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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 40986-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADAM DEAN HORD,

Appellant.

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

The Honorable Barbara Johnson, Judge

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting a *Smith affidavit* as substantive evidence in violation of ER 801(d)(1)(i).

2. The trial court erred in finding Appellant Hord guilty of harassment based upon erroneous evidence admitted over Hord's objection.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court abuse its discretion in admitting a Smith affidavit as substantive evidence over Hord's objection when the affidavit failed to meet three of the four criteria for admissibility?

III. STATEMENT OF THE CASE

A. Procedural Facts.

Adam Hord was tried to a Clark County jury on an amended information charging a single count of felony harassment (death threats).¹ CP 3-4. The jury acquitted Hord of felony harassment but found him guilty of the lesser offense of harassment, a gross misdemeanor.² CP 26, 27. The jury also returned a special verdict finding that the harassment was a domestic violence offense. CP 28.

¹ RCW 9A.46.020(a)(i) and RCW 9A.46.020(2)(b)(ii).

² RCW 9A.46.020(2)(a)

Hord received a suspended sentence and was placed on probation for 24 months with a requirement that he perform certain conditions. CP 29-29.

Hord subsequently appealed all portions of his judgment and sentence. CP 40.

B. Trial testimony.

Abigail Mitchell and Adam Hord lived together as a couple for over seven years. 1RP³ at 48. They have a daughter together. Her name is Grace. 1RP at 47, 52. In March 2010, troubles in the relationship boiled over and Mitchell starting staying with a friend, Misha Condon. 1RP at 47-49. Grace was about a year and a half old when Mitchell went to stay with Condon. 1RP at 47.

Within a few days of moving in with Condon, Mitchell took Grace to Hord's parent's home so Hord could visit with Grace. 1RP at 48-52. Hord and Mitchell had not seen each other or talked to each other since she left to stay with Condon. 1RP at 53. After spending time with Grace, Hord did not want to leave her and, in Mitchell's opinion, he seemed frustrated by having to do so. 1RP at 54.

During her trial testimony, Mitchell denied that Hord acted aggressively toward her during the visit with Grace. 1RP at 53-54.

³ 1RP – Volume 1 of the report of proceedings
2RP – Volume 2 of the verbatim report of proceedings

However, Mitchell had previously written a statement for the police, a *Smith affidavit*, that Hord had acted aggressively toward her. See Trial Exhibit 4A (Supplement Designation of Clerk's Papers).

Later that day, Hord called Mitchell. He asked her where she and Grace were staying. Mitchell gave Hord directions to Condon's house. 1RP at 59. Hord said something to Mitchell about snapping her neck. 1RP at 59. Mitchell did not take the remark seriously. 1RP at 61.

Condon was going out for the evening. 1RP at 101. Mitchell felt a little nervous about spending the night by herself at Condon's house. 1RP at 101. While she was out, Condon received a text from Mitchell asking her to come home. 1RP at 103. Condon believed that Mitchell had spoken with Hord over the phone, Hord said something about breaking her neck, and that Mitchell was scared. 1RP at 103. Condon returned home. 1RP at 103.

When Condon arrived at her house, her uncle Bill Dugan was there. 1RP at 105. Hord and Dugan were best friends. 2RP at 153. Hord arrived at the house about 15 minutes later. 1RP at 92-93, 107. Condon, who had known Hord for many years, described his demeanor as "edgy." 1RP at 108. Condon felt that Hord was acting aggressively. 1RP at 110. Hord asked Mitchell to go for a walk with him so they could talk. 1RP at 111. Mitchell told him, "No." 1RP at 111. Hord said something like,

“What do you think I am going to do. Cut you up into little pieces.” 1RP at 111. Hord left taking some gardening shears with him. 1RP at 113. Mitchell did not believe that Hord would hurt her. 1RP at 67. She knew his passionate and emotional side. 1RP at 67.

Hord returned again later in the evening and was sent away. 1RP at 114.

No one at the house that evening called 911 or made efforts to contact the police. 1RP at 122.

The next day, Mitchell spoke to her father. 1RP at 77. Her father is the police chief for the City of Washougal. 1RP at 77. After talking to his daughter, the chief sent an officer to talk to Mitchell. 1RP at 78.

The responding officer, Corporal Ferguson, interviewed Mitchell. She made a written statement, a *Smith affidavit*. 1RP at 128. See Trial Exhibit 4A (Supplemental Designation of Clerk’s Papers). Mitchell’s *Smith affidavit* was admitted at trial over Hord’s objection.

