

FILED
Court of Appeals
Division II
State of Washington
4/20/2018 4:16 PM

NO. 51282-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES WATSON,

Appellant.

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

The Honorable Jerry T. Costello, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
	Issues pertaining to assignments of error.....	1
B.	STATEMENT OF THE CASE.....	1
	1. Procedural History	1
	2. Substantive Facts	2
C.	ARGUMENT.....	5
	1. THE TRIAL COURT VIOLATED WATSON’S CONSTITUTIONAL RIGHT TO CROSS EXAMINE THE STATE’S KEY WITNESS ABOUT HER MOTIVE TO LIE.	6
	2. THE PROSECUTOR’S FAILURE TO CORRECT TESTIMONY FROM THE STATE’S WITNESS SHE KNEW TO BE FALSE VIOLATED WATSON’S DUE PROCESS RIGHT TO A FAIR TRIAL.....	10
D.	CONCLUSION.....	12

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	6
<i>State v. Finnegan</i> , 6 Wn. App. 612, 495 P.2d 674, <i>review denied</i> , 81 Wn.2d 1001 (1972).....	10
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).....	9
<i>State v. McDaniel</i> , 83 Wn. App. 179, 920 P.2d 1218 (1996), <i>review denied</i> , 131 Wn.2d 1011 (1997)	9
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994), <i>cert. denied</i> , 514 U.S. 1129, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995).....	6
<i>State v. York</i> , 28 Wn. App. 33, 621 P.2d 784 (1980).....	7, 8

Federal Cases

<i>Berger v. California</i> , 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969)	8
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004).....	6
<i>Davis v. Alaska</i> , 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974).....	6, 7, 9
<i>Napue v. Illinois</i> , 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) .	10, 11
<i>United States v. Zuno-Arce</i> , 339 F.3d 886 (9th Cir.2003)	10

Statutes

RCW 9A.36.041.....	2
RCW 9A.46.020(1).....	2

Constitutional Provisions

Const. art. 1, § 22	6
U.S. Const., amend. VI	6, 7

A. ASSIGNMENTS OF ERROR

1. The trial court's exclusion of evidence relevant to a key prosecution witness's motive to lie violated appellant's constitutional right of confrontation.

2. The State's failure to correct a key witness's false testimony violated appellant's due process right to a fair trial.

Issues pertaining to assignments of error

1. Appellant was charged with fourth degree assault and harassment, and the State's case rested primarily on the testimony of the complaining witness. Did exclusion of evidence pertinent to the witness's motive to lie violate appellant's right of confrontation?

2. The State's key witness provided false testimony, which the prosecutor knew was false. Where the State's case turned on the witness's credibility, and the witness's willingness to lie under oath was material to her credibility, did the State's failure to correct the false testimony violate appellant's right to due process?

B. STATEMENT OF THE CASE

1. Procedural History

On August 28, 2017, the Pierce County Prosecuting Attorney charged appellant James Watson in Juvenile Court with fourth degree

assault and harassment (bodily injury). CP 1-2; RCW 9A.36.041(1)(2); RCW 9A.46.020(1)(a)(i)(b). The case proceeded to fact finding hearing before the Honorable Jerry Costello. The court found Watson guilty on both counts and entered findings of fact and conclusions of law in support of its decision. CP 5-11. The court imposed three months community supervision with 20 hours of community service. CP 12-19. Watson filed this timely appeal. CP 34.

2. Substantive Facts

In August 2017, 14-year-old James Watson and his mother, Margaret Watson, lived with Margaret Mitchell and her boyfriend John Warberg. RP 19-20, 80. On the morning of August 27, 2017, Watson was awaked by a dispute between his mother and Mitchell. RP 82. Watson got up and joined in, and eventually both Mitchell and Margaret Watson called 911. RP 31, 82-84. Because there was a report of a domestic disturbance, responding law enforcement officers were required to make an arrest, and they arrested the Watsons. RP 71. James Watson was charged with fourth degree assault and harassment. CP 1.

Mitchell was the State's primary witness at trial. She testified that they were in the process of moving, and Margaret Watson had some tie-down straps that she needed to move her furniture. When Margaret Watson refused to return the straps, Mitchell took her purse. RP 24. They

argued, with Margaret Watson demanding her purse back. According to Mitchell, James Watson joined in the argument, holding a bat, and said he would bash her head in if she touched his mother. RP 25-26. Margaret Watson then hit her in the face. RP 26. When Mitchell moved to the living room, James Watson grabbed her arms, held them behind her back, and told his mother to hit her again. RP 27.

Defense counsel sought to demonstrate Mitchell's motive to lie through cross examination. He asked if she had recently had some issues with CPS, but the court sustained the State's objection. RP 40. Counsel asked Mitchell if she believed Margaret Watson had reported her to CPS, and Mitchell said no. When the State objected, counsel explained that he believed part of Mitchell's actions were retaliation for her understanding of the CPS situation, and the court overruled the objection. RP 40-41.

