diminished capacity, which went directly to the question of intent, violated the right to present a defense).

Although the trial court in this case deemed the evidence of the drug relationship between Mr. Pierce and Ms. Rincon to be prejudicial, any State's interest in protecting Ms. Rincon cannot outweigh Mr. Pierce's right to defend. Where evidence has high probative value to a defense, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." State v. Hudlow, 99 Wn.2d at 16.

Additionally, as the constitutional question as also been formulated by the federal courts, the erroneous exclusion of evidence under state law violates a defendant's constitutional right to present a defense, and is not harmless, where the omitted evidence, evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist. Jones v. Stinson, 229 F.3d 112, 120 (2d Cir. 2000). The defendant's right to present a defense is violated for purposes of federal review where a state court's evidentiary ruling unjustifiably prevented the petitioner from presenting evidence of such consequence that its exclusion eliminated a reasonable doubt that would otherwise have been suggested by the record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Here, the evidence showing how Mr. Pierce came by the jewelry created a dispositive issue as to whether it was "stolen" and its exclusion violated his right to present a defense. The exclusion of this evidence eliminated a reasonable doubt as to the charges of trafficking that otherwise would have been suggested by the record. Jones v. Stinson, 229 F.3d at 120; United States v. Agurs, 427 U.S. at 112.

For all of these reasons, because Mr. Pierce's proffered evidence, if believed, would have established a defense to first degree trafficking in stolen property, the trial court's error violated his right to present a defense, was not harmless, and reversal is required. R.H.S., at 848-49 (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)).

e. The trial court also commented on the evidence when it erroneously told the jury that there had been no evidence of use of drugs by anyone in the case. In the process of violating Mr. Pierce's right to present a defense, the trial court committed additional constitutional error, under the State Constitution, by impermissibly commenting on the evidence when enforcing its erroneous in limine ruling.

Article IV, § 16 of the Washington Constitution orders that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon[.]" State v. Jackman, 2006 Wash. LEXIS 346, *8, n. 6) (April 13, 2006); State v. Lane, 125 Wn.2d 825, 838; 889 P.2d 929 (1995). Where a judge violates this rule, it is an error of constitutional magnitude which may properly be raised for the first time on appeal. State v. Jackman, 2006 Wash. LEXIS 346, *8-9 (judicial comment in jury instruction); see RAP 2.5(a). To meet this

standard of manifest error, Mr. Pierce must show how, in the context of the trial, the alleged error actually affected his case; it is this showing of actual prejudice that makes the error “manifest”, allowing appellate review. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).⁸

The court in Mr. Pierce’s trial commented on the evidence. A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case, or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d at 838; State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). Thus in State v. Lane, the Supreme Court held that the trial court commented on the evidence where a significant issue was whether a jailhouse informant had been released early because of his cooperation with police, or for a reason causally unrelated to that cooperation and therefore not impeaching of his credibility. The trial court gave an oral instruction to the jury that stated that the court “accepted” the State’s version of events, i.e., that the

⁸Here, if there was constitutional error, it had identifiable consequences because the court told the jury to entirely disregard the accused’s evidence that he had a drug relationship with Ms. Rincon, out of which relationship he had properly gained ownership of the jewelry claimed to be stolen. This evidence is inconsistent with trafficking in stolen property in the first degree. The error was manifest. State v. McFarland, 127 Wn.2d at 333.

informant/witness had not received his early release in exchange for his cooperation. State v. Lane, 125 Wn.2d at 839. The Lane Court stated that

By making the statement regarding Blake's treatment, the trial judge charged the jury with a fact and expressly conveyed his opinion regarding the evidence. Consequently, we agree with the Court of Appeals that the trial court's instruction regarding Blake's early release constituted an impermissible comment on the evidence.

State v. Lane, 125 Wn.2d at 839. Under this standard, the judge in Mr. Pierce's case commented on the evidence when she sua sponte instructed the jury that there was no evidence of drug use in the case. 2RP 168. Mr. Pierce had in fact testified that his relationship with Ms. Rincon involved mutual drug use, an important fact that supported his explanation as to how he came by the jewelry. 2RP 161-62. This comment by the judge was the court's evaluation of fact that there had been no drug use by Ms. Rincon or a party, and it was clearly a comment on the evidence. Indeed, it has been said that the touchstone for whether the court has commented on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. State v. Lane, 125 Wn.2d at 838 (citing State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977)).

