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59034-1 ^{HC}

81769-3

NO. 59034-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS POUNCY,

Appellant.

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

The Honorable Helen L. Halpert, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE TRIAL COURT'S ADMISSION OF FINDINGS OF FACT FOR IMPEACHMENT PURPOSES CONSTITUTED JUDICIAL COMMENT ON THE EVIDENCE.

The state relies on Gentry to argue admission of the judge's findings do not constitute judicial comment on the evidence. Brief of Respondent (BOR) at 16-17. Gentry held admission of a prior judgment and sentence as evidence of the defendant's past criminal record during the penalty phase of a death penalty trial did not constitute judicial comment because the evidence did not convey the judge's personal attitudes toward the merits of the sentence. State v. Gentry, 125 Wn.2d 570, 638-39, 888 P.2d 1105 (1995). The judgment and sentence was proper evidence because its admission, to which the rules of evidence did not apply, was specifically authorized by statute to prove an aggravating factor at sentencing. Id., 125 Wn.2d at 636, 637-38; RCW 10.95.060(3); RCW 10.95.070(1).

Pouncy's case involves judicial findings of fact admitted to impeach his expert witness on a contested issue at trial, not a judgment and sentence admitted under statutory authority to determine the proper sentence. Unlike the judgment and sentence in Gentry, the Yakima judge's findings commented on the credibility of the defense's expert witness, criticized the evidence relied upon by that witness, and otherwise communicated the

judge's opinion regarding the truth of the expert's testimony. For these reasons, the Yakima findings constituted judicial comment on the evidence. State v. Lane, 125 Wn.2d 825, 837-38, 889 P.2d 929 (1995); Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 409, 451 P.2d 669 (1969).

The state further suggests the findings of the Yakima judge do not constitute judicial comment because they were entered in a different case by a different judge. BOR at 17. The state cites no authority for this proposition. Nor does there appear to be any case that addresses the rather unique scenario presented here, perhaps because no other prosecutor has resorted to this particular impeachment tactic. In any event, the state is unable to explain why the animating rationale behind the prohibition against judicial comment ceases to operate when the comment of a different judge in a different case is entered into evidence to impeach the testimony of a witness. As the state repeatedly points out, the findings of the Yakima judge criticize the very same methodologies used by Dr. Wollert in Pouncy's case. BOR at 14, 24. And Wollert is the criticized witness in the Yakima case. Under these circumstances, the opinion of a different judge on the value of Wollert's testimony is just as capable of influencing the jury as any comment from the trial judge. As a result, there is no

sound reason why admission of the Yakima findings should escape the prohibition against judicial comment.

The state alternatively contends the judicial comment was harmless because there was overwhelming untainted evidence to support the verdict. BOR at 18-19. The comment was not harmless because the verdict hinged on which expert the jury believed. The state, however, maintains the jury could not have been influenced by the comment because Wollert's testimony was "deeply flawed" and "was not worth much to begin with." BOR at 19. "[T]he finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.'" State v. Fernandez-Medina, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000) (citation omitted). The jury, not appellate counsel for the state, was the trier of fact in this case. The state's attempt to prove the judicial comment was harmless beyond a reasonable doubt by relying upon a personal determination of Wollert's credibility and the truth of his testimony must fail.

2. IF THE FINDINGS OF FACT DO NOT QUALIFY AS JUDICIAL COMMENTS, THEN COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE AN APPROPRIATE EVIDENTIARY OBJECTION TO THEIR ADMISSION.

In addressing Pouncy's ineffective assistance claim, the state insists admission of the judge's opinion on the merits of Dr. Wollert's methodolo-

gy was proper because the opinion was relevant to a fact at issue. BOR at 23-25. As set forth in Pouncy's opening brief, a judge's opinion regarding the truth and weight of a witness's testimony is irrelevant because the jury is the exclusive trier of fact. Brief of Appellant at 17-19.

The state claims the findings were not inadmissible hearsay. BOR at 25. It is undisputed the Yakima findings were statements, the Yakima judge was the declarant, and that the judge did not make the statements while testifying at the trial. Where the out-of-court statement of a non-testifying declarant is used to impeach a trial witness, the impeaching statement constitutes hearsay. State v. Williams, 79 Wn. App. 21, 27, 902 P.2d 1258 (1995).

