39933-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

DAVID D. MOELLER
Appellant

39933-4-II

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STATE OF WASHINGTON
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On Appeal from the Superior Court of Pierce County

Cause No. 08-1-05488-0

The Honorable Bryan E. Chushcoff

APPELLANT'S REPLY BRIEF

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II. SUMMARY OF THE CASE

Appellant, David Moeller was convicted by jury of the assault, rape and unlawful imprisonment of his companion, Deborah Stegner.[1] The issues on appeal include the court's failure to bring the case to trial in a timely manner and to enforce the rules of criminal procedure, specifically the discovery rules. Mr. Moeller also assigns error to constitutional violations and other reversible errors during his trial:

1. The court was dilatory in bringing the case to trial and enforcing the discovery rules.
2. The State introduced over a hundred photographs of Ms. Stegner's bruises, based solely on their incremental probative value and without regard to necessity or their cumulative prejudicial effect;
3. The court denied Moeller his constitutional right to present evidence relevant to Ms. Stegner's credibility and bias.
4. The jury heard highly prejudicial evidence in the form of hearsay by Ms. Stegner to a forensic investigator. This evidence was erroneously admitted under ER 803(a)(4), the medical treatment exception to the hearsay rule.

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[1] This Court's General Order No. 2006-1 requires the names of juveniles, but not adults to be replaced by initials or pseudonyms. Accordingly, Appellant refers to Ms. Stegner, an adult woman, by her name.

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5. Moeller was prejudiced by inadmissible hearsay constituting narration of remembered facts that was mischaracterized as excited utterance.

6. Moeller was erroneously punished for assaultive conduct that constituted an element of first degree rape.

7. The prosecutor committed reversible misconduct.

8. Mr. Moeller was denied a fair trial and received ineffective assistance of counsel to the extent counsel failed offer timely objections and preserve arguably reversible issues for review.

9. The cumulative weight of error requires a new trial.

III. ARGUMENT

1. THE DILATORY PRETRIAL PROCEDURES AND DISCOVERY VIOLATIONS DENIED DUE PROCESS.

First, the State claims Moeller never objected to the months-long delays in bringing him to trial. This is wrong. Moeller moved to dismiss pursuant to CrR 4.7. 5/12RP 16.

Next, the State claims complexity of the issues necessitated delaying the trial. BR 10. The record does not support this. The issues are as simple as they get. Did David Moeller inflict the injuries

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manifested by Deborah Stegner or did he not. The case boils down to credibility.

The State next blames the defendant for the delays. BR 13. The court did this too. The court blamed defense counsel for insisting on an in-person interview with the prosecuting witness, rather than a telephone interview, even though counsel explained that his experience had taught him that eye-contact was essential. 5/12RP 20-21. The court's reason for denying the motion to dismiss was that the State said it would produce Stegner for an in-person interview the following week. 5/12RP 21. That did not happen.

As for defense counsel's illness, if the trial had been timely, it would have been over and on the books long before defense counsel was incapacitated.

Moreover, the defense was placed in the position of either requesting additional continuances or foregoing the opportunity to examine the alleged medical evidence or to interview the complaining witness before the trial. The State cannot force a defendant to sacrifice one constitutional right in order to exercise another. *State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001).

CrR 4.7(d) obligated the prosecutor to exercise the power of his office to obtain the necessary information and make it available to the

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defense. The rule does not suggest the prosecutor do this whenever it is convenient. Moreover, so long as the courts interpret the rule as carrying no penalty, the State has no incentive to comply, and defendants are powerless to assert their rights.

The State concedes it had the forensic report in its possession but claims it was not required to identify the author because the signature was illegible. BR 18. This is disingenuous. The State could simply have turned the report over to the defense and the defense investigator could have tracked Lopez down. The State finally did this on July 21, 2009. BR 19. But charges were filed in November, 2008.

The State also claims the prosecutor was powerless to get a medical records release from Ms. Stegner. BR 20. Again, this is insupportable. Even assuming e-mail and FAX had not been invented, 7-10 days would be sufficient to transmit the requested information both ways by U.S. mail, especially if a notice were attached informing Ms. Stegner in block letters that the charges would be dropped unless she mailed back the release by a date certain.

2. THE CUMULATIVE GRUESOME PHOTOGRAPHS CONSTITUED REVERSBLE ERROR.

The State claims the mass of photographs was neither cumulative nor intended to overwhelm the emotions of the jurors. In support of this,

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the State argues probative value picture by picture. BR 25-30. But the court was also required to balance prejudicial effect.

