No. 73142-4-I

THE COURT OF APPEALS IN THE STATE OF WASHINGTON
DIVISION ONE

DAVID L. DESPAIN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

Cause No. 14-1-00205-1

STATEMENT OF ADDITIONAL GROUNDS, RAP 10.10

1. OPENING STATEMENT

There is ZERO PHYSICAL evidence proving that MR. DESPAIN committed the alleged crimes. The ONLY evidence offered was the testimony of the alleged victim, who could not even identify MR. DESPAIN IN court.

This case boils down to a text Book credibility contest. This makes any evidence of credibility the sole determining factors used by the jury to find MR. DeSpain Guilty. No case law discusses the application of ER 609(a)(2) under the circumstances of this case. Especially when the Judge AND Prosecutor used MANY ill Tactics to deprive MR. DeSpain of any chance of a Fair trial. These tactics were used to paint a picture of MR. DeSpain's Bad character, so the jury would believe a criminal has the propensity to prey on the alleged victim AND commit another theft IN the second degree. The Public believes that criminals are not honest and have the nature To Lie.

THE Judge told the jury of MR. Despain's extensive criminal history. The prosecutor intentionally elicited this same inadmissible evidence through the testimony of the alleged victim, after the Appellant's testimony. The defense objected both times.

Furthermore, there was no need to seek the aggravating factor based on vulnerability. The prior criminal history aggravator does not need to be submitted to the jury, and was more then enough to base the consecutive exceptional sentence upon. The state used the vulnerability aggravator in combination with the prior criminal history to inflame the passion and prejudice of the jury. This conviction is not based on evidence, it is based on prejudice.

As an issue of first impression MR. Despain argues that the use of Ek. 609(a)(2) must be limited under the facts of this case. If this court does not

Same Thing

Take action, the danger is that a totally innocent person can be found guilty in the future because of a prior crime of dishonesty. MR. DESPAIN did not receive a fair trial.

For clarity purposes MR. DESPAIN will incorporate the relevant facts into the applicable arguments below. MR. DESPAIN asks that he is not held to the same standards as lawyers, MR. DESPAIN is untrained in the law. Please give these pleadings liberal interpretation. MALENG v. COOK, 490 U.S. 488, 493 (1989)

2. ARGUMENT ON WHY RELIEF SHOULD BE GRANTED

THE ADMISSION OF MR. DESPAINS PRIOR THEFT IN THE SECOND DEGREE CONVICTION AND OTHER PRIOR CRIMES WAS AN ABUSE OF DISCREATION AND PROSECUTORIAL MISCONDUCT THAT VIOLATED MR. DESPAINS SUBSTANTIVE AND PROCEDURAL RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTION; THIS ERROR ALSO VIOLATED MR. DESPAINS RIGHT TO A FAIR AND IMPARTIAL JURY; PRESUMATION OF INNOCENCE; BURDEN OF PROOF; AND RIGHTS TO A FAIR TRIAL; THE USE OF ER 609(a)(2) SHOULD BE LIMITED UNDER THE FACTS OF THIS CASE.

In this case the prior conviction evidence admitted under ER 609(a)(2) exceeded the limited purpose of impeachment and was used as substantive evidence of Guilt. In fact it is the only evidence used to determine Guilt. This violates the Natural right that ~~xx~~ simply because a defendant has committed a crime in the past does not mean the defendant will lie when testifying." State v. Jones, 101 Wash. 2d 113, 119, 677 P. 2d 131 (1984). A fundamental recurrance is necessary To protect Mr. Despain and other's rights. Wash. Const. Art. 1 § 32. England abolished the use of this rule, and So should Washington State. See Seventy-Two Years At The Bar; A Memoir of Sir Harry Bodkin Poland 26 (Bowen-Rowlands ed. 1924) quoted in 2 J. Wigmore, Evidence § 574 at 817 (Rev. 1979).

The Supreme Court narrowly construes ER 609 because of the danger for injustice associated with admitting evidence of a criminal defendant's past convictions. State v. Newton, 109 Wash. 2d 69, 70, 75, 743 P. 2d 254 (1987).

Add file

An error in admitting evidence is ground for reversal if it is prejudicial. State v. Bourgeois, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997). There is no question here that the errors effected the juries verdict. This is because there is zero evidence of Guilt, merely, testimony of Ms. Faulty, which is not support by one shred of physical evidence. "An error in admitting evidence is prejudicial if within reasonable probabilities, the outcome of the trial would have been materially effected had the error not occurred." State v. Garcia, 179 Wn.2d 828, 318 P.3d 266, 277 (2014). The errors in this case clearly demonstrate that the prior convictions negatively impacted the jury's evaluation of Mr. Spain's credibility and was applied as evidence of Guilt.

