SUPREME COURT NO. 90494-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

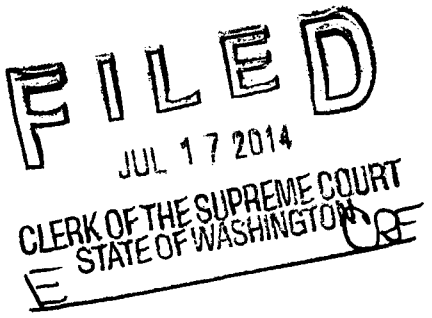
CLAY JONAK,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 44321-0-II
Cowlitz County No. 12-1-00408-8

PETITION FOR REVIEW



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FILED IN COA ON JULY 7, 2014

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A. IDENTITY OF PETITIONER

Petitioner, Clay Jonak, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Jonak seeks review of the June 4, 2014, order of Division Two of the Court of Appeals denying Jonak's Motion to Modify, and the Court of Appeals Commissioner's April 8, 2014, ruling affirming his conviction and sentence.

C. ISSUES PRESENTED FOR REVIEW

Jonak was charged with first degree theft, and the State presented testimony from a former friend of appellant's who said he admitted committing the theft. When Jonak attempted to testify about an email he received from the witness which would demonstrate her bias, the court excluded the evidence for lack of foundation. Where the defense offered evidence from which a jury could find the email was sent by the prosecution witness, did the wrongful exclusion of evidence of that witness's bias deny Jonak his constitutional right of confrontation?

D. STATEMENT OF THE CASE

Clay Jonak was charged with first degree theft of some dredging equipment owned by Manson Construction. He admitted taking three items belonging to Manson from Longview Booming, where they were

stored, and recycling them. RP 349-50. He testified, however, that he was given permission to do so by Bob Richardson, Manson's Northwest Dredging Operations Manager. RP 107, 363. Richardson admitted that he discussed the recycling project with Jonak, but he testified he had not given Jonak permission to get started. RP 112-13. The State's case against Jonak rested on the resolution of this dispute.

There was no dispute that Jonak lived on property adjacent to Longview Booming for several years. RP 102, 235, 334. The properties shared an access road and a locked gate, to which Jonak had the key code. RP 247, 335. It was also undisputed that Manson Construction stored a large amount of dredging equipment on the property, which had gone unused for years. RP 102, 234.

Jonak owns a metal recycling business, and in March 2012, he contacted Manson to inquire whether they were interested in recycling the unused equipment in Longview. RP 93, 108, 335, 338-39. He drove to Manson's Seattle office to discuss his proposal, where he was introduced to Richardson, who he was told had authority to set up contracts for recycling metals. RP 94, 104, 108, 340.

Jonak testified that he told Richardson what his company does, and he proposed recycling everything Manson wanted recycled and splitting the proceeds. RP 341. Richardson asked him to come back with

a diagram and some photographs of the equipment stored in the Longview yard. RP 344.

Roger Ison was with Jonak during the first meeting with Richardson. RP 127, 184. Ison testified that Richardson told Jonak that as far as he was concerned, Jonak could scrap the equipment at the Longview yard, but he needed to work out some details first. RP 185, 191.

Richardson testified, on the other hand, that he told Jonak he was not sure what equipment was stored at the Longview yard and what the company would want to scrap. He testified that he told Jonak he would set up a meeting in Longview with his boss to identify the items that would be recycled. RP 109-111.

A few days later Jonak returned to Richardson's office in Seattle with a diagram of the equipment located at the Longview yard. RP 112, 344. Jonak testified that Richardson told him the equipment was pretty much scrap, and he should go ahead and get started with the recycling. RP 346. Richardson testified that he told Jonak he had no problem using him to scrap the items stored in the Longview yard. He testified that he did not tell Jonak they had a contract or that he could get started on the project, however. RP 112-13.

After that second meeting, Jonak recycled three items from the Longview yard. RP 349. He drove to Seattle a third time but was unable

to meet with Richardson, who was in Mexico on business. RP 127, 348. Jonak testified that he left the receipts from the recycling transactions with Richardson's secretary. RP 352-53.

