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COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

Tacoma Washington

Robert Frantom Appellant/Plaintiff v. Deputy Sheriff Shane Hanson Of the Kitsap Sheriff's Office Defendant/Appellee	COA # 52007-9 - II Appellant/Plaintiff's Reply Brief Due Date: March 11, 2019

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Civil Case Division
Case No.: 15-2-13409-0
Pierce County Superior Court

Table Of Contents

Contents

INTRODUCTION 1

APPELLEE DOES NOT REFUTE OR DENY APPELLANT'S CASE LAW SUPPORTING A MISTAKE OF LAW BY THE TRIAL COURT 2

THE FOLLOWING 4 POINTS ARE THE PRIMARY TRIAL COURTS ERRORS THAT DEMONSTRATE THE COURT'S FUNDAMENTAL MISUNDERSTANDING OF THE LAW 4

[A] THE TRIAL COURT GRANTED BOARD CROSS EXAMINATION RIGHTS TO THE APPELLEE THAT DO NOT EXIST UNDER THE APPLICABLE CASE LAW THUS PREJUDICING THE APPELLANT. 4

[B] THE TRIAL COURT REFUSED TO ACCEPT THAT RULE § 611(C) DEFINED AND ENLARGES THE CLASS OF WITNESSES PRESUMED HOSTILE, 'AND THEREFORE SUBJECT TO INTERROGATION BY LEADING QUESTIONS WITHOUT FURTHER SHOWING OF ACTUAL HOSTILITY.' " 4

[C] THE TRIAL COURT FAILED TO UNDERSTAND THE LAW SURROUNDING THE PRESUMPTIONS ASSOCIATED WITH EC § 611(C) AND CONSISTENTLY ERRED IN INTERPRETING THE STATUTE. 7

[D] THE TRIAL COURT RULED, WITHOUT ANY EVIDENCE, THAT THE APPELLEE, DEPUTY HANSON, WAS NOT AN ADVERSARIAL WITNESS AND THAT THE APPELLANT COULD NOT USE LEADING QUESTIONS DURING HIS INTERROGATION. 8

Standard of Review 9

APPELLEE'S ISSUES ON REVIEW ARE MISDIRECTED 12

Issue I 12
Issue II 13
Issue III 14
Issue IV 15
CONCLUSION 17

Table Of Authorities

Cases

Anning v. Rothschild & Co., 130 Wash. 232 9

Chonich v. Wayne County Community College, 874 F.2d 359, 368 (6th Cir.1989) 2, 6

Elias v. City of Seattle, No. 75848-9-I, 2018 WL 993644, at *5 (Wash. Ct. App. Feb. 20, 2018) 19

Ellis v. City of Chicago, 667 F.2d 606, 612-13 (7th Cir. 1981) 7, 8

Favila v. City of Chicago, No. 09-C-3265, 2011 U.S. Dist. LEXIS 58751 (N.D. Ill. 2011) 7

Fehr v. SUS-Q Cyber Charter Sch., No. 4:13-CV-01871, 2015 WL 6166627, at *3 (M.D. Pa. Oct. 20, 2015). 6

Gibbons v. Vill. of Sauk Vill., No. 15 CV 4950, 2017 U.S. Dist. LEXIS 179108, (N.D. Ill. 2017) 9

Hodgins v. Oles, 8 Wash. App. 279, 279, (1973) 7

In re Estate of Skinner, 248 N.C. App. 29 *, 787 S.E.2d 440, 2016 N.C. App. LEXIS 659 (N.C. Ct. App. June 21, 2016) 12

Marquis v. City of Spokane, 130 Wash. 2d 97, 109 (1996) 4

National Railroad Pass. Corp. v. Certain Temporary Easements Above R.R. Right of Way, 357 F.3d 36, 42 (1st Cir. 2004) 3

Ratliff v. City of Chicago, No. 10 CV 739, 2012 U.S. Dist. LEXIS 165411, 2012 WL 7993412, *1 (N.D. Ill. Nov. 20, 2012) 8