The state nevertheless argues the judge's statements are not hearsay because the prosecutor did not introduce the document itself as an exhibit. BOR at 25. The prosecutor quoted the findings to the jury during the course of cross-examination. 16RP 160-61; 17RP 35-36. Hearsay may not be incorporated into questions asked for impeachment purposes. Washington Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 687-89, 724, 724 P.2d 997 (1986). An out of court statement offered to prove the truth of the matter asserted does not cease to be hearsay simply because the contents of a document are incorporated into a question rather than

physically admitted, especially when the witness is forced to affirm the statement's existence on the stand. See Nipper v. Snipes, 7 F.3d 415, 416, 417 (4th Cir. 1993) (judicial findings from another case read to jury during examination of witness constituted hearsay). This Court will not permit cross-examination that attempts to impeach by slipping hearsay evidence into the trial. Sherman, 106 Wn.2d at 687-89.

The state asserts even if the findings were hearsay, they were admissible under the public record exception to the hearsay rule pursuant to ER 803(a)(8). BOR at 25. Washington has not adopted a hearsay exception for public records as part of ER 803. State v. Monson, 113 Wn.2d 833, 838-39, 784 P.2d 485 (1989). Rather, RCW 5.44.040 governs the admissibility of public records as an exception to the hearsay rule. Id. In any event, the state's contention fails for several reasons.

First, there is no evidence in the record to show the document was certified as required by RCW 5.44.040. Although the state claims in its brief that the document was certified, this Court will not consider evidence outside the record. State v. Rienks, 46 Wn. App. 537, 545, 731 P.2d 1116 (1987).

Second, the state did not seek to admit the document itself at trial, and so the public records exception was never even triggered. There was no public record to be excepted.

Third, a document is not admissible under the public records exception to the hearsay rule if the document contains conclusions involving the exercise of judgment or the expression of an opinion. Monson, 113 Wn.2d at 839. The Yakima's judge's finding that Wollert's methodologies are not generally accepted in the scientific community squarely falls into the category of opinion and exercise of judgment.

Fourth, the bright line rule is that judicial findings of fact do not fall within the public records exception to the hearsay rule. 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.75 (4th ed. 2006). In excluding judgments, including underlying findings and conclusions, as hearsay, "the courts have undoubtedly been influenced by the fact that jurors often attribute more importance to judgments than is warranted, and often regard judgments as conclusive proof despite instructions to the contrary." Id. This rule is followed in the vast majority of jurisdictions. Id.; see, e.g., Nipper, 7 F.3d at 417 (public records exception under FRE 803(8)(C) does not apply to judicial findings); accord United States v. Jones, 29 F.3d 1549, 1554 (11th Cir. 1994). It is clear

that when the drafters of the Washington rules of evidence wanted to allow the admission of judgments or their underlying facts, they did so expressly. See ER 803(22) (judgment of previous conviction); ER 803(23) (judgment as to personal, family, or general history, or boundaries).

The state further maintains admission of the findings did not violate the rule against using extrinsic evidence for impeachment purposes under ER 608(b). BOR at 26-27. The state cites Tegland and Navarro for the proposition that inquiry into an expert's professional misconduct or negligence is not barred by ER 608(b) if it is relevant to the quality of the expert's opinion. BOR at 26; 5B Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 705.7 (5th ed. 2007); Navarro de Cosme v. Hospital Pavia, 922 F.2d 926, 932-33 (1st Cir. 1991). Neither authority discusses that proposition in relation to the bar against using extrinsic evidence. Tegland and Navarro are further inapposite because the attack on Wollert's credibility was not based on professional misconduct or negligence.

3. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF PERSONALITY DISORDER.

The state acknowledges the term "personality disorder" has a "very specific psychological meaning" and is "well-defined in the psychological

profession." BOR at 31, 32. The state nevertheless contends the term did not need to be defined for the jury because it does not have a technical meaning. BOR at 31-32.

