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Court of Appeals
Division III
State of Washington

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OCT 11 2017
WASHINGTON STATE
SUPREME COURT

Supreme Court No. 95087-3
Court of Appeals No. 34974-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS JEFFERSON KEYS,

Petitioner.

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

The Honorable Robert A. Lewis, Judge

PETITION FOR REVIEW

LISA E. TABBUT
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A. IDENTITY OF PETITIONER

Petitioner, Thomas Jefferson Keys, through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Under RAP 13.4(b), petitioner Mr. Keys seeks review, in part, of the July 13, 2017, unpublished opinion (Appendix A) and the August 31, 2017, Order Denying Motion for Reconsideration (Appendix B) of Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

Whether the trial court denied Mr. Keys his constitutional right to present a defense when it refused to allow him to impeach complaining witness Officer Skeeter with her reputation for dishonesty under ER 608(a)?

D. STATEMENT OF THE CASE

Kevin Hughes discovered his Honda CR-V missing from its designated parking stall. RP Vol. 2 184; RP Vol. 3 195-96. About a week later, armed with a BB pistol, Mr. Keys robbed a Vancouver AM/PM convenience store of about \$200.¹ RP Vol. 2 106-123. Mr. Keys drove

¹ Mr. Keys' counsel conceded guilt on this count in closing argument. RP Vol. 5 531.

Hughes' Honda during the robbery. RP Vol. 2 107, 134, 178; RP Vol. 3 193-97. Hughes had not given Keys permission to take his car. RP Vol. 3 194.

After the robbery, Vancouver police kept an eye out for the suspect Honda. RP Vol. 3 at 267-71. They spotted it after a time. At least five marked police cars driven by uniformed officers fell in line behind the Honda and signaled it to stop with their sirens and lights. RP Vol. 3 270, 326. Several police cars followed the Honda into a cul-de-sac. The Honda went to the far end of the cul-de-sac. RP Vol. 3 at 219, 270.

Officer Jaime Haske approached the Honda on foot to perform a traffic stop on the Honda's driver. RP Vol. 3 327. The Honda accelerated. RP Vol. 3 222. Officer Haske and Officer Miranda Skeeter, afraid they would be struck by the car, ran out of the way. RP Vol. 3 289; RP Vol. 4 341. Corporal Ryan Starbuck, also fearful of being struck, ran to safety. RP Vol. 3 220-22. Officer Haske felt the Honda driver intended to run her over so she shot at the Honda. RP Vol. 4 at 341. The Honda drove out of the cul-de-sac striking none of the officers.

The abandoned Honda was located a few blocks away. RP Vol. 4 357-59. A backpack left in the car had Mr. Keys' identification card in it. RP Vol. 4 413. Mr. Keys was arrested the next day at a Vancouver bus stop. RP

Vol. 4 351-52. Mr. Keys' DNA was on the Honda's steering wheel and on a BB pistol found in the Honda. RP Vol. 4 380, 385-87, 426, 442.

Mr. Keys did not testify. RP Vol. 5 491. He attempted to present a defense by offering evidence of Officer Miranda Skeeter's reputation for dishonesty in the Clark County law enforcement community. The trial court refused to allow Mr. Keys to impeach Officer Skeeter with evidence of her reputation for dishonesty. RP Vol. 5 at 479-84.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Mr. Keys' constitutional right to present his defense was violated by the trial court's refusal to allow impeachment of Officer Skeeter with her reputation for dishonesty.

Mr. Keys' constitutional right to present his defense was violated when the trial court excluded evidence of Officer Skeeter's reputation for dishonesty. A criminal defendant has the constitutional right to a meaningful opportunity to present a complete defense. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 297, 359 P.3d 919 (2015). This includes the right to present relevant evidence. *Aiken v. Aiken*, 187 Wn.2d 491, 505, 387 P.3d 680 (2017).

ER 608(a) permits a party to attack or support the credibility of a witness with evidence of the witness' reputation for honesty or dishonesty.