Rice v. City of Boise City, 2018 U.S. Dist. LEXIS 58600, (D. Idaho 2018) 9

Rosa-Rivera v. Dorado Health, Inc., 787 F.3d 614, 616–17 (1st Cir. 2015) 2, 5

Satgunam v. Basson, No. 1:12-CV-220, 2016 WL 9274720 5

Scarpelli v. Washington Water Power Co., 63 Wash. 18 9

Sintra, Inc., et al, v. The City of Seattle, et al 119 Wn.2d 1 (1992) 4

Stahl v. Sun Microsystems, Inc., 775 F. Supp. 1397, 1398 (D. Colo. 1991) 5

State v. Coe, 101 Wash.2d 772, 789, (1984) 19

State v. Fisher, 165 Wash. 2d 727, 745 (2009) 15

State v. Rhodes, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) 12

State v. Robinson, 153 Wash.2d 689, 693, (2005) 14

State v. Russell, 125 Wash. 2d 24, 93 (1994). 19

State v. Wheeler, 249 N.C. 187, 192, 105 S.E.2d 615, 620 (1958) 12

United States v. McLaughlin, No. CRIM.A. 95-CR-113, 1998 U.S. Dist. LEXIS 18588, 1998 WL 966014, at *1 6

Vanemmerik v. The Ground Round, Inc., No. CIV.A. 97–5923, 1998 WL 474106, at *1 (E.D.Pa. July 16, 1998) 6

Xieng v. Peoples Nat'l Bank, 120 Wn.2d 512 (1993) 4

Yousefi v. Delta Elec. Motors, Inc., No. C13-1632RSL, 2015 U.S. Dist. LEXIS 180844, at *4 (W.D. Wash. May 11, 2015) 5

Statutes

EC § 611 17

EC § 611(c) 7, 8, 10

ER § 611(b) 14

ER § 611(c) ..... passim

General Equipment Mfrs., Inc. v. Westfield Ins. Co., 430 Pa.Super. 526, 635 A.2d 173 (1993) 9

INTRODUCTION

This appeal is based on the Trial Court's failure to comply with ER § 611(c).

Specifically, the appeal is founded on the failure of the Court to allow the Appellant to use leading questions with a party opponent, and officers closely associated with party opponent and the actual incident. The Court ruled that the Plaintiff could not use leading questions with any witness that they called, including the defendant, an adverse party opponent, or a witness associated with an opposing party. The converse was also true. The Court allowed the Appellee to use leading questions when "crossing" their client, or officers closely associated with their client, when called by the Appellant. This was a mistake of law and misrepresents what ER § 611(c) allows and what it prohibits.

This mistake permeated the Plaintiff's case and resulted in an order by the Court not to use leading questions. Thus, prejudicing Appellant's ability to present his case in the form and fashion he believed would be most effective. At the same time it gave the Appellee an advantage in their use of leading questions with their own client and officers closely associated with their client was undeserved and improper.

This is NOT an appeal about the Court's rulings on any given question, even though the Appellee attempts to frame the appeal in

those terms. This is an appeal on the Trial Court's misunderstanding of the Rule § 6111and is subject to De Novo review.

The Appellee also claims that the Appellant cannot show prejudice. Appellee is asking the Appellant to prove a negative. The Trial Court arbitrarily and capriciously prohibited the Appellant from asking further leading questions to the adverse party and witnesses closely associated with the adverse party [RT 93-96] and allowed the Appellee to use leading questions when they were questioning the adverse party and witnesses closely associated with the adverse party, when called by the Appellant.

This biased the presentation of evidence and shifted the scales of justice in this case.

APPELLEE DOES NOT REFUTE OR DENY APPELLANT'S CASE LAW SUPPORTING A MISTAKE OF LAW BY THE TRIAL COURT

The Trial Court disregarded ER § 611(c) which allows cross examination using leading question when: [1] the witness is hostile; [2] The witness is an adverse party; [3] The witness is identified with an adverse party. *Rosa-Rivera v. Dorado Health, Inc.*, 787 F.3d 614, 616–17 (1st Cir. 2015); *Chonich v. Wayne County Community College*, 874 F.2d 359, 368 (6th Cir.1989) or when the witness is hostile. *National Railroad Pass. Corp. v. Certain Temporary Easements Above R.R. Right of Way*, 357 F.3d 36, 42 (1st Cir. 2004).

Appellant cited numerous cases dealing with the "exceptions" to ER § 611(c) . Appellee did not dispute those cases nor their

holdings. Instead, Appellee tried to spin the analysis into a review of the individual questions that were objected to and to promote the abuse of discretion standard of review.

