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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 34425-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMAL PAYTON,

Appellant.

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

The Honorable John A. McCarthy, Judge

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REPLY BRIEF OF APPELLANT

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A. **REPLY TO RESPONDENT'S STATEMENT OF THE CASE**

The state presents the "facts" of the case as much more straight forward and clear than they were presented to the jury at trial.

First, the testimony of Patrick Olson, the complaining witness, was not simply that he was having some beers with his friend Joe when Mr. Payton and another man, called Youngster, arrived. Brief of Respondent (BOR) at 6. Mr. Olson described Joe initially in his testimony as one of the three men who came to the house with Mr. Payton and Youngster. He told the 911 operator that there were three men involved in what he described as a strong-arm robbery; he provided descriptions of all three men. RP 81-84, 94, 97-98, 118-119. Only later in his testimony did Mr. Olson explain that Joe had spent the night at his house and assert that Joe did not take part in the incident. RP 119.

Second, Mr. Olson was far from clear about the reason for the incident. He said at different times that the incident occurred because Mr. Payton's girlfriend was caught joyriding in his car, because Mr. Payton and Youngster were part of a clique that were conspiring to play games with him, because he

got "lippy" or was rude to the men, and because the men were robbing him. RP 44-46, 86-87, 89-90, 93-94, 99.

Third, contrary to the assertion that Mr. Payton and Youngster struck Mr. Olson "with bat, knife and fists," Mr. Olson insisted that he did not see any of the blows land and could not tell if Mr. Payton had hit him with the bat. RP 92.

Q Did you see the baseball bat?

A I didn't see the knife, but I seen that he had a bat.

Q How was he holding it when he first approached?

A Just kind of toward his side.

Q Do you know whether he was successful in striking you with the bat?

A Yeah, I can -- there would have to be camera footage to get that. All I know is I received quite a few blows to the head. You know, to break my head open like that, you know, it would have to be a piece of metal of some kind, or not have to be, but--

Q Did you see any of the blows actually hit you?

A No.

Q Let me start with the baseball bat. Did you see him actually hit you with the baseball bat?

A No I just had my guard up.

Q And is that why you couldn't see?

A. Yeah, I put my guard up.

RP 92.

Later, Mr. Olson responded to a question, "But you could not tell with what they were hitting you; is that correct?", with "Yeah, you are right about that." RP 122.

Officer Shawn Noble, who responded to the 911 call, testified that he noticed a small cut and some bruising on Mr. Olson's face; he wrote in his report that Mr. Olson was treated for "minor scrapes and bruises." RP 63-65, 76. The fire department concluded that Mr. Olson did not need to go to the hospital. RP 74. The following day, Mr. Olson learned that his cheekbone was broken. RP 81, 101. Mr. Olson described the bat, at one point, as being short and "like a boy bat," and at another point as being about four feet long. RP 111-112.

Fourth, although the state asserts that Mr. Payton was going to take Mr. Olson's television set and that Youngster was going to get a truck to do this, Mr. Olson admitted that he watched after the men left and no one took anything from the house or returned to it after they left. RP 96-98, 99, 120.

Even though Mr. Olson told the 911 operator that three men were taking his television out of his house, nothing was taken. RP 120.

**B. ARGUMENT IN REPLY**

**1. THE TRIAL COURT ERRED IN ADMITTING MR. PAYTON'S STATEMENT THAT HIS LIFE WAS OUT OF CONTROL BECAUSE OF HIS DRUG USE.**

The state argues that Mr. Payton's statement, three months after the alleged incident, that his life was out of control because of drug use was somehow relevant to Mr. Payton's trying to minimize or justify the assault-- even though Mr. Payton repeatedly denied hitting Mr. Olson. BOR 11.

The state does not address at all Mr. Payton's arguments (1) that any possible probative value of the statement was greatly outweighed by the unfair prejudice engendered by admitting it, and (2) that it is well-established that evidence of drug use is admissible only on a showing that the witness was under the influence of drugs at the time of testifying or the incident or when a defendant puts his character at issue. See Opening Brief of Appellant (AOB) 14-15; State v. Dault, 19 Wn. App. 709, 719, 578 P.2d 43 (1978). In failing to address these arguments, the state implicitly admits that it

has no response to them which would be helpful to its position.

It is unclear why Mr. Payton would be trying to minimize or justify his actions while denying that he hit Mr. Olson. Any possible relevance of his statements was, in any event, greatly outweighed by its unfair prejudice. Moreover, the statement about drug use did not meet any of the criteria for introducing such evidence. Evidence of drug use is unfairly prejudicial and likely was used by the jury to infer that Mr. Payton was the type of person to have committed the crime. The wrongful admission of the evidence should require reversal of Mr. Payton's conviction on appeal.

**2. THE TRIAL COURT ERRED IN ADMITTING THE 911 TAPE AS AN EXCITED UTTERANCE; MR. OLSON WAS CALM AND COLLECTED DURING THE CALL AND HAD TIME TO REFLECT AND EXAGGERATE THE TRUTH.**

The state's argument is that Mr. Olson's 911 call was properly admitted as an excited utterance because Mr. Olson was emotional after the call. This argument should be rejected. The defense assertion at trial that Mr. Olson was "calm, cool, collected" at the time he spoke with the 911 operator was un rebutted at trial and on appeal. BOR

15; RP 20-21, 106-107. The 911 tape speaks for itself; his statement was not an excited utterance because he was not excited at the time he made the statement.