Richardson set up a meeting at the Longview yard on April 23, 2012, with Jonak and Eric McMann and Jim McNalley from Manson Construction. RP 116, 145. According to Richardson, the purpose of the meeting was to determine what items, if any, would be recycled. RP 111. Although Richardson had told Jonak he would likely be given the contract to do the recycling, he had not mentioned that agreement to anyone else at Manson before the meeting. RP 135, 146, 154. Jonak's understanding was that the purpose of the meeting was to finalize the financial terms of the agreement. RP 346, 352.

When the people from Manson discovered that items were missing from the yard, they called the property owner and the sheriff's office. RP 152. Jonak testified that, at that point, he asked Richardson if he was going to say anything about their recycling agreement. When Richardson did not speak up, Jonak realized something was wrong, and he started getting concerned. RP 356-57. Jonak did not say anything to McMann about the agreement, because he was relying on Richardson to do that. RP 381. Jonak was asked if he had taken any of the missing property, and he

said he had not. RP 152, 245. He explained at trial that he meant that he did not commit theft. RP 378.

The deputy who investigated the report noticed some distinctive tire tracks in the area where the missing equipment had been, which he determined were consistent with a crane parked near Jonak's residence. RP 259. When the deputy asked Jonak about the crane, he said it had not been operational for two and a half to three months. RP 271. Jonak told the deputy that no one else had access to the crane. RP 275. Jonak gave the deputy a written statement, in which he denied taking part in or having any knowledge of a theft, and the deputy left. RP 276, 294.

Two days later, after finding evidence that Jonak had recycled items from the Longview yard at Bob's Metals in Portland between March and April 2012, the deputy returned and arrested Jonak. RP 277-78, 82. When the deputy described the evidence he had gathered, Jonak commented that Richardson had thrown him under the bus. RP 283. Jonak told the deputy that Richardson had given him permission to recycle the Manson materials. RP 286.

In August 2012, Sharon Gaines contacted the prosecutor to provide information about Jonak. RP 224. Gaines and Jonak had a brief relationship more than 20 years ago, and they have a daughter together. RP 219. According to Gaines, Jonak contacted her in May 2012 saying he

had been arrested for theft and he was in a lot of trouble. Jonak invited her to come to Washington from Texas and share his house. RP 220. When she arrived in June, she felt she had been misled about the conditions of Jonak's home. She did not feel it was a safe place to live with her two children, one of whom is disabled, and she stayed with Jonak only a few days. RP 221, 230.

Gaines testified that she asked Jonak about the theft charge, and he told her that he took some items from his landlord's property, broke them down, and recycled them for money. She claimed Jonak told her that the police were not going to do anything because they had no evidence against him. RP 222-23.

Jonak testified that Gaines had made contact with him by email in the spring of 2012. RP 365. After exchanging a few emails, they spoke on the phone, and he told her he potentially needed someone to care for his home as a result of his arrest. He invited her to come to Longview, and she accepted. RP 366-67. After a subsequent conversation Jonak told Gaines not to come to Longview, but she came anyway. RP 368-69. Gaines and her children stayed with Jonak for four days, until he located a homeless shelter that could accommodate her disabled child. RP 370-71.

Although she claimed she lost everything she owned in the process of moving to Washington to help Jonak, Gaines denied harboring any

resentment toward him, saying she was "impartial." RP 225-26. The defense attempted to demonstrate Gaines's bias, and impeach her testimony that she was impartial, through an email containing derogatory comments about Jonak. RP 376.

First, counsel showed the email to Gaines on cross examination, and she denied sending it. RP 227-28. Jonak then testified that he received the email from Gaines in July 2012, shortly before she contacted the prosecutor. RP 374. He recognized the email address as the one Gaines had used to contact him before she moved to Longview. RP 372.

The prosecutor objected that the defense could not establish the foundation for that email, and defense counsel asked additional questions to authenticate it. RP 372. Jonak testified that in addition to the address he recognized as Gaines's, the email contained information that only Gaines would know. RP 373-74. When defense counsel asked Jonak about the contents of the email, the prosecutor objected that the email was hearsay and argued that Jonak had not established that Gaines sent the email because there was no evidence connecting the email to a particular IP address or server. RP 374. Counsel responded that Jonak had adequately identified the email as coming from Gaines by the address and the content. RP 374. The court sustained the prosecutor's objection based on lack of foundation. RP 376.