This attempt to frame the issue as an abuse of discretion analysis completely ignores the fact that the Trial Court based its rulings on a faulty understanding of ER § 611(c) [RT 93-98] and the exceptions to ER § 611(c).

Appellee also suggests that the Appellant had to ignore the Trial Court's rulings, (that the Appellant is not allowed to use leading questions on the witnesses that they call), in order to preserve their appeal. Appellant has never seen a case in which the Court of Appeals requires the Appellant to ignore a Court's order and act contemptuously in order to preserve an appeal.

Appellee does not address the Appellants numerous cases that directly support the Appellant's appeal. These Case, both Federal and State, are clear authority for the Appellant's position. Where state statutes, or laws, are similar to equivalent Federal statutes or laws, the Court can be guided by the federal laws. *Sintra, Inc., et al, v. The City of Seattle, et al* 119 Wn.2d 1 (1992); *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512 (1993); *Marquis v. City of Spokane*, 130 Wash. 2d 97, 109 (1996). There is no dispute that both Federal and Washington Case law can be used to resolve questions concerning Washington's ER § 611(c) .

THE FOLLOWING 4 POINTS ARE THE PRIMARY TRIAL COURTS ERRORS THAT DEMONSTRATE THE COURT'S FUNDAMENTAL MISUNDERSTANDING OF THE LAW

[A] THE TRIAL COURT GRANTED BOARD CROSS EXAMINATION RIGHTS TO THE APPELLEE THAT DO NOT EXIST UNDER THE APPLICABLE CASE LAW THUS PREJUDICING THE APPELLANT.

To the extent plaintiff's counsel is permitted to ask leading questions of a witness on direct examination, the presumption is that the witness is hostile to plaintiff. The normal justification for allowing leading questions on cross-examination disappears in those circumstances. Leading questions will not, therefore, be permitted on defendants' cross-examination" *Yousefi v. Delta Elec. Motors, Inc.*, No. C13-1632RSL, 2015 U.S. Dist. LEXIS 180844, at *4 (W.D. Wash. May 11, 2015);

[B] THE TRIAL COURT REFUSED TO ACCEPT THAT RULE § 611(C) DEFINED AND ENLARGES THE CLASS OF WITNESSES PRESUMED HOSTILE, 'AND THEREFORE SUBJECT TO INTERROGATION BY LEADING QUESTIONS WITHOUT FURTHER SHOWING OF ACTUAL HOSTILITY.' "

Satgunam stands for the proposition that individuals associated with a party are presumed to be hostile and that there is no need for a further showing of hostility before leading questions can be used on direct. *Satgunam v. Basson*, No. 1:12-CV-220, 2016 WL 9274720 emph. added., *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1397, 1398 (D. Colo. 1991).

Appellee does not deny the wording of ER § 611(c) which allows cross examination using leading question when: [i] the

witness is hostile; [ii] The witness is an adverse party; [iii] The witness is identified with an adverse party. *Rosa-Rivera v. Dorado Health, Inc.*, 787 F.3d 614, 616–17 (1st Cir. 2015); *Chonich v. Wayne County Community College*, 874 F.2d 359, 368 (6th Cir.1989);

The term 'witness identified with an adverse party' is applied broadly to a witness who is employed by the adverse party or by virtue of a demonstrated connection to an opposing party." *United States v. McLaughlin*, No. CRIM.A. 95-CR-113, 1998 U.S. Dist. LEXIS 18588, 1998 WL 966014, at *1; a person 'identified with an adverse party' has come to mean, a person who is an employee, agent, friend, or relative of an adverse party." *Vanemmerik v. The Ground Round, Inc.,* No. CIV.A. 97–5923, 1998 WL 474106, at *1 (E.D.Pa. July 16, 1998); *Fehr v. SUS-Q Cyber Charter Sch.*, No. 4:13-CV-01871, 2015 WL 6166627, at *3 (M.D. Pa. Oct. 20, 2015).

