

Supp. App. Brief

IN THE WASHINGTON COURT OF APPEALS
DIVISION II

No. 38154-1-II

DATE FILED: 11/19/07
STATE OF WASHINGTON
BY: *[Signature]*
CLERK

STATE OF WASHINGTON,
Respondent

v.

DAVID ALAN BRISTOL,
Appellant

APPELLANT'S SUPPLEMENTAL BRIEF

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ORIGINAL

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I. ASSIGNMENT OF ERROR

The trial court erred by ruling that an out of court statement was inadmissible when it was offered to explain the conduct and state of mind of the defendant at the time of the incident.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Whether or not the excluded statement was inadmissible hearsay.

III. FACTS

The principle facts and procedures of the matter are set forth in Mr. Bristol's opening brief. This recitation is confined to the supplemental issue raised.

Mr. Bristol testified on his own behalf. RP 271 et. seq. He specifically denied the allegations. RP 213 He explained his conduct on the night in question in detail. However, one detail was left out: he was not allowed to directly explain his reason for taking his daughter to her boyfriend's house in the middle of the night because the reason involved a threatening statement made by his daughter. The defense raised the issue

after state's hearsay objections had been sustained. RP 206. The trial court consistently ruled the statement to be inadmissible hearsay. RP 210, 212, 225.

First, both Mr. Bristol and his daughter testified that Mr. Bristol had taken her to her boyfriend's house late the night of the incident. Mr. Bristol testified to some familial issues with his daughter. On the night in question, he had been in an argument with his daughter over some of these issues. He would have testified that the argument was ended by his daughter's threat to say that he had inappropriately touched her. Thereafter, he relented and gave her a ride to the boyfriend's apartment. The prosecution exploited this inadmissibility by questioning his motivation for taking his daughter there. RP 216-17 (defense objection at RP 218; court rules at RP225).

Second, a line of questioning was developed by the state that focused on the point in time that Mr. Bristol became aware of the allegations against him. RP 218. The prosecution attacked Mr. Bristol's assertion that he did not know until October (the allegation dated in August). Confusion arose in Mr. Bristol's testimony in that he tried to distinguish between the official report of the allegation and his inability to communicate the excluded threat.

After objection and argument on the issue, the trial court allowed Mr. Bristol to testify that he had the impression from his daughter that she would make the allegations.¹ But the result of the case hung on a contest of credibility between the complainant and the defendant. No other direct evidence of guilt or innocence was received. The confusion occasioned by the trial court's ruling may have harmed Mr. Bristol's credibility.

IV. ARGUMENT

A. Standard of Review

Rulings on the application of the hearsay rule are reviewed for abuse of discretion. Brundidge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 450, 191 P.3d 879 (2008). Abused discretion is “discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Miller v. Campbell, 164 Wn.2d 529, 535, 192 P.3d 352 (2008).

1. The trial court abused its discretion by excluding evidence that was not hearsay.

ER 801(c) defines hearsay operationally as “a statement. . . offered in

¹ At RP 233: Defense Counsel: Did you have reason to believe, because of your conversations with her, that she was going to make this allegation?” Mr. Bristol: “She said it, so yes.”

evidence to prove the truth of the matter asserted.” By its terms, the rule excludes from the definition of hearsay out of court statements offered for another purpose. Relevant statements may be admissible simply because they are made regardless of truth or falsity. See State v. Stubsjoen, 48 Wn.App. 139, 738 P.2d 306 (1987). Further, out of court statements may be admissible for limited purposes other than for truth such as to provide context to testimony (e.g., *res gestae*) or to explain actions taken in response to the statement. See State v. Moses, 129 Wn.App. 718, 119 P.3d 906; rev. denied, 157 Wn.2d 1006 (2006); see also, State v. Mason, 127 Wn.App. 554, 564, 126 P.3d 34 (2005)(admission of statement seeking help in domestic violence case does not violate Confrontation Clause).

Such alternative purposes were articulated below by the defense. RP 218, 226 But the trial court would not relent as to the admission of the statement itself. RP 225 The result, as noted, was that Mr. Bristol’s explanation of his actions became stilted and incomplete. Not until redirect was he able to speak of the threat. And, the effectiveness of the prosecution’s attack on why Mr. Bristol took his daughter to Garrett’s apartment in the middle of the night was not diminished by this later testimony. The prejudice to Mr. Bristol’s case was already done.

In Moses, supra, out of court statements by a child of a domestic assault victim were allowed to be repeated by a social worker. The statements had occasioned the declaring to contact CPS. The court of Appeals affirmed the admission of the statements, saying: “We conclude that FM’s statement was not introduced for the truth of the matter asserted, but to show why Muller contacted CPS.” *Id.* at 732. The proposition that a statement offered to explain the actions of the hearer does not constitute hearsay drives this result.

Similar analysis is found in State v. Roberts, 80 Wn.App. 342, 908 P.2d 892 (1996). In a prosecution for possession resulting from the discovery of a marijuana grow operation, the defendant sought to defend the issue of dominion and control by asserting that a subtenant was responsible for the grow area of the house. Roberts sought to testify that he did not report the subtenant because of the subtenant’s threats. 80 Wn.App at 349. The trial court sustained the prosecution’s hearsay objection with regard to the threat. *Id.*

The Court of Appeals reversed Robert’s conviction. The analysis of the hearsay issue applies well to the present case. The court held that

“[t]he content of the alleged threat was not hearsay, as it was

offered not to prove that Sylvester [the subtenant] intended to carry out the threat, or even that Sylvester necessarily made the threat, but only to show(should the jury believe that Sylvester existed and threatened Roberts) the effect of the threat on Roberts, I.e., to cause him not to report the grow operation to the police.”

80 Wn.App. at 352. This result even though Roberts had testified without objection that he feared vandalism from Sylvester. *Id.*

In the present case, Mr. Bristol testified without objection that his daughter had said something about the allegations during the fight. RP 202. But, like Roberts, he was never allowed to relate the actual threat. This was error because, as the cases show, the operational definition of hearsay is inapplicable to statements made for purposes other than the truth thereof. Moreover, it was error that clearly could have had impact on the credibility determination the jury had to make.

In light of Mr. Bristol’s right to a fair trial, the trial court’s rulings on this issue were untenable and unreasonable. It is fundamental to any criminal case where the defendant denies the allegation that a complete explanation of his conduct be allowed. To hamstring an offer of explanation on an incorrect reading of the evidence rules is manifestly unreasonable.

V. CONCLUSION

The trial court's error cut against the credibility of Mr. Bristol's denial. This when the entire case turned on a judgment of the credibility of the two primary witnesses, the complainant and the defendant. The matter should be reversed and remanded for new trial.

Dated this 22 day of December, 2008.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'John L. Cross', written over a horizontal line. The signature is stylized and cursive.

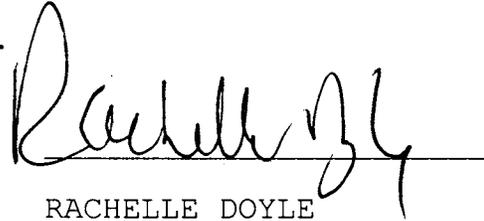
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1 Copies of the following documents: APPELLANT'S SUPPLEMENTAL
2 BRIEF, DECLARATION OF SERVICE.

3 I declare under penalty of perjury under the laws of the
4 State of Washington the foregoing is true and correct.

5
6 DATED this 23RD of December, 2008.

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