

65703-8

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NO. 65703-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DION EARL JOHNSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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DIVISION ONE
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A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED MR. JOHNSON'S CONSTITUTIONAL RIGHTS AND ABUSED ITS DISCRETION WHEN IT EXCLUDED CROSS-EXAMINATION AND EXPERT EVIDENCE RELATING TO THE KEY WITNESS'S ABILITY TO ACCURATELY PERCEIVE AND RECALL THE EVENTS IN QUESTION.

Evidence of a witness's drug use is admissible to the extent it affects her ability to perceive or testify accurately about the events in question, at least if it is supported by medical or scientific evidence. See State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974); see also State v. Tigano, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991) (no error where proponent of evidence fails to show drug use affected witness's ability to accurately perceive or recall events in question).¹ Where the evidence is crucial to the defense, exclusion of such drug use evidence is reversible error. State v. Brown, 48 Wn. App. 654, 655-61, 739 P.2d 1199 (1987) (abuse of discretion to exclude evidence that complaining witness's LSD use affected her ability to perceive and recall events in question).

¹ The Tigano Court's misapplication of Renneberg is discussed in Appellant's Opening Brief. Op. Br. at 21-22.

The trial court here abused its discretion by denying Mr. Johnson the opportunity to present evidence that the key witness against him had used PCP within the time period of at least some of the alleged crimes and expert scientific evidence that PCP affects the ability to perceive and recall even subsequent to the instance of use. CP 35 (Defense Trial Brief, Motion 7); 1/27/10RP 42-43, 45, 100, 101-02, 129. The trial court's ruling contravened Brown and Renneberg by preventing Mr. Johnson from presenting evidence crucial to his defense and supported by expert testimony. See 48 Wn. App. at 660-61; 83 Wn.2d at 737.²

The State's argument in response completely ignores that Mr. Johnson sought to admit *expert testimony* to connect Ms. Hunter's use of PCP to her inability to accurately perceive and recall the events in question. The State's response is unconvincing for several additional reasons.

The State contends that the trial court acted appropriately because it allowed examination of Ms. Hunter prior to excluding drug use evidence from the jury. Resp. Br. at 13. But Ms. Hunter's pretrial testimony confirmed that she had used PCP, including in November or early December 2009 (in proximity to the events

² The trial court erred again when it refused to allow Mr. Johnson's evidence even once the State opened the door. Op. Br. at 23-24.

forming the basis of count ten). 2/2/10RP 104, 116-17.

Nonetheless, the trial court did not allow Mr. Johnson to present testimony—pretrial or to the jury—from an expert witness that would show Ms. Hunter’s PCP use affected her ability to perceive and recall the events in question *even if not used simultaneously to the alleged incidents*. Through this expert testimony, Mr. Johnson intended to connect Ms. Hunter’s drug use to the events at issue in the trial. See Resp. Br. at 14-15 (arguing PCP use was a collateral matter because defense did not connect it to events in question). Under Renneberg and Brown, the trial court’s ruling was erroneous and prejudiced Mr. Johnson by hamstringing his ability to cross-examine the State’s key witness. 48 Wn. App. at 660-61; 83 Wn.2d at 737.

The State relies on State v. Carlson, but that case is not on point. Resp. Br. at 12. In Carlson, the defendant sought to admit evidence of a witness’s cocaine use that occurred prior to the alleged crime. 61 Wn. App. 865, 875-76, 812 P.2d 536 (1991). The defendant, however, proffered no evidence, expert or otherwise, to connect the cocaine use to an inability to perceive the events at the time they occurred or to recall them accurately at trial. Id. Unlike the defendant in Carlson (and unlike the defendants in

Tigano, 63 Wn. App. 336), Mr. Johnson proffered expert testimony to connect Ms. Hunter's PCP use to her inability to accurately perceive and recall. In this case, however, the trial court refused to even hear from the defense expert outside the presence of the jury.

Contrary to the State's contention, Mr. Johnson's ability to question Ms. Hunter regarding her PTSD symptoms did not cure the error. Resp. Br. at 14. Ms. Hunter denied her PTSD had any effect on her ability to perceive and recall the events in question. With regard to her PCP use, however, Mr. Johnson sought to admit expert testimony to demonstrate that scientific evidence connects PCP use with a subsequent inability to accurately perceive and recall events. The PTSD evidence, accordingly, cannot balance out the denial of Mr. Johnson's right to question Ms. Hunter about her use of PCP and present expert testimony to connect that use to the events in question.

The trial court's refusal to allow Mr. Johnson to present evidence of Ms. Hunter's drug use and expert evidence of its effect on her ability to perceive and recall was an abuse of discretion and in contravention of Mr. Johnson's constitutional rights to confront and cross-examine witnesses. Because this case came down to whether the jury believed Ms. Hunter, the evidence related to the

continuing effects of her drug use was crucial to Mr. Johnson's defense that she was not accurately portraying events.

