

No. 45698-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRENDA VASSAR,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. SUMMARY OF THE STATE'S ARGUMENT

The State is mindful of the rules regarding cross examination and closing argument, and respectfully submits that the four questions of cross examination at issue in this appeal, and the State's subsequent closing argument, were not misconduct because both were in response to the defendant's own testimony.

II. FACTS

On May, 31, 2013, Charlene Hammons (Charlene) purchased a 1964 Ford pick-up from the defendant/appellant, Brenda Vassar (Brenda). (RP 23, 30). Charlene purchased the truck for her husband, who liked to restore old trucks. (RP 23, 24). Brenda sold the truck because she needed the money. (RP 26). The purchase price was \$500. (RP 27). The money was paid to Brenda in cash. (RP 27). Charlene prepared a bill of sale, which relinquished all title of the vehicle from Brenda to Charlene, and which Brenda signed. (RP 28, 30 and Exhibit 1). Brenda gave Charlene the keys to the truck. (RP 83). Charlene took possession of the truck; the truck was left in Charlene's yard. (RP 81, 83). Brenda did not give Charlene the title to the truck because Brenda said she had to go retrieve it from her safe. (RP 27).

The bill of sale states the date of purchase was on April 2, 2013. (RP 30, Exhibit 1). The bill of sale also said the title will be given to Charlene on or before April 4, 2013. (RP 30, Exhibit 1). Brenda signed the bill of sale. (RP 28).

After Charlene took possession of the truck, her husband felt the truck had a little more rust than he wanted. (RP 32). Charlene sold the truck to another gentleman named Terry. (RP 32). The sale to Terry was conditioned on Charlene obtaining the title from Brenda. (RP 32). Charlene allowed Terry to drive the vehicle into Centralia. (RP 32 & 63). Terry parked it on Tower Avenue in Centralia. (RP 33 & 63). When he came back to get the truck, the truck was gone. (RP 32-33). Terry called Charlene to report the truck missing, because he thought she (Charlene) had picked it up. (RP 33). Charlene did not pick it up. (RP 33).

Charlene went to Brenda's work to confront Brenda. (RP 33). Brenda said she took the vehicle back. (RP 33). Brenda said she thought she was liable for it because the truck was not yet insured. (RP 33). Brenda refused to give the truck back. (RP 124).

On June 10, 2013, Officer Lowrey (Centralia PD) contacted Brenda. (RP 63). Brenda said she had sold the vehicle to Charlene

but that it had not been paid for. (RP 63). Officer Lowrey advised Brenda that Charlene had a bill of sale. (RP 63).

Brenda then changed her story. (RP 63). She said she couldn't remember if she had been paid. (RP 63). That seemed odd to Officer Lowrey; he could not imagine forgetting if he had been paid \$500. (RP 64). Brenda said the bill of sale was forged. (RP 64). Brenda refused to tell Officer Lowrey where the truck was located, except to tell him it was in "storage." (RP 124).

Officer Lowrey obtained a certified copy of Brenda's driver's license picture along with her signature. (RP 64, Exhibit 10). He obtained this from the Washington State Department of Licensing (DOL). (RP 64).

After comparing signatures, Officer Lowrey noticed there were a lot of similarities in the signatures. (RP 72). Officer Lowrey contacted Brenda again. (RP 65). He informed her that he believed that the vehicle was sold, that the bill of sale was valid and that she needed to return the vehicle. (RP 66). Brenda said she would not return the vehicle without proof of insurance. (RP 66, 124). Brenda told Officer Lowrey that she would not give Charlene the title to the vehicle without proof of insurance. (RP 67).

On June 23, 2013, after taking a vacation, Officer Lowrey came back to work and discovered that the truck had not been returned. (RP 68). Officer Lowrey contacted Brenda once again over the phone. (RP 69). Brenda told Officer Lowrey the truck was in storage and that it would not be returned. (RP 69).

Officer Lowrey said he was going to be looking for her to arrest her for vehicle theft. (RP 69). No warrant was issued for Brenda's arrest, but the officer felt he had probable cause. (RP 75).

Officer Lowrey was later informed that the truck had been dropped off in the Good Will parking lot. (RP 69).

