

No. 63556-5-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

ISMAIL HASSAN,
Appellant.

REPLY BRIEF

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I. INTRODUCTION

Even if charging Mr. Hassan with second-degree assault did not accurately reflect the subjective intent of the prosecutor and was wholly attributable to the State's negligence, the trial court erred by permitting the State to amend the information on Count II from second- to first-degree assault *after* the State rested, *after* the trial was completed, and *after* a verdict returned. *State v. VanGerpen*, 125 Wn.2d 782, 789-91, 888 P.2d 1177 (1995). This Court should reject the State's objection *to its own motion* raised for the first time in its *Response* brief. The information in place when the State rested its case and when the jury returned its verdict controls—not the previous one that it successfully amended and not the amending information that the trial court allowed after verdict.

The trial court erred by giving the State's requested "missing witness" instruction (Instruction No. 8) where the defense theory was to attack the State's proof, namely the identification of Mr. Hassan by the State's witnesses; where Mr. Hassan did not testify and where no defense witness implied that other uncalled witnesses could corroborate the defense case; and where the "missing" witnesses had apparent Fifth Amendment privileges.

The trial court improperly excluded significant portions of the two defense experts's testimony and thereby substantially interfered with Mr. Hassan's constitutional right to present a defense.

Mr. Hassan concedes, in light of *State v. Aguirre*, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 727592 (2010) that his double jeopardy/firearm enhancement claim is no longer viable. In light of the fact that Hassan’s counsel proposed the challenged “firearm” enhancement instruction, he withdraws that claim so that he can raise it, if necessary, as a claim of ineffective assistance of counsel in a PRP.

II. ARGUMENT

A. The Trial Court Improperly Permitted the State to Amend the Information After Verdict in Violation of the State and Federal Constitutions.

Introduction

The information that was in place when the jury returned its verdict charged Mr. Hassan with one count of first degree and one count of second-degree assault. CP 49-50. Count II listed (in bold) the name of the crime as “Assault in the Second Degree” and contained the elements of that crime. Not wanting to accept the consequences of its own negligence, the State now argues that the trial court should never have accepted the second amended information—posing an objection to its own motion for the first time on appeal.

The second-amended information alleged in Count II the crime of “assault in the second degree,” cited to the second-degree assault statute, and stated the elements of second-degree assault. Thus, the face of the

charging document both revealed only the intent to charge second-degree assault in Count II and contained only the elements related to that offense.

The Constitution Limits Amendment After the State Rests

The State now argues that it made a mistake and should not be bound by the plain language of the information—that subjective intent of the trial prosecutor should control, rather than the plain language of the written document itself.

The outcome of this issue is squarely controlled by *State v. VanGerpen*, 125 Wn.2d 782, 789-91, 888 P.2d 1177 (1995). In attempting to distinguish *VanGerpen, supra*, the State engages in legal sleight of hand. The State argues that *VanGerpen* does not control by switching the focus in this case from the amendment after trial to the amendment during trial—an amendment which was uncontested.

The State cannot now complain about a result which it sought and obtained at trial. Just as a defendant cannot invite an error and then raise an objection for the first time on appeal to the course of action that it successfully sought at trial, neither can the State. The doctrine of invited error prohibits any party from seeking a result at trial and then complaining about it on appeal. See *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 100 P.3d 380 (2000); *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999); *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d

762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995))).

In this case, the trial prosecutor sought to amend the information. This Court should not entertain an objection raised for the first time on appeal by the appellate prosecutor to the second-amended information.

Instead, the question posed here is remarkably similar to the question posed in *VanGerpen*: Should the State be permitted to amend the charging document after the State has rested its case in order to add an essential element of the crime which was inadvertently omitted from the document? 125 Wn.2d at 786. The answer by the *VanGerpen* court was “no.” The same answer should follow in Hassan’s case.

