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Supreme Court No. 92261-6
Court of Appeals No. 72263-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

SAYIDEN H. MOHAMED,

Respondent.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

A. SUMMARY OF APPEAL 1

B. ISSUES PRESENTED 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 6

The Court of Appeals' holding that a defendant may not be impeached with prior convictions when his out-of-court statements are offered for the limited purpose of explaining the basis for an expert's opinion is consistent with Washington law and should be affirmed 6

1. Mr. Mohamed's prior convictions were not admissible as impeachment because his out-of-court statements were offered to explain the basis for his expert's opinion and not to prove the truth of the matters asserted 7

2. The burden was on the State to request a limiting instruction in order to ensure the jury would not consider Mr. Mohamad's out-of-court statements for the truth of the matters asserted 17

E. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Cases

Group Health Co-op. of Puget Sound, Inc. v. Dept. of Revenue, 106 Wn.2d 391, 722 P.2d 787 (1986) 9, 10

In re Det. of Coe, 175 Wn.2d 482, 286 P.3d 29 (2012) 10, 14, 15

In re Det. of Marshall, 156 Wn.2d 150, 125 P.3d 111 (2005) 10, 14

Lockwood v. AC & S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987) 20

State v. Anderson, 44 Wn. App. 644, 723 P.2d 464 (1986) 10, 15

State v. Eaton, 30 Wn. App. 288, 633 P.2d 921 (1981) 12, 15, 17

State v. Fish, 99 Wn. 86, 992 P.2d 505 (1999) 8

State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001) 18

State v. Fullen, 7 Wn. App. 369, 499 P.2d 893 (1972) 11, 14, 15

State v. Gallagher, 112 Wn. App. 601, 51 P.3d 100 (2002) 19

State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010) 18

State v. Martinez, 78 Wn. App. 870, 899 P.2d 1302 (1995) 10, 15

Sturgeon v. Celotex Corp., 52 Wn. App. 609, 762 P.2d 1156 (1988) .. 19

Other Jurisdictions

Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964) 18

State v. Morrow, 273 Neb. 592, 731 N.W.2d 558 (2007) 11

United States v. Burton, 937 F.2d 324 (7th Cir. 1991) 11

United States v. Price, 792 F.2d 994 (11th Cir. 1986) 8

Rules

ER 103(a) 14

ER 105 19

ER 703 9

ER 705 9

ER 801(c) 8

ER 806 ..... 4, 7, 8

Other Authorities

21A Wright & Graham, Federal Practice & Procedure: Federal Rules of Evidence, § 5065 18

5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 105.2 (5th ed. 2007) 20

5B Karl B. Tegland, Washington Practice: Evidence Law and Practice, §705.5 (5th ed. 2007) 9

5C Karl B. Tegland, Washington Practice: Evidence Law and Practice, §806.2 (5th ed. 2007) 8

A. SUMMARY OF APPEAL

The Court of Appeals properly concluded Sayiden Mohamed's prior convictions were not admissible to impeach out-of-court statements he made to the defense expert. The statements were not offered for the truth of the matters asserted but rather for the limited purpose of explaining the basis for the expert's opinion. This Court should affirm.

B. ISSUES PRESENTED

1. When an out-of-court statement is admitted at trial, ER 806 permits the opposing party to impeach the declarant only if the statement is admitted for the truth of the matters asserted. When a medical expert relies upon a defendant's out-of-court statements in forming his opinion, the statements are admissible only for the limited purpose of explaining the basis for the expert's opinion and not for the truth of the matters asserted. Mr. Mohamed's out-of-court statements were admitted only for the limited purpose of explaining the expert's opinion. Did the Court of Appeals correctly conclude the statements were not subject to impeachment under ER 806?

2. When evidence is admitted for a limited purpose, the burden is on the *opposing party* to request a limiting instruction to ensure the

jury considers the evidence for only that purpose. Failure to request a limiting instruction results in waiver of the right to argue the jury was improperly allowed to consider the evidence for another purpose. Here, the defense offered Mr. Mohamed's out-of-court statements for a limited purpose and the State did not request a limiting instruction. Did the State waive the right to argue the jury was improperly allowed to consider the evidence for another purpose?

