

No. 65319-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

GARY GENE WESTOM,

Appellant.

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FILED IN THE COURT OF APPEALS
DIVISION ONE
BY [Signature]

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

The Honorable Gerald L. Knight

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The admission of Mr. Westom's girlfriend's hearsay statements violated ER 607 as the State called her solely to impeach her before the jury.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Rulings interpreting ER 607 bar the State from impeaching its own witness where the primary purpose is to admit otherwise inadmissible evidence. The State called Mr. Westom's girlfriend who testified that she could not remember what occurred on the night in question but otherwise provided no substantive evidence. The State was allowed to impeach her, thus admitting her previously inadmissible hearsay statements incriminating Mr. Westom. Is Mr. Westom entitled to reversal of his conviction and remand for a new trial for the erroneous admission of the hearsay statements?

C. STATEMENT OF THE CASE

On September 18, 2009, Mandi Wagner was hosting a poker party at her home at Fourth Street and Alder in Sultan. RP 60-61. Ms. Wagner lived at the home with her fiancé and their two children. RP 60. Approximately eight adults were at the party as well as Ms. Wagner's two children. RP 62. Earlier in the evening,

the people at the party noted a fight between nine to twelve people in front of a house approximately two doors down from Ms.

Wagner's. RP 63. This house had a reputation for being a "party house" where this sort of behavior was common. RP 66.

At close to 10 p.m., a person walked quickly up to Ms. Wagner's house carrying a can of gasoline with a lighted piece of fabric inside and threw this lighted can at Ms. Wagner's house. RP 66-67. This person did not say anything before throwing the lighted object. RP 67. The fire was quickly extinguished. RP 68. Neither Ms. Wagner nor anyone else at the home was able to identify the person who threw the can. RP 83, 103, 199-201. They did see the person leave in a white minivan. RP 106.

Darbi Stine testified she was at the "party house" on the evening of September 18, 2009, "hanging out" and drinking. RP 125-26. Ms. Stine knew appellant Gary Westom and on that night, watched as Mr. Westom and two others engaged in a fight with people from the "party house." RP 128-29. The fight ended with Mr. Westom and the other two men leaving but vowing to return. RP 131. Ms. Stine claimed approximately 45 minutes later, she saw Mr. Westom alight from the passenger side of a white van, walk up to a nearby house and throw a lighted gasoline can at Ms.

Wagner's house. RP 135-38. Ms. Stine stated she saw Mr.

Westom return to the van and flee the area. RP 139.

Gary Westom was subsequently charged with first degree arson. CP 91-92. Pretrial, Mr. Westom moved to bar the State from calling his girlfriend, Lynette Johnson, since she had previously indicated she would claim a privilege against self-incrimination because she was with Mr. Westom on the evening of September 18. CP 55-64. The court deferred ruling.

The State subsequently called Ms. Johnson to testify in its case-in-chief. Despite Ms. Johnson's repeated protestations that she did not remember any of the events, the State, over Mr. Westom's repeated objections, was allowed to impeach her with her statements to the police that she was with Mr. Westom on September 18, 2009. RP 306-10.

Q: Ms. Johnson, do you remember talking to Detective Vanderweyst on September 26, 2009?

A: No.

Q: Do you remember telling Detective Vanderweyst that on the evening of September 18 of 2009 that you, your boyfriend, the defendant, arrived at approximately Fourth and Alder in a white van?

A: No.

Q: Do you remember telling Detective Vanderweyst that after your boyfriend, the defendant, left that white van, that you got out of the van and walked down Fourth Street down to Main Street in Sultan?

A: No. I don't recall saying that.

RP 310-11.

The jury convicted Mr. Westom as charged. CP 34.

D. ARGUMENT

THE STATE MAY NOT CALL A WITNESS SOLELY TO IMPEACH THEM BEFORE THE JURY

1. The State may not call a witness for the primary purpose of impeaching the witness in order to introduce otherwise inadmissible evidence. ER 607 states that “[t]he credibility of a witness may be attacked by any party, including the party calling the witness.” This rule was substantially limited by the decision in *State v. Lavaris*, which held the State:

may not impeach its own witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible.

106 Wn.2d 340, 345-46, 721 P.2d 515 (1986), *citing State v.*

Barber, 38 Wn.App. 758, 770-71, 689 P.2d 1099 (1984), *review*

denied, 103 Wn.2d 1013 (1985). The Court found the decisions

interpreting the equivalent federal evidence rule, Fed.R.Evid. 607

persuasive in adopting the rule. *Lavaris*, 106 Wn.2d. at 346, *citing United States v. Miller*, 664 F.2d 94, 97 (5th Cir. 1981); *United States v. DeLillo*, 620 F.2d 939, 946 (2nd Cir.), *cert. denied*, 449 U.S. 835 (1980). The *Lavaris* Court unfortunately did not articulate any guidelines for determining when there is a “primary purpose” to impeach. Tegland, *5A Washington Practice, Evidence Law and Practice*, §607.3 at 380 (5th ed. 2007).