The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

The foundational requirement for evidence under ER 608(a) is a community that is both neutral and general. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). A community can include a person's work community. In *Land*, the state established a community comprising a small group of business associates in which the defendant worked as a salesman for several years and developed a reputation for untruthfulness among his business contacts.

Mr. Keys sought to introduce evidence of Officer Skeeter's reputation for dishonesty in her work community. Officer Skeeter joined the City of Vancouver Police Department in 2006. Clark County senior prosecuting attorney Rachel Probstfeld worked for the Clark County Prosecutor's Office since 2008. Because she had been in the office for eight years, Probstfeld knew a wide variety of the participants in the Clark

County criminal justice system including prosecutors, advocates, support staff, police officers, defense attorneys, and attorneys with various other civil roles and practices. Over time, she talked to about 30 persons about Officer Skeeter and believed, based on her overarching knowledge, that Officer Skeeter had a poor reputation for truthfulness in the broad criminal justice community.

The trial court excluded the evidence, ruling that Probstfeld's opinion was based on a collection of other community members' bad experiences with, and misconduct of, Officer Skeeter which differed from the court's understanding of reputation. The trial court erred in excluding Probstfeld's testimony. The Clark County law enforcement community is a relevant community for the rule.

Mr. Keys' defense on the first degree assaults on the officers was to challenge the state's ability to prove his intent. Assault in the first degree required proof that Mr. Keys acted with the specific intent to inflict great bodily harm. Any evidence of his intent besides his driving forward at the officers who were near their own cars and in front of him, would be telling to the jury. Even though Officer Skeeter was running to get out of the street, she testified that she looked back and saw Mr. Keys laughing. Under the circumstances, that physical display of emotion could

be interpreted as heartless and menacing. None of the other three officers at the scene noted anything specific about the driver as he drove past the officers. Officer Skeeter's testimony was important. It was equally important for the jurors to know that Officer Skeeter was known in the Clark County law enforcement community as an officer who did not necessarily tell the truth.

A claim that the defendant's constitutional right to present a defense is violated is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.2d 576 (2010). When constitutional error is identified on appeal, the conviction must be reversed unless the state can demonstrate beyond a reasonable doubt that the error did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Without Probstfeld's testimony, the jury was left unaware of Officer Skeeter's poor reputation for honesty. The state recognized that when, between filing its original information and the second amended information, it amended the charges to provide jurors with an alternative of finding Mr. Keys guilty of second degree assault for the cul-de-sac incident. CP 5-14.

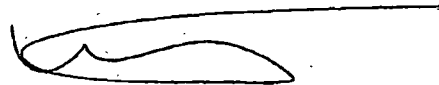
Mr. Keys' assault convictions must be reversed unless the state can demonstrate beyond a reasonable doubt that the error did not

contribute to the conviction. Second degree assault requires only proof of an intentional assault. CP 11-13; RCW 9A.36.021. Given Officer Skeeter's poor reputation for honesty, the state reasonably had its doubts about Officer Skeeter's testimony and her odd-one-out clear view of Mr. Keys' alleged mirth while making his way past the officers. The trial court's failure to allow in the reputation evidence denied Mr. Keys his constitutional right to present a defense.

F. CONCLUSION

This court should accept review and reverse Mr. Keys' assault convictions.

Respectfully submitted September 29, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Thomas Jefferson Keys

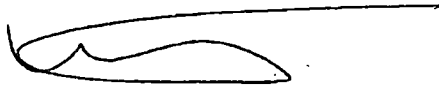
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Petition for Review to (1) Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division III; and (3) I mailed it to Thomas Jefferson Keys/DOC#347059, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 29, 2017, in Winthrop, Washington.

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

Lisa E. Tabbut, WSBA No. 21344
Attorney for Thomas Jefferson Keys, Petitioner

APPENDIX A

FILED
JULY 13, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
)	No. 34974-8-III
Respondent,)	
)	
v.)	
)	
THOMAS JEFFERSON KEYS III,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — Thomas Jefferson Keys III was convicted of 11 felony offenses and 1 gross misdemeanor offense, many of which arose when he ran a police blockade. We affirm the convictions and remand for correction of the judgment and sentence.

