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COURT OF APPEALS

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STATE OF WASHINGTON

No. 34166-2-II

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

vs.

KEVIN DONOVAN MOORE, Appellant.

THURSTON COUNTY SUPERIOR COURT
The Honorable Richard A. Strophy
Cause No. 04-1-01815-7

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS AND PROCEEDING'S.

On June 30, 2004, young Mitchell Coxwell was betrayed by an erstwhile associate, beaten, and robbed. RP 26, 30-31, 215-216, 233-34.

Coxwell earlier had contacted Ian McCrae, an inmate he had met while serving a term in juvenile detention, and arranged for the purchase of several hundred dollars worth of drugs. RP 216-219. The two agreed to meet at a truck stop off Interstate-5 in south Thurston County. RP 26,219.

Coxwell traveled to the rendezvous with two young friends: Freddie Garza and Megan Dickensen, both seventeen years of age. RP 81, 84, 143, 145. Upon arrival, the trio encountered Ian McCrae in the passenger seat of a "green car." RP 88, 147-148, 154, 221. McCrae was found to be accompanied by the more formidable appearing defendant¹, who was the driver of the "green car." RP 89, 92, 97-98, 151-155, 225-229.

Coxwell spoke with McCrae and the defendant, who required him to drive off with them in order to consummate the deal. RP 224. In spite

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¹ The defendant was not known by Coxwell or his companions. However, the defendant was variously described as "muscular...shaved head, 6 feet tall, 300-350 pounds" RP 32, a "big guy," "taller bald-headed" RP 89, 90, 97-98; and "tall. ...in shape." RP 151. At trial, each witness identified the defendant as the driver of "the green car." RP 97, 98, 155, 225.

of his own misgivings Coxwell agreed, got into the back seat of the “green car” and was driven off to a remote area. RP 227-228, 231.

Moore stopped the car, signaled to McCrae, and they demanded that Coxwell hand over “the money.” RP 231-232. Lest Coxwell mistake their purpose, the defendant grabbed his arm and ordered: “let go of the fucking money...let go or I break your fucking arm.” RP 233-234. Coxwell – a mere 5’ 8” tall, and 115 pounds, took Moore seriously. RP 234.

Coxwell managed to open the car door, but his escape was thwarted by McCrae, who left his passenger seat and grappled with the victim, choking and throttling him. RP 233-234, 236. So disabled, Coxwell’s money – over four-hundred dollars – was stripped from his grasp. RP 235. He was left stranded in the roadway when the robbers roared off in “the green car.” RP 235.

Coxwell managed to rejoin his companions Garza and Megan some time later, “...all beat up.” RP 92-93, 152. 911 was called, and the responding deputy sheriff noted the victim’s apparent injuries to his throat and neck. RP 29, 42.

Coxwell was able to provide the name of one suspect, Ian McCrae, and descriptions of the driver (eventually identified as the defendant) of

the “green car.” RP 31-32, 46. The “green car” was located several months later after a sheriff’s detective received information (from Ian McCrae) that Moore might have been involved. RP 53, 59.

The defendant was identified as the driver of the suspect vehicle by Coxwell from a photo montage in early October, 2004. RP 54-56. The “green car” was located at an autobody shop run by a business associate of the defendant’s named Byron Shaw. RP 59-61, 79. When interviewed by a detective, Shaw was “unclear” about when he had acquired the vehicle – a green 1999 Pontiac² – from the defendant, but allowed that it might have been the preceding “late June – early July.” RP 59, 61.

At trial, various Department of Licensing records evidencing the transfer of this green Pontiac to Mr. Shaw were offered into evidence. RP 63, 173, Ex. 13. These documents were dubious as to the dates of the actual transfer³. Mr. Shaw had to admit his lie – that the intent was to “fudge the dates.” RP 180.

In sum, the jury was presented with evidence of robbery from the victim, Mitchell Coxwell, as well as the evidence of Coxwell’s teenaged companions, who identified the defendant as the driver of the vehicle that drove off with Coxwell, and that some minutes later he returned “beat up”

2 This vehicle subsequently was identified by Coxwell and Garza as the car used by the defendant and McCrae on June 30th. RP 64, 88.

3 Various given as June 21, 2004, or July 8, 2004. RP 175-176.

and without money. Soon thereafter, the defendant unloaded the “green car,” in a vain attempt to avoid discovery as a participant in robbery.

The defense was one of alibi, which was rejected by the jury. CP

10. This appeal followed.

II. RESPONSE TO ASSIGNMENTS OF ERROR.

A. THE TRIAL COURT PROPERLY PERMITTED IMPEACHMENT OF THE WITNESS STEPHANIE COLSTON BY HER PRIOR INCONSISTENT STATEMENTS.

The defendant’s former girlfriend was called by the defense to attempt to establish that on the date of the crime – June 30, 2004, she and the defendant were sojourning at Long Lake in Thurston County. RP 287-290.

