No. 83308-7

STEPHENS, J. (concurring)—I agree with the lead opinion that the Court of Appeals should be affirmed, but disagree with its reasoning. The lead opinion holds that the State's questioning of David Otterson about his plea agreement to testify truthfully was harmless error. I would hold that it was not error.

ANALYSIS

Although the parties discuss the plea agreement's "testify truthfully" language mainly as a matter of improper prosecutorial vouching, I agree with the lead opinion that we should deal with this issue as previous Court of Appeals cases have: using the balancing test of Evidence Rule (ER) 403. *See State v. Green*, 119 Wn. App. 15, 23-24, 79 P.3d 460 (2003); *State v. Jessup*, 31 Wn. App. 304, 315-16, 641 P.2d 1185 (1982). Certainly, evidence of "testify truthfully" language may be unfairly prejudicial to the extent it implies that the State can assure that the witness is telling the truth. When prosecuting attorneys' offices draft plea agreements, they can

include self-serving language that has no probative value at trial.

However, under ER 403, we should weigh the prejudice engendered by the "testify truthfully" language in a plea agreement against the State's legitimate purposes for questioning a witness about a plea agreement. When the State offers a witness who has agreed to testify as part of a plea agreement, the existence of a "deal" is an obvious ground for impeachment. It shows potential bias and motivation to lie. There is even the possible inference that the State offered the witness the plea agreement to procure *fraudulent* testimony implicating the defendant. In the face of obvious (and damning) lines of questioning on cross-examination, the prosecutor in this case wished to present Otterson's testimony in its true context—as part of a plea deal in exchange for truthful testimony. By questioning Otterson on direct examination about this issue, the prosecutor intended to "pull the sting" from the anticipated cross examination.

We have previously approved of similar trial strategy under ER 403. In *State v. Bourgeois*, 133 Wn.2d 389, 402-03, 945 P.2d 1120 (1997), a State's witness, Frank Rojas, had given inconsistent statements about whether the defendant committed the crime. On direct examination, the State questioned Rojas about his fear of the defendant as the reason for the inconsistencies. The same line of questioning was error as to other witnesses, whose credibility was not at issue. *Id.* at 401-02. However, it was not error as to Rojas "because his credibility was attacked. Although the attack occurred after Rojas was directly examined by the State, it was reasonable for the State to anticipate the attack and 'pull the sting' of

the defense's cross-examination." *Id.* at 402. We explained:

> "A trial is not just combat; it is also truth-seeking; and each party is entitled to place its case before the jury at one time in an orderly, measured, and balanced fashion, and thus spare the jury from having to deal with bombshells later on. It is on this theory that defense counsel, in beginning their examination of a defendant, will often ask him about his criminal record, knowing that if they do not ask, the prosecutor will do so on cross-examination. What is sauce for the goose is sauce for the gander."

Id. (quoting *United States v. LeFevour*, 798 F.2d 977, 984 (7th Cir. 1986)). Because the defense's "line of cross-examination was to be anticipated," the prosecution could present Rojas's testimony in the context of his prior inconsistent testimony and his fear of the defendant "to blunt the impact of [the defendant's] cross-examination." *Id.* at 403. Here, as in *Bourgeois*, the State's questioning about the plea agreement "anticipated" and "blunt[ed] the impact" of the defense's argument that Otterson was lying to secure the benefit of the plea or that the State induced Otterson to lie to help convict the defendant.[1]

Although the State's reference to the "testify truthfully" requirement of a plea agreement serves a legitimate purpose under ER 403 and *Bourgeois*, it is also prejudicial. The prejudice arising from the implication that the State can somehow verify a witness's truthfulness may be compounded by self-serving language in the plea agreement, which is an adversarial document prepared in anticipation of

[1] This conclusion follows more readily in this case than in *Bourgeois*. In *Bourgeois*, it was assumed that the defense would have impeached Rojas on the basis of his inconsistent statements had the State not mentioned them on direct examination. In this case, Ish's defense attorney affirmatively stated that he would use the plea agreement during cross-examination. Verbatim Report of Proceedings (VRP) at 1080. Beyond merely anticipating the cross-examination, the State was told that impeachment based on the plea agreement was coming.

litigation. Some limits on the State's ability to put the terms of the plea agreement in evidence on direct examination are therefore appropriate.

