73590-0

NO. 73590-0-I

FILED
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Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN M. CURRAN,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The defendant denied assaulting or threatening the victim. He admitted and argued that he was guilty of malicious mischief when he acted in anger and smashed her car mirror. He testified to several reasons for his anger. He was not permitted to testify that he believed the victim has plans to prostitute herself and a friend. That evidence was excluded in response to a State's motion in which the defense concurred.

2. Was the defendant denied his right to put on a defense when the court, with his agreement, excluded irrelevant and disputed evidence of the victim's alleged prior bad acts?

3. Did error occur when the court excluded inadmissible character evidence?

4. If error occurred, did the defendant invite it when he concurred that the evidence would not be admissible?

5. The defendant has not provided the court with enough information to waive costs on appeal.

II. STATEMENT OF THE CASE

During the day and into the night of March 26, 2014, the defendant Sean Curran, a friend named Mitch[1] and two women

[1] Mitch was not further identified or called by either side.

were at the defendant's Bothell home smoking methamphetamine. The women, who were also using heroin, were Shelby Ostergard and the defendant's sometimes-girlfriend Viktoriya Tarasenko. 1 RP 98-100.

Ostergard was in and out of the house all day. She decided to leave for good when the defendant began to act like he was psychotic, worrying that people were coming to get him and running around the house with a gun. 1 RP 103-104, 137. Tarasenko wanted to leave with Ostergard but the defendant wanted her to stay so Ostergard went home alone. 1 RP 105.

At around noon the next day, Tarasenko called Ostergard. She was speaking quickly, seemed flustered, and asked Ostergard to come pick her up. 1 RP 108-09, 156.

Ostergard drove over and pulled her Jetta into the defendant's driveway. Tarasenko came out of the back of the house with her bag as the defendant came out the front with a metal baseball bat. 1 RP 112. He was wide-eyed and scary and screamed at Ostergard that she was trespassing, that he would call the police, and that he was going to kill her. 1 RP 113-14. As Ostergard sat in the driver's seat, the defendant swung the bat as if to smash the windshield, but held back and hit her side mirror

instead. Glass exploded everywhere, some of it landing on Tarasenko who was standing by the driver's side rear door. 1 RP 114. Tarasenko scrambled into the back seat as the defendant reached in and slapped Ostergard. The defendant told Ostergard if she called the police, he would come to her house and kill her. She believed him. 1 RP 115-117, 155.

As Ostergard drove away, the defendant followed in his white truck. When he pulled up alongside her Jetta, he raised his gun and again threatened to kill her. 1 RP 118-19.

Ostergard and Tarasenko arrived home but did not call the police because Ostergard took the defendant at his word. 1 RP 121. They were still there at 1 am the next morning, March 28, when the defendant arrived in his white truck. Still frightened by the defendant's threats, Ostergard called 911. 1 RP 121, 127.

Police arrived minutes later and found the defendant outside Ostergard's house by his truck. 2 RP 173-74. The defendant said he was there to apologize for his earlier behavior. 2 RP 175. He had a holster and a fully loaded clip for a .45 caliber pistol but had no gun with him. 2 RP 177; 184. Post-*Miranda*, he said he drove to Ostergard's to apologize for breaking her mirror and to offer to fix

it. 2 RP 184. Tarasenko did not wish to talk to police and instead hid in a closet. 1 RP 124; 2 RP 178.

After the incident, Ostergard stopped spending time with Tarasenko. Nor did she have further contact with the defendant. 1 RP 127, 154.

The defendant was eventually charged with felony harassment, fourth degree assault, and third degree malicious mischief. CP 90-91. The case was tried on March 4 and 5, 2015.

Pretrial, the State moved to exclude prior bad acts and character evidence regarding Ostergard. Supp. CP __ (sub no. 48, State's Motions in Limine). Specifically, the State believed the defendant intended to make two claims. The first claim was that Ostergard and Mitch had been involved in ATM fraud. Ostergard had earlier told the State that she, Mitch, and the defendant had, indeed, been committing ATM fraud, and that it was the defendant's idea. The second claim was that Ostergard and Tarasenko were planning to prostitute themselves. This, Ostergard denied. The State moved to exclude that testimony as improper character evidence and bad acts. 1 RP 4-5; CP __ (sub no. 48).