During cross-examination the witness acknowledged that she became aware of the fact that she would be a witness in the summer of 2005, a few months before trial. RP 295. In further cross-examination the prosecutor developed the theme that the defendant had tried to speak with the witness about her testimony, and finally she flatly denied that the defendant contacted her. RP 295-301. Actually, the defendant had come to Colston’s house, tried to enter, and she called the sheriff. RP 373-374, 395-397. The witness stated: “I don’t think you guys have anything saying that I did (call the sheriff).” RP 300.

Thereafter, an offer of proof was made outside the presence of the jury and the court – after balancing the probative value and possible prejudicial effect – allowed limited evidence to be presented to the jury. RP 386-388. Essentially, the court limited the rebuttal evidence to the fact that Colston did call law enforcement, that Moore had been present at her residence, and that she did not wish to make a statement because she was afraid of how he would react to her giving a statement. RP 387. The trial judge proposed giving the jury a limiting instruction, but this offer was rejected by the defense. RP 388, 399. In any event, the trial court properly allowed impeachment by extrinsic evidence of the witness' prior inconsistent statement. This was not impeachment on a collateral matter.

First, the issue of the credibility of an alibi witness and whether or not the subject matter of such testimony was discussed with a defendant beforehand is material.⁴

Secondly, the two statements were inconsistent. Colston had complained that the defendant contacted her – subsequently she said that he did not. In Washington, the test for determining whether statements are inconsistent was first stated in Sterling v. Radford, 126 Wash. 372, 375, 218, P.2d 205 (1923):

4 A material fact is of some consequence in the context of other facts and the applicable law. State v. Sargent, 40 Wn. App. 340, 348, 698 P. 2598(1985).

...inconsistency is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done. On a comparison of the two utterances are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?" (emphasis in original)

Finally, the impeachment was not on a collateral issue. In Washington, the "test" for determining whether or not a fact is a collateral matter was adopted in State vs. Dickenson, 48 Wn. App. 457, 468, 740 P.2d 312 (1987):

Could the fact upon which error is based have been brought into evidence for a purpose independent of the contradiction? ... (citation's omitted)... (matter is collateral if the evidence is inadmissible for any purpose independent of the contradiction).

The "fact" of the defendant's contact with the witness when he did, and her concern about his reaction to her cooperating with the police thereafter, would be admissible as conduct evidencing guilt or a "guilty conscience." For example, evidence that a defendant threatened a witness is normally admissible to imply guilt. State vs. Bourgeois, 133 Wn. 2d. 389, 400, 945, P.2d 1120 (1997). Threatening gestures directed towards a witness are relevant to show consciousness of guilt. State vs. McGhee, 57 Wn. App. 457, 788, P.2d 603 (1990). Conduct that falls short of a threat but is nevertheless intended to influence the testimony of a witness may be admissible in the same manner. State vs. Moran, 119 Wn. App. 197, 81, P.3d 122 (2003). Thus, the contact by the defendant with the witness

could have been admissible for a purpose “independent of the contradiction,” and so was not a collateral matter.

B. THE DEFENDANT’S CROSS-EXAMINATION OF MITCHELL COXWELL WAS NOT SO RESTRICTED SO AS TO VIOLATE HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES.

The instant offense occurred on June 30, 2004, CP 9, and trial commenced October 26, 2005. Several days before trial began the victim, Mitchell Coxwell, was charged with Burglary in the First Degree. RP 14, 16. This charge of burglary became the subject of a plaintiff’s motion in limine which, after time, was granted by the court. RP 13-16, 242-249. The trial judge noted that the specific instance of conduct “...must be probative of truthfulness or untruthfulness. It must relate to the witness’ character for truthfulness or untruthfulness.” RP 248.

The defendant argued that Coxwell might try to “curry favor” with the State through his testimony and “get some help on these burglary charges.” RP 243.

The trial court, having heard the testimony of the investigating detective as well as Garza, Dickinson, and Coxwell, rejected this notion, noting that Coxwell throughout was “consistent” in his statements regarding the robbery and that no agreement was made with Coxwell

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concerning the pending burglary charges in order to gain his testimony at trial. RP 251, 253. Defense counsel conceded that the trial judge was correct. RP 252.

And so the defendant was precluded from asking the witness about an accusation of burglary. This did not prevent defense counsel from establishing that Mitchell Coxwell was currently in jail RP 264. In fact, the defense was hardly hamstrung in its ability to conduct wide-ranging cross-examination. Coxwell was examined about his criminal history (conviction for possessing stolen property and a stint in juvenile detention) RP 216, 217, drug ingestion and addiction (RP 255-257), his alleged inconsistent statements RP 259-263, 265-268, his motives for testifying (RP 264-265), and his memory. RP 267. This was rich ground that was tilled vigorously by the defense, albeit to no avail.

Since the charge of burglary did not entail a conviction, resort must be had to Evidence Rule 608, which provides; in pertinent part:

(b) Specific instances of Conduct. Specific instances of the 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. (emphasis added).

Thus, at the very outset, cross-examination by a defendant of any witness is limited by court rule to instances of misconduct that are “probative of truthfulness or untruthfulness.”

