

NO. 73590-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SEAN CURRAN,

Appellant.

FILED
Jan 11, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR .. 2

D. STATEMENT OF THE CASE 2

E. ARGUMENT..... 6

MR. CURRAN’S RIGHT TO DUE PROCESS WAS DENIED WHEN HE WAS RESTRICTED FROM PRESENTING HIS DEFENSE. 6

 1. *The right to due process includes the right to present a defense. ...6*

 2. *Mr. Curran was prevented from presenting his defense. 7*

 3. *Mr. Curran is entitled to a new trial. 10*

F. CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	6
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	7
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)	7
<i>State v. Allen S.</i> , 98 Wn. App. 452, 989 P.2d 1222 (1999)	11
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	13
<i>State v. Cayetano-Jaimes</i> , --- Wn.App. ---, 359 P.3d 919 (Wash. Ct. App. 2015).....	7
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	6, 7, 10
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983)	7, 11
<i>State v. Iniguez</i> , 167 Wn.2d 273, 217 P.3d 768 (2009)	6
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	6
<i>State v. Smith</i> , 148 Wn.2d 122, 59 P.3d 74 (2002).....	7
<i>State v. Whelchel</i> , 115 Wn.2d 708, 801 P.2d 948 (1990).....	7
<i>United States v. Scheffer</i> , 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)	7
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	6

A. INTRODUCTION

Sean Curran spent March 26, 2014 at his house, using methamphetamine with Shelby Ostergard and others. When they ran out of drugs, Mr. Curran went to sleep. Ms. Ostergard had other plans, first committing bank fraud and then attempting to prostitute herself in order to obtain more drugs.

When Mr. Curran discovered Ms. Ostergard's plan to prostitute herself and Viktoriya Tarasenko to an "older gentleman," he became upset. When Ms. Ostergard returned to his house to pick up Ms. Tarasenko for this liaison, Mr. Curran smashed the side mirror of her car with a baseball bat. Ms. Ostergard claimed he then threatened to kill her, chasing her in his truck while pointing a firearm at her. Mr. Curran denied these claims.

Mr. Curran was precluded from presenting his defense by the court. As a result, Mr. Curran was unable to demonstrate why the State's witnesses had a motive to lie and why the State's case was not supported by credible evidence.

This preclusion denied Mr. Curran due process by preventing him from presenting his defense. Because credibility was a central issue

in the State's case, this error was not harmless beyond a reasonable doubt. Mr. Curran is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

The court committed error by denying Mr. Curran's due process right to present a defense.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. Due process is denied where a person is precluded from presenting their defense. Unless, the State is able to establish beyond a reasonable doubt that the court's denial of due process is harmless, a new trial should be ordered. Where the court denied Mr. Curran his right to present a defense by precluding him from testifying regarding the motive of the State's witnesses to lie, is he entitled to a new trial?

D. STATEMENT OF THE CASE

Sean Curran was charged with felony harassment, assault in the fourth degree and malicious mischief in the third degree for actions he took against Shelby Ostergard on March 27, 2014. CP 90.¹

¹ References to the record will be by the date of the proceedings found on the cover page of the transcript, followed by the page number. E.g., 5/4/15 RP 1.

Mr. Curran and Shelby Ostergard had known each for a year or two when this occurred. On the night of March 26, Mr. Curran, Ms. Ostergard, and others were at Mr. Curran's house "partying" and using methamphetamine. 5/4/15 RP 102. Ms. Ostergard was also using heroin. 5/4/15 RP 99. Ms. Ostergard admitted she had committed bank fraud so she could get money to buy more drugs by making withdrawals on her bank account and then claiming her access card had been stolen. 5/4/15 RP 5.

According to Ms. Ostergard, at some point she left Mr. Curran's house to return to her father's house. 5/4/15 RP 107. Some later time she got a call from Viktoriya Tarasenko, who asked her to come back to Mr. Curran's house to pick her up. 5/4/15 RP 108. She brought along a friend named "Mitch."² 5/4/15 RP 110.

When Ms. Ostergard returned to Mr. Curran's house, Ms. Tarasenko came outside, followed by Mr. Curran. 5/4/15 RP 110. Mr. Curran yelled at Ms. Ostergard and then hit the side view mirror of her car with a baseball bat, knocking it off the car. 5/4/15 RP 115. Ms. Ostergard claimed Mr. Curran threatened to kill her, then followed her

² There was no testimony regarding "Mitch's" last name. He was not called as a witness.

in his vehicle and while driving, displaying a firearm and saying again he was going to kill her. 5/4/15 RP 119. Ms. Tarasenko, who also testified for the State, had no memory of Mr. Curran following her and Ms. Ostergard in his truck, or threatening them with his firearm. 5/4/15 RP 155. She testified she did not see Mr. Curran show, display or brandish a weapon during her memory of the incident. 5/4/15 RP 159.