No authority or statute is cited by the appellee that witnesses identified with an adverse party are not presumed hostile in law under ER § 611(c). *Ellis v. City of Chicago*, 667 F.2d 606, 612-13 (7th Cir. 1981) (noting that "when the city is a defendant to a §1983 claim, police officers employed by the city and who were present during portions of the incident at issue are 'clearly qualified as a witness identified with an adverse party'"); *Favila v. City of Chicago*, No. 09-C-3265, 2011 U.S. Dist. LEXIS 58751 (N.D. Ill. 2011) (holding that "the real test for leading questions under the Rule is whether the other officers are "identified with an adverse party"). Yet, a refusal to

employ the clear Court interpretation on witnesses associated with adverse parties is the very position that the Trial Court took.

Appellee does not provide any objection to the principle that an adverse witness can be questioned with leading questions. In fact, Appellee simply ignores the cases and law presented by the Appellant, and falls back on the position that the Court has Broad discretion to permit leading questions. It is undisputed that an adverse witness includes an adverse party, or an officer, director, or managing agent of a public or private corporation, partnership, or association that is an adverse part is subject to leading questions. *Hodgins v. Oles*, 8 Wash. App. 279, 279, (1973) . However, the Trial Court does not accept this fact or the presumptions underlying the rule.

Adding to the Appellee's dearth of contrary authority on the proposition that certain types of witnesses are presumed adverse is the law developed around employees who are often treated as adverse witnesses to the employer's opposing party, as they are considered to be identified with the adverse party. *Ellis v. City of Chi.*, 667 F.2d 606, 613 (7th Cir. 1981) . That is exactly what occurred in the case at bar. All of the law enforcement witnesses were involved in the incident.

An example comes from *Ratliff* where officers of the City of Chicago were presumed adverse to the civil rights plaintiff. "In addition to current employment, a witness is most likely to be treated as adverse where he or she was employed at the time of the

incident in question and had a hand in the incident that resulted in suit." *Ratliff v. City of Chicago*, No. 10 CV 739, 2012 U.S. Dist. LEXIS 165411, 2012 WL 7993412, *1 (N.D. Ill. Nov. 20, 2012) .

Even when the employment is tangential, an employee of a city defendant may be considered to be identified with an adverse party. *Gibbons v. Vill. of Sauk Vill.*, No. 15 CV 4950, 2017 U.S. Dist. LEXIS 179108, (N.D. Ill. 2017) Prior parties who were adverse as parties are "witnesses identified with an adverse party. *Rice v. City of Boise City*, 2018 U.S. Dist. LEXIS 58600, (D. Idaho 2018) . This would include Zoellin and Barraclough who were called by the Appellant. Appellee objected to the use of leading questions with these witnesses as well; and the Court sustained those objections.

[C] THE TRIAL COURT FAILED TO UNDERSTAND THE LAW SURROUNDING THE PRESUMPTIONS ASSOCIATED WITH EC § 611(C) AND CONSISTENTLY ERRORED IN INTERPRETING THE STATUTE.

A presumption serves as, and in the place of, evidence until the prima facie case is met by the opposite party with disinterested testimony. When the prima facie case is so met, the presumption has spent its force, and the party in whose favor it operated must meet his opponent's evidence with evidence. *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18; *Anning v. Rothschild & Co.*, 130 Wash. 232,

No evidence was produced by the Appellee that would overcome the EC § 611(c) presumptions concerning adverse witnesses associated with adverse parties, adverse parties themselves. The lack of any evidence to undermine the EC § 611(c)

presumptions means that the Trial Court was obliged to follow the presumptions.

The law recognizes certain presumptions which, on grounds of public policy, may not be rebutted. These are not presumptions, properly speaking, but are rules of substantive law.

> Presumptions of law, which are the only true presumptions, are assumptions made by the law itself, compelling the court to a resulting conclusion, which may or may not have a logical or reasonable foundation in basic fact. Presumptions of law derive their force from the law of the jurisdiction, not from logic or probability as such. They are the conclusions which the court draws of the existence of one fact from others already proved. Such presumptions are such conclusions as are warranted by the legal experience of courts in administrating justice. . . . Whenever the law affords the assumption as to a particular fact, attribute, condition, or conduct about people, it is not incumbent upon a party to litigation to prove that such is the fact. Rather, such fact is presumed and the burden falls on the other party to give proof that such was not the fact. These presumptions are rebuttable. Nevertheless, until they are rebutted by the introduction of evidence, they stand.

§ 43:3.Irrebuttable presumptions, Federal Trial Handbook Civil § 43:3 (4th ed.) .