Further, the state is incorrect when it asserts that Mr. Olson was truthful when he reported that items were being taken from his house. BOR at 16-17. Mr. Olson admitted he was improvising during the 911 call because he was "starting to get paranoid." RP 119. He was reporting what he feared was happening, not what he knew to be true. Mr. Olson admitted that while he was on the phone he saw Mr. Payton and Joe leave the house without the television set. RP 94. He testified at trial:

A Him [Mr. Payton] walking out, Joe walking out, car stopping by and looked--like I said, it looked like they were handing him something, who knows what it was. I don't care what it was. But it didn't look--*it was nothing of mine, you know.* It could have been something of theirs that they wanted to get rid of.

But I can't be positive if he was handing him. Just like he walked up to the window and looked like he had tossed something in there.

Q "He," being JP [Mr. Payton]?

A No, Joe.

. . . . .

Q When you were at your uncle's place calling the police, what is the first thing you saw happen at your home?

A One person ran out of the kitchen side of the door.

Q Do you know which person that was?

A Joe

Q And what is the next thing that you saw?

A Him walking out towards the park.

Q "Him" being?

A JP walking out toward 96th

Q A different direction than Joe?

A Yeah

RP 96-98. Mr. Olson believed that they were going to get a truck and take his television, but he saw Mr. Payton leave without it.

The 911 tape was not admissible as an excited utterance because Mr. Olson reflected and told things that he did not know to be true and which were not consistent with the things he actually observed. He was not so under the influence of the incident that he could not make a considered statement to the 911 operation. Under these circumstances, the trial court erred in admitting the tape as an excited utterance.

**3. THE TRIAL COURT ERRED IN DENYING MR. PAYTON'S MOTION FOR NEW TRIAL BASED ON THE JURY'S CONSIDERATION OF EXTRINSIC EVIDENCE.**

Contrary to the argument of the state, it is clear that the jury did consider extrinsic evidence during deliberations. Ms. Gustafson, one of the jurors, was very clear that she believed that another potential juror who worked in the evidence room had actually seen the bat. CP 62; RP(2/10) 7-8. Ms. Gustafson deliberated and believed that there was a bat during deliberations because of the extrinsic evidence at voir dire. Although she initially denied that the excused juror's comments were discussed during voir dire, she later agreed that she was not certain whether the belief that there was a weapon in the property room was or was not expressed during deliberations. RP(2/10) 10-12. In her taped statement, Ms. Gustafson said that the potential juror who worked in the evidence room was "familiar with the weapon and had indeed seen the weapon. So at that point, that's why we all figured that there was a weapon." CP 62.

And most importantly, although the state discounts the information from Mr. Kotsu, because he "had some problems communicating in English" and

discounts Mr. Kotsu's concerns about whether guilt had been proven because English was his second language, it was defense counsel's conversation with Mr. Kotsu that led to Ms. Gustafson. Mr. Kotsu reported that Ms. Gustafson said "we know there was a bat because the property evidence officer saw it." RP(6/24) 9-10 (as reported by defense counsel). Ms. Gustafson confirmed that she believed that the property evidence officer had seen the bat. If she had not said what Mr. Kotsu believed she said during deliberations, then he would have had no way of knowing what she thought. If he, as the state asserts, had a question about whether there was a bat and that question was resolved for him by what Ms. Gustafson said, then certainly prejudice is established.

Whether the assault took place with the bat was crucial to a finding of guilt. The jury instructions required the state to prove that Mr. Payton committed an assault with a deadly weapon. CP 20. The bat was the only weapon that Mr. Payton was accused of using during the incident. The jurors' belief, based on extrinsic evidence, that

the bat was actually taken into evidence was prejudicial.

Consideration of the extrinsic evidence was improper because it was "not subject to objection, cross examination or rebuttal." State v. Pete, 152 Wn.2d 546, 553, 98 P.3d 803 (2004). Here, the evidence was simply not true; there was no bat taken into evidence. Mr. Payton was so prejudiced that nothing short of a new trial could cure the prejudice. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The trial court erred in denying Mr. Payton's motion for new trial and therefore his conviction should be reversed on appeal.

**4. CUMULATIVE ERROR DENIED MR. PAYTON A FAIR TRIAL.**

In this case all of the errors combined to enhance the unfair prejudice to Mr. Payton and his conviction should be reversed because of the cumulative impact of the errors. The cumulative impact of the introduction of the unfairly prejudicial statements about drug use, the introduction of the 911 tape which was not demonstrated to be reliable and the introduction of extrinsic evidence during deliberations should

require reversal of Mr. Payton's convictions and a remand for retrial without the errors.

C. **CONCLUSION**

Appellant respectfully submits that his conviction for second degree assault should be reversed and remanded for retrial. At the retrial, the court should exclude the portion of Mr. Payton's custodial statement referring to his drug use and should exclude the 911 tape.

DATED this 6<sup>th</sup> day of November, 2006

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I certify that on the 6th day of November, 2006, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

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