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Court of Appeals
Division III
State of Washington

NO. 30694-1-III
Consolidated with 30968-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH EPPERSON,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The court improperly charged the jury.
2. The court improperly imposed legal financial obligations
3. The court improperly limited Appellant's ability to present a defense.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial court properly instructed the jury.
2. The record does not support the legal financial costs ordered.
3. The court did not improperly limit Appellant's ability to present a defense.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants briefs therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific areas of the record as needed in the body of this brief.

III. ARGUMENT.

The issue raised by Zuvela pertains solely to two pages of clerk's papers and three or four pages of the verbatim report of proceedings.

The issue raised by Epperson is contained in a very limited section of the trial transcript pertaining to a ruling by the court that rejected Epperson's attempt to introduce an alleged break-in of the victim's home

some months after the date of this crime. The only offer of proof made was that the victim had told them that some person who had been invited into his home had tried to rob him. There is no other record that this of what actually occurred, merely a statement by trial counsel that the victim's home had been burgled. That information came from Epperson initially and the victim confirmed that a person he knew had been invited into his home and pulled a gun on him. (RP 191-2, 201-06)

There are also several issues raised with regard to legal financial obligations that the State will concede and request this Court remand to allow the trial court to address those issues. (Zuvela's brief issues 2-4)

RESPONSE TO ASSIGNMENTS OF ERROR ONE – Zuvela

The State agrees that the right to a trial by jury is and has been a fundamental right afforded to the citizens of this country and this State.

State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (Wash. 1910);

Referring to the declaration of our Constitution that the right of trial by jury shall remain inviolate, this court in State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958, 959 (58 Am. St. Rep. 391), said:

'The effect of the declaration of the Constitution above set out is to provide that the right of trial by jury as it existed in the territory at the time when the Constitution was adopted should be continued unimpaired and inviolate. Whallon v. Bancroft, 4 Minn. 109 [Gil. 70]; State ex rel. Clapp v. Minn. Thresher Mfg. Co., 40 Minn. 213, 41 N.W. 1020 [3 L. R. A. 510]; Taliaferro v. Lee, 97 Ala. 92, 13 So. 125.' This appears to be the rule generally recognized by the authorities. 24 Cyc. 102.

See also, Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 128, 467 P.2d 372 (1970) “The right to trial by jury has been held to be the right which existed at the time of the adoption of the constitution. State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 P. 958 (1897); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910); Garey v. Pasco, 89 Wash. 382, 154 P. 433 (1916); Theodore v. Washington Nat'l Inv. Co., 164 Wash. 243, 2 P.2d 649 (1931); Watkins v. Siler Logging Co., 9 Wn.2d 703, 116 P.2d 315 (1941).” This right is also guaranteed in The Bill of Rights, Amendment VI;

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. (ratified December 15, 1791)

While the historical discussion of the right to a trial by jury is interesting the question in this case is not whether this or any other defendant has the right to a trial by jury, that is inviolate, rather the simple question posed by appellant Zuvela is;

Did the court impermissibly interfere with that right when it charged the jury with an instruction, commonly known as the “to convict” instruction, which stated in part;

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. (CP 27, 28)

The simple answer is NO. The court did not interfere with the appellant’s right to a fair trial by jury. The law in this area is well settled. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court is granted broad discretion in determining the wording and number of jury instructions. Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). Appellant is entitled to an instruction on the defendant's theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). Failure to provide such an instruction is reversible error. See State v. Redmond, 150

Wn.2d 489, 495, 78 P.3d 1001 (2003). Generally, this court will review the adequacy of jury instructions de novo as a question of law. State v. Cross, 156 Wn.2d 580, 617, 132 P.3d 80 (2006).

Appellant argues that the "to convict" instructions were erroneous because the court informed the jury that it had a duty to convict if it found all of the elements of the crime beyond a reasonable doubt. Appellant cites State v. Meggyesy, 90 Wash.App. 693, 696, 958 P.2d 319, review denied, 136 Wash.2d 1028, 972 P.2d 465 (1998), overruled on other grounds by State v. Recuenco, 154 Wash.2d 156, 110 P.3d 188 (2005), in which Division One stated;

Arthur Heggins and Thomas Meggyesy challenge the giving of standard WPIC "to convict" jury instructions used in their respective trials. Each contends the trial court erred by instructing the jury that if it found that the State had proved beyond a reasonable doubt all elements of the charged crime, then it had "a duty to return a verdict of guilty." We hold that neither the federal nor the state constitution precludes such an instruction. Accordingly, we affirm.

