

NO. 34949-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KEITH EDWARD BERRY,

Appellant.

STATE OF WASHINGTON  
BY  DEPUTY  
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COURT OF APPEALS  
DIVISION II

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

The Honorable Frank E. Cuthbertson, Judge

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REPLY BRIEF OF APPELLANT

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**A. RESTATEMENT OF FACTS**

At the time 911 was called, Ms. Neal and Mr. Berry were standing in front of their house and Mr. Berry did not have hold of Ms. Neal's hair. RP 127, 130, 164. The prosecutor conceded at trial that Mr. Berry never touched Ms. Neal or hit her with the bat, the alleged deadly weapon, during the incident. RP RP 556-557. In the 911 call, Mr. Kosiuga never told the operator that Mr. Berry was dragging Ms. Neal, that he had her hair or that he could hear anything that Ms. Neal was saying. Exhibit 5. Mr. Kosiuga stated to the operator only that the two were arguing and generally that Mr. Berry either was swinging the bat or had it on his shoulder.

Even in Ms. Neals alleged statements to the police, she never said that she feared that Mr. Berry was going to inflict injury on her with the baseball bat; as the state reports, she said he threatened to smash the car windows with the bat. See Brief of Respondent (BOR) at 3-4. The one alleged threat of injury with the bat was after that incident was over and the police were arriving, and that alleged threat was the basis for the harassment charge, not the assault. RP 557-558.

The issue for the jury, as the case was charged, was whether Mr. Berry actually caused in Ms. Neal fear or apprehension that he would cause bodily injury to her with the bat.

**B. ARGUMENT IN REPLY**

**1. THERE WAS INSUFFICIENT EVIDENCE THAT MR. BERRY ASSAULTED MS. NEAL WITH A DEADLY WEAPON.**

The state concedes on appeal, as it did at trial, that there was no evidence presented at trial that Mr. Berry ever hit Ms. Neal with the bat. Brief of Respondent (BOR) at 42; RP at 556-557. The state argues instead that the jury was presented with sufficient circumstantial evidence to prove that Ms. Neal was fearful of bodily injury. BOR at 42. But the state's circumstantial evidence does not establish that Ms. Neal feared that Mr. Berry would assault her *with the bat* or feared that he would injure her *with the bat*.

Because Ms. Neal specifically testified that she did not believe that Mr. Berry was going to hit her with a bat, the evidence was necessarily insufficient to convict Mr. Berry of second degree assault, as he was charged. This is because the actual imminent fear of bodily injury on the part of

the victim is an essential element of the assault. State v. Bland, 71 Wn. App. 365, 860 P.2d 1046 (1993). It is actual fear, not whether a reasonable person would have been fearful, that must be proven.

Other witnesses may have testified that Mr. Berry was swinging the bat or that Ms. Neal was screaming that Mr. Berry should let go of her hair. But this testimony could not establish that she feared he would injure her with a deadly weapon, the bat. This testimony, in fact, showed that she was more concerned about his holding her hair than being struck with a bat and would have acted the same even if Mr. Berry had not had a bat.

The one alleged threat with the bat was the basis of the harassment charge, not the assault.

The evidence was insufficient to establish that Mr. Berry assaulted Ms. Neal with a deadly weapon and therefore his second degree assault conviction should be reversed and vacated.

**2. THE TRIAL COURT ERRED IN ADMITTING TESTIMONIAL HEARSAY.**

It is very clear in this case that the state did not wish for Ms. Neal to testify at trial. The prosecutor alerted the court prior to trial that Ms. Neal would not appear. RP 100. 114. This position

was reiterated throughout the trial. RP 198-199. Ms. Neal appeared only because of the persistent efforts of defense counsel to locate Ms. Neal and have her attend trial. RP 286, 356-358. When Ms. Neal appeared, the prosecutor persisted in saying that the state would not need to reopen its case for her testimony because the defense was going to call Ms. Neal as a witness. RP 387.

It was only through the efforts of the defense and after Ms. Neal's out-of-court testimonial hearsay had been presented that Ms. Neal testified. Even if the court had insisted that the state reopen its case-- which it did not--it would have done so only because the defense succeeded in getting her to come to court. And it is far from clear that the state would have called Ms. Neal if the court had held that the defense could not call her as a defense witness.