The *Lavaris* Court also adopted the rationale of the federal courts in adopting the rule limiting the State’s impeachment of its own witness:

[I]t would be an abuse of the rule [Fed.R.Evid. 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence – or, if it didn’t miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize

106 Wn.2d at 344-45, *quoting United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir.1984).

The State did just that here: called Ms. Johnson for the primary purpose of impeaching her and putting her otherwise hearsay declarations before the jury.

2. The primary purpose of calling Ms. Johnson as a witness was to put before the jury her otherwise inadmissible hearsay statements to the police. In *Lavaris*, while rejecting specific guidelines regarding when it is the State's "primary purpose" to call a witness to impeach, the Court did note that impeachment would be improper where it "was employed as a mere subterfuge to place before the jury evidence not otherwise admissible." *Lavaris*, 106 Wn.2d at 346. Instructive on this issue are several prior decisions interpreting ER 607.

In *State v. Stingley*, two witnesses were called to testify and were asked solely about pretrial statements they had made to the police and prosecutor. 161 Wash. 690, 2 P.2d 61 (1931). Both claimed not to remember and each was subsequently impeached with their prior statements. The Supreme Court held the impeachment was improper because neither witness had given any substantive evidence, noting that "one is not allowed to prove his case by impeachment testimony." *Id.* at 697.

In *State v. Delaney*, a witness was called to testify and also stated he could not remember anything regarding what he been asked. 161 Wash. 614, 297 P. 208 (1931). The State then impeached him with his prior inconsistent statements. The

Supreme Court again reversed, finding the State's actions improper:

[The witness] had not made an affirmative statement of any admissible evidentiary fact favorable to the defense or unfavorable to the prosecution which called for contradiction by impeachment or otherwise.

Id. at 618.

More relevant to the present case was the decision in *Kuhn v. United States*, 24 F.2d 910, (9th Cir.), *cert. denied sub nom Lee v. United States*, 278 U.S. 605 (1928). In *Kuhn*, the Government called a witness to testify who either had no knowledge of the events or was unwilling to testify against the defendants. The prosecution was allowed to impeach the witness with his prior statements to Government agents. *Id.* at 913. Although the testimony was later struck by the district court, the Ninth Circuit deemed it proper to express its disapproval of the Government's impeaching of its own witness. *Id.*

A party whose cause is injured by the unexpected answer of his witness may, upon a showing of surprise, neutralize the effect of the adverse testimony by proving that at another time the witness made statements inconsistent therewith That being true, in cases, as here, where the witness gives no testimony injurious to the party calling him, but only fails to render the assistance which was expected by professing to be without knowledge on

the subject, there is no reason or basis for impeachment under the rule.

Id.

In Mr. Westom's case, Ms. Johnson proceeded much as the witnesses in *Stingley*, *Delany*, and *Kuhn* did: Ms. Johnson either offered no testimony injurious to the State or simply professed a lack of knowledge. Despite this fact, the trial court wrongly allowed the State to put before the jury two statements Ms. Johnson had made previously to the police that would not have been otherwise admissible because they were hearsay statements without an exception. Admission of these statements violated ER 607.

3. The error in allowing Ms. Johnson's inadmissible hearsay declarations before the jury was not a harmless error. An error in admitting evidence is prejudicial if, within reasonable probabilities, the trial's outcome would have been materially affected if the error had not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997), quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Only one witness positively identified Mr. Westrom as the person who threw the lighted gasoline can: Darbi Stine. All of the other witnesses to the event were unable to identify the person who threw the can. As a result, Ms. Stine's credibility was an issue

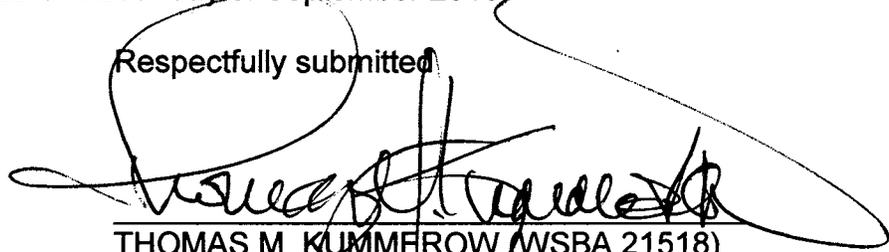
before the jury. Ms. Johnson's hearsay statements which were admitted in violation of ER 607 corroborated Ms. Stine's claim that Mr. Westom was the person who arrived in the white van at the location where the gasoline can was thrown. Had Ms. Johnson's prior hearsay statements not been admitted, the jury could have rejected Ms. Stine's claims, as the prosecutor by his own admission in closing argument stated that Ms. Stine was "not the brightest bulb in the pack." RP 346. Thus, within reasonable probabilities, the outcome of Mr. Westom's trial would have been different absent the error. Mr. Westom is entitled to reversal of his conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated, Mr. Westom submits this Court must reverse his conviction and remand for a new trial.

DATED this 29th day of September 2010

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends across the signature block.

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DIVISION ONE**

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)	
Respondent,)	NO. 65319-9-I
)	
GARY WESTOM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF SEPTEMBER, 2010, 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:

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