Ms. Ostergard called the police the next day, when she saw Mr. Curran at her house. 5/4/15 RP 121. He was arrested shortly thereafter.

Mr. Curran did not deny that he had been using drugs with Ms. Ostergard on March 26. He had used drugs with her countless times before. 5/5/15 RP 190.

According to Mr. Curran, Ms. Ostergard had decided she and Ms. Tarasenko could make some money prostituting themselves. 5/4/15 RP 5. Mr. Curran was prevented during the course of the trial from explaining his motivation for his actions or his theory for why Ms. Ostergard was being untruthful.

Mr. Curran testified he woke up on March 27 to find Ms. Ostergard pulling the screen windows off his house. 5/5/15 RP 189. She was trying to get into his house to find “something to get her doped.” 5/5/15 RP 190. He admitted to breaking the side view mirror

on Ms. Ostergard's car. 5/5/15 RP 191. Mr. Curran tried to explain why he was angry with her, telling the jury she wanted to "hang out with some older gentlemen." 5/5/15 RP 191. When he attempted to explain this, the State objected and the court sustained the objection. 5/5/15 RP 192.

He stated he went to Ms. Ostergard's house the next day to pick up Ms. Tarasenko. 5/5/15 RP 192. When Mr. Curran attempted to explain why she needed to be picked up, the State objected. 5/5/15 RP 192. The objection was again sustained. 5/5/15 RP 192. Mr. Curran attempted to explain Ms. Ostergard's motive for fabrication several times during direct and cross examination. Each time, the court sustained the State's objection and struck the testimony. See, 5/5/15 RP 192, 5/5/15 RP 193, 5/5/15 RP 200, 5/5/15 RP 206, 5/5/15 RP 207. These objections will be examined in greater detail below.

Mr. Curran was found guilty of malicious mischief and harassment. 5/5/15 RP 233-34. The jury was unable to reach a verdict with respect to the assault charge. 5/5/15 RP 233.

E. ARGUMENT

MR. CURRAN’S RIGHT TO DUE PROCESS WAS DENIED WHEN HE WAS RESTRICTED FROM PRESENTING HIS DEFENSE.

1. *The right to due process includes the right to present a defense.*

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). A defendant’s right to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.* “The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). Sixth Amendment violations, including the right to present a defense, are reviewed de novo. *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).

The trial court must consider the “the integrity of the truth finding process and [a] defendant’s right to a fair trial” before precluding defense evidence. *State v. Hudlow*, 99 Wn.2d 1, 14, 659

P.2d 514 (1983). If evidence is relevant, “the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Darden*, 145 Wn.2d at 622. Evidence rules that “‘infring[e] upon a weighty interest of the accused’ and are ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve’ ” abridge this essential right. *State v. Cayetano-Jaimes*, --- Wn.App. ---, 359 P.3d 919, 925 (Wash. Ct. App. 2015) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998))).

Reversal for a violation of the constitution is required unless the court finds it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Error is only harmless if the court is convinced beyond a reasonable doubt that “any reasonable jury would have reached the same result without the error.” *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

2. *Mr. Curran was prevented from presenting his defense.*

Ms. Ostergard spent the night before Mr. Curran was arrested at his house partying and abusing methamphetamine with him and others.

5/4/15 RP 5. When they ran out of drugs, Ms. Ostergard admitted she and another person decided to commit bank fraud to obtain more money to buy more drugs. 5/4/15 RP 5.

According to Mr. Curran, Ms. Ostergard also decided she and Ms. Tarasenko could make some money prostituting themselves. 5/4/15 RP 4. Ms. Ostergard denied she intended to prostitute herself. 5/4/15 RP 5. The State moved to preclude this evidence and the court granted the State's motion. 5/4/15 RP 6.

While Mr. Curran admitted he was angry and smashed the side view mirror of Ms. Ostergard's car, he claimed he did this in order to stop the two women from prostituting themselves. 5/5/15 RP 206. When Mr. Curran tried to explain that he was angry because he did not want the women to "hang out" with "older gentlemen," the State objected. 5/5/15 RP 192. The Court sustained the objection, finding the question called for speculation "as to someone else's mental state." 5/5/15 RP 192.

When Mr. Curran attempted to explain Ms. Tarasenko's motivation for telling her story, Mr. Curran said "I know. I just can't say. I don't know what to say." 5/5/15 RP 192. The State again objected and the Court stopped Mr. Curran from explaining his

understanding of why the women were upset with him and had a motive to lie. 5/5/15 RP 193.

During cross examination, the State confronted Mr. Curran directly regarding his state of mind.

Q: You were angry at that point, fair to say?

