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CRIMINAL DIVISION

CLERK OF COURT

STATE OF WASHINGTON

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No. 33455-1-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
V.
ADAM N. SMITH

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The defendant in this case was denied his right to confront his accusers by the limitation of his right to cross examine a key State's witness who had lied in the original report to protect her husband, and had become so angry when her husband's presence in the house was revealed that she threatened two witnesses with violence.

II. ISSUES PRESENTED

Did the sustaining of the State's objections during cross examination deny the defendant his right to confront his accusers?

III. STATEMENT OF THE CASE

The defendant Adam Smith, Appellant herein, was charged by Information filed on February 22, 2005 with one Count of Assault in the Second Degree in violation of RCW 9A.36.021(1)(c) and one count of Residential Burglary in violation of RCW 9A.52.025. Both included allegations of domestic violence. The allegations arose out of an incident that occurred on February 18, 2005 where it was alleged that the defendant had tried to break into a home to where a woman who he had a relationship over the past seven and one half years and had a child with was staying, Kyleen

Campbell. She had sought a no contact order against the defendant on February 11, 2005 and it was served on the defendant on February 11, 2005. CP 1-13.

The appellant was arraigned on the information on February 22, 2005. Pleas of not guilty were entered and the matter was set for trial on April 11, 2005, omnibus was scheduled for March 16, 2005. CP 11, 13. Smith was held on \$50,000.00 bail. CP 15. On February 14, 2005 John R. Hyson entered a Notice of Appearance. CP 16. Mr. Hyson missed the Omnibus date of March 16, and the matter was reset for March 23, 2005. CP 17, 18. On March 17, 2005 an Omnibus Application was filed by the defendant's counsel. CP 19. The Omnibus was continued to April 4, 2005 on March 23, 2005. On March 25, 2005 an incomprehensible Knapstead motion was filed. The trial was once again continued on April 5, 2005 to May 9, 2005. Then to May 11, 2005 because of a conflict in the schedule with the defense counsel. CP39 – 40.

On June 13, 2005 the day the trial began, the defendant was arraigned on an Amended Information charging him with One Count of Burglary in the First Degree, One Count of Assault in the Second Degree and one Count of Violation of a Court Order, a gross misdemeanor. CP 45.

On June 16, 2005 the jury returned a verdict of Guilty to Count I,

Burglary in the First Degree, Not Guilty to Count II, Assault in the Second Degree and Guilty to Count III, Violation of a Court Order. CP 217. The jury also found that the defendant was not armed with a deadly weapon at the time of the commission of the crime of Burglary in the First Degree and was not unanimous that the crime was committed against a family or household member. CP 219. The Violation of the Court Order was found to be against a family member. CP 223.

On June 22, 2005 the defendant was sentenced 17 months in prison. He filed a Notice of Appeal that date.

IV. STATEMENT OF FACTS

David Hughes of the Bremerton Police Department was called out to a residence on 414 South Yantic in the City of Bremerton. Dispatch had told him that a male was trying to kick in the door of the residence. VRP 43. When he arrived two dogs were barking in the yard, the front door casing was splintered and the door was kicked in. VRP 44. He found a sweatshirt laying to the side of the porch. In the sweatshirt he found a couple of large rocks, a set of keys to a Honda vehicle and a tube of what appeared to be makeup. VRP 44. He also noticed and recorded with pictures that the door had been damaged. The dead bolt and the entry lock set striker plates had been broken off the casing. VRP 67. A Honda CRX was located near the house. VRP

94.

Hughes spoke to two women at the residence: Angel Bedrosian and Kyleen Campbell. He took written statements from the two of them. He testified that he only went into the doorway of the residence and did not see anyone else in the house.

Kyleen Campbell testified that she had been dating the defendant, Adam Smith for the past seven-and-a-half to eight years and that they had two children out of this relationship. VRP 56. She had gotten a Protection Order against him on February 11, 2005. After getting the restraining order she stayed at Angel Bedrosian's house - The 414 Yantic Avenue Address. VRP 58. On February 17, 2005, she testified that she had seen Adam Smith earlier in the day when she and Angel arrived back at the address. He, according to Ms. Campbell was driving his Honda CRX, and followed the two women for several blocks. No contact was made at that time. Later, at approximately 12:30 a.m. she awakened by Angel yelling "Get him, Cain. Get Him." Cain was Angel Berosian's Pit Bull mix. Also present in the home was Louis Gaulden, Angel's husband and four children. VRP 62. She testified that when she looked out the bedroom door, she saw the entry way was bent forward and Louis and Angel were holding it up. She immediately called 911 and went back into the bedroom. She claimed that she looked from behind a shelf