In this credibility contest the conviction could not rest on any physical evidence because

Law enforcement and the State failed to collect, produce, or admit any. Since, this case boiled down to who the jury believed more Ms. Faulty, or MR. Despain, any evidence attacking credibility is really evidence of Guilt. Under these circumstances the 2009 prior conviction for Theft Two goes beyond the purpose of impeachment and implicates Guilt. This is prejudicial and highly unlawful and illegal. This violates MR. Despains Fair trial rights and shatters the presumption of Innocence. This error also relieves the state of the burden of production and persuasion creating an un-constitional presumption. Sandstrom v. Montana Prior convictions certainly pose a great risk of prejudice. State v. Bache, 146 wn. App. 897, 193 P.3d 198 (Wash. App. Div. 3 2009).

Back Soon.

Numerous courts have expressed skepticism concerning the constitutionality of ER 609(a)(2). This case is a perfect example to expose the unfairness of this rule as applied to credibility contest. Especially when Mr. Despain was convicted of committing the same crime he was currently be tried on.

On 1/13/15 the court ruled the 2009 theft was admissible for impeachment purposes. VRP 13. This was done without any consideration as to the potential prejudice given the facts of the case. This court should announce a new rule that applies to cases like Mr. Despain (1) when the physical evidence is scant, (2) in a credibility contest, and (3) the prior conviction is the same conviction, rather, the same charge in the current trial; then the trial court must balance and consider whether the prior conviction is more prejudicial than probative. ER 401, 402, 403.

A main focus should be the likelihood that the prior conviction will exceed the purpose of impeachment and be used as evidence of guilt. Another factor that should be considered is whether the prior crime will create a propensity that the accused committed this crime merely because he did in the past.

The historical development of ER 609 may be traced into the antiquity of the common law. In 17th century England, a person who had been convicted of a crime was disqualified as a witness, a disqualification thought to have originated as an additional punishment for the crime. Ashcraft, Evidence of Former Convictions, 41 Chicago B. Rec. 303, 403 (1960). Because the disqualification had the effect of also punishing innocent persons in need of the convict's testimony, however, soon based it on

page nine

a different theory: that a convict was of such poor moral character that he could not be expected to tell the truth. 2 J. Wigmore EVIDENCE § 519, at 726 (REV. 1979).

The common law rule disqualifying convicts as witnesses persisted into the 18th century, when it met the determination and resistence of Jeremy Bentham. J. Bentham, 7 Rationale of Judicial EVIDENCE 406.

Although the modern rule permitting impeachment by prior conviction has its genesis in the common law disqualification of convicts, it is important to note that it had no application to the defendants in a criminal action, who was incompetent to testify under common law. ASHCRAFT, EVIDENCE of FORMER CONVICTIONS, 41 Chicago B. Rec. 303 (1960). England waited 55 years after establishing the competency of convicts before finally abolishing

the defendant's disqualification in the CRIMINAL EVIDENCE Act of 1898. See Seventy-two Years AT THE BAR; A Memoir of Sir Harry Bodkin Poland 26 (Bowen-Rowlands ed. 1924), quoted in 2 J. Wigmore EVIDENCE, § 576, at 817 (rev. 1979). Accordingly, there is no precedent at common law for impeachment by prior convictions insofar as the defendant in a criminal action is concerned. ASHCRAFT, at 304.

England recognized the need to shield the defendant in a criminal action from impeachment by prior conviction, and the State of Washington must make this realization Too.

Without this error the jury would have Not convicted Mr. Despain. The conviction would be precluded due to the massive amount of reasonable doubt in this case. VRP 289-91.

MR. DeSpain was placed into an unconstitutional Hobson's choice, refuse to testify And risk the effect of Not Presenting his side of the story; or testify and risk the Inherent prejudice associated with Prior convictions, especially, for the same offense. This Procedure Must be ~~AB~~ endowed, or Given more Process as argued above. This conviction was Not Sought, Nor found upon evidence of Guilt, rather, that MR. DeSpain is a bad person who is not credible. In Fact the State committed Misconduct in closing when stating it's pretty simple. You either believe MRS. Faith's or you Believe THE DEFENDANT VRP 286

This is error the State is not allowed to frame its case in this Fashion. The Jury cannot be told that in order to acquitt the defendant, it has to not believe the alleged victim. IN RE PERS. Restraint of GLASSMANN, 175 WN. 2d 696, 703, 286 P. 3d 673 (2012); Estelle v. williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

THE state based its entire case ON DEMONIZING MR. DESPAIN.