[D] THE TRIAL COURT RULED, WITHOUT ANY EVIDENCE, THAT THE APPELLEE, DEPUTY HANSON, WAS NOT AN ADVERSARIAL WITNESS AND THAT THE APPELLANT COULD NOT USE LEADING QUESTIONS DURING HIS INTERROGATION.

The Appellant specifically asked the Court to rule that defendant Hanson was a hostile witness, and the Court responded

that Appellant had never made a motion to treat the Defendant as a hostile witness. There is no requirement to make such a motion. Irrespective of the Court's mistaken belief that a motion needs to be made to treat an adverse party, as hostile, and to use leading questions, the Court also was mistaken in its belief that the Appellee was not presumed to be a hostile (adverse) party.

A party may call their adversary as a witness, as on cross-examination, and put leading questions to the witness, and draw from the adversary's testimony those facts or admissions which weaken the adversary's case or strengthen the case of the calling party. *General Equipment Mfrs., Inc. v. Westfield Ins. Co.,* 430 Pa.Super. 526, 635 A.2d 173 (1993). When leading questions are appropriate, but due to a mistaken understanding of the evidence code there is a policy during that trial that denies that opportunity to a party, that party is prejudiced.

Standard of Review

Appellees assert that the Appellant asserts two separate standards for review; abuse of discretion or de novo. The normal standard for review of evidentiary rulings is an abuse of discretion. However, the appellate review in this case is not focused on the court's evaluation of individual questions but on the Court's improper interpretation of EC § 611(c) .

Where the Appellate Court evaluates the Trial Court's understanding of a statute or law, the review is de novo. A mistake of law is an understanding of the facts that exist but there is an error

or ignorance in understanding how the law is to be applied to the facts. *Blacks Law Dictionary* 2nd Ed. 'While this Court is bound by the findings of fact made by the [trial court] if supported by evidence, it is not bound by that court's conclusions of law based on the facts found.' Accordingly, we review the trial court's conclusions of law de novo." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) quoting *State v. Wheeler*, 249 N.C. 187, 192, 105 S.E.2d 615, 620 (1958) . *In re Estate of Skinner*, 248 N.C. App. 29 *, 787 S.E.2d 440, 2016 N.C. App. LEXIS 659 (N.C. Ct. App. June 21, 2016) .

In this case, the Trial Court simply made a mistake as to the meaning and application of EC § 611(c) .

At RT93-96 the Court stated "

> MR. OLMSTEAD Okay. And he told you that the –
>
> MS. GEORGE: Objection; leading.
>
> THE COURT: Sustained.
>
> MR. OLMSTEAD: I'm sorry?
>
> THE COURT: There was an objection as to leading, and I sustained the objection.
>
> MR. OLMSTEAD: May I approach this witness under Rule 611.5 as a party-opponent?
>
> THE COURT: No, not for direct examination.
>
> MR. OLMSTEAD: Well, the rule reads that I can lead a witness if he's a party-opponent. He is a named party-opponent to my client.
>
> THE COURT: Ladies and gentlemen of the jury, step out. (The jury was not present.)
>
> THE COURT: Go ahead and be seated. So, Counsel, you cited Evidence Rule 611; correct?
>
> MR. OLMSTEAD: I'm going -- I didn't -- I hadn't brought my staples; I don't have them with me. These are the –
>
> THE COURT: Well, I'm telling you it's 611, so I'll read it to you: Evidence Rule 611, subsection (c): "Leading questions should not be used

under direct examination of a witness except as may be necessary to develop the witness's testimony." So, your objection is overruled.

MR. OLMSTEAD: When a witness –

THE COURT: I mean, the objection is sustained.

MR. OLMSTEAD: When a witness is an adverse party, is identified with an adverse party, or is hostile to the calling party, they may be -- you may use direct –

THE COURT: Yes, but you never made a motion to this Court to treat this witness as hostile, and there was nothing in the response given by the witness that would have allowed me to grant –

MR. OLMSTEAD: I'm not –

THE COURT: -- your request.

MR. OLMSTEAD: Oh, excuse me. I'm not doing it as a fact that he's hostile. I'm doing it as a fact that he is an opposing party.

THE COURT: No, that is not how the rule is written and that is not how it is imposed, Counsel.

MR. OLMSTEAD: All right.