Consequently, like in Brown, where this Court could not "characterize[] the error" of excluding such testimony "as harmless[,] Mr. Johnson's convictions must be reversed. 48 Wn. App. at 661; accord State v. Darden, 145 Wn.2d 612, 626, 628, 41 P.3d 1189 (2002) (exclusion of cross-examination of key witness not harmless and remanding for new trial); State v. Jones, 168 Wn.2d 713, 724-25, 230 P.3d 576 (2010) (exclusion of defendant's version of events not harmless even where evidence was "not airtight").

2. THE PROSECUTOR COMMITTED MISCONDUCT WHEN SHE VOUCHERED FOR THE STATE'S PRIMARY WITNESS AND DISCREDITED A DEFENSE WITNESS THROUGH FACTS NOT IN EVIDENCE.

Mr. Johnson's convictions must also be reversed because prosecutorial misconduct denied his right to a fair trial. Though it is misconduct for a prosecutor to state a personal belief as to the credibility of a witness, at closing argument the prosecutor in this case vouched for the State's key witness: Ms. Hunter. E.g., State v. Monday, 171 Wn.2d 667, 677-78, 257 P.3d 551 (2011); State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). With regard to

Ms. Hunter, the prosecutor stated that “I believe hell hath no fury like a woman who’s gone through nine years of physical and emotional abuse and come out the other side through domestic violence support advocacy.” 2/8/10RP 43. In full, she argued:

In opening, defense told you that Denise was a scorned woman. *I don’t believe* Denise is scorned and *I believe that hell hath no fury like a woman who’s gone through nine years of physical and emotional abuse and has come out the other side through domestic violence support advocacy.*

Id. (emphasis added). The prosecutor further told the jury there was “no reason to doubt” Ms. Hunter:

Denise’s testimony is corroborated by other witnesses’ testimony and by the other evidence you have heard in this case Because of that *there is no reason to doubt her.*

2/8/10RP 36 (emphasis added). Through this argument, the prosecutor injected her personal belief into the case, vouched for the State’s primary witness and injected argument not based on the evidence presented at trial. See generally Op. Br. at 27-29.

Despite the State’s argument in response, there was reason to doubt Ms. Hunter because defense witnesses Toni Washington and Marie Reed contradicted Ms. Hunter’s testimony. See Resp. Br. at 22. Moreover, the prosecutor’s use of the phrases “I believe” and “I don’t believe” is misconduct because it demonstrates the

prosecutor's injection of her personal belief into the case. The State argues, without reason, that the words should simply be read out of the prosecutor's statement. Resp. Br. at 23. But as the Washington Supreme Court recently reaffirmed in Monday, a prosecutor shall not assert in argument her personal opinion as to the credibility of a witness. 171 Wn.2d at 677-78. Injection of personal opinion is precisely what occurred here when the prosecutor asserted "*I don't believe Denise is scorned and I believe that hell hath no fury like a woman who's gone through nine years of physical and emotional abuse.*" 2/8/10RP 43 (emphasis added).

The State concedes that the prosecutor committed additional misconduct by relying on facts not in evidence relating to the witness Toni Washington. Resp. Br. at 24. With regard to this witness, the prosecutor stated:

And then December 8th, really, Toni Washington was going to get up on that stand and spill it for me, really, she was. I don't think so. Because Toni is exactly where Denise was 14 months, 24 months, five years ago. She's hooked into a bad relationship - -

2/8/10RP 60.³

³ The State argues that the poor quality of the transcript should weigh in its favor. Resp. Br. at 24. But to the extent there is a lack of adequate record here, that implicates defendant's due process rights and thus cannot be held against him. E.g., State v. Larson, 62 Wn.2d 64, 67, 381 P.2d 120 (1963).

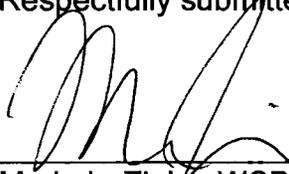
The State's case depended upon the jury's determination of Ms. Hunter's credibility. Through Toni Washington, Mr. Johnson sought to demonstrate the unreliability of Ms. Hunter's testimony. In closing argument, the State improperly interfered with the jury's role. First, the State vouched for Ms. Hunter. Second, the State relied on facts not in evidence to discredit Ms. Washington. Individually, or compounded in the cumulative, these instances of misconduct prejudiced Mr. Johnson's right to a fair trial and were not harmless.

B. CONCLUSION

For the reasons set forth above and in Mr. Johnson's Opening Brief, the convictions should be reversed in full because the trial court erroneously excluded evidence crucial to the defense, prosecutorial misconduct resulted in an unfair trial and a spectator outburst prevented a fair trial by an impartial jury. In the alternative, the sentence should be reversed and remanded for an evidentiary hearing because the State and trial court failed to justify inclusion of a federal conviction in Mr. Johnson's offender score. Finally, the special verdict should be vacated because it is premised on an improper jury instruction.

DATED this 23rd day of September, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MLZ', written over a horizontal line.

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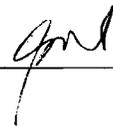
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I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF SEPTEMBER, 2011.

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