Meggyesy is directly on point. The ruling in Meggyesy was followed in State v. Brown, 130 Wn.App. 767, 770-1, 124 P.3d 663 (2005) which also cites State v. Bonisisio, 92 Wash.App. 783, 964 P.2d 1222 (1998)

Brown claims that the trial court's "to convict" instructions, which advised the jury that it had a "duty" to convict upon a finding of proof beyond a reasonable doubt, violated his right to a jury trial. Specifically, he argues that

the instruction misled the jury into believing that it lacked the power to nullify. Because the issue may arise on retrial, we briefly address it.

Jury instructions are sufficient if they are not misleading, permit the parties to argue their cases, and properly inform the jury of the applicable law when read as a whole. State v. Kennard, 101 Wash.App. 533, 536-37, 6 P.3d 38 (2000) (citing State v. Tili, 139 Wash.2d 107, 126, 985 P.2d 365 (1999)). Brown asserts that the state constitution prohibits the challenged jury instruction language.

In State v. Meggyesy, Division One, addressing essentially the same arguments Brown makes here, upheld a similar instruction, holding that it violated neither the state nor federal constitution. State v. Meggyesy, 90 Wash.App. 693, 701-04, 958 P.2d 319 (1998), *overruled on other grounds in State v. Recuenco*, 154 Wash.2d 156, 110 P.3d 188 (2005), *cert. granted*, --- U.S. ----, 126 S.Ct. 478, 163 L.Ed.2d 362 (2005) (applying the six-step analysis set forth in State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986)).

We agreed with the reasoning of Meggyesy in State v. Bonisisio, 92 Wash.App. 783, 964 P.2d 1222 (1998). There, the defendant also complained of a "to convict" instruction that instructed the jury it had a "duty" to return a verdict of guilty upon finding proof beyond a reasonable doubt of each element of the charge. Bonisisio, 92 Wash.App. at 793, 964 P.2d 1222. Bonisisio had proposed an instruction telling the jury that it "may" convict. Bonisisio, 92 Wash.App. at 793, 964 P.2d 1222.

Brown argues that Bonisisio and Meggyesy are distinguishable because in those cases each defendant asked the court to instruct the jury that it "may" convict. Here, Brown argues that the language of the "to convict" instruction affirmatively misleads the jury about its power to acquit. Brown points to the jury's power to acquit against the evidence, citing to Hartigan v. Territory of Wash., 1 Wash. Terr. 447, 449 (1874). Brown also argues that the court's use of the word "duty" in the "to convict" instructions conveyed to the jury that they could not acquit if the elements had been established. He cites to the

dictionary definition of "duty" as, "[a]n act or a course of action that is required of one by ... law." Br. of Appellant at 20 (quoting *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fourth Edition, Houghton Mifflin* (2000)). Brown claims that this is a misstatement of the law and that it deceived the jurors about their power to acquit in the face of sufficient evidence.

We find no meaningful difference between Brown's argument and the issues raised in Bonisisio and Meggyesy. The Meggyesy court, although addressing a slightly different argument, held that instructing the jury it had a "duty" to convict if it found the elements were proven beyond a reasonable doubt did not misstate the law. Meggyesy, 90 Wash.App. at 700-01, 958 P.2d 319. And in Bonisisio, 92 Wash.App. at 794, 964 P.2d 1222, we held that the trial court did not err in instructing the jury that it had a duty to convict if it found that the State had proven all the elements beyond a reasonable doubt. Further, the purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case. State v. Borrero, 147 Wash.2d 353, 362, 58 P.3d 245 (2002). The power of jury nullification is not an applicable law to be applied in a second degree burglary case. We reject Brown's argument that the court erred in giving the "duty" instruction.

There is no difference between the issue raised in these consolidated cases and the decisions in Meggyesy, Bonisisio and Brown and Appellant has not set forth a reason why this court should not follow those decisions or a basis to set those decisions aside.

This court will review jury instructions de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error when it prejudices a party. Cox v. Spangler, 141 Wash.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient when

they allow counsel to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied. Cox, 141 Wash.2d at 442, 5 P.3d 1265.

Neither appellant objected to the instruction. (RP 450, 453-4) The only objection on the part of Zuvella was to Instruction 15, he joined in an exception to the “failure” to give the lesser included of “attempted second degree burglary.” (RP 453-4) Further, Zuvella argues this is an issue of constitutional magnitude and yet he does not argue this instructional error was a manifest constitutional error that can be raised for the first time on appeal under RAP 2.5(a). He does not address this problem at all in his brief. An instructional error not objected to below may be raised for the first time on appeal only if it is "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An error is manifest if it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). “To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)) (alteration in original).”