and heard him say "I just want to talk to Kyleen." VRP 65. She could not see his face directly from where she was positioned. He was dressed in all black, and according to the witness had a gun by his hand, and was pushing at the door. The whole incident took only a few minutes and Cain was outside the house the whole time pulling on the alleged intruder. She testified that the entry door had previously been broken by Angel's husband, Louis but not as badly as it was on that night. Kyleen did not tell the police about Louis, being in the house because, she said, that she was protecting him for her friend Angel who also had a Protective Order against her husband. VRP 73. The information about Louis being in the house had just been provided to the prosecution 4 days prior to the trial. VRP 73.

Kyleen did not see the door being broken. But believed that the hinges were broken off. The pictures did not confirm her testimony and said she could not see it because she was in the bedroom. VRP 83. She also testified that she and Angel had planned their testimony. But all of that changed on Thursday, when she told that prosecutor that Louis had been in the house at the time of the incident. Angel, when she was told of this, allegedly threatened to kill Kyleen. VRP 90.

The defense called Alan Smith to testify that he was the brother of the defendant Adam Smith and he had been to the 414 Yantic residence once

before about a week before the incident and at that time he noticed that the "whole door jamb was knocked out of the frame." VRP 128.

Mr. Smith also testified outside the presence of the jury that Angel Bedrosian, threatened to have his child raped, because she found out that he was going to testify at the trial and that occurred after she had heard him speak with defense counsel regarding the broken door and Louis Gauden's role in the breaking of it. VRP 130. The judge questioned why this was important. VRP 130. Defense counsel claimed that the threats went to "veracity" and "bias". And further that it was an attempt to intimidate a witness. VRP 131. The judge ruled that the witness, Bedrosian had not testified, and the defense counsel said he would call Alan Smith back as a rebuttal witness. He was not called back.

After much trouble the State called Angel Bedrosian to the stand. But, before she would testify or speak with defense counsel the Court appointed counsel for her. The State offered her immunity for lying in hiding the fact that Louis Gauden was present during the incident. The prosecutor said he would not grant immunity to her for the threats, but that he indicated to Angel Bedrosian that "we (the prosecutor's) office had no interest in prosecuting those threats, but it is entirely up to her as to whether she would be invoking that right or not." VRP 152.

Bedrosian took the stand with this understanding and without objection from defense counsel. She said she knew Adam Smith, and that on February 17, 2005 his girlfriend Kyleen Campbell was staying at her house at 414 Yantic. Kyleen and she were returning from doing errands when they saw the defendant in his car, a white Honda CRX. VRP 159.

Later that night at about 12:30, she testified that she was awakened by the barking of her large dog, Cain. She walked slowly to the door, opened the door and let her dog out saying "Get him Cain." She let the dog out because she believed someone was trying to get into her house. She then opened the door again and saw the dog wrestling with something on the ground which turned out to be a jacket. She said she saw Adam, and Kyleen came out of the room and he said, "Kyleen I want to talk to you." Kyleen turned around and got the phone and called the police. Then he left. Angel testified that the door was pushed off the hinges and was bent as a result of the altercation.

Towards the end of her direct testimony she was questioned by the prosecutor as follows:

Q. Now, a couple of quick questions. The first question is, after this incident happened, did you happen to come down to the courthouse for one of the court hearings?

A. I had to come and get my restraining order dropped for my husband, my no-contact order with my husband.

Q. When you were down here, during that dropping of the restraining order, understanding that you have spoken to your attorney, did you make any threats to any witness, and other persons, at that time?

A. Oh, Actually I have been advised not to say anything about that because it may incriminate me.

Q. Also, in talking, did you have a phone conversation with Kyleen Campbell last week?

A. I talked to her yesterday. Yeah, I talk to Kyleen a lot. I am the one that found her an apartment in Silverdale.

Q. When you talked to Kyleen last week, did you make any threats to Kyleen about her coming - - what she would come and testify to in here?

A. I have been advised not to speak on that because it may incriminate me, also.

Q. And, you understand that our office, the state's office has indicated to you that we have no interest in prosecuting you on those two incidents.

A. I understand.

VRP 171-172.

Mr. Lindsay: Nothing further.

On cross examination the defense counsel tried to go into the nature of the threats as follows:

Q. Along the same line - -

A. Yes sir.

Q. - - of what he was just questioning you about - -

A. Yes sir.

Q. - - did you ever threaten to have the daughter of one of the witnesses in the case raped and killed?

Mr. Lindsay: I am going to object. That has been asked and answered.