C. STATEMENT OF THE CASE

One evening in April 2014, Everett police officers responded to the home of Sayiden Mohamed after Mr. Mohamed made a series of 911 calls. 6/30/14RP 75, 103. The officers determined there was no emergency or criminal activity to investigate, but discovered Mr. Mohamed had an outstanding warrant. 6/30/14RP 78-79, 105-06. When the officers tried to arrest Mr. Mohamed, he became belligerent, yelled and made threats. 6/30/14RP 80, 106-07. As the officers struggled to place him in handcuffs, he allegedly spit at two of the officers in the face. 6/30/14RP 85-86, 108-09. Mr. Mohamed was charged with two counts of third degree assault. CP 111.

All three of the responding officers testified Mr. Mohamed was obviously intoxicated or "extremely intoxicated." 6/30/14RP 77, 98,

104; 7/01/14RP 14. Mr. Mohamed smelled of alcohol, his eyes were watery, and his speech was slurred. He told one officer he had been drinking alcohol since early afternoon. 7/01/14RP 18.

Mr. Mohamed presented a voluntary intoxication defense. He retained an expert in pharmacology, Dr. Robert Julien, who concluded Mr. Mohamed was in a state of alcohol-induced blackout, or "drug-induced dementia," at the time. 7/01/14RP 46. Dr. Julien concluded that as a result of his drug-induced dementia, Mr. Mohamed was not capable of forming an intent to commit the crime. 7/01/14RP 58.

In forming his opinion, Dr. Julien relied upon the police officers' descriptions of Mr. Mohamed's behavior as well as Mr. Mohamed's self-report, as no toxicology results were available. 7/01/14RP 50-51. Experts in Dr. Julien's field commonly rely upon police reports and self-reports in forming their opinions. 7/01/14RP 52, 95. Dr. Julien testified Mr. Mohamed told him that on the day of the incident, he consumed five 24-ounce cans of beer with a high alcohol content, as well as most of a pint of vodka. 7/01/14RP 53. Mr. Mohamed also said he had no memory of the incident and only remembered waking up in jail. 7/01/14RP 53, 56. Mr. Mohamed's self-report was consistent with the police officers' descriptions of him

as extremely intoxicated. 7/01/14RP 57. Dr. Julien concluded Mr. Mohamed was sufficiently intoxicated to experience drug-induced dementia. 7/01/14RP 57-58.

Defense counsel offered Mr. Mohamed's statements to Dr. Julien not for the truth of the matters asserted but to explain the basis for Dr. Julien's opinion. 7/01/14RP 23. The court acknowledged the statements were not being offered as substantive evidence or under any exception to the hearsay rule. 7/01/14RP 26-27. The court proposed providing a limiting instruction which would state, "Statements by the defendant to Dr. Julien are being offered only for the limited purpose of seeking to help explain Dr. Julien's opinions and are to be considered by you only for that limited purpose." 7/01/14RP 29-31.

Instead of agreeing to the limiting instruction, the deputy prosecutor sought to impeach Mr. Mohamed's out-of-court statements by presenting evidence of his prior convictions for crimes of dishonesty under ER 806.[1] 7/01/14RP 21-22, 31. Defense counsel objected,

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[1] ER 806 provides "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."

arguing the statements were not subject to impeachment because they were not being offered for the truth of the matters asserted. 7/01/14RP 23-24. The court overruled the objection. 7/01/14RP 28-29.

Thus, while cross-examining Dr. Julien, the deputy prosecutor asked if he was aware that Mr. Mohamed "had been convicted of multiple crimes of dishonesty, like, two felony convictions and multiple misdemeanor theft convictions, and that he had been dishonest in the past." 7/01/14R 69. Further, during closing argument, the prosecutor argued Dr. Julien's opinion was unreliable because he

> cannot dispute the fact that his report is solely for the most part based on self-reporting of which the defendant, as I stated to him, has crimes of dishonesty. Was he being dishonest at that time? Did he have an incentive to be dishonest? You bet he did.

7/01/14RP 127-28.

