

64349-5

64349-5

NO. 64349-5-I

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

REC'D

MAY 11 2010

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CONNOR,

Appellant.

2010 MAY 11 PM 3:55

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

The Honorable Theresa B. Doyle, Judge

BRIEF OF APPELLANT

JARED B. STEED  
ERIC NIELSEN  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issue Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural History</u> .....	1
2. <u>Charged Offense</u> .....	2
3. <u>Order In Limine</u> .....	5
C. <u>ARGUMENT</u> .....	6
THE TRIAL COURT’S FAILURE TO STRIKE TESTIMONY IN VIOLATION OF THE ORDER IN LIMINE DEPRIVED CONNOR OF A FAIR TRIAL. ....	6
D. <u>CONCLUSION</u> .....	10

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

State v. Barr  
123 Wn. App. 373, 98 P.3d 518 (2004)  
rev. denied, 154 Wn.2d 1009 (2005) ..... 9

State v. Demery  
144 Wn.2d 753, 30 P.3d 1278 (2001)..... 9

State v. Escalona  
49 Wn. App. 251, 742 P.2d 190 (1987)..... 6, 7

State v. Essex  
57 Wn. App. 411, 788 P.2d 589 (1990)..... 7, 8

State v. Miles  
73 Wn.2d 67, 436 P.2d 198 (1968)..... 7

State v. Thompson  
90 Wn. App. 41, 950 P.2d 977 (1998)  
rev. denied, 136 Wn.2d 1002 (1998) ..... 7

State v. Weber  
99 Wn.2d 158, 659 P.2d 1102 (1983)..... 6

State v. Wilburn  
51 Wn. App. 827, 755 P.2d 842 (1988),  
overruled on other grounds,  
Adams v. Dept. of Labor and Industries,  
128 Wash.2d 224, 905 P.2d 1220 (1995).....7

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 404 ..... 7

ER 609 ..... 7

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to strike testimony in violation of an in limine order prohibiting testimony that described golf pencils taken from appellant as "weapons" or "shanks."

2. The State's violation of an in limine order deprived appellant of a fair trial.

Issue Pertaining to Assignments of Error

Prior to trial, the court precluded the State from eliciting testimony that referred to two golf pencils taken from appellant as "weapons" or "shanks." The trial court re-affirmed its ruling the following day, and told the prosecutor to remind her witnesses not to refer to the golf pencils as "shanks." Despite the court's ruling, a prosecution witnesses later identified the golf pencil taken from appellant as "the pencil he [appellant] had modified to use as a weapon." The trial court denied defense counsel's timely objection and motion to strike. Was appellant denied a fair trial where the state witness violated the court's in limine order prohibiting testimony that described the golf pencil as a "weapon?"

B. STATEMENT OF THE CASE

1. Procedural History

On October 8, 2008, the King County prosecutor charged Richard Connor with two counts of custodial assault for an incident that occurred

on September 28, 2008. CP 1-5. Count I alleged Connor assaulted correction officer David Demoss and Count II alleged he assaulted correction officer Abdul Mohamed. On July 13, 2009, the Honorable Theresa B. Doyle conducted a pre-trial hearing on the State's motion to admit Connor's custodial statements. 3RP 23-36.<sup>1</sup>

The court found the statements admissible and entered written findings of fact and conclusions of law on September 25, 2009. 3RP 23-36; 8RP 2-8; CP 70-73. Trial commenced on July 14, 2009.

A jury found Connor not guilty on Count I and guilty on Count II. CP 50-51; 60-69. Connor was sentenced to an agreed recommendation of 50 months in prison, with twelve months of community custody. CP 60-69; 8RP 2-8. Connor timely appeals. CP 74.

## 2. Charged Offense

On September 28, 2009, approximately eight correction officers dressed in all black and wearing riot helmets, body armor, and boots marched to Connor's room at the Regional Justice Center Detention Facility (RJC) intending to forcibly remove him. 5RP 50, 55; 6RP 19, 26, 35, 49-50, 55. Officers intended to physically remove Connor because he

---

<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – April 24, 2009; 2RP – May 22, 2009; 3RP – July 13, 2009; 4RP – July 14, 2009 (morning); 5RP – July 14, 2009 (afternoon); 6RP – July 15, 2009; 7RP – July 16, 2009; 8RP – September 25, 2009.

declined to turn over his personal tennis shoes after his medical waiver allowing them was revoked. 5RP 41-42; 6RP 18, 48, 73, 75, 80, 82, 86-87, 96.