In *Green*, the Court of Appeals struck the right balance. 119 Wn. App. at 23-24. Because of the prejudicial language in a plea agreement securing a witness's testimony, *Green* held that the State could not offer the plea agreement as an exhibit during its direct examination. *Id.* The State contended that it should be able to "pull the sting" of the defense's impeachment on cross-examination by introducing the plea agreement on direct examination. *Green* rejected this argument: the State could "pull the sting" by *asking questions* on direct examination to set up the context of the testimony but could not introduce the plea agreement, with its self-serving language, unless the defense opened the door on cross-examination. *Id.* at 24. "This approach . . . allows the State to inquire in its direct examination about the existence of an agreement and the witness's reasons for cooperating to avoid an appearance that it is attempting to conceal information from the jury." *Id*.

Green's resolution of the issue makes sense because it prevents the jury from hearing the prejudicial language of the agreement unless the defense opens the door. But, it also allows the State to present the witness's testimony for what it is, avoiding a "bombshell" during cross-examination. By placing the witness's testimony in its real context, the rule in *Green* best allows the jurors to appraise its credibility. In other words, it serves ER 403's goals by allowing probative information to come in while limiting prejudice as much as possible.[2]

[2] Of course, a trial court has discretion to limit the State's questioning regarding a plea agreement to avoid prosecutorial vouching. The prosecutor cannot simply read the

At trial in this case, the defense and the prosecution argued over whether the plea agreement would be admissible as an exhibit during the State's direct examination. Verbatim Report of Proceedings (VRP) at 1079-80. The State agreed not to admit the plea agreement, but wished to question Otterson about it. The defense objected to any question regarding Otterson's agreement to testify truthfully as self-serving prosecutorial vouching. *Id.* at 1080-81. The trial court ruled that, so long as the State did not suggest that it was vouching for Otterson's credibility by allowing him to testify, the State could point out the terms of the plea agreement. "Otherwise," the trial court stated, "the defense will be dangling the possibility that the State has an agreement that says 'You can lie as much as you want to. We just want you to get up there and testify.'" *Id.* at 1081-82.

During the State's direct examination of Otterson, the prosecutor asked about his contact with law enforcement regarding Ish's case. *Id.* at 1101-07. In eliciting Otterson's description of his plea agreement, the following brief exchange occurred:

> Q. What happened at the start of your trial in October?
> A. I was offered a plea agreement where I pled to a second degree robbery if I exchanged testimony in this case.
> Q. With regard to exchanging testimony in this case, what type of testimony?
> A. Truthful testimony.

Id. at 1104. This was the sum total of the testimony on direct examination regarding the witness's agreement to testify truthfully. After the defense thoroughly cross-examined Otterson about the plea agreement, the prosecutor reiterated a similar

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plea agreement aloud as a series of questions. What is probative is the fact that the witness is testifying pursuant to a plea agreement in which the State asked for truthful testimony, not the language of any provision in particular.

exchange on redirect examination. *Id.* at 1153.

These questions merely placed the witness's testimony in context for the jury and did not suggest that the prosecutor was verifying or vouching for its truth.[3] I would hold that the prejudice engendered by this exchange did not substantially outweigh its probative value, and the trial court did not abuse its discretion under ER 403 in allowing this testimony. I would affirm the Court of Appeals.

CONCLUSION

It is not error for the State to "pull the sting" on direct examination of a witness by asking questions about the context of a plea agreement, including the fact that the plea agreement was in exchange for truthful testimony. The limited questioning in this case and trial court's statements show that the parties were aware of, and properly minimized, the prejudice arising from such an exchange. I would affirm the Court of Appeals.

[3] The lead opinion agrees that the exchanges were brief and that the prosecutor did not dwell on the "testify truthfully" issue; for this reason it finds the error harmless. *See* lead opinion at 13-14. Puzzlingly, the lead opinion does not apply this understanding during its ER 403 analysis to conclude that the minor prejudice did not outweigh the testimony's probative value.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst

Justice James M. Johnson