THE COURT: Sustained.

Q. (By Mr. Hyson) So, it's a fact that you did have a restraining order against your husband the night that he was there, right?

A. That's correct, sir.

Q. And you have got complete immunity for that right, right?

A. I believe that that's what just happened a few minutes ago.

Q. Why did they give that to you?

MR. LINDSAY: I object, both relevance and - -

THE COURT: Sustained.

VRP 173.

Q. When was the last time you talked to Kyleen?

A. Yesterday.

Q. Was that the day that you threatened her that you are not going to testify about?

MR. LINDSAY: Object, asked and answered.

THE COURT: Sustained.

VRP 193.

She also provided the only testimony in regard to actual entry into the house.

Q. Did he come inside your house?

A. When he was pushing in the door, I can't tell you how much of his body might have got in the door. Maybe a foot, like his foot, maybe the top part of his body. I remember an arm above me, but did he walk in and come in my house? No. That wasn't happening. He wasn't in the right state of mind.

VRP Vol. III p. 198.

Defense counsel attempted to cross exam her as to what benefit she thought she would get from the immunity but was stopped by a sustained objection from the prosecution. The defendant's counsel also attempted to

get into the fact that Bedrosian, had threatened to kill Kyleen and also threatened to have Alan Smith's daughter raped. To both questions she refused to testify on advise of counsel as there was no immunity to the potential harassment charges. The prosecutor objected to the questions as being asked and answered. No motion was made to strike the testimony of Angel Bedrosian.

V. ARGUMENT

The Sixth Amendment Provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor"

Article 1, Section 22, of the Washington State Constitution, guarantees that, "[i]n criminal prosecutions the accused shall have the right . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf. . . ."

The Confrontation Clause of the Sixth Amendment guarantees that a criminal accused be allowed the right "to be confronted with the witnesses against him" is incorporated into the Fourteenth Amendment and hence applies to state criminal trials. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065,

13 L.Ed. 2d 923(1966); Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965). Adequate cross examination is the essence of this right. Even apart from the Sixth Amendment, fair opportunity for cross examination is an indispensable element of due process. Any substantial impairment of cross examination, therefore, violates these rights.

In this case the State called two main witnesses. Angel Bedrosian and Kyleen Campbell, the two had admittedly lied to the investigating officers to hide the fact that Angel's husband Louis Gauden was in the house at the time of the incident the defendant was accused of committing. Gauden also, had a restraining order against him at the time. Both Angel and Kyleen had conspired as to what their testimony would be prior to the trial in this matter to allegedly keep this fact a secret. Louis had evidently gotten violent with Angel and broke a door in the residence which caused Angel to seek the protective order. It was not until just before the trial that the conspiracy was alleged to have ended, when Kyleen was supposed to have come clean with the prosecutor about Louis being in the house on the night of the alleged First Degree Burglary.

It was the theory of the defense, that the door which was broken, was not broken by the defendant but rather by Louis, during the earlier incident. The broken door was the only evidence of entry other than the testimony of

Angel and Kyleen. All other evidence found linking the defendant to the Burglary was found outside of the house. Angel and Kyleen had both agreed to conceal the fact that Louis was in the house to prevent him from being prosecuted for Violation of a No Contact Order. Angel's anger at Kyleen for breaching their agreement caused her to become so angry that she threatened Kyleen's life and threatened to have Alan Smith's daughter raped. The defense believed that this was relevant evidence for the jury to hear as it showed motive to lie and the depth of that motive.

The prosecution effectively cut off any inquiry into this line of questioning, by granting Angel Bedrosian immunity as to her false statement to the police on the day of the incident but not granting her immunity on the threats against Kyleen and Alan's daughter. Angel was therefore given the privilege of choosing what she wanted to answer and claiming the Fifth on what she did not. The defendant was not allowed to explore with Angel why she needed immunity in regard to her lying to the police at the time of the incident. The defendant was not allowed to go into the threats made against Kyleen and Alan Smith and since the jury never heard the testimony of Alan Smith as to the threats against him and his family, they never got to know the depth of the lengths that Angel Bedrosian was willing to go to protect her husband.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. Luvene, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." Powell, 126 Wn.2d at 258. Similarly, a court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). However, the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters. See State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987).