So the defense would have US - would need you to believe that Margaret Faithys made this up out of the - out of the Blue.

why? why? why would Margaret Faithys make this up? VRA 285

This type of Misconduct deprives MR. DESPAIN of a Fair trial and amplified the prejudice of admitting the prior theft conviction under 609(a)(2).

The same applies to the State's ill tactic in charging MR. DESPAIN with the vulnerability aggravator. This tactic was designed to further make MR. DESPAIN look like a No good low life dirt bag. This aggravator served No other purpose. In Fact the Free crimes aggravator was charged on all counts. The Free crimes Aggravator is based upon prior convictions So during the time of trial did not need to be

placed in front of the jury. The [illegible] crime Aggravator would have been enough to base an exceptional consecutive sentence upon. The Vulnerability Aggravator was not needed and served no other purpose, than making MR. DESPAIN look like a Predator. This is proven by the Prosecutors Improper closing argument in VRP 287. without any evidence that proved MR. DESPAIN intended To committ a theft with MS. Faulty's being home, the Prosecutor made MR. DESPAIN look like a creep who preyed upon an old woman. VRP 287. This served no purpose other than to discredit MR. DESPAIN and make the jury disbelieve his testimony, the lack of evidence, and blindly convict a felon creep. This cort cannot approve of these type of trial tactics. The danger is that 100% Innocent People will continue to be convicted based on Prejudice and Bias.

[1] This may not be true in light of Alleyne v. U.S., 570 U.S. ____, 186 L.Ed. 2d 314, 133 S.Ct. 2151 (2013). However, the aggravator would need to be Bifurcated. State v. Bucl[illegible]

The Prosecutor even misstated the record when claiming "so from his own admissions we know he stole that jewelry." VRP 283. This is untrue.

Further misconduct ensued after the Appellant testified. On direct the defense asked Mr. Despain if he had been convicted of the 2009 theft. the Appellant stated yes. The State Re-called Ms. Faultys to testify. The State asked: All right. So when he was telling you that he'd never done anything like this before, did he indicate that he'd been convicted of theft in 2009? VRP 258

This opened the fallen out of line and Prejudicial testimony from Ms. Faultys:

A- Not then. I learned that later.

P- okay.

A- That and several others. VRP 258

Defense counsel did object and the objection was sustained. RP 263 The bell was already rung, in

fact the bell was actually Re-RUNG. ON VRP 18 the Judge informed the jury that:

AND, Furthermore, the defendant has committed Multiple current offenses and the Defendants High offender score results in some of the current offenses going UNPUNISHED VRP 18

Defense counsel objected, however, the Judge denied Both Motions for Mistrial. These Two errors compound the prejudice from the 2009 theft Prior conviction being used. These errors denied MR. DESPAIN of any chance to have a fair AND accurate verdict rendered from the jury. The jury would never believe MR. DESPAIN over MS. FAULTYS. No Matter that She could not IDENTIFY MR. DESPAIN. VRP 168. No matter how faulty, MS. faultys memory is. VRP 166. No Matter that the ONLY evidence against MR. DESPAIN was allegedly obtained in some RUSE

endorsed by the police. why would the police allow MS. Faulty to go through with the ruse? why expose MS. Faultys to a dangerous criminal? why not stay with MS. Faultys and as soon as MR. DesPain showed up and handed over the stolen items, jump out and arrest him? The reason is because none of the ruse story is true. MS. Faultys allegedly tricked MR. DesPain into giving back the stolen jewelry bag and inside were items that did not belong to MS. Faultys. This was never proven, where was the wrist watch, necklace, and bag?

More shocking is that the trial judge denied the motion for new trial partially because he did not recall that there was any testimony about other convictions, when it just happened and the judge himself gave testimony. This is an abuse of discretion.

MR. DESPAIN will wrap this up now. The cumulative Errors denied MR. DESPAIN A fair trial. INSTead MR. DESPAIN was convicted because he is a convict who commits thefts AND Preys upon old women. MR. DESPAIN respectfully request that this court announce a New Rule that the trial Judge MUST conduct the Prejudice test ON Prior convictions when there is:

(1) scant evidence
(2) A credibility contest
(3) The Prior conviction is the same offense the accused is currently being tried upon.

Conclusion

The Appellant Prays that this court Reverse and Remand for a New Trial with INSTructions to exclude all evidence of Prior convictions AND the vulnerability Aggravator.

Respectfully submitted,

11/24/15

X David L. DeSpain
David L. DESPAIN Pro se litig