

64729-6

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NO. 64729-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL STANLEY,

Appellant.

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KING COUNTY

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY ROBERTS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1) The U.S. and Washington State Constitutions guarantee a defendant the right to confront witnesses against him in a criminal trial. In a case where a co-defendant testifies against the appellant and his bias in avoiding punishment for his crime is obvious, is it a violation of the Confrontation Clause to exclude evidence of the co-defendant's probationary status?

2) Assuming *arguendo* that the Confrontation Clause was violated, appellant Stanley's victim testified that he had "no doubt" Stanley had beaten and robbed him. The State presented extensive physical evidence including photographs of appellant Stanley's inflamed knuckles. Stanley's co-defendant also provided corroborating testimony. In such an environment with overwhelming evidence of Stanley's guilt, was the trial court's exclusion of codefendant Johnson's probationary status a constitutional error so harmful as to warrant a new trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Gabriel Stanley and Fulton Johnson with Robbery in the Second Degree. CP 1-6. Jurors convicted Stanley

and acquitted Johnson. CP 25; 2RP¹ 90-91. The trial court imposed a standard range sentence of twelve months and one day, and appellant Stanley timely filed his Notice of Appeal. CP 28, 30, 36-46.

During trial, the State presented testimony from the robbery victim identifying appellant Stanley as the culprit, corroborating testimony from Mr. Johnson, appellant Stanley's "ditched" shirt and the victim's wallet, photographs of the appellant near the scene of the robbery, photographs of the appellant's inflamed knuckles, and photographs of the victim's bruised face. 1 RP 56-58, 2RP 34, 36-37, 44, 47-50, 1 RP 103, 108-110, 1 RP 118, 2 RP 13.

Before trial, the court denied a motion under ER 609 to impeach Mr. Johnson with prior convictions for Attempted Residential Burglary and Vehicle Prowl. 1 RP 22-25. Following the ER 609 ruling, appellant Stanley's attorney stated:

I know I'm not exactly involved in this motion, but if Mr. Johnson does testify, some of his statements to the police officers went extensively into the idea that he is on community custody, supervised by DOC, why would he do this, he knows better than this. And I

¹ This brief refers to the verbatim report of proceedings as follows: 1 RP - November 17-18, 2009; 2 RP - November 19-20, 2009; 3 RP - December 18, 2009.

would just like to be clear that we can cross-examine him in regard to that while not necessarily mentioning the convictions for which he is on community custody. 1 RP 25.

The deputy prosecutor joined in the motion. 1 RP 26.

Counsel for Mr. Johnson objected, arguing that the evidence fell under the court's prior ER 609 ruling. 1 RP 26,28. Counsel argued that Mr. Johnson's probation was more prejudicial than probative. 1 RP 26, 28-29. The court agreed and ruled that no mention of Mr. Johnson's probationary status would be allowed unless the witness opened the door, presumably pursuant to ER 403 though the record is unclear. 1 RP 29 and ER 403. Appellant Stanley now argues that the trial court's exclusion of Mr. Johnson's probationary status was a constitutional error so harmful as to require a new trial. Brief of Appellant p. 1.

2. SUBSTANTIVE FACTS

On the evening of July 31st, 2009, the victim Mr. Andrew Mueller consumed pizza, two beers, and a serving of Jagermeister. 1 RP 51. After dinner, Mr. Mueller was "a little intoxicated" and purchased a six pack of beer at Ronnie's Market before walking home through an alley. 1RP 80, 1RP 51-52.

Appellant Stanley approached Mr. Mueller in the alley. 1RP 56, 2RP 33. Mr. Mueller testified that Stanley was wearing a "maroonish jumpsuit". 1 RP 54, 80. Appellant Stanley approached Mr. Mueller and asked where he lived, but Mr. Mueller refused to disclose information. 1RP 57. Appellant Stanley then asked Mr. Mueller for money, and Mr. Mueller answered that he only had a debit card. 1RP 57-58. Appellant Stanley then demanded Mr. Mueller's wallet. 1 RP 58.

Mr. Fulton Johnson — an accomplice of Stanley's who had been standing back from the conversation — approached Mr. Mueller and said something to the effect of "motherfucker, this is real". 2 RP 34, 1 RP 57-59. Mr. Mueller then tried to run, but appellant Stanley pushed him into a retaining wall. 1 RP 60. Stanley then punched Mr. Mueller twice in the face using his right fist. 1 RP 61, 91. Appellant Stanley then stole Mr. Mueller's wallet and keys before fleeing with Mr. Johnson. 2RP 47, 48. Bruised and bloodied, Mr. Mueller ran back to Ronnie's Market and had the store clerk call 911. 1 RP 66, 132, 2 RP 13.