Next defense counsel asked Mitchell if she had any concerns about the CPS situation in relation to recent arrests out of Seattle Municipal Court or another jurisdiction. RP 41. The State objected on grounds of relevance and speculation, saying there was no information before the court regarding recent arrests. RP 41. The court said it had to sustain the objection because it was a compound question and told counsel to ask another question. RP 41. Defense counsel then asked Mitchell if she had

recently had a domestic violence assault arrest out of Seattle Municipal Court. Mitchell answered no. RP 41

The State objected on relevance grounds, and the court asked counsel how this information was relevant. RP 41. Counsel explained that he understood these arrests were related to Mitchell's children. There were CPS complaints, and she was in the position that any additional arrests would be significant. RP 42. In addition to possible retaliation, this situation would show why she would make false statements. RP 42. The prosecutor responded that there was no foundation for these alleged arrests or charges, and the court sustained the objection. RP 42.

Defense counsel asked no further questions on cross exam, and the prosecutor conducted no redirect exam. RP 42. Once Mitchell was excused, defense counsel noted for the court that she had answered that she had no arrest, but he had had conversations with the prosecutor about the arrest, and the prosecutor was aware of it. RP 43-44. The prosecutor agreed that she was aware of Mitchell's arrest. RP 44. Defense counsel responded that the witness had just knowingly perjured herself and that the prosecutor needed to address it. The court told the prosecutor to proceed with the next witness. RP 44.

Warberg then testified that he was sitting outside during the dispute and did not hear anything that was said. He saw James Watson

with a bat in his hand, but it was on the ground, not in the air. RP 49-50. He said he also saw Watson hold Mitchell's arms behind her back, although he still could not hear anything. RP 52. Warberg then disappeared around the corner, because he did not want to get involved. RP 53.

One of the sheriff's deputies who responded to the 911 calls also testified. He said the situation was confusing because both parties to the dispute had called 911, and everyone was fairly excited. RP 66, 69. After interviewing everyone he determined that the altercation was two against one, so he arrested the Watsons. RP 70-71.

Watson testified that he heard his mother yelling at Mitchell to give her purse back, and he got out of bed. RP 82. He attempted to retrieve the purse, but Mitchell pushed past him and went downstairs. He testified he may have brushed against Mitchell when he tried to grab the purse, but he did not touch her after that. RP 83-84. The only thing he yelled to Mitchell was to give his mother's purse back. RP 94. Mitchell made it clear she was going to call 911, and his mother called as well. RP 83-84. Watson did not see Warberg during his interactions with Mitchell. RP 90.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED WATSON'S CONSTITUTIONAL RIGHT TO CROSS EXAMINE THE STATE'S KEY WITNESS ABOUT HER MOTIVE TO LIE.

The Sixth Amendment and Const. art. 1, § 22, guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974); *State v. Russell*, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995). Confrontation is a fundamental “bedrock” protection in a criminal case. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004). *See Davis*, 415 U.S. at 315. The primary and most important component of the constitutional right of confrontation is the right to conduct a meaningful cross examination. *Davis*, 415 U.S. at 316; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

The purpose of cross examination is to test the perception, memory, and credibility of witnesses, thus assuring the accuracy of the fact finding process. *Davis*, 415 U.S. 316; *Darden*, 145 Wn.2d at 620. “Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question.... As such, the right to confront must be zealously guarded.” *Darden*, 145 Wn.2d at 620 (citations omitted). Because cross examination is so integral to the

adversarial process, “a criminal defendant is given extra latitude in cross examination to show motive or credibility, especially when the particular prosecution witness is essential to the State’s case.” *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

In *Davis*, the defense sought to question a key prosecution witness concerning the fact that he was on probation as a juvenile offender and thus could be under pressure from the police to shift the blame from himself and identify a perpetrator. The trial court disallowed this cross-examination, on the basis of a statute protecting the secrecy of juvenile records. *Davis*, 415 U.S. at 311, 313-14. The Supreme Court reversed, holding that the defendant's Sixth Amendment right of confrontation was violated when the court’s ruling prevented him from establishing the factual record necessary to argue his bias theory. *Davis*, 415 U.S. at 318-20.

As the Supreme Court explained, “[c]ross examination is the principle means by which the believability of a witness and the truth of his testimony are tested.” *Davis*, 415 U.S. at 316. The jury was entitled to have the benefit of the defense theory so that it could make an informed judgment as to the weight to place on the key witness’s testimony. Thus, defense counsel should have been permitted to expose the jury to facts from which it could determine the reliability of the witness. *Davis*, 415

U.S. at 318. The Court held that since the juvenile was a key witness for the state, and the excluded evidence would have raised serious questions as to his credibility, the defendant's right of confrontation was paramount to the state's interest in protecting the juvenile offender. *Davis*, 415 U.S. at 319.

In this case, as in *Davis*, the court excluded cross examination of the key prosecution witness which would have demonstrated her motive to lie. As counsel explained, Mitchell had some recent issues with CPS case as well as a recent domestic violence arrest out of Seattle Municipal Court and thus was in the position that any further arrests could have a significant impact. Law enforcement had been dispatched to a domestic dispute, requiring that an arrest be made. Mitchell therefore had a motive to shift the blame from herself and lie to police to avoid arrest. RP 40-42.

