No. 320596

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

MICHAEL W. ROBISON

APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY

HONORABLE SALVADORE COZZA

BRIEF OF APPELLANT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

A. The trial court committed reversible error when it allowed the State to question the Appellant regarding a drug addiction contrary to its own pre-trial ruling under the theory that the "door was opened" during direct examination.

B. The trial court committed reversible error when it allowed the State to repeatedly assert that the Appellant had been forced to submit to a buccal swab in violation of his Right to Remain Silent.

C. The trial court committed reversible error when it allowed the use of the controversial Washington Pattern Jury Instruction 401 including the bracketed "abiding belief in

the truth of the crime charged language" over the objection of both the State and the Appellant.

II. ISSUES

A. Whether the trial court committed reversible error by allowing extensive evidence of Appellant's drug addiction in testimony in spite of a pre-trial ruling that excluded that very evidence on the theory that the "door had been opened ?

B. Whether the Appellants right to remain silent and not provide evidence against himself was violated by the State's continuous referral to the fact that he had been court ordered to submit to a buccal swab for DNA evidence ?

C. Whether the combination of Washington Pattern Jury Instruction 401's language regarding "abiding belief" and

argument by the State violated the Appellant's right to a fair trial ?

III. STATEMENT OF THE CASE

On October 28, 2013, Appellant's trial on one count of robbery in the first degree began in Spokane County Superior Court. At issue was a robbery that occurred on January 9, 2011, at the Baskin and Robbins on Fourteenth and Grand in Spokane Washington. RP 115 - 118. A lone man wearing a full face ski mask and sweat pants entered that location and brandished what later was discovered to be a fake air soft pistol while demanding cash. RP 116 & 180. The hat, sweat pants and pistol were discovered by a dog track behind a building immediately to the north of the Baskin and Robbins under a sign stashed in a snow bank. RP 301 - 302. All those items were admitted at trial. RP 174 - 183. No suspect was apprehended at the time of the crime. RP 271.

When Detective Hill received the case for investigation on October 10, 2011, there was not a suspect in the case. RP 341. There were no fingerprints found on the fake pistol. RP 345. On February 28, 2011, crime lab results for DNA analysis came back with an "unknown individual A" as the primary contributor of the sample taken from the ski mask recovered at the crime scene. RP 347. There was no DNA profile matching this primary contributor in the databases kept by law enforcement known as CODIS. RP 347. No suspect was identified from this evidence. RP 347. With no further evidence, Detective Hill suspended the case. RP 348.

On approximately October 4, 2011, a Breanne Snyder came forward to prosecutors and detectives claiming that Appellant committed the robbery. RP 326 - 335, 349. Because Ms. Snyder was involved in the robbery she was allowed a free talk to provide her information without the possibility of prosecution in the case. RP 88, 327 - 333. Ms. Snyder's record

of criminal behavior was horrendous including several crimes of dishonesty. RP 82 - 86. All those crimes were put in a diversion or deferred prosecution after she came forward with the information against Appellant. RP 86.

With the evidence from Ms. Snyder, Detective hill was able to narrow down his case to Appellant as the suspect. RP 349. Appellant was cooperative. RP 351. Detective Hill testified that he was granted a search warrant to get a DNA sample from Appellant. RP 350. The State asked specifically "Without the search warrant, could you have forced Mr. Robinson to give you DNA". RP 350. Detective Hill's response was a simple "I could not". RP 350. During direct examination of the defendant the State made a speaking objection stating that "He (the Appellant) was ordered to give a sample of DNA. The misgivings are irrelevant". RP 377. The Washington State Crime Lab was able to match Appellants DNA to "unknown individual A". RP 225, 352.

Prior to the beginning of trial the court had ruled that Ms. Snyder could testify that she and the Appellant needed the money for drugs. RP 18. Ms. Snyder testified at trial that she was an "opiate" addict and she and Appellant needed to rob to get money for pills. RP 41, 43. Further, over objection she was allowed to testify that the money from the robbery was used to purchase oxycotton. RP 61. Direct examination of Appellant did not bring up any drug addiction or use. During cross examination of Appellant the State questioned him extensively regarding his use of opiates until the flagrant violation of the court's pre-trial ruling forced an objection to the entire line of questioning. RP 381 - 383. The court overruled the objection saying "The door is opened". 383. The State continued with the line of questioning, RP 383, and again in cross examination. RP 395.

In the State's closing argument it used the drug abuse by both Ms. Snyder and the Appellant with effectiveness to

characterize the relationship between the two, RP 445, 455, 463, and to argue that their drug abuse together was the motive for the Appellant to rob the Baskins and Robbins. RP 453.