The court should not admit gruesome photographs the primary effect of which is to arouse the passions of the jury and prejudice the defendant. 'The test in such cases is whether the probative value of the photographs outweighs their probable prejudicial effect.' *State v. Adams*, 76 Wn.2d 650, 655-656, 458 P.2d 558 (1969), citing 23 C.J.S. Criminal Law § 852(1), p. 353 (1961).

> The fact that a photograph may have some probative force is not always completely determinative of its admissibility. There are cases where the logical relevance of such an exhibit will unquestionably be overwhelmed by its inherently prejudicial qualities which will impair the defendant's right to a fair and impartial trial. When undoubtedly the minute peg of relevancy will be entirely obscured by the quantity of dirty linen hung upon it, fair play directs the exclusion of the exhibit.

State v. Bucanis, 26 N.J. 45, 53, 138 A.2d 739, 743, 73 A.L.R.2d 760 (1958). That is the case here.

If protecting a defendant from undue prejudice conflicts with the rule of logical relevance, a proper determination as to which should prevail requires the court to exercise sound discretion. *State v. Johnson*, 56 Wn.2d 700, 708-09, 355 P.2d 13 (1960). This balancing of the probative value of photographs evidence against their harmful effect rests primarily with the trial court. *State v. King*, 71 Wn.2d 573, 429 P.2d 914

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(1967). But this Court is obliged to review the exercise of this discretion in criminal cases and to grant a new trial if that discretion has been abused. *Johnson*, 56 Wn.2d at 709.

The question before this Court is not whether each image can be distinguished from the others by some miniscule detail; we do not claim the photographs are identical duplicates. Rather, the question is how many of these pictures did the State need to prove the requisite degree of injury beyond a reasonable doubt? Five, ten, twenty, forty? Whatever, at some point way before the 100th photo, the court should have exercised an iota of restraint and performed some degree of gate-keeping to avoid gratuitous prejudice.[2]

3. MOELLER WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

The State claims the trial court properly excluded evidence tending to show the complaining witness was biased. BR 30-32. This ignores the fundamental rule that the threshold for relevant evidence in a criminal prosecution is very low. It is error to exclude evidence that has any tendency, however slight, to support the defendant's theory of the case.

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[2] The State is correct that not all the photographs were of the injuries. BR 25. See Amended Exhibit Record filed March 11, 2010, Supp. CP. Still, 108 were of the bruises, which is about 100 too many.

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The Fourteenth Amendment requires that criminal prosecutions conform to prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994), citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Specifically, criminal defendants have a due process right to have their defenses heard. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007), citing *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *accord, Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

The defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the Sixth amendment right to confront witnesses. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998), citing *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Dickenson*, 48 Wn. App. 457, 469, 740 P.2d 312 (1987). Accordingly, a person charged a crime should be given "great latitude" to cross examine a prosecution witness to show motive or impeach credibility. *State v. Spencer*, 111 Wn. App. 401, 410, 45 P.3d 209 (2002), quoting *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971). Where evidence is of high probative value, "no state interest can be compelling enough to preclude

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its introduction consistent with the Sixth Amendment and Art 1, sec. 22." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), citing *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

An error in excluding otherwise relevant, admissible evidence is an error of constitutional magnitude to which the constitutional harmless error test applies. *See State v. Austin*, 59 Wn. App. 186, 194, 796 P.2d 746 (1990), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). A constitutional evidentiary error is harmless only if this Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error; the State bears the burden of establishing harmless error in this context. *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

Moreover, an error resulting in the exclusion of relevant evidence cannot be harmless. "[I]t is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors." *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). Any error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *Davis*, 415 U.S. at 318; *State v. Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893 (1980); *Dickenson*, 48 Wn. App. at 470.

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4. A FORENSIC EXAMINER IS NOT A MEDICAL TREATMENT PROVIDER IN THE CONTEXT OF HEARSAY.

The State slips into its facts a claim that Ms. Stegner received treatment from a sexual assault nurse examiner. BR 6. The record does not support this. Lopez's title may have been sexual assault nurse examiner, but Stegner did not receive treatment from her. The State argues that Steger made statements to this person. BR 36. This is true, but the statements are not admissible because they were not made for purposes of medical treatment.