In *VanGerpen*, the State intended to charge VanGerpen with attempted first-degree murder, but omitted the element of premeditation from the charging document in place during trial. There was no question but that VanGerpen had notice of the State’s intent to charge first-degree murder—the charge was listed in that manner and the instructions informed the jury on all the elements of the crime of attempted murder in the first degree. “However, proper jury instructions cannot cure a defective information. Jury instructions and charging documents serve different functions.” *Id.* at 787.

As in this case, the State argued that this was a mistake and defendant was not harmed. “In this case, the State argues that this court

should hold that *Pelkey* does not prevent the State from amending an information when the amendment corrects an omission of a statutory element when the defendant cannot show any prejudice from the amendment.” The Court firmly rejected that claim: “As noted above, we rejected this argument in *Pelkey* and again in *Markle*; we again do so here.” *Id.* at 790. Likewise, the unanimous court, while acknowledging that the omission of the element of “premeditation” was unintentional, held that “omission of an essential statutory element cannot be considered a mere technical error.” “Sometimes errors made in charging documents are oversights in omitting an element of the crime, but for sound policy reasons founded in our state and federal constitutions, this court has nonetheless consistently adhered to the essential elements rule.” *Id.* The Court explained:

In the present case, the information alleged only intent to cause death, not premeditation. Therefore, the State failed to charge one of the statutory elements of first degree murder and instead included only the mental element required for second degree murder. The State seeks to distinguish *Pelkey* and *Markle* on the basis that in those cases the State sought to change the crime charged after the State had rested, while in this case the State merely seeks to add an essential element. The fallacy in this argument is that by adding an element, the State changed the crime charged from attempted murder in the second degree to attempted murder in the first degree.

Id. The Court then added:

This court drew a bright line in *Pelkey*, which we adhered to in *Markle* and in *Schaffer*. The rule that any amendment from one crime to a different crime after the State has rested its case is per se prejudicial error (unless the change is to a lesser included or lesser

degree crime) protects the constitutional right of the accused to be informed of the nature of the offense charged. A change in the rule would necessitate a reversal of both *Pelkey* and *Markle* and this we decline to do.

Id. at 791. There is no reason to erase that bright line in this case.

The present case is distinguishable from *VanGerpen* in only one respect. In *VanGerpen*, the stated charge was first-degree murder. However, the information contained only the elements of second-degree murder. As a result, the Court viewed the information as deficient—it failed to contain the essential elements of what it purported to charge. In this case, the second-amended information alleged second-degree assault and the elements matched that charge. Thus, this is not a defective charging document case. This Court should reverse and remand for resentencing on the crime of conviction. Alternatively, this Court should reverse and remand for a new trial.

B. The Trial Court Erred by Giving a Missing Witness Instruction That Could Be Used Against Mr. Hassan.

Introduction

In its second argument the State attempts to defend the giving of an instruction that made Hassan's silence affirmative evidence of his guilt. Alternatively, the State then argues that jurors likely paid little attention to the instruction that it strenuously argued was necessary. The missing witness instruction should only be given in limited circumstances—to permit the State to attack the defense case, not to attack the defendant's

failure to reveal the names and contact information of others present during a crime where the defense does not remotely suggest that those witnesses would testify favorably.

This Court's decision in *State v. Dixon*, 150 Wash.App. 46, 55, 207 P.3d 459 (2009), not discussed in the State's *Response*, is controlling.

In *Dixon*, the police arrested Corinne Dixon for driving with a suspended or revoked license. *Dixon*, 150 Wash.App. at 49. In a search incident to arrest, the officer found drugs in Dixon's purse. *Id.* at 49. Dixon had a male passenger in her car who denied that the drugs were his. *Id.* at 51.

However, the officer did not record the passenger's name. *Id.* At trial, Dixon declined to testify and her counsel argued in closing that a question remained about whether she actually had control over her purse. *Id.* at 52.

In rebuttal, the State asked the jury why Dixon never produced the passenger to testify. *Id.* The jury convicted Dixon of unlawful possession of methamphetamine and bail jumping (for her pretrial failure to appear).

