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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 300340 - III

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,
Respondent

and

DON DOUGLAS LOVELL,
Appellant

REPLY BRIEF OF APPELLANT DON DOUGLAS LOVELL

Mark C Prothero, WSBA #18702
Attorney for Appellant

421 W Riverside - Ste 868
Spokane WA 99201
(Ph) 509-747-8157
(Fax) 509-747-8165

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A. RESTATEMENT OF ISSUES IN REPLY

On pages 1 and 2 of "Respondent's Brief," the STATE OF WASHINGTON has clearly made a considered decision to simply ignore the precise issues which the appellant, DON DOUGLAS LOVELL, has framed and raised in this appeal. Suffice it to say, the respondent has not filed a cross appeal in this matter as contemplated by Rules 5.1(d) and (f) of the Washington Rules of Appellate Procedure [RAP], nor can the respondent be perceived as an "aggrieved party" for purposes of RAP 3.1, so as to be entitled to raise its own issues.

Consequently, STATE OF WASHINGTON has no right to raise or direct an issue for consideration or decision on this appeal. State v. Carter, 138 Wn.App. 350, 157 P.3d 420 (2007). Instead, the appellant, Mr. LOVELL, alone has the right to have his precise issues, as framed, decided by this court on this appeal.

Once again, those precise issues as raised and framed by the appellant, Mr. LOVELL, are as follows:

1. Whether the accused's constitutional rights to present a viable defense on his own behalf, and to effectively respond to the allegations of the STATE, as guaranteed under the state and federal constitutions, were violated by the erroneous evidentiary rulings of the Superior Court of Walla Walla County, State of Washington, which precluded and unduly restricted the ability of the accused to present certain expert testimony of Dr. Ronald Fleck on the negative effects of complaining witness' alcoholism upon the accuracy of her short- and long-term memory processes and which evidence bore directly upon the credibility of the

complaining witness's testimony concerning her belated claim she had been "strangled" by the defendant during the incident on August 24, 2009, and as alleged by the prosecution in Count II: assault in the second degree-domestic violence [strangulation][RCW 9A.36.021(1)(g) and RCW 10.99.020]. [See, Assignments of Error Nos. 1 through 5, as set forth on pages 1 and 2 of Appellant's Opening Brief].

2. Whether, in terms of these same erroneous evidentiary rulings at trial, the superior court likewise violated the defendant's constitutional right by invading the sole province of the jury to determine the veracity of a witness when it deprived the trier of fact of Dr. Fleck's testimony concerning the negative neurological effects of complaining witness' alcoholism upon her short- and long-term memory processes, which evidence bore directly upon the complaining witness' recollection and testimony regarding her belated claim she had been strangled by the defendant during the incident on August 24, 2009, and as alleged by the prosecution in Count II: assault in the second degree-domestic violence [strangulation][RCW 9A.36.021(1)(g) and RCW 10.99.020].

B. RESTATEMENT OF STANDARD OF REVIEW IN REPLY

On page 8 of the "Respondent's Brief," the STATE OF WASHINGTON attempts to distort and limit the standard of review in this case to simply an abuse of discretion standard, rather than address or focus upon the precise error of law standard associated with those infirmities of the trial court's decision which raise to a constitutional magnitude. This is one more veiled attempt by the prosecution to ignore, deflect and overlook the precise constitutional issues framed and presented by the appellant, Mr. LOVELL, on this appeal.

To reiterate, the precise standards governing review of this case are as follows:

Errors of law involving evidentiary matters, including those of a constitutional magnitude, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001); see also, State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993); State v. Dunn, 125 Wn.App. 582, 105 P.3d 1022 (2005). Also, the failure or refusal of the trial court to either follow or apply the governing law constitutes a manifest abuse of discretion. State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995). In a criminal case, an error of constitutional magnitude is presumed prejudicial and requires reversal on appeal unless the prosecution establishes, by way of other evidence in the case, that such error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

C. ARGUMENT IN REPLY

On pages 9 through 12 of the "Respondent's Brief," the STATE OF WASHINGTON similarly goes on to ignore, and fails to argue or address, the precise constitutional issues framed and raised by the appellant, DON DOUGLAS LOVELL, on this appeal. The respondent further neglects, in direct violation of RAP 10.3(a)(6), to cite any legal authority for her limited analysis and argument associated with her unsubstantiated claims the superior court did not abuse its discretion on the subject evidentiary rulings. See also, Hollis v. Garwall, Inc., 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999); Beal v. City of Seattle, 134 Wn.2d 769, 777 n.2, 954 P.2d 237 (1998).