At the conclusion of the evidentiary portion of the trial the court provided what it considered a correct version of the jury instructions. RP 426. Both the State and the Appellant objected to the inclusion of the bracketed material for WPIC 401 "abiding belief in the truth of the crime charged" language. RP 426. In closing arguments the State argued "You folks are the ones charged with figuring out what is important." RP 452. Further, that the State's version of what happened on January 9, 2011, is the only "reasonable" explanation. RP 458. In fact, the State's entire argument focused extensively on reasonableness. RP 463 - 470.

On October 31, 2014, Appellant was found guilty of robbery in the first degree by jury verdict.

IV. ARGUMENT

A. Standard of Review

Abuse of Discretion on all evidentiary issues. State v. Gallagher, 112 Wn. App. 601, 609, 51 P.3d 100 (2002).

B. State's Continuous Use of Appellant's Drug Addiction at Trial was in Flagrant Violation of the Trial Court's Pre-trial Ruling and the door was not opened by Appellant's testimony.

Beginning with State v. Gallagher, 112 Wn. App. 601, 609, 53 100 (2002), there has been an exception to pre-trial rulings that preclude evidence if the "door is opened" by testimony offered by the beneficiary of the ruling by proffering testimony on the subject matter that has been excluded. The point being to prevent a false impression regarding the evidence

excluded pre-trial by the party that opens the door. Id. 610. That rule has continued in tact through the present day. State v. Hartzell, 156 Wn. App. 918, 932, 237 P.3rd 928 (2010). The caveat, however, has always remained that the original proponent of the evidence that was excluded by pre-trial ruling cannot "open the door" to its later introduction by asking the very questions that are meant to elicit the excluded evidence or testimony. Gelleher, supra at 609, State v. Koss, 158 Wn. App. 8, 241 P.3d 415 (2010). In every case on 'opening the door" the defendant introduced evidence through his own witness that either took advantage of the pre-trial exclusion of evidence or brought it to the jury's attention.

A proponent of the evidence cannot create the circumstance necessary to violate a pre-trial ruling then take advantage of that deception by walking through that door. In Appellant's case the pre-trial ruling by the court was clear. The State could elicit testimony that she and the Appellant needed

the money for drugs. The State, however, wishing to emphasize the need for "motive" in the case, RP 10, and lacking any other on Appellant's part, repeatedly brought up the drugs and drug addiction at every opportunity. The Appellant mentioned nothing of drugs in direct examination. In flagrant violation of the court's pre-trial order, the State pushed the Appellant into admitting a drug addiction to opiates, and repeatedly made a connection to the crime and that addiction. Upon defense objection, the court ruled simply that the "door had been opened". The State repeatedly raised it again during its closing argument.

The Appellant's drug addiction was certainly not relevant or admissible at trial, as the trial court had correctly ruled in its pre-trial motions. The Appellant did nothing to "open the door" to the admission of that evidence. In effect what happened was the Appellant was denied a fair trial because the court excluded the evidence until a point where the Appellant could not have

lessened the damage to the jury by admitting his addiction of his own accord. And the State, with the collusion of the court, was able to violate a argued and ruled upon motion that the defense had adhered to religiously in order to paint a picture of the Appellant that he was the drug addicted architect of a robbery scheme to get money for drugs.

The scenario described above is exactly what happened in this case. It is up to this court to decide if this was either not an abuse of the trial court's discretion or "harmless error". It is a too familiar decision. This circumstance was a flagrant violation of the Appellant's right to strategise for his presentation of his case, based on the court's pre-trial ruling, and to be protected by Evidence Rule 404(b)'s introduction of irrelevant and inadmissible bad acts. The trial court had already weighed the State's arguments and found them wanting. The jury was told Appellant was a drug addict and a bad influence on the witness that came in and testified that she had helped

commit the robbery. Appellant was deprived of a fair trial. Appellant respectfully requests this court recognize this violation and remand this case for a new trial.

C.. The State Violated Appellant's Right to Remain Silent and not to Incriminate Himself when it repeatedly referred to the Fact that He had been Court Ordered to Submit to a Buccal Swab for DNA Evidence.