After the jury returned a guilty verdict, defense counsel moved for a new trial, relying upon a case she recently discovered, State v. Lucas, 167 Wn. App. 100, 271 P.3d 394 (2012). 7/02/14RP 6, 14; CP 78-85. In Lucas, Division Two held a defendant may not be impeached with prior convictions when his out-of-court statements are admitted at trial to explain the basis for his expert's opinion and not as substantive

evidence. Id. The trial court agreed Lucas was controlling and granted a new trial. 7/30/14RP 16; 8/07/14RP 5-6; CP 2, 5.

The State appealed. Division One agreed with Division Two's holding in Lucas and affirmed.

D. ARGUMENT

The Court of Appeals' holding that a defendant may not be impeached with prior convictions when his out-of-court statements are offered for the limited purpose of explaining the basis for an expert's opinion is consistent with Washington law and should be affirmed.

The trial court and the Court of Appeals properly concluded prior conviction evidence was not admissible to impeach Mr. Mohamed's out-of-court statements because the statements were not offered or admitted for the truth of the matters asserted.

The State had a ready solution at trial to ensure the jury would use the out-of-court statements only for their limited purpose by requesting a limiting instruction. It is fundamental that the *opponent* of evidence admitted for a limited purpose—here, the State—has the burden to request a limiting instruction.

The State wants it both ways in this case. The State may not sit on its hands, allow Mr. Mohamed's out-of-court statements to be admitted without a limiting instruction, and then argue his prior

convictions must be admitted to ensure the jury does not afford his statements too much credibility.

The State is, in effect, advocating for a backdoor means of admitting highly prejudicial prior conviction evidence. This evidence carries the great potential to encourage the jury to enter a verdict based on prior misconduct rather than the facts of the current case. The State's argument is contrary to Washington law and should be rejected.

1. Mr. Mohamed's prior convictions were not admissible as impeachment because his out-of-court statements were offered to explain the basis for his expert's opinion and not to prove the truth of the matters asserted.

ER 806 permits a party to attack the credibility of a hearsay declarant as if the declarant had testified at trial, but only if the statements were not offered for the truth of the matters asserted: "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.

By its express terms, ER 806 applies only "[w]hen a *hearsay* statement . . . has been admitted in evidence." ER 806 (emphasis added). "'Hearsay' is a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

Thus, "ER 806 authorizes impeachment of a declarant only when the declarant's statement has been offered to prove the truth of the matter asserted. If the statement is offered for some other non-hearsay purpose, ER 806 does not apply." State v. Fish, 99 Wn. App. 86, 95, 992 P.2d 505 (1999).

When an out-of-court statement is offered for a nonhearsay purpose, impeachment is not allowed because there is "no concern about the credibility" of the declarant and "no need for evidence on the subject." Jordan v. State, 895 P.2d 994, 998 (Alaska 1995) (quotation marks and citations omitted); see also United States v. Price, 792 F.2d 994 (11th Cir. 1986) (defendant not entitled to impeach informant under FRE 806 because informant's statements offered for limited purpose of placing defendant's own statements in context); 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice, § 806.2, at 242 (5th ed. 2007).

An expert may rely upon inadmissible out-of-court statements to form his opinion, and the court may allow the expert to recount those statements at trial in order to explain the basis of the opinion. Under

ER 703, experts may base their opinions on inadmissible facts or data "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Under ER 705, an "expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data." These rules permit a trial court to allow an expert to relate otherwise inadmissible out-of-court statements to the jury in order to explain the bases for his or her opinion. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice, §705.5, at 293-94 (5th ed. 2007).

Although an expert may testify about inadmissible evidence he relied upon, the underlying information is not admissible as substantive evidence. "The admission of these facts . . . is not proof of them." Group Health Co-op. of Puget Sound, Inc. v. Dept. of Revenue, 106 Wn.2d 391, 399, 722 P.2d 787 (1986).

> [I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only.

Id. (quotation marks and citations omitted).

