No. 38387-1

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

STATE OF WASHINGTON, Respondent

V.

KEVIN M. BREIMON, Appellant, pro se

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY
The Honorable Diane Woolard, Judge

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW UNDER R.A.P. 10.10

Kevin Breimon 03-16-09

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DIVISION II
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B. LAW AND ARGUMENT

1. THE TRIAL COURT AFFECTED THE DEFENDANTS DECISION ON WHETHER OR NOT TO TESTIFY WHEN IT THREATENED TO MENTION PREVIOUS ASSAULTS AND VIOLATION OF COURT ORDERS

(a.) The defendant has a state and federal constitutional right to testify on his own behalf.

U.S. CONST. AMEND. V (Relevant Part)

"... Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

AMEND. XIV (Relevant Part)

"...No state shall make or enforce any law which shall abridge the privelages or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws."

WASH. CONST. ART I SECTION 22 (Relevant Part)

"In criminal prosecutions the accused shall have the right to..., testify in his own behalf..."

(b.) The trial court erred when it informed the defendant that should he decide to testify assault offenses would be used against him.

Midway through trial the court inquired as to the defendants intent to testify. VRP 09-10-08 at 56/15. Defense counsel requested a ruling as to whether prior offenses would be used. at 56/22. The court, addressing the defendant conducted a "Colloquy" stating, "you understand you have quite a long history of assaults, violation of court orders, and so forth." at 57/3. "And should you decide to testify, you could be questioned about your history". at 57/7.

Washington Rules of Evidence (ER) 404 (Relevant Part)

"(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occassion, ... (b) Other crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opprotunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

This rule does not allow the court in this instance to introduce the defendants prior convictions for assault. Even if it did the court would have been required to determine whether the danger of undue prejudice outweighs the probative value of the evidence. Slough & Knightly, other vices, other crimes, 41 Iowa L. Rev 325 (1956) State v. Whalon, 1 Wn. App 785, 464 P.2d 730 (1970).

ER 405 (a) Reputation. "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct." (b) "Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct."

"This rule likewise would not have acted as a vehicle to carry the defendants conviction for assault to trial in the event that he testified, since reputation was not at issue in this case nor did the court have reason to believe the defendants testimony could open the door to introduction under this rule.

ER 608 (Relevant Part) "(a.) Reputation Evidence of Character. The Credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise."

ER 609 "<u>IMPEACHMENT BY EVIDENCE OF CONVECTION OF CRIME.</u> (a) General rule. For the purposes of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness from the witness or established by public record during examination of the witness <u>but only if the crime</u> (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted,

and the court determines that the probative value outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment."

Neither ER 608 or 609 support the trial courts position that should the defendant have exercised his right to testify that assault convictions would be mentioned. The prejudice clearly would have dominated the probative value and the court should have weighed this out anyway and properly informed the defendant, defense counsel, and the state on what prior convictions could have been used for impeachment. In fact this is a pretrial or motion in liminie matter. Nevertheless the court committed serious error which affected a constitutional right of the defendant.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MOTION TO DISMISS FILED AT CLOSE OF STATES EVIDENCE.

Defense counsel motioned the court to dismiss all counts after the close of the states case. VRP 09-10-08 at 108/15. "In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the states case in cheif, (c) at the end of all the evidence, (d) after the verdict, and (e) on appeal." State v. Jackson, 82 Wash. App 594, 607-08, 918 P.2d 945 (1996). "At the end of the states case in cheif, a court examines sufficiency based on evidence admitted at trial so far." Id at 608. Here, as in Jackson, the defendant motioned to dismiss at the close of the states case in

cheif. A defense was not pursued, the defense rested at, VRP 09-10-08 at 110/16. Counsel argued "no. I'm saying that the state offerred --- they offerred no evidence through any witness that an assault occurred or that there was harrassment. All they offerred was impeachment evidence of their own witness. there is no evidence here for the state. So therefore the court should dismiss." VRP 09-10-08 at 109/19.

The trial court denied the motion reasoning that admission of exhibit no. 7, VRP 09-10-08 at 108/24 - 110/15, created substaniative evidence. Counsel made a formal objection to the admission of this document VRP 09-10-08 at 73/3. This objection also should have been sustained (please review for abuse of discretion). "Where the out of court declarant fabricates any part of her statement, none of the statement can be admitted as exception to hearsay." State v. Hochhalter, 131 Wn. App 506 (2006). In this case the states victim clearly fabricated this story. VRP 09-10-08 at 75/17, 60/3-9, 63/14; 66/21, 80/14, 81/3, 88/19, and 90/23 ect... Furthermore, Exhibit no. 7 should not have been admitted where the witness/victim admitted she was intoxicated and that she had fabricated the statement. But also, the answers to the leading questions were unresponsive VRP 09-10-08 at 81/22.

