IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION 2

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

State of Washington, Respondent	)	Court of Appeals Cause No. 53099-6-II
v.	)	STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
David G.M. Thomas Appellant,	)	

I David G.M. Thomas, have recieved and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground I- Abuse of Discretion

During direct examination of the appeallant by his attorney he was asked ". . . . . prior to the incident

that brings you to court today, (charged offenses) had you ever had any involvment with the police in in a situation like this"? The Appellant replied: "Aside from being arrested (current offenses) I have Never been assaultive, at the very least disrespected to any authority figure. I mean - I mean to any police officer." Attorney: "To a police officer, Okay." Appellant: "Period". Verbatim Report - Direct Examination - THOMAS page: 544, Lines: 15-23.

The state, Mr. Smith, then ask the court to excuse the Jury. Then requested to admit appellant's criminal history based on assaults as character evidence. Verbatim report page: 545, Lines: 13-24.

Appellants attorney reiterated: "He was talking about (assaults pertaining to) authority figures." Verbatim Report page: 546, Lines: 2-3

The trial Judge allowed the admission of the prior conviction by stating: "Okay well it appears to me that because he's indicated that at least allthough he's, at the end, modified it with authority figures, the direct impression that he was trying to create was that he was'nt a violent person, and so he's open the door for instances where he was violent in the pass". Verbatim Report page: 546, Lines: 4-9.

The State went on to bring up Appellants

prior New york state conviction, 3rd degree assault (Misdemeanor) that occurred in 2013, and explained to the Jury that the conviction was for Breaking the victims nose, during cross-exaimination. Verbatim Report Cross-Exaimination - Thomas page: 547, Lines: 6-25, page: 548, Lines: 1-25.

ER 404(b) states:

> To admit evidence of other crimes or misconduct under ER 404(b) the trial court must identify on record the purpose for which the evidence is admitted.

Wash. R. Evid. 609 - Impeachment by evidence of conviction crime states:

..... Evidence that the witness has been

> Convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (i) was punishable by dealth or imprisonment in excess of 1 year under the law whic the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered....

The trial court must apply the correct legal standard and rest it's decision on facts support by the record. The trial court failed to use and or apply any Legal standard, and failed to determine wether the probative value of admitting the prior assault in the 3rd degree conviction outweighed the prejudical effect to the apellant on the record.

The trial court also made its decision on facts unsupported by the record. The record shows that the contex of the appellants testimony implicated that he has never been assaultive to authority figures i.e police figures/officers, not as the trial court determined, that the appellant has never been assaultive.

"A trial Court abuses it discretion if its decision is manifestly unreasonable or based on untenable grounds." Wash. State physicians Ins Exch. & Ass'N v. Fisons Corp. 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) A decision is based on untenable grounds or made for untenable reasons if it rest on facts unsupported

in the record or was reached by applying the wrong legal standard. State v. Rohrich, 149 Wn.2d 647, 654 (2003) (quoting State v. Rundquist, 79 Wn.App 786, 793, (1995) Fourteenth amend. const. Due process violation

Appellant was being tried for multipul assaults one of which was for Breaking a police officers nose. The trial court allowed the state to question the Appellant about a prior 3rd degree assault conviction, and explained to the Jury the details of the prior assault which resulted to the victims nose also being Broken, and also revealed the appellant's history of "Boxing", without weighing the probative and prejudical effect.

Cross examination on prior convictions under

Wash. R. Evid 609(a) was limited to facts contained in the record of the conviction:(prior) the fact of the prior conviction, the type of crime, and the punishment imposed. Cross exaimination exceeding these bounds was irrelevant and likely to be unduly prejudical, hence inadmissble. State v. Alexis, 95 Wn.2d 15, 18 (1980) sixth amend. const. violation right to fair trial.

Where multipul (prior) convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that if he did it before he probably did so this time. As a general guide, those convictions which are for

the same crime should be admitted sparingly.

State v. Jones, 101 Wn.2d 113, 120 (1984)

The prohibition against introducing evidence of collateral crimes in a criminal prosecution is well established in Washington. There is no more insidious and dangerous testimony that attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial, and such testimony should only be admitted when clearly necessary to establish the essential elements of the charged offense which is being prosecuted.

Washington. const. Art 1, section 22, 6th amend const. violation.

The defendants attorney failed to object to the admission of the evidence ~~[illegible]~~ pertaining to the prior 3rd degree assault conviction, However, the failure to object will not prevent a reviewing court from protecting a defendants constitutional right to a fair trial. An Objection is unnecessary in cases of incurable prejudice only because "there is, in effect, a mistrial and a new trial is the only and the mandatory remedy". State v. Case, 49 Wn.2d 66 (1956)

Under Rule 2.3 (a)(3): A party may raise the following claimed error for the first time in

the appellate court (3) Manifest error affecting a Constitutional right. In re Dependency of M.S.R 174 Wn.2d 1, 11, 271 P.3d 234 (2012) To determine whether manifest constitutional error was committed, there must be "aplausible showing by the appllant that the asserted error had practical identifiable consequences in the trial of the case. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)

Additional Ground II - Abuse of Discretion During Direct exaimination of officer Schoolcraft the prosecutor ask him multiple questions pertaining to his opinion and or observation of

of signs of the defendants diagnosed

mental illnesses. Such as:

Question. During this incident with Mr. Thomas, (defendants), did he appear to you to be confused?