Later in the evening on June 23, 2013, Lowrey received a call from Charlene. Charlene found the truck in the Good Will parking lot, in Centralia. (RP 38). The vehicle had been disabled. (RP 39, 40). Fortunately, Charlene had photographs of the engine before it had been taken by Brenda. (RP 23). The photographs verified that after Brenda took the truck, a hood emblem was missing and the air cleaner was taken off the engine. (RP 40). The battery had been swapped out for an old one. (RP 39-40). The license plates had been removed so that the vehicle could not be driven on the road. (RP 41, 93).

On June 24, 2013, knowing that Centralia PD was looking for her, Brenda turned herself into the Lewis County Jail. (RP 95).

At trial, Brenda Vassar testified on her own behalf. (RP 80-105). She testified Charlene had never given her any money. (RP 82). She testified that she never signed the bill of sale. (RP 83). She testified that Charlene must have forged Brenda's signature on the bill of sale. (RP 89, 97). Notwithstanding this testimony, Brenda also testified she left the truck in Charlene's yard and left the key with Charlene. (RP 83). Brenda testified on direct examination that, "Officer Lowrey told everyone that he came in contact with, that there was a warrant out for my arrest and anyone helping me would be arrested as well." (RP 94).

Brenda also testified on direct, "Officer Lowrey called and said I could go turn myself in again, that the jail was aware I had a PC, which I had never heard of before." (RP 95).

On cross-examination, the State elicited the following testimony from the defendant, all without objection from defense counsel:

Q. Now, you say Officer Lowrey was telling everyone – those are your words, "everyone" – that there's a warrant out there, right?

A. Yes.

Q. In fact, he didn't have a warrant, did he?

A. No, he didn't.

Q. It was probable cause, right?

Note: *the following four questions are at issue in this appeal*

A. It was a lie, is what it was.

Q. You're calling this officer here a liar; is that what you're saying?

A. Yes, I am.

Q. So the officer is not telling the truth, correct?

A. That's correct.

Q. Charlene Hammons, she's not telling the truth, right?

A. That's correct

Q. The only person in this courtroom we should trust is you, right?

A. I believe so. (RP 102).

This cross examination is the basis for the defendant's appeal.

III. ARGUMENT

A. THE DEFENSE, ON DIRECT EXAMINATION OF THE DEFENDANT, OPENED THE DOOR TO CROSS-EXAMINATION BY PLACING CREDIBILITY OF THE STATE'S WITNESSES AT ISSUE. MOREOVER, THE DEFENDANT TESTIFIED, IN A NON-RESPONSIVE ANSWER TO THE STATE'S QUESTION, THAT THE POLICE OFFICE LIED.

On direct examination, the defendant admitted she was told that the officer had "PC". (RP 95). But when asked about probable cause on cross examination, the defendant blurted out that "it was a lie." (RP 102). This answer was non-responsive to the question. The State had absolutely no idea the defendant would answer the question the way she did. Moreover, the answer was unclear: Was the fact that the officer thought he had probable cause a lie, or was her perception of an arrest warrant a lie? But once the defendant's answer was stated, the State had both the right and obligation to question the defendant further regarding her answer.

This blurring out of a non-responsive answer is factually different and distinguishable from the cases cited by the Appellant. In *Casteneda-Perez*, the State actually asked the defendant about the officers lying first. *State v. Casteneda-Perez*, 61 Wn. App. 354, 357, 810 P.2d 74 (1991). In *Vassar*, Vassar volunteered that statement first, and the State merely followed up on her nonresponsive answer. There would have been no questions regarding the officer lying if the defendant had not first accused him.

The Court in *Casteneda-Perez* stated that:

"The tactic of the prosecutor was apparently to place the issue before the jury in a posture where, in order to acquit

the defendant, the jury would have to find the officer witnesses were deliberately giving false testimony.” *State v. Casteneda-Perez*, 61 Wn. App. at 362.

But in *Vassar*, the prosecutor did not place the issue before the jury. The defendant did. (RP 102). Moreover, the State asked a grand total of four (4) questions on cross examination that the appellant claims were misconduct. These four questions start on line one of RP page 102. (RP 102).