After fleeing the scene, Mr. Johnson observed appellant Stanley "wipe down" the wallet with a white shirt that Stanley had used as a "sweat rag" earlier that day. 2 RP 35, 2 RP 49. After

wiping down the victim's wallet, appellant Stanley "stuffed" his shirts and wallet in a bush. 2 RP 49. Mr. Johnson and Stanley then "broke off" from each other and left in separate directions. 2 RP 54. Mr. Johnson made his way to a bus stop while Mr. Stanley headed home. 1RP 102, 125, 2 RP 6.

King County Sheriff's Christopher Deputy Dearth was dispatched within minutes of Mr. Mueller's 911 call. 1 RP 66. When Deputy Dearth arrived at the scene, he drove around the area and found Mr. Johnson waiting at the bus stop dressed in a black shirt and blue jeans. 1 RP 102-3. After being detained, Mr. Johnson led Deputy Dearth to the shirts and wallet in the bush. 1 RP 103. Meanwhile, assisting Deputy Milne detained appellant Stanley at his home. 2 RP 5-6.

Officers then drove Mr. Mueller to the bus stop and apartment building where he had "doubt" or "hesitation" identifying Mr. Johnson and appellant Stanley as the men present at the crime. 2 RP 15, 17, 1 RP 67-68.

During the subsequent police interview and police statement, Mr. Mueller was "in shock" and allowed Officer Fitchett to write a statement. Mr. Mueller did not read the statement "very closely". 1 RP 96. Mr. Mueller was still "quite angry" about the incident and

wanted to "get over with the night". 1 RP 85. Mr. Mueller acknowledged that his police statement incorrectly identified Mr. Johnson as the assailant, but testified that he had no doubt appellant Stanley was in fact the assailant. 1 RP 89, 69.

At trial, Mr. Johnson corroborated Mr. Mueller's testimony and confirmed that appellant Stanley was the assailant. 2RP 34, 36-37, 44, 47-50. Mr. Johnson testified that Mr. Stanley initiated the confrontation, assaulted Mr. Mueller, stole Mr. Mueller's wallet, and hid the wallet and shirts in a bush. 2RP 34, 36-37, 44, 47-50. Police also collected photographs of appellant Stanley's inflamed hands, photographs of Mr. Mueller's bruised face, and the white shirt that appellant Stanley used to wipe the wallet. 1 RP 118, 2 RP 13, 1 RP 103, 108-110.

C. **ARGUMENT**

1. THE TRIAL COURT DID NOT VIOLATE APPELLANT STANLEY'S RIGHT TO CONFRONTATION.

The United States and Washington constitutions provide a criminal defendant the right to confrontation. The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." U.S. Const. amend. 6. The Washington constitution

provides: "In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face ..." Const. art. 1, § 22 (amend. 10). The federal confrontation right is applicable to the states through the Fourteenth Amendment. State v. Hieb, 107 Wn.2d 97, 727 P.2d 239 (1986) (citing Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). Whether a trial court has violated an accused's confrontation rights is an issue reviewed de novo. State v. Medina, 112 Wn. App. 40, 48 P.3d 1005 (2002).

A defendant does not have the right to have irrelevant evidence admitted. Further, there is no constitutional right to an unfettered cross-examination. State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983). A court may not exercise discretion to prejudice the constitutional right to confront. State v. Dickenson, 48 Wn. App. 457, 740 P.2d 312 (1987). The confrontation clause, however, guarantees no more than an opportunity for effective cross-examination. It is satisfied if the defendant has the opportunity to bring out any weakness in the adverse witness's evidence. State v. Dukes, 56 Wn. App. 660, 784 P.2d 584 (1990). If cross-examination would have limited usefulness, it is not error to exclude it. State v. Wicker, 66 Wn. App. 409, 832 P.2d 127 (1992).

Here, the trial court was well within its rights to limit the cross-examination of Johnson because it would have been of little use to appellant Stanley, and served only to cast aspersions on Johnson. Johnson's bias was already demonstrated by his potential culpability for the robbery, his probationary status showed little, if anything about different *additional* bias.

However, appellant Stanley claims the trial court violated his Sixth Amendment right to confront a witness against him and therefore requests a new trial. Brief of Appellant p. 1. The defense relies solely on Davis v. Alaska for the proposition that defendant Stanley's conviction should be reversed on confrontation clause grounds. Brief of Appellant p. 10. In Davis, the Supreme Court reversed a defendant's burglary conviction because the trial court did not permit the defense to inquire into the key witness's probationary status. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974). The Court reasoned that the defense should be allowed to cross-examine the key witness about his probationary status in order to show bias that he may have had reason to hide his culpable behavior in the case and that bias outweighed the State's interest in protecting the record of a juvenile offender. Davis, 415 U.S. at 321.