This Court has repeatedly affirmed that, under ER 703 and 705, a court may admit otherwise inadmissible out-of-court statements for the limited purpose of explaining an expert's opinion. See In re Det. of Coe, 175 Wn.2d 482, 512-14, 286 P.3d 29 (2012) (expert allowed to testify as to Coe's unadjudicated prior offenses because expert relied upon information in forming her opinion); In re Det. of Marshall, 156 Wn.2d 150, 162-63, 125 P.3d 111 (2005) (expert could relate otherwise inadmissible evidence, including Marshall's criminal and psychiatric history and self-report, because expert relied upon information in forming her opinion); Group Health Co-op. of Puget Sound, 106 Wn.2d at 399-400 (allowing admission of otherwise inadmissible hearsay to show basis for expert's opinion but not as proof of facts).

The Court of Appeals has also repeatedly affirmed that an expert witness may recount otherwise inadmissible material, including a defendant's version of events, if the expert relied upon the information in forming his opinion. See State v. Martinez, 78 Wn. App. 870, 879, 899 P.2d 1302 (1995) ("ER 703 allows an expert to base an opinion on facts or data reasonably relied on by experts in their field, even if these facts or data are otherwise inadmissible"); State v. Anderson, 44 Wn. App. 644, 652-53, 723 P.2d 464 (1986) (ER 703 and

ER 705 allow experts to base opinions on facts or data not admissible in evidence, and court to permit disclosure of underlying facts to jury); State v. Fullen, 7 Wn. App. 369, 381, 499 P.2d 893 (1972) (defendant's statements to expert admissible "as medical history from which professional diagnosis might follow," not as substantive evidence).

In this case, the Court of Appeals applied these principles in a straightforward manner, holding Mr. Mohamed's out-of-court statements could not be impeached because they were not admitted to prove the truth of the matters asserted but rather for the limited purpose of explaining the basis of his expert's opinion.[2] Slip Op. at 6-9. The Court of Appeals' opinion is consistent with the above well-established authorities and should be affirmed.

The Court of Appeals' opinion is also consistent with two other Court of Appeals cases more directly on point, State v. Lucas, 167 Wn.

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[2] Because Mr. Mohamed's statements were admitted for the limited purpose of explaining the basis for his expert's opinion, the cases on which the State relies, State v. Morrow, 273 Neb. 592, 731 N.W.2d 558 (2007) and United States v. Burton, 937 F.2d 324 (7th Cir. 1991), do not apply. Neither of those cases involves the admission of out-of-court statements under ER 703 and ER 705 for the limited purpose of explaining the basis of an expert's opinion.

App. 100, 271 P.3d 394 (2012) and State v. Eaton, 30 Wn. App. 288, 292-93, 633 P.2d 921 (1981).

In Lucas, Division Two held prior conviction evidence was not admissible under ER 806 to impeach Lucas's out-of-court statements made to a defense psychiatrist expert because the statements were not admitted to prove the truth of the matters asserted. Lucas, 167 Wn. App. at 108-10. Lucas is indistinguishable from this case.

The facts and holding of Eaton are similar to Lucas but with a different twist. In Eaton, a defense psychiatrist interviewed Eaton and concluded he was probably in an alcohol-induced blackout and incapable of forming intent. Eaton, 30 Wn. App. at 290. Concerned the expert would repeat Eaton's statements to the jury as hearsay, the trial court required Eaton to testify so he could be cross-examined about the statements. In testifying, Eaton was subjected to impeachment through admission of his prior robbery conviction. Id. at 291-92. The Court of Appeals reversed, holding Eaton's statements were admissible for the limited purpose of explaining the basis of the expert's opinion and he should not have been subject to cross-examination in order to test the truth of the statements. Id. at 293-95.

The State contends Mr. Mohamed's out-of-court statements were in fact admitted for their truth but that is not supported by the record. Petition at 5-6. Defense counsel made plain to the court and the prosecutor that the statements were being offered for the limited purpose of explaining the basis of the expert's opinion and not for the truth of the matters asserted. 7/01/14RP 23. The court acknowledged the statements were not being offered as substantive evidence or under any exception to the hearsay rule. 7/01/14RP 26-27. The court offered to provide the State with a limiting instruction. 7/01/14RP 29-31.