The Court in *Casteneda-Perez* pointed out that the prosecutorial tactic was the prosecutor “persistently seeking to get the witnesses to say that the officer witnesses were lying.” (emphasis added), *State v. Casteneda-Perez*, 61 Wn. App. at 362. That was not the case in *Vassar*. The deputy prosecutor simply asked Ms. Vassar a few follow up questions to Ms. Vassar’s unsolicited accusation, then moved on. (RP 102).

In *Dhaliwal*, the defense alleged improper questioning by the State regarding religious and cultural stereotyping. *State v. Dhaliwal*, 150 Wn.2d 559, 756, 79 P.3d 432 (2003). That was hardly an issue in *Vassar*.

In *Davenport*, the deputy prosecutor argued in closing that the defendant was an accomplice. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). The defendant was not charged

as an accomplice. *State v. Davenport*, 100 Wn.2d at 760. Nor was a jury instruction given regarding accomplice liability. *State v. Davenport*, 100 Wn.2d at 760. Unlike *Davenport*, the State is not accused of misrepresenting the law in *Vassar*.

The Appellant spends some time arguing *State v. Fleming*. (Appellant's brief, pages 11-13). The facts in *Fleming* are different than those in *Vassar*.

Dwight Fleming and a friend met up with "DS" and her friends at DS's mobile home, where DS was sexually assaulted. *State v. Fleming*, 83 Wn. App. 209, 211, 921 P.2d 1076 (1996). Fleming and his friend were each charged with Rape, Third Degree. *Fleming*, 83 Wn. App. at 212. At trial, the charges were amended to Rape, Second Degree. *Fleming*, 83 Wn. App. at 212. Both defendants were convicted. *Fleming*, 83 Wn. App. at 212. In stark contrast to *Vassar*, neither Fleming nor his co-defendant testified at trial. *Fleming*, 83 Wn. App. at 212.

In *Vassar*, the defendant voluntarily took the stand. She directly challenged the veracity of both the complaining witnesses (Charlene Hammons) and the State's investigating officer (Mike Lowrey). In a nonresponsive answer to a question regarding the officer telling her he had probable cause (*Vassar* referred to it as

“PC”) Vassar blurted out, “It was a lie.” (RP 104). The State did not ask her if it was a lie, she volunteered that statement. (RP 104). Once she impugned the veracity of the officer, the State merely followed up with a few questions that solidified her unsolicited statement.

Vassar’s entire defense was that she was the victim of the state’s witnesses lying to her, and lying about her. Her entire defense depended on the jury believing her story of the events, and disbelieving the State’s two witnesses. She did not have to present this defense; the State did not force her into presenting the defense. The Appellant does not raise one claim of error regarding the State’s case in chief. Vassar’s testimony was completely voluntary.

Once Vassar testified and raised her defense, the State was entitled to question her regarding it. To hold otherwise would be to allow a defendant to testify as to facts diametrically opposed to the State’s, but not allow the State to cross examine the defendant regarding his or her story. A jury listening to such a case might very well conclude that because the State did not cross examine a witness as to his or her statements, the State was conceding the issue. The truth telling mechanism of our courts is cross-

examination. If Vassar did not want to be cross-examined regarding her accusation of Officer Lowrey, she should not have said, "It was a lie." That was completely within her control.

Vassar was not a case of the state using a "tactic" as described in *State v. Casteneda-Perez*. The State did not force Ms. Vassar to say that the police were lying. Her statement to that effect was made completely on her own volition.

B. THE STATE'S WITNESS, CHARLENE HAMMONS, TESTIFIED THAT SHE HAD A REPOSSESSION BUSINESS.

The Appellant argues that the State argued facts not in evidence. (Appellant's brief, page 20.) The state concedes that it did not offer evidence that Charlene Hammons was "bonded". But Charlene did testify that she had a repossession business. (RP 21). The fact that her business was "bonded" was simply a reasonable inference from her testimony. All vehicle repossession businesses must be bonded. That's like saying X is a building contractor. It is assumed from the statement that X is a properly licensed and bonded building contractor.

The mere claim that Charlene was "bonded" does not show her testimony was enhanced as being more credible. Appellant argues that being "bonded" is an "official state licensing title."