For these reasons alone, the argument in response of the STATE OF WASHINGTON should be stricken and not be considered on this appeal. Furthermore, the STATES' glaring failure to address or even discuss the appellant's various constitutional issues should now be considered nothing short of a concession on the respondent's part as to the merits of the constitutional issues raised by Mr. LOVELL on this appeal. See, State v. Ward, 125 Wn.App. 138, 143-44, 104 P.3d 61 (2005). This should particularly be the case in this instance since such "concession" is entirely consistent with the governing constitutional law as set forth in appellant's opening brief concerning those precise issues framed and now left unaddressed by the STATE OF WASHINGTON in its responsive brief. See, State v. Steen, 164 Wn.App. 789, 804, 265 P.3d 901 (2011). This is borne out once again by a simple revisiting of Mr. LOVELL's initial arguments on pages 9 through 17 of his

opening brief, to wit:

1. The defendant's constitutional rights to present a viable defense on his own behalf, and to effectively respond to the allegations of the state, as guaranteed under the corresponding provisions of the state and federal constitutions, were violated by the erroneous evidentiary ruling of the superior court concerning the subject testimony of Dr. Ronald Fleck on the issue of the complaining witness's alcoholism and the negative effects this would have on her memory processes [RP 504-05, 505-06], insofar as these rulings prevented the accused, DON DOUGLAS LOVELL, from establishing for the trier of fact the lack of credibility of complaining witness due to her inability to accurately recollect the events which occurred on August 24, 2009. [Issue No. 1].

Again, at trial, the court would not allow Mr. LOVELL to present the expert testimony of Dr. Ronald Fleck that, within a reasonable medical certainty or probability, the complaining witness, Patricia L. March, is an "alcoholic" based upon the level and daily pattern of her drinking habit, and this pattern of alcoholism had existed for several years. [RP 505-06]. In fact, Ms. March had herself openly admitted to her health care provider, Lauri Renee Larson, that she is an "alcoholic." [RP 244-45].

In passing, and as an aside, the foregoing also demonstrate that the prosecution's claim, on page 10 of its Responsive Brief, that the issue of the complaining witness' "alcoholism" was not preserved for appeal is entirely baseless.

That point aside, during the same bench conference, the trial court also denied Mr. LOVELL the right to examine Dr. Fleck as to the impact drinking has upon an alcoholic's cognitive skills and ability to accurately recall events. [RP 504-05]. The court erroneously deemed this evidence "irrelevant" without any explanation or without going into any analysis of Rules 702 through 705 of the Washington Rules of Evidence [ER].

This was notwithstanding the fact the defendant made an offer of proof by way of Dr. Fleck's proffered testimony showing the clear "relevancy" of this evidence in terms of explaining why the complaining witness, Ms. March, and her belated claim that she was "strangled or choked" on August 24, 2009, should not be deemed credible or trustworthy by the jury and trier of fact. [RP 500-01]. This evidence of possible alcoholic blackouts and amnesic syndrome [RP 500-01], when coupled with Dr. Fleck's testimony that any perceived injury to the complaining witness's neck could not, within a reasonable medical certainty or probability, be consistent with any squeezing of the neck, choking or strangulation [RP 489-94, 522-24], would have clearly "assist[ed] the trier of fact" in both understanding the actual cause of this particular injury to the neck, as well as providing the jury with the proper means by which to accurately judge Ms. March's credibility and veracity in terms of her belated claim of strangulation. See, ER 702.

In short, and once again, such expert evidence is clearly contemplated as being admissible under ER 702. Dr. Fleck explained, both before and after defendant's offer of proof, that the "hematoma" which was found on Ms. March's

neck was instead consistent with a blow or striking action, rather than some other force such as choking, to the left anterior area of Ms. March's neck. [RP 489-94, 522-24]. As pointed out by the defendant's post-trial motion as to count II, there was no physical evidence suggesting otherwise. [CP 149-50].

As to Dr. Fleck's proffered testimony [RP 500-01, 504-05, 505-06], this evidence would have clarified for the jury why the complaining witness might have falsely or mistakenly accused Mr. LOVELL of strangulation well after the date of the incident. Most significantly, the trial record is clear that, during deliberations, the jurors were struggling with the issue of whether Ms. March had been strangled in terms of the court's existing instructions. [RP 733-34; CP 112-13, 131]. Had the proffered evidence of Dr. Fleck not been rejected out of hand by the court, this evidence might well have "assisted the jury" in terms of this thorny question. Id. See, ER 702.

