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JW

No. 41131-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN MARK LUCAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

THE TRIAL COURT ABUSED ITS DISCRETION BY
ADMITTING EVIDENCE OF MR. LUCAS'S PRIOR
CONVICTION FOR ROBBERY THROUGH THE
TESTIMONY OF THE EXPERT WITNESS

The State contends the trial court properly allowed the deputy prosecutor to elicit evidence of Mr. Lucas's prior conviction for robbery under ER 806 as a means of attacking the credibility of the expert witness. SRB at 7-8. The State contends the purpose of eliciting the testimony was to impeach *Dr. Larsen* by showing that he knew Mr. Lucas had been convicted of robbery. SRB at 8. The State's argument is contrary to the language and purpose of ER 806. The rule permits a party to attack the credibility of the *hearsay declarant*, not a witness who recounts the hearsay statements. The rule states:

When a hearsay statement . . . has been admitted in evidence, *the credibility of the declarant* may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. . . .

ER 806 (emphasis added). As stated in the opening brief, the rule rests on the principle that "[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility is subject to impeachment and support just as if he had testified." Judicial Council Comment ER 806, quoted in 5C Karl B. Tegland,

Washington Practice: Evidence Law and Practice § 806.1, at 240 n.1 (5th ed. 2007). Thus, the rule is concerned only with the credibility of the hearsay declarant. The rule's drafters did not intend the rule be used as a "back door" method of admitting evidence of a defendant's prior convictions for the purported purpose of attacking the credibility of a witness who recounts the defendant's out-of-court statements. To the extent the trial court applied the rule as a means of permitting the State to attack Dr. Larsen's credibility, the court abused its discretion.

Adopting such an interpretation of the rule in this case is also consistent with general principles of relevance and undue prejudice. As this Court recognized in State v. Eaton, when a defendant's out-of-court statements are admitted through the testimony of a psychiatrist expert, eliciting whether the expert knew of the defendant's prior convictions has little relevance in judging the credibility of the expert's opinion. State v. Eaton, 30 Wn. App. 288, 294-95, 633 P.2d 921 (1981). "[E]xperienced forensic psychiatrists are . . . aware of the danger of fabrication and are trained to detect untruthful answers to their questions." Id. Admission of prior conviction evidence significantly bolsters the

State's case but has little relevance to the truth-finding function of the trial. Id. at 297.

The State contends Eaton is not on point but the State is incorrect. In Eaton, this Court held that when an expert recounts the out-of-court statements of a criminal defendant and testifies he based his opinion in part on those statements, the door is not thereby opened to admission of the defendant's prior convictions. Eaton, 30 Wn. App. at 293-94. It is not necessary to subject the defendant to cross-examination and impeachment in order to judge the credibility of the expert's opinion. It is up to the expert, not the court—or the prosecutor—to determine what data the expert could reasonably rely upon. Id. at 294. If the expert is qualified to express an opinion, the court must defer to the expert's advice on that point. Id. The State may attack the credibility of the expert's opinion by pointing out to the jury that the opinion is based on the subjective symptoms and narrative statements given by the defendant after he was charged with a crime, and that the defendant might have therefore been motivated to fabricate his statements. Id. at 293-95. But the court may not require the defendant to undergo cross-examination as a way of making that point. Id. ER 703 is not concerned with the reliability of the

hearsay as long as it is of a type of data that a psychiatrist could reasonably rely upon in forming an opinion about the defendant's mental condition at the time of the crime. Id.

As stated in the opening brief, although Mr. Lucas was not required to testify and undergo cross-examination in the usual sense, the result of the court's application of ER 806 was to treat him like a testifying witness. ER 806 permits a party to attack the credibility of a hearsay declarant as if he had testified at trial. Tegland, Washington Practice, supra.

The State complains at length that admission of Mr. Lucas's out-of-court statements to the psychiatrist enabled Mr. Lucas to present his version of events for the truth of the matters asserted without subjecting his statements to adversarial testing. SRB at 3-4. The State complains the only way the deputy prosecutor could contest the truth of the statements was through ER 806. SRB at 7. But that is incorrect. The State acknowledges it could have objected to admission of Mr. Lucas's self-serving statements to Dr. Larsen but chose not to. SRB at 9. A psychiatrist expert witness may not recount a defendant's version of events for the truth of the matters asserted, because the statements would be inadmissible hearsay. State v. Fullen, 7 Wn. App. 369, 381, 499 P.2d 893

(1972). Instead, the statements are admissible only "as medical history from which professional diagnosis might follow." Id. Consistent with Fullen, the trial court here characterized Mr. Lucas's out-of-court statements to Dr. Larsen as non-hearsay admitted only to explain how the expert formed his opinion.¹ 3/09/10RP 341. To the extent the statements were admitted for the truth of the matters asserted, the State could have objected and required the doctor to limit his testimony to his examination of Mr. Lucas without relating Mr. Lucas's hearsay statements. See Fullen, 7 Wn. App. at 381. That the State chose not to do so does not mean the door was therefore opened to admission of Mr. Lucas's robbery conviction under ER 806.

In addition, if the State was concerned that the jury might use Mr. Lucas's out-of-court statements as substantive evidence, the State could have requested a limiting instruction. State v. Lui, 153 Wn. App. 304, 321-22, 221 P.3d 928 (2009), rev. granted, 168 Wn.2d 1018, 228 P.3d 17 (2010) (where otherwise inadmissible out-of-court statements are admitted for only limited purpose of explaining basis of expert's opinion, a party is entitled to appropriate instruction informing jury of that purpose). The State

¹ The State has not assigned error to the trial court's conclusion.

was not entitled to introduce highly prejudicial evidence of Mr. Lucas's prior conviction simply because it chose not to object to admission of the hearsay or request a limiting instruction.

Finally, the State contends that even if admission of Mr. Lucas's prior robbery conviction was error, it was harmless. SRB at 11-12. The State apparently argues that because Dr. Larsen's testimony—that he was aware of Mr. Lucas's prior conviction—was contrary to the deputy prosecutor's expectation, the evidence must have had little impact on the jury. *Id.* The State's argument is disingenuous and contrary to well-established case law. Even if the prosecutor was disappointed to learn that the psychiatrist was aware of the prior conviction, the prosecutor's disappointment did not mitigate the effect of the evidence on the jury. As stated in the opening brief, Washington courts consistently recognize that prior conviction evidence is highly prejudicial in criminal trials, regardless of how brief the testimony is about it. *See* AOB at 23-25. The erroneous admission of such evidence for impeachment purposes is harmless only if the defendant had other prior convictions that were properly admissible. *State v. Calegar*, 133 Wn.2d 718, 728, 947 P.2d 235 (1997) (and cases cited therein). Here, admission of the prior conviction evidence was not harmless, because it

encouraged the jury to conclude Mr. Lucas had a general propensity for criminality. It also severely undermined Mr. Lucas's defense. The principal issue in the case was whether, due largely to Mr. Lucas's history of mental illness, he had the ability to form the requisite criminal intent. When the jury learned Mr. Lucas had a prior conviction for robbery and therefore was previously found to have had the ability to form a criminal intent, Mr. Lucas's diminished capacity defense was severely undermined. Thus, the error was not harmless and the convictions must be reversed.

B. CONCLUSION

As set forth above and in the opening brief, the trial court abused its discretion in permitting the State to elicit evidence that Mr. Lucas had a prior conviction for robbery through the testimony of the psychiatrist expert. Because admission of the highly prejudicial evidence was not harmless, the convictions must be reversed.

Respectfully submitted this 7th day of July 2011.


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JONATHAN LUCAS,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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