Even assuming Appellants could invoke RAP 2.5(a), this argument has no merit. Once again this case is controlled by State v. Brown, 130

Wash.App. 767, 124 P.3d 663 (2005), in which the court rejected this very argument, that it was error to instruct a jury that it had a duty to convict if they found all elements beyond a reasonable doubt. Brown, 130 Wash.App. at 770-771, 124 P.3d 663. This court should follow Brown, and hold the instruction as given in this case was not an error.

Appellant argues that juries have the power to acquit, even if the not-guilty verdict is contrary to the law and the evidence. He acknowledges that a court need not inform jurors of this power. However, he argues that an instruction telling the jurors that they *could not* acquit if the elements have been established affirmatively is error, he then states “this misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence.” Appellant's Br. at 26-7. He argues that the factors identified in State v. Gunwall, 106 Wash.2d 54, 61-62, 720 P.2d 808 (1986), demonstrate that article I, sections 21 and 22 of the Washington Constitution prohibit a trial court from affirmatively misleading a jury about its power to acquit.

Appellant objects to the trial court's instruction to the jurors that it was their "duty" to accept the law and that it was their "duty" to convict if the elements were proved beyond a reasonable doubt. He claims that using

the word "duty" meant that the jury could not acquit if the elements had been established.

Both Division One and Division Two have rejected Zuvela's arguments Meggyesy and Bonisisio both held that altering the instructions to tell the jury it "may" convict is equivalent to notifying the jury of its power to acquit against the evidence. Meggyesy, 90 Wash.App. at 699-700, 958 P.2d 319; Bonisisio, 92 Wash.App. at 794, 964 P.2d 1222.

There is no meaningful difference between Appellant's arguments nor those raised in Brown, Bonisisio and Meggyesy. Further, in Bonisisio, 92 Wash.App. at 794, 964 P.2d 1222, the court held that the trial court did not err in instructing the jury that it had a duty to convict if it found that the State had proved all the elements beyond a reasonable doubt. The purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case. State v. Borrero, 147 Wash.2d 353, 362, 58 P.3d 245 (2002). The power of jury nullification is not an applicable law to be applied in a second degree burglary case. The court stated "We reject Brown's argument that the court erred in giving the "duty" instruction. Brown, 130 Wash.App. at 771, 124 P.3d 663."

This court should reject Zuvela's constitutional arguments. The court in Meggyesy applied the six-step analysis set forth in Gunwall and found

no independent state constitutional basis to invalidate the challenged instructions. Meggyesy, 90 Wash.App. at 703-04, 958 P.2d 319.

There is no difference between the instruction offered in this case and that addressed in the cases cited above. There is no factual basis presented by Appellant which would or should cause this Court to reconsider the findings of Meggyesy, Brown or Bonisisio the reasoning in those cases is sound and should not be changed, especially based on the facts of this case.

RESPONSE TO ASSIGNMENTS OF ERROR ONE – Epperson

Epperson’s only issue is that the trial court improperly restricted his ability to present a defense. This is premised on the ruling by the court that it would not allow Epperson to introduce irrelevant information regarding unfounded allegations pertaining to criminal acts that occurred at the victim’s home, the residence he was convicted of burglarizing.

It is a far stretch at best for Epperson to claim that he gave a “plausible” reason for being at or in the victim’s residence. His story was that this group just happened to be driving by the victim’s home on the way to the Jack-in-the-Box and they noticed from their moving vehicle that the door to this home was “ajar” which to Epperson meant “just a crack showing.” (RP 430, 441) They stopped and entered this home and just looked to make sure that the victims were OK. He claimed that the

items which were in the yard had been there when they had gone by. (RP 437) Epperson did not really have an explanation as to why Ms. Rogers was in the home and stated that she had never had the two bags which were found in the home containing jewelry in her hands. Both victims testified that they had observed Rogers with these two bags in her hands. Epperson also indicated that the house was cluttered but had to agree on cross, that the picture presented to him by the State did not show that. (RP 439-42) He stated the reason he had fled was he had been in trouble before, he was convicted of Burglary, and that he did not want to go through that again. He testified that it was chaos there and they, Mr. Wilton and Zuvella, were “yelling and screaming.” (RP 433)

The victim’s testified at length that none of the defendants were authorized to be in their residence. That Zuvella had told Mr. Wilton the reason for them being there was they owed him money. The victims observed Zuvella, Epperson and Rogers come from their home. The testified that Zuvella rammed their car in an attempt to leave the scene and that their personal property was inside of the van driven by Zuvella when he was attempting to flee and that Mr. Wilton was able to recover some items from inside the van as it attempted to flee the residence with one of the doors still open. (RP 232-4, 244)

There is clearly no basis to allow the admission of an alleged crime, that allegedly occurred almost one year AFTER the date of the crime charged in this case, alleged to have occurred at the same location, committed by some other person, a person who allegedly had been invited into the home would have a bearing on Epperson's defense of general denial.