The court, however, sustained the prosecutor's relevance objections to questions about both the CPS issues and the domestic violence arrest. RP 40, 42. While the court may limit cross examination in consideration of legitimate interests, such as relevancy, "denial or diminution calls into question the integrity of the fact-finding process and requires the competing interests be closely examined." *York*, 28 Wn. App. at 37 (citing *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969)). Moreover, some things are "always relevant,"

including specific attacks on a witness's credibility on issues directly relevant to the case at hand. *Davis*, 415 U.S. at 316. Because Mitchell was the State's key witness and the excluded evidence would have raised serious questions about her credibility, the court's ruling violated Watson's right to effective cross examination.

Violation of the defendant's rights under the confrontation clause is constitutional error and therefore presumed prejudicial. *State v. McDaniel*, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), *review denied*, 131 Wn.2d 1011 (1997). Reversal is required unless the State proves beyond a reasonable doubt that the error was harmless. Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

Here, the State's case was built on Mitchell's testimony. Warberg testified that he did not hear anything that was said. RP 60. And while he said he saw Watson with a bat in his hand, the bat was on the ground and not in the air as Mitchell claimed. RP 60. No bat was found in the house or presented in evidence in any event. RP 72. Moreover, Warberg was outside during the entire conflict and could not corroborate Mitchell's version of the circumstances, and therefore his testimony alone would not

support findings that Watson was guilty. The State cannot prove that exclusion of evidence that established Mitchell's motive to lie was harmless, and reversal is required.

2. THE PROSECUTOR'S FAILURE TO CORRECT TESTIMONY FROM THE STATE'S WITNESS SHE KNEW TO BE FALSE VIOLATED WATSON'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The State has a duty in a criminal prosecution not to elicit perjury or present false evidence. This obligation extends to the affirmative duty to correct State witnesses who testify falsely. *State v. Finnegan*, 6 Wn. App. 612, 495 P.2d 674, (citing *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)), *review denied*, 81 Wn.2d 1001 (1972). A defendant's due process right to a fair trial is violated when the State, although not eliciting the false evidence, allows it to go uncorrected when it appears. *Napue*, 360 U.S. at 269.

To establish a due process violation based on the use of false evidence, the defendant must establish that "(1) the testimony [or evidence] was actually false, (2) the prosecutor knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir.2003).

The record shows that Mitchell, the State's key witness, testified falsely, and the prosecutor knew the testimony was false. Mitchell was asked on cross examination if she recently had a domestic violence assault arrest out of Seattle Municipal Court. She answered "No." RP 41. The prosecutor admitted that she was aware this testimony was false. RP 43-44. But instead of correcting the witness, as she was obligated to do, she argued that there was "no foundation for these alleged arrests or charges." RP 42. The court sustained the objection, prohibiting the defense from inquiring further, and the prosecutor conducted no redirect examination. RP 42.

Mitchell's false testimony was material to her credibility. The principle that the State may not knowingly use false evidence to obtain a conviction applies even if the false testimony goes only to the credibility of the witness. *Napue*, 360 U.S. at 269. The determination of guilt may rest on the credibility of a given witness. *Id.* Thus, if false testimony is in any way relevant to the case, the prosecutor has the responsibility and duty to correct the falsehood and elicit the truth. *Id.* at 269-70.

Although the court did not rely on the false testimony about Mitchell's arrest to establish the factual allegations against Watson, the fact that the witness lied under oath was relevant to her credibility. Relying on Mitchell's testimony about the allegations against Watson,

without correcting testimony the prosecutor knew to be false, materially misrepresented Mitchell's credibility to the court. Because the State's case turned on Mitchell's credibility, the failure to correct her false testimony was material to the outcome.

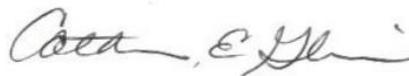
The presentation of false testimony, which the prosecutor knew to be false but did not correct, and which was material to the case, violated Watson's right to due process.¹ The findings of guilt must be reversed.

D. CONCLUSION

For the reasons discussed above, the findings of guilt must be reversed.

DATED April 20, 2018.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

¹ Watson raised this issue in a motion for new trial, arguing the prosecutor had a duty to withdraw Mitchell as a witness after she provided false testimony. CP 20-26; RP 134. The court denied the motion, ruling that it was untimely and that the prosecutor did not have an obligation to withdraw the witness because the court did not consider the perjured testimony. CP 46; RP 145-47. This Court is not bound by the lower court's conclusion regarding a denial of constitutional rights. *Napue*, 360 U.S. at 272.

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in
State v. James Watson, Cause No. 51282-3-II as follows:

James Watson
2204 166th St Ct E
Spanaway, WA 98378

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
April 20, 2018

GLINSKI LAW FIRM PLLC

April 20, 2018 - 4:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51282-3
Appellate Court Case Title: State of Washington, Respondent v. James M. V. Watson, Appellant
Superior Court Case Number: 17-8-00695-2

The following documents have been uploaded:

- 512823_Briefs_20180420161558D2650934_0263.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 51282-3 State v Watson Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com
Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
Phone: 360-876-2736

Note: The Filing Id is 20180420161558D2650934