Dixon argued on appeal that the missing witness argument constituted prosecutorial misconduct. *Dixon*, 150 Wash.App. at 53. This court agreed. *Id.* at 55.

Noting that Dixon did not unequivocally imply that her male passenger would have corroborated her trial theory, the Court held that the inference was improper because the officer's guess that the two were friends insufficiently demonstrated Dixon's control over her passenger.

Dixon, 150 Wash.App. at 55. Further, “there [was] a substantial likelihood that any testimony in Dixon's favor would have caused the passenger to incriminate himself.” *Dixon*, 150 Wash.App. at 55.

In this case, the defense did not go as far as in *Dixon*. Here, the defense did not imply that one of the missing witnesses would have testified favorably for Hassan. Instead, the defense simply attacked the State’s proof.

Hassan should not have been required to give the names and contact information for the cousins, even if he had it, to the State. To so hold violates Mr. Hassan’s right to remain silent, as well as his right to require the State to prove the case against him. Of course, if Hassan had tried to exploit the absence of the potential witnesses, then the situation would have been different.

This Court should reverse and remand for a new trial.

C. The Trial Court Precluded Mr. Hassan from Presenting the Complete Opinions of His Experts and Thereby Denied Him the Right to Present a Defense

Introduction

The trial court permitted two defense experts to testify, but only after significantly limiting the scope of each witnesses’s testimony. The State argues that this Court should focus on the scope of the evidence admitted, not the evidence excluded. The State would never accept such a limitation on its right to prove what it alleges. The question is not the one posed by

the State. Instead, the question is whether relevant and material evidence of Hassan's defense was excluded. Here, it was.

In this reply, Hassan focuses on the testimony of Dr. Loftus. Dr. Loftus was allowed to testify about how memory can result in an unintentional and unknowing case of misidentification, but was limited to describing the non-intuitive factors—the factors that were beyond the normal understanding of jurors. However, this made him a much less credible and persuasive witness because his opinion was based only on counter-intuitive factors—the court having precluded him from describing the intuitive factors.

For example, the trial court precluded Dr. Loftus from answering or discussing whether alcohol affects memory (RP (4/24/09) 62); whether lighting is a factor in the ability to recognize and identify a person (*id.* at 74); and whether stress is a factor (*id.*). Earlier—before trial testimony commenced—the trial court excluded additional aspects of Dr. Loftus' testimony:

....testimony about the – about lighting and that kind of stuff, there's no expert testimony that is required for that that I've ever heard from anybody that is not – is not within common knowledge of everyone about lighting...

RP (4/14/09) 229.

The United States Constitution guarantees criminal defendants “a meaningful opportunity” to present a complete defense. *Crane v. Kentucky*,

476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (internal quotation marks omitted). In the context of a criminal trial, an accused's right to present a defense derives from the Sixth Amendment. *Ferensic v. Birkett*, 501 F.3d 469, 475 (6th Cir.2007). A central component of a defendant's right to present a defense is the right to offer the testimony of witnesses. *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Expert testimony often forms a critical part of a defendant's presentation of evidence.

As a result, the court in *Ferensic* noted that expert testimony regarding eyewitness identifications “inform[s] the jury of *why* the eyewitnesses' identifications were inherently unreliable” and, thus, provide a “scientific, professional perspective that no one else [can] offer[] to the jury.” *Ferensic*, 501 F.3d at 477. The significance of an expert's testimony “cannot be overstated” because, without it, a jury has “no basis beyond defense counsel's word to suspect the inherent unreliability of an eyewitness identification.” *Id.* at 482.