In response to the motion, the court asked the defense if he intended to go into those areas. The defense's answer was

unequivocal, "No, we do not, Your Honor." Based on that agreement, the court excluded the evidence without further argument. 1 RP 6.

In his opening statement, defense said,

> What is true is that [the defendant] did break the mirror. We are not disputing that. We are disputing... that he threatened to kill her, that he assaulted her. .. it will be the word of [Ostergard] who is a drug addict...
>
> So I foresee Sean Curran taking the witness stand and saying, yes, I overreacted, and she kept on coming over to my house bothering me, so I finally took a bat and hit her mirror.... That is one fact that is not in dispute. .

1 RP 88.

Ostergard, Tarasenko, and two officers testified. Tarasenko confirmed that she had called Ostergard to come pick her up and that the defendant was angry and did not want her to leave. 1 RP 156. She confirmed that he broke Ostergard's mirror, slapped Ostergard, and threatened her, saying something like, "I'm going to [ ] kill you!" 1 RP 151-52, 155. She said she did not want to be in court, that she had nothing against the defendant, and that she did not want him to get into trouble. 1 RP 160.

Defense did not raise the excluded evidence during his during his cross examination of either Ostergard or Tarasenko.

The defendant testified as well. 2 RP 189-208. He denied that he had assaulted or threatened Ostergard. 2 RP 190. He admitted he broke her mirror because she had tried to break into his house earlier, because she really cared about her Jetta, because he had run her off his property before, because he was fed up and angry, because he did not want Tarasenko to leave with her, and because 911 either would not come when he called or would take too long. 2 RP 189-191, 208. He did not say how breaking the mirror might have stopped Tarasenko from leaving.

The defendant testified that Ostergard had lied about him in court before. 2 RP 190. He said that when Ostergard came to his house, she was "very persistent" about not going alone "to hang out with some older gentlemen." Defense asked him why Ostergard would not want to go alone. Fearing that the defendant was approaching the excluded evidence, the State objected. The court sustained the objection. 2 RP 191-92.

The defendant also testified about going to Ostergard's home uninvited the night after the incident. He said Tarasenko called him in tears but he could only speculate as to why. 2 RP 192. He also said he went to Ostergard's because he was "gentlemanly", because he felt bad for scaring her, because he

wanted to apologize, and because he wanted to pick up Tarasenko to stop his friends from doing bad things, another apparent reference to the excluded testimony. 2 RP 195-96.

The defendant testified that the police never told him why he was under arrest and never questioned him. 2 RP 194. He admitted that he confessed to them that he had broken Ostergard's mirror. 2 RP 203.

In closing, defense told the jury that the defendant committed the malicious mischief because he overreacted. "The baseball bat to the mirror was a huge mistake. He did not have lawful authority to do that... So on malicious mischief, he is guilty." 2 RP 221. Defense argued that the evidence on the other two crimes was insufficient to convict and merely he said/she said. 2 RP 224.

The jury convicted the defendant of malicious mischief and harassment but was unable to reach a verdict on the assault charge. CP 55-57. The defendant was sentenced on June 2. 6/2/15 RP. He told the court he was indigent and currently unemployed. He and was sentenced to three months in jail and payment of $600. A restitution obligation was imposed by no order was entered. 6/2/15 RP 6-7.

III. ARGUMENT

A. THE DEFENDANT WAS PERMITTED TO PRESENT HIS DEFENSE BUT NOT PERMITTED TO INTRODUCE IRRELEVANT, UNPROVED, IMPROPER CHARACTER EVIDENCE THAT HE AGREED SHOULD BE EXCLUDED.

Both the state and federal constitutions guarantee the right to present a defense, examine witnesses, and offer testimony. U.S. Const. amend 6; Const. art. I, § 22; Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); State v. Hayes, 165 Wn. App. 507, 520, 265 P.3d 982 (2011), review denied, 176 Wn.2d 1020 (2013). Evidentiary decisions are within the trial court's discretion. Hayes, at 520. An abuse of discretion occurs when a court's decision is manifestly unreasonable or based on untenable grounds. Id.

