

I. ADDITIONAL GROUNDS FOR REVIEW.

"THE TRIAL COURT ABUSED IT'S DISCRETION AND DENIED MR. BRIGHTMAN HIS DUE PROCESS RIGHTS TO A FAIR TRIAL UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY ADMITTING VICKERY'S TESTIMONY."

1.1 On the last day of the State's case, defense counsel was informed that the State would be calling Michelle Ramirez Vickery (hereinafter "Vickery"), as a witness. 13 RP-1673. Vickery was not on the State's witness list for either the original trial or the retrial, but the State argued it had received information from Vickery the day before which it believed was relevant. 13 RP-1683. It was alleged that Vickery would testify that she and Brightman were in a relationship prior from 1995-1997, and she saw him with guns all the time, including the gun Brightman was alleged to have carried when Mr. Villa was shot. 13 RP-1676-77, 1679, 1681. The State argued that Vickery's testimony was relevant to rebut Brightman's testimony about where the gun came from and to create an inference that Brightman knew what to do with a gun when Mr. Villa was allegedly intentionally shot. 13 RP-1681-82.

1.2 The State know of Brightman's prior testimony, in the prior trial regarding where the gun came from, and Brightman's own testimony established his knowledge about guns. 8 RP-1039-1055: Brief of Appellant, at pp. 4 & 5. Vickery's testimony as to Brightman's knowledge about guns was purely "'impermissibly suggestive' and 'impermissibly cumulative'" as to the questions of not only knowledge about guns, but also "'impermissibly suggestive' and 'impermissibly cumulative'" as to inferences from Vickery's testimony as to lack of mistake or accident. Brightman's counsel also argued that Vickery's testimony was not relevant to rebut the defense that the shooting was accidental, because Vickery could not testify to any similar incidents, 14 RP-1775, 1780: Brief of Appellant, at p. 38, that Vickery's testimony was not relevant to intent, knowledge, or lack of mistake or accident, for purposes of ER 404(b). Id.

1.3 Vickery's testimony as to Brightman's knowledge about guns was not admissable for the State to prove, or establish a causal nexis or more probable then not, that because Brightman had knowledge about guns, this impeached Brightman's testimony that the shot was accidental.

1.4 In fact, Vickery's testimony established that she was not able to tell conclusively whether or not the gun carried by Brightman when Mr. Villa was shot was the same gun Brightman possessed when she and Brightman were together from 1995-1997, 14 RP-1790-1791: Brief of Appellant, at p. 39, rather she testified they were similar. Id. In fact, whether the gun was the same gun was trivial. Vickery's testimony was not probative, it did not establish, or prove, a causal nexus, or more probable than not, that because the guns were the same this impeached Brightman's testimony that the shooting was accidental, nor did Vickery's testimony impeach Brightman's testimony as to where he got the gun (Exhibit 127) from, because Vickery was never able to testify that the guns were, in fact, the same. Id., at RP-1790-1791: Brief of Appellant, at p. 39.

1.5 Therefore, the trial court's finding Vickery's testimony relevant to intent, knowledge, and lack of mistake or accident was based on untenable grounds and for untenable reasons as to constitute an abuse of discretion. State v. Rundquest, 79 Wn.App. 786, 793, 905 P.2d 922, 925 (Div. 2, 1995) (citing State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1018 (1993)).

1.6 Vickery's testimony was therefore, irrelevant, under ER 401 because it had no tendency to make the existence of any fact in the determination of the State's case more probable or less probable that it would have been with or without Brightman's own testimony.

1.7 The reasonable presumption is that the State knows that Rules of Evidence. The only plausible reason for the State to use this irrelevant evidence would be to both cause Defense Counsel to unduly request a continuance, but to create a "more likely than not" danger of unfair prejudice and confusion of the issues to mislead the jury by considerations that were a undue waste of time and needless presentation of irrelevant cumulative evidence. Mr. Brightman was prejudiced by the admission of Vickery's testimony because Vickery's testimony allowed the State to impermissibly suggest an inference to the jury that Brightman was lying about Mr. Villa's death being an accidental. Vickery's testimony would have a "more likely than not" probability to effect the juries verdict and therefore cannot be held "harmless beyond a reasonable doubt" when this Court considers the purposes for which that State sought to impermissibly use Vickery's testimony

in relation to the weight of the other evidence the jury considered, which was nearly non-existent.

1.8 Mr. Brightman is entitled to a fair trial by an impartial jury. The State's use of Vickery's testimony in the fashion that it did, denied Mr. Brightman a fair trial under the due process clause of the 14th Amendment for the above stated reasons.

1.9 For the reasons stated above and those stated in the Brief of Appellant, Mr. Brightman requests that this matter be remanded for a new trial.

I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Signed this 23rd day of October, 2008.

Signed: Nathan Brightman

NATHAN D. BRIGHTMAN, #781405

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Court of Appeals No. 36150-7-II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

DECLARATION OF SERVICE BY MAILING

I Nathan D. Brightman declare under the penalty of perjury under the laws of the State of Washington that on the 23rd day of October, 2008, that I mailed a copy of: (1) Declaration of Service by Mailing, and (2) Additional Grounds for Relief, to:

Court of Appeals Division II
David C. Ponzoha, Court Clerk
950 Broadway Suite 300
Tacoma, Wa. 98402

Pierce County Prosecutor's Office
930 Tacoma Ave., S.
Tacoma, Wa. 98402

Catherine E. Glinski
Attorney For Appellant
P.O. Box 761
Manchester, Wa. 98353

I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Signed this 23rd day of October, 2008.

Signed: [Signature]
NATHAN D. BRIGHTMAN, # 7814105
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