

64056-9

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No. 64056-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM HARRIS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
DIVISION ONE
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A. ARGUMENT

1. WHERE THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING MR. HARRIS'S PRIOR MURDER CONVICTION, REVERSAL IS REQUIRED.

a. The admission of Mr. Harris's 1982 murder conviction for purposes of impeachment or 404(b) evidence was improper. A defendant's prior felony convictions are inadmissible against him because prior convictions are highly prejudicial and not relevant to guilt or innocence. State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997).

The trial court here failed to meet its burden to show that, pursuant to ER 609(a)(1) or ER 404(b), the probative value of the evidence outweighed its prejudicial effect. State v. Calegar, 133 Wn.2d 718, 722, 947 P.3d 235 (1997); State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), adhered to on rehearing, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989); State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980); State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981); State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).¹

¹ Appellant directs the Court to pages 15-22 of Appellant's Opening Brief, which addresses this area further.

b. The Respondent fails to provide support for its position that Mr. Harris opened the door to the admission of the prior conviction. The State argues that during direct examination, Mr. Harris opened the door to the admission of his 1982 homicide conviction by referring to experiencing memory loss during a drinking binge several months following the alleged crime. Resp. Brief at 11-15. To support this argument, the State cites several cases discussing the concept of door-opening in general, but which are not particularly on-point in this specific case. In State v. Warren, for example, cited by the State, the defendant in that matter clearly put at issue his credibility on the very issue before the jury – whether he molested and raped his stepdaughters. 134 Wn. App. 44, 64, 138 P.3d 1081 (2006). When the defendant in Warren testified on direct that he was not the type of person who would touch the sexual parts of a girl, as the State argues, it was clearly the appropriate use of discretion for the trial court to allow that defendant's prior conviction for child molestation as impeachment evidence. Id. at 64.

The instant case is distinguishable from Warren, however. Mr. Harris in no way put his credibility at issue during his direct testimony, as did the defendant in Warren. Mr. Harris testified that he was interviewed by a psychiatrist at Western State Hospital several months following his arrest during a competency

examination, and that one of the topics discussed was his most recent drinking binge. 7/14/09 RP 17. Mr. Harris told the psychiatrist that he was having blackouts, and that he found himself unable to recall basic things, such as where he lived, and even his brother's name. 7/14/09 RP 17.

The State also discusses State v. Hartzell, 153 Wn. App. 137, 221 P.3d 928 (2009) (trial court has discretion to admit relevant testimony on rebuttal case) and State v. Kendrick, 47 Wn. App. 620, 736 P.2d 1079 (1987) (testimony regarding defendant's post-arrest silence admissible to rebut claim of cooperation with police). Each case cited by respondent is inapposite. Notably, the State fails to mention a single case decided upon either ER 609 or ER 404(b), the two evidence rules argued in Appellant's Opening Brief.

c. The State makes factual errors in its interpretation of the trial record. Respondent argues that Mr. Harris put forth a mixed defense of failed memory and misinterpreted actions. Resp. Brief at 14. At no time did Mr. Harris offer a psychiatric defense of faulty memory at trial; the record is clear that appellant admitted to writing the notes and told the jury exactly to whom – the complainant's adult brother. 7/13/99 RP 187-89, 199-200.

In addition, respondent suggests that Mr. Harris's defense counsel conceded that the door to his murder conviction had been

opened by his direct testimony. Resp. Brief at 15 (“Harris’ counsel conceded that the door had been opened”). This remark has been taken out of context and should be clarified. Mr. Harris’s defense counsel strenuously objected to the admission of the 1982 homicide conviction. 7/14/09 RP 62. Defense counsel argued that it was unlikely that any limiting instruction would cure the prejudice if this conviction was admitted, and asked the trial court to consider alternate forms of impeachment available. Id. Defense counsel’s only concession was as follows:

The defense does not disagree that Mr. Harris opened the door to evidence of prior convictions directly or indirectly, and he referred to [his] prior residence and his brother. The prosecutor can ask him about growing up with a brother, living with a brother, and his knowledge of his brother. But I do not think that opens evidence up for prior conviction of murder.

7/14/09 RP 63 (emphasis added).

It is disingenuous for the State to argue that defense counsel thus conceded that the door had been opened to the admission of this prior conviction.

d. Because the trial court failed to make factual findings to support its ruling on the admissibility of the prior conviction, and because Mr. Harris never put his good character into question, reversal is required. The trial court implicitly conceded that the admission of Mr. Harris’s prior murder conviction was likely to be so

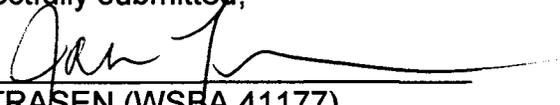
prejudicial that no limiting instruction would be sufficient to cure the prejudice caused by its introduction. 7/14/09 RP 29. The court's failure to exclude the 1982 conviction, or to make specific findings on the record, was an abuse of discretion, requiring reversal.

B. CONCLUSION

Mr. Harris's conviction must be reversed and remanded for a new trial because the admission of his prior conviction was an abuse of discretion and a violation of his due process rights.

DATED this 19th day of July, 2010.

Respectfully submitted,



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DIVISION I

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 WILLIAM HARRIS,)
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 Appellant.)

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 19TH DAY OF JULY, 2010, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

King County Prosecuting Attorney
W554 KING COUNTY COURTHOUSE
516 3RD AVE STE W554
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William Harris
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WY
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COURT OF APPEALS
STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 19th DAY OF JULY, 2010

x Ann Joyce