Later that evening, Corporal Ferguson made an uneventful contact with Hord at his residence. 1RP at 135-37. Hord acknowledged saying “break your neck” and “cut into little pieces. ” He explained that he only did so to try to get a reaction out of her. 1RP at 136-37.

IV. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED IN HEARSAY EVIDENCE UNDER THE GUISE OF A PREVIOUSLY SWORN INCONSISTENT STATEMENT (A SMITH AFFIDAVIT).

A. The trial court improperly admitted Abigail Mitchell's written statement under ER 801 (d)(1)(i)

A witness's prior inconsistent statement is admissible as substantive evidence if it satisfies the elements of ER 801(d)(1)(i). State v. Smith, 97 Wn.2d 856, 863, 651 P.2d 207 (1982). Under ER 801(d)(1)(i), a court may admit statements of a witness when "the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." The reliability of the statement is key. Smith, 97 Wn.2d at 863.

To determine whether an earlier statement is reliable and therefore admissible, the trial court considers the Smith factors. State v. Nelson, 74 Wn. App. 380, 387, 874 P.2d 170, review denied, 125 Wn.2d 1002 (1994). Those factors are: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as part of a standard procedure in one of the four legally permissive methods for determining the existence of probable

cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. Smith, 97 Wn.2d at 861-63. The trial court's decision to admit evidence is reviewed for an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

In Hord's case, only Smith factor (4), that Mitchell was subject to cross examination when giving the subsequent inconsistent statement, is satisfied.

(i) Mitchell did not make a voluntary statement. Mitchell did not fill out the statement form voluntarily. She had talked to her father about her relationship with Hord. Her father, a police chief, then sent one of his officers, Corporal Ferguson, to talk to Mitchell. Mitchell did not invite this contact. She thought that she was sharing personal information only with her father:

PROSECUTOR: And, we briefly touched on this earlier, but on March 28th, the next day, did you meet with law enforcement?

MITCHELL: Yes, I did.

PROSECUTOR: And, did you choose to speak with them about this incident at that point in time?

MITCHELL: I guess I did choose to do that. Yes.

PROSECUTOR: Did you also choose to provide a written statement, when asked?

MITCHELL: Yes. Yeah. I guess -- I mean, I didn't really anticipate like, I guess, all of this. I just -- the way

that that even came about was that I -- the next day, you know, I had just been talking to my dad about it and that -- that's how we sort of got here, I guess. I didn't -- I didn't really know what to do or what I was doing, so.

PROSECUTOR: Okay. And, who -- who is your dad that you talked about this with?

MITCHELL: My dad. His name is Ron. He is the Chief of Police for Washougal. For Washougal, Washington.

PROSECUTOR: And, you told him about this incident?

MITCHELL: Very briefly. I didn't really go into any details with him about it. I just sort of was not sure what to do and like wondering, you know, kind of like speaking with him about it and he -- you know, he just told me, you know, go down the next day and just, you know, file -- get something filed. Just, you know, for your own peace of mind and then, later, is when you know, he had called back and said, "I'm just sending someone down to talk to you right now."

PROSECUTOR: Okay. And, again, you spoke with law enforcement, you agreed to give this written statement, correct?

MITCHELL: A. Oh, I just -- I mean, it was just a piece of paper put in front of me so I just certainly filled it out. I mean, --

1RP at 77-78.

But Mitchell did not realize that she had the right not to make a written statement. At the end of her exchange with the prosecutor, she noted: "I didn't really know I had the option not to [write a statement], I guess." 1RP at 78. Thus, the writing of Mitchell's statement can hardly be seen as voluntary.

(ii) Minimum guaranties of truthfulness are absent. The minimal guaranty of truthfulness element is satisfied if the statement was made under oath subject to the penalty of perjury and in a formalized proceeding. Smith, 97 Wn.2d at 862; ER 801(d)(1)(i).

In State v. Sua, the court reversed a conviction in part because the trial court admitted a *Smith affidavit* that was not made under oath subject to the penalty of perjury. State v. Sua, 115 Wn. App. 29, 48, 60 P.3d 1234 (2003). The same should hold true here.

Directly below Mitchell's written statement but before her signature, the following boilerplate text appears:

I have written or had this statement written for me and this statement truly and accurately reflects my recollection of the event. The police officer has explained to me that I have to certify, or declare, under penalty of perjury, that the above information is true and correct, under penalty of law.

Just below that, Mitchell signed and dated the statement.

Below Mitchell's signature, is the following tailored boilerplate:

I, Officer *Ferguson*⁴, confirm that *Abigail Mitchell* authored or dictated this entire statement without input from any other person or myself, I also confirm that I read the above perjury clause to *Abigail* before this statement was signed.