Answer. (schoolcraft) No he did not.

Question. Did he appear unaware of what was happening?

Answer. No.

Question. Did he -- was he speaking to himself or making -- thank you, any kind of bizarre statements?

Answer. No he was not.

Question. Did he make (any) reference to any kind of beings or objects that weren't there?

Answer. No, he did not.

Question. Now, in your work as a police officer, Officer Schoolcraft, do you have occasion to come into contact with people who are exhibiting signs of mental illness or who appear psychotic?

Answer. Frequently, yes.

Verbatim Report, Direct Exaimination - Schoolcraft

page: 124, Lines: 5-20, Defense counsel objected

to the line of questining page: 124, Lines: 21-22

page: 125, Lines: 5-16. page: 126, lines 13-25,

page: 127, Lines: 1-4

The trial court must apply the correct

legal standard and rest it's decision on facts

supported by the record. The trial court failed to apply the correct legal standard by stating: 5th, 14th Amend. const. Art. 1, section 22

"..... The situation is simular to an officer comming on the scene and lets say for example, he has experience or training in detecting signs that a person is intoxicated and so then the question is, did you see any signs or they didn't see the signs. So here, apparently he's has some traning or experience with people who show signs of mental illness, outward signs of mental illness, and I guess the question is, did you see any of those signs in relation to Mr. Thomas"

The court went on to say:

"..... that he's going to say that based on what he understand (Schoolcraft) people are mentally ill demonstrate, that Mr. Thomas

Was'nt doing any of that, that part of it is fine".

Verbatim Report - Direct Exaimination - SchoolCraft

page: 127, lines: 5-16, page: 128, lines: 1-3

The state was allowed by the trial court, and went on to ask officer Schoolcraft:

Question: Officer Schoolcraft, we left off you had discussed your experience working with or having contact with ~~[illegible]~~ folks who were mentally ill. Have you undergone any formal training regarding interactions with mentally ill people?

Answer: We're--all officers are required to go through crisis intervention training. Its a forty course taught by various mental ~~[illegible]~~ health professionals about all different types of Mental illnesses.

Question. Okay, during your interactions with the defendant on that date in May 2017. Did you observe him exhibit any signs of mental illness?

Answer. I did not, no.

Wash. R. Evid. 701 provides that:

non-expert witness testimony is limited to those opinions or inferences which are: (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witnesses testimony or the determination of a fact in issue (c) not based on scientific, technical, or other specialized knowledge within the scope of Wash R. Evid. 702

Washington R. Evid. 702 provides:

The trial court must exclude expert testimony involving scientific evidence unless the testimony satisfies ER 702

if (1) the witness qualifies as an expert and (2) the testimony will assist the trier of fact.

The trial court failed to apply Wash. R. Evid. 701 or 702 on the record prior to admitting officer Schoolcraft's testimony on Mr. Thomas Metal Health. The trial court must apply the correct legal standard and rest its decision on fact supported by the record. A trial court abuses its discretion if its decision is Manifestly unreasonable or based on untenable grounds." Wash. State physicians Ins Exch. & Ass'n v. Fisons Corp. 122 Wn.2d 299, 399

858 P.2d 1054 (1993) State v. Rohrich,

149 Wn.2d 647, 654 (2003) (quoting State v.

Rundquist 79 Wn. App. 786, 793, 905 P.2d 922 (1995)

And a trial Court would necessary abuse its

discretion if it based its ruling on an erroneous

view of the Law. Fisons Corp, 122 Wn.2d at 339

Wash. amend. const Art. 1, section 22, U.S.

const. amend. ~~Fourteen~~ Fourteenth, sixth, and

Fifth.

Under ER 702 the trial court must

exclude testimony from unqualified experts and

testimony that is unhelpful to the Jury.

Lakey v. Puget Sound Energy, Inc. 176 Wn.2d 909,

918, 296 P.3d (2013) Forbes v. Matsunaga 181 Wn.2d

346, 357, 333 P.3d 388 (2014) Under ER 701 :

> Before opinion testimony may be offered in a criminal trial, the trial court must determine its admissibility. In determining whether such statements are impermissible opinion testimony, the court must consider the circumstance of the case including the following factors: (1) the type of witness involved (2) specific nature of the testimoney (3) the nature of the charges (4) the type of defense, and the other evidence befor the trier fact

State v. Demery, 144 Wn.2d 753 (2001)

To be otherwise admissible, opinion evidence

must also ~~[illegible]~~ satisfy ER 403, ER 701, ER 702

Seattly v. Heatley, 70 Wn. App at 579

Lay opinion evidence may not be admitted in a criminal trial to ~~how~~ establish the defendants state of ~~mind~~ mind at the time the alleged crime was committed, offirer Schoolcrafts opinion directly addressed the "core element" of the charged offense, and or defense and was an improper comment on guilt. Error not harmless. State v. Quaale, 182 Wn.2d 191 (2014) State v. Queen City farms, 126 Wn.2d at 103-104 ("the Supreme Court found (the found) the witness testimony to be "speculation and Conjecture")