In this case as in State v. Darden 145 Wn.2d 612, 41 P.3d 1189 (2001) we have an attempt to cross examine an essential fact witness. In that case the court had not allowed defense counsel to cross examine the detective in a drug bust as to the location of his surveillance, based on a claim of a need to protect the location and the persons who had allowed him access to the location. The Supreme Court reversed the conviction based on a violation of the defendant's right to confront the witnesses against him. In this case, the evidence went to motive to lie and the depth of that motive.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. U.S. Const. amend VI; Const. art. I, § 22; Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514(1983) at 15. In the constitutional sense, "confrontation" means more than mere physical confrontation. Davis, 415 U.S. at 315. The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). The purpose is to test the perception, memory, and credibility of witnesses. State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77 (1982); State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). Confrontation therefore helps assure the accuracy of the fact-finding process. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. Id. As such, the right to confront must be zealously guarded. State v. Kilgore, 107 Wn. App. 160, 184-85, 26 P.3d 308 (2001). However, the right to cross-examine adverse witnesses is not absolute. Chambers, 410 U.S. at 295. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague,

argumentative, or speculative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). Since cross-examination is at the heart of the confrontation clause, it follows that the confrontation right is also not absolute. The confrontation right and associated cross-examination are limited by general considerations of relevance. See ER 401, ER 403; Hudlow, 99 Wn.2d at 15.

Here, we have two individuals who were willing to conspire to lie to protect the husband of one of the women. The depth of that commitment was relevant to show the bias of the witness and also her willingness to shift the blame for the damage done to her house to the defendant as opposed to her husband.

The objections were sustained as to the alleged threats, not for relevance but because they were asked and answered. VRP 173 and 193. The questions regarding any threats were asked by the prosecutor, not the defense counsel. VRP 171-172. They were not to the specific nature of the threats but only generalizations. The defense counsel had not asked any questions of the witness as to the matters that the objection were sustained. Here the trial court found it unnecessary for defense counsel to be able to inquire into the matters raised on direct by the prosecution. It appears that under the court's reasoning, it is enough if the prosecution gets to ask a question. If the question has been asked by the prosecutor why allow any more inquiry.

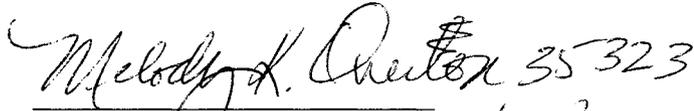
The court did not allow any inquiry into why she believed she needed immunity as to not disclosing that her husband was in the house, and that he had a restraining order against him as well, and effectively lying to the prosecutor and the investigator.

The combination of the prosecution's limited immunity and the court not allowing any questions as to the alleged threats or why she believed she needed immunity effectively cut off all cross examination relative to motive and bias and denied the defendant the right to confront his accusers.

VI. CONCLUSION

Because the defendant was denied the right of confrontation, the court should reverse the conviction in this matter and remand the matter for a new trial.

Respectfully submitted this 14th day of April, 2006.


Roger A. Hunko, WSBA #9295 for Roger Hunko

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STATE OF WASHINGTON

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**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,)
)
) **Plaintiff,**)
)
) v.)
)
) **ADAM N. SMITH,**)
)
) **Defendant.**)

NO. 33455-1-II

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss:
COUNTY OF KITSAP)

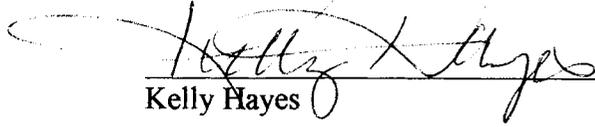
Kelly Hayes, being first duly sworn on oath, does depose and state:

On April 14, 2006, I sent by U.S. Mail the original and one copy of Brief of Appellant to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

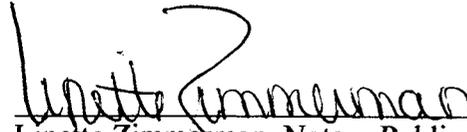
On April 14, 2006, I sent by hand delivery a copy of the Brief of Appellant to the appeals clerk, c/o Kitsap County Superior Court, 614 Division Street, Port Orchard, WA 98366.

On April 14, 2006, I sent by hand delivery a copy of the Brief of Appellant to Randall Sutton, Kitsap County Prosecutor's Office, 614 Division Street, Port Orchard, WA 98366.

On April 14, 2006, I sent by U.S. Mail a copy of the Brief of Appellant to defendant, Adam N. Smith, 1340 Lloyd Parkway, Port Orchard, WA 98366.


Kelly Hayes

SUBSCRIBED AND SWORN to before me this 14th day of April, 2006.


Linette Zimmerman, Notary Public in
and for The State of Washington.
My Commission Expires: 12/09/06.