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NO. 34527-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TOBBIE DUANE EATON,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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ASSIGNMENT OF ERROR

Assignment of Error

Trial counsel's failure to object when the state called a witness solely for the purpose of rebutting his testimony with prior inconsistent statements and when the state argued substantively from that rebuttal evidence denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Issue Pertaining to Assignment of Error

Does a trial counsel's failure to object when the state calls a witness solely for the purpose of rebutting his testimony with prior inconsistent statements and when the state argues substantively from that rebuttal evidence deny the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when, but for that evidence, the result of the trial would have been an acquittal?

STATEMENT OF THE CASE

Factual History

At about 2:00 in the afternoon on September 5, 2005, Jason Roth and his girlfriend Wendy Scales went to the home of Dustin and Shana Hysmith for a bar-b-que. RP 7, 25, 123-124, 138. Other persons were present along with a number of children. *Id.* Both Jason and Wendy consumed a number of alcoholic drinks during the afternoon and evening. RP 9, 26, 27. At about 11:30 that evening Jason and Wendy walked out front to leave. RP 9. As Wendy walked up to her car, which was parked on the street, a small, older, vehicle with three males inside slowed as it passed. RP 9, 139-140. At least one of the males asked Wendy how she was doing, and she replied that they should just keep on driving down the road. *Id.* Wendy finds this type of conduct very rude and she does not tolerate it. *Id.*

Upon seeing the vehicle and hearing Wendy's statement, Jason walked up to the vehicle and said "you got anything else to say to my girlfriend?" RP 12. When he did this the front seat passenger got out and Jason put his fists up prepared for a fight. RP 14, 127. However, the person just lunged at him and then backed up to the vehicle. RP 127. At this point both the driver and other passenger got out and yelled for the first person to stop what he was doing and get back in the car so they could leave. RP 33. As the first passenger was getting back in the car Jason felt something warm

on his stomach, reached down, and found that he was bleeding. RP 15. Upon pulling up his shirt he saw that he had been stabbed and his small intestines were protruding from the wound. *Id.* He then said: "Dustin, he stabbed me" or something to that effect. RP 34, 129. While this was happening Shana Hysmith took her children into the house and returned with her telephone. RP 143. She then called "911" to request the police and an ambulance. *Id.*

When Wendy and Dustin heard Jason's comment about being stabbed they both looked carefully at the vehicle license number and tried to get a good look at the people in the vehicle. RP 34, 130. Wendy later described the vehicle as a Toyota although it was actually a Honda and she could not tell whether it was a two or four door. RP 29. The police were eventually able to identify the vehicle owner from the license as Shaun Turner. RP 45, 75. Wendy Scales was later able to identify Shaun Turner as the driver of the vehicle from a photo montage. RP 46-48. However, the police did not prepare a montage with the first passenger's picture in it. RP 49-51. Rather, a number of weeks after the incident she saw a newspaper article with the defendant's photo included and then identified the defendant as the first passenger who stabbed her boyfriend Jason. RP 50-51.

When the police contacted Shaun Turner he reportedly told them that he, the Defendant Tobbie Eaton, and Chris Shaffer had been driving around

town in his vehicle all day on September 5th drinking, getting drunk, and looking for a person who had stolen property from them. RP 68, 162-163. Shaun Turner also reportedly told them that the defendant had a knife with him, that he stated that he was going to cut someone with the knife that night, that he didn't care who it was, and that he didn't care if he went to prison for it. RP 83. Finally, the police claimed that Shaun Turner also stated that he saw the defendant stab Jason Roth, that when the defendant got back in the car he showed him the bloody knife and said that he had told them he would stab someone that night. RP 74. However, by the time the case was called for trial and before the state called him as a witness Shaun Turner denied making any of these statements and denied that the statements were true. RP 74-96.

Procedural History

By information filed October 3, 2005, the Clark County Prosecutor charged the defendant Tobbie Duane Eaton with one count of First Degree Assault while armed with a deadly weapon. CP 1. The case later came on for trial with the defense calling ten witnesses. RP 6-158. When the state called Shaun Turner to the stand, he testified that he, Tobbie, and a third person had been driving in his car earlier in the day and getting drunk, and that he remembered they talked to more than one woman. RP 68. He denied remembering anything else. RP 69. He did state that he talked to the police

but testified that he was scared and that everything he told them was untrue.

Id.