Defense counsel's later agreement to an instruction stating the jury could consider evidence of Mr. Mohamed's prior convictions "only in deciding what weight or credibility to give to the defendant's statements," CP 94, 107-08; 7/01/14RP 105-08, did not change the basis for which the statements were offered or admitted. Counsel agreed to the instruction only after the court had already ruled, over objection, that Mr. Mohamed's prior convictions were admissible. Counsel did not reoffer Mr. Mohamed's out-of-court statements as substantive evidence, and the court did not change its ruling regarding the basis for admissibility.

Moreover, even if counsel had offered Mr. Mohamed's statements as substantive evidence, they were *not admissible* for that purpose. They did not fall under any exception to the hearsay rule. See Fullen, 7 Wn. App. at 381 (defendant's "self-serving" out-of-court statements not admissible to prove truth of matters asserted). If the State believed the court erroneously admitted the out-of-court statements as substantive evidence, the State had an obligation to object. By failing to object, the State has waived any argument that the court admitted the evidence on an erroneous basis. See ER 103(a) ("Error may not be predicated upon a ruling which admits . . . evidence" unless "a timely objection or motion to strike is made").

The State had several procedural options available to minimize the possibility the jury would consider Mr. Mohamed's out-of-court statements for their truth.

First, and most important, the State could have requested a limiting instruction. When otherwise inadmissible evidence is admitted for the limited purpose of helping to explain an expert's opinion, the trial court should "give an appropriate limiting instruction explaining that the jury is not to consider this revealed information as substantive evidence." Coe, 175 Wn.2d at 513-14; see also Marshall, 156 Wn.2d at

163. The jury is presumed to follow such an instruction. Coe, 175 Wn.2d at 514. Here, the trial court proposed a similar instruction but the State did not request it. 7/01/14RP 29-30.

Second, the State could have asked the court to limit the scope of the information recounted by the expert. See Martinez, 78 Wn. App. at 879-80 ("trial court should determine under ER 403 whether to allow disclosure of inadmissible underlying facts based upon whether the probative value of this information outweighs its prejudicial or possibly misleading effects"); Anderson, 44 Wn. App. at 652-53 (trial court may refuse to allow expert to testify as to defendant's out-of-court statements); Fullen, 7 Wn. App. at 381 (court may allow expert to testify only "concerning his examination of the defendant without relating specifically those things which could bring in hearsay").

Finally, the State had the tools of cross-examination. See Eaton, 30 Wn. App. at 292 ("the proper way to test the reliability of the [expert's] opinion was through cross examination of the psychiatrist, not by requiring the defendant to testify"). Although the probative value of expert medical testimony may be lessened when it is based on narrative statements given by a defendant charged with a crime, the assumption underlying ER 703 is that opposing counsel will forcefully

bring that point to the jury's attention during cross-examination of the expert. Id. at 294-95. Further, "[j]urors are quite aware that a criminal defendant may be motivated to fabricate a defense and are unlikely to be influenced unduly by an expert opinion that is shown to rest on questionable sources of information." Id.

The deputy prosecutor had ample opportunity on cross-examination to elicit reasons to doubt the reliability of Dr. Julien's opinion. Dr. Julien acknowledged he did not know whether Mr. Mohamed was telling the truth, and the value of his opinion would be affected if the information he was provided was not true. 7/01/14RP 69-70. He added, however, that Mr. Mohamed's self-report of how much alcohol he drank was consistent with the police officers' observations of his behavior. 7/01/14RP 69-70. The jury also learned that Dr. Julien told Mr. Mohamed of the purpose of the interview before asking him any questions, suggesting Mr. Mohamed might have a motive to lie. 7/01/14RP 67. Finally, the jury was instructed, in evaluating the expert's the opinion, it could "consider the reasons given for the opinion and the sources of his or her information." CP 95.

The State did not need evidence of Mr. Mohamed's prior convictions to properly question the reliability of the expert's opinion.