The jury returned a guilty verdict, and Jonak appealed, arguing that the trial court denied him his constitutional right of confrontation by excluding evidence of Gaines's bias. A Court of Appeals Commissioner entered a ruling affirming Jonak's conviction, and the Court of Appeals denied Jonak's motion to modify the Commissioner's ruling.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE DENIAL OF JONAK'S RIGHT OF CONFRONTATION PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

A criminal defendant has a constitutional right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003). The bias of a witness is always relevant to discredit that witness's testimony. Davis, 415 U.S. at 316. Not only must the defendant be allowed to cross examine the prosecution witness about statements indicating bias, the defense must also be permitted to introduce extrinsic evidence of such bias through the testimony of other witnesses. Spencer, 111 Wn. App. at 408; State v. McDaniel, 37 Wn. App. 768, 772-73, 683 P.2d 231 (1984); State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980). A trial court's decision denying the defendant this right is reversible error. Spencer, 111 Wn. App. at 408.

In this case, the trial court denied Jonak the opportunity to establish Gaines's bias through evidence of an email he received from her, which contained derogatory comments aimed at Jonak. RP 376. Gaines testified that she was impartial with regard to Jonak and that she only felt sorry for him. RP 226, 230. Jonak attempted to rebut this suggestion that she harbored no resentment which could influence her testimony by testifying about an email he received from Gaines shortly before she contacted the prosecutor's office to report that Jonak admitted committing the charged theft. RP 372-74. But the trial court excluded all evidence regarding the email, ruling that it lacked the proper foundation. RP 376. Not only was the court's ruling incorrect, but it violated Jonak's right to impeach this prosecution witness with evidence of bias.

First, as the State conceded on appeal, Jonak properly established the foundation for evidence of the email from Gaines under ER 901. Jonak testified that the email in question was sent from the address he recognized as Gaines's, as it was the same address from which he had received emails from her before she moved to Washington. RP 372. In addition, he knew the email came from Gaines because it contained information that only she would know. RP 373-74. Based on this testimony from a witness with knowledge, as well as the content which identifies the sender, a reasonable jury could determine that Gaines sent

the email in question, and therefore a sufficient foundation was established. See ER 901(a); State v. Kinard, 109 Wn.App. 428, 436, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022 (2002) (requirement of authentication satisfied by testimony from witness with knowledge that matter is what it is claimed to be). The trial court abused its discretion in excluding the evidence for lack of foundation.

Moreover, the trial court's discretion in excluding evidence is limited by the defendant's constitutionally guaranteed right to confrontation. See State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A defendant's right to confrontation includes the right to impeach the State's witness with evidence of bias. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

It is well-recognized that "the defendant should be afforded broad latitude in showing the bias of opposing witnesses." Spencer, 111 Wn. App. at 411. Here, Gaines contacted the prosecutor's office in August 2012, claiming that Jonak had admitted to her that he stole the property from Manson Construction. There was evidence that Gaines felt she had been mistreated by Jonak, and although she claimed at trial that she was an impartial witness, evidence that she sent Jonak an angry and insulting email just prior to contacting the prosecutor's office would have

demonstrated her bias against Jonak and cast doubt on her credibility. The jury was entitled to have that evidence before them so they could make an informed decision as to the weight to put on Gaines's testimony. See Davis, 415 U.S. at 317-18.

In her ruling, the Court of Appeals Commissioner concluded that any error by the trial court in excluding the email was harmless because the "untainted" evidence against Jonak was strong. Ruling, at 5-6. Because exclusion of the email infringed on Jonak's constitutional right of confrontation, the error is presumed prejudicial and requires reversal unless it was harmless beyond a reasonable doubt. Johnson, 90 Wn. App. at 69 (citing Davis v. Alaska, 415 U.S. at 318). That presumption cannot be overcome in this case.