During the direct examination on Mr. Turner the state asked the witness whether or not he had made the following statements to the police or to the attorneys: (1) that the defendant had been in a fight, (2) that the defendant had a knife, (3) that the defendant confronted and stabbed someone, (4) that the defendant showed him a knife, (5) that the defendant had stated earlier in the evening that he was going to stab someone and he didn't care if he went to prison for it, (6) that the defendant had a chrome folding knife with a rubber handle and a three inch blade, (7) that the defendant had wanted to stab someone and didn't care who it was, (8) that he saw the defendant stab someone and Mr. Turner said "What the fuck did you just do", (9) that the defendant said "I told you I would do it; I told you I'd stab someone." RP 69, 70, 72, 74, 79, 81, 83, 85, 86, 88, 96, 97. Mr. Turner denied making any of these statements to the police. *Id.* The prosecutor asked Mr. Turner the last question about the defendant reportedly bragging about committing a stabbing no fewer than eight separate times on direct and redirect examination. *Id.* The defendant's attorney failed to object to any of these questions. *Id.*

In addition, the defendant's attorney failed to object when the state recalled Detective Marler to the stand and asked him about what Mr. Turner

had said to him. RP 149-164. When so asked, Detective Marler testified that Shaun Turner told him that the defendant had committed the stabbing, that that evening he had said that he wanted to stab someone, that after he committed the assault he displayed the bloody knife and said that he had told them that he would stab someone that night. RP 149-164.

During closing argument the prosecutor argued substantively from these statements both in opening and rebuttal. RP 186, 188-190. In the first instance the prosecutor stated:

After admitting to those things, then he was hesitant to admit too much more. He admitted that he had, when he was interviewed by Detective Marler he, told Detective Marler that, in fact, the defendant was the one that did this thing, his buddy, the defendant.

RP 186.

The prosecutor went on in closing and made the following statement when discussing Shaun Turner's testimony.

I asked Mr. Turner, Did the defendant say, See, I told you I'd stab someone, after the stabbing? And Shaun Turner says, Oh, the defendant didn't say that, basically like he's correcting me, you know, like, Well, he didn't say exactly that, he said something else. So obviously again he's remembering exactly what happened and who said what, so he had a clear recollection of what happened, but he's saying that's not what he said, indicated he said something else.

So Shaun Turner obviously was the driver, the defendant's buddy, obviously saw this thing go down. Shaun Turner tried to say that he didn't really see it and he just told Detective Marler he did because he was scared by Detective Marler.

RP 188-189.

The prosecutor went on in rebuttal to state the following:

Shaun Turner did not want to cooperate. It was obvious from his testimony. He didn't want to give up his buddy, the defendant. That was painfully obvious in his testimony. But he did, and he admitted it's his. We've got the right vehicle.

RP 207.

The defendant's attorney failed to object to any of this argument. RP 188-190, 207.

Following argument the jury retired to deliberate. RP 211. The jury later returned a verdict of guilty, along with a special verdict that the defendant was armed with a deadly weapon when he committed the offense. CP 89-90. On a subsequent date the court imposed a sentence of life in prison without the possibility of parole based upon the fact that the defendant had two prior convictions for strike offenses committed and sentenced on different occasions. CP 94-105. These two prior convictions were for Second Degree Robbery committed on February 12, 2002, and sentenced on March 28, 2002, and Second Degree Assault committed on November 23, 2003, and sentenced on December 22, 2003. *See* Exhibit 1 and Exhibit 2. The defense did not dispute the fact or substance of these convictions and did not object to the correctness of the sentence. RP 218-226. The defendant thereafter filed timely notice of appeal. CP 94-105.

ARGUMENT

TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE CALLED A WITNESS SOLELY FOR THE PURPOSE OF REBUTTING HIS TESTIMONY WITH PRIOR INCONSISTENT STATEMENTS AND WHEN THE STATE ARGUED SUBSTANTIVELY FROM THAT REBUTTAL EVIDENCE DENIED THE DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar the defendant claims ineffective assistance based upon trial counsel’s failure to object to the state calling Shaun Turner for the sole purpose of rebutting his testimony with otherwise inadmissible hearsay and then arguing substantively from that evidence in closing. The following examines this argument.

Under ER 802, hearsay “is not admissible except as provided by these rules, by other court rules, or by statute.” Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase “other than one made by the declarant while testifying at the trial or hearing” includes an out-of-court statement made by an in-court

witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). Thus, in the case at bar, all statements the witness Shaun Turner made on prior occasions to a police officer or to the attorneys was inadmissible hearsay and could not be admitted as substantive evidence unless some exception to the hearsay rule applies.

Evidence Rule 801(d)(1) provides an exception under which prior inconsistent statements may be admitted as substantive evidence. This rule states:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person;

ER 801(d)(1)(i).

In order for a statement to qualify under ER 801(d)(1)(i), it must be "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." In the case at bar the state did not argue that Shaun Turner's prior statements had been "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." Thus, they were not admissible as

substantive evidence. However, they were potentially admissible to impeach Shaun Turner's testimony. Under ER 607 "the credibility of a witness may be attacked by any party, including the party calling the witness." However, "a prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." *State v. Babich*, 68 Wn.App. 438, 444, 842 P.2d 1053 (quoting *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1984)), review denied, 121 Wn.2d 1015, 854 P.2d 42 (1993). This principle is discussed in detail in *State v. Lavaris*, 106 Wash.2d 340, 721 P.2d 515 (1986).