The defendant claims he was denied his constitutional right to present a defense and to impeach witnesses when he was not permitted to discuss an alleged prostitution plan, evidence he agreed was inadmissible. The court properly excluded that testimony, not only because of the defendant's agreement but also because it was not germane to any issue in the case, including credibility.

1. The Excluded Evidence Was Not Probative, Not Material, And Did Not Rise To The Level Of A Defense.

The defendant claims he was denied the constitutional right to present a defense. He has not identified what that defense is because there is none.

The Supreme Court discussed the issue of denial of a defense in Jones. Jones was accused of rape and wanted to raise a consent defense. He was prepared to testify that the victim had consented to sex with him and others at an "all-night drug-induced party." Jones, 168 Wn.2d at 721. The Supreme Court found that excluding that evidence denied Jones's due process right to present his defense. Id. The testimony "was of extremely high probative value." Id. The testimony was his entire defense and, if believed, would have been a defense. Id. There was no state interest compelling enough to exclude this evidence which was "evidence of *high* probative value." Id. at 720, quoting State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983) (emphasis in original).

More recently, this court decided State v. Cayetano-Jaimes, 190 Wn. App, 286, 369 P.3d 919 (2015). Cayetano was accused of raping a very young relative whom he was babysitting. He and his

wife testified that they had never babysat the child. Id. at 294-95. He sought to have the young child's mother, who was in Mexico, testify telephonically that he had never babysat the child. The trial would not permit the telephonic testimony. Id. at 293-94.

This court reversed. Id. at 303. The witness's testimony was highly probative and its exclusion effectively barred the defendant from presenting a defense. Id. There was no showing that the telephonic testimony would disrupt the fairness of the fact-finding process. The defendant was deprived of the right to present relevant, material, and vital testimony. Id.

In the present case, the defendant raised no defense to the malicious mischief charge. He admitted, in opening, on the stand, and in closing, that he was guilty of the crime. He referred to the jury's decision on that count as "the easy one." 2 RP 221. On the assault and threats to kill, his defense was not that the crimes were justified by the circumstances but rather that they did not occur.

The present case is nothing like Jones or Cayetano-Jaimes. The defendant was not precluded from testifying about his anger in ways that vilified the victim. He gave several reasons for his anger, including the victim's continued trespasses at his home, her desire to hang out with "older gentlemen", he desire to do "bad things", her

heroin use. Insofar as the defendant believed that his anger and Ostergard's character were relevant, he managed to testify about both.

The defendant acknowledged as much during pre-trial motions. When the State raised its motion to exclude, defendant agreed that he did not plan to go into that area, in effect agreeing with the State that the evidence had no bearing on his guilt or innocence. He was not denied his right to present a defense.

2. The Excluded Evidence Had No Bearing On Ostergard's Credibility Or Motive To Fabricate.

The defendant argues that he was not permitted to attack Ostergard's and Tarasenko's credibility because he was not permitted to testify that he believed the women were about to prostitute themselves. That evidence goes neither to motive nor to credibility. It is inadmissible character evidence.

A witness's credibility may be attacked by either party. ER 607. The attack can be accomplished in many ways: by evidence of a character of untruthfulness, by specific instances of conduct that show a character for truthfulness, by evidence of a crime, or by prior statements. ER 608, ER 609, ER 613.

In the present case, the excluded evidence fit into none of those categories. The evidence was not a prior criminal conviction or a prior statement. The evidence had no bearing on truthfulness and so was irrelevant to the witnesses' credibility.

Evidence is relevant when it supports a reasonable inference on a contested matter or tends to establish a theory of the case or disprove the adversary's testimony. State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002). Evidence that does not tend to prove or disprove an issue, it is not relevant. Id. There is no constitutional right to have irrelevant evidence admitted. Id. at 624. A trial court's ruling on evidence is reviewed for an abuse of discretion. Id. at 619. A court abuses its discretion when its ruling is based on untenable grounds or reasons. Id.

The defendant argues that the excluded evidence showed Ostergard and Tarasenko had a motive to fabricate the charges. This claim is puzzling because it does nothing to explain why they told the truth about the broken mirror but not about the assault and threats. The defendant is arguing, in effect, that the evidence was not relevant to their credibility about the broken mirror but was relevant to their testimony about the assaults and threats.

