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NO. 92261-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

SAYIDEN H. MOHAMED,

Respondent.

SUPPLEMENTAL
BRIEF OF PETITIONER

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ORIGINAL

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I. ISSUE

This court has granted review of the following issue:

ER 806 allows a declarant to be impeached if his statements are admitted for their truth. Can a person be impeached under this rule when an expert testifies that the validity of his opinion depends on the truth of that person's statements?

II. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals opinion. A more detailed summary is in the Brief of Appellant at 2-7.

III. ARGUMENT

A. APPLICATION OF ER 806 AND SIMILAR RULES DEPENDS ON WHETHER STATEMENTS WERE ADMITTED FOR THEIR TRUTH, NOT ON THE SPECIFIC BASIS FOR ADMISSIBILITY.

The primary purpose of this supplemental brief is to discuss case law from other jurisdictions that have adopted rules similar to ER 806. The State has extensively briefed this case in the Court of Appeals and the petition for review. Except when necessary for clarity, the State will not repeat the arguments in those briefs.

This case involves a specific application of ER 806: use of prior convictions by the State to impeach statements made by a defendant. The rule, however, has a much broader application. Comparable rules have allowed defendants to impeach statements

introduced by the prosecution. See, e.g., United States v. Moody, 903 F.2d 321 (5th Cir. 1990); State v. Morrow, 273 Neb. 592, 731 N.W.2d 558 (2007). Conversely, they have allowed the prosecution to impeach statements introduced by defendants, whether those statements were made by the defendants themselves or by others. See, e.g., United State v. Greenridge, 495 F.3d 85, 97 (3rd Cir.), cert. denied, 552 U.S. 1017 (2007) (impeachment of statements made by defendant); State v. Watson, 61 Ohio St. 3d 1, 6, 572 N.E.2d 97, 103-04 (1991) (impeachment of statements made by persons other than defendant). The rule applies to all permissible methods of impeachment, whether by prior convictions, inconsistent statements, reputation, or otherwise. See, e.g., Greenridge, 485 F.3d at 97 (use by prosecution of defendant's prior conviction to impeach defendant's statement); United States v. Burton, 937 F.2d 324 (7th Cir. 1991) (use by defendant of declarant's prior conviction to impeach declarant's statement); Moody, 903 F.2d at 328 (use by defendant of declarant's reputation for untruthfulness to impeach declarant's statement); Lewis v. Gubanski, 50 Ark. App. 255, 905 S.W.2d 847 (1995) (use in civil case of inconsistent statements to impeach declarant's statement).

In deciding whether impeachment is permissible under rules similar to ER 806, courts have asked essentially one question: was the fact-finder allowed to consider the statement as evidence of its truth? If the answer is yes, it makes no difference what rule or doctrine authorized admission of the statement. It does not even matter whether the statement was properly admitted *at all*. Whenever the fact-finder is allowed to consider the truth of the statement, the opposing party is entitled to impeach the declarant.

Several cases illustrate this point. In one, the defendant was charged with being an accomplice in a robbery. He introduced evidence that when arrested, he told the arresting officer that he had been unaware that the principal was going to commit the robbery. In response, the State introduced evidence of the defendant's prior robbery conviction. The Oregon Court of Appeals held that this was proper under Oregon Rule of Evidence 806. This was because "[i]t is clear from the context of the record that defendant's statements were offered to prove the truth of the matter asserted." State v. Dishman, 148 Ore. App. 404, 407 n. 2, 939 P.2d 1172, 1174 (1997).

A second case involved another robbery prosecution. The defendant claimed an alibi. In support of this claim, he introduced

evidence that he had told a witness that he was going to a rap studio. To impeach this evidence, the State introduced evidence of the defendant's prior robbery conviction. On appeal, the defendant argued that impeachment was improper because his statement was not hearsay. The North Carolina Court of Appeals rejected this argument: "[The witness's] testimony assisted in establishing an alibi for defendant that evening, and therefore, was hearsay because it was offered for the truth of the matter asserted." The impeachment was therefore proper under North Carolina Rule of Evidence 806. State v. McConico, 153 N.C. App. 723, 727, 570 S.E.2d 776, 780 (2002), review denied, 357 N.C. 168, 581 S.E.2d 439 (2003).

A third case involved a prosecution for murder committed in the course of a robbery. In cross-examining a police officer, the defendant elicited testimony that two people had told the officer that the defendant was not the robber. The State impeached that testimony with inconsistent statements from the two declarants. On appeal, the defendant claimed that the declarants' statements were not offered for their truth, but only to impeach the police officer. The Ohio Supreme Court rejected this claim: "[N]o limiting instructions were placed on these statements at the time they were introduced,

and the jury was free to consider them for any purpose." The impeachment was therefore proper under Ohio Rule of Evidence 806. Watson, 61 Ohio St. 3d at 6-7, 572 N.E.2d at 103-04.

Similarly in the present case, no instruction was given limiting use of the defendant's statements. The jury was therefore free to consider them for their truth. This being so, the State was entitled to impeach the defendant as declarant.

B. THE POSSIBLE AVAILABILITY OF A LIMITING INSTRUCTION IS IRRELEVANT, IF NO SUCH INSTRUCTION IS ACTUALLY GIVEN.

The Court of Appeals placed heavy emphasis on the State's failure to seek a limiting instruction. The cases discussed above show that this consideration is irrelevant. If a limiting instruction is actually given, it may preclude the jury from considering a statement for its truth, which makes impeachment improper. If, however, no instruction is given, the jury may consider the statement for its truth, thereby allowing impeachment.