(Appellant's Brief page 20). Appellant cites no authority that this is an "official title" recognized anywhere in Washington State law. Being bonded just means you're insured in case you wrongfully repossess a vehicle. It doesn't mean you're an expert or that you carry the authority of the State of Washington.

The defense actually enhanced Charlene's credibility by asking her the following:

Q. Now, earlier you said you owned a repo business?

A. Yes I do.

Q. So what does that entail?

A. I get orders from different car lots, and I pick up the cars.

Q. So you repossess vehicles?

A. Yes, I do.

Q. How long have you been doing that?

A. I've been doing it for a couple years now. (RP 49).

Then defense counsel once again bolstered Charlene's knowledge of repossessing cars by asking her if she was "fairly experienced at this industry." RP 50. It is somewhat disingenuous to now claim, on appeal, that arguing Charlene was "bonded" for the purpose of repossessing cars was unfairly bolstering Charlene's credibility, when defense counsel questioned Charlene regarding

her business more than the State did. The State submits that the defense cross-examination did more to solidify Charlene's credibility with regards to buying and selling cars than the State's singular comment regarding her being "bonded." Any error in mentioning that Charlene was bonded is therefore harmless.

C. VASSAR IS DISTINGUISHABLE FROM VENEGAS AND WALKER.

The Appellant argues *Vassar* is like *Venegas* and *Walker* because both of those cases were "credibility contests." (Appellant's brief, page 22). In *Venegas*, the defendant did take the stand. *State v. Venegas*, 155 Wn. App. 507, 519, 228 P.3d (813 (2010)). But the prosecutorial misconduct revolved around the deputy prosecutor's comment during closing: "In order to find the defendant not guilty, you have to say to yourselves, 'I doubt the defendant is guilty, and my reason is ---- blank.'" *Venegas*, 115 Wn. App. at 519. This is the famous "fill in the blank" argument that all deputy prosecutors are taught to avoid. That argument was not made in *Vassar*.

Likewise, *Walker* took the stand and testified. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011). But like *Venegas*, the problem was the closing argument, not the cross

examination of the defendant. Applying the *Venegas* and *Walker* holdings to *Vassar*, the State in *Vassar*:

- 1) did not use a fill in the blank test.
- 2) did not use a puzzle.
- 3) did not minimize the reasonable doubt standard by making it analogous to everyday decision making.

What the State in *Vassar* did was argue that the testimony presented by the State was more credible than that presented by the defendant. The defendant did not have to testify. But once she did, the State was entitled to argue reasonable inferences. These inferences included the inference that if she really wanted to persuade the police that the bill of sale was forged, AS SHE TESTIFIED (RP 89, 97), then she would have taken steps to do so. She didn't. So the State argued her version of the events was not credible. This was not "burden shifting." The argument was based on the defendant's own testimony.

IV. CONCLUSION

The State's four-question cross examination that is at issue in this appeal was based on the Defendant's unsolicited, non-responsive statement that the officer's statement was a lie. The State's cross examination was not a "tactic" designed to force the defendant to say the state's witnesses were not telling the truth.

Had Ms. Vassar not accused the officer of lying, she would not have been cross-examined on that point. The state merely cross-examined the defendant regarding her testimony. The defendant put the veracity of the State's witnesses at issue, not the State.

During closing, the State took great care not to call Brenda Vassar a liar. That word, "liar," does not appear anywhere in the State's closing argument. The State does, as pointed out by the Appellant, use the word, "mistaken." Given the testimony from the defendant, the State intentionally toned down its rhetoric in closing so there would be no basis for a misconduct claim.

The Appellant has shown no misconduct on the part of the State. Moreover, given the defense testified to by the defendant, the defense has shown no prejudice. Ms. Vassar testified that the officer lied and the state's witness forged the bill of sale. All the State's cross-examination did was underscore her defense.

The conviction of Brenda Vassar should be affirmed.

RESPECTFULLY submitted this 28 day of August, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

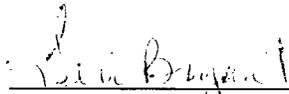
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. BRENDA VASSAR, Appellant.	No. 45698-2-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On August 28, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email addresses: Liseellnerlaw@comcast.net.

DATED this 28th day of August, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

August 28, 2014 - 11:02 AM

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