While *Davis* bears a superficial resemblance to the current case, it differs in a number of key respects. In Davis, the juvenile witness was a *third party* to the crime and a primary witness to what occurred and there was little outside his probationary status to demonstrate his bias in testifying. Davis, 415 U.S. at 309. In contrast, the victim Mueller was the primary witness who provided testimony in the present case, while Johnson was a secondary witness testifying on his own behalf. 1 RP 56-58, 2 RP 34-50. In addition, Johnson's own interests were implicated in the court's evidentiary ruling because he was also a co-defendant. In Davis, the Court required admission of the juvenile witness's probationary status because it was the likely source of relevant bias and the State's interest in protecting the evidence was minimal. See Davis, 415 U.S. at 317. In the present case, the witness already possessed a blatant bias: co-defendant Johnson had motivation to lie because he was being accused of a crime and his own rights as a defendant were implicated.

Finally, the State's case did not completely rest on defendant Johnson's credibility as the Davis prosecution relied completely on the juvenile witness's credibility. The State primarily proved its case using the victim's testimony and physical evidence. 1 RP 89,

69, 1 RP 118, 2 RP 13, 1 RP 103, 108-110. Therefore, there was no violation of the appellant's confrontation rights.

2. THE TRIAL COURT'S PRECLUSION OF MR. JOHNSON'S PROBATIONARY STATUS WAS A HARMLESS ERROR.

Even if Davis is deemed relevant, the trial court's error was harmless. Washington Courts have held that a "confrontation clause violation is subject to review for harmless error." State v. Hieb, 107 Wn.2d 97 (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 160 P.3d 640 (2007). A harmless error is an error that is trivial, or formal, or merely academic, and in no way affected the final outcome of the case. State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977). It is the State's burden to show that the error was harmless. State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976).

Here, there can be little doubt that the jury would have reached the same conclusion even if codefendant Johnson's probationary status had been introduced to the jury. While the defendant's various items of clothing and Mr. Mueller's confused

police statement certainly added to the perplexity of the trial, the jury reasonably relied on overwhelming evidence to convict appellant Stanley. Mr. Mueller testified that he had no doubt that Stanley initiated the confrontation and that Stanley punched him twice in the face. He fully described the fact that Stanley was taller than him and was the taller of the two assailants. 1 RP 56-58. Johnson also testified that Stanley initiated the conflict, Stanley assaulted Mr. Mueller, and Stanley stole Mr. Mueller's wallet and keys. Further, Stanley ran from the scene and Stanley hid his own shirt and the victim's wallet in a bush. 2RP 34, 36-37, 44, 47-50. Johnson corroborated his involvement by directing officers to the location of the shirts and wallet. The jury also viewed and considered the white shirt, a jersey, photos of Stanley's inflamed knuckles, and photos of Mr. Mueller's bruised face. 1 RP 89, 69, 1 RP 118, 2 RP 13, 1 RP 103, 108-110. Finally, the jury reviewed evidence via surveillance video that Stanley was seen earlier in the night in what appeared to be the exact same jersey recovered in the bushes after the robbery and was identified by victim Mueller as wearing pants similar to those seen on the same video. 2 RP 72.

It is also unclear what additional probative value the evidence of Johnson's probation would have provided. The jury

already could consider Johnson's inherent bias in testifying in his own trial and placing culpability on Stanley. Given his obvious bias as a co-defendant facing the restriction of his liberty, the probative value of the probationary status was limited for the purpose of showing Johnson wanted to "stay out of trouble". Further, any other purpose for the evidence would likely be limited to simply deriding Johnson for his status as having been convicted of a crime, an inappropriate use for the evidence.

The possible bias introduced by defendant Johnson's probationary status was dwarfed by Mr. Johnson's obvious and inherent bias as a criminal codefendant. Due to overwhelming evidence, the jury convicted defendant Stanley. CP 25; 2RP 90-91. And because the jury would have reached the same conclusion even if Mr. Johnson's probationary status was introduced, the trial court's ruling was a harmless error.

D. CONCLUSION

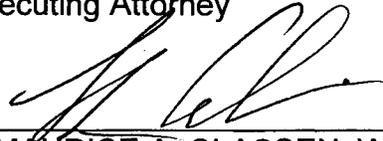
The State asks that this Court uphold defendant Stanley's conviction pursuant to a valid jury verdict.

DATED this 11th day of August, 2010.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By:

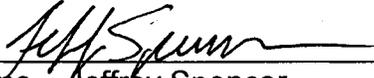


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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nielsen, Broman & Koch, PLLC, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. GABRIEL STANLEY, Cause No. 64729-6-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name Jeffrey Spencer
Done in Seattle, Washington

8/11/2010
Date

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