In Burton, for example, the prosecution introduced evidence of a conversation between the defendants and an informant. The informant's statements during that conversation could have been offered for the non-hearsay purpose of placing the defendants' statements in context. But because no limiting instruction was

given, the statements could be considered for their truth. The defendants therefore had the right to impeach the informant with his prior convictions. Burton, 937 F.2d at 327-28.

The converse situation arose in Watson. As discussed above, the defendant there introduced statements that were arguably admissible for the non-hearsay purpose of impeaching another witness. But because no limiting instruction was given, the State was allowed to impeach the declarants with their prior inconsistent statements. Watson, 61 Ohio St. 3d at 104, 572 N.W.2d 97 ((1991). See also Morrow, 273 Neb at. 600, 731 N.W.2d at 564-65 (absent limiting instruction, purported non-hearsay purpose for statement could not prevent defendant from impeaching declarant).

The conclusion is clear. If a party wishes to offer a statement for a non-hearsay purpose, that party must request an instruction precluding consideration of the truth of the statement. If such an instruction is given, neither party may argue that the statement is true or false, so impeachment is irrelevant. If no such instruction is given, the party who introduced the statement can properly ask the fact-finder to consider it as substantive evidence. In that case, the

opposing party has the right to introduce evidence casting doubt on the statement's truth.

C. UNDER THE INSTRUCTIONS AND EVIDENCE IN THE PRESENT CASE, THE SOLE RELEVANCE OF THE DEFENDANT'S STATEMENTS DEPENDED ON THEIR TRUTH.

The record in the present case makes it clear that the defendant's statements were admitted for their truth. This is so for several reasons. First, no limiting instruction was given. In Washington, when hearsay is admitted without objection, the fact finder may consider it for its probative value. State v. Whisler, 61 Wn. App. 136, 139, 810 P.2d 540 (1991). As discussed above, the same is true in other jurisdictions.

Second, the jurors in this case were given the *opposite* of a limiting instruction. Instruction no. 4 said that the jury could consider evidence of prior convictions "in deciding what weight or credibility to give to the defendant's statements." CP 94. Under this instruction, the jurors were entitled to decide that the defendant's statements were credible and entitled to great weight.

Third, the sole relevance of the defendant's statements arose from their truth. The defense expert testified that the defendant told him that he drank five cans of "211 Steel Reserve beer" plus a pint of vodka. 7/1 RP 53. That statement, *if true*,

allowed the expert to estimate the defendant's blood alcohol concentration. 7/1 RP 54-55. If the truth of the statement is disregarded, however, it had no relevance at all. The defendant's mere speaking of the words "I drank five cans of beer" had no bearing on any issue in this case.

If the defendant's statement was not admitted for its truth, the prosecutor could properly argue that there was no evidence of how much alcohol the defendant had consumed. That would make the expert's opinion meaningless. It would be a hypothetical opinion based on facts that had never been proved. But under the instruction in this case, such an argument from the prosecutor would be improper. He could and did argue that the defendant's statement was not credible. 7/1 RP 127-28. He could not, however, properly argue that the statement was not evidence of the defendant's degree of intoxication. Such an argument would have been squarely contrary to Instruction no. 4.

This distinction can be illustrated by a hypothetical example. Suppose an expert testifies that if a person is in Los Angeles at noon, he could not be in Everett at 12:30 on the same day. That expert opinion would support an alibi for a crime committed in Everett at 12:30 – *if* there is evidence that the defendant was in Los

Angeles at noon. If there is no such evidence, the opinion may be entirely correct in the abstract, but it is irrelevant to establish an alibi.

Now suppose that the only evidence of the defendant's whereabouts is his statement, "I was in Los Angeles at noon." If that statement is *not* admitted for its truth, the prosecutor could tell the jury that the expert's opinion is correct but completely irrelevant. On the other hand, if the statement *is* admitted for its truth, the prosecutor could not properly make such an argument. The prosecutor could argue that the statement is lacking in credibility, but he could not argue that the statement is not evidence of the defendant's location.

In the present case, the defendant's statement was admitted for its truth. The sole relevance of the statement depended on its truth, and the jury was told that they could determine the statement's credibility. This being so, the prosecutor had the right to impeach the declarant, whether by prior convictions or any other proper means.

IV. CONCLUSION

ER 806 rests on a basic foundation: when a fact-finder is called on to determine the truth of a statement, it must be given the

information necessary for an accurate determination. The Court of Appeals has created an arbitrary exception – when the statement is made to an expert, the fact-finder must be deprived of that information.

The absurdity of that rule is demonstrated by this case. The defense expert relied on the defendant's statements without assessing their truth. The expert explained that this assessment was the jurors' job. 7/1 RP 68-69. Yet the Court of Appeals held that the jurors could not be given the information they needed to make an accurate assessment of the statement's truth.

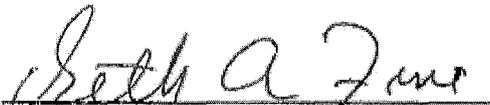
This court should end that absurdity. When a statement is admitted for its truth, the declarant can be impeached. This applies equally to prosecutors, criminal defendants, and civil litigants. It applies regardless of the theory under which the evidence was admitted. Whenever a jury or other fact-finder is called on to assess the truth of a statement, the opposing party can use the tools of impeachment to aid that assessment.

In this case, the trial court properly allowed the defendant to be impeached. The court erred in granting a new trial on the basis of that proper impeachment. The decision of the Court of Appeals

should be reversed. The case should be remanded with instructions
to enter judgment on the verdict.

Respectfully submitted on April 1, 2016.

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OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

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Dated this 15th day of April, 2016, at the Snohomish County Office.



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Thanks.

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