FACTS

Mr. Keys was convicted of first degree robbery, three counts of first degree assault of three law enforcement officers, three counts of second degree assault of the same victims, first degree malicious mischief, attempting to elude a police vehicle, hit and run injury accident, theft of a motor vehicle, and attempting to injure a police dog. The six assault counts, the malicious mischief, and the attempted dog injury charge arose when

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Mr. Keys drove a stolen car at and then through a police blockade, disabling a patrol car, leading one officer to fire several shots at him, and sending three of the officers running for safety. They are the counts at the center of the disputed issue in the case.¹

One of the assault victims was Officer Miranda Skeeter. She was on the county prosecutor's *Brady*² list. That fact was disclosed to the defense prior to trial. The four officers at the scene described the incident in similar terms. Officer Skeeter provided one piece of additional information that the other witnesses did not report. Skeeter indicated that the driver was "laughing" when he drove at the officers.

The defense cross examined Officer Skeeter concerning the "laughing" testimony, asking numerous questions about the testimony in an attempt to show that she could not have made the observation while fleeing the oncoming vehicle. The defense later sought to call a deputy prosecuting attorney to testify concerning Officer Skeeter's reputation for untruthfulness in the Vancouver law enforcement community.

¹ The trial court dismissed two assault counts involving a fourth officer who was off to the side and was not endangered when Mr. Keys ran the blockade.

² *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The primary holding in *Brady* was that the prosecution has a duty to turn over all exculpatory evidence in its possession. In this context, placement on a *Brady* list means that the prosecutor believes potential impeachment evidence exists that must be disclosed to the defense. See, e.g., Mary Ellen Reimund, *Are Brady Lists (aka Liar's Lists) the Scarlet Letter for Law Enforcement Officers? A Need for Expansion and Uniformity*, 3 INT'L JOURNAL HUMAN. & SOC. SCI. 1 (2013).

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The defense put the deputy prosecutor on the stand and made an offer of proof outside the presence of the jury. The witness testified that she had spoken with around 30 people concerning Officer Skeeter's truthfulness and that the officer's reputation was poor. The witness also admitted on cross-examination that she had never used the word "reputation" in her discussions with the 30 people.

After hearing the proffer, the trial judge rejected the proposed testimony. Recognizing that a specialized community could hold knowledge of a witness's reputation, the trial judge found that "the evidence here does not indicate that the witness is aware of reputation as that term is used." The court noted that the deputy prosecutor "is aware that a number of other people have concerns about Officer Skeeter's truthfulness, but I cannot tell from the offer of proof that it's based on reputation. It appears it isn't based on general reputation."

The defense then rested without calling any witnesses. The jury returned the verdicts previously noted. At sentencing, the court vacated the three second degree assault convictions. Those convictions were listed on the judgment and sentence form, with a line drawn through each of the three and the word "vacated" next to each listing. The form also includes preprinted figures for the filing fee and a jury demand fee, but neither figure was carried over to the total line for that category. The court orally indicated that it was not imposing any discretionary court costs.

Mr. Keys timely appealed.

ANALYSIS

The sole substantive challenge is to the exclusion of the proposed reputation testimony. The parties agree the matter should be remanded for correction of errors in the judgment and sentence form. We will discuss the evidentiary issue before turning, quite briefly, to the sentencing matter. In light of the State's indication that it will not be seeking costs on appeal, we need not consider Mr. Keys' request to waive appellate costs.

This court reviews the trial court's evidentiary rulings for abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 429-430, 705 P.2d 1182 (1985). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

ER 608(b) provides in essence that a party may not attack the credibility of a witness by extrinsic evidence of prior conduct, but the witness may be cross-examined as to her character for truthfulness or untruthfulness. ER 608(a) similarly allows reputation testimony concerning a witness's character trait of truthfulness or untruthfulness. To offer such testimony, the proponent of the reputation testimony generally must satisfy a five factor test. *State v. Lord*, 117 Wn.2d 829, 873, 822 P.2d 177 (1991). The five elements are:

“The first element is the foundation for the testimony—the knowledge of the reputation of the witness attacked. Second, the impeaching testimony must be limited to the witness's reputation for truth and veracity and may not relate to the witness's general, overall reputation. Third, the questions must be confined to the reputation of the witness in his

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community . . . Fourth, the reputation at issue must not be remote in time from the time of the trial. Finally, the belief of the witness must be based upon the reputation to which he has testified and not upon his individual opinion.”

