

NO. 35630-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

SAQUARRA ST. MARIE SMITH,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S PRESENTATION OF FACTS SETS OUT ONLY ONE OF THE THREE VERSIONS OF WHAT HAPPENED DURING THE ALLEGED ASSAULT.

As set out in the Opening Brief of Appellant (AOB), there were three versions of what happened during the alleged assault: (a) the taped statement of Ms. Smith; (b) the testimony of the complaining witness Nacole Naquin; and (c) the testimony of Tiffany Osborne, who had entered a plea which reduced her potential sentence by approximately ten years in exchange for her testimony. AOB 4-8; Exhibits 24, 25, 27; RP 270, 301.

The prosecutor's Statement of the Case presents only Tiffany Osborne's version interspersed with the portions of Ms. Naquin's testimony that appear most incriminating to Ms. Smith. Brief of Respondent (BOR) 1-4.

For one example, the state sets out that "Defendant then pushed Ms. Naquin onto a bed and started punching and kicking Ms. Naquin." BOR 2. Ms. Naquin, however, was unable to determine who hit her. RP 143-146, 173-174, 177. Ms. Smith told the police that it was Ms. Osborne who threw Ms. Naquin

on the bed and hit her with a chair. Exhibits 24, 25, 27.

The issues on appeal should be considered in light of all of the facts presented to the jury, as set out in Ms. Smith's opening brief at 4-10.

2. THE DENIAL OF THE RIGHT TO FULLY CROSS-EXAMINE TIFFANY OSBORNE DENIED MS. SMITH HER STATE AND FEDERAL CONSTITUTIONAL RIGHT TO CONFRONTATION OF WITNESSES.

On cross-examination, the defense was not permitted to examine Tiffany Osborne about whether she was being investigated for other problems besides the assault. RP 301. The trial court improperly prohibited cross-examination on these problems which arose from her having left the state in violation of the conditions of her release to go with a pimp to California where she was involved in prostitution. RP 306-307. Contrary to the assertions of the state, this evidence was relevant to Ms. Osborne's motive and bias in testifying favorably to the state whether or not it was part of the plea agreement. ¹

¹ It appears as well that the other investigation was a part of the plea agreement at least to the extent that Ms. Osborne was agreeing to testify in proceedings arising from the prostitution activity. RP 301, 306.

The defense was entitled to explore all of the interactions between Ms. Osborne and the police which might give rise to a reason for her to want to testify favorably to the state. In Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974), the witness was a juvenile offender, like Ms. Osborne, and was on probation at the time of the trial. Certainly, being on release and leaving the state to be involved in prostitution could result in even greater pressure to testify favorably than simply being on probation.

Credibility was central to the jury's determination and failure to permit the defense to explore with Ms. Osborne her other problems with the law denied Ms. Smith her state and federal rights to confrontation of the witnesses against her.

The state's argument that the issue of Ms. Osborne's violation of the conditions of release was not preserved should also be rejected. What defense counsel was not permitted to ask about was other matters under investigation. Those matters included leaving the state in violation of conditions of release.

In any event, Ms. Osborne's involvement in prostitution could certainly have given rise to her feeling pressure to testify favorably to the state whether or not she had been charged with a crime for her activities. The defense was entitled to explore this area to establish her bias and motive. See AOB 12-15.

3. DETECTIVE MILLER'S TESTIMONY THAT HE BELIEVED HE HAD PROBABLE CAUSE TO ARREST MS. SMITH AND SUBMITTED HIS REQUEST FOR A WARRANT TO THE PROSECUTOR, FOLLOWED BY HIS TESTIMONY THAT SHE WAS ARRESTED, DENIED MS. SMITH HER STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY.

On appeal, Ms. Smith challenges the testimony of Detective Miller that he believed he had developed probable cause to arrest her, that he notified patrol and submitted his documented investigation to the prosecutor for a warrant, and that he subsequently learned that Ms. Smith had been arrested. RP 79.

The state urges this Court not to consider this as opinion of guilt for three reasons: (1) that Detective Miller was just describing his steps in the investigation, not giving his opinion as to guilt; (2) that under Ms. Smith's theory the state would be barred from saying a defendant was

arrested, and (3) that testimony about believing there is probable cause to arrest is not equivalent to saying there was proof beyond a reasonable doubt. BOR 7-8.

These three arguments should be rejected. First, there is no inherent need or right to present testimony that the defendant was arrested. If an arrest is relevant, the testimony can simply be that the defendant was arrested -- or was interviewed after his arrest or taken into custody at the scene or read his Miranda warnings. Unless relevant to a material issue at trial, an officer's belief that he has probable cause to believe the defendant committed a crime or that he submitted the information from his investigation and the court agreed by issuing an arrest warrant is not admissible. See State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990) (evidence is not admissible to establish why an officer did what he did unless that information is relevant to a material issue at trial); State v. Johnson, 61 Wn. App. 539, 546, 811 P.2d 687 (1991) (detective's testimony that, based on an informant's statement, he had reason to suspect defendant was inadmissible hearsay).