In this case, the court's rejection of any truth value in Mr. Pierce's previous testimony plainly was a comment on the evidence violated article IV, § 16.

This violation had identifiable consequences, and was not an obscure error. The jury was charged with determining, inter alia, if the property in question was stolen. RCW 9A.82.010(19). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. Hansen, 46 Wn. App. at 300. The Supreme Court has explained:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). Here, the trial court's sua sponte announcement that there was no evidence of drug use is a comment on the evidence that our Supreme Court has stated is highly likely to influence a jury.

The error warrants reversal. Washington cases "demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. art. 4, § 16." State v. Lane, 125 Wn.2d at 838. Once it has been demonstrated that a trial judge's conduct or remarks

constituted a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Bogner, 62 Wn.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, "the burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment." State v. Lane, 125 Wn.2d at 838-39 (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974)).

For example, the Court in Lane reversed because the trial court commented on a matter of fact that went directly to the credibility of a witness's testimony. State v. Lane, 125 Wn.2d at 839. Here, the trial court's comment was on an even more central matter. The court commented on the evidence so as to give the jury its own opinion of, and instructed the jury to discredit, any evidence of drug use. In doing so the court effectively discredited the underpinnings of Mr. Pierce's defense, that the jewelry he pawned was obtained lawfully by him in the course of his relationship with Ms. Rincon in which they "partied" together and she provided him with property in exchange for drugs.

The burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted, which it plainly does not in this case. State v. Jackman, 2006 Wash. LEXIS 346, *9. It does not affirmatively appear in the record of this case that no prejudice could have resulted from the comment. State v. Lane, 125 Wn.2d at 838-39. The trial court's comment openly denigrated any effort by Mr. Pierce to put forth his defense on the essential element requiring that the property be stolen. This Court should reverse Mr. Pierce's convictions for trafficking in stolen property.

**2. MR. PIERCE'S TRAFFICKING
CONVICTIONS SHOULD BE
REVERSED UNDER THE CUMULATIVE
ERROR DOCTRINE.**

The cumulative effects of the above trial court errors requires reversal of Mr. Pierce's convictions, in the unlikely event that this Court concludes that each error examined on its own would otherwise be considered harmless, or that some error was improperly preserved. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). To determine whether cumulative error exists, the reviewing court examines the nature of the errors: multiple constitutional errors -- as

shown in the present case -- are more likely to accumulate to cumulative error than multiple nonconstitutional errors. Russell, 125 Wn.2d at 94. Whether the error was prejudicial is of course also relevant. See State v. Bradbury, 38 Wn. App. 367, 375, 685 P.2d 623 (1984) (holding that because 'no prejudicial error was found there can be no application of the cumulative error doctrine'). In addition, this Court has discretion under RAP 2.5(a)(3) to review any inadequately preserved errors and determine if the cumulative affect of incompetent evidence denied the defendant a fair trial.

[W]e note that several of the errors alleged on appeal were not properly preserved for appeal. Because we believe, however, that the cumulative effect of all these errors, preserved and not preserved, denied Alexander a fair trial, State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984), we exercise our discretion under RAP 2.5(a)(3) to review all of his claims. See State v. Curry, 62 Wn. App. 676, 679, 814 P.2d 1252 (1991); State v. Noel, 51 Wn. App. 436, 439, 753 P.2d 1017, review denied, 111 Wn.2d 1003 (1988).

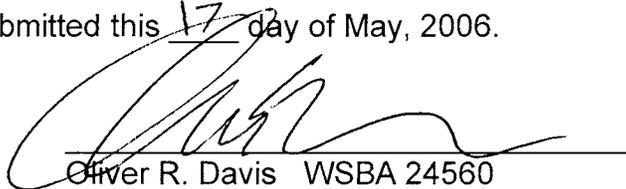
State v. Alexander, 64 Wn. App. at 150-51. Some errors, individually, would be harmless because of the weight of the other evidence presented at trial. See Russell, 125 Wn.2d at 93-94. However, the prejudice from these errors can accumulate into cumulative error. Russell, 125 Wn.2d at 93-94. Here, in the unlikely event that the Court does not find each error -- the violation of Mr. Pierce's right to present a defense, and the court's comment on the

evidence -- to individually require reversal, the evidence against him was not overwhelming and the trial errors require reversal

E. CONCLUSION

Based on the foregoing, Mr. Pierce respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 17 day of May, 2006.



Oliver R. Davis WSBA 24560
Washington Appellate Project - 9105
Attorneys for Appellant