The State's theory of the case was that Jonak, who had lived next to the Longview yard and had access to the unattended Manson equipment for years, and who had driven from Longview to Seattle three times to work out the terms of an agreement to recycle that equipment, suddenly decided to steal the equipment instead. Gaines's testimony that Jonak told her he committed the theft because he was having financial difficulties lent needed weight to the State's theory. Because the jury might not have convicted Jonak if it was permitted to consider the evidence of Gaines's bias against him, the trial court's error in excluding evidence about the

email cannot be considered harmless under the constitutional harmless error standard. The Court of Appeals's holding to the contrary presents a significant question of constitutional law which should be reviewed by this Court. RAP 13.4(b)(3).

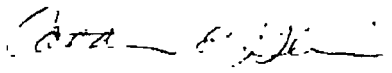
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Jonak's conviction.

DATED this 7th day of July, 2014.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



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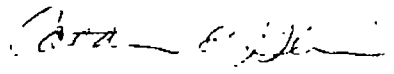
Certification of Service by Mail

Today I mailed a copy of the Petition for Review in *State v. Clay Jonak*, Court of Appeals Cause No. 44321-0-II as follows:

Clay Jonak
100 Tennant Way
Longview, WA 98632

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
July 7, 2014

GLINSKI LAW FIRM PLLC

July 07, 2014 - 10:38 AM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

CLAY J. JONAK,
Appellant.

No. 44321-0-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated April 8, 2014, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 4th day of June, 2014.

PANEL: Jj. Johanson, Lee, Melnick

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON, Appellant, v. CLAY J. JONAK, Appellant.	No. 44321-0-II RULING GRANTING MOTION ON TH EMERITS TO AFFIRM

Clay J. Jonak appeals his conviction for first degree theft. This court affirms his conviction. RAP 18.14(a).

FACTS

In March 2012, Jonak, the owner of a metal recycling business, contacted Manson Construction to inquire whether the company wanted to recycle unused dredging equipment it stored on a lot next to Jonak's residence and business. He drove to Manson's Seattle office to discuss his proposal and met with Bob Richardson, a Manson manager. Richardson asked Jonak to diagram and photograph the equipment. Another Manson employee who attended the meeting recalled that Richardson told Jonak that as far as Richardson was concerned, Jonak could scrap the equipment but

that he needed to work out some details first. Richardson, however, believed he told Jonak that he needed to get more information about the equipment and would set up a meeting at the storage yard with his boss to see what needed to be recycled.

Jonak dropped a diagram of the site off at Richardson's office. Jonak met with Richardson and recollected that Richardson told him to get started with the recycling. Richardson, however, said that although he told Jonak he would have no problem using him to recycle, he did not tell him to get started. After the meeting, Jonak recycled three items from the storage yard and stated that he left the receipts with Richardson's secretary.

In April 2012, Jonak met in the storage yard with Richardson and Eric McMann and Jim McNalley, other Manson employees. Richardson did not mention to the other Manson employees that he intended Jonak to handle the recycling. During the meeting, the Manson employees noticed items were missing from the storage lot. They called the sheriff's office. Jonak became concerned when Richardson did not say anything about an agreement for him to perform recycling. The sheriff's deputy asked Jonak if he removed any property from the site and he said he did not.

The deputy noticed some distinctive tire marks in the lot and traced them to a crane parked near Jonak's house. Jonak told the deputy the crane was not operational. Jonak provided the deputy with a statement that he did not commit theft. After investigating further, the deputy returned and arrested Jonak. At that time, Jonak said that Richardson had thrown him under the bus and that he had Richardson's permission to take and recycle the missing items.

The State charged Jonak with first degree theft on April 30, 2012. He went to trial. At trial, an ex-girlfriend of Jonak's named Sharon Gaines testified that Jonak contacted her in Texas shortly after he was arrested and asked her to come to his home. After she arrived in June 2012, she stayed only a few days because the house was not suitable for her or her children, one of whom was disabled. They discussed the theft charge and Jonak admitted he took the items but that the police had no evidence. She contacted the police in August 2012 to tell them about Jonak's statements. During her testimony, she stated that her feelings about Jonak were "impartial." Report of Proceedings (RP) at 225-26. Jonak, however, tried to introduce evidence of witness bias in the form of an e-mail Gaines wrote to Jonak. Gaines, however, denied that the sender's e-mail address was hers and denied writing the e-mail, and the trial court excluded it due to lack of foundation. Portions of Gaines's testimony nevertheless demonstrated some level of anger toward Jonak. For example, she said that Jonak manipulated her to get her to move to his property. She also accused him of putting "a disabled child and . . . woman on the street." RP at 230, 221.