Stegner received all her medical treatment from Emergency Room physicians and nurses. Only after treatment was complete was Stegner released – at her own request — to a forensic investigator, Ms. Lopez. Ex. 7; RP 228. But by forensic investigator Lopez's own testimony, the purpose of her examination was <u>not</u> treatment. Lopez testified it was not her function to provide medical treatment. Her job was to gather evidence for a potential criminal prosecution. The hospital's procedure was to complete treatment before a patient was released for a forensic interview. If any medical concern arose, Lopez would summon a medical treatment provider to handle the situation, which is what she did in this case. She herself provided no treatment whatsoever. RP 222-23; 244.

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At issue here is the exception to the hearsay rule that presumes out-of-court statements are reliable because the need for medical treatment creates an incentive to tell the truth. ER 803(a)(4).

ER 803(a)(4) pertains to statements "reasonably pertinent to diagnosis or treatment." As such, it allows statements regarding causation of injury, but generally not statements attributing fault. For example, the statement "the victim said she was hit on the legs with a bat," would be admissible, but "the victim said her husband hit her in the face" would not be admissible. *State v. Redmond*, 150 Wn.2d 489, 496-97, 78 P.3d 1001 (2003), citing *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046, *cert. denied*, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001). The trial court is required to redact those portions of an alleged assault victim's medical records that dealt with the issue of fault. *Redmond*, 150 Wn.2d at 497.

Here, even if Lopez had been providing medical treatment, which she was not, the objectionable hearsay statements were about blame, not causation. You can put a frilly white cap on your investigator, give her a desk at the hospital, even put the letters R.N. after her name. But whether her testimony is admissible under the medical treatment exception hinges on a single relevant question: *"What did this person DO?"* Here, Ms. Lopez did not collect medical information to turn over to a physician for

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the purpose of treatment. Rather, her sole function arose post-treatment and was to gather incriminating forensic evidence to be handed over to a prosecutor for use in a criminal prosecution.

Moreover, particularly in domestic dispute cases, once treatment is completed and evidence-gathering begins the incentive to be truthful disappears. More than that, statements made at the hospital immediately following an incident are more likely — not less — to be tainted by anger and resentment toward the alleged perpetrator. If the circumstances suggest any likely incentive at that point, it would be to minimize ones own contribution, exaggerate blame, overlook mitigating factors, fabricate aggravators, and say whatever might motivate the investigators to throw the book at the offender.

State v. Sims, 77 Wn. App. 236, 890 P.2d 521 (1995), relied on by the State, is distinguishable. There, Division I held that an adult domestic violence victim's statements to a physician were admissible under the same rationale as a child victim's because the statements were relevant to treatment. The State compares the *Sims* victim's additional statements identifying the abuser to a hospital social worker. *Sims*, 77 Wn. App. at 239-40. But the social worker in *Sims* was a hospital employee, part of the hospital's own social work department. *Sims*, 77 Wn. App. at 240. The State concedes she was "an integral part of the treating medical team."

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BR 36. Nothing in *Sims* suggests the social worker's function was not to provide treatment, albeit emotional rather than physical.

Here, by contrast, Lopez worked for an outside contractor (Multicare, BR 6) and she herself described her function as evidence collection. She was not part of the treatment team. If she had conducted her interview three days later at Multicare's business offices, the true nature of the interaction would be manifestly clear. The fact that she did it in the hospital for convenience and efficiency does not make her investigations treatment. (This may explain the multiplicity of photographs. The State elected to sacrifice exuberantly colorful bruises in order to conduct an evidentiary examination in a hospital setting for hearsay purposes. Officers then had to rephotograph Stegner a few days later after the bruises had developed. RP 71-72.)

The State also cites *State v. Williams*, 137 Wn. App. 736, 154 P.3d 322 (2007) in which samples were collected during the medical examination. *Williams*, 137 Wn. App. at 740. This was done "for 'a combination' of purposes — medical as well as forensic.'" *Williams*, 137 Wn. App. at 746. Here, by contrast, Lopez was not a hospital nurse or treatment provider. Stegner's medical treatment was complete and she was "released" to Lopez and taken to a different room for a forensic examination for the sole purpose of evidence collection.

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The Lopez testimony was inadmissible hearsay. It was highly prejudicial, and defense counsel was ineffective for not, at minimum, preserving the issue with a timely objection.

The error was not harmless as the State claims. BR 39. Stegner's accusations were repeated over and over by highly credible and respected witnesses, including Lopez and the police officers. And the attitude conveyed to the jurors by all these witnesses was one of uncritical acceptance of Stegner's version. This tended to bolster Stegner's credibility with evidence that is strictly inadmissible for the simple reason that it is both extremely unreliable and highly persuasive in the minds of the jurors.