Once a trial court admits expert testimony, “it is for the jury to decide whether any, and if any what, weight is to be given to the testimony.” *United States v. Bonds*, 12 F.3d 540, 563 (6th Cir. 1993) (quoting *United States v. Stifel*, 433 F.2d 431, 438 (6th Cir. 1970)). The Supreme Court made clear in *Daubert* that, in determining the scientific validity and evidentiary reliability of scientific evidence, “[t]he focus, of

course, must be solely on principles and methodology, not on the conclusions that they generate.” *Bonds*, 12 F.3d at 563 (quoting *Daubert v. Merrell Dow*, 509 U.S. 579, 594 (1993)). “Questions about the certainty of the scientific results are matters of weight for the jury.” *Bonds*, 12 F.3d at 563.

However, a trial court unfairly interferes with jurors perceptions of expert testimony when it precludes an expert from testifying to the full range of factors relevant to his opinion. Science often involves a mixture of intuitive and non-intuitive factors. It is no secret that many American adults reject some scientific ideas. In a 2005 Pew Trust poll, for instance, 42% of respondents said that they believed that humans and other animals have existed in their present form since the beginning of time. But evolution is not the only domain in which people reject science: Many believe in the efficacy of unproven medical interventions, the mystical nature of out-of-body experiences, the existence of supernatural entities such as ghosts and fairies, and the legitimacy of astrology, ESP, and divination. It should be obvious that the acceptance of a “novel” scientific theory is much more likely when that theory is based on a number of intuitive factors. Developmental data suggests that resistance to science will arise in children when scientific claims clash with early emerging, intuitive expectations. This resistance will persist through adulthood if the scientific claims are contested within a society, and will be especially

strong if there is a non-scientific alternative that is rooted in common sense. This is exactly why testimony concerning the lack of reliability of eyewitness testimony is allowed in the first place: because we believe that eyewitnesses almost always get it right and that confidence directly correlates with accuracy.

When an expert is limited in explaining his scientific conclusion by reference to only the non-intuitive factors it is highly likely that jurors will reject the conclusion—because it clashes with intuition.

That is exactly what happened in this case. Because the State has not shown harmlessness beyond a reasonable doubt, reversal is required.

D - E. Hassan Withdraws His Challenge to the “Firearm” Instruction. He Concedes that His Double Jeopardy Claim Is Controlled by *Aguirre*.

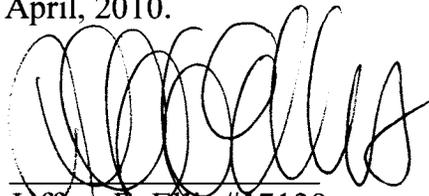
In his opening brief, Mr. Hassan assigned error to the failure to include the “firearm” instruction in the so-called “to convict” instruction and to the content of the instruction defining the elements of a firearm enhancement. In the State’s *Response*, it notes that Hassan’s attorney proposed the challenged instruction. Hassan has carefully reviewed the record and agrees. Although Hassan continues to claim that the instruction was harmful error, given the application of the “invited error” rule, he now withdraws this claim so that he can raise it in a Personal Restraint Petition, if necessary.

In his opening brief, Hassan also raised a double jeopardy claim based on the duplication of the firearm element—as an element and an enhancement. The Supreme Court recently decided this issue in *State v. Aguirre*, __ Wn.2d __, __ P.3d __, 2010 WL 727592 (2010). While Hassan complains that *Aguirre* was wrongly decided, he concedes that it is controlling.

III. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 24th of April, 2010.



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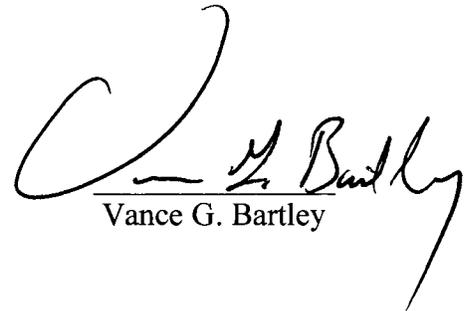
CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on April 26, 2010 I served the parties listed below with a copy of *Appellant's Reply Brief* as follows:

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