Officer's Schoolcrafts testimony was

inadmissible lay opinion testimony under ER 701 and prejudiced the defendant because it invaded the Jury's providence by testifying to an ultimate issue such as whether Thomas suffered from mental illness at the time of the crime. Thomas presented an "insanity defense" during trial. Ashley v. Hall, 138 Wn. 151 (1999)

Because it is the Jury's responsibility to determine the defendants guilt or innocence, no witness, lay or expert may give an opinion as to defendants guilt, whether by direct statement or by inference. Such an opinion

would invade the Jury's independent determination of facts and violate the defendants constitutional right to a Jury trial. Wash. const. Art. 1, section 22, U.S. const. 6th amend. State v. Farr-Lenzini, 93 Wn. App 453 (1999)

Where a criminal defendants mental state is the "core issue" and the only disputed element of the crime, a police officers testimony on the issue amounts to an improper opinion on guilt, which impinges the Constitutional right to a Jury trial. 6th amend. U.S. const.

Additional Ground III - Right to Fair trial - Closing Arguments

During Closing Arguments the prosecutor constantly made comments, and argued facts not in evidence inorder to inflame the passions of the Jury. Also, the prosecutor made comments about the defendant mental health, and or "insanity defense" that placed the "burden of Proof" on the defense. Such as:

"...it shows that rather than being insane or out of his mind, he just didn't want to go to Jail that night and he chose to fight the police and attack them with a weapon." Verbatim Report - Closing arguments, page: 677, Lines: 1-4

" So the defendant is holding the knife in his right hand" page: 682, Lines: 17-18

"I think its important because he has the knife in his right-hand, flips out the blade at some point ....." then he begins swinging with the right, with the knife" page: 683, Lines: 3-7

" The defendant is throwing punches and swinging with the knife and it seems that the bulk of his violence is directed against officer Schoolcraft. Hits him in the face, he's swinging the knife ~~towar~~ towards him, cuts the back-- that patch on the Back of his arm ..... on the Back of his vest" page: 683, lines: 10-15"

"So he brakes officer Schoolcrafts nose, tries to stab him, stabs Suarez in the arm" page: 684, Lines: 7-8.

"Now, when they hit the ground, I think the evidence is reasonable to ~~conclude~~ conclude

that at that point he loses the knife on the ground, after he hits." page: 684, Lines: 17-20."

The prosecutor continued to make comments about the defendant having and or attacking the officers with the "knife" page: 687, lines: 2-5, 13-16, page: 692, Lines: 1-4,.

The prosecutor made various comments pertaining to the defendants mental ~~men~~ health and or insanity defense, and placed the burden of proof on the defendant. such as:

"Mental Health alone is not the same the same thing as a person being insane and not guilty by reason of insainity. Two very different concepts. Mental

illness is a medical concept. Lot's of folks have mental illness. Many people struggle with mental health issues." ..." the defendant bears the burden of (proof) proving to you that he was insane at the time of the crime. so I don't (state) have to disprove that he was insane. They actually have to prove it to you. The burden is on them. (defense) page: 692, lines: 22-25, page: 693, Lines 1-9, Lines: 10-25, page: 694, Lines: 1-5

There was no witness or evidence on the record, or presented in trial that proved that the defendant stabbed or cut the officiers or possesed a knife. Not one of the four trained police officers gave any testimony that they saw the defendant with a knife, or stab any of them with a knife. That evidence

does not exist. This was prejudical to the defendant, along with the multiple statements pertaining to mental Health, which the prosecutor is not qualified to make, ~~because~~ because the State argued facts not in evidence, and placed the burden of proof on the defense, which violated the defendants Constitutional right to a fair trial. Wash. const. Art 1, section 22, U.S. 6th amend. const.

The defense did not object to the comments, however, the failure to object will not prevent a reviewing court from protecting a defendants

constitutional right to a fair trial. An objection is unecessary in cases of incurable prejudice only because "there is, ineffect, a mistrial, and a new trial is the only and the mandatory remedy. The misconduct was so Flagrant and ill intention that an instruction would not have cured the prejudice. State v. Case, 49 Wn.2d 66 (1956) State v. Walker, 182 Wn.2d 463 (2014) State v. Reed, 102 Wn.2d 140, 147 (1984)

Additional Ground IV- Cumulative Error

Whether a criminal trial is tainted by cumulative Error is an issue of constitutional Law

that is reviewed de novo. Please review.

To obtain relief based on the Cumulative Error Doctrine, a defendant must show that while multipul trial errors standing alone might not be off sufficient gravity to constitute grounds for a new trial, a new trial is required by the combined effect of the accumulation of errors State v. Coe, 100 Wn.2d 772, 789 (1984)

Conclusion

Pro se defendant respectfully ask this court to review the statement of additional grounds, and remand for re-trial based on the above.

Dated this 12th day of October 2019

David [illegible]
Signature