After Connor's medical waiver was revoked, Sergeant Katherine Jones told Connor he would have to give up his shoes. Jones said Connor swore at her and told her she would have to come into his room and get the shoes herself. 5RP 41-43, 49; 6RP 80, 96. Jones ordered Officer Andrew Currier to lock Connor's room and avoid talking to Connor. Currier said Connor painted a "target" on his cell door pounded it, then twice asked Currier to come to his room. Currier asked Connor if he was threatening him. Currier said Connor told him if it was a threat he would know it, and hit the door again. Currier said Connor flexed his muscles and asked Currier whether he felt threatened. 6RP 15-16, 21.

Jones returned to Connor's room with three officers. 5RP 47. Connor continued to decline to turn over his shoes. Jones asked officers Demoss and Mohamed to participate in a forced "extraction" of Connor from his room. 6RP 34. When officers arrived at Connor's room they opened the door and used pepper spray. 6RP 41, 43, 69, 114. When officers opened the door a second time they rushed in and pinned Connor to the ground within 10-15 seconds. 6RP 23, 53. When Demoss pulled Connor's arms out from under him he saw two golf pencils attached to

each other. 6RP 44, 55-57, 71. Demoss never saw the pencils in Connor's hands. 6RP 44, 57, 89.

Demoss never saw Connor hit him during the incident, but said he felt two to three hits to his groin during the incident. Demoss also said his helmet was knocked off during the incident, but admitted he was not sure how. 6RP 42-43, 53, 55-58, 98-99. Demoss testified that he later watched a video recording of the incident and on the recording he saw Connor try to hit Mohamed in the chest with a pencil. Demoss did not see Connor hit Mohamed while the incident was occurring. 6RP 39, 46, 70, 101-02, 117, 120-21. Mohamed did not feel any punches during the strike and was unsure whether the incident caused any damage to his equipment. 6RP 115-16, 121-22. Currier, however, never saw Connor strike any officers while watching the incident. 6RP 22, 28. Demoss and Mohamed were not injured during the incident. 6RP 52, 57, 93-95.

Jones said lengthened pencils were contraband at the RJC and normally confiscated. 100-01. Jones admitted golf pencils, however, are issued to RJC residents, and residents may have more than one pencil at a time. 3RP 39. Jones also admitted RJC residents often use extended golf pencils for writing and drawing. 6RP 92-93. No knives, razors, needles, or other modified objects were found in Connor's possession or in his room after the incident. 6RP 91-92.

### 3. Order In Limine

Prior to trial, the court entered an in limine order prohibiting the State from eliciting testimony that referred to the two golf pencils taken from Connor after the incident as “weapons” or “shanks.” 3RP 10-11. Over the prosecutor’s objection, the court held that State witness’ could describe why they thought the pencil might be used as a weapon, but concluded that in “referring to the item, they [witnesses] can refer to it as a golf pencil or a modified golf pencil.” 3RP 10-11. The prosecutor asked the court to reconsider its ruling the following day. The trial court reaffirmed its prior ruling, and told the prosecutor to remind her witnesses not to refer to the golf pencils as “shanks.” 4RP 2-4.

Despite the court’s ruling, during Demoss’ direct testimony he identified the golf pencil taken from Connor as “the pencil he [Connor] had modified to use as a weapon.” Defense counsel immediately objected and asked the court to strike Demoss’ testimony. Defense counsel’s objection was overruled. 6RP 40-41. The prosecutor continued to ask Demoss whether Connor had “struck out” during the incident. Demoss responded, “I didn’t – I didn’t even realize he had – I didn’t even realize there was any kind of weapon involved until he [Connor] was pinned on the ground[...].” 6RP 42. The court issued no curative instruction, and the jury was never told to disregard Demoss’ testimony.

C. ARGUMENT

THE TRIAL COURT'S FAILURE TO STRIKE TESTIMONY IN VIOLATION OF THE ORDER IN LIMINE DEPRIVED CONNOR OF A FAIR TRIAL.