It would, under these circumstances, be patently unfair to presume that Mr. Berry would have called Ms. Neal as a defense witness had her testimonial hearsay statements not been introduced erroneously in the state's case-in-chief.

The Washington Supreme Court, in State v. Rohrich, 132 Wn.2d 742, 478, 939 P.2d 697 (1997), expressly held that the defendant could not constitutionally be put in such a catch-22 situation of having to call the witness or waiving his rights to confrontation.

The state does not argue that Ms. Neal's out-of-court statements were not testimonial hearsay. Since these statements were admitted in violation of Mr. Berry's confrontation rights, his conviction for second degree assault should be reversed.

**3. MS. NEAL'S HEARSAY STATEMENT AND FOREST'S HEARSAY STATEMENTS WERE NOT ADMISSIBLE AS EXCITED UTTERANCES.**

As set out in Mr. Berry's Brief of Appellant, neither Ms. Neal nor Forest were so under the influence of Ms. Neal's interaction with Mr. Berry that either could not have reflected. Ms. Neal was distressed because she did not know where her daughter Forest was, and calmed down once she learned that her daughter was safe. RP 215-216. Forest was able to go to the store, call for a ride, and follow instructions to wait for her grandmother to arrive before making statements to her grandmother. RP 490-494.

The trial court erred in admitting these statements as excited utterances.

**4. THE PROSECUTOR'S MISCONDUCT IN FORCING MR. BERRY TO COMMENT ON THE CREDIBILITY OF OTHER WITNESSES DENIED MR. BERRY A FAIR TRIAL AND THE COURT ERRED IN RULING THAT THIS CROSS-EXAMINATION OPENED THE DOOR TO THE ADMISSION OF THE 911 TAPE REPORTING THE INCIDENT.**

The prosecutor committed misconduct by asking Mr. Berry, on cross-examination, to comment on the credibility of Yuri Kosiuga. This is well-established misconduct. See AOB at 28-29. It is the jury's province to determine the credibility of witnesses and not proper to elicit from one witness his opinion of the truthfulness of another.

Further, although the state argues that Mr. Berry attacked the credibility of Mr. Kosiuga during the testimony of Glenn Glover describing Mr. Kosiuga's ability to remember and statements made to him by Kosiuga which were inconsistent with his trial testimony, BOR 37-38, the primary means by which Mr. Kosiuga's credibility was attacked was through the state's own cross-examination of Mr. Berry. Thus, it was the state's own cross-examination that most directly placed Mr. Kosiuga's credibility at issue, and the court erroneously

ruled that the state opened the door to its own rebuttal. RP 504-510. The state specifically argued that the defense had challenged Mr. Kosiuga's memory and that Mr. Berry had said Mr. Kosiuga was a liar. RP 505.

In any event, ER 801(d)(1)(ii) applies to admit prior consistent statement only where the prior statement was made before any motive to fabricate arose. See, Tome v. United States, 513 U.S. 150, 115 S.Ct. 696, 130 L. Ed 574 (1995); State v. Thomas, 150 Wn.2d 821, 865, 83 P.3d 970 (2004); State v. McDaniel, 37 Wn. App. 768, 771, 683 P.2d 231 (1984).

The attack on the credibility of Mr. Kosiuga arose from the prosecutor's forcing Mr. Berry to say that Kosiuga, for whatever reason, was either, lying or mistaken in testifying inconsistently with Mr. Berry's testimony. The defense investigator merely added that Mr. Kosiuga was unsure of many of the details when he was interviewed and recalled things differently from his trial testimony. Neither the cross-examination nor the defense investigator's testimony imputed a recent motive to fabricate to Mr. Kosiuga.

There was, in fact, no allegation of a motive to fabricate. Mr. Berry expressly disclaimed any knowledge of such a motive. RP 310-311. Prior consistent statements are admissible only if there is an allegation of a motive to fabricate and the statements were made before the motive to fabricate. The trial court erred in admitting the 911 tape. See also, AOB at 31-32.

**C. CONCLUSION**

Appellant respectfully submits that his convictions should be reversed and his conviction for second degree assault dismissed. If the conviction is not dismissed it should be remanded, along with the harassment conviction, for retrial.

DATED this 21<sup>st</sup> day of February, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 21<sup>st</sup> day of February, 2007, I caused a true and correct copy of Reply Brief of Appellant to be served on the following via prepaid first class mail:

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