5. MS. STEGNER'S STATEMENTS TO OFFICER RICHARDS WERE ERRONEOUSLY ADMITTED.

Defense counsel objected that Richards's testimony about Stegner's statements were hearsay. RP 123. The State claims the court correctly concluded the statements were admissible as excited utterances under ER 803(a)(2). RP 130. This was wrong. Statements are not admissible if the declarant was narrating past events from memory; the statement must be contemporaneous with the event. *State v. Pugh*, 167 Wn.2d 825, 837-38, 225 P.3d 892 (2009).

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Here, Stegner's statements did not arise spontaneously out of the event. The event was over. The purpose of her statements was to narrate to Richards Stegner's recollection of the event. Moreover, most of the statements were in response to Richards's questions.

6. MULTIPLE CONVICTIONS FOR FIRST DEGREE RAPE AND SECOND DEGREE ASSAULT VIOLATED DOUBLE JEOPARDY.

When an assault elevates another charged offense to a higher degree, the two offenses generally merge and are the same for double jeopardy purposes. *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005). Here, if the conduct constituting the assault either constituted the forcible compulsion element of first degree rape or elevated the degree of a rape accomplished by a different act of forcible compulsion, then the offenses merged and double jeopardy precludes convictions for the same conduct under both the first degree rape and assault statutes.

The State claims a separate Friday assault supports a separate assault conviction. BR 46. But the prosecutor did not make an election or require juror unanimity as to the conduct constituting the assault. Specifically, the jury was not instructed it had to find a separate assault that did not further the rapes.

Therefore, both convictions cannot stand.

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7. *VENEGAS* IS CONTROLLING ON THE ISSUE OF PROSECUTORIAL MISCONDUCT.

The State here committed precisely the same misconduct this Court held to be reversible in *State v. Venegas*, 155 Wn. App. 507, 524, 228 P.3d 813 (2010). The State speculates that *Venegas* would not have been reversed if deliberately misleading the jury about the meaning of reasonable doubt had been the only error in that case. BR 44, note 21. That may or may not be so. Regardless, it is not the only error in Moeller's case. Moreover, a flagrant and ill-intentioned argument on such a fundamental principle of law is sufficient in itself to require reversal, whether or not it was "merely" the straw that broke the camel's back. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937, 946 (2009).

8. MOELLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The State asks the Court not to review any of the numerous trial errors in this case that were not objected to below. This in itself establishes Moeller's claim of ineffective assistance of counsel. It is prejudicially deficient on its face not to object to trial court errors and thus fail to preserve potentially reversible issues for appeal

The record also refutes the State's view that advising Moeller not to testify was not deficient performance that prejudiced Moeller, given the sentencing court's comments once the judge heard Moeller's side of the

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story. Contrary to the State's argument (BR 50) whether counsel could or could not force his client not to testify is not at issue. The whole point of having the assistance of counsel is to have an experienced and knowledgeable advisor to help with critical decisions such as whether to take the stand. Moeller did not waive his right to effective counsel by following his counsel's ill-conceived advice.

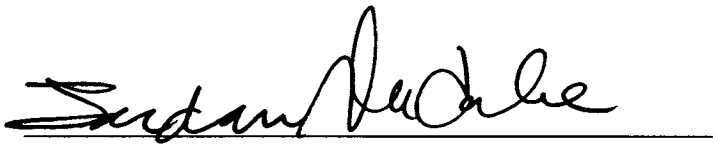
9. MOELLER WAS DENIED A FAIR TRIAL BY THE CUMULATIVE WEIGHT OF ERROR.

The State disputes that cumulative error requires reversal. BR 50. Contrary to the State's assertions, the accumulated errors here were sufficiently serious and pervasive as to destroy confidence in the verdicts. The Court should remand this matte to the superior court for a new trial.

V. CONCLUSION

For the foregoing reasons, David Moeller asks this Court to reverse his conviction and vacate the judgment and sentence.

Respectfully submitted this September 18, 2010.



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CERTIFICATE OF SERVICE

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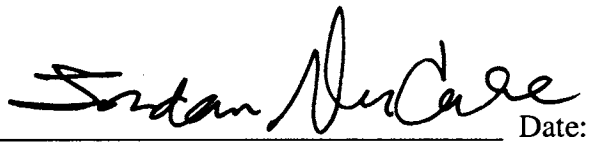

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