The inadmissible prejudicial statements made by Demoss in violation of the in limine order was a serious trial irregularity that denied Connor a fair trial. When a witness's remark violates a motion in limine and so prejudices the jury that the defendant is denied the right to a fair trial, a new trial is warranted. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). To determine whether such a trial irregularity may have improperly influenced the jury, courts consider: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could have been cured by an instruction to disregard the remark. Escalona, 49 Wn. App. at 254 (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

In Escalona, a second-degree assault case, a state's witness testified that Escalona "already has a record and had stabbed someone," in violation of a pretrial order excluding such evidence. Escalona, 49 Wn. App. at 253. The trial court instructed the jury to disregard the improper statement and declined to declare a mistrial. Escalona, 49 Wn. App. at 253. On appeal, the court reversed, holding that a mistrial was warranted

because the violation of the motion in limine was so prejudicial it deprived Escalona of a fair trial. Specifically, the court held (1) the comment violated the express policies underlying ER 609 and 404(b) and was serious given the state's otherwise weak case, which consisted primarily of the complaining witness's testimony; (2) the statement was not cumulative or repetitive of other evidence; and (3) even a curative instruction could not cure the prejudice because of the strong likelihood the jury would find Escalona guilty of acting in conformity with his prior act. Escalona, 49 Wn. App. at 255-56. see also State v. Miles, 73 Wn.2d 67, 68, 436 P.2d 198 (1968) (armed robbery conviction reversed because witness violated in limine ruling by testifying Miles had just committed a similar crime elsewhere); State v. Wilburn, 51 Wn. App. 827, 832, 755 P.2d 842 (1988), overruled on other grounds, Adams v. Dept. of Labor and Industries, 128 Wn.2d 224, 905 P.2d 1220 (1995) (rape conviction reversed because witness violated in limine ruling by testifying that Wilburn said, "Yes, I did it again and I need treatment").

Like the witnesses in Escalona, Wilburn, and Miles, Demoss' testimony violated the court's in limine order in a manner that prejudiced Connor. First, the statement made by Demoss was serious because it violated an explicit order in limine. See State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998), rev. denied, 136 Wn.2d 1002 (1998); State v.

Essex, 57 Wn. App. 411, 416, 788 P.2d 589 (1990) (a remark is sufficiently serious when it violates a motion in limine to exclude it.). Additionally, Demoss' testimony suggested the only reason Connor possessed the pencils was to use them as a weapon. The defense at trial was that Connor did not use the jail issued pencils as weapons, but possessed them for purposes of writing or drawing. Demoss' testimony regarding the pencils undercut this theory by improperly suggesting the incident was a well-planned event; damaging evidence in a case where the jury's verdict rested on a determination of Connor's intent.

The second factor, whether the improper testimony was cumulative, also supports reversal. None of the correction officers participating in Connor's forced cell extraction saw Connor using the pencil as a weapon at the time of the incident. Indeed, Demoss admitted he only saw the pencil after it slid from underneath Connor after he was pinned on the ground. Similarly, Jones and Mohamed saw the pencil only after reviewing the video recording of the incident. Thus, the testimony was prejudicial and not cumulative of any other properly admitted trial evidence.

The third factor is whether the trial court instructed the jury to disregard the improper testimony. It did not. 6RP 40-41. Thus, the jury was free to consider Demoss' testimony that Connor possessed the pencil

with intent to use it as weapon. Because the impermissible evidence had the imprimatur of the court, it had an even greater impact than the testimony of a civilian witness. See, e.g., State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004), rev. denied, 154 Wn.2d 1009 (2005) (opinion of a government official, especially a police officer, may influence a jury); State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (testimony from a law enforcement officer may be especially prejudicial because the officer's testimony often carries a special aura of reliability). Moreover, because the testimony was not stricken, and no curative instruction issued, the jury was free to consider it in light of later suggestions from the prosecutor that Connor had been planning the assault. Under these circumstances, at a minimum, Demoss' testimony in violation of the order in limine should have been struck, and the jury instructed to disregard the testimony. The erroneously admitted evidence prejudiced Connor and warrants a new trial.

D. CONCLUSION

The trial court erred when it denied the defense motion to strike the testimony of Demoss. Connor respectfully requests that this Court reverse the trial court's denial of the motion to strike and remand for a new trial.

DATED this 11<sup>th</sup> day of May, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED  
WSBA No. 40635



ERIC J. NIELSEN  
WSBA No. 12773  
Office ID No. 91051

Attorneys for Appellant