Jonak also called a witness, Kathy Knapp, to testify that Gaines was biased. Knapp stated that Gaines was "nasty" and "threatening" to Jonak. RP at 322. Knapp also said that Gaines tried to recruit drug dealers to beat up Jonak and his girlfriend.

Jonak, during his testimony, also referenced Gaines's e-mail. He said that he recognized the e-mail address as one used by Gaines. He also said that the e-mail contained information that only Gaines would know. He sought again to admit the e-mail but the trial court sustained the prosecutor's objection based on lack of foundation. ER 901. Jonak appeals.

ANALYSIS

Jonak argues that the trial court denied his right to confront a witness when it excluded evidence of Gaines's bias in the e-mail. He contends that he met the standard for authenticating the e-mail set out in ER 901 and should have been permitted to use it to demonstrate bias and attack Gaines's credibility. He additionally argues that the trial court's decision to exclude this evidence was not constitutionally harmless error.

This court reviews de novo alleged violations of the confrontation clause. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). A defendant has a constitutional right under the Sixth Amendment of the United States Constitution to impeach a prosecution witness with evidence of bias. *Davis v. Alaska*, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *see State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). "It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility." *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319 (1971). An error excluding bias evidence is presumed prejudicial but is subject to a harmless error analysis. *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493 (2014). "A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict cannot be attributed to the error." *Lui*, 179 Wn.2d at 495; *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

When determining whether a constitutional/confrontation clause error is harmless, this court applies the overwhelming untainted evidence test. *Lui*, 179 Wn.2d at 495. "Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless." *State v. Davis*, 154

Wn.2d 291, 305, 111 P.3d 844 (2005), *aff'd by Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The court may also consider whether the excluded evidence was cumulative, the importance of the witness's testimony, the extent of corroborating and contradicting testimony, the extent of cross-examination otherwise permitted, and the strength of the State's case. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 914 & n.12, 952 P.2d 116 (1998) (quoting constitutional harmless error standard from *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). Ultimately, "[i]f there is no 'reasonable probability that the outcome of the trial would have been different had the error not occurred,' the error is harmless." *State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007) (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)), *overruled on other grounds by Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

Here, the State agrees with Jonak's argument that the trial court's decision to exclude the e-mail "for lack of foundation was likely incorrect." Br. of Resp't at 15. It nevertheless argues that even assuming that the trial court violated Jonak's confrontation right when it erred in sustaining the State's objection, any error was harmless.[1] This court agrees.

[1] The State additionally argues that the trial court had additional grounds to exclude the e-mail. First, the State contends that "to the extent that the e[-]mail provided evidence that M[s]. Gaines was biased against Mr. Jonak the content of the e[-]mail would be repetitive and only marginally relevant." Br. of Resp't at 15. In addition, because Gaines denied authoring the e-mail, the use of the e-mail would "only impeach Ms. Gaines on a collateral issue, i.e., the provenance of the e[-]mail, rather than whether she was biased against Mr. Jonak." Br. of Resp't at 17.

Jonak here argues that the e-mail was crucial to illustrate Gaines's bias. Despite that Gaines testified that her feelings toward Jonak were impartial, additional testimony from both Gaines and Knapp demonstrated Gaines's bias. Moreover, looking at the "untainted" evidence, the State's case was strong. Only Jonak testified that he had Richardson's permission to recycle the dredging equipment. He falsely told the deputy that the crane was inoperable. He repeatedly denied taking the equipment and he did not mention to Manson employees or law enforcement his purported agreement with Richardson until after he was arrested. Consequently, any error by the trial court in excluding the e-mail was harmless. Accordingly, it is hereby

ORDERED that this court's motion on the merits to affirm is granted.

DATED this 8TH day of April, 2014.

Aurora R. Bearse
Court Commissioner

cc: Catherine Glinski
Aaron Bartlett
Hon. Dennis Maher, Pro Tem
Clay J. Jonak