THE COURT: I will read it again to you, Evidence Rule 611, because you want to use leading questions which was the objection that was raised. So, Evidence Rule 611, subsection (c) reads: "Leading questions should not be used under direct examination" -- this is your witness, so you called him in direct examination -- "of a witness except as may be necessary to develop the witness's testimony." There was an objection made to you leading this witness. It runs afoul of Evidence Rule 611, and it will not be allowed. And as I indicated, the other portion that you read, which means trying to treat the witness as a hostile witness as you're trying to do the adverse part, no motion was made to this Court to do so, and there isn't a record to support it, so even that would have been not allowed; so the objection is sustained. Let's get the jurors.

MR. OLMSTEAD: I'd like to make the motion, then, to ask the Court to allow me to treat him as a hostile witness.

THE COURT: Well, as I just indicated, there isn't a record in regards to allowing you to treat him as a hostile witness. Just because you don't get an answer that you like from a witness does not mean the witness is hostile.

MR. OLMSTEAD: All right. I'm sorry, Your Honor.

THE COURT: But your objection, of course, is noted for the record. Let's get the jury out. Oh, one second.

The Court is stating that [a] an adverse party is not subject to leading questions on direct; [b] a motion must be made before an adverse

party can be questioned on direct with leading questions; and [c] that there is no presumption that witnesses associated with adverse parties are hostile.

All three of these "findings" are both unsupported and contrary to existing precedent and law. They represent an interpretation of a statute that the Appellant believes to be mistaken.

The Court reviews the interpretation of rules (i.e. ER § 611(c)) de novo. *State v. Robinson,* 153 Wash.2d 689, 693, (2005).

> We review the trial court's interpretation of ER 404(b) de novo as a matter of law. *Foxhoven,* 161 Wash.2d at 174, 163 P.3d 786. If the trial court interprets ER 404(b) correctly, we review the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion.

State v. Fisher, 165 Wash. 2d 727, 745 (2009) . In the case at bar the Trial Court's rulings are subject to de novo review because the trial Court's interpretation of ER § 611(c) is and was incorrect.

APPELLEE'S ISSUES ON REVIEW ARE MISDIRECTED

Issue I

Appellee asks in issue 1 "whether, by failing to raise the question before the trial court of his ability to cross-examine or ask leading questions of any witness other than Deputy Hanson, Plaintiff/ Appellant Frantom failed to preserve the issue for appeal."

The Appellee fails to recognize, or chooses not to recognize, that the Trial Court in effect ordered the Plaintiff not to use leading questions on Direct when the witness was an adverse party, or

associated with an adverse party by sustaining the objections to the leading questions that were asked. The Court, in so ordering Appellant to cease using leading questions, and refusing to find the defendant a hostile party, shut down the presentation of the Appellant's case.

For the Appellee to suggest that the Appellant needed to disregard the Trial Court's clear order so as to preserve his appeal is unfathomable. It is equivalent to suggesting that if the Appellant wanted to preserve the questions and issues he intended to appeal, that he was required ignore the Court's orders and to be held in contempt of court over and over.

It is undisputed that when the Trial Court said the objection or disagreement with the Court's ruling was preserved for the record, that the topic was closed and no further leading questions were to be asked of adverse parties, or witnesses associated with adverse parties. Furthermore the Trial Court's ruling that it was appropriate for the Appellee to use leading questions with the witnesses called by the Appellant, specifically with their own client and officers associated with their client, was prejudicial and incorrect.

Issue II

The Appellee's second issue, "Whether the trial court properly exercised its discretion in controlling the manner of interrogation of Deputy Hanson so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and to protect Deputy Hanson from harassment or undue embarrassment" is compound and tangential.

The issue on Appeal is not the exercise of the court's discretion, but whether the Court was mistaken in their understanding of the rule or statute. If one were to assume that the Court's understanding of ER § 611(c) was correct, then the Court's actions would have been within its discretion to manage the presentation of evidence. But that is not the underlying question or issue. The Underlying question or issue is whether the Court had a proper and correct understanding of ER § 611(c) .

If the Trial Court used a mistaken understanding of the law, then the Court could not have properly exercised its authority to use that law, or rule, to control the giving of evidence.

Issue III

Whether any potential error in limiting Frantom's cross examination of Deputy Hanson during the plaintiffs case was harmless because Frantom was permitted to cross examine Deputy Hanson when the defense called Hanson as a witness.