3. THE DEFENDANT RECIEVED INEFFECTIVE ASSISTANCE OF COUNSEL

(a.) The defendant has a state and federal constitutional right to effective assistance of counsel.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel U.S. CONST. AMEND. VI; WASH.CONST. ART 1 § 22. A defendant is denied this right when his attornies conduct falls below objective standard of reasonableness, and there is a probability that but for counsels conduct the outcome of trial would have been different. State V. Benn, 120 Wn.2d 631, 663, 845 P.2d 289; Strickland V. Washington, 466 U.S. 668, 687-88, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984) Cert denied, 510 U.S. 944 (1993).

(b.) The defendant recieved ineffective assistance when counsel failed to make prompt objections thereby allowing prejudicial evidence to reach the jury's ears on multiple occassions.

During the states direct examination of Deputy Brown the state asked questions begging for hearsay throughout. "what information did you recieve regarding the incident we are here to discuss." VRP 09-10-08 at 42/2. After objection an order to rephrase question. "why did you make contact with the defendant?" at 42/7. The answer was "I was advised that he had injured his girlfriend". 42/9. This is hearsay and should have been objected to. "Did she tell you who this altercation was with?" at 44/25. "And how did she tell you that how did that occur?" at 45/25. The witness answerred "her finger was bent back." at 46/1. "Did she tell you or how did she say this injury

occured?" at 47/3. "Why was Ms. Johnson not at her home?", "She was afraid to..." at 49/18. Counsel failed to make prompt objections or objections at all or ask for curative instructions from the court, thereby allowing the jury to be tainted by inadmissible prejudicial hearsay evidence.

(c.) Counsel was ineffective for failing to object to multiple statements that the defendant would run when contacted

During direct examination of officer Brown Officer Brown testified that he was told "if he saw me, he would probably run..." VRP 09-10-08 at 50/4. No objection was made to this. Then during the states rebuttal testimony of officer Brown he repeated this statement "first, she said that he'd probably run if he saw me." at 98/13. These statements were inadmissible hearsay which indicate conciousness of guilt and a propensity for criminality Counsel was ineffective for failing to object and this improper evidence contributed to the vast amount of prejudicial evidence allowed to reach the jury.

These instances are distinguishable from that in, Cockett V. Ray, 333 F.3d 938, 944 (9th Cir 2003), Since failure to object to this hearsay evidence cannot be linked to any legitimate trial strategy.

(d.) Counsel failed to investigate pretrial and properly inform defendant on what crimes would be used against him if he chose to testify.

(argument contained in section B 1)

4. THE TRIAL COURT IMPROPERLY ADMITTED DOCUMENT AS EXHIBIT

The state moved to admit plantiffs identification No. 7. Defense counsel objected on the grounds that it "is not really her statement. It has all these leading questions in here that she's simply responding to. So this is not her statement." VRP 09-10-08 at 68/3-15, at 73/3. The content of the written part of this form is located at, VRP 09-10-08 at 73-75.

(a.) It was error to allow into evidence document containing leading questions and other inadmissible prejudicial evidence.

(b.) Statement answerring question out of context should not have been used and tends to suggest intoxication of declarant.

On cross examination defense counsel asked Ms. Johnson to read a section of the questionaire. "If this incident checked in the above table occurred within the past 12 months, please explain."; "Alright and what does that handwriting say?", "Just told me that if I ever get back with my exhusband he would kill both of us." VRP 09-10-08 at 81/23 - 82/5. This statement is not responsive to the question its an invalid explanation to a non prejudicial question, the answer to which is prejudicial. It is explained away by intoxication. VRP 09-10-08 at 81/3-11. This statement was not knowing, intelligently, or voluntarily made and had been recanted informally pretrial. It should not have been allowed and was used to convict on the charge of threat to kill.

(c) The trial court abused its discretion when it allowed questionaire into evidence.

Several of the questions asked by the questionaire would not have been allowed in court (and weren't) but were asked an answered on paper and handed to the jury for consideration during their deliberations. Examples of this are recent history of domestic violence and situations dating back 17 years or more VRP 09-10-08 at 69.