A. Disappointed, as well.

Q. But you were angry, correct?

A. Yeah. I wasn't really necessarily mad at Shelby either, necessarily. I was mad at Mikayla, Shelby, and Tori for resorting to what they were doing.

Q. What I'm trying to figure out is when you smashed the mirror off her car, that came out of anger?

A. Sure.

5/5/15 RP 200. Finally, when the State asked Mr. Curran "the whole reason" for why he had hit her car with a bat, Mr Curran stated "Shelby ... was trying to prostitute herself." 5/5/15 RP 206. The State objected and the court struck the testimony. 5/5/15 RP 206.

On redirect, Mr. Curran expressed his frustration in not being able to present his defense. 5/5/15 RP 207. He stated:

I can't explain why I had took these actions that I took. It's like why did you get mad, but don't tell me why you got mad; just why were you mad.

5/5/15 RP 207.

In its closing argument, the State focused on Mr. Curran's motive, arguing he was angry because Ms. Tarasenko did not want to leave Mr. Curran's house. 5/5/15 RP 219-20. Despite the fact Mr. Curran had been unable to explain why the witnesses had a motive to fabricate, the State concluded its closing argument by asking the jurors to think about the "reasonableness of the testimony that you heard in context of the entire situation and all of the other testimony." 5/5/15 RP 221. In its rebuttal, the State again focused on the motivation of the witnesses to tell the truth, comparing the credibility of the State's witnesses with Mr. Curran. 5/5/15 RP 227-28. The State's final remarks to the jurors again returned to the "reasonableness of everything taken together," clearly focusing on credibility. 5/5/15 229.

3. *Mr. Curran is entitled to a new trial.*

When the court precluded Mr. Curran from presenting his defense, Mr. Curran was denied his right to due process. The court failed to apply the constitutionally required analysis, which obligates the court to determine whether evidence offered by the defendant is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. First, the court must analyze whether the evidence is of at least minimal relevance. *Id.* If relevant, the State must

show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Id.* Then, relevant evidence may only be withheld if the State's interest to exclude prejudicial evidence outweighs the defendant's need for the information sought. *Id.*

Mr. Curran's state of mind and the motive of the State's witnesses to fabricate their stories is relevant. ER 401. The threshold to admit relevant evidence is very low and even "minimally relevant evidence" is admissible. *Hudlow*, 99 Wn.2d at 16. Impeachment testimony is relevant if it tends to cast doubt on the credibility of the person being attacked, and credibility is a fact of consequence to the action. *State v. Allen S.*, 98 Wn. App. 452, 466, 989 P.2d 1222 (1999).

The State cannot demonstrate that the error the court committed in precluding Mr. Curran from presenting his defense is harmless beyond a reasonable doubt. Mr. Curran's credibility, along with that of the State's witnesses, was central to this case. Without allowing Mr. Curran the ability to describe his actions and demonstrate why the other witness's stories were not credible, Mr. Curran's explanation lacked believability. In fact, much of the State's closing argument focused upon the motivation of the witnesses to tell the truth. When the court precluded Mr. Curran from explaining why the witnesses were lying,

the State was able to argue the issue of credibility without challenge. Mr. Curran was prevented from making the same argument and persuading the jurors the State's witnesses should not be believed. The State cannot demonstrate beyond a reasonable doubt that preclusion of Mr. Curran's evidence that he had no intent to harass Ms. Ostergard and instead wanted to prevent both of the women from prostituting themselves to buy more methamphetamine is harmless.

The Court's preclusion of Mr. Curran's defense denied him his due process rights. It was not harmless beyond a reasonable doubt. Mr. Curran is entitled to remand for a new trial.

F. CONCLUSION

Mr. Curran's due process rights were denied by the court's decision to preclude him from testifying regarding the motive of the State's witnesses to tell the truth. This denial of due process was not harmless beyond a reasonable doubt, as credibility was a central issue in the State's case. Mr. Curran is entitled to a new trial.

Should Mr. Curran not prevail on appeal, he asks this Court to waive appellate costs, consistent with the trial court finding of indigency and the court's decision to only impose mandatory fees at sentencing. *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

DATED this 11th day of January 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73590-0-I
)	
SEAN CURRAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SETH FINE, DPA	()	U.S. MAIL
[sfine@snoco.org]	()	HAND DELIVERY
SNOHOMISH COUNTY PROSECUTOR'S OFFICE	(X)	AGREED E-SERVICE
3000 ROCKEFELLER		VIA COA PORTAL
EVERETT, WA 98201		
[X] SEAN CURRAN	(X)	U.S. MAIL
19521 6 TH DR SE	()	HAND DELIVERY
BOTHELL, WA 98102	()	_____

SIGNED IN SEATTLE, WASHINGTON, THIS 11TH DAY OF JANUARY, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎ (206) 587-2711