When a defendant's out-of-court statements are admitted through the testimony of an expert, eliciting whether the expert knew of his prior convictions has little relevance in judging the credibility of the expert's opinion yet significantly bolsters the State's case. Eat, 30 Wn. App. at 294-95. Further, "[t]here is a significant danger that jurors will consider prior convictions admitted for impeachment purposes as substantive evidence of guilt, regardless of instructions to the contrary." Id. at 291 n.4 (citations omitted).

In sum, the Court of Appeals' holding that Mr. Mohamed's out-of-court statements could not be impeached because they were not admitted to prove the truth of the matters asserted is consistent with Washington law. The prior conviction evidence was not necessary and carried a great potential of unfairly influencing the jury to enter a verdict based on prior misconduct rather than the facts of the current offense. This Court should affirm the Court of Appeals.

2. The burden was on the State to request a limiting instruction in order to ensure the jury would not consider Mr. Mohamad's out-of-court statements for the truth of the matters asserted.

To the extent the State was concerned the jury would consider Mr. Mohamed's out-of-court statements for the truth of the matters asserted, the State should have requested a limiting instruction.

"[T]he burden of seeing to it that a proper limitation is placed on the use of utterances banned by the hearsay rule as proof of the facts stated but admissible for narrower purposes, falls *on the opponent of the evidence*." Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964) (emphasis added); see also 21A Wright & Graham, Federal Practice & Procedure: Federal Rules of Evidence, § 5065 ("the burden is on *the opponent* to seek clarification of the status of the evidence either by objecting to its admissibility or seeking a limiting instruction") (emphasis added).

Washington law is in accord. The burden of requesting a limiting instruction falls on the opposing party and, if such an instruction is requested, the trial court must provide it. See State v. Hartzell, 156 Wn. App. 918, 937, 237 P.3d 928 (2010) ("a trial court *must* give a limiting instruction where evidence is admitted for one purpose but not for another and *the party against whom the evidence is admitted* asks for a limiting instruction") (latter emphasis added); State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001) ("When evidence is admitted for a limited purpose and *the party against whom it is admitted* requests such an instruction, the court is obliged to give it.") (emphasis added); State v. Gallagher, 112 Wn.

App. 601, 611, 51 P.3d 100 (2002) ("A trial court must give a limiting instruction where evidence is admitted for one purpose but not for another and *the party against whom the evidence is admitted* requests the trial court give the instruction.") (emphasis added);Sturgeon v. Celotex Corp., 52 Wn. App. 609, 623-24, 762 P.2d 1156 (1988) ("When evidence is admitted for a limited purpose and *the party against whom it is admitted* requests an appropriately worded limiting instruction, the court is under a duty to give the instruction.") (emphasis added); ER 105 ("the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly").

In this case, *the State* was the opposing party with the burden to request a limiting instruction. Mr. Mohamed's out-of-court statements were admitted to support his defense expert's opinion. In other words, they were admitted *against the State*. The State was the party at risk of harm if the jury considered the evidence for substantive purposes. Therefore, the State bore the burden to request a limiting instruction.

By failing to request a limiting instruction, the State waived its right to argue the jury erroneously considered the evidence for its truth. "Absent a request for a limiting instruction, evidence which is admitted as relevant for one purpose is deemed relevant for others. Any error for

failure to instruct is waived by *the party against whom the evidence is admitted.*" Lockwood v. AC & S, Inc., 109 Wn.2d 235, 255, 744 P.2d 605 (1987) (emphasis added); see also 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 105.2 (5th ed. 2007).

The State's position is, essentially, when evidence is admitted against the State for a limited purpose, the State may sit by, refuse to request a limiting instruction, and then argue the evidence is subject to impeachment because no limiting instruction was given. This Court should reject that argument and hold the State waived its right to argue the jury was improperly allowed to consider the evidence for the truth of the matters asserted.

E. COCLUSION

This Court should affirm the Court of Appeals' opinion affirming the trial court's decision to grant a new trial.

Respectfully submitted this 1st day of April, 2016.

/s/ Maureen M. Cyr

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, SAYIDIN MOHAMED, Respondent.	)))))))))	NO. 92261-6

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SIGNED IN SEATTLE, WASHINGTON, THIS 1ST DAY OF APRIL, 2016.

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Supplemental Brief of Respondent

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