In sum, there should be no question whatsoever that appellant's previously identified five [5] assignments of error, on pages 1 and 2 of his opening brief, are well taken. In this regard, the following factors should once again be considered by this court on appeal:

a. Said errors are of a constitutional magnitude. Again, it is Mr. LOVELL's position that the foregoing, challenged rulings of the superior court which deprived the trier of fact of this relevant evidence--explaining the reason for the lack of credibility associated with Ms. March's belated and unsubstantiated claim that she was strangled--violated the defendant's constitutional rights to present a viable

defense on his own behalf, and to be able to effectively respond to the criminal allegations of the plaintiff, STATE OF WASHINGTON, brought against him in Count II of the third amended information. In effect, the court's rulings deprived the jury of the complete and entire picture surrounding the unsubstantiated claim of the complaining witness that she was choked by the accused, see, Wash.St.Const., Art. I, § 21; U.S.Const., amend. 6 and 14; and, further, prejudicially restricted Mr. LOWELL's ability of to defend himself in an otherwise "he said . . . she said . . . situation." See, Wash.St.Const., Art. I, § 3; U.S.Const., amend. 6 and 14. As more artfully stated, the court's preclusion of the proffered expert testimony of Dr. Fleck "unfairly curtailed the accused's ability to present a logical explanation for the [alleged victim's claims and] testimony." State v. Carver, 37 Wn.App. 122, 125, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984).

I. Said errors are a violation of due process. From a due process standpoint, a criminal defendant has an unqualified, constitutional right to present all admissible evidence in his defense. See, State v. Clark, 78 Wn.App. 471, 477, 678 P.2d 842, review denied, 128 Wn.2d 1004 (1995); State v. Rehak, 67 Wn.App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993); accord, State v. Thomas, 150 Wn.2d 821, 857, 93 P.3d 970 (2004); State v. Hudlow, 99 Wn.2d 659, P.2d 514 (1983); see also, Wash.St.Const., Art.I, §3; U.S. Const., amend 5 and 14. In this vein, ER 402 expressly provides that evidence shall be deemed admissible when, as expressed under ER 401, 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." Here, there can be no question that the foregoing evidence which was either prohibited or otherwise restricted by the superior court, met the requirements of ER 402 and 401. Such evidence not only makes it more likely or probable that the claims of the complaining witness associated with Count II, i.e. "strangulation," were untrue and based upon the less-than-sound memory of the complaining witness. Surely, the jury shall have been entitled to consider this additional, proffered evidence bearing upon Patricia L. March's faulty memory and, consequently, her lack of credibility.

II. The accused's right of confrontation and compulsory process were also violated. From a right of confrontation standpoint, when evidence is by its very nature "exculpatory," such as Dr. Fleck's testimony concerning the ramification of Patricia L. March's alcoholism, that evidence is clearly relevant and material to the issue of an accused's guilt or innocence. Therefore, he has an unqualified constitutional right to present such evidence to the trier of fact. See generally, Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973); see also, Taylor v. Illinois, 484 U.S. 400, 98 L.Ed.2d 798, 108 S.Ct. 646 (1988); Gomez v. Greer, 896 F.2d 252 (7th Cir. 1990). To deprive a criminal defendant of the opportunity to present such evidence not only impinges upon his constitutional right to have his fate determined by a jury of his peers, it equally deprives him of the right to compulsory process which includes and encompasses his constitutional right to present a viable defense on his own behalf. See generally, State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Roberts, 80 Wn.App. 342, 350, 908

P.2d 892 (1996).

III. In sum, these errors which are of a constitutional magnitude warrant reversal. Given the foregoing considerations, the decision of the superior court to exclude the proffered testimony of Dr. Fleck [RP 504-55, 505-06] was clearly an error of significant constitutional magnitude. Because the prosecution cannot prove that the resulting prejudice to Mr. LOVELL was harmless beyond a reasonable doubt, the conviction, judgment and sentence entered against him on this final remaining charge, Count II of the third amended information, should now be reversed. See, State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994); RAP 12.2.

