SUPREME COURT NO. 91430-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

SHERRY NIELSEN,

Respondent.

ON REVIEW FROM DIVISION TWO OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Court of Appeals No. 44052-1-II

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, SHERRY NIELSEN, by and through her attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Ms. Nielsen asks this Court to deny the State's Petition for Review of the unpublished Court of Appeals decision issued on December 16, 2014.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' harmless error analysis conflicts with decisions of this Court or presents a significant question of constitutional law.

2. Whether the Court of Appeals properly relied on a decision of this court in remanding for a new trial.

D. STATEMENT OF THE CASE

Michael Miller and Sherry Nielsen moved from California to Washington together in 2005. 1RP[1] 118. They shared an apartment in Vancouver for over a year. Then, in May 2007, Miller bought a house, and Nielsen rented a room from him for $450 a month. 1RP 119. Nielsen moved out in July 2009. 1RP 120. In 2010 Miller stopped making his

[1] The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—9/17/12; 2RP—9/18/12; 3RP—10/4 and 9/12.

mortgage payments, and in June 2011 he moved back to California. 1RP 114, 130. He had the utilities shut off before he left. 1RP 128.

In June 2012, Miller received a water bill from the City of Vancouver, charging for recent usage. 1RP 128. When he contacted the water department, he was told that Nielsen had requested water service at his Vancouver house. 1RP 128. Miller informed the water department employee that Nielsen was not authorized to be at the house. 1RP 128.

On June 11, 2012, Vancouver Police Officer Ed Prentice was dispatched to Miller's house to investigate Miller's complaint that Nielsen was living there. 1RP 169. Prentice contacted Nielsen, who said that she used to live in the house with Miller, and she had moved back in about a week earlier. Nielsen said she was paying rent to the bank, rather than Miller, and that the bank agreed to her living there so the house would not be vacant. 1RP 171. Officer Prentice called Miller to report what Nielsen had said. Nielsen then showed him a rental agreement dated May 4, 2008, and a print out of a Facebook conversation with Miller in which they discussed her taking over the property. 1RP 172. Miller acknowledged that there could be some sort of written rental agreement from 2008. 1RP 175. Prentice told Miller that with the documentation Nielsen had, he was reluctant to take law enforcement action. 1RP 174.

About two weeks later, Nielsen brought documents to the water department in an attempt to establish an account in her name. 1RP 77. She provided the rental agreement from 2008, a rental agreement dated April 1, 2012, and excerpts from a Facebook conversation with Miller. 1RP 79, 88. The water department employee suspected the documents were not valid and told Nielsen her supervisor would have to review them. 1RP 90-91.

The water department supervisor called Miller and told him that Nielsen had presented a rental agreement dated April 1, 2012, that purported to have his signature. When Miller told her he had not signed the agreement, she advised him to contact the police. 1RP 129.

Miller spoke to Vancouver Police Officer James Watson and reported that his house was being occupied by a former tenant who was not authorized to be there. 1RP 138. Watson contacted the water department and obtained copies of the documents Nielsen had presented. 1RP 94, 138-39.

Officers Watson and O'Meara went to the house to contact Nielsen. Nielsen's friend answered the door, and Watson asked to speak to Nielsen. When Nielsen came to the door, Watson explained that he was investigating a complaint from Miller that she was squatting at the house.

1RP 144-45. Watson asked if they could speak inside, and Nielsen acquiesced. 1RP 145.

When the officers entered the kitchen, Watson told Nielsen's friend she had to leave. 1RP 61, 66, 153. Nielsen was recovering from recent surgery, and she had a bandage on her arm and was wearing a nightgown. She asked to be allowed to get dressed, but Watson would not let her leave the room. 1RP 60-61, 151-52.

Nielsen told Watson that she had been living in the house continually since 2007, and she showed him a rental agreement dated 2008. 1RP 145. Because the agreement only referenced renting a room, Watson told Nielsen it was insufficient to prove she had permission to occupy the entire house. He asked to see a more recent agreement, and Nielsen showed him the Facebook stream she had presented to the water department. 1RP 146.

Watson then advised Nielsen of her Miranda rights. He told her that Miller was claiming he never signed any rental agreement with her and that what she had given the water department was a forgery. 1RP 147. She again showed him the 2008 agreement and said it was not a forgery. 1RP 148. Nielsen said she had permission to be in the house and Miller was lying. 1RP 149. Watson placed Nielsen under arrest. 1RP 150.

Nielsen was charged with one count of forgery based on the 2012 rental agreement and one count of making a false statement to a public servant based on her conversation with Prentice.

At a CrR 3.5 hearing, Nielsen testified that she kept asking if she could change her clothes, but Watson refused. 1RP 60. She said she first asked to leave to change clothes about 10 minutes into the interview, and one of her requests was made right before she was placed under arrest. 1RP 62. Watson's testimony on the issue was inconsistent, first saying he told Nielsen she could not leave before arresting her, then claiming she did not ask to change clothes until after her arrest. 1RP 65. The trial court did not enter a finding of fact resolving this factual dispute as to when Nielsen asked to leave the room to change clothes.

Trial counsel argued that Nielsen was in custody from the time the officers entered the house, because the officers clearly communicated that they were in charge of the encounter by ordering Nielsen's friend to leave and refusing to let Nielsen leave the room to get dressed. 1RP 68-70. While the court acknowledged that the police exerted control by telling Nielsen's friend to leave, it felt that the situation did not become custodial until Nielsen was formally arrested and handcuffed. The court ruled that because Nielsen was not in custody, all of her statements during the interrogation were admissible at trial. 1RP 72-73; CP 107.

