

68735-2

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NO. 68735-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAMSON HAILEMARIAN,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER L. WORLEY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUE PRESENTED

The defense sought to introduce extrinsic evidence to prove a prior act of violence of the victim. The act of violence was subsequent to being robbed by the defendant and was not relevant to the victim's credibility. Did the trial court properly exercise its discretion in excluding such evidence?

B. STATEMENT OF THE CASE

On November 4, 2011, sixteen-year-old Romulus Saunders was walking to a relative's house to get a haircut. 2RP 23, 25. He noticed the defendant, Samson Hailemariam, about 20 feet away from him, riding a bike towards him. 2RP 26. Saunders knows Hailemariam from the neighborhood. 2RP 26. When Hailemariam reached Saunders, Hailemariam got off his bike and asked him what he was doing. 2RP 27. When Saunders told him he was minding his own business, and then proceeded to try and walk past Hailemariam, Hailemariam said, "Stop right there." 2RP 27.

Hailemariam then asked Saunders about the iPhone he was listening to and said, "Let me see it." 2RP 27-28. Saunders told him no and then Hailemariam said, "No, you're going to let me see your iPhone." 2RP 28. A few more words were exchanged and

Saunders tried to walk away. 2RP 28. Hailemarian grabbed Saunders, who tried to convince Hailemarian to leave him alone. 2RP 28-29. Hailemarian forced Saunders into a covered walkway near a building and pushed him up against a wall. 2RP 29-30. Hailemarian told Saunders, "I'm going to blast you," which Saunders understood as street slang for a threat to shoot Saunders. 2RP 30-31. During this time, Hailemarian took Saunders' hat and also took his iPhone. 2RP 31-32. Saunders explained that he did not fight to retain his property because he believed Hailemarian had a weapon and he was scared for his safety. 2RP 32-33.

As Hailemarian had Saunders pushed up against the wall, Officer Stone arrived on the location. 2RP 10; 3RP 22. Unbeknownst to Hailemarian and Saunders, Officer Chapackdee was teaching a class next door and heard the disturbance. 3RP 18. He called his department, the Seattle Police Department, for a unit to arrive and assist, as Officer Chapackdee was not in full uniform that day. 3RP 19-20. As both Officer Stone and Chapackdee approached, they saw Hailemarian pushing Saunders up against the wall aggressively, and yelling at Saunders. 2RP 10; 3RP 22. Hailemarian was physically forcing Saunders up against

the wall. 2RP 10. Saunders was on his toes, with his eyes wide open and appeared to be in shock. 2RP 10-11. Officer Stone heard Hailemarian yell at Saunders, "Bitch Nigga! I'll fuck you up!" 2RP 11.

Officer Stone, in an attempt to distract Hailemarian, yelled at him. 2RP 11-12. Hailemarian turned, with a "deer-in-the-headlights look." 2RP 11. By this time Officer Chapackdee was also present and Officer Stone was able to separate both parties. 2RP 12.

Hailemarian told Officer Stone that Saunders had called him, "a bitch in the walkway and disrespected him" and that Hailemarian, "was standing up for himself." 2RP 13. During this time, Officer Chapackdee was speaking with Saunders about what had happened. 2RP 12-13. Officer Stone also spoke with Saunders and described Saunders as scared and shaking. 2RP 15:

Saunders told the officers that Hailemarian still had his iPhone. 2RP 13. At this moment Hailemarian pulled the phone out of his pocket and said, "here it is" and handed the phone to Officer Stone. 2RP 13-14. Officer Stone confirmed the phone did in fact belong to Saunders and then arrested Hailemarian for robbery. 2RP 14-15.

Before the defense presented their case, trial counsel for the State interviewed defense witness Shane Robinson. 3RP 25-26. Both officers testified that Robinson was present when they arrived but he left the scene early on in the investigation after refusing to give a statement to them. 2RP 19; 3RP 23. The State moved to exclude Robinson from testifying that a couple of weeks after the robbery, Saunders told Robinson that he was going to have his brother kill Hailemarian. 3RP 26.

Hailemarian's trial counsel argued that, because Saunders had denied during cross-examination ever threatening a witness in this case, Robinson should be allowed to testify that Saunders had told him that he was going to have his brother kill Hailemarian. Defense counsel did not argue that this was relevant substantive evidence, but rather impeachment evidence. 3RP 27-31. The actual questioning by Hailemarian's trial counsel was as follows:

Counsel: And so it's your testimony you never tried to use a phone and call your friends?
Saunders: Huh-uh.
Counsel: You didn't threaten to call your friend so that they would come and take care of Samson?
Saunders: No.
Counsel: Okay. Now, Mr. Saunders, did you threaten any witnesses in this case?
Saunders: No.

2RP 44. Trial counsel for Hailemariam then asked no further questions of Saunders. 2RP 44. The State argued that the evidence proffered by defense was irrelevant and not proper impeachment, and the court agreed. 3RP 31.

C. ARGUMENT

THE DEFENSE SOUGHT TO INTRODUCE EXTRINSIC EVIDENCE TO PROVE A PRIOR ACT OF VIOLENCE OF THE VICTIM. THE ACT OF VIOLENCE WAS SUBSEQUENT TO BEING ROBBED BY THE DEFENDANT AND WAS NOT RELEVANT TO THE VICTIM'S CREDIBILITY. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING SUCH EVIDENCE.

Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Clark, 78 Wn. App. 471, 477, 898 P.2d 854, *review denied*, 128 Wn.2d 1004 (1995). Such abuse occurs when, considering the purposes of the trial court's discretion, it is exercised on untenable grounds or for untenable reasons. Id.

Hailemariam claims that the trial court's exclusion of evidence pertaining to the alleged threat made by the victim, after the crime had been committed, was not only erroneous but also violated his right to present a defense. At trial, counsel for the

defendant argued that whether the evidence was relevant or not, Saunders denied making the statement and that defense was therefore, "entitled to impeach Mr. Saunders' statement." 3RP 27. When the trial court pressed defense counsel to state the relevance of this evidence, defense counsel then argued that it was admissible regardless of relevance. 3RP 27-29. The trial court concluded that this evidence was not relevant to the credibility of the victim. 3RP 29. In response, defense changed their argument. Defense then argued that the victim, "presented himself as somebody who was just a passive victim here, he did not have, basically, an aggressive bone in his body, he was victimized by this person, and yet here he is concocting crimes." 3RP 30. The trial court reiterated that it was not relevant to the victim's credibility and was not proper impeachment. 3RP 30.

A defendant's right to an opportunity to be heard in his defense, including the right to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), citing Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

However, “[t]hese rights are not absolute, of course.” Id. Defendants have no constitutional right to present irrelevant evidence. State v. Gregory, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Similarly, a criminal defendant does not have a constitutional right to present inadmissible evidence in his defense. Clark, 78 Wn. App. at 477, 898 P.2d 854, citing State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L. Ed. 2d 665 (1993).

Here, trial counsel sought to impeach Saunders and the court correctly disallowed the improper impeachment, as defense was attempting to present extrinsic evidence on an issue that was not relevant to the witness’ credibility. Pursuant to ER 608(b):

Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.

The rule allowing this type of impeachment, “allows inquiry into specific instances only when those instances demonstrate a general disposition for truthfulness or untruthfulness. In general, the rule does not allow inquiry about acts of violence...” 5D Karl B. Tegland, *Washington Practice: Evidence* at 335 (2011-2012 ed.). Further, if the inquiry is allowed, and the witness denies the prior conduct, the inquiry ends. The cross-examiner must “take the answer” of the witness and may not call a second witness to contradict the first witness. *Id.* (quoting State v. Barnes, 54 Wn. App. 536, 774 P.2d 547 (1989)).

Here, trial counsel for the defendant asked the victim, “... did you threaten any witnesses in this case?” 2RP 44. First, the question was not relevant to the victim’s credibility. Second, the victim denied having threatened any witnesses in this case. Thus, defense is not allowed under ER 608 to then introduce extrinsic evidence to contradict this fact.

More importantly, even assuming the truth of the proffered testimony from Robinson, his testimony would not even rebut the testimony of Saunders. There is nothing in the record to suggest that Saunders intended for any threat to be conveyed to

Hailemariam. There is nothing in the record to suggest that the alleged threat was conveyed to Hailemariam. Finally, there is nothing to suggest that Saunders would ever consider Hailemariam a witness, as Hailemariam was the defendant, his attacker and his robber. As the trial court noted, if this evidence has any relevance at all, then it is, as “consistent with someone who has been robbed” as not. 3RP 30.

For the first time on appeal, Hailemariam argues a new theory of admission: that the evidence was relevant to proving defense’s theory of the case, stating, “The fact of Saunders’ threat during the fight is made far more probable by evidence that two weeks after this incident, Saunders made a very similar threat.” Brief of Appellant, 10. This is exactly the type of propensity evidence that is not relevant, not admissible and barred by ER 404(b).

Defense relies upon State v. Young, 48 Wn. App. 406, 739 P.2d 1170 (1987). However, that reliance is misplaced. In Young, the defendant was charged with vehicular homicide and testified

that during the crime itself, one of his passengers grabbed the steering wheel causing him to crash. 48 Wn. App. at 408. Young testified that he was not the cause of the accident that killed his passengers. Id. In support of this, Young sought to offer evidence that on four separate occasions, prior to the accident, the same passenger had grabbed the wheel away from the driver. Id. at 408-09. In Young, the trial court's suppression was reversed based solely on 404(b), because the evidence was deemed admissible to prove the identity of the person truly responsible for the accident, the control of the vehicle by the victim and the proximate cause of the accident. Id. at 413. That is simply not the case here. At most, the defense theory is that the alleged threat showed the victim's propensity toward violence. Such evidence is not admissible pursuant to ER 404(b), even if admission of the evidence had been argued on that basis below. However, a party may assign evidentiary error on appeal only on specific grounds argued at trial. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

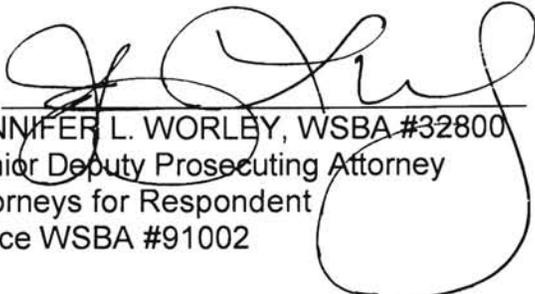
D. CONCLUSION

For the reasons cited above, this Court should affirm Hailemariam's conviction.

DATED this 18 day of January, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JENNIFER L. WORLEY, WSBA #32800
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 JENNIFER SWEIGERT, 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. SAMSON HAILEMARIAN, Cause No. 68735-2-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.

Betty A. Huddleston
Name

1/22/13
Date

Done in Seattle, Washington