FILED
Court of Appeals
Division II
State of Washington
12/3/2018 2:55 PM

NO. 51901-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KALI A. ETPISON,

Appellant.

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

The Honorable Jeffrey Bassett, Judge

REPLY BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iii

B. ARGUMENT IN REPLY 1

1.THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF MR. ETPISON'S 17 YEAR MILITARY CAREER 1

C. CONCLUSION 5

TABLE OF AUTHORITIES

WASHINGTON CASES **Page**

State v. Cohen, 125 Wn.App. 220, 104 P.3d 70 (2005) 2

State v. Dye, 178 Wash.2d 541, 309 P.3d 1192 (2013) 2

State v. Franklin, 180 Wash.2d 371, 325 P.3d 159 (2014) 1

State v. Jones, 168 Wash.2d 713, 720, 230 P.3d 576 (2010) 1

State v. Kirkman, 159 Wash.2d 918, 155 P.3d 125 (2007) 3

State v. Maupin, 128 Wash.2d 918, 913 P.2d 808 (1996) 1

State v. Strizheus, 163 Wn.App. 820, 262 P.3d 100 (2011) review denied, 173 Wash.2d 1030, 274 P.3d 374 (2012). 1

CONSTITUTIONAL PROVISIONS **Page**

U.S. Const. amend. VI 1

Wash. Const. art. 1, § 22 1

A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF MR. ETPISON'S 17-YEAR MILITARY CAREER

A criminal defendant has a constitutional right to present a defense under the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington Constitution. ***State v. Maupin***, 128 Wash.2d 918, 924, 913 P.2d 808 (1996). The defendant also has the constitutional right to present evidence in his defense. ***State v. Jones***, 168 Wash.2d 713, 720, 230 P.3d 576 (2010). The evidence must be relevant; but, if relevant, can be excluded only if there is a strong showing that it will prejudice the jury. *Id.*

The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. ***State v. Franklin***, 180 Wash.2d 371, 377 n. 2, 325 P.3d 159 (2014); ***State v. Strizheus***, 163 Wash.App. 820, 829, 262 P.3d 100 (2011), review denied, 173 Wash.2d 1030, 274 P.3d 374 (2012). "An erroneous evidentiary ruling that violates the defendant's constitutional rights, however, is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." ***Franklin***, 180 Wash.2d at 377 n. 2.

A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or its discretion is exercised

for untenable reasons. ***State v. Cohen***, 125 Wn.App. 220, 223, 104 P.3d 70 (2005). Evidentiary errors of non-constitutional magnitude are not reversible if they are harmless.

Here, the trial court initially granted the State's motion in limine to exclude evidence of Mr. Etpison's military honors and accomplishments, but later expanded the ruling to exclude any evidence of his military career. 2RP at 37. The State argued that reference to Mr. Etpison's significant military career would be prejudicial to the prosecution because jurors who have had military service or known others in the military would know that having a domestic violence conviction would preclude the use of firearms, therefore ending the defendant's military career. 1RP at 12.

Assuming the court's basis for excluding the testimony was based on the prosecution's argument that testimony regarding the defendant's military career was prejudicial, the basis for the decision was untenable because (1) it was purely speculative to believe that jurors had knowledge that a domestic violence conviction would end Mr. Etpison's military career, and (2) jurors were instructed to consider only evidence heard from witnesses, stipulations, and exhibits admitted during trial. Instruction No. 1; CP 151-52. "Juries are presumed to follow instructions absent evidence to the contrary." ***State v. Dye***, 178 Wash.2d 541, 556, 309 P.3d 1192

(2013); ***State v. Kirkman***, 159 Wash.2d 918, 928, 155 P.3d 125 (2007).

Moreover, if the State was concerned about improper use of testimony regarding Mr. Etpison's military career, it could have requested that the court provide a limiting instruction regarding the appropriate consideration of Mr. Etpison's military record.

The State argues in its Brief of Respondent (BR) that testimony about Mr. Etpison's military career supplied an inference of good character, and that allowing Mr. Etpison to present testimony regarding his military record would be "tantamount for allowing him to advance good character evidence that is other than by reputation." BR at 19.