Lay jurors are not psychiatrists. They are not schooled in the intricacies of the DSM, where this term is defined. In re Pers. Restraint of Young, 122 Wn.2d 1, 50, 857 P.2d 989 (1993). The term is technical because it is not self-explanatory and has no common usage. State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). The state is unable to explain how average jurors could properly define a term for themselves when that term has a specialized meaning known only to those in the psychological profession. Reversal is required because there is no way to ascertain whether jurors used a proper definition of an element of the state's case. State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 798 (1984).

Without citation to the record, the state contends the trial court did not err in supplying a definition of "personality disorder" to the jury because both experts defined the term in the same fashion. BOR at 31, 33. This argument is flawed for several reasons.

The jury is bound by the law as contained in the jury instructions; it is not bound by anything the expert says. CP 1010 (Instruction 22). Even if both experts agreed on the definition, jurors could have rejected

the expert's understanding and substituted their own varying and incorrect definitions of the term in the absence of an appropriate jury instruction.

In this case, however, the experts did not even define the term in the same fashion. Dr. Packard described the term as follows:

Personality disorders are kind of pervasive, long-lasting, chronic, if you will, ways of thinking, feeling, acting, interacting with others, relationships, interacting with the society, that are markedly deviant from cultural expectations and norms.

9RP 27.

Wollert, meanwhile, declined to define the term. Referring to the statutory definition of a SVP, defense counsel asked Wollert:

Q. Well, now, if I could ask, it says, "Respondent suffers from a mental abnormality and/or a personality disorder." So that's saying, is it, that a personality disorder can be a mental abnormality or it can be just there by itself?

A. You know, *the interpretation of that is something that I will have to leave to the court.* I considered personality disorder in the same way I would consider defining a mental abnormality, that there is some condition present.

15RP 119-20 (emphasis added).

Unlike Packard, Wollert understood expert witnesses are not supposed to instruct the jury on the law. That role is reserved for the judge alone. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002).

Moreover, Packard's definition differs from Pouncy's proposed definition in significant respects. Packard's definition omits the DSM IV-R

requirements that a mental condition, in order to qualify as a personality disorder, must (1) have an onset in adolescence or early adulthood; (2) be stable over time; and (3) lead to distress or impairment. CP 730, 931. If the jury took its guidance from Packard in determining what "personality disorder" meant, then it committed Pouncy based on an incorrect understanding of that term.

But the fundamental point is that the jury should not have to accept a technical definition of an element of the state's case from the state's expert witness. State v. Olmedo, 112 Wn. App. 525, 534-36, 49 P.3d 960 (2002). "A contrary rule would confuse the jury because each party would find an expert who would state the law in the light most favorable to its position." Clausing, 147 Wn.2d at 628.

4. POUNCY'S RIGHT TO JURY UNANIMITY WAS VIOLATED BECAUSE SUBSTANTIAL EVIDENCE DID NOT SUPPORT EACH ALTERNATE MEANS OF PROVING THE MENTAL ILLNESS ELEMENT.

The state acknowledges Dr. Packard presented evidence of pedophilia to the jury and concedes there was insufficient evidence to prove Pouncy suffered from pedophilia. BOR at 38-39. The state nevertheless contends unanimity was ensured because it did not present evidence of multiple abnormalities. BOR at 38-39. In support of this dubious proposition, the state argues the jury could not have considered pedophilia

as an alternative mental abnormality because Packard did not testify pedophilia fit the definition of mental abnormality. BOR at 39, 40.

"An appellate court must be able to determine from the record that jury unanimity has been preserved." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). Packard nowhere indicated pedophilia did not qualify as a mental abnormality. 8RP 72-74; 9RP 24-26, 139. Indeed, the form and manner of presentation reveals Packard took it for granted that pedophilia is a mental abnormality.¹ As framed by Packard's testimony, the issue was whether sufficient evidence supported a diagnosis of pedophilia, not whether pedophilia was a mental abnormality. Indeed, if Packard did not believe pedophilia could qualify as a mental abnormality, then there is no reason why he would even talk about it in this SVP case. Nor would the state have spent considerable effort it directing the jury to consider evidence that supported the diagnosis. Such a discussion would