The Appellant's were allowed to extensively cross-examine Mary Kelly-Wilton about her previous criminal history and about alleged improprieties regarding claimed losses from this crime. (RP 247-50, 255-259)

It is clear that a defendant has the right to present a defense that someone else committed this crime. Epperson and Zuvella both enjoyed the right under both the sixth amendment to the United States Constitution and article I, section 22 of the Washington Constitution to obtain witnesses and present a defense. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). The right to present a complete defense, including a third party culpability defense, does not mean that Epperson may introduce whatever evidence he wishes. This court would set aside an evidentiary ruling that was "arbitrary" or "disproportionate to the purposes they are designed to

serve" such a ruling would have to yield to a defendant's right to present a defense. Wynne v. Renico, 606 F.3d 867, 870 (6th Cir. 2010) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)), cert. denied, 131 S. Ct. 2873 (2011).

Under both the sixth amendment to the United States Constitution and article I, section 22 of the Washington Constitution a defendant has the right to obtain witnesses and present a defense, but a defendant has no right to present irrelevant evidence. To admit evidence suggesting another person committed the crime, the defendant must lay an adequate foundation; that is, Epperson must establish a train of facts or circumstances as tend clearly to point out someone besides the defendant as the guilty party. State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Evidence of possible motive alone is insufficient to establish this nexus. State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933); State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). The defendant has the burden of showing that "other suspect" evidence is admissible. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). As previously noted a trial court's decision to admit or refuse evidence is addressed to its sound discretion and is reviewable only for manifest abuse of that discretion. Thomas, 150 Wn.2d at 856.

It is very important that Regina Rogers was seen with actual personal property in her hands when the owner saw her that those bags containing the victim's property were tossed back into the residence by Rogers before she fled. Rogers fled at the same time that Epperson was leaving. They were both observed getting into the van driven by Zuvela. Epperson was seen stacking up the computer by Mr. Wilton.

Epperson set forth no facts which would point of another person or which would support his claim that a third party committed this crime and he was merely there to check on the safety and welfare of the victims. The fact that none of the three, Rogers, Epperson nor Zuvela called 911 before during or after they saw the allegedly open home when they were confronted by the victims or after they fled the neighborhood. Most critically the information that Epperson was attempting to have admitted does not address the alleged person who allegedly committed the crime he was accused of and this information was from almost a year after his crime and has absolutely nothing to do with the actual facts of his case.

Epperson says that the victim's home "was the continued target of criminal conduct." There is nothing on the record other than the statement by counsel that the later crime even occurred. Even if it did occur an act by an unrelated criminal against a common victim is not admissible. This is once again an attempt to paint the victims as bad people that they were

not the “nicest” people, a fact that was and is of no consequences to the case charged against Epperson. Epperson argues that he merely wished to introduce this information not to infer that the Wilton’s were criminals but to show that this home was a “desirable target for criminal activity perpetrated by other.” That statement is true only to the extent that Epperson himself was caught burglarizing the home, there was no other “activity” that was ever raised or proven at trial.

The ruling of the trial court addresses the issue and the obvious reason that Epperson wanted to introduce this “evidence”;

Again, we're talking about whether it was a robbery, burglary that takes place sometime before Christmas of 2011 as opposed to this January offense date. I think Mr. Krom actually hits it on the head when he states the defense wants to utilize this because they want this jury to know that this is not your, quote, unquote, typical alleged victim. This is my observation, that in some way they have brought this type of attention upon themselves.

Mr. Krom asserts that he thinks it helps his case. I think that's a tossup, quite bluntly, as to whether it would help or hurt. Also what could be seen going hand in hand in that is other people involved in criminal activity as well, ripping off those that are of like mind.

At any rate, there is nothing that would compel this court that there would be anything relevant about inquiry into this most recent incident regarding apparently Mr. Wells being the named individual that would be helpful to this trier of fact. The prejudicial nature would far outweigh the probative value. There certainly isn't any of the earmarks that I would be willing to review my prior ruling on as to similarities that could change my mind. That has not occurred. (RP 205-6)

The evidence in this case was overwhelming. The victims came home while the crime was in progress. They both observed the defendant's in the process of removing personal property from their home or observed their property in the van owned by Zuvela. There was never any rebuttal of the statement made by Zuvela to Mr. Wilton that the reason they were doing this was that he was owed money. Nor did Epperson himself refute the statement he made to the victim that he did not know why he was there. His defense was not that he did not know why he was there but he specifically knew why he was there and that was to aid his friends when he believed their home might have been burglarized.