Again, the issue as stated by the Appellee is misdirected. The Appellant, relying on ER § 611(c) planed and intended to use leading questions on the witnesses called who were law enforcement officers. The fact that the Appellee called some of those witnesses in their case in chief does not cure the damage to Appellant's case.

The rules on cross examination are clear: ER § 611(b) provides <u>Cross Examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness</u>. Thus, the numerous topics that Appellant intended to go into during their direct examination of adverse witnesses was at a

minimum circumscribed by the Appellee's direct examination and their failure to raise specific topics or issues.

Plaintiff simply could not show that the Appellee's actions were inconsistent with his behavior when he was precluded from using leading questions and limited to the issues raised by the Appellee on direct.

Issue IV

The Appellee's fourth issue of ". . . if there was any error in limiting Frantom's cross examination of Deputy Hanson during the plaintiff's case, Plaintiff has failed to identify any resultant prejudice" is disingenuous at best.

The Appellee fails to recognize, or chooses not to recognize, that the Trial Court in effect ordered the Plaintiff not to use leading questions on Direct when the witness was an adverse party, associated with an adverse party or hostile. The Court in so ordering Appellant to cease using leading questions, and refusing to find the defendant a hostile party, shut down the presentation of the Appellant's case. This occurred not only with Hanson, but because of the Court's Order it also effected the questioning of other officers who Appellant called.

For the Appellee to suggest that the Appellant needed to disregard the Trial Court's clear order so as to preserve his appeal is unfathomable. It is equivalent to suggesting that if the Appellant wanted to preserve the questions and issues he intended to raise that he was required to be held in contempt of court over and over.

It is undisputed that when the Trial Court said the objection or disagreement with the Court's ruling was preserved for the record, that the topic was closed and that no further leading questions were to be asked of adverse parties, witnesses associated with adverse parties, and that when the Appellee questioned the witnesses called by the Appellant, they could use leading questions on their own client and officers associated with their client.

Appellant, having been forbidden to question witnesses with the type of questions that the rules allow them to use, cannot now show that a question that was forbidden would have had a particular benefit. Yet, that is what the Appellee is suggesting the Appellant must do to show harmful error.

Harmful error is not limited to a specific question or answer. An error prejudices a party when it affects or presumably affects the outcome of trial *Elias v. City of Seattle*, No. 75848-9-I, 2018 WL 993644, at *5 (Wash. Ct. App. Feb. 20, 2018). It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. *State v. Coe,* 101 Wash.2d 772, 789, (1984) ; *State v. Russell*, 125 Wash. 2d 24, 93 (1994).

The fact that a leading question was disallowed would not make for harmful error. However, a blanket prohibition on, what would normally be the appropriate use of leading questions, is an error that corrupts the totality of the Appellant's trial case.

Cross examination is the crucible of the trial process and the Appellant was denied the use of that crucible. The fact that the Trial Court disallowed a party the use of a legal procedure, and allowed

the other party the use of an improper procedure, certainly points to injury, if in no other form than the denial of the right to a fair trial. A trial cannot be fair when one party cannot use the tools that they are authorized to use, and relied on using, and the other party is granted the use of tools that they would not normally have access to.

Appellant was prejudiced on both fronts. He was prohibited from using leading questions when he could legally do so and then the Appellee was allowed to use leading questions when they should not have been able to do so.

CONCLUSION

The Court removed the Plaintiff's ability to put the police witnesses through the crucible of cross examination. This completely shattered the trial preparation of the Plaintiff's counsel who would have aggressively dissected the Defendants testimony through the use of leading questions.

Appellant does not question the Court's right to manage the trial, limit testimony on cross to the topics on direct, etc. The Appellant grants that the Trial Court has the power and right to allow or deny the use of cross examination based the terms of EC § 611 et.seq.

This appeal is not about rulings on particular questions or specific answers. It is about the systematic misapplication of the Rules in a way that denied a party the rights that the Rules granted.

This tribunal should grant the Appellant's appeal and find that the Trial Court used the wrong interpretation of EC § 611. That this misunderstanding of EC § 611 et.seq. limited the appellants right to present their case; and that the interests of justice require that the Appellant be granted a new trial.

Dated: 3/9/2019

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Superior Court Case Number:	15-2-13409-0

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