¹ Before Packard said anything about paraphilia NOS nonconsent, he testified there was evidence Pouncy suffered from pedophilia and that pedophilia is a type of paraphilia. 8RP 72. In its overarching presentation of evidence showing mental abnormality, the state sandwiched Packard's later, more extensive discussion of pedophilia (9RP 23-26) with testimony on paraphilia NOS nonconsent. 8RP 162-186; 9RP 6-23, 26.

have been irrelevant.² On this record, there is no way of knowing whether one or more jurors believed there was sufficient evidence to support a finding of pedophilia and treated pedophilia as the mental abnormality suffered by Pouncy.

The state alternatively claims it ensured unanimity by electing paraphilia NOS nonconsent as the abnormality. BOR at 39.

The state's purported election is insufficient. The state must expressly and specifically make an election to the jury. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). The state does establish election unless (1) its closing argument, when considered with the jury instructions and the charging documents, makes clear which act the state relies on to convict; and (2) there is no possibility the jury could have been confused as to which act the state relied upon. State v. Bland, 71 Wn.

² Without citation to the record, the state argues it was entitled to introduce evidence of pedophilia to rebut Pouncy's claim that he had adequately addressed his sexual deviance in treatment. BOR at 38 n.2. At the time Packard testified on direct examination about Pouncy and pedophilia as part of the state's case in chief, Pouncy had not presented any evidence that he had adequately addressed his sexual deviance in treatment. There was nothing for the state to rebut at that point. The state's argument is further illegitimate because Pouncy had never been diagnosed with pedophilia and had never been treated for pedophilia. 8RP 74; 9RP 139. It is inconceivable the state could in good faith seek to preemptively rebut a non-existent claim that he had made adequate treatment gains for pedophilia.

App. 345, 351-52, 860 P.2d 1046 (1993), overruled on other grounds, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

The state baited the jury with pedophilia in its closing argument.

18RP 68. In rebuttal, the state further argued it was appropriate for Packard to talk about pedophilia because

[t]his isn't some artificial world that we're talking about, that Mr. Pouncy's going to live in, where we don't use words that apply because Mr. Pouncy's lawyer is offended by them. This is the real world that we're talking about letting this man walk around in . . . I would agree pedophilia is frightening and it should be considered as frightening when we're considering this man out in our community.

18RP 146.

These are not the words of a prosecutor who seeks to notify the jury that it should only consider paraphilia NOS nonconsent as the mental abnormality. On the contrary, the state wanted to the jury to consider pedophilia as an alternative abnormality. Otherwise, the state would not have argued pedophilia should be considered by the jury in deciding whether Pouncy should be returned to the community.

Furthermore, the generic "to commit" instruction did not specify paraphilia NOS nonconsent as the only abnormality capable of being considered by the jury. CP 991 (Instruction 3). The petition, meanwhile, only describes Pouncy's alleged mental abnormality as a "paraphilia." CP

1-2. Pedophilia is a paraphilia. 8RP 72. While the certification of probable cause specified paraphilia NOS nonconsent as the abnormality, there is nothing in the record to show the jury ever heard or read the certification of probable cause. CP 7. The certification therefore does not help the state prove it was impossible the jury considered pedophilia as the abnormality.

Telling the jury there is insufficient evidence for one means of committing the crime is not the same as electing a different means. The court instructed the jury that attorneys' arguments are not evidence, and that it was free to draw its own conclusions from the evidence presented. CP 988 (Instruction 1). The jury was free to draw its own conclusions regarding the strength of the evidence for pedophilia. Emphasizing paraphilia NOS nonconsent over pedophilia does not constitute sufficient election either. See Williams, 136 Wn. App. at 497 (no election where state emphasized one particular act of assault but did not expressly elect to rely only on that single act). Pouncy was therefore deprived of his right to a unanimous jury verdict.

B. CONCLUSION

For the reasons stated, this Court should reverse the verdict.

DATED this 31st day of July, 2007.

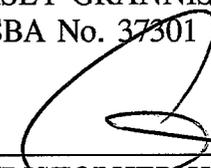
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