Id. (quoting 5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 231, at 202-04 (3d ed. 1989).

The trial court applied the test and was satisfied that the first four factors were established. The proffer foundered on the final factor. The trial court was concerned that the witness had discussed specific instances of untruthfulness with others rather than Officer Skeeter’s reputation evidence. In other words, the proffer was essentially improper ER 608(b) prior acts evidence rather than proper ER 608(a) reputation evidence. This is a tenable basis for rejecting the testimony.

But even if the proffer had been sufficient, the exclusion of the testimony was not harmful error. Evidentiary error, like other forms of nonconstitutional error, is harmless if, within reasonable probability, it did not affect the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). We are confident that was the situation here.

Four officers described the incident in similar terms, and the physical evidence certainly bore out the fact that a violent collision had occurred when Mr. Keys broke through the blockade. That evidence amply supported convictions for first degree assault. Although Mr. Keys argues the “laughing” comment was central to the State’s case, that was not the situation. In closing, the prosecutor said Skeeter had the worst

recollection of the group since she was the first officer to flee to safety.³ Although he mentioned her “laughing” comment while briefly summarizing her testimony, he did not argue that evidence in his discussion of the defendant’s intent when attacking the officers. Instead, the prosecutor focused on the driving, emphasizing the speed of the car and that it was driven at the three officers, all of whom barely escaped. A witness who observed the incident from his house likewise believed that the driver barely missed the officers. Additionally, defense counsel handled the “laughing” testimony professionally, contrasting that observation with those of the other officers who had a better opportunity to see what was happening.

If there was error in failing to allow further impeachment of Officer Skeeter, it did not amount to anything of significance in this contest because the “laughing” comment was an insignificant portion of the case. Any error was harmless.

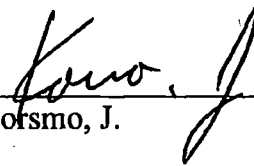
The parties agree that the judgment and sentence form contains several errors that require correction and jointly request that we remand to the trial court. Since there is uncertainty about the financial obligations imposed, we agree that a remand is appropriate.

³ One of the other officers stood her ground to fire at the approaching vehicle before moving to safety, while another officer had to get his canine out of the car before Keys struck it. The fourth officer was to the side and did not need to retreat.

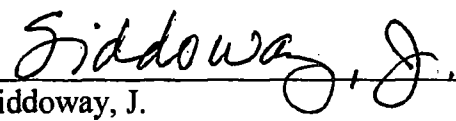
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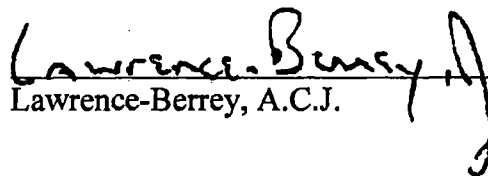
The convictions are affirmed. The case is remanded to the trial court for correction of errors in the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Korsmo, J.

WE CONCUR:


Siddoway, J.


Lawrence-Berrey, A.C.J.

APPENDIX B

FILED
AUGUST 31, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON


STATE OF WASHINGTON,)	No. 34974-8-III
)	
Respondent,)	
)	
v.)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
THOMAS JEFFERSON KEYS,)	
)	
Appellant.)	

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of July 13, 2017, is hereby denied.

PANEL: Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:



GEORGE FEARING
Chief Judge

LAW OFFICE OF LISA E TABBUT

September 29, 2017 - 11:08 AM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent vs. Thomas Jefferson Keys III, Appellant
Superior Court Case Number: 14-1-01979-3

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