Nothing about this process suggests that Mitchell made her statement under oath. This lack of oath cannot simply be ignored. The

⁴ *Italicized* words were written in by hand.

court is obliged to construe ER 801(d)(1)(i) according to its plain meaning, and to give effect to all of its language. Sua, 115 Wn. App. at 48.

An unsworn written statement can satisfy the oath requirement if it is signed and contains language such as, “I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct[.]” State v. Nieto, 119 Wn.App. 157, 161, 79 P.3d 473, 476 (2003). But as noted above, that is not what the statement signed by Mitchell says. It merely says that Mitchell “[has] to certify, or declare, under penalty of perjury, that the above information is true and correct.” Nothing in the statement says that Mitchell did certify her statement under the penalty of perjury.

(iii) The statement was not used to establish probable cause. There are four legally permissible methods for determining the existence of probable cause thus allowing charges to be filed against a defendant: (1) filing of an information by a prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) filing of a criminal complaint before a magistrate. Smith, 97 Wn.2d 862. Here, Mitchell’s written statement did not factor into the establishment of probable cause.

Corporal Ferguson did file a probably cause statement. Supplemental Clerk’s Papers, (sub nom. 2). However, nothing in

Ferguson's probable cause statement hints at any reliance on Mitchell's *Smith affidavit*.

Accordingly, this *Smith* factor, like the other two *Smith* factors, is not met.

B. The trial court abused its discretion in admitting Mitchell's *Smith affidavit*.

The admissibility of a prior inconsistent statement under ER 801(d)(1)(i) is reviewed for abuse of discretion. If the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of legal issues, the ruling may be an abuse of discretion. City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000).

Here the trial court abused its discretion in admitting Mitchell's written statement. While the court said that all of the elements for admissibility were met, it is clear from the above analysis that they were not. Although some parts of the *Smith affidavit* are inconsistent with Mitchell's trial testimony, three of the four Smith factors, as demonstrated above, are absent. The proponent of the statement's admissibility bears the burden of proving each of these elements. Nieto, 119 Wn. App. at 161. Here, the state as the proponent of the written statement's admissibility, failed to establish its reliability prior to its admission. Accordingly, the

trial court abused its discretion when it allowed the statement to be used as evidence against Hord.

C. The harassment conviction cannot be sustained in absence of the *Smith affidavit*.

For Hord to be convicted of harassment, the state had to prove the following elements of the crime:

- (1) That on or between March 27, 2010, and March 28, 2010, the defendant knowingly threatened to cause bodily injury immediately or in the future to Abigail Mitchell; and
- (2) That the words or conduct of the defendant placed Abigail Mitchell in reasonable fear that the threat would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the threat was made or received in the State of Washington, County of Clark.

CP 19.

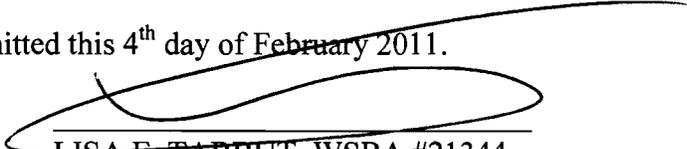
Hord did not deny making the threat. He told Corporal Ferguson that he had. But Mitchell consistently denied during her testimony that Hord had place her in any fear at all. It is only in the *Smith affidavit* where, on “Page 3 of ___” that Mitchell answers “yes” to the question of “were you put in fear of being hurt during this incident.” Ex. 4A. Other witnesses testified that Mitchell seemed fearful. But only Mitchell could know the truth. Without the *Smith affidavit*, the jury was only left

with the sheerest of speculation as to Mitchell's true feelings. Without the *Smith affidavit*, the harassment charge fails.

V. CONCLUSION

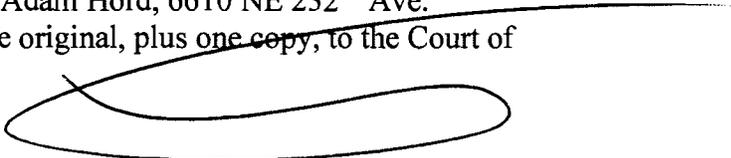
Adam Hord's conviction for harassment should be reversed.

Respectfully submitted this 4th day of February 2011.


LISA E. TABBUT, WSBA #21344
Attorney for Adam Hord

CERTIFICATE OF MAILING

I certify that on February 4, 2011, I deposited in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Michael C. Kinnie, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA 98666-5000; (2) Adam Hord, 6610 NE 232nd Ave. Vancouver, WA 98682; and (3) the original, plus one copy, to the Court of Appeals, Division 2.


LISA E. TABBUT, WSBA #21344

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