This court recently decided a similar issue. State v. Gonzalez-Mendoza, ___ Wn.2d ___, 363 P.3d 593 (2015). There, the defendant raped a prostitute but claimed the sex was consensual. 363 P.3d at 594-95. The defendant sought to introduce testimony that the victim had previously given a false name when she had been arrested for various crimes. Defense conceded that the crimes themselves were not admissible but giving a false identity was. The trial court found the argument "disingenuous" and that giving a false name was not probative of the victim's credibility on the rape. Id. at 596.

This court found that testimony on credibility was relevant if it cast doubt on a witness's credibility if credibility was a "fact of consequence" at trial. Id. It also found that the giving of the name was essentially improper propensity evidence, generally inadmissible under ER 404(b) and improper under ER 608(b).

That reasoning applies to the present case. Here, the defendant sought to attack the witnesses' credibility by testifying that he believed they were about to prostitute themselves, a crime that was not reported, not charged, and disputed by Ostergard pre-trial, the only time it was raised. That is improper propensity

evidence and improper impeachment. The trial court properly excluded it.

B. IF ERROR OCCURRED, IT WAS INVITED BY THE DEFENDANT.

Under the invited error doctrine, a criminal defendant may not seek appellate review of an error he helped create, even when the alleged error involves constitutional rights. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.3d 514 (1990). The doctrine prevents a defendant from setting up an error by affirmatively assenting to it and later complaining of it on appeal. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). An error is invited if the defendant materially contributes to it by engaging in affirmative action that knowingly and voluntarily sets it up. In re Personal Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001). The State bears the burden of showing invited error. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

If there was error, it was invited. When the State moved to exclude the contested evidence, the court asked the defense if it intended to go into that area. The defendant said no. Based on that agreement, the court granted the motion without making any

further record. To now claim that the error was uninvited is disingenuous.

Moreover, when the State challenged the defendant's attempts to insert the excluded testimony, defense stood mute. He never asked the court to reconsider its original ruling and never argued that the evidence was admissible. If error occurred, it was invited.

C. THE DEFENDANT SHOULD BE REQUIRED TO PAY COSTS ON APPEAL.

The authority to recover costs stems from the legislature. State v. Nolan, 141 Wn.2d 620, 627, 8 P.3d 300 (2000). The Rules of Appellate Procedure (RAP) direct courts of appeal to determine costs after filing a decision that terminates review (except for voluntary withdrawals). RAP 14.1(a). The panel of judges deciding the case has discretion to refuse costs in the opinion or order. RAP 14.1(c) and RAP 14.2.

Current ability to pay is not the only relevant factor. State v. Sinclair, ___ Wn. App. ___, ___ P.2d ___ (2016) (72102-0-I). The court may consider whether the defendant will have the ability to pay if and when the State attempts to sanction a failure to pay. State v. Blank, 131 Wn.2d 230, 246-47, 930 P.2d 1213 (1997). If a

defendant is unable to repay costs in the future, the statute contains a mechanism for relief. Id. at 250.

In the present case, the trial court signed an ex parte indigency order. Supp. CP __ (sub no. 77, Order of Indigency). The order stated only that the defendant lacked the funds to pursue his appeal. Id. The only financial information provided the court was that the defendant was currently unemployed. Supp. CP __ (sub no. 76, Motion and Declaration). The order reflected only the defendant's ability to financially launch an appeal, not any ability to repay debt in the future. Id.

The defendant was 28 years old at the time of trial. 2 RP 204. He had served his entire time by August 2015. Supp. CP __ (sub no. 89, Return of Commitment). The court has been given no evidence that the defendant is not now working and no reason he should not be able to be employed for decades to come.

The present case is very different from Sinclair where the defendant was 66 years old and sentenced to a minimum of 280 months in custody. ___ Wn. App. at ___. Here, the defendant is young, no longer in custody, and possibly employable.

The defendant has provided this court with no basis to deny the imposition of appellate costs. The request should be denied.

IV. CONCLUSION

Because no constitutional or evidentiary error occurred, the conviction should be affirmed and costs should be imposed.

Respectfully submitted on March 8, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. SEAN M. CURRAN, Appellant.	No. 73590-0-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 9th day of March, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Travis Stearns, Washington Appellate Project, Travis@washapp.org; and wapofficemail@washapp.org.

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

Dated this 9th day of March, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
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