Even if this court were to determine that the refusal by the trial court to allow the admission of this "evidence" was error this court would not need to reverse the finding of the jury. State v. Nelson, 131 Wn.App. 108, 125 P.3d 1008,1014, (2006):

But an erroneous evidentiary ruling is not grounds to reverse unless, within reasonable probabilities, it changed the outcome of the trial. State v. Christopher, 114 Wash. App. 858, 863, 60 P.3d 677, review denied, 149 Wash. 2d 1034, 75 P.3d 968 (2003); State v. Tharp, 96 Wash. 2d 591, 599, 637 P.2d 961 (1981).

Mr. Nelson asserts the error was prejudicial but does not explain how. And we do not find the prejudice was so obvious that the record speaks for itself. The evidence that he assaulted his wife in the manner alleged by the State was overwhelming. The error was therefore

harmless. State v. Davis, 154 Wash. 2d 291, 305, 111 P.3d 844 (citing State v. Guloy, 104 Wash. 2d 412, 426, 705 P.2d 1182 (1985)), cert. granted, --- U.S. ----, 126 S.Ct. 547 (2005).

Once again the rationale for the request to allow admission of this alleged crime which occurred in the victim's home almost a year after the crime Epperson was charged with was because Epperson alleged he was merely an innocent party passing by who stopped and while attempting to be a good person and check on the safety and welfare of his friends, became embroiled in a fight between Mr. Zuvella and Mr. Wilton. He claimed there was some third party who committed this specific crime, on a specific date in the home of a specific victim. The crime that allegedly happened almost a year later would not in any manner support a defense that the present crime was committed by a third person. In that situation "before such testimony can be received there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party. . . .
State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932), cited with approval in State v. Mak, 105 Wn.2d 692, 716, 718 P.2d 407, cert. denied, 479 U.S. 955 (1986).

See also, State v. Bell, 60 Wn. App. 561, 565, 805 P.2d 815 (1991)

"We agree that a defendant has a right to present a defense. However,

the evidence must be "relevant and material to the defense." As noted above, Bell has failed to show that the evidence is either relevant or material."

Epperson did not demonstrate at trial nor does he on appeal that the alleged incident almost a year after the fact was in any manner "relevant or material" to his defense. State v. Roberts, 80 Wn. App. 342, 908 P.2d 892 (1996):

Washington defines the right to present witnesses as a right to present material and relevant testimony. See State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The defense bears the burden of proving materiality and relevance, i.e., that the defense has a "colorable need" for the witness. Smith, 101 Wn.2d at 41. /6

The right to testify allows a defendant to give relevant, admissible evidence. See State v. Hudlow, 99 Wn.2d 1, 1415, 659 P.2d 514 (1983); State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 113 S. Ct. 2449 (1993). Roberts bears the burden of establishing the relevance and admissibility of the proposed testimony. Rehak, 67 Wn. App. at 162; Smith, 101 Wn.2d at 41.

Here, to be material and relevant, the testimony Roberts wished to offer must involve a period of time relevant to the existence of this grow operation and support a viable defense to constructive possession of the grow operation.

To paraphrase Roberts, to be material and relevant the testimony Epperson wished to offer must have involved a period of time relevant to the existence of the burglary and support the viable defense that someone else was the true perpetrator.

IV. CONCLUSION

The State concedes the issues regarding the imposition of legal financial obligations. With regard to all other allegations raised this court should affirm the actions of the trial. The rulings and instructions given should be upheld.

This court should dismiss all allegations except those pertaining to legal financial obligations. Those should be remanded to the trial court with instructions from this court.

Respectfully submitted this 25th day of March 2013

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DECLARATION OF SERVICE

I, David B. Trefry, state that on March 25, 2013, by agreement of the parties, I emailed a copy of the Respondent's Brief to: Dana Nelson at SloaneJ@nwattorney.net and to Jennifer L. Dobson at dobsonlaw@comcast.net and by United State mail, to Joseph Epperson DOC# 777392, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, WA 99001 and to David N. Gasch at gaschlaw@msn.com and by United States mail to, John Jacob Zuvela DOC #925330, P.O. Box 900, Shelton, WA 98585

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of March, 2013 at Spokane, Washington.

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