Limitations on a criminal defendant’s confrontation rights have been approved by common law. In State vs. Guizzoti, 60 Wn. App. 289, 293, 803 P.2d 808 (1991), the Court of Appeals pointed out that while the Constitution requires a criminal defendant be “permitted to adequately cross-examine” a state witness:

A trial court may, however, refuse to permit cross examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative.

Other courts have disdained permitting impeachment on the basis of a charge. In United States vs. Hodnett, 537 F.2d 828 (5th Cir. 1976), the court baldly noted that “the effort to impeach on the basis of mere accusation or arrest is not permissible.” In State vs. Harmion, 21 Wn. 2d 581, 588, 152 P.2d 314 (1944), the Supreme Court disallowed impeachment on the basis of a charge, noting that “...these facts (arrested...accused) are immaterial, since innocent persons may be arrested or indicted.” More recently the Supreme Court affirmed limitations on defense cross-examination when the defense attempted to

impeach a State's witness about alleged drug-related activities. State vs. Benn, 120 Wn. 2d. 631, 651, 845 P.2d 289 (1993). The Court reiterated that "Trial courts have discretion to determine the scope of cross examination and to prohibit further questioning where the claimed bias is speculative or remote." The claimed bias of Mitchell Coxwell – that he might think favorable testimony might help him is the sheerest speculation.

III. RESPONSE TO "STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

1. The prosecutor did not violate any motion in limine. Prior to taking testimony, the defense moved to preclude the reference (anticipated to be made by Mitchell Coxwell) to the defendant as "the source" for drugs Coxwell was seeking on June 30th. The Court reserved ruling on the issue, advising counsel: "You'll have to interpose an objection, and I'll rule on it ... but I'm not going to exclude mention of it in limine. RP 11. Thereafter, during direct examination of Coxwell, various objections were made – some sustained, another overruled. RP 223-224.

2. Ground 2 by the defendant makes no reference to the record in support of the claim of a violation of the "Brady Law." The claim is baseless.

3. This ground has been addressed in RESPONSE TO ASSIGNMENTS OF ERROR, 2-B.

4. The crime date was June 30, 2004. Defense alibi witnesses testified that they were at Long Lake, Thurston County, with the defendant at that time.

Stephanie Colston testified that she and the defendant journeyed to Las Vegas, Nevada, in late June, 2004, and returned to Olympia on June 28th. RP 287. If this Las Vegas trip “plane tickets and ... hotel bill” are what the defendant is referencing here, evidence of the trip was testified to by Ms. Colston. Insofar as documents might buttress the claim of such a trip, they would be superfluous if not irrelevant, because the “alibi” concerned the crime date.

The documents demonstrating the transfer of the defendant’s green Pontiac to Mr. Shaw were certified copies of records from the Department of Licensing. RP 63, Ex. 13. They were admissible under RCW 5.44.040.

5. The terms “perjury” and “lie” were first used by the defense. RP 433. During closing argument, defense counsel referred to the alibi witnesses who testified “uniformly ...” (RP 433), and thereafter, counsel rhetorically asked the jury about whether they “... could ...get ... your friends to come in and perjure themselves...?” RP 433.

Finally, defense counsel reiterated: “If you want to believe they’re all perjuring themselves, fine...” RP 435.

The rebuttal argument by the prosecutor was confined to answering the defense argument and otherwise was based on the evidence presented at trial. RP 457.⁵

6. Detective David Haller was the lead investigator in the case and was properly allowed to sit at counsel table during the trial. RP 18, Ex. 615.

7. There is no reference made to the record in support of this claim.

8. Mitchell Coxwell was carrying hundreds of dollars – later stolen from him – in order to buy drugs from Ian McCrae who was present at the rendezvous with the defendant, Moore. RP 219-222, 225. As noted by the trial judge, such evidence did not put the victim “in a very good light”, but it was part of the “res gestae.” RP 7-8. Certainly, the meeting between Coxwell and McCrae (and the defendant) was “an inseparable part of the crime charged” and therefore admissible. State vs. Tharp, 96 Wn. 2d 591, 637 P.2d 961 (1981).

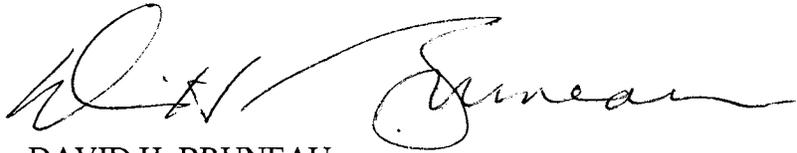
⁵ Witness Byron Shaw, one of the defendant’s cronies, admitted “fudging” the documents – he admitted lying. RP 180. Since these documents were also executed by the defendant, he was party to this cover-up. RP 456. Similarly, alibi witness Colson was caught in a lie. RP 300.

IV. CONCLUSION.

The defendant received a fair trial. The evidentiary rulings by the trial court were well considered and appropriate. The defendant was not prejudiced by these rulings in any way. The conviction for robbery in the first degree should be affirmed.

RESPECTFULLY SUBMITTED this 26 day of September, 2006.

EDWARD G. HOLM
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A handwritten signature in black ink, appearing to read "D. H. Bruneau", written in a cursive style.

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