The fact of an arrest is prejudicial, but may be relevant to a material issue at trial. But an officer's testimony that he believed, based on his investigation and interaction with the witnesses, that he had probable cause to arrest a defendant is not relevant and impermissibly conveys to the jury the officer's personal opinion that the defendant committed the crime. This is unfairly prejudicial and denies the defendant his state and federal constitutional rights to a fair and impartial jury.

The fact that the officer testifies that he had probable cause to believe the defendant committed the crime rather than he believed he had proof beyond a reasonable doubt is irrelevant. The testimony still conveys to the jury that, in the officer's opinion, the defendant committed the crime.

Detective Miller's testimony was completely gratuitous, not necessary for any determination of facts by the jury; it conveyed his opinion as to Ms. Smith's guilt. This was constitutional error and reversible error given the importance of credibility to the jury's consideration. Ms. Smith's conviction

should be reversed and her case remanded for retrial.

4. THE PROSECUTOR'S QUESTION WHICH REFERRED TO THE ASSAULT WITH WHICH MS. SMITH WAS CHARGED DENIED MS. SMITH HER STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY AND CONSTITUTED IMPROPER OPINION AS TO HER GUILT.

Over defense objection, the prosecutor asked Tiffany Osborne, "At any point during the assault and the assault that you committed and the defendant is on trial for, was Nacole able to say anything?" RP 256. Ms. Smith challenged this question as an improper expression of the prosecutor's opinion that an assault -- specifically the assault with which Ms. Smith had been charged -- had occurred.

The prosecutor's question, in fact, could have no other meaning. The prosecutor's question asked Ms. Osborne if Nacole had anything to say during a specific event, the assault that she committed and the assault Ms. Smith was on trial for. Thus, the state's response that the comment was not prejudicial because Ms. Smith's theory of the case was that she committed a second degree assault is not persuasive; the prosecutor's question referred to the charged assault in the first degree not generally an assault. BOR 9-10.

Second, the state's response that the prosecutor was establishing only that Ms. Osborne had pled guilty to an assault should not be well-taken. BOR 9. The question was to elicit what, if anything, Nacole said during the altercation.

After the defense objection, the prosecutor very deliberately spelled out, not only that Ms. Osborne had entered a plea to assault, but that the particular assault Ms. Osborne was being questioned about was the assault with which Ms. Smith had been charged. This was a deliberate and improper opinion as to guilt. It denied Ms. Smith her state and federal constitutional rights to trial before a fair and impartial jury.

While not every use of the word "assault" by the prosecutor or a witness is objectionable, defendants are entitled to the presumption of innocence and to trials in which the jury's role in determining credibility and resolving factual issues is not undermined by prosecutors and police officers who communicate their personal opinions that the charge was properly made and the defendant guilty.

5. DETECTIVE MILLER'S REFERENCE TO MS. SMITH'S CRIMINAL HISTORY WAS IMPROPER ER 404(B) EVIDENCE.

Detective Miller testified that he had "looked at [Ms. Smith's] criminal history, wanted to see if there was in fact some association that was consistent with what I have been provided . . .," and in this way improperly communicated to the jury that Ms. Smith had a criminal history which was associated with her picture in the photo montage. RP 76.

The state argues that the error in putting this testimony before the jury cannot be raised on appeal because of defense counsel's failure to object. Under the facts of this case, however, an objection should not be necessary to preserve the error.

Defense counsel could not have reasonably anticipated this testimony. When the state intends to introduce ER 404(b) evidence, it must seek admission from the trial court prior to introducing it. State v. Salterelli, 98 Wn.2d 358, 361-362, 655 P.2d 697 (1982). After the unanticipated statement had been made, there was no way to remove the prejudice of the statement from the minds of the jurors.

Detective Miller clearly conveyed to the jurors that Ms. Smith had prior criminal history. The statement about criminal history was made in the context of a montage assembled by the King County Regional Justice Center, suggesting a mug shot. RP 76, 78. Miller's testimony suggested that she might have been acting consistently with her prior history in committing the charged act. RP 76. This is not the type of evidence that the jurors were likely to be able to set aside. This improper testimony should result in the reversal of Ms. Smith's convictions, particularly in light of the importance of credibility in the case and in light of the other errors at trial.

6. CUMULATIVE ERROR DENIED MS. SMITH A FAIR TRIAL.

Here, the jury was presented with three versions of the incident; the jurors necessarily had to weigh the relative credibility of each version. Under these circumstances, the improper limitation on cross-examination, the improper opinion testimony as to guilt by both the case detective and the prosecutor, and the improper ER 404(b) evidence individually and certainly cumulatively denied Ms.

Smith a fair trial. Her conviction should be reversed and her case remanded for retrial.

B. CONCLUSION

Appellant respectfully submits that her conviction and sentence enhancement should be reversed and her case remanded for retrial.

DATED this 31st day of May, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 31st day of May, 2007, 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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