Certainly, military service is an honorable function. However, there is no basis to perceive that a military career affords an unrealistic suggestion of good character any more than any other occupation. Moreover, the State's argument is belied by the fact that trial courts routinely permit police officers to appear in court in uniform and permit testimony regarding the officers' training, experience, and length of time in law enforcement at the beginning of their testimony, presumably as "background information," exactly as requested by defense counsel regarding Mr. Etpison's own career. To be sure, in this case, police officer Joshua Stottlemyer was permitted to testify about his current job with the Bremerton Police Department, his twenty-two-year career in law

enforcement, including employment with the Washington State Patrol and the Glynn County Police Department in Glynn County, Georgia. 4RP at 436. Officer Stottlemyer also testified about his graduation from the Washington State Patrol Trooper Academy, Georgia Police Officer Standards and Training Academy, and Criminal Justice Training Academy. 4RP at 436. Officer Alexander George was similarly permitted to testify regarding his occupation as an officer with the Bremerton Police Department, the fact that he had 720 hours criminal justice training at an academy and the length of his law enforcement career. 5RP at 619. Officer Bryan Hall was also permitted to testify regarding his eleven-year career in law enforcement, as well as his training including training in case law, patrol tactics, crime scene investigation, interview and interrogation techniques of victims and witnesses and suspects, and conducting investigations for misdemeanor and felony offenses including domestic violence. 5RP at 639.

It is difficult to see how the background and training of the officers responding to the call in this case, whose credibility was at issue, is more relevant than that background and career of the defendant, whose credibility was certainly at issue. The court's ruling left the jury with the understanding that while Officer Stottlemyer had a twenty-two-year career in law enforcement and Officer George had an eleven-year career in law

enforcement, Mr. Etpison's occupation was a complete cypher. The jury was left to wonder: what does he do for a living? Is he self-supporting? Where has he been for the past seventeen years? The information regarding the officers was supplied to the jury, but the same information regarding Mr. Etpison was denied to the jury. It is inappropriate for a trial court to deny a courtroom participant the right to present him or herself in the best posture, whether it is manner of dress, grooming, or in this case, testimony regarding a distinguished, seventeen year Army career.

Accordingly, the trial court abused its discretion in denying testimony regarding Mr. Etpison's military career.

This case boiled down to credibility and the testimony by Mr. Etpison that he did not assault his wife. In rebuttal argument, the prosecutor explicitly challenged Mr. Etpison's credibility and characterized the case as a credibility determination. 6RP at 880-82. The court's ruling excluding testimony regarding his military career violated Mr. Etpison's right to a fair trial by prohibiting the jury from consideration of facts relevant to a credibility determination. The State cannot show the error was harmless beyond a reasonable doubt.

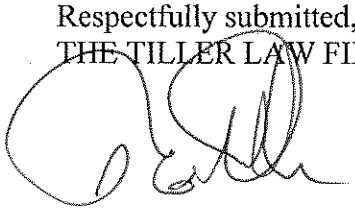
B. CONCLUSION

For the reasons stated herein, and in the opening brief Mr. Etpison respectfully requests this Court to reverse the convictions and dismiss the

charges against him.

DATED: December 3, 2018.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Kali A. Etpison

CERTIFICATE OF SERVICE

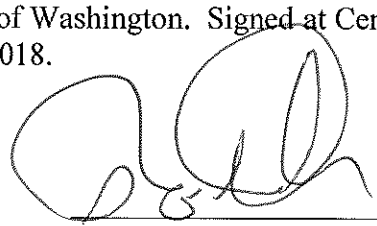
The undersigned certifies that on December 3, 2018 that this Appellant's Reply Brief was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Prosecuting attorney, Mr. Randall Sutton and copies were sent by first class mail, postage prepaid to the following Appellant:

Mr. Randall Avery Sutton
Kitsap Co. Prosecutor's Office
614 Division St
Port Orchard, WA 98366-4614
rsutton@co.kitsap.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Kali Etpison
2127 12th St #A103
Bremerton, WA 98312

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 3, 2018.



PETER B. TILLER
ptiller@tillerlaw.com
Of Attorneys for Kali Etpison

THE TILLER LAW FIRM

December 03, 2018 - 2:55 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51901-1
Appellate Court Case Title:	State of Washington, Respondent v. Kali A. Etpison, Appellant
Superior Court Case Number:	17-1-01827-7

The following documents have been uploaded:

- 519011_Briefs_20181203145439D2391672_5031.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was 20181203144742804.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Becca Leigh - Email: bleigh@tillerlaw.com
Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20181203145439D2391672