Miller testified at trial that he never had a written rental agreement with Nielsen. They had a verbal agreement that she could stay in the house as long as she paid him $450 a month, but Nielsen moved out permanently in July 2009, and they had no tenancy agreement after that. 1RP 120-21. Miller testified that he did not authorize Nielsen to be in the house in 2012, and he did not sign the rental agreement Nielsen presented to the water department. 1RP 123-24.

The water department supervisor testified that water to the house had been shut off at the request of the owner and started again at Nielsen's request. Even though Nielsen initiated the service, the account remained in Miller's name as the owner of record of the property. 2RP 194.

Defense counsel argued that the State failed to prove Nielsen was guilty of forgery, because she did not present the lease agreement with the intent to injure or defraud. Her intent was to put the utilities in her name so that Miller would not be billed for the water she used. 2RP 251-53, 257.

The jury returned guilty verdicts.

The Court of Appeals reversed the forgery conviction and remanded for a new trial. It held that because the trial court did not determine whether the interrogating police officers denied Nielsen's request to leave the room before she was advised of her Miranda rights,

her statements were erroneously admitted. Slip Op. at 9. Because this error was not harmless beyond a reasonable doubt, remand for a new trial was required.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

THE STATE HAS NOT ESTABLISHED THAT REVIEW OF THE COURT OF APPEALS' DECISION IS APPROPRIATE UNDER RAP 13.4(B).

1. The Court of Appeals' harmless error analysis does not present an issue for review.

The State argues in its Petition that the Court of Appeals' decision conflicts with this Court's decision in State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), asserting that the court failed to apply the constitutional harmless error standard identified in that case. Petition at 6. The State also argues that this Court should grant review in this case to resolve the question of what harmless error standard is appropriate. Petition at 12. Contrary to the State's assertions, the Court of Appeals applied the overwhelming untainted evidence test identified in Guloy. Moreover, because the error in this case was not harmless under either harmless error analysis, this case does not present a constitutional question for this Court to resolve.

After determining that the trial court erroneously admitted Nielsen's statements, the Court of Appeals considered whether that error was harmless. It noted that the erroneous admission of statements obtained in violation of Miranda is subject to constitutional harmless error analysis, which presumes the error prejudicial and places the burden on the State to prove the error was harmless. Sip Op. at 9 (citing State v. Nysta, 168 Wn. App. 30, 43, 275 P.3d 1162 (2012) (citing Guloy, 104 Wn.2d at 425), review denied, 177 Wn.2d 1008 (2013)). The Court noted that "constitutional error is harmless 'if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.'" Id. It further noted that if the "'untainted evidence ... is so overwhelming that it necessarily leads to a finding of guilt,' the error does not warrant reversal." Slip Op. at 9 (quoting Guloy, 104 Wn.2d at 426).

Next, the court applied these principles to the facts of this case. The court pointed out that a necessary element of forgery as charged in this case was intent to injure or defraud. See RCW 9A.60.020. While the State presented evidence that Nielsen deceived the utilities department and Miller in attempting to establish water service and remain at the house, the evidence also showed that Nielsen attempted to establish an account with the water district in her name. The defense argued that there was no intent

to injure or defraud, because she was attempting to take responsibility for the water bill herself, rather than having Miller charged for the water she used. The untainted evidence therefore was not so overwhelming that it would necessarily lead to a finding of guilt. Slip Op. at 10.

As the Court of Appeals recognized, the improper admission of Nielsen's statements allowed the State to bolster its argument that Nielsen acted with intent to injure or defraud, because evidence of evasiveness in one setting may support a claim of fraudulent intent in another. Thus, the Court of Appeals could not say beyond a reasonable doubt that any reasonable jury would have reached the same result absent the trial court's error. Slip Op. at 10 (citing Nysta, 168 Wn. App. at 43).

The State argues that, instead of applying the overwhelming evidence test, the Court of Appeals determined whether the improperly admitted evidence contributed to the verdict, and this Court must determine which test should apply to constitutional harmless error analysis. Petition at 7-8. The Court's opinion shows, however, that the error was not harmless under either analysis. Slip Op. at 10. Because the Court of Appeals' decision does not conflict with decisions of this Court, review is not appropriate under RAP 13.4(b)(1). And because the same result is reached under both the overwhelming evidence analysis and the

contribution analysis, this case does not present a constitutional question which this Court must resolve. RAP 13.4(b)(3).

2. The ordered remedy does not present an issue for review.

The Court of Appeals held that the trial court erred in admitting evidence of Nielsen's statements and that the error was not harmless. It remanded for a new trial, relying on this Court's decision State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997), which held that erroneous admission of evidence that does not prejudice the defense is not grounds for reversal. Slip Op. at 11. The Court of Appeals' decision is consistent with Bourgeois, and review should be denied.

F. CONCLUSION

The State has not established that the Court of Appeals' decision satisfies the criteria for review under RAP 13.4(b), and the petition for review should be denied.

DATED this 13th day of April, 2015.

Respectfully submitted,

CATHERINE E. GLINSKI
WSBA No. 20260

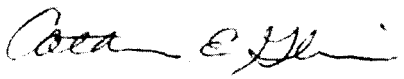
Attorney for Respondent

Certification of Service by Mail

Today I a mailed copy of the Answer to Petition for Review in *State v. Sherry Nielsen,* Cause No. 91430-3 as follows:

Sherry Nielsen
32287 Corbet Draw Road N
Almira, WA 99103

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
April 13, 2015

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Attached for filing is the Respondent's Answer to Petition for Review.

Catherine Glinski
Attorney for Respondent