In *Lavaris* the defendant's confession to murder was admitted at his first trial. On appeal the Supreme Court reversed, holding that the trial court had erred when it failed to excluded that confession, which had been obtained unlawfully. On retrial, the state called a witness named Castro who testified to the circumstances leading up to the killing. However, he also testified that he was not at the scene of the crime the night before the murder; that he did not remember seeing anyone at the scene of the killing, and that he had not been present when anyone was killed. The trial court then allowed the state to impeach him with his own prior inconsistent statements which incriminated the defendant. Following his second conviction the defendant appealed, arguing that the trial court had erred when it allowed the state to impeach as a guise for introducing otherwise inadmissible evidence.

However, the Supreme Court affirmed, finding that (1) the substantive evidence of the witness was essential in many areas of the State's case, and (2) the State did not call the witness for the primary purpose of impeaching him with testimony that would have been otherwise inadmissible. By contrast, in the case at bar the slight substantive evidence that Shaun Turner presented when called as a witness was far from essential to the state's case. Rather, the state had three eyewitnesses to the event and did not need to call Shaun Turner.

As concerned the second issue, any fair review of Shaun Turner's testimony reveals that the state's sole purpose in calling him was to present otherwise inadmissible testimony. First, although Sean Turner was ostensibly the state's witness, the prosecutor's questioning was unadulterated cross-examination. Second, the testimony covers 32 pages of transcripts with about 30 of those pages devoted solely to impeaching the witness with his prior inconsistent statements that incriminated the defendant. On eight separate occasions the prosecutor asked Mr. Turner if he had told the police that the defendant had said "I told you I would do it; I told you I'd stab someone." The state called Mr. Turner for one purpose only: to impeach him with inadmissible evidence that incriminated the defendant.

In addition to calling Mr. Turner for the sole purpose of impeaching him with his prior inconsistent statements, the state took this action one step

further and argued substantively from this evidence. In the first instance the prosecutor stated:

After admitting to those things, then he was hesitant to admit too much more. He admitted that he had, when he was interviewed by Detective Marler he, told Detective Marler that, in fact, the defendant was the one that did this thing, his buddy, the defendant.

RP 186.

The prosecutor went on to state.

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RP 188-189.

Finally, the prosecutor went on in rebuttal to argue the following:

Shaun Turner did not want to cooperate. It was obvious from his testimony. He didn't want to give up his buddy, the defendant. That was painfully obvious in his testimony. But he did, and he admitted it's his. We've got the right vehicle.

RP 207.

In this argument the state requested that the jury convict the defendant based upon what Shaun Turner said to the police: that the defendant was the

one who committed the crime.

In this case there was no possible tactical reason for the defendant's attorney to fail to object to the admission of Shaun Turner's testimony or the state's substantive arguments from that testimony. The defense presented was primarily one of mistaken identity and there was a significant evidence to support this argument. The witnesses had never seen the defendant before. There were three possible assailants in the vehicle. The witnesses only identified the defendant after seeing his picture in the paper in an article identifying him as one of the perpetrators. The event occurred during a very short space of time. It was at night and the state's witnesses had all been drinking alcohol. Under these facts no reasonable defense attorney would fail to object to the presentation of grossly prejudicial evidence when a proper objection would have kept it from being admitted. Thus, trial counsel's failure fell below the standard of a reasonable prudent attorney.

In addition, for the reason stated above there is a very real likelihood that, but for counsel's failure to object, the jury would have acquitted. As was just mentioned the state's case rested solely upon the identification of the state's three main witnesses. There were no admissions from the defendant. There was no physical evidence to tie the defendant to the crime. Finally, there were two other possible perpetrators. Thus, trial counsel's failure to object also caused prejudice, thereby denying the defendant his right to

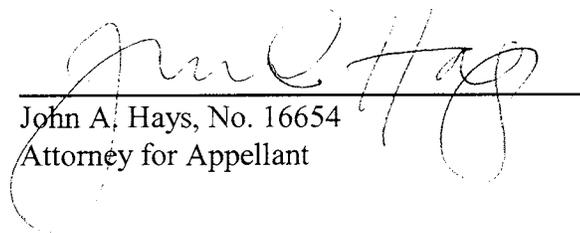
effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. As a result, the defendant is entitled to a new trial.

CONCLUSION

Trial counsel's failure to object to the admission of highly prejudicial, inadmissible evidence denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

DATED this 28th day of September, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

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

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 TOBBIE DUANE EATON,)
10 Appellant,)

CLARK CO. NO.05-1-02141-4
APPEAL NO: 34527-7-II
AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON)
12) vs.
12 COUNTY OF CLARK)

13 CATHY RUSSELL, being duly sworn on oath, states that on the 28^H day of
14 SEPTEMBER, 2006, affiant deposited into the mails of the United States of America, a
14 properly stamped envelope directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
16 1200 FRANKLIN ST.
17 VANCOUVER, WA 98668

TOBBIE D. EATON #839145
WA STATE PENITENTIARY
P.O. BOX 520
WALLA WALLA, WA 99362

and that said envelope contained the following:

- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 28TH day of SEPTEMBER, 2006.

Cathy Russell
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 28th day of SEPTEMBER, 2006.

[Signature]
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09