2. The constitutional rights of the appellant, DON DOUGLAS LOVELL, as guaranteed under the state and federal constitutions, were similarly violated insofar as the superior court's rulings, barring inquiry on the issues associated with the complaining witness's alcoholism and the neurological negative impact thereof on her ability to accurately recollect events, had the net effect of invading the province of the jury by essentially embracing and vouching for the veracity of the complaining witness, as well as the guilt of the accused, by depriving the trier of fact of this relevant and critical exculpatory evidence which bore directly on the issue of her credibility and trustworthiness. [Issue No. 2].

As previously noted, the right of the accused to a trial by a jury of his peers,

rather than the court, was implicated by the same erroneous evidentiary rulings of the superior court.

a. A violation of the accused's right to a jury trial resulted. The nature of the subject trial court rulings concerning Dr. Fleck's testimony as to Patricia L. Marsh's alcoholism, as well as the negative neurological impact such alcoholism would have had on her ability to accurately recall and describe events of August 24, 2009, had the net effect of invading the province of the jury which is solely responsible for determining the credibility of witnesses as well as the guilt of the accused. United States v. Young, 470 U.S. 1, 18-19, 84 L.Ed.2d 1, 105 S.Ct. 1038 (1985); United States v. Velarde, 214 F.3d 1204, 1211 (10th Cir. 2000); United States v. Charley, 189 F.3d 1251, 1266-267 (10th Cir. 1999); Snowden v. Singletary, 135 F.3d 732 (11th Cir.), cert. denied, 525 U.S. 963, 142 L.Ed.2d 329, 119 S.Ct. 405 (1998); United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985); United States v. Samara, 643 F.2d 701, 705 (10th Cir. 1981); State v. Black, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987); State v. Demery, 100 Wn.App. 416, 997 P.2d 420 (2000); State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994), review denied, 126 Wn.2d 1010 (1995); State v. Jones, 71 Wn.App. 798, 813, 863 P.2d 85, review denied, 124 Wn.2d 1018 (1994); State v. Alexander, 64 Wn.App. 147, 822 P.2d 1250 (1992); see also, Lambright v. Stewart, 220 F.3d 1022 (9th Cir. 2000); United States v. Binder, supra. By depriving the trier of fact of this highly relevant medical evidence, the jury could otherwise assume Ms. March's short and long term memory processes were intact and that she could, in fact, be considered credible and her testimony trustworthy in terms of her

belated claim the defendant had strangled her during the drunken, tumultuous and acrimonious events of August 24, 2009.

By implication, the refusal to allow Dr. Fleck's proffered testimony was likewise equal or analogous to an impermissible opinion by the court on the guilt of the accused and the trustworthiness of Ms. March's testimony. Jones, at 813; State v. Maule, 35 Wn.App. 287, 293, 667 P.2d 96 (1983). In essence, the court removed the issue of Ms. March's credibility entirely from the table. Id. Had the trier of fact been afforded the opportunity to reflect on the proffered testimony of Dr. Fleck on matters pertaining to the effects of alcoholism upon Ms. March's memory processes, the jury may well have reached a different verdict as to Count II, as it did with respect to its finding of "not guilty" on counts III and V. See generally, United States v. Azure, 801 F.2d 336, 340-41 (8th Cir. 1986).

Simply put, in this unique set of circumstances, the "relevancy" and "weight to be given the proffered medical evidence" of Dr. Fleck should have been left to the jury alone to decide, rather than the court. The challenged and erroneous evidentiary rulings of the superior court, therefore, constitute a clear and indisputable violation of the accused's right to a jury determination of the facts at issue including, but not limited to, the right to have all relevant facts bearing on the veracity of Ms. March available to it during deliberation, as is guaranteed by the state and federal constitutions. Id.; see also, Wash.St.Const., Art. I, § 21; U.S.Const., amend. 6 and 14.

b. This further error warrants reversal. Once again, the plaintiff, STATE OF

WASHINGTON, cannot demonstrate that this additional constitutional error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn.App. 253, 261-62, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Thus, once again, the conviction, judgment and sentence, pertaining to count II of the third amended information, should now be reversed. RAP 12.2.

D. CONCLUSION

Based upon the foregoing points and authorities, the Appellant, DON DOUGLAS LOVELL, once again respectfully requests that the judgment and sentence which was entered in error by the Superior Court of Spokane County, State of Washington, on May 17, 2011, be reversed by this court on appeal and, further, that the criminal charge of assault in the second degree be ordered dismissed with prejudice.

DATED this 1st day of October, 2012.

Respectfully submitted:



Mark C. Prothero, WSBA #18702
Attorney for Appellant,
DON DOUGLAS LOVELL