There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds State V. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

It was unreasonable for the court to give the jury this document it was unreasonably suggestive, contained facts not in evidence, was a statement which was recanted, was drafted while declarant was intoxicated and the prejudice outweighed probative value (the prejudice is not compared on the record). The declarant and other witness presented evidence that the declarant was intoxicated at the time of making statements and completing questionaire. 09-10-08 at 72/7, 88/16.

5. ACTUAL INNOCENCE / SUFFICENCY OF THE EVIDENCE TO CONVECT CHALLENGE

The trial courts findings of fact are reviewed under a 'clearly erroneous standard,' and will be reversed only if not supported by substantial evidence. State V. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). Substantial evidence exists only if there is a sufficient quantity of evidence in the record to persuade a fair minded, rational person

of the truth of the finding. State V. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing State V. Holstien 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

"When facing a challenge to the sufficency of evidence, we ask whether, after veiwing the evidence in the light most favourable to the state, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt, State V. Green, 94 Wn.2d 216, 221, 616 P. 2d 628 (1980), Because credibility determinations are for the trier of fact and are not subject to review, State V. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and persuasiveness of evidence." State V. Walton, 64 Wn. App 410, 415-16, 824 P.2d 533 (1992).

(a.) The state offered no evidence of Assault or Harrassment

Defense counsel motioned the court to dismiss at the close of the states case and did not put on a defense. VRP 09-10-08 at 109.

The courts reasoning for denying the motion was the admission of Exhibit No. 7 or what the was refferred to as a "Smith affidavit." This court should determine whether this document was properly admitted. And if not what other evidence could a rational trier of fact rely upon to return a guilty verdict.

(b.) The states entire case relied upon recanting witnesses prior statements.

(i) Ms. Johnson attempted to recant prior to trial to avoid perjury conviction. The alleged victim Ms Johnson, called defense counsel and made several contacts with the state to correct the lies she had told prior to trial where she could be exposed to penalties for such. VRP 09-10-08 at 80-81.

(ii) Ms. Johnson admitted that she fabricated story in order to prevent being evicted. Ms. Johnson admitted she lied to the police and doctor in order to have the defendant arrested so she would not be evicted. VRP 09-10-08 at 63. She also related this to her longtime friend who also testified, VRP 09-10-08 at 89-90, And an advocate for the state "from the very beggining she did not want it [the case] to proceed." VRP 09-10-08 at 94/1, 95.

(iii) Ms. Johnson's statements past or present could not be relied upon due to intoxication. Ms. Johnson admits to having serious drinking problems and to being intoxicated a lot during the period leading up to the offense date suggested in this case and days after, 09-10-08 at 76, 81, 88,

(C) The state shifted the burden to the defendant to prove his innocence and undermined the presumption of innocence.

A criminal defendant is considered innocent until proven guilty. Not a shred of evidence was presented which suggested the defendant assaulted or threatened anyone Not a single person who ever saw the defendant become physical or issue a threat was ever placed on the stand. The state simply put on a case which impeached Ms Johnson's testimony that the defendant did not assault her. Her previous statements were used successfully to prove that she was a liar either now or then but this evidence relates to her credibility not the defendants culpability for assault. The state successfully demolished her credibility so how can it be relied upon from a previous date when she has outright admitted she lied, why and that she was intoxicated.

The state shifted the burden in its closing arguments when it commented on the lack of evidence of drinking by Ms Johnson. VRP 09-10-08 at 135/9. Though the defendant has no duty to present a defense evidence of alcoholism was presented multiple times by Ms. Johnson, talk of vommitting blood by doctor due to chronic alcoholism VRP 09-10-08 at 31 and by freind of Ms. Johnson VRP 09-10-08 at 92.

6. THE DEFENDANT WAS DENIED FAIR TRIAL WHEN THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT

The State asked the jury to find guilt based upon

Sympathy VRP 09-10-08 at 133-134.

The State engaged in prosecutorial misconduct when it selectively prosecuted the defendant even after witness recanted.

C. CONCLUSION

For the reasons stated herein the defendant respectfully requests dismissal on all counts, remand for fair proceedings and or evidentiary hearings on issues for which the court deems appropriate.

D. DECLARATION AND PROOF OF SERVICE

I DECLARE UNDER PENALTY OF PERJURY THE FOREGOING IS TRUE AND CORRECT UNDER THE LAWS OF WASHINGTON AND THAT I SERVED A COPY OF THESE DOCUMENTS: 1 PRO SE STATEMENT OF ADDITIONAL GROUNDS and 1 MOTION FOR STATE RESPONSE TO:

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SIGNED AT CLALLAM BAY
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