The Fifth Amendment to the United States Constitution as well as Article one, section nine of the Washington State Constitution guarantee that no person in a criminal case shall be compelled in any criminal case to give evidence against himself. State v. Unga, 165 Wn.2d 95, 196 P.3d 645 (2008). In State v. Modica, 18 Wn App. 467, 475, 569 P.3d 1161 (1977), the Court quoted the United States Supreme Court in Doyle v. Ohio, 426 U.S. 610, 617-619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), in stating ". . . it would be fundamentally unfair and a deprivation

of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial". Finally, and although this issue has not been addressed in Washington law as far as counsel is able to devise, the Colorado Court of Appeals has addressed the issue of whether or not a refusal to allow a search if used as primary evidence by the State would be a violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. Colorado v. Chavez, 190 P.3d 760, 763 (2007). Mr. Chavez argued unsuccessfully in that case that to admit evidence of a defendant's refusal to voluntarily consent to a search is essentially punishing the defendant for exercising a Constitutional right. Id. 766. The fundamental reason that argument was unsuccessful was that the Court concluded that, although the State's references to the refusal to consent to a search were "improper", the rest of the evidence against the defendant was "overwhelming", and any error was, apparently,

harmless. Id. 767.

In this case the question of consent was much more personal than Mr. Chavez' refusal to allow a search of his apartment. The State was relentless in its pursuit of the fact that Appellant was forced by a court order to provide a sample of his DNA. Detective Hill was asked if "Without the search warrant could you have obtained DNA from Mr. Robison? Let me state that question a better way. Without the search warrant could you have forced Mr. Robison to give you DNA?" Detective Hill answered "I could not". The State went on "Was the search warrant granted?" Detective Hill "Yes it was". Then again within minutes the prosecutor asked the same question, "Were you able to get a lawful search warrant in this case to collect DNA from Mr. Robison?" Defense counsel objected "asked and answered". The court "I will permit that". Detective Hill: "I did". RP 350. During direct examination of Appellant he was asked if he had any misgivings about giving a sample of his

DNA? Appellant responded "I didn't commit the crime I had no . . ." then he was abruptly cut off by the State's speaking objection that "He was ordered to give a sample of DNA. The misgivings are irrelevant".

Prior to all this parlance there was never any evidence offered as to whether or not Appellant was ever "forced by the order" to give a sample of his DNA. For the State to ask him if he had refused to voluntarily give his DNA would have been a clear violation so the prosecutor skirted that issue entirely by merely asserting that he was forced to give his DNA. It must be kept in mind that other than the "free talk" with Ms. Snyder, a potential co-defendant and a career offender with no less than six prior offences hanging in the balance, there was no suspect in this case. She was not a reliable witness to stand on her own. The DNA was the kicker that corroborated a weak case, and the State knew full well it had to concentrate on it and give the jury the impression that Appellant had some thing to hide and he

knew it. Hence the repeated over emphasis on the unknown fact that he was forced to provide a sample of his DNA. This makes this case unique in the fact that Mr. Robison was compelled to be a witness against himself by the repeated overt references to his "refusal" to provide a sample of his DNA.

Based on this flagrant violation of Mr. Robison's rights as outlined above Appellant respectfully requests the court reverse his conviction and remand for a new trial.

D. The Inclusion of the Bracket Language regarding "Abiding Belief in the Truth of the Crime Charged" in WPIC 401 Deprived the Appellant of a Fair Trial.

Washington Pattern Jury Instruction 401, when including the bracketed material reads thus:

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as

plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. (If, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt.)

In State v. Emery, 174 Wn.2d 741, 760, 278 P.2d 653 (2012), and State v. Berube, 286 P.3d 402, 411 (2012), both courts determined that the State's argument that a jury's job is to search for the truth is impermissible. The bracketed material in

WPIC 401 inexorably connects the concepts of truth and being satisfied beyond a reasonable doubt. To argue or distinguish otherwise is to defy all logic. "If . . . you have an abiding belief in the truth of the crime charged you are satisfied beyond a reasonable doubt". The State in this case confined its argument to reasonableness of the evidence, but how can a juror be expected to not equate reasonableness with his or her abiding belief in the truth of the crime charged when they are desperately searching for a definition for "reasonable doubt", and the bracketed material gives them the only clear explanation.

This case differs significantly in that both the State and Defense Counsel objected to the giving of the bracketed sentence. The court gave the instruction over both objections. The question must be asked why? The only reasonable explanation must be that the court deems the connection between belief in the truth of the crime charged and being

convinced beyond a reasonable doubt. Which is only reasonable, but it is improper.

Based on the courts including the bracketed material in the final jury instructions over the objection of counsel and the danger of infusing the search for truth into the jury deliberations, Appellant respectfully requests this Court reverse the conviction and remand for new trial.

IV. CONCLUSION

Based on the foregoing, Michael Robison respectfully requests this Court reverse the conviction for robbery in the first degree and remand for a